COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. CITIZENSHIP OF THE UNION: RIGHT TO MOVE AND RESIDE FREELY WITHIN THE MEMBER STATES

Judgment of the Court of Justice (Fifth Chamber), 16 January 2025, E P (Erasmus+ grant), C-277/23

Link to the full text of the judgment

Reference for a preliminary ruling – Citizenship of the Union – Article 21(1) TFEU – Right to move and reside freely within the territory of the Member States – Tax legislation – Income tax – Calculation of the amount of the basic personal allowance for a dependent child who has received mobility support for educational purposes in the context of the Erasmus+ programme – Regulation (EU) No 1288/2013 – Taxation of grants to support the mobility of individuals covered by that regulation – Restriction on freedom of movement – Proportionality

In response to a request for a preliminary ruling from the Ustavni sud Republike Hrvatske (Constitutional Court, Croatia), the Court of Justice rules on the mobility of students in the context of the tax legislation of a Member State relating to the calculation of the amount of the basic personal allowance in respect of the dependent child who received the Erasmus+ grant.

E.P., a Croatian national, is liable to pay income tax and enjoys certain tax advantages provided for by the applicable national legislation.[1] One of her dependent children received, in respect of the 2014/2015 academic year, support for learning mobility under the Erasmus+ programme for a period of study at a university in Finland.

For the tax periods preceding 2014, E.P. benefited from an increase in the basic personal allowance for a dependent child. By a tax notice of 27 July 2015, she was informed that she was required to pay the tax concerned on the ground that that increase had been removed for the period from 1 January to 31 December 2014. During that period, she had received amounts in excess of the threshold set, as a result of that child's receipt of mobility support.

E.P. lodged a complaint against that notice of assessment with the independent department responsible for the second-instance administrative procedure. Since that complaint was rejected, she brought an action against that decision before a Croatian administrative court. Following the dismissal of that action, E.P. lodged an appeal before the Visoki upravni sud (Administrative Court of Appeal, Croatia), which dismissed it. She then lodged a constitutional appeal before the referring court, claiming, inter alia, that she was placed at a disadvantage, in breach of Articles 20 and 21 TFEU, as a result of her dependent child exercising the right to move and reside in a Member State other than that child's Member State of origin for the purposes of education.

Since it had doubts as to the compatibility of the national legislation concerned with EU law, the referring court made a reference to the Court of Justice for a preliminary ruling.

Findings of the Court

First of all, the Court states that the Erasmus+ programme is based on Articles 165 and 166 TFEU and is intended, inter alia, to promote student mobility within the European Union and to enable students to begin or pursue their studies in various Member States, irrespective of their place of origin, thereby strengthening the European dimension of education and training. The implementation of that objective is liable to be impeded, having regard to the economic means available to students and their parents, by the additional costs to which that mobility gives rise. The financial support provided through, inter alia, grants intended to support the mobility of the beneficiaries of that programme

1 The Zakon o porezu na dohodak (Law on income tax) of 3 December 2004 (NN 177/04).

demonstrates the European Union's desire to help overcome those obstacles in a concrete and effective manner.

In that regard, it is true that EU law offers no guarantee to a citizen of the Union that the exercise of his or her freedom of movement will be neutral as regards taxation. That same principle applies a fortiori to a situation where the person concerned claims to be the victim of less favourable treatment following the exercise of a family member's freedom of movement. However, if a Member State participates in the Erasmus+ programme, it must ensure that the arrangements for the allocation and taxation of grants to support the mobility of beneficiaries of that programme do not create an unjustified restriction on the right to move and reside in the territory of the Member States.

Next, the Court finds that, in that context, national provisions such as those at issue in the main proceedings are liable to deter EU nationals from exercising their freedom to move and reside in a Member State other than their Member State of origin. The exercise of that freedom may have an impact on the calculation of the income tax of parents who are taxpayers and such provisions are therefore liable to undermine the mobility of students within the European Union in the context of the Erasmus+ programme. Accordingly, the taking into account of the mobility support which a dependent child has received under that programme for the purposes of determining the amount of the basic allowance to which a parent taxpayer is entitled in respect of that child, with the consequent loss of the entitlement to the increase in that allowance for the purposes of calculating income tax, is liable to constitute a restriction on the right to freedom of movement and residence enjoyed by citizens of the Union under Article 21 TFEU. The existence of such a restriction cannot be called into question by the fact, first, that the dependent child who exercised his or her freedom of movement was not himself or herself the taxpayer who was deprived of his or her entitlement to the increase in the allowance and, secondly, that the taxable parent thus disadvantaged has not exercised his or her freedom of movement.

In such circumstances, the effects of that restriction may be relied on not only by the Union citizen who has exercised his or her freedom of movement, but also by the Union citizen on whom that first citizen is dependent and who is therefore directly disadvantaged by the effects of that restriction. Ultimately, having regard to the economic links between the child and his or her parent – resulting from the fact that that child depends on his or her parent in order to meet his or her costs and the fact that the national legislature has chosen to take into account the income of the dependent child in determining the tax situation of that parent – both the dependent child and the taxpayer parent may, in circumstances such as those of the case in the main proceedings, rely on Article 21 TFEU and the provisions adopted for its application.

Lastly, the Court notes that a restriction on the right to freedom of movement and residence can be justified in the light of EU law only if it is based on objective considerations of public interest and if it is proportionate to the legitimate objective of the provisions of national law. First, it notes that the national provisions in question are intended to take account of the real capacity of the taxpayer parents to pay income tax, in order to avoid the overestimation of that capacity, which must be regarded as constituting an objective in the public interest.

Secondly, as regards compliance with the principle of proportionality, since the objective of the Erasmus+ programme is to promote student mobility for the purposes of education, in particular in the context of university education, and taking into account the level of the amounts of support for learning mobility under that programme and the actual cost of living in the host Member State, that support is supposed to contribute to covering the additional costs which would not have arisen in the absence of that mobility. Consequently, the receipt of such support does not lead to a reduction in the expenditure of taxpayer parents in the context of their maintenance obligations towards their dependent children, nor does it increase those parents' capacity to pay tax. The tax treatment of the support at issue in the main proceedings is therefore not capable of taking into account, in a consistent and systematic manner, the real capacity to pay income tax of taxpayer parents with a dependent child participating in that programme. Since that treatment is liable to lead to a heavier tax burden for those taxpayer parents, without the resources available to them having been increased to meet that burden, the national legislation concerned may even have the opposite effect.

The Court concludes that Articles 20 and 21 TFEU, read in the light of the second indent of Article 165(2) TFEU precludes legislation of a Member State which, in order to determine the amount

of the basic personal allowance to which a taxpayer parent is entitled in respect of his or her dependent child, takes into account the support for learning mobility which that child has received under the Erasmus+ programme, with the result, as the case may be, that that parent loses the entitlement to the increase of that allowance for the purposes of calculating income tax.

II. INSTITUTIONAL PROVISIONS: RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the Court of Justice (Fifth Chamber), 16 January 2025, Commission v Pollinis France, C-726/22 P

Link to the full text of the judgment

Appeal – Access to documents – Regulation (EC) No 1049/2001 – Article 4(3), first subparagraph – Protection of the decision-making process – Regulation (EU) No 182/2011 – Committee procedure – Positions expressed by Member States and other Members of Committees – Refusal to grant access

Hearing an appeal, which it dismisses, brought by the European Commission against the judgment of the General Court in the case Pollinis France v Commission, [2] by which that court annulled the two decisions of the Commission [3] refusing access to documents concerning the guidance document of the European Food Safety Authority (EFSA) of 2013, [4] the Court of Justice clarifies the scope to the exception relating to there being an ongoing decision-making process, [5] in the context of a committee procedure, and gives a ruling on what may qualify as a 'matter where the decision has not been taken by the institution'.

Pollinis France is a French non-governmental organisation acting to protect the environment and the purpose of which is the protection of wild and honey bees and the promotion of sustainable agriculture in order to help preserve pollinators. In 2020, it lodged with the Commission two requests for access [6] to certain documents concerning the EFSA guidance document of 2013. The first request covered, in essence, documents recording the positions of the Member States, of the members of the Standing Committee on Plants, Animals, Food and Feed [7] and of the Commission in relation to that guidance document and any draft relating to the same subject matter, received or drawn up by the Commission since October 2018. The second request concerned certain documents relating to that EFSA guidance document of 2013 and covered, in essence, correspondence, agendas, minutes or reports of meetings between members of the SCoPAFF and certain officials or Members of the Commission in the period between July 2013 and September 2018.

In response to the confirmatory requests for access, the Commission granted, by two decisions of 2020, partial access to some documents and refused access to some other documents, on the basis of

2 Judgment of 14 September 2022, Pollinis France v Commission (T-371/20 and T-554/20, EU:T:2022:556; 'the judgment under appeal').

3 Commission decisions C(2020) 4231 final of 19 June 2020, in Case T-371/20, and C(2020) 5120 final of 21 July 2020, in Case T-554/20 ('the decisions at issue').

4 Guidance Document on the risk assessment of plant protection products on bees, adopted by the EFSA on 27 June 2013 ('the EFSA guidance document of 2013').

5 On the basis of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

6 Pursuant to Regulation No 1049/2001 and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

7 'SCoPAFF'.

the exceptions, respectively, relating to the protection of privacy and the integrity of the individual [8] and the existence of an ongoing decision-making process.

The EFSA guidance document of 2013 had been discussed for several years within the SCoPAFF, without any agreement having been reached on its text due to disagreement amongst the Member States, and without that document having been adopted by the Commission. In 2019, the Commission had asked the EFSA to revise its guidance document of 2013 in order to take account of more recent scientific developments.

It is against that background that, in the judgment under appeal, the General Court, seised of two actions for annulment, found that, by the decisions at issue adopted in 2020, the Commission indicated that, pending the finalisation of the revision of that guidance document, its examination within the SCoPAFF was 'halted' and that that meant that the decision-making process could be regarded as being 'ongoing', since it would resume only after the completion of that revision.

However, according to the General Court, at the time that the decisions at issue were adopted there was no longer any decision-making process with a view to implementing the EFSA guidance document of 2013. On the contrary, the Commission had decided, implicitly but necessarily, not to implement that document. The very fact that a revision of it was ongoing at the time that the decisions at issue were adopted meant that it was impossible to determine the content of any revised document, the form of its possible adoption or the procedure that might be followed for that purpose, and so the Commission's decision-making process was devoid of any object. Consequently, the Commission could not validly rely on the exception relating to the protection of an ongoing decision-making process.

Findings of the Court

Hearing an appeal brought by the Commission which raised two grounds of appeal, the Court of Justice examines, in the context of the first ground, whether the General Court was correct in law to hold, in the judgment under appeal, that the Commission's decision-making process on the subject of the EFSA guidance document of 2013 had been closed at the time when the decisions at issue were adopted.

As a preliminary matter, the Court of Justice recalls that Regulation No 1049/2001, which is based on the principal of openness and transparency, seeks to confer on the public as wide a right of access as possible to the documents of the EU institutions. While that right of access is subject to certain limits based on reasons of public or private interest, the exceptions from the right of access provided for by Regulation No 1049/2001 must be interpreted and applied strictly. In addition, if the institution concerned decides to refuse access to a document which it has been asked to disclose, it must, in principle, explain how disclosure of that document could specifically and actually undermine the interest protected by the exception provided for in Article 4 of Regulation No 1049/2001 that that institution relies on. Finally, the risk of that interest being undermined must be reasonably foreseeable and not purely hypothetical.

First of all, as regards, more specifically, the exception relating to the protection of the decision-making process, the Court indicates, first, that under the first subparagraph of Article 4(3) of Regulation No 1049/2001, access to a document, drawn up by an institution for internal use or received by it and which relates to a matter where the decision has not been taken by that institution, is to be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in the disclosure of the document in question.

In that regard, the Court recalls that the concept of 'decision-making process' must be understood as relating directly to the taking of a decision, without covering the entire administrative procedure which led to it. The taking of a decision presupposes that there is a specific matter to which the decision to be taken will relate, and that is so irrespective of whether the adoption of a specific and

8 Within the meaning of Article 4(1)(b) of Regulation No 1049/2001.

identifiable draft act is imminent. Moreover, contrary to the Commission's submission, the General Court did not find that if a decision were not to be taken imminently, there would in fact be no decision-making activities.

Next, to hold that a decision has not yet been taken and therefore a 'decision-making process', within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001, is ongoing where there is no defined object of such a process would be contrary to both the scheme of that provision and the case-law. Thus, so long as the specific object of a decision to be taken in the future has not yet been defined, any risk that the decision-making process aimed at adopting that decision would be undermined as a result of the disclosure of a document requested pursuant to Regulation No 1049/2001 is by definition hypothetical, given that it would, in practice, be impossible to ascertain whether the content of that document actually relates to that decision-making process.

Finally, it is also without erring in law that the General Court did not find that the argument put forward by the Commission that it still had 'the objective' of implementing a guidance document on bees was decisive in the assessment of whether there was a 'matter where the decision has not been taken by the institution', within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001. To accept that an institution's intention alone to take a decision on a matter within its competence makes it possible for it to rely on that provision, without it being required that there was a decision-making process with a view to adopting a decision on a defined object, would, in practice, result in recognising that that institution has the option of refusing to disclose any document which related to that matter. The concept of a 'matter where the decision has not been taken by the institution' should not be interpreted so broadly as to cover every document which relates to a given matter.

Consequently, the Court of Justice concludes that the General Court was fully entitled to hold that the fact that the Commission still had the objective of implementing a guidance document on bees in order to provide the Member States' authorities with a document setting out 'current scientific and technical knowledge' did not suffice, in itself, to make it possible to conclude that there was still a 'matter where the decision [had] not been taken by the institution', within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001. It concludes that the first ground of appeal must therefore be rejected and, next, that the second ground of appeal must be rejected as ineffective and, consequently, the appeal in its entirety must be dismissed.

III. PROTECTION OF PERSONAL DATA

Judgment of the General Court (Sixth Chamber, Extended Composition), 8 January 2025, Bindl v Commission, T-354/22

Link to the full text of the judgment

Processing of personal data – Protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies – Regulation (EU) 2018/1725 – Concept of 'transfer of personal data to a third country' – Transfer of data when visiting a website – EU Login – Action for annulment – Act not open to challenge – Inadmissibility – Action for failure to act – Position taken ending the inaction – No need to adjudicate – Action for damages – Sufficiently serious breach of a rule of law conferring rights on individuals – Causal link – Non-material damage

Ruling in extended composition, the General Court upheld in part the claims for damages brought by Mr Bindl, the applicant. In that regard, the Court rules for the first time on the interpretation of

provisions of Regulation 2018/1725 [9] and, again for the first time, draws the appropriate conclusions from the 'Schrems II' case-law [10] in the context of the application of that regulation and of the 'principle' of consistent interpretation of similar provisions of Regulations 2016/679 [11] and 2018/1725.

The applicant visited the website of the Conference on the Future of Europe ('CFE') on 30 March 2022 and, using his Facebook account, registered for the 'GoGreen' event featured on it. On 8 June 2022, he visited that website again. The European Commission is the data controller for the purposes of that website.

By two requests for information of 9 November 2021 and 1 April 2022, reiterated on 22 April and 2 May 2022, the applicant asked the Commission to provide him with information about the processing of his data and the possible transfer of such data to third countries. He stated in particular that he had noticed that when he logged in to the CFE website, a connection with third-party providers, such as the United States (US) undertaking Amazon Web Services, had been activated.

By email of 3 December 2021, the Commission sent him a list of his personal data which had been processed and informed him that his data had not been transferred to recipients outside the European Union and that the CFE website used a content delivery network managed by Amazon Web Services EMEA SARL ('AWS EMEA'), established in Luxembourg (Luxembourg).

The applicant brought the present action on 9 June 2022.

Findings of the Court

The Court rules, first of all, on the admissibility of the claims for annulment of transfers of personal data to third countries which are said to have taken place on 30 March and 8 June 2022 ('the transfers at issue').

In that regard, the Court points out that not all operations that may result in a transfer of personal data, within the meaning of Regulation 2018/1725, constitute challengeable acts for the purpose of Article 263 TFEU.

In the present case, assuming that the transfers at issue are established, the Court notes that they are physical, not legal, acts. Those transfers are IT operations migrating data from one terminal or server to another that result from interactions between the applicant and the Commission's IT systems or services.

Accordingly, in so far as the transfers at issue are not acts of the Commission that have binding effect, they are not likely to have binding legal effects capable of affecting the interests of the applicant and cannot therefore be considered challengeable acts for the purpose of Article 263 TFEU.

The Court then goes on to rule on the merits of the four claims for damages put forward by the applicant.

As regards, first of all, the first claim for compensation for non-material damage resulting from an infringement of the right of access to information, the Court finds that no such non-material damage has been demonstrated in the present case.

The only unlawful conduct established in the present case is that of the Commission's failure to observe the one-month time limit prescribed by Regulation 2018/1725 [12] with regard to the information request of 1 April 2022. However, since that time limit was not exceeded by more than

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9 Chapter V of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

10 Judgment of 16 July 2020, Facebook Ireland and Schrems (C-311/18, EU:C:2020:559).

11 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

12 Under Article 14(4) of Regulation 2018/1725, the data controller is required, if he or she should decide not to take action on a request for information, to inform the person making the request, within one month, of the reasons for not taking action.

two months and, moreover, the applicant received at least a partial response to his information request of 3 December 2021, the unlawful conduct does not seem to have been such as to cause the applicant the non-material damage alleged, consisting in his being prevented from controlling the processing of his personal data.

Consequently, the Court dismisses the applicant's first claim for damages.

As regards, next, the second claim for compensation for non-material damage resulting from the disputed transfer at the time of the visit to the CFE website on 30 March 2022, the Court notes that, during that visit, there was indeed a transfer of the applicant's personal data, within the meaning of Regulation 2018/1725, including of his IP address. However, it also observes that it has not been demonstrated in this instance that, during that visit to the CFE website, there was a transfer of the applicant's personal data to a third country [13] and, in particular, to the United States.

In addition, the mere risk of access to personal data by a third country – should AWS EMEA, because of its status as a subsidiary of a US undertaking, be unable to object to a request from the US authorities concerning access to data stored in servers located within the European Economic Area (EEA) – cannot amount to a transfer of data, within the meaning of Regulation 2018/1725. In other words, the risk of an infringement of Regulation 2018/1725 cannot be treated as being akin to a direct infringement of that regulation. In that regard, the mere risk of an infringement of the provisions of Regulation 2018/1725 relating to transfers to third countries cannot, in any event, be sufficient to establish misconduct on the part of the Commission amounting to a sufficiently serious breach of those provisions.

With regard, moreover, to the third claim for compensation for non-material damage resulting from the disputed transfer at the time of the applicant's visits to the CFE website on 8 June 2022, the Court examines, in the present case, whether the Commission's use of the Amazon CloudFront service as the content delivery network for the CFE website is the direct cause of the non-material damage claimed, consisting in a loss of control over the applicant's personal data.

The Court finds that it is indeed the operation of the Amazon CloudFront service, with its routing mechanism which functions according to the principle of proximity and which covers a geographic area greater than the territory of the EEA, including, in particular, the United States, that made it possible for the applicant's IP address to connect, during visits to the CFE website, to Amazon CloudFront servers located in the United States.

However, although the Commission's use of the Amazon CloudFront service is a necessary condition for the transfers of personal data to the United States, that is not sufficient to establish a sufficiently direct causal link between the non-material damage invoked by the applicant and the Commission's allegedly unlawful conduct. In fact, it is the applicant's conduct that must be regarded as being the direct and immediate cause of the non-material damage claimed, and not the alleged misconduct on the part of the Commission in using the Amazon CloudFront service. Thus, it is the applicant who, while in Germany, made technical adjustments to change his apparent location and created the conditions required to trigger connections to servers located in the United States through the operation of the Amazon CloudFront service, by causing the routing mechanism of that service to redirect his requests to visit the CFE website to servers located in the United States.

Moreover, the applicant is not justified in behaving in such a way as to trigger a certain outcome (namely, the transfer of his personal data to a third country), only subsequently to claim compensation for damage allegedly caused by that outcome, which was in fact directly caused by his conduct. Accordingly, the Court considers that the applicant's situation cannot be assessed in the same way as that of a user who has actually travelled to the United States and who therefore may have accessed the CFE website from within that country.

As regards, lastly, the fourth claim for compensation for non-material damage resulting from the disputed transfer on signing in to EU Login on 30 March 2022, the Court states that, in the present

13 Article 46 of Regulation 2018/1725.

case, it has been demonstrated that, first, of the various options for signing in to EU Login, the applicant chose to sign in with his Facebook account. Secondly, the 'Sign in with Facebook' hyperlink contains a link to a URL address of the Facebook website. Thirdly, when the applicant activated that hyperlink by clicking on it, his browser accessed the URL address of the Facebook website and then transmitted his IP address to Facebook.

The Court concludes from this that, by means of the 'Sign in with Facebook' hyperlink displayed on the EU Login webpage, the Commission created the conditions for the applicant's IP address to be transmitted to Facebook. That IP address constitutes the applicant's personal data, which, by means of that hyperlink, was transmitted to Meta Platforms, an undertaking established in the United States. That transmission amounts, therefore, to a transfer of personal data to a third country, within the meaning of Regulation 2018/1725.

Furthermore, at the time of that transfer of data, on 30 March 2022, no adequacy decision of the Commission, within the meaning of Regulation 2018/1725, [14] existed with regard to the United States. In the absence of such a decision, personal data may be transferred to a third country or to an international organisation only if the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available, in accordance with Regulation 2018/1725. [15]

In the present case, the Commission has neither demonstrated nor claimed that there was an appropriate safeguard, in particular a standard data protection clause or contractual clause. By contrast, it has been demonstrated that the displaying of the 'Sign in with Facebook' hyperlink on the EU Login website is entirely governed by the general terms and conditions of the Facebook platform.

Consequently, the Commission created the conditions for a transfer of the applicant's personal data to a third country to proceed, without, however, complying with the conditions laid down in Regulation 2018/1725. [16] Accordingly, the non-material damage invoked by the applicant must be considered to be actual and certain, in so far as the transfer referred to above, which was contrary to Regulation 2018/1725, put the applicant in a position of some uncertainty as regards the processing of his personal data, in particular of his IP address.

In the light of the above, the Court orders the Commission to pay the sum of EUR 400 to the applicant for the non-material damage sustained as a result of the disputed transfer on signing in to EU Login on 30 March 2022.

Judgment of the Court of Justice (First Chamber), 9 January 2025, Mousse, C-394/23

Link to the judgment as published in extract form

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 5(1)(c) – Data minimisation – Article 6(1) – Lawfulness of processing – Data relating to title and gender identity – Online sale of travel documents – Article 21 – Right to object

Having received a request for a preliminary ruling from the Conseil d'État (Council of State, France), the Court of Justice clarifies the scope of the principles of lawfulness and data minimisation, laid down

14 Article 47 of Regulation 2018/1725.

15 Article 48(1) of Regulation 2018/1725.

16 Article 46 of Regulation 2018/1725.

in the GDPR, [17] in the context of the processing, by a transport undertaking, of data relating to its customers' titles for the purposes of personalising its commercial communication.

SNCF Connect sells rail travel documents via its website and online applications. Its customers are required to indicate their title, by ticking 'Monsieur' or 'Madame' ('Mr' or 'Ms') when purchasing those travel documents online.

The association Mousse lodged a complaint with the Commission nationale de l'informatique et des libertés (CNIL) (French Data Protection Authority) against SNCF Connect, on the ground that the conditions for collecting and recording data relating to the titles of SNCF Connect's customers did not comply with the requirements of the GDPR. More specifically, Mousse alleged that the collection of those data by SNCF Connect infringed the principles of lawfulness and data minimisation as well as the obligations of transparency and provision of information arising from that regulation. [18]

By decision of 23 March 2021, the CNIL decided that the data processing carried out by SNCF Connect was lawful, on the ground that it was necessary for the performance of the relevant contract [19] for the provision of transport services and that it was consistent with the principle of data minimisation.

On 21 May 2021, Mousse brought an action before the referring court seeking annulment of the CNIL's decision, claiming that the obligation imposed on SNCF Connect's customers to indicate their title was not necessary for the performance of a contract for the provision of transport services, that it was liable to infringe, inter alia, the right to respect for private life and that it gave rise to a risk of discrimination on grounds of gender identity.

In that context, the referring court asks whether, in order to assess the need for SNCF Connect's collection of data relating to its customers' titles, account may be taken, first, of commonly accepted practices in commercial, civil and administrative communications and, second, of the fact that those customers could, after providing those data to the controller, exercise their right to object to the use of such data, for reasons relating to their particular situation. [20]

Findings of the Court

In the first place, the Court examines whether the processing of personal data relating to the title of customers of a transport undertaking, the purpose of which is to personalise the commercial communication, may be regarded as necessary for the performance of a contract [21] or for the purposes of the legitimate interests pursued by the controller or by a third party. [22]

As regards, first, the need for such processing for the performance of a contract, [23] the Court states that it must be objectively indispensable to achieve a purpose forming an integral part of the performance of the contract. More specifically, such processing must be essential for the proper performance of the contract concluded between the controller and the data subject and, therefore, there must be no other workable and less intrusive solutions.

In the present case, given that the main subject matter of the transport contract in question is the provision of a rail transport service to customers and that the purpose of the data processing at issue in the main proceedings is to personalise the commercial communication with the customer, that

17 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR'), Article 5(1)(a) and (c).

18 Article 13 of the GDPR.

19 Point (b) of the first subparagraph of Article 6(1) of the GDPR.

20 Article 21 of the GDPR.

21 Point (b) of the first subparagraph of Article 6(1) of the GDPR.

22 Point (f) of the first subparagraph of Article 6(1) of the GDPR.

23 Point (b) of the first subparagraph of Article 6(1) of the GDPR provides that the processing of personal data is lawful if it is 'necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract'.

communication may constitute a purpose forming an integral part of the performance of the contract. The provision of such a service involves, in principle, communicating with the customer in order, inter alia, to send him or her a travel document by electronic means, to inform him or her of any changes affecting the corresponding journey and to enable exchanges with after-sales service. Such communication may require adherence to accepted practices and may include, in particular, forms of addressing a customer, in order to show that the undertaking respects him or her.

However, the Court points out that such communication does not necessarily have to be personalised according to the gender identity of the customer concerned. In the present case, as regards the services in question in the main proceedings, personalised commercial communication, based on a presumed gender identity according to a customer's title, does not appear to be objectively indispensable or essential in order to enable the proper performance of a contract and, therefore, cannot be regarded as necessary for its performance. A workable and less intrusive solution seems to exist, since SNCF Connect could choose, with regard to customers who do not wish to indicate their title or in general, to communicate based on generic, inclusive expressions when addressing those customers, with no correlation to the latter's presumed gender identity.

As regards, second, the need to process the personal data relating to the title of the customers of a transport undertaking for the purposes of the legitimate interests pursued by the controller or by a third party, [24] the Court reiterates, first of all, the three conditions to be met in order for such processing to be lawful.

As regards, first, the condition relating to the pursuit of a legitimate interest by the controller or by a third party, the Court points out that it is for the controller to indicate to the person whose personal data it collects the legitimate interests which the controller pursues during the processing in question. Such a legitimate interest could exist, for example, where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client of the controller.

In the present case, the Court indicates that it is for the referring court to ascertain whether SNCF Connect informed its customers [25] of a legitimate interest and states that the processing of personal data for the purposes of direct commercial marketing may serve a legitimate interest. In particular, in such a context, personalised advertising may be equated with commercial marketing.

As regards, second, the condition relating to the need for the processing of personal data for the attainment of the legitimate interest pursued, the Court explains that it must be examined in conjunction with the principle of data minimisation. [26] Thus, it is for the referring court to ascertain whether the legitimate interest pursued by the processing of the data can reasonably be achieved just as effectively by other means less restrictive of the fundamental freedoms and rights of data subjects. In the present case, it appears that personalised commercial communication can be limited to the processing of customers' surnames and forenames, since their title and/or gender identity are not information that is strictly necessary in that context, in particular in the light of the principle of data minimisation. In that context, the Court states that, although the GDPR [27] does not provide for the accepted practices and social conventions specific to each Member State to be taken into account for the purposes of assessing whether the processing of personal data is necessary, it is open to the controller to adhere to those practices and social conventions. That controller could use, vis-à-vis

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24 Point (f) of the first subparagraph of Article 6(1) of the GDPR provides that the processing of personal data is lawful if it is 'necessary for the purpose of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child'.

25 Under Article 13(1)(d) of the GDPR, the controller of personal data is under an obligation to inform data subjects directly of the legitimate interest pursued when the personal data is collected.

26 Under Article 13(1)(d) of the GDPR, the controller of personal data is under an obligation to inform data subjects directly of the legitimate interest pursued when the personal data is collected.

27 Point (f) of the first subparagraph of Article 6(1) of the GDPR.

customers who do not wish to indicate their title or in general, generic, inclusive expressions when addressing those customers, with no correlation to their gender identity.

As regards, third, the condition that the interests or fundamental freedoms and rights of the data subject do not take precedence over the legitimate interest of the controller or of a third party, the Court considers that that condition entails a balancing of the opposing rights and interests involved. It is for the national court concerned to carry out that balancing exercise by taking into account, inter alia, the reasonable expectations of the data subject, the extent of the processing concerned and the impact of that processing on that data subject. In the present case, subject to verification by the referring court, a customer of a transport undertaking is not supposed to expect that undertaking to process data relating to his or her title or gender identity in the context of the purchase of a travel document. That would be the case, in particular, if that processing were carried out solely for direct commercial marketing purposes. However, the Court states that the legitimate interest relating to direct commercial marketing cannot, in any event, prevail where there is a risk that the fundamental freedoms and rights of the person concerned will be infringed. It is thus for the national court to determine whether there is a risk of discrimination on grounds of gender identity, as claimed by Mousse, in particular in the light of Directive 2004/113. [28] The Court adds, in that regard, that the scope of that directive cannot be confined simply to discrimination based on the fact that a person is of one or other gender. In view of its purpose and the nature of the rights which it seeks to safeguard, that directive also applies to discrimination arising from a change in a person's gender identity.

In the light of the foregoing, the Court concludes that the processing of personal data relating to the title of the customers of a transport undertaking, the purpose of which is to personalise the commercial communication based on their gender identity, cannot be regarded as necessary for the purposes of the legitimate interests pursued by the controller or by a third party, where the undertaking did not inform those customers of the legitimate interest pursued when those data were collected, where the processing is not carried out only in so far as is strictly necessary for the attainment of that legitimate interest, or where, in the light of all the relevant circumstances, the fundamental freedoms and rights of those customers can prevail over that legitimate interest, in particular because of a risk of discrimination on grounds of gender identity.

In the second place, the Court examines whether, in order to assess the need for the processing of personal data relating to the title of customers of a transport undertaking for the purposes of the legitimate interests pursued by the controller or by a third party, account must be taken of the possible existence of a right of the data subject to object. [29] The possible existence of a right to object presupposes the existence of lawful processing, based in the present case on the legitimate interests pursued by the controller or by a third party. In order to be lawful, such processing must first satisfy the condition of strict necessity for the legitimate interest pursued. It thus follows from the wording and scheme of the provisions of the GDPR that the existence of a right to object cannot be taken into consideration for the purposes of assessing lawfulness and, in particular, the need to process personal data based on the legitimate interests pursued by the controller or by a third party.

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28 Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

29 Under Article 21 of the GDPR, the data subject has the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of the first subparagraph of Article 6(1) of the GDPR, including profiling based on those provisions.

Judgment of the Court of Justice (First Chamber), 9 January 2025, Österreichische Datenschutzbehörde (Excessive requests), C-416/23

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 57(1)(f) and Article 57(4) – Tasks of the supervisory authority – Concepts of a 'request' and 'excessive requests' – Charging of a reasonable fee or refusal to act on requests in the event of manifestly unfounded or excessive requests – Criteria which may guide the supervisory authority in making its choice – Article 77(1) – Concept of a 'complaint'

Following a reference for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the Court of Justice rules on a series of questions that have not previously been addressed concerning provisions of the General Data Protection Regulation (GDPR) [30] covering tasks of supervisory authorities and their discretion in determining the existence of excessive requests and drawing the appropriate conclusions.

In 2020, F R, a natural person, lodged a complaint [31] with the Österreichische Datenschutzbehörde (Data Protection Authority, Austria; 'the DSB') concerning an alleged infringement on the part of a company concerning the right of access to that natural person's personal data. [32] That authority refused to act on F R's complaint on account of its excessive nature. [33] It noted, inter alia, that, within a short period of time, F R had sent it a large number of similar complaints.

Ruling on the action brought by F. R., the Bundesverwaltungsgericht (Federal Administrative Court, Austria) annulled the DSB's refusal decision. Hearing an appeal on a point of law lodged by the DSB against the ruling of that court, the referring court addressed three questions to the Court concerning the concept of a 'request', the concept of an 'excessive request' and the legal implications in the event of excessive requests in the context of the GDPR. [34]

Findings of the Court

First, as regards the concept of a 'request' used in Article 57(4) of the GDPR, the Court notes that in the light of the broad interpretation to be accorded to that concept, it covers a complaint that the data subject has the right to lodge with a supervisory authority. [35]

The Court observes that that conclusion is corroborated both by the context of that provision and by the objectives of the GDPR.

In that context, first, the Court observes that, in so far as Article 57(4) of the GDPR provides for an exception to the 'free-of-charge' principle for tasks carried out by supervisory authorities, [36] it should also apply to the handling of complaints referred to in the GDPR, especially since that task constitutes an essential task of those authorities. Conversely, an interpretation to the effect that the concept of a 'request' contained in that provision does not cover the complaints referred to in the GDPR would

30 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1).

31 Pursuant to Article 77(1) of the GDPR.

32 Right referred to in Article 15 of the GDPR.

33 Refusal based on Article 57(4) of the GDPR which provides that 'where requests are manifestly unfounded or excessive, in particular because of their repetitive character, the supervisory authority may charge a reasonable fee based on administrative costs, or refuse to act on the request. The supervisory authority shall bear the burden of demonstrating the manifestly unfounded or excessive character of the request'.

34 Articles 57(4) and (77)(1) of the GDPR.

35 Reference is made to the concept of a 'complaint' used in Article 57(1)(f) and Article 77(1) of the GDPR.

36 Principle set out in Article 57(3) of the GDPR.

deprive that provision of a large part of its effectiveness and would run counter to the effective protection of the rights guaranteed by that regulation.

Second, it points out that the pursuit of the objective of ensuring a consistent and high level of protection of natural persons within the European Union referred to in that regulation requires that the proper functioning of the supervisory authorities be guaranteed by ensuring that it is not hindered by the lodging of complaints which are manifestly unfounded or excessive, within the meaning of Article 57(4) of the GDPR. That provision thus offers supervisory authorities the possibility of better management of those complaints, thus reducing the workload they impose on them. In that regard, where a supervisory authority is confronted with complaints which are manifestly unfounded or excessive, the ability to charge a reasonable fee or to refuse to act on such complaints is such as to ensure a high level of protection of personal data.

Next, the Court considers that requests addressed by the data subject to the supervisory authority cannot be classified as 'excessive', within the meaning of Article 57(4) of the GDPR, solely on account of their number during a specific period, since the exercise of the option provided for in that provision is subject to that authority's demonstrating the existence of an abusive intention on the part of such a data subject.

The Court states that a finding of an abusive intention may be made if a person has lodged complaints in circumstances where it was not objectively necessary to do so in order to protect his or her rights under that GDPR.

In that context, it also points out that it is incumbent on the Member States to provide the supervisory authorities with the appropriate resources to process all complaints submitted to them, if necessary by increasing those resources in the light of the use made by data subjects of their right to lodge complaints. Accordingly, a supervisory authority cannot base an argument, in order to refuse to act on a complaint, on the fact that a person who lodges a significantly greater number of complaints than the average number of complaints lodged by each data subject significantly mobilises the resources of that authority to the detriment of the handling of other complaints submitted by other persons.

Furthermore, the Court notes that complaints made under the GDPR contribute significantly to ensuring a consistent and high level of protection of natural persons within the European Union and to strengthening and setting out in detail the rights of those persons. Thus, allowing the supervisory authorities to make a finding of the excessive character of requests on the sole basis that a large number of complaints have been made would be liable to undermine the attainment of that objective. A large number of complaints may be a direct consequence of a high number of failures, on the part of one or more controllers, to respond to or refuse to act on requests for access made by a data subject in order to protect his or her rights.

The Court concludes that, on the basis of the particular circumstances of each case, it is incumbent on a supervisory authority to demonstrate that the large number of complaints it receives is not to be explained in terms of the data subject wishing to obtain protection of his or her rights under the GDPR, but in terms of some other purpose, unconnected with that protection. That is so, in particular, where those circumstances show that the lodging of complaints is intended to interfere with the proper functioning of the supervisory authority by taking up its resources in an abusive manner. That may be the case, for example, where a data subject lodges such a large number of complaints, relating to a multitude of controllers with which the data subject does not necessarily have any connection, and where that disproportionate use of the right to submit complaints shows, taken together with other factors such as the content of the complaints, an intention on the part of the data subject to paralyse the functioning of the supervisory authority by flooding it with requests.

Finally, the Court finds that, where the supervisory authority is faced with excessive requests, it may, under Article 57(4) of the GDPR, choose, by reasoned decision, between charging a reasonable fee based on administrative costs and refusing to act on those requests, taking account of all the relevant circumstances and satisfying itself that the chosen option is appropriate, necessary and proportionate.

That finding is corroborated by the wording of Article 57(4) of the GDPR which appears to confer on the supervisory authority the freedom to choose, in the event that the abusive character of the

requests submitted to it has been established, one of the two options referred to therein. In addition, a choice in favour of one of the two options may be made if, in any event, the effective exercise of the right to lodge complaints is ensured. Furthermore, taking account of the importance of the right to lodge complaints in relation to the objective of ensuring a high level of protection of personal data, of the essential place occupied by the handling of such complaints among the tasks assigned to supervisory authorities and of the obligation of those authorities to handle such complaints with all due diligence, it is for supervisory authorities to have regard to all the relevant circumstances and to satisfy themselves that the chosen option is appropriate, necessary and proportionate.

Judgment of the General Court (Tenth Chamber, Extended Composition), 29 January 2025, Data Protection Commission v European Data Protection Board, Joined Cases T-70/23, T-84/23 and T-111/23

Link to the full text of the judgment

Protection of personal data – Article 65(1)(a) of Regulation (EU) 2016/679 – Binding decision instructing a lead supervisory authority to broaden the scope of its investigation and issue a new draft decision – Competence of the European Data Protection Board

Sitting in extended composition, the General Court dismisses the action of the Data Protection Commission – the Irish supervisory authority for personal data protection – seeking annulment in part of the binding decisions of the European Data Protection Board (EDPB) at issue. In its judgment, it rules, for the first time, on the competence of the EDPB to require a national supervisory authority to broaden its analysis of a case and, if necessary, its investigation.

After exchanges with the other supervisory authorities concerned, the Data Protection Commission, as the lead supervisory authority, found that there was no consensus on the objections to its draft decisions concerning the cross-border processing of data in connection with the use of the social network Facebook, the social network Instagram and the messaging service WhatsApp. As a result, it referred the matter to the EDPB through the consistency mechanism. [37]

Following the examination of the three files, the EDPB, considering that most of the objections to the draft decisions were relevant and reasoned, decided to adopt a position on the matters they raised.

Thus, on 5 December 2022, it adopted binding decisions requiring the Data Protection Commission to carry out new investigations into the data processing carried out in connection with the use of the three abovementioned applications and, on the basis of the results thereof, to issue new draft decisions.

The Data Protection Commission then challenged the EDPB's power to impose such measures on it by means of binding decisions.

Findings of the Court

In the first place, the Court clarifies the scope of the EDPB's competence [38] relying on a literal, contextual and purposive analysis of the GDPR.

In that context, first of all, it notes that, according to a literal interpretation of the relevant provisions of the GDPR, [39] the EDPB is competent to adopt provisions, such as the contested provisions, instructing the lead supervisory authority to conduct a new investigation into certain aspects of the files in question and then to adopt new draft decisions. Since the EDPB's binding decision must

37 In accordance with Article 60(4) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR').

38 Under Article 65(1)(a) of the GDPR.

39 Article 65(1)(a) of the GDPR, read in conjunction with Article 4(24), Article 65(6) and recitals 126 and 136 of that regulation.

concern all the matters that are the subject of relevant and reasoned objections, the relevant provisions of the GDPR do not preclude, where the EDPB approves a relevant and reasoned objection relating to the absence or inadequacy of analysis in the draft decision of an aspect of the case that makes it impossible to know whether or not there is an infringement of that regulation, that decision from including an instruction to the lead supervisory authority to remedy that lack of analysis and, if it appears necessary in the light of the file in the EDPB's possession, to deepen or broaden to that end the investigation carried out up to that point. If it appears that the case file is insufficient to enable the required analysis to be carried out in full, the EDPB must be allowed to require the lead supervisory authority to undertake further investigation.

Next, the Court considers, as part of the contextual interpretation of the relevant provisions of the GDPR, that the general context of the obligation of cooperation between the supervisory authorities concerned by a case, which is enshrined in the GDPR, confirms the EDPB's competence to adopt the contested measures.

On that point, it states that the procedure for cooperation between supervisory authorities concerned by a case, [40] which may involve triggering the consistency mechanism operated by the EDPB, is not a 'one-way' procedure in which the stages always follow each other in the order of the provisions providing for them, without the possibility of returning to a previous stage or temporarily remaining at the same stage.

In addition, it notes that the analysis of the conditions under which the processing of personal data is carried out and its compliance with the GDPR does not have be limited to what is highlighted in the complaint made. In particular, fully carrying out the tasks of the supervisory authorities provided for in the GDPR of enforcing the application of that regulation and handling complaints to the extent appropriate [41] involves adopting an appropriate scope of analysis of the file in the light of the complaint that gave rise to it, but also in the light of other factors which may supplement it. The relevant and reasoned objection, according to its definition, relates to aspects the analysis of which comes within the scope of the two abovementioned tasks. As a result, the fact that a relevant and reasoned objection concerns the scope of the analysis and, where applicable, the scope of the investigation and that the EDPB follows that objection in no way undermines those tasks.

Lastly, the Court states that the examination of the purposes of the GDPR also confirms the literal interpretation of the relevant provisions of the GDPR.

In that regard, it points out, in particular, that the mechanism for cooperation between supervisory authorities concerned by a case reaches its limits where those authorities cannot reach a consensus. It is in that situation that the matter in respect of which consensus has not been reached must be submitted by the lead supervisory authority to the consistency mechanism, which results in an EDPB binding decision. In the event that the investigation is reopened, the competent authority must adopt a final decision on the substantive aspects that have been investigated and determined following an EDPB binding decision within the period provided for in the GDPR. That does not prevent it from carrying out an additional investigation and analysing those aspects of the case that have not yet been examined.

In the second place, the Court considers that the conditions for conferring competence on an EU body do not oppose the adopted interpretation that the EDPB has the power to require a lead supervisory authority to broaden its analysis and, where appropriate, its investigation. The exercise of such a power is circumscribed by various conditions and criteria which limit its discretion. Thus, that power, first, is exercised only in the event of a clearly identified shortcoming in the analysis undertaken by the lead supervisory authority in its handling of the case which may have significant consequences, as is apparent from the definition of a relevant and reasoned objection, and, second, results from the collective assessment of the supervisory authorities comprising the EDPB.

40 Provided for in Article 60 of the GDPR.

41 Article 57(1)(a) and (f) of the GDPR.

Furthermore, the Court notes that the exercise of that power is subject to judicial review. More specifically, within the limits of the pleas relied on before them, the Courts of the European Union are able to review the substantive legality of the contested provisions in the light of the circumstances of the case. In particular, it is open to them, first, to verify whether the EDPB, by adopting provisions of that nature, did indeed act on a relevant and reasoned objection by a supervisory authority. It is open to them, second, to examine the legality of the very substance of such provisions giving instructions to the supervisory authorities.

In that context, the Court adds that an EDPB binding decision requiring the applicant to broaden its analysis and its investigation does not call into question its ability to prioritise the performance of its various tasks as an independent authority, the review of which falls to the national court alone. Nor does it call into question, more generally, its independence. [42]

IV. FREEDOM OF MOVEMENT: FREEDOM OF ESTABLISHMENT

Judgment of the Court of Justice (Fourth Chamber), 16 January 2025, Banco de Santander (Representation of individual consumers), C-346/23

Link to the full text of the judgment

Reference for a preliminary ruling – Markets in financial instruments – Directive 2004/39/EC – Article 52(2) – Action brought in the interests of consumers – Consumer organisations having a legitimate interest in protecting consumers – Standing to bring legal proceedings to defend the individual interests of their members – Loss of standing in the case of investments in high-value financial products – Exemption from court fees and from the obligation to pay the costs incurred by the opposing party – Procedural autonomy – Principle of effectiveness

In the context of a dispute relating to the validity of contracts for the acquisition of financial instruments concluded by investor-consumers defended by a consumer association, the Court of Justice confirms that the standing to bring proceedings of such an association defending the individual interests of a number of its members cannot be subject to restrictions relating to the financial means of those members and to the characteristics of the financial products in which those members have invested. Such criteria may nevertheless be taken into consideration in order to decide whether that association can benefit from legal aid.

Two individuals had invested in financial products with Banco Banif, now Banco Santander. An action was brought against that bank before the Spanish courts by the Asociación de Consumidores y Usuarios de Servicios Generales – Auge (Association of Consumers and Users of General Services; ‘Auge’), which represented those two individuals; in that action, they sought a declaration that the contracts for the acquisition of those financial products were null and void, on the grounds that those contracts were not properly accepted.

Since the courts of first instance and appeal upheld that action, the bank referred to above applied for an exceptional review procedure on the basis of procedural defects and brought an appeal on a point of law against that judgment before the Tribunal Supremo (Supreme Court, Spain), which is the referring court. The bank claims before that court that Auge does not have standing to bring legal proceedings on behalf of its members, on the ground that the products subscribed for by those members are high-value speculative financial products, and not products of common and widespread use, with the result that the action brought does not fall within the scope of consumer protection under national law.

42 Enshrined in Article 39 TEU, Article 16(2) TFEU and Article 8(3) of the Charter of Fundamental Rights of the European Union.

According to national case-law, consumer organisations do not have standing to bring proceedings where the action concerns investments in speculative financial products or high-value financial products, since those products were not in common, ordinary and widespread use. According to the referring court, not granting those associations standing in those circumstances makes it possible to avoid fraudulent or wrongful use of the specific standing of consumer associations to bring proceedings by investors with significant financial means, with a view to exercising the right to legal aid which national law grants to those associations.

It is in that context that the referring court asks whether the national case-law limiting the standing to bring proceedings of a consumer association on behalf of one of those investor-consumers on account of that investor-consumer's financial means and the monetary value, type and complexity of his or her investments is consistent with Article 52(2) of Directive 2004/39. [43]

Findings of the Court

First of all, the Court recalls that a 'retail client', within the meaning of Article 4(1)(12) of that directive, may be classified as a 'consumer' if he or she is a natural person acting outside any commercial activity. [44] It is also clear from recital 14 of Directive 2020/1828 [45] that a 'retail client' constitutes a consumer and from recital 13 of that directive that it covers, in addition to general consumer law, fields such as that of financial services.

Next, the Court states that Member States are entitled to grant consumer protection bodies standing to bring proceedings in order to protect the individual interests of a number of their members.

In reaching that conclusion, the Court notes that Article 52(2) of Directive 2004/39 refers to the interest of 'consumers' in the plural. Although the use of the plural indicates that an action brought by a consumer organisation must relate to the interests of a number of consumers, that provision does not specify whether that collective dimension of the action refers to the general interest of consumers or, on the contrary, to the individual interests of a number of consumers. Nevertheless, in so far as that provision refers to the law of the Member States both as regards the determination of the bodies which may represent the interests of consumers and as regards the detailed procedural rules according to which that representation must actually be exercised, the Member States remain free to determine the individual or collective nature of the interests which may be defended by consumer protection organisations.

In addition, where a Member State has conferred on consumer organisations standing to bring legal proceedings in order to defend the individual interests of a number of their members, it is not, however, permissible to limit the standing of such an organisation to defend a certain category of consumers identified on the basis of their financial means and the financial instruments in which they have invested. Article 52(2) of Directive 2004/39 provides for a right of appeal in the interests of all consumer-investors, without distinguishing them in that regard.

However, neither that provision nor any other set of rules under EU law requires legal aid to be granted to consumer organisations bringing actions in the interest of consumers. Each Member State must establish its own rules regarding its legal aid scheme, in accordance with the principle of procedural autonomy, provided that those rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness). In that

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43 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

44 See, to that effect, judgment of 3 October 2019, Petruchová, (C-208/18, EU:C:2019:825, paragraph 76).

45 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ 2020 L 409, p. 1). Annex I to that directive refers to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349), which repealed and replaced Directive 2004/39 and Article 74(2) of which, which concerns the right to bring proceedings in the interests of consumers, corresponds to Article 52(2) of Directive 2004/39, with the wording of those two articles being almost identical.

regard, the court fees that an association is required to pay if it does not receive legal aid must not constitute insurmountable costs that are capable of making it impossible in practice or excessively difficult to exercise the right to take action provided for in Article 52(2) of Directive 2004/39.

V. JUDICIAL COOPERATION IN CRIMINAL MATTERS: RIGHT TO BE PRESENT AT THE TRIAL

Judgment of the Court of Justice (Fourth Chamber), 16 January 2025, VB (Information concerning the right to a new trial), C-400/23

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Right to be present at the trial – Article 8(2) – Trial resulting in a decision imposing a conviction in absentia or a decision of acquittal in absentia – Conditions – Article 8(4) – Obligation to inform the person tried in absentia of the legal remedies available – Article 9 – Right to a new trial or to another legal remedy which allows a fresh determination of the merits of the case and which may lead to the original decision being reversed – Article 10(1) – Right to an effective remedy – National legislation making the recognition of the right to a new trial subject to the submission of a request to reopen criminal proceedings to a judicial authority before which the person tried in absentia must appear

Ruling on a request for a preliminary ruling from the Sofiyski gradski sad (Sofia City Court, Bulgaria), the Court of Justice clarifies the obligations of the Member States in criminal proceedings conducted in absentia.

The referring court is seised of criminal proceedings brought against VB, who is charged with acts constituting criminal offences punishable by custodial sentences. VB has not been formally notified of the charges brought against him. Moreover, he has not been informed either that his case has been brought before a court, or, more specifically, of the date and place of the trial or of the consequences of his non-appearance. The competent national authorities have not succeeded in locating VB, since he absconded during the pre-trial stage, prior to the police operation to apprehend the suspects.

Taking the view that the conditions for conducting the trial in the absence of the accused person, provided for by Directive 2016/343, [46] are not satisfied in the present case, the referring court is uncertain as regards the scope of its obligation to inform the person tried in absentia of the legal remedies available. [47] It states that in Bulgaria, as soon as the time limit for lodging an appeal against a conviction imposed in absentia expires, the only legal remedy available against that conviction is a request to reopen the criminal proceedings, which must be submitted to the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria). That 'right to a new trial or to another legal remedy' is neither communicated nor even recognised at the time the person convicted in absentia is informed

46 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1). Under Article 8(2) of that directive, 'Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:
(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.'

47 Article 8(4) of Directive 2016/343 provides that, in the event of a trial being held without it being possible to satisfy the conditions laid down in Article 8(2) of the directive because the suspect or accused person cannot be located despite reasonable efforts having been made, Member States are to ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy.

of the conviction. Furthermore, Bulgarian law provides for an obligation on the part of the person who has submitted a request to reopen the criminal proceedings to appear before the court that will examine that request, failing which no further action will be taken on the request.

The referring court, having doubts as regards the compatibility of the Bulgarian procedural system with Directive 2016/343, referred several questions to the Court of Justice for a preliminary ruling.

Findings of the Court

First of all, as regards the right of the person convicted in absentia 'to a new trial or to another legal remedy' within the meaning of Article 8(4) of Directive 2016/343, the Court states that that directive does not preclude a Member State from establishing a procedural system that does not automatically lead to the reopening of criminal proceedings but requires persons convicted in absentia who are interested in such a reopening to submit a request to that end to another court, separate from that which rendered the decision in absentia, in order for that other court to ascertain that the condition governing the right to a new trial is satisfied, that is to say, that the conditions laid down in Article 8(2) of that directive were not satisfied. This follows, in particular, from the wording of Article 8(4) of the directive concerned. First, the fact that the possibility of challenging the decision rendered in absentia is presented as a separate procedural element independent of the 'right to a new trial or to another legal remedy' indicates that Member States have the possibility of providing for proceedings which precede a new trial or the exercise of another legal remedy, since the purpose of such proceedings may be to ascertain that the abovementioned conditions were not satisfied. Second, the use of the coordinating conjunction 'or' in the phrase 'right to a new trial or to another legal remedy' implies that the Member States have the choice of providing for the reopening of criminal proceedings in the form of a new trial or of providing for 'another legal remedy' equivalent to a new trial.

The Court considers that such a procedural system is compatible with Directive 2016/343 provided that, first, the proceedings relating to the request for the reopening of criminal proceedings do in fact allow a new trial to be held in all cases where it is established, after verification, that the conditions laid down in Article 8(2) of that directive were not satisfied, and second, the person convicted in absentia, when he or she is informed of the conviction, is also informed of the existence of those proceedings.

Next, the Court recalls that it is for the referring court to assess whether the procedural system established by the Bulgarian legislature is compatible with Directive 2016/343, and in particular whether the proceedings relating to the reopening of criminal proceedings meet all the requirements stemming from the principle of effectiveness.

As regards the assessment of whether the system established by the Bulgarian legislature observes the principle of effectiveness, in the first place, the Court states that it is important to guarantee that the proceedings relating to the request to reopen criminal proceedings lead to the recognition of the right to a new trial in all cases where the conditions laid down in Article 8(2) of that directive were not satisfied.

In the second place, it must be ascertained whether the person convicted in absentia receives, at the time he or she is informed of that conviction or shortly thereafter, a copy in full of the decision rendered in absentia and information as regards his or her procedural rights, including as regards the possibility of making a request to reopen the criminal proceedings and as regards the court before which and the time limit within which that request must be made.

In the third place, any proceedings relating to a request for a new trial must be organised in such a way that that request is dealt with all due speed, so that it is determined as soon as possible whether the trial in absentia took place without the conditions laid down in Article 8(2) of Directive 2016/343 having been satisfied. That requirement of speed is all the more important since decisions rendered in absentia can be enforceable.

In the last place, the principle of effectiveness requires that the person concerned be able to express his or her views, in person or through a lawyer, on the question whether the trial in absentia took place without the conditions laid down in Article 8(2) of Directive 2016/343 having been satisfied. That possibility cannot be understood as meaning that there is an obligation on the part of the person concerned to appear in person before the court examining that request. The obligation for the person concerned who has become aware of the conviction to appear in person before the court to which he

or she submitted a request for a new trial amounts to obliging a person still at liberty to surrender to custody in order to secure the right to a new trial. This would be incompatible with the fundamental right to a fair trial.

Furthermore, as regards the obligation to inform the person tried in absentia of his or her right to a new trial, the Court recalls [48] that the EU legislature has refrained from specifying the manner in which the information relating to the 'right to a new trial or to another legal remedy' is to be provided. Although Directive 2016/343 cannot be interpreted as requiring a court adjudicating in absentia to rule, in its decision, on the right to a new trial, [49] it leaves a broad discretion to the Member States as regards its implementation. It cannot therefore be interpreted as prohibiting that court from examining, during a trial conducted in absentia, whether the conditions laid down in Article 8(2) of that directive are satisfied and, where those conditions are not satisfied, from stating in its decision that the person concerned is entitled to a new trial. It is important, nevertheless, in the examination carried out in that regard by the court conducting a trial in absentia, that that court hear the lawyer who represents the person concerned, since that person is, in that situation, absent. The requirements imposed by Directive 2016/343 are thus met where the court conducting a trial in absentia itself examines, after hearing both the prosecution and defence counsel on that matter, whether the conditions laid down in Article 8(2) of that directive are satisfied and, where they are not satisfied, states, in the decision rendered in absentia, a copy in full of which is to be provided to the person concerned at the time that person is informed of that decision or shortly thereafter, that he or she is entitled to a new trial.

VI. COMPETITION

1. STATE AID

Judgment of the General Court (Fourth Chamber, Extended Composition), 29 January 2025, Danske Fragtmænd v Commission, T-334/22

Link to the full text of the judgment

Action for annulment – State aid – Postal sector – Capital contribution in favour of Post Danmark – Decision finding no State aid – Capital contribution in favour of PostNord – Decision declaring the aid incompatible with the internal market – Lack of individual concern – No substantial effect on the competitive position – Inadmissibility

The General Court, ruling in extended composition, dismisses the action brought by Danske Fragtmaend A/S seeking annulment of the Commission Decision on the aid implemented by Denmark and Sweden for PostNord AB and Post Danmark A/S. [50] In its examination of the individual concern criterion, the Court rules that the applicant has not established that its competitive position was likely to be substantially affected by the aid measures at issue.

Danske Fragtmænd is a company incorporated under Danish law which is active, inter alia, on the Danish market for road transport of goods and parcel distribution services.

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48 Judgment of 8 June 2023, VB (Information for a person convicted in absentia) (C-430/22 and C-468/22, EU:C:2023:458, paragraph 27).

49 Judgment of 8 June 2023, VB (Information for a person convicted in absentia) (C-430/22 and C-468/22, EU:C:2023:458, paragraph 31).

50 Commission Decision (EU) 2022/459 of 10 September 2021 on the State aid SA.49668 (2019/C) (ex 2017/FC) and SA.53403 (2019/C) (ex 2017/FC) implemented by Denmark and Sweden for PostNord AB and Post Danmark A/S (OJ 2022 L 93, p. 146) ('the contested decision').

PostNord is a postal services company 40% of the share capital of which is owned by the Kingdom of Denmark and 60% is owned by the Kingdom of Sweden. PostNord Group AB is wholly owned by PostNord. Post Danmark A/S is a wholly owned subsidiary of PostNord Group which operates on the Danish and overseas postal services market.

Post Danmark's revenue decreased by 55% between 2009 and 2019.

In that context, the Kingdom of Denmark and the Kingdom of Sweden each injected, separately, capital into PostNord in an amount of 267 million Swedish kronor (SEK) (approximately EUR 23.1 million) and SEK 400 million (approximately EUR 34.6 million), respectively. PostNord Group, for its part, injected capital into Post Danmark for an amount of DKK 2.339 billion (approximately EUR 313.6 million).

By the contested decision, the Commission held that the capital injections of the Kingdom of Denmark and the Kingdom of Sweden into PostNord constituted unlawful State aid incompatible with the internal market. By contrast, it took the view that the capital injection from PostNord Group into Post Danmark did not constitute State aid.

Danske Fragtmænd brought an action for annulment against that decision.

Findings of the Court

The Commission claimed that the action was inadmissible on the ground that the applicant did not have standing to bringing proceedings; the applicant did not demonstrate that its position on the market had been substantially affected by the capital injections at issue.

The Court notes at the outset that the contested decision is not addressed to Danske Fragtmænd and that it cannot be classified as a regulatory act, given that the capital injections into PostNord and Post Danmark are individual in nature. Consequently, the action for annulment is admissible only if the applicant is, in accordance with the second limb of the fourth paragraph of Article 263 TFEU, directly and individually concerned by the contested decision, those two conditions being cumulative.

Examining the condition of individual concern, the Court recalls that, in the field of State aid, that condition may be satisfied where the applicant adduces evidence to show that the measure at issue is liable to have a substantial adverse effect on its position on the market concerned. In that regard, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid in order to be regarded as individually concerned by the decision. Nor can it merely rely on the presence of certain factors indicating a decline in commercial or financial performance in order to demonstrate a substantial adverse effect on its position on the market.

As regards, first of all, the role played by the applicant in the administrative procedure before the Commission, the mere fact that Danske Fragtmænd played an active role in that procedure in the present case is not sufficient to infer that it is individually concerned by the contested decision.

As regards, next, the substantial effect on the applicant's market position, the Court finds, first, that the claim that Danske Fragtmænd lost approximately 30% of its market share due to Post Danmark dumping its prices thanks to the capital injections at issue must be rejected, since it is not substantiated by prima facie evidence.

Second, the Court rejects the applicant's argument that, before the capital injections at issue were granted, it lost customers to several competitors whereas, after the grant of those capital injections, it lost customers exclusively to PostNord and more specifically to Post Danmark, In that regard, it finds that the lists of customers allegedly lost in favour of PostNord produced by Danske Fragtmænd in support of its line of argument must all be understood as identifying the customers who left the applicant to switch exclusively to PostNord or its subcontractors, even before the capital injections were granted. Accordingly, the lists produced do not prove a change in the behaviour of those customers following the grant of the capital injections at issue.

Third, the Court rejects Danske Fragtmænd's argument that it lost a significant number of clients to PostNord as a result of the grant of the capital injections at issue. On that point, it notes that, even if the lists of customers allegedly lost to PostNord were sufficient to establish the plausibility, prima facie, of a substantial effect on the applicant's competitive position, the applicant does not

demonstrate, to the requisite legal standard, that there is a likely correlation between the alleged loss of customers to PostNord and the capital injections at issue.

First of all Danske Fragtmænd's alleged loss of customers was relatively steady between 2016 and 2019, despite the grant of the capital injections at issue.

Next, the applicant has not adduced prima facie evidence in support of its argument that the alleged loss of customers resulted more specifically from Post Danmark's alleged practice of dumping prices or of setting prices lower than its competitors thanks to the capital injections.

Moreover, since factors other than the capital injections at issue can explain the alleged loss of customers, it was for the applicant to adduce evidence to establish, in particular, that, despite those other factors, the substantial effect on its competitive position was likely to stem from those capital injections. The applicant has not produced such evidence.

Last, the fact that Danske Fragtmænd's turnover was relatively steady during the period concerned, despite the grant of the measures at issue, tends to show that those measures are not liable to have had a substantial adverse effect on its position on the market concerned.

In those circumstances, the applicant has not established that its competitive position on the market in question was likely to be substantially affected by the capital injections at issue. Therefore, it has not demonstrated that it is individually concerned by the contested decision and the Court dismisses the action as inadmissible for lack of standing, without ruling on whether the applicant is directly concerned.

2. AGREEMENTS, DECISIONS AND CONCERTED PRACTICES AND ABUSE OF DOMINANT POSITION

2.1. NATIONAL COMPETITION AUTHORITIES

Judgment of the Court of Justice (Second Chamber), 30 January 2025, Caronte & Tourist, C-511/23

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Article 102 TFEU – Abuse of dominant position – Empowering national competition authorities to enforce the rules on competition – Directive (EU) 2019/1 – Independence of national competition authorities – Article 4(5) – Setting priorities for the proceedings for the enforcement of Articles 101 and 102 TFEU – Fines on undertakings and associations of undertakings – Article 13 – Procedures for infringement of the rules of competition law – Compliance with a reasonable time limit – National legislation requiring the national authority to issue a statement of objections within a time limit of 90 days of knowledge of the essential elements of the infringement – Automatic annulment in its entirety of the decision of the national competition authority in the event of failure to comply with that time limit – Principle ne bis in idem – Revocation of the power to initiate new infringement proceedings in respect of the same facts – Principle of effectiveness – Rights of defence of undertakings

In response to a reference for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the Court of Justice finds that Directive 2019/1 [51] and Article 102 TFEU preclude national legislation which requires the national competition authority to commence the inter partes investigation stage of competition proceedings before it within a period of 90 days, starting from the moment it has knowledge of the essential elements of the alleged infringement.

On 24 March 2018, the Autorità Garante della Concorrenza e del Mercato (the national competition authority, Italy; 'the AGCM') received a complaint concerning the prices charged by Caronte & Tourist SpA ('C&T'), which provides ferry services across the Strait of Messina (Italy).

Having requested additional information from the port authority of Messina, the AGCM notified C&T on 4 August 2020 of its decision to initiate a procedure with a view to establishing an infringement of competition law.

By decision of 11 April 2022, the AGCM found, on the basis of the national legislation, that there had been an abuse of a dominant position by C&T, in that it had charged excessive prices for ferrying vehicles across the Strait of Messina. Consequently, the AGCM ordered C&T to cease that practice in future and imposed a fine on C&T.

C&T challenged the decision of 11 April 2022 before the Regional Administrative Court, Lazio, relying, inter alia, on the late commencement of the inter partes investigation stage of the procedure which gave rise to that decision.

In that regard, that court explains that, in accordance with national legislation, as interpreted by the Consiglio di Stato (Council of State, Italy), the AGCM is to commence the inter partes stage of competition infringement proceedings by issuing a statement of objections within a period of 90 days, starting from the moment it has knowledge of the essential elements of the alleged infringement, which could be no more than those set out in the first report of the infringement ('the period at issue'). Any failure to observe that period would entail the annulment, in its entirety, of the AGCM's decision adopted at the end of the infringement procedure, without the undertaking concerned being required to establish that it has suffered any damage as a result of the failure to observe the period at issue. Moreover, in accordance with the principle ne bis in idem, the AGCM would not be in a position to initiate new infringement proceedings in respect of that same practice, even if the undertaking concerned has never brought an end to it.

Since the Regional Administrative Court, Lazio, harbours doubts as to the compatibility of that legislation with EU competition law, it has decided to refer the matter to the Court of Justice.

Findings of the Court

As a preliminary point, the Court notes that, in the present case, the AGCM's decision to commence the inter partes stage of the infringement proceedings in respect of C&T was adopted during the period for transposition of Directive 2019/1, which seeks to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. It is clear from settled case-law, that, during the period for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the achievement of the result prescribed by that directive.

Bearing that in mind, the Court holds that, by its question referred for a preliminary ruling, the referring court asks, in essence, whether Directive 2019/1 and Article 102 TFEU are to be interpreted as precluding national legislation such as that at issue in the main proceedings.

In that regard, the Court starts by recalling that, while, in the absence of specific EU legislation, the establishment and application of rules governing procedural time limits for the establishment and

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[51] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019 L 11, p. 3).

imposition of penalties by the national competition authorities fall within the competence of the Member States, the latter must exercise that competence in a manner consistent with EU law.

Thus, national rules laying down such time limits must, in compliance with the principle of legal certainty, seek to ensure that cases are dealt with within a reasonable time by the competition authorities while not having the effect of compromising the effective application of Articles 101 and 102 TFEU and Directive 2019/1 in the domestic legal system.

In order effectively to fulfil their obligation to implement EU competition law, the national competition authorities must be able to give differing degrees of priority to the complaints brought before them, by having, for that purpose, a broad discretion. In addition, the recognition of such a broad discretion is also justified in the light of Directive 2019/1.

In those circumstances, it follows both from the very purpose of the stage prior to the statement of objections in competition infringement proceedings and from the broad discretion which a national competition authority must have in setting priorities for its procedures in respect of the enforcement of Article 102 TFEU that, during that phase of the procedure, such an authority must be in a position not only to carry out all the preliminary measures of inquiry and the often complex factual and legal assessments which are necessary in order to ascertain whether the commencement of the inter partes investigation stage is justified, but also to choose, according to the degree of priority which it wishes to give, in the exercise of its operational independence, to an ongoing infringement procedure, the most appropriate time for commencing, where applicable, the inter partes investigation stage of that procedure.

Thus, a national competition authority must have the possibility of temporarily postponing the commencement of the inter partes investigation stage in a given procedure, even when it has already established the existence of the essential elements of the alleged infringement. Nevertheless, that temporary postponement cannot amount to a failure to observe the reasonable period within which the stage prior to the statement of objections in infringement proceedings must be concluded.

In the light of the above, the Court points out that the application of the period at issue to the preliminary phase of investigative procedures carried out by the AGCM entails the risk that the AGCM may have to treat all infringement proceedings before it without any differentiation, taking into consideration not the circumstances specific to each procedure, but by following only a chronological order, thus preventing it from establishing and implementing priorities for the proceedings for the enforcement of Articles 101 and 102 TFEU.

In addition, the consequences of failing to observe the period at issue are liable to prevent the AGCM from cooperating fully within the European Competition Network, which, as is apparent from Directive 2019/1, is formed by the national competition authorities and the European Commission for the purposes of close cooperation as regards the application and enforcement of Articles 101 and 102 TFEU.

Furthermore, the Court notes, first, that the rights of defence of undertakings subject to infringement proceedings are not, in any event, liable to be infringed solely because the period at issue was not observed. Second, the legal consequences attached to the failure to observe the period at issue, as described by the referring court, appear capable of giving rise to a systemic risk that acts constituting infringements of EU competition law would go unpunished, which runs counter to the principle of effectiveness.

In those circumstances, the Court finds that the application of the period at issue to the AGCM's activities is liable to have the consequence of undermining the operational independence of that authority and of creating a systemic risk that acts constituting infringements of Article 102 TFEU would go unpunished. It follows that the national provisions laying down the period at issue are liable seriously to compromise the achievement of the result prescribed by Directive 2019/1.

In the light of the foregoing, the Court concludes that Directive 2019/1 and Article 102 TFEU, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which, in proceedings for a finding establishing an anti-competitive practice by a national competition authority first, requires that authority to commence the inter partes investigation stage of those proceedings by notifying the statement of objections to the undertaking concerned within a period of 90 days, starting from the moment it has knowledge of the essential elements of the alleged

infringement, which could be no more than those set out in the first report of the infringement, and, second, penalises failure to observe that period by annulling in its entirety the final decision of that authority at the end of the infringement proceedings and revoking that authority's power to initiate new infringement proceedings in respect of that same practice.

Furthermore, since, in accordance with Italian law, the period of 90 days at issue in the present case is also applicable to the preliminary investigation stage, carried out by the AGCM, in respect of unfair business-to-consumer commercial practices, the Court, in response to a parallel reference for a preliminary ruling from the Regional Administrative Court, Lazio, concluded, by judgment of the same day [52] and for similar reasons to those set out above, that Articles 11 and 13 of Directive 2005/29, [53] read in the light of the principle of effectiveness, must be interpreted as precluding national legislation which requires, under the same conditions as those set out above, the national authority responsible for the enforcement of consumer protection laws to commence the inter partes investigation stage of the infringement proceedings before it within a period of 90 days, starting from the moment it has knowledge of the essential elements of the alleged infringement.

2.2. ACTIONS FOR DAMAGES FOR INFRINGEMENTS OF COMPETITION LAW

Judgment of the Court of Justice (Grand Chamber), 28 January 2025, ASG 2, C-253/23

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Article 101 TFEU – Directive 2014/104/EU – Actions for damages for infringements of competition law – Point 4 of Article 2 – Concept of 'action for damages' – Article 3(1) – Right to full compensation for harm suffered – Assignment of compensation claims to a provider of legal services – National law precluding recognition of the standing of such a provider with a view to group collection of those claims – Article 4 – Principle of effectiveness – First paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Right to effective judicial protection

Hearing a request for a preliminary ruling from the Landgericht Dortmund (Regional Court, Dortmund, Germany; 'the referring court'), the Court of Justice, sitting as the Grand Chamber, rules on the question of the extent to which national law may preclude the possibility, for persons who consider themselves to have been harmed by an infringement of competition law, to assign their rights to compensation to a legal services provider so that the latter may bring a group action for damages.

In 2009, the German competition authority adopted a commitment decision concerning inter alia the Land Nordrhein-Westfalen (Land of North Rhine-Westphalia, Germany) concerning a cartel in respect of prices in the roundwood sector.

A group of sawmills established in Germany, Belgium and Luxembourg considered that they had suffered harm as a result of the cartel in question and assigned their compensation rights to a legal services provider, which brought a group action for damages, in its own name but on their behalf, before the referring court. However, in accordance with a judicial interpretation of the applicable

52 Judgment of 30 January 2025, Trenitalia (C-510/23).

53 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

German legislation, such a group action is not accepted in the field of compensation for harm caused by an alleged infringement of competition law.

However, the referring court considers that the group action for collection is the only remedy available under German law which could ensure the effective implementation of the right to compensation in cartel cases.

In that context, that court refers three questions for a preliminary ruling concerning, in essence, whether national law may exclude, in disputes relating to competition law, a group action for collection, where the lack of an equivalent remedy would render it practically impossible or excessively difficult to bring an action for damages, in particular for damages amounting to a low value concerning a large number of injured persons.

Findings of the Court

First, the Court declares inadmissible the first question referred for a preliminary ruling, concerning a situation in which the persons who consider themselves to have been harmed by an infringement of competition law wish to assign their rights to compensation for the purposes of a group action for damages following a final decision of a competition authority finding such an infringement ('a follow-on action').

A commitment decision such as that adopted in the present case by the German competition authority does not contain a final finding as regards an infringement of Articles 101 and 102 TFEU. Consequently, the first question manifestly does not relate to the facts or object of the dispute in the main proceedings.

The Court then examines whether EU law precludes an interpretation of national legislation which has the effect of preventing persons allegedly harmed by an infringement of competition law from assigning their rights to compensation to a provider of legal services so that it may assert them, collectively, in an independent action for damages, that is to say an action for damages that does not follow a final and binding decision, in particular concerning the establishment of facts, of a competition authority finding such an infringement ('a stand-alone action').

The Court begins by recalling that the right to compensation for the harm caused by an infringement of competition law was codified in Article 3(1) of Directive 2014/104, [54] which provides that Member States are to ensure that any person who has suffered such harm is able to claim and to obtain full compensation for that harm. Under recital 4 of that directive, that right to compensation requires that each Member State set out procedural rules guaranteeing the effective exercise of that right, an exercise that also derives from the right to effective judicial protection enshrined in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

In that regard, Directive 2014/104 sets out certain rules relating to actions for damages so that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm. In that context, that directive defines the concept of an 'action for damages' as encompassing an action brought by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim. Thus, Directive 2014/104 envisages the possibility for such an action to be brought by a third party to whom the right of the party allegedly harmed to seek compensation was assigned.

However, the Court observes that Directive 2014/104 does not impose any obligation on the Member States to establish a mechanism for a group action for collection, such as that at issue in the main proceedings, nor does it govern the conditions to which the validity of an assignment by the injured party, in view of such a group action, of its right to compensation for the harm caused by an infringement of competition law is subject. Consequently, both the establishment of such a mechanism and the conditions governing the validity of such an assignment form part of the detailed

54 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

rules governing that right to compensation, which are not governed by Directive 2014/104, but are a matter for the domestic legal system of each Member State, in accordance with the principles of equivalence and effectiveness.

In the present case, the referring court has doubts as to the conformity with the principle of effectiveness and the right to effective judicial protection of a judicial interpretation of national law which prevents persons harmed by an infringement of competition law from having recourse to a group action for collection. In that regard, it states that a group action is the only remedy allowing those persons to assert collectively their right to compensation, while an individual action would not allow them to exercise that right in an effective manner, on account of its particularly complex, long and costly character.

On that point, the Court observes that it is for the referring court alone to determine whether the abovementioned interpretation has the effect of rendering impossible or excessively difficult the exercise of the right to compensation for harm resulting from an infringement of competition law. The referring court must however take into account all the relevant information in respect of the detailed rules laid down by national law for the exercise of that right to compensation.

Accordingly, the interpretation of national law that precludes the group action for collection for harm resulting from an infringement of competition law would only be contrary to EU law if the referring court were to conclude, first, that other collective mechanisms laid down by national law would not make it possible to assert in an effective manner the right to compensation of injured persons and, second, the conditions for bringing an individual action laid down by national law render the exercise of that right to compensation impossible or excessively difficult, thus undermining their right to effective judicial protection.

The Court nevertheless states that the procedural costs inherent in an individual action for damages do not permit the view, in themselves, that the exercise of the right to compensation would be rendered practically impossible or excessively difficult in the context of such an action. In order to reach that conclusion, the referring court should identify the specific elements of national law that present an obstacle to the exercise of those individual actions.

The Court adds that, if that court were to find that the mechanism for a group action for collection constitutes, in the case in the main proceedings, the only procedural means enabling the sawmills concerned effectively to assert their right to compensation, such a finding would be without prejudice to the application of national provisions governing the activity of the providers of legal services in order, in particular, to guarantee the quality of those services and the objective and proportionate nature of the remuneration received by such providers, and to prevent conflicts of interest and abusive procedural conduct.

Lastly, as regards the consequences to be drawn from any finding, by the referring court, to the effect that the national provisions at issue do not comply with the right to effective judicial protection, that court will first have to determine, taking into consideration the whole of national law and applying the methods of interpretation recognised under that law, whether it may interpret the relevant provisions in a manner consistent with the requirements of EU law, without interpreting those provisions *contra legem*. It is only in the event that no interpretation that is consistent with EU law is possible that those provisions should be disapplied by the referring court.

VII. APPROXIMATION OF LAWS: PUBLIC PROCUREMENT

Judgment of the Court of Justice (Fourth Chamber), 16 January 2025, DYKA Plastics, C-424/23

Link to the full text of the judgment

Reference for a preliminary ruling – Award of public works contracts – Directive 2014/24/EU – Article 42 – Technical specifications – Formulation – Whether the list at Article 42(3) is exhaustive in nature – Invitation to tender requiring drainage work to be carried out using pipes made of vitrified clay and made of concrete – Plastic pipes excluded – Article 42(4) – Reference to a type or to a specific production – Situations in which a reference must be accompanied by the words "or equivalent"

Ruling on a request for a preliminary ruling from the ondernemingsrechtbank Gent, afdeling Gent (Ghent Business Court, Ghent Division, Belgium), the Court rules on the question whether a contracting authority may, without infringing the prohibitions on discrimination and restriction of competition set out in Directive 2014/24, [55] state, in the technical specifications of a public works contract, that the works must be undertaken using products manufactured from a particular material.

Fluvius System Operator CV ('Fluvius'), a company incorporated under Belgian law, requires, when publishing public contract notices for the installation or replacement of sewers, the use of vitrified clay pipes for sewage disposal systems and concrete pipes for rainwater disposal systems. DYKA Plastics NV ('DYKA'), a manufacturer and supplier of sewage pipes made of plastic, believes that its exclusion from the public procurement procedures organised by Fluvius infringes the prohibitions on discrimination and restriction of competition set out in Directive 2014/24. [56] Having given Fluvius formal notice to include sewage pipes made of plastic in its calls for tender, DYKA brought an action before the referring court, requesting it to order Fluvius to put an end to that practice and to order it to pay compensation.

Lacking certainty in particular regarding the interpretation of Article 42(3) and (4) of Directive 2014/24, which governs the technical specifications of public contracts, the referring court decided to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling.

Findings of the Court

In the first place, as regards whether the list of methods for formulating technical specifications set out in Article 42(3) of Directive 2014/24 is exhaustive, the Court infers from the phrase 'the technical specifications shall be formulated in one of the following ways' that it is for the contracting authority to draw up the technical specifications in accordance with one of the formulation methods laid down in that provision and not in accordance with another method. Accordingly, the technical specifications must, in accordance with Article 42(3) of Directive 2014/24, be formulated following one of the methods laid down in points (a) to (d) of that provision, without prejudice to mandatory national technical rules which are compatible with EU law, as referred to in that provision, and without prejudice to the exceptions laid down in Article 42(4) of that directive.

As regards the exceptions laid down in Article 42(4) of that directive, the Court points out that the second sentence of that provision sets out such an exception, since that sentence states that there may be situations 'where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to paragraph 3 [of Article 42 of that directive] is not possible'. The contracting authority may, in such cases, exceptionally include in the technical specifications a reference to the

55 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

56 Articles 18 and 42 of Directive 2014/24.

elements to which a reference is in principle prohibited by the first sentence of Article 42(4) of that directive, in so far as that reference is accompanied by the words 'or equivalent'.

Furthermore, in so far as the first sentence of Article 42(4) of Directive 2014/24 states that the prohibition on using the references mentioned therein does not apply where such references are 'justified by the subject matter of the contract', that situation also involves a derogation from the exclusive applicability of the methods for formulating the technical specifications listed in Article 42(3) of that directive.

In the second place, the Court rules, in essence, on the question whether Article 42(4) of Directive 2014/24 must be interpreted as meaning that contracting authorities may state, in the technical specifications of a public works contract, the materials of which the products proposed by the tenderers must be made.

First, the Court points out that, in so far as they establish 'the characteristics required of a works', [57] the technical specifications define [58] the very subject matter of the public contract. It is true that contracting authorities enjoy a broad discretion, justified by the fact that they are better placed to know which supplies they need and the requirements which are necessary in order to achieve the desired results, as regards the technical conditions which they are in a position to prescribe in relation to the works and materials or parts which they involve. However, Directive 2014/24 sets certain limits with which they must comply.

Accordingly, contracting authorities must ensure [59] that the technical specifications afford economic operators equal access to the procurement procedures and do not have the effect of creating unjustified obstacles to the opening up of public procurement to competition. Similarly, it follows from recital 74 of Directive 2014/24 that technical specifications formulated with a view to the award of a public contract must open up that public contract to competition and therefore allow tenders to be submitted which reflect, inter alia, the diversity of technical solutions available in the marketplace.

The formulation of technical specifications in terms of functional and performance requirements generally allows the objective of opening up to competition to be achieved in the best way possible. Therefore, that formulation method, which favours innovation in public procurement, should be used as widely as possible. Formulating the technical specifications in that manner [60] allows any economic operator whose products meet the performance and functional requirements imposed by the contracting authority to submit a tender, irrespective, in particular, of the process used in manufacturing its products and the material of which those products are made.

In order for the formulation method laid down in Article 42(3)(b) of Directive 2014/24, which is based, in order of preference, on standards, to ensure also sufficient opening up to competition, the EU legislature provided that the technical specifications formulated in accordance with that method must be accompanied by the words 'or equivalent'.

By contrast, including a reference in technical specification to 'a specific make or source, or [to] a particular process which characterises the products or services provided by a specific economic operator' or 'to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products' is, in principle, prohibited. [61] Such references, far from contributing to opening up a public contract to competition, have the effect of restricting competition.

Nevertheless, a contracting authority may, on an exceptional basis, include such a reference, where a sufficiently precise and intelligible description of the subject matter of the contract is not possible. In

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57 Pursuant to Article 42(1) of Directive 2014/24.

58 As is apparent from recital 92 of that directive.

59 In accordance with Article 42(2) of Directive 2014/24, read in conjunction with Article 18(1) thereof.

60 Referred to in Article 42(3)(a) of Directive 2014/24.

61 Article 42(4) of Directive 2014/24.

such a situation, the contracting authority must accompany that reference with the words 'or equivalent'. [62]

In addition, it is apparent from the phrase 'unless justified by the subject matter of the contract', which is found in Article 42(4) of Directive 2014/24, that where a reference such as that referred to in that provision is justified by the subject matter of the contract, it may be included in the technical specifications, without the in principle prohibition or the requirement to add the words 'or equivalent' applying. The latter situation must, if it is not to undermine the objective of opening up public procurement to competition, be interpreted restrictively, so that it covers only situations in which a requirement relating to the use of a product of a particular type or origin or of a particular trade mark, or obtained on the basis of a particular patent or particular process, follows inevitably from the subject matter of the contract.

Second, the Court provides guidance regarding the application of the rules set out in Article 42, for the purpose of determining the extent to which they are capable of applying to a reference, such as that at issue in the main proceedings, consisting of a requirement to use pipes made of 'vitrified clay' and of 'concrete'.

In that regard, the Court states that the material of which a product is made cannot be classified as a 'performance' or 'functional requirement'. [63] While a material may contribute to the performance of a product or to its ability to meet a functional requirement, it does not constitute, in itself, a 'performance' or a 'functional requirement'.

In a situation such as that at issue in the main proceedings, where there are, in the economic sector concerned, products which are distinguishable according to their manufacture and, in particular, the material of which they are made, the requirement to use products made of a certain material must be classified as a reference to a 'type' or 'specific production' having the 'effect of favouring or eliminating certain undertakings or certain products', [64] since that reference leads to the elimination of undertakings which supply products made of a material other than that required.

It is true that, as the case may be, the requirement relating to the use of a particular material for a public contract or part thereof may be justified by one of the two exceptions mentioned above, which are laid down in Article 42(4) of Directive 2014/24. Accordingly, for example, the requirement to use a particular material could be justified by the subject matter of the contract where it follows inevitably from the aesthetic sought by the contracting authority or from the need for a work to be in line with its environment, or where, in the light of performance or a functional requirement, the use of products made of that material is inevitable. In such situations, no alternative based on a different technical solution is conceivable.

However, where the use of a material does not follow inevitably from the subject matter of the contract, the contracting authority may not, without adding the words 'or equivalent', require a particular material to be used. It must then, in the context of technical specifications, refrain from requiring a particular material to be used, either by avoiding referring to such a material in the procurement documents or by referring to one or a number of materials while adding the words 'or equivalent'.

In the light of the foregoing, the Court concludes that Article 42(4) of Directive 2014/24 must be interpreted as meaning that contracting authorities may not, without adding the words 'or equivalent', state, in the technical specifications of a public works contract, the materials of which the products proposed by the tenderers must be made, unless the use of a particular material follows inevitably from the subject matter of the contract, it not being possible to contemplate an alternative based on a different technical solution.

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62 Third sentence of Article 42(4) of Directive 2014/24.

63 Within the meaning of Article 42(3)(a) of Directive 2014/24.

64 Within the meaning of the first sentence of Article 42(4) of Directive 2014/24.

VIII. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Tenth Chamber, Extended Composition), 22 January 2025, Banco Cooperativo Español v SRB, T-498/19

Link to the full text of the judgment

Economic and Monetary Union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the ex ante contributions for the 2019 contribution period – Articles 12 and 14 of Delegated Regulation (EU) 2015/63 – Concept of 'change of status' – Institutional protection scheme – Plea of illegality

Ruling on an action for annulment, which it dismisses, the Court considers a novel issue, namely the possibility of taking into account, in the calculation of an institution's ex ante contribution to the Single Resolution Fund (SRF), that institution's participation in an institutional protection scheme (IPS) in the year preceding the contribution period concerned.

Banco Cooperativo Español, the applicant, is a credit institution established in Spain, a member of the IPS of the Banco Cooperativo IPS, which was authorised in March 2018 by the Banco de España (Bank of Spain, Spain), in accordance with Regulation (EU) No 575/2013. [65]

By decision of 16 April 2019 [66] ('the initial decision'), the Single Resolution Board (SRB) set the ex ante contributions to the SRF, [67] for 2019 ('the 2019 contribution period'), of the institutions subject to the combined provisions of Article 2 and Article 67(4) of Regulation No 806/2014, including the applicant. On 8 August 2022, the SRB adopted the contested decision, [68] by which it withdrew and replaced the initial decision, in order to remedy, in the light of various decisions of the Court of Justice, [69] the failure to state reasons in that decision.

Following the disagreement between the applicant and the SRB as to the factors taken into account for the purposes of calculating its ex ante contribution for the 2019 contribution period, in particular the failure to take into account its participation in an IPS in 2018, the applicant brought an action against the contested decision. In support of that action, the applicant raises two pleas in law, concerning, first, infringement of Articles 12 and 14 of Delegated Regulation 2015/63, in so far as the SRB failed to take account of its participation in an IPS for the purposes of calculating its ex ante contribution for the 2019 contribution period and, second, in the alternative, a plea of illegality in respect of Articles 12 and 14 of that delegated regulation on the ground of infringement of Article 103(2) and (7) of Directive 2014/59. [70]

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65 Regulation of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

66 Decision SRB/ES/SRF/2019/10 of the Single Resolution Board of 16 April 2019 on the calculation of the 2019 ex ante contributions to the SRF.

67 In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

68 Decision SRB/ES/2022/47 of the SRB of 8 August 2022 withdrawing Decision SRB/ES/SRF/2019/10 of the SRB of 16 April 2019 on the 2019 ex ante contributions to the SRF, in so far as it concerns the institutions listed in Annex I thereto and calculating the 2019 ex ante contributions of those institutions to the SRF ('the contested decision').

69 Judgment of 15 July 2021 in Commission v Landesbank Baden-Württemberg and SRB (C-584/20 P and C-621/20 P, EU:C:2021:601), and the orders of 3 March 2022, SRB v Hypo Vorarlberg Bank (C-663/20 P, not published, EU:C:2022:162) and SRB v Portigon and Commission (C-664/20 P, not published, EU:C:2022:161).

70 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC,

Findings of the Court

The General Court examines the plea of illegality raised by the applicant, according to which, if Article 12(2) and Article 14(1) of Delegated Regulation 2015/63 were to be interpreted as meaning that its participation in an IPS in 2018 cannot be taken into account for the purposes of calculating its ex ante contribution for the 2019 contribution period, those provisions would then be contrary to Article 103(2) and (7) of Directive 2014/59.

First, as regards the scope of Article 12(2) and Article 14(1) of Delegated Regulation 2015/63, [71] the Court notes that it is apparent from Delegated Regulation 2015/63 [72] that it is for the SRB to calculate the ex ante contributions on the basis of information relating to the latest approved and certified annual financial statements which are available on 31 December of year N-1 ('year N-1'), it being understood that that information therefore relates to financial statements of the penultimate year preceding the contribution period or, in exceptional circumstances, to an accounting year which began during that penultimate year and was closed in year N-1 (for those two periods, 'reference year N-2').

In that context, the Court states that, for the purposes of calculating an institution's ex ante contribution, information on an institution's participation in an IPS is closely linked to other information contained in its financial statements. Where the SRB applies, for example, the IPS risk indicator, [73] it must, inter alia, take into account the relative weight of the risk indicator 'trading activities and off-balance sheet exposures, derivatives, complexity and resolvability'. [74] Information relating to that risk indicator is, as a general rule, included in the financial statements of the institution concerned.

Thus, where such an institution participates in an IPS in year N-1, that participation occurs after the closure of the financial statements relating to reference year N-2, which are decisive for the calculation of that institution's ex ante contribution. In those circumstances, that participation in an IPS cannot be regarded as information relating to those financial statements. In such a case, it is not for the SRB to take that participation into consideration when it calculates the ex ante contribution of that institution for the contribution period concerned.

That conclusion is confirmed by the objective pursued by the system of ex ante contributions of achieving, by 31 December 2023 at the latest, at least 1% of the amount of covered deposits of all the institutions authorised in the territories of the Member States participating in the SRM. If the SRB had to take into account all the memberships in an IPS of the institutions concerned during year N-1, the reliability of the calculation of the ex ante contributions which is carried out during the following year could be compromised, since the SRB would be required, inter alia, to make that calculation on the basis of information other than that relating to those duly approved financial statements. The unreliability of that calculation thus risks hindering the attainment of the objective pursued by the system of ex ante contributions.

The Court therefore holds that Article 12(2) and Article 14(1) of Delegated Regulation 2015/63 must be interpreted as not permitting the SRB to take into account an institution's participation in an IPS that took place in 2018 for the purposes of calculating its ex ante contribution for the 2019 contribution period.

Second, as regards the legality of Article 12(2) and Article 14(1) of Delegated Regulation 2015/63 in the light of Article 103(2) and (7) of Directive 2014/59, the Court notes that the Commission enjoys a

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2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

71 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

72 That follows from a combined reading of Article 4(1) and of Article 14(1) to (3) of Delegated Regulation 2015/63.

73 As provided for in Article 6(5)(b) of Delegated Regulation 2015/63.

74 In accordance with second subparagraph of Article 7(4) of Delegated Regulation 2015/63.

broad discretion where it is called upon to undertake complex assessments and evaluations. This is also the case for the determination of the reference dates for taking into account information that is relevant for the adjustment of ex ante contributions to the risk profile, including the reference date for taking into account an institution's participation in an IPS. Thus, as regards the taking into account of those reference dates, review by the Courts of the European Union is limited to verifying whether the exercise of the discretion afforded to the Commission has been vitiated by a manifest error or a misuse of powers, or whether the Commission has manifestly exceeded the limits of that discretion.

First of all, the Court points out that, in Delegated Regulation 2015/63, the Commission did indeed take into consideration institutions' membership in an IPS as an element relevant to the adjustment of the ex ante contributions to the risk profile of institutions. In particular, certain liabilities created by an institution which is a member of an IPS are excluded from the calculation of the basic annual contributions. [75] In addition, that delegated regulation takes into account an institution's participation in an IPS in order to adjust the basic annual contribution to the institution's risk profile. [76]

Next, although the Court finds that the calculation of the ex ante contributions takes into account participation in an IPS with a time lag, which corresponds to the period between the reference date of the financial statements and the date of calculation of the ex ante contributions, it considers that that approach is justified, however, by the need to establish a common date for all the institutions concerned which allows the comparison of the data and information they provide for the purposes of calculating the ex ante contributions. First, it follows that such a date is intended, inter alia, to enable the SRB to reliably calculate the ex ante contributions on the basis of approved financial statements. Second, the time lag referred to is not manifestly inappropriate given that the SRB takes into account information relating to the latest approved and certified financial statements, with the result that the calculation of the ex ante contributions is based on the information relating to the first year for which they are available in an approved and certified form. [77]

Lastly, the Court notes that the applicant has not submitted other evidence to show that Article 12(2) and Article 14(1) of Delegated Regulation 2015/63 were vitiated by a manifest error of assessment or a misuse of powers or manifestly failed to respect the limits of the Commission's power when they determined the point in time at which the participation of an institution's participation in an IPS had to be taken into account.

In those circumstances, first, the Court rejects that head of unlawfulness on which the applicant relies in support of the plea of illegality. Second, in the light of the reasons set out in the examination of that plea, it rejects the plea alleging the illegality of the contested decision as unfounded and, therefore, dismisses the action in its entirety.

75 In accordance with Article 5(1)(b) of Delegated Regulation 2015/63.

76 Article 6(5)(b) and Article 7(4)(b) of Delegated Regulation 2015/63.

77 In accordance with Article 14(1) of Delegated Regulation 2015/63.

IX. ENVIRONMENT: WASTE

Judgment of the Court of Justice (Grand Chamber), 21 January 2025, Conti 11. Container Schiffahrt (Basel Convention), C-188/23

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Shipment of waste – Directive 2006/12/EC – Directive 2008/98/EC – Concept of 'waste' – Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal – Article 1(4) – Regulation (EC) No 1013/2006 – Waste subject to the prior written notification and consent procedure – Shipments of waste within the European Union – Article 1(3)(b) – Validity – Interpretation in conformity with the Basel Convention – Waste generated on board a ship following damage sustained by it on the high seas – Concept of 'offloading of waste' – Partial offloading of waste in a safe port

Ruling on a request for a preliminary ruling from the Oberlandesgericht München (Higher Regional Court, Munich, Germany), the Grand Chamber of the Court of Justice clarifies the scope of Article 1(3)(b) of Regulation No 1013/2006 on shipments of waste, [78] under which waste generated on board vehicles, trains, aeroplanes and ships is excluded from the scope of that regulation until it is offloaded in order to be recovered or disposed of. In that context, the Court also confirms that Article 1(3)(b) can be interpreted in conformity with the Basel Convention. [79]

Weakened by a fire which had broken out on the high seas during a voyage between the United States and Belgium, the container ship MSC Flaminia ('the Flaminia') was towed to the port of Wilhelmshaven in Germany.

On account of the presence on board the Flaminia of waste in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues produced in connection with the fire, the German authorities compelled the owner of the Flaminia ('Conti') to initiate a prior written notification and consent procedure under Regulation No 1013/2006 with regard to the shipment of that waste to a repair yard in Romania. After part of the waste, consisting of fire-extinguishing waters, was offloaded in the port of Wilhelmshaven in order to be shipped to the port of Odense (Denmark), the Flaminia continued its journey to Romania, with the part of the waste that was not unloaded. The purpose of the latter shipment was, following the completion of that prior written notification and consent procedure, to recover or dispose of the waste remaining on the ship.

Taking the view, inter alia, that, by requiring it to initiate that prior written notification and consent procedure, the German authorities had disregarded the derogation provided for in Article 1(3)(b) of Regulation No 1013/2006, Conti brought an action before the Landgericht München I (Regional Court, Munich I, Germany) seeking compensation for the damage that the initiation of that procedure had caused to it.

In response to a request for a preliminary ruling made by that court, the Court of Justice held, in its judgment in Conti 11, [80] that residues, in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues attributable to damage sustained on the high seas on board a ship, must be regarded as waste generated on board ships, within the meaning of Article 1(3)(b) of

78 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

79 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, signed in Basel on 22 March 1989, approved on behalf of the European Economic Community by Council Decision 93/98/EEC of 1 February 1993 (OJ 1993 L 39, p. 1; 'the Basel Convention').

80 Judgment of 16 May 2019, Conti 11. Container Schiffahrt (C-689/17, 'the judgment in Conti 11', EU:C:2019:420).

Regulation No 1013/2006, which are therefore excluded from the scope of that regulation until they are offloaded in order to be recovered or disposed of.

Following that preliminary ruling, the Landgericht München I (Regional Court, Munich I) partially upheld Conti's claim for compensation. Hearing the appeal, the Oberlandesgericht München (Higher Regional Court, Munich) nevertheless expresses doubts as to the validity of Article 1(3)(b) of Regulation No 1013/2006, as interpreted in the judgment in Conti 11, in the light of the Basel Convention. Thus, it has decided to ask the Court of Justice about the validity and interpretation of Article 1(3)(b) of Regulation No 1013/2006 in the light of that convention.

Findings of the Court

After having declared admissible the question on the validity of Article 1(3)(b) of Regulation No 1013/2006, the Court recalls that secondary EU legislation must be interpreted, so far as possible, in a manner that is consistent with the international agreements concluded by the European Union.

Article 6 of the Basel Convention establishes a prior written notification and consent procedure, which applies to any shipment of waste falling within its scope. Although Article 1(4) of that convention excludes from its scope waste resulting from the 'normal' operation of a ship, the Court makes it clear that that provision cannot be interpreted in such a way as to call into question the achievement of the objectives pursued by that convention, namely the protection of human health and the environment, set out, inter alia, in the fourth paragraph of the preamble to the Basel Convention.

Under Article 1(3)(b) of Regulation No 1013/2006, as interpreted in the judgment in Conti 11, the waste generated on board a ship following damage sustained by that ship on the high seas is excluded from the scope of that regulation and, consequently, exempted from the prior written notification and consent procedure provided for therein, until it is offloaded in order to be recovered or disposed of. That exclusion is justified by the sudden and unforeseeable nature of the generation of that type of waste, making it in practice impossible or excessively difficult for the person responsible for the ship concerned to be able to be acquainted in sufficient time with the information necessary for the correct application of the rules relating to the prior written notification and consent procedure. Nevertheless, that exclusion applies only as long as the waste concerned has not left the ship in order to be shipped for recovery or disposal.

Achieving the objectives pursued by Regulation No 1013/2006, namely the protection of human health and the environment, however, necessarily involves considering that, where, as in the dispute in the main proceedings, part of that waste has been offloaded in a safe port in order to be recovered or disposed of, the waste which remains on that ship, with a view to being shipped to another port in order for it to be disposed of or recovered, no longer benefits from the derogation provided for in Article 1(3)(b) of Regulation No 1013/2006.

First, the objective of ensuring the sound management of waste and reducing shipments of it to a minimum consistent with the environmentally sound and efficient management of it, which is set out in Article 4(2)(c) of the Basel Convention and reiterated in recital 8 of Regulation No 1013/2006, would be compromised if the person responsible for the ship concerned had, after the offloading of part of that waste in a safe port, a margin of discretion as to whether to trigger the prior written notification and consent procedure for the shipment of the waste remaining on the ship.

Second, the application of the written notification and consent procedure prior to the shipment of the waste remaining on the ship concerned contributes to the achievement of the objective of making waste producers accountable for their environmentally sound management, since the person responsible for the ship having offloaded part of the waste will have to opt for a shipment of the waste remaining on that ship which best meets the requirements of protection of the environment and human health.

That interpretation is all the more compelling where, following a fire, waste has merged with the ship, making it particularly difficult – if not impossible – to separate that waste strictly. In that situation, the application of the prior written notification and consent procedure to the ship itself requires the person responsible for the ship to opt for a shipment enabling its dismantling in a safe and environmentally sound manner.

In the light of those considerations, the Court concludes that interpreting Article 1(3)(b) of Regulation No 1013/2006 as meaning that the exception which is provided for therein applies only until the offloading in a safe port of all or part of the waste generated on board a ship following damage on the high seas, and not to the subsequent shipment of the waste which has remained on that ship to another port in order to be recovered or disposed of, is in conformity with Article 1(4) of the Basel Convention, since it does not compromise the objective of protecting human health and the environment pursued by that convention.

In those circumstances, the Court considers it unnecessary to assess whether, in the case at hand, the conditions enabling it to examine the validity of an act of EU law in the light of the provisions of an international convention which binds the European Union are satisfied, namely, first, whether the nature and the broad logic of that convention preclude such an examination and, second, whether the provisions of the same convention which are relied upon for the purposes of that examination appear, as regards their content, to be unconditional and sufficiently precise.

X. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (First Chamber, Extended Composition), 15 January 2025, MegaFon v Council, T-193/23

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine – Lists of persons, entities and bodies subject to restrictive measures – Inclusion and maintenance of the applicant's name on the lists – Right to be heard – Obligation to state reasons – Error of assessment – Proportionality – Freedom to conduct a business – Action for annulment

This case raises novel issues concerning the scope of the obligations on the Council of the European Union in relation to the compilation of an evidence file to support the validity of the inclusion of an entity's name on a list relating to sectoral restrictive measures.

On 31 July 2014, as a result of the situation in Ukraine, the Council adopted Decision 2014/512 [81] and Regulation No 833/2014, [82] in order to introduce targeted restrictive measures, including on dual-use goods and sensitive technologies. Those acts were modified several times [83] following the military operation in Ukraine begun by the Russian Federation on 24 February 2022.

The Council then adopted a number of acts [84] by means of which MegaFon OAO, a company established in Moscow (Russia) and operating in the telecommunications sector, as an entity directly

81 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13).

82 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1).

83 Decision 2014/512 was amended by Decisions (CFSP) 2022/327 of 25 February 2022 (OJ 2022 L 48, p. 1), (CFSP) 2022/578 of 8 April 2022 (OJ 2022 L 111, p. 70) and (CFSP) 2022/1271 of 21 July 2022 (OJ 2022 L 193, p. 196). Regulation No 833/2014 was amended by Council Regulations (EU) 2022/328 of 25 February 2022 (OJ 2022 L 49, p. 1), (EU) 2022/576 of 8 April 2022 (OJ 2022 L 111, p. 1) and (EU) 2022/1269 of 21 July 2022 (OJ 2022 L 193, p. 1).

84 These consisted, first, of Council Decision (CFSP) 2023/434 of 25 February 2023 amending Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2023 L 59 I, p. 593) and of Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2023 L 59 I, p. 6); second, of Council Decision (CFSP) 2023/1517 of 20 July 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2023 L 184, p. 40); and,

supporting the military and industrial complex of the Russian Federation in its war of aggression against Ukraine, was included and maintained on the lists of entities in respect of which restrictions are imposed on exports of dual-use goods and technology and of goods and technology which might contribute to the technological enhancement of Russia's defence and security sector.

That company is seeking annulment of those acts, alleging, in particular, an infringement by the Council of its obligation to state reasons, an infringement of the rights of the defence and of the right to effective judicial protection and error of assessment by the Council in finding, incorrectly, that the applicant directly supported the Russian military and industrial complex.

The Court dismisses the action.

Findings of the Court

In the first place, as regards the plea alleging infringement by the Council of the obligation to state reasons, the Court recalls that the statement of reasons for an act imposing a restrictive measure must identify the actual and specific reasons why the Council considered that such a measure had to be adopted in respect of the person concerned, taking into account the context in which that act was adopted.

In the present case, the actual and specific reasons why the Council considered that the measures at issue had to be adopted in respect of the applicant, and therefore that its name had to be included on the lists at issue, correspond to the criteria set out in the relevant provisions and in the recitals of the contested acts, [85] that is to say, the applicant is an entity which directly supports the Russian military and industrial complex.

In that regard, reliance on the same considerations, relating to direct support for Russia's military and industrial complex, in order to adopt restrictive measures aimed at more than one person does not mean that those considerations cannot give rise to a sufficiently specific statement of reasons for each of the persons concerned.

The applicant was therefore in a position to understand that its name had been included and maintained on the lists at issue because it was considered to be an entity directly supporting the military and industrial complex of Russia in its war of aggression against Ukraine, having regard to the fact that it was one of the principal mobile telephone and telecommunications operators in Russia and as a result of the political context at the time the contested acts were adopted.

In the second place, as regards the plea alleging infringement of the rights of the defence and of the right to effective judicial protection, the Court recalls that the right to be heard guarantees every person the opportunity to make known his or her views during an administrative procedure before the adoption of a decision liable to affect his or her interests adversely. Accordingly, during a procedure to adopt restrictive measures, the competent EU authority must communicate to the persons concerned the grounds and evidence relied on against them on which that authority proposes to base its decision, so that those persons may effectively make known their views on those grounds and on that evidence.

Nevertheless, limitations may be placed on the right to be heard, subject to certain conditions. [86] In particular, according to the Court's case-law, the Council is not required to inform the person or entity concerned beforehand of the grounds on which it intends to rely in order to adopt restrictive measures in respect of that person or entity. The absence of any such obligation is explained by the need for an element of surprise in order for those measures to be effective and, ultimately, by overriding considerations to do with safety or the conduct of the international relations of the European Union and of its Member States.

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third, of Council Decision (CFSP) 2024/422 of 29 January 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 2024/422).

85 In particular, recital 10 of Decision 2023/434 and Articles 3, 3a and 3b of Decision 2014/512, as amended, and also recital 4 of Regulation 2023/427 and Articles 2, 2a and 2b of Regulation No 833/2014, as amended.

86 Under Article 52(1) of the Charter of Fundamental Rights of the European Union.

In addition, neither the relevant provisions of the acts establishing restrictive measures nor the general principle of respect for the rights of the defence give the persons concerned a right to a formal hearing, since it is sufficient that they can make representations in writing.

In the present case, the initial acts had to take advantage of an element of surprise and the Council was therefore not obliged to hear the applicant before its initial listing.

However, on application by the applicant, the Council had an obligation to inform it of the grounds for applying those measures to it, immediately after those acts were adopted, so that it could make known its views on those grounds. [87]

In the present case, following the applicant's requests, the Council replied to it, in essence, that the ground justifying the inclusion of its name on the lists at issue – that is to say, the fact that it is allegedly an entity which directly supports the Russian military and industrial complex – was to be found in the relevant provisions of the initial listing acts.

Therefore, the applicant was able to understand the grounds for the inclusion of its name on the lists at issue, which enabled it to defend its rights in the best possible conditions.

As regards the decision to maintain the restrictive measures taken against a person, the Court recalls that the Council must (i) disclose to the person concerned, before it adopts its decision, the new evidence available to it on which it can base that decision and on which it relied in order to update the information concerning the personal situation of the person concerned and the situation in the third country at issue and (ii) obtain that person's comments on that new evidence.

In the present case, the grounds of the maintaining acts do not differ from those of the initial acts, with the result that the Council was not required to hear the applicant before adopting those acts.

In the third place, as regards the plea alleging error of assessment, the Court examines first of all whether the Council was entitled to rely on the evidence submitted at the stage of the defence. The court recalls that non-disclosure by the Council of the evidence on the basis of which it included a person's name on a list for the purposes of restrictive measures is not capable of undermining that person's rights of defence where that evidence constitutes a known context, that is to say, it is publicly available and, accordingly, may be presumed to be known to all. In the present case, the Court finds that the fact that, in a time of war, one of the major telecommunications operators of the Russian Federation, such as the applicant, participates in directly supporting that country's military and industrial complex, may be presumed to be known to all. Accordingly, the Council is not in principle required to provide documents, where the alleged facts which served as a basis for the inclusion on the lists at issue may be presumed to be known to all. Furthermore, the Court finds that, in the event of a challenge, the Council is entitled to submit documents which are widely available in the public domain to the Court in order to support the accuracy of a fact known to all.

Next, the Court finds that the evidence provided by the Council is reliable and relevant. First, the provision of roaming services by the applicant in certain Russian-controlled regions of Ukraine and the provision of telecommunications services in Crimea that is apparent from webpage articles are likely further to undermine Ukraine's territorial integrity. Accordingly, they constitute evidence confirming the applicant's support for the Russian military and industrial complex. Second, the Council has provided publicly available press articles referring to the presence of infrastructure belonging to the applicant in the Kharkiv region. Third, the Council adduces extracts from a webpage containing a list of the contracts concluded between the Russian army and the applicant between 2013 and 2021, testifying to the existence of a long-term link between the applicant and that army which bears out the line of argument that the applicant is an entity which directly supports the military and industrial complex of the Russian Federation.

87 See judgment of 18 July 2013, Commission and Others v Kadi, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 100 and the case-law cited).