COURT OF JUSTICE
OF THE EUROPEAN UNION

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I. PROCEEDINGS OF THE EUROPEAN UNION: ACTIONS FOR ANNULMENT

Order of the General Court (Grand Chamber), 4 June 2024, Medel and Others v Council, T-530/22 to T-533/22

Link to the full text of the order

Actions for annulment – Regulation (EU) 2021/241 of the European Parliament and of the Council – Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland – Lack of direct concern – Inadmissibility

Sitting as the Grand Chamber, the General Court dismisses as inadmissible actions brought by four associations of judges [1]seeking annulment of the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for the Republic of Poland. [2]

The applicants are associations representing judges at international level whose members are, as a general rule, national professional associations, including Polish associations of judges.

On 12 February 2021, the European Parliament and the Council of the European Union adopted Regulation 2021/241 establishing the Recovery and Resilience Facility ('the Facility'). [3] Under the Facility, funds may be granted to the Member States, in the form of a financial contribution, which consists in non-repayable financial support or is in the form of a loan.

By the contested decision, the Council approved the assessment of the recovery and resilience plan for the Republic of Poland and specified, in the annex, the milestones and targets to be achieved by that Member State in order for the financial contribution made available to it in the contested decision to be released. The first part of that annex includes, inter alia, the measures regarding the reform of justice in Poland which are set out in milestones F1G, F2G and F3G. [4] The applicants disputed the contested decision in so far as the milestones are incompatible with EU law.

By its order, the Court upholds the plea of inadmissibility raised by the Council, pursuant to Article 130(1) of the Rules of Procedure of the General Court, and, accordingly, dismisses the applicants' actions.

Findings of the Court

As a preliminary point, the Court observes that, in so far as the contested decision is addressed to the Republic of Poland, the admissibility of the actions must be examined in the light of the second and

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1 Magistrats européens pour la démocratie et les libertés (Medel) in Case T-530/22, International Association of Judges (IAJ) in Case T-531/22, Association of European Administrative Judges (AEAJ) in Case T-532/22 and Stichting Rechters voor Rechters in Case T-533/22.

2 Council Implementing Decision of 17 June 2022 on the approval of the assessment of the recovery and resilience plan for the Republic of Poland, as amended by the Council Implementing Decision of 8 December 2023 ('the contested decision').

3 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ 2021 L 57, p. 17).

4 The stated milestones, which are measures of progress made in the implementation of a reform, require the strengthening of the independence and impartiality of Polish judges (milestone F1G), require that the judges affected by decisions of the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) ('the Disciplinary Chamber') are guaranteed access to proceedings allowing a review of the decisions of that chamber affecting them (milestone F2G), and require that measures be taken to ensure that the review proceedings referred to in milestone F2G were, in principle, closed, according to the indicative timetable, in the fourth quarter of 2023 (milestone F3G).

third limbs of the fourth paragraph of Article 263 TFEU, in which the condition of direct concern is laid down. [5]

The Court examines, first of all, the admissibility of the applicants' actions acting in their own name.

In that regard, the Court finds that no legal provision relating to the Facility grants them that procedural right. Similarly, the fact that they are involved as regular interlocutors with the EU institutions on the issue of judicial independence does not provide them with standing to bring proceedings.

Next, the Court examines the admissibility of the applicants' actions acting on behalf of their members whose interests they defend.

In that regard, the applicants differentiate three groups of judges, including, in particular, the Polish judges affected by decisions of the Disciplinary Chamber who, in the applicants' view, are directly concerned by the review proceedings envisaged in milestones F2G and F3G, all of the Polish judges who they claim are directly concerned by those review proceedings and by milestone F1G, and all the other European judges who they claim are also directly concerned by those milestones.

As regards the judges in the first group, the Court examines, in the first place, the substance of the contested decision, assessed in the light of its content and context.

It notes that the contested decision makes the payment of a financial contribution subject to compliance with conditions, namely the implementation of the recovery and resilience plans assessed by the European Commission and approved by the Council, including the attainment of milestones and targets, which are measures of progress made in the implementation of a reform. Since milestones F1G, F2G and F3G are of a budgetary conditionality nature in that the achievement of those milestones is a condition for obtaining funding under the Facility, they reflect the relationship between respect for the value of the rule of law, on the one hand, and the efficient implementation of the EU budget, in accordance with the principles of sound financial management and the protection of the European Union's financial interests, on the other.

However, when setting those milestones, the Council was not seeking to replace the rules on the value of the rule of law or on effective judicial protection, as clarified by the case-law of the Court of Justice. It follows that, by establishing those milestones, the Council was not seeking to authorise the Republic of Poland not to comply with judgments of the Court of Justice finding that the Republic of Poland had failed to respect the value of the rule of law or the principle of effective judicial protection.

In the light of those assessments, the General Court examines, in the second place, whether the contested decision directly concerns the judges in the first group in the light of milestone F2G. It observes that, in order for the judges affected by the decisions of the Disciplinary Chamber to be directly concerned, there must be a direct link between the contested decision and its effects on those judges.

In that regard, milestone F2G merely imposes a condition to be satisfied by the Republic of Poland in order to be eligible for funding. The contested decision did not have the effect of making the judges affected by decisions of the Disciplinary Chamber subject to the conditions laid down in the contested decision, nor did the latter render a specific rule directly applicable to those judges. Therefore, by providing for milestone F2G, it did not definitively impose specific obligations on the Republic of Poland's relations with the judges affected by decisions of the Disciplinary Chamber and there is no direct link.

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5 The fourth paragraph of Article 263 TFEU provides that any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person *or which is of direct and individual concern to them*, and against *a regulatory act which is of direct concern to them and does not entail implementing measures*.

Consequently, even after the adoption of the contested decision, the situation of the judges affected by decisions of the Disciplinary Chamber remained governed by the relevant provisions of Polish law applicable to that situation as well as by the provisions of EU law and the judgments of the Court of Justice, without milestone F2G set out in that decision directly altering the legal situation of those judges, in the sense required by the fourth paragraph of Article 263 TFEU.

As regards the judges in the second group, the General Court finds that the applicants have not demonstrated that there is a sufficiently close link between the situation of all Polish judges and milestone F1G. As regards the judges in the third group, the Court also rejects the applicants' argument that milestones F1G, F2G and F3G directly concern all other European judges.

Thus, given that the judges whose interests the applicants defend are not entitled to bring proceedings themselves, the applicants have also failed to satisfy the conditions for their actions to be admissible.

Lastly, the Court rejects the applicants' argument that the conditions for admissibility should be eased. Such easing would be contrary both to the fourth paragraph of Article 263 TFEU and to the case-law of the Court of Justice. The systemic deficiencies in the judicial system in Poland alleged by the applicants cannot, in any event, justify the General Court derogating from the condition of direct concern which applies to actions brought by natural or legal persons.

The Court states that that finding is without prejudice to the Republic of Poland's obligation, in accordance with the second subparagraph of Article 19(1) TEU and Article 266 TFEU, to remedy as soon as possible the infringements found by the Court of Justice as regards the rule of law crisis. Similarly, that decision does not affect the possibility for the Member States and the EU institutions to bring an action against any provisions adopted by the institutions, bodies, offices and agencies of the European Union which are intended to have binding legal effects; nor does it affect the Commission's actions aimed at contributing to ensure compliance with the requirements resulting from the EU rules on the rule of law.

II. FREEDOM OF MOVEMENT: FREEDOM TO PROVIDE SERVICES AND POSTING OF WORKERS

Judgment of the Court of justice (Fifth Chamber), 20 June 2024, Staatssecretaris van Justitie en Veiligheid (Posting of workers from third countries), C-540/22

Link to the full text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Articles 56 and 57 TFEU – Posting of third-country workers by an undertaking of one Member State to carry out works in another Member State – Duration exceeding 90 days in a 180-day period – Obligation for the posted third-country workers to be holders of residence permits in the host Member State in the event that services are provided for more than three months – Limitation of the period of validity of the residence permits issued – Amount of the fees relating to the application for a residence permit – Restriction on the freedom to provide services – Overriding reasons in the public interest – Proportionality

Hearing a request for a preliminary ruling from the rechtbank Den Haag, zittingsplaats Middelburg (District Court, The Hague, sitting in Middelburg, Netherlands), the Court of Justice specifies the conditions under which, regarding their right of residence in the host Member State, third-country nationals may be posted to a Member State by an undertaking established in another Member State.

The applicants, who are Ukrainian nationals, are holders of temporary residence permits issued by the Slovak authorities. They work for ROBI spol s.r.o., a company governed by Slovak law, which

posted them to a company governed by Netherlands law in order to carry out work in the port of Rotterdam (Netherlands). To that end, ROBI declared the nature of the activities carried out during the posting and the duration of that posting to the competent Netherlands authorities.

Subsequently, ROBI informed those authorities that those activities would continue beyond the right of circulation – 90 days in a 180-day period – enjoyed by a foreign national who holds a residence permit issued by a Member State, as laid down in Article 21(1) of the Convention implementing the Schengen Agreement. [6] For the duration of that supply of services, ROBI therefore lodged applications with the Netherlands authorities for residence permits for each applicant. Fees were collected for the processing of those applications. The competent authority, acting in the name of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands), issued the residence permits applied for, while limiting their period of validity to the period of validity of the Slovak temporary residence permits, that is to say, a period shorter than the duration of the posting.

In April 2021, the objections lodged by the applicants in respect of each of the decisions granting them residence permits were dismissed by the State Secretary for Justice and Security. Hearing an action challenging the decisions taken in April 2021, the referring court questions the Court of Justice as to whether a piece of national legislation imposing an obligation, in the context of a cross-border supply of services, for a third-country worker employed by a service provider established in a Member State to hold, in addition to a residence permit in that Member State, a residence permit in the Member State in which the supply is carried out after the expiry of the 90-day period referred to in the above provision of the CISA (it being possible for the period of validity of that permit to be limited in time) is consistent with the freedom to provide services enshrined in Articles 56 and 57 TFEU. It also asks the Court to examine whether imposing fees for each application for a residence permit in the Member State in which the supply is carried out is in line with EU law.

Findings of the Court

By its judgment, in the first place, the Court rules that Articles 56 and 57 TFEU do not call for the automatic recognition of a 'derived right of residence' for third-country workers posted to a Member State, either in the Member State where they are employed or in the Member State where they are posted.

In the second place, regarding the obligation, imposed on the service provider undertaking by the contested piece of legislation, to declare the supply of services to the competent national authorities and to obtain a residence permit for each third-country worker which it intends to post to the territory of that Member State, the Court finds, first of all, that, in the present case, the piece of legislation at issue, although it applies without distinction, imposes, in the case of supplies of services performed by undertakings established in another Member State which exceed three months, formal requirements on those undertakings in addition to those to which they are already made subject in the Member State in which they are established, pursuant to Directive 2009/52, [7] in order that they may employ third-country nationals. Such a piece of legislation therefore introduces a restriction on the freedom to provide services for the purposes of Articles 56 and 57 TFEU.

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6 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 (OJ 2010 L 85, p. 1), and by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the CISA'). Under Article 21(1) of the CISA: 'aliens who hold valid residence permits issued by one of the Member States may, on the basis of that permit and a valid travel document, move freely for up to 90 days in any 180-day period within the territories of the other Member States, provided that they fulfil the entry conditions referred to in Article 5(1)(a), (c) and (e) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) … and are not on the national list of alerts of the Member State concerned'.

7 Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (OJ 2009 L 168, p. 24).

Next, examining whether that restriction may be justified by an overriding reason in the public interest, the Court notes, inter alia, that the desire to avoid disturbances on the labour market is undoubtedly an overriding reason in the public interest. However, such a reason cannot justify a piece of national legislation which applies to third-country nationals posted by a service provider undertaking established in another Member State with a view to their carrying out, under the supervision and authority of that undertaking, a supply of services other than the loan of manpower, given that those posted workers are not considered to be active on the labour market of the Member State to which they are posted. That being said, the Court recalls that the objective of ensuring that posted workers have legal certainty by enabling them easily to establish that they are posted lawfully to the territory of the Member State in which the service is being provided and, accordingly, that they are staying there legally also constitutes an overriding reason in the public interest. Regarding the proportionality of such a measure, obliging service providers established in another Member State to apply for a residence permit for each posted third-country worker, in order that those workers may have a secure document, constitutes a measure appropriate for attaining the objective of increasing legal certainty for such workers, as that permit proves that they have a right of residence in the host Member State. In addition, the legislation at issue does not appear to go beyond what is necessary for the purpose of attaining such an objective, as the obligations imposed on the service provider undertaking are, inter alia, necessary in order to prove that the posting is lawful. Accordingly, the legislation at issue in the main proceedings may be justified by the objective of increasing legal certainty for posted workers and of facilitating checks by the administrative authorities and must be regarded, in the present case, as being proportionate. The Court also acknowledges that the objective consisting in the need to check that the worker concerned does not represent a threat to public policy must be regarded as capable of justifying a restriction on the freedom to provide services. In the present case, the contested measure appears appropriate for attaining that objective and, moreover, cannot be regarded as going beyond what is necessary for that purpose, provided that it entails refusing residence only to persons who represent a genuine and sufficiently serious threat to one of the fundamental interests of society. As the assessment of the threat which a person may represent for public policy may vary from one country to another, the fact that a similar check may exist in the Member State in which the service provider undertaking is established cannot render irrelevant the carrying out of such a check in the Member State in which the supply of services is to be carried out. Furthermore, unlike the declaration procedure, which is based on checks based on information received or already possessed, the residence permit procedure, inasmuch as it requires the person concerned to report to the premises of a competent authority in person, may enable the identity of that person to be verified in detail, which is particularly important in combating threats to public policy. Thus, the objective of protecting public policy is capable of justifying a Member State requiring service providers who are established in another Member State and who wish to post third-country workers to obtain – after a three-month period of residence in the first Member State – a residence permit for each of those workers. Such an objective is also capable of justifying that first Member State, at that time, making the issuing of such a permit subject to verifying that the person concerned does not represent a threat to public policy or public security, provided that the checks carried out to that end could not reliably be carried out on the basis of the information the communication of which is required or could reasonably have been required by that Member State during the declaration procedure, which it is for the referring court to verify.

Consequently, the Court states that Article 56 TFEU does not preclude a piece of legislation of a Member State which provides that, where an undertaking established in another Member State carries out, in that first Member State, a supply of services the duration of which exceeds three months, that undertaking is obliged to obtain in the host Member State a residence permit for each third-country worker which it intends to post to that first Member State, and which provides that, in order to obtain that permit, that undertaking is to declare beforehand to the competent authorities of the host Member State the supply of services in respect of which those workers are to be posted and is to communicate to those authorities the residence permits which those workers hold in the Member State where it is established, as well as their employment contracts.

In the last place, as regards the fact that the fees payable for the grant of a residence permit to a third-country worker posted to one Member State by an undertaking established in another Member State are greater than the amount of the fees payable for the grant of a certificate of residence to a Union citizen, the Court recalls that, in accordance with the principle of proportionality, in order for a

measure requiring the payment of fees in exchange for the issuing, by a Member State, of a residence permit to be capable of being regarded as compatible with Article 56 TFEU, the amount of those fees cannot be excessive or unreasonable. The proportionate nature of the fees payable must be assessed in the light of the costs generated by the processing of that application which must be borne by the Member State concerned. In that regard, the Court notes that the fact that the fees requested for the issuing of a residence permit to a posted third-country worker are greater than those requested for a certificate of residence for a Union citizen cannot, in principle, be sufficient to establish, in itself, that the amount of those fees is in breach of Article 56 TFEU. However, that fact may constitute a compelling indication of the disproportionate nature of that amount if the tasks which the administrative authorities must complete in order to grant such a residence permit, as well as the costs of producing the corresponding secure document, are equivalent to those needed for the grant of a certificate of residence to a Union citizen, which it is for the referring court to determine.

Accordingly, the Court concludes that Article 56 TFEU does not preclude a piece of legislation of a Member State pursuant to which the period of validity of the residence permit which may be granted to a third-country worker posted to that Member State may not, in any event, exceed a period determined by the piece of national legislation in question, which may thus be shorter than the period needed to perform the service for which that worker is posted. That article also does not preclude the period of validity of that residence permit being limited to the period of validity of the work and residence permit held by the person concerned in the Member State in which the service provider is established. Lastly, according to that article, the issuing of that residence permit may require the payment of fees in an amount greater than the amount of the fees payable for the issuing of a certificate of lawful residence to a Union citizen, provided that: first of all, the initial period of validity of that permit is not manifestly too short to meet the needs of the majority of service providers; next, it is possible to renew the residence permit without having to meet excessive formal requirements; and, lastly, that amount approximately corresponds to the administrative costs generated by the processing of an application for such a permit.

III. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court of Justice (Grand Chamber), 11 June 2024, Staatssecretaris van Justitie en Veiligheid (Women identifying with the value of gender equality), C-646/21

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Common asylum policy – Directive 2011/95/EU – Qualification for refugee status – Article 2(d) and (e) – Reasons for persecution – Article 10(1)(d) and (2) – 'Membership of a particular social group' – Article 4 – Individual assessment of the facts and circumstances – Directive 2013/32/EU – Article 10(3) – Requirements for the examination of applications for international protection – Article 24(2) of the Charter of Fundamental Rights of the European Union – Best interests of the child – Determination – Third-country nationals who are minors and who identify with the fundamental value of equality between women and men by reason of their stay in a Member State

Hearing a reference for a preliminary ruling from the rechtbank Den Haag, zittingsplaats 's-Hertogenbosch (District Court, The Hague, sitting at 's-Hertogenbosch, Netherlands), the Court, sitting as the Grand Chamber, rules on the question whether third-country nationals who are minors identifying with the fundamental value of equality between women and men due to their stay in a Member State may be regarded as belonging to 'a particular social group', [8] constituting a 'reason for persecution' capable of leading to the recognition of refugee status.

K and L are sisters of Iraqi nationality, born in 2003 and 2005, respectively. They arrived in the Netherlands in 2015 and have stayed there continuously since. Their applications for asylum, submitted in November 2015, were rejected in February 2017. In April 2019, they submitted subsequent applications, [9] which were rejected as manifestly unfounded in December 2020. In challenging those rejection decisions, K and L are arguing before the referring court that, due to their long stay in the Netherlands, they have become 'westernised'. They fear persecution if they were to return to Iraq because of the identity they have formed in the Netherlands, characterised by the adoption of norms, values and conduct that are different from those of their country of origin, which have become so fundamental to their identity and conscience that they cannot renounce them. They submit that they are therefore members of a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95.

In those circumstances, the referring court is uncertain, first, as to the interpretation of the concept of 'membership of a particular social group' and, second, as to the manner in which the best interests of the child are to be taken into consideration, as guaranteed in Article 24(2) of the Charter of Fundamental Rights of the European Union, in the procedure for examining applications for international protection.

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8 Under Article 10(1)(d) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9), for the purpose of assessing the reasons for persecution, a group is to be considered to form a 'particular social group' where in particular its members share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

9 Under Article 2(q) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) a 'subsequent application' is a further application for international protection made after a final decision has been taken on a previous application.

Findings of the Court

In the first place, the Court states that a group is to be regarded as a 'particular social group' where two cumulative conditions are satisfied. First, the persons who may belong to it must share at least one of three identifying features, namely an 'innate characteristic', a 'common background that cannot be changed' or a 'characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'. Second, that group must have a 'distinct identity' in the country of origin 'because it is perceived as being different by the surrounding society'.

As regards the first of those conditions, the fact that a woman genuinely identifies with the fundamental value of equality between women and men, in so far as it presupposes a desire to benefit from that equality in her daily life, entails being free to make her own life choices, particularly in relation to her education and career, the extent and nature of her activities in the public sphere, the possibility of achieving economic independence by working outside the home, her decision on whether to live alone or with a family, and the free choice of a partner, choices which are fundamental to her identity. In those circumstances, the fact that a third-country national genuinely comes to identify with that fundamental value may be considered 'a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'.

As regards the second condition, relating to the 'distinct identity' of the group in the country of origin, women may be perceived as being different by the surrounding society and recognised as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin. That condition will also be satisfied by women who share an additional common characteristic, such as the fact that they genuinely come to identify with the fundamental value of equality between women and men, where those norms in their country of origin have the result that those women, on account of that common characteristic, are also perceived as being different by the surrounding society.

It follows that women, including minors, who share as a common characteristic the fact that they genuinely come to identify with the fundamental value of equality between women and men during their stay in a Member State may, depending on the circumstances in the country of origin, be regarded as belonging to a 'particular social group', constituting a 'reason for persecution' capable of leading to the recognition of refugee status.

In that regard, the Court points out that the fact that a third-country national genuinely comes to identify with that fundamental value during her stay in a Member State cannot be regarded as circumstances which that national has created by her own decision since leaving her country of origin, 10 or as an activity the sole or main purpose of which was to create the necessary conditions for applying for international protection. [11] Suffice it to note that, where such identification has been established to the requisite legal standard, it can in no way be equated with the abusive intent and abuse of the procedure which Article 5(3) of Directive 2011/95 is intended to combat.

In the second place, the Court finds that where an applicant for international protection is a minor, the competent national authority must take into account, after an individual examination, the best interests of that minor when assessing the merits of his or her application for international protection.

On that issue, the Court states, first, that, pursuant to Article 51(1) of the Charter of Fundamental Rights, Member States are to comply with Article 24(2) thereof when they are implementing Union law and therefore also when they are examining a 'subsequent application'. Second, since Article 40(2) of Directive 2013/32 does not draw any distinction between a first application for international protection and a 'subsequent application' as regards the nature of the elements or findings capable of

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10 See Article 5(3) of Directive 2011/95.

11 See Article 4(3)(d) of Directive 2011/95.

demonstrating that the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95, the assessment of the facts and circumstances in support of those applications must, in both cases, be carried out in accordance with Article 4 of that latter directive.

Furthermore, for the purpose of assessing an application for international protection based on a reason for persecution such as 'membership of a particular social group', a long stay in a Member State may be taken into account, especially where it coincides with a period during which an applicant who is a minor has formed his or her identity.

Judgment of the Court of Justice (Fourth Chamber), 13 June 2024, Commission v Hungary (Reception of applicants for international protection II), C-123/22

Link to the full text of the judgment

Failure of a Member State to fulfil obligations – Area of freedom, security and justice – Directives 2008/115/EC, 2013/32/EU and 2013/33/EU – Procedure for granting international protection – Effective access – Border procedure – Procedural safeguards – Return of illegally staying third-country nationals – Appeals brought against administrative decisions rejecting an application for international protection – Right to remain in the territory – Judgment of the Court establishing a failure to fulfil obligations – Non-compliance – Article 260(2) TFEU – Financial penalties – Proportionality and dissuasiveness – Lump sum – Periodic penalty payment

The Court orders Hungary to pay a lump sum in the amount of EUR 200 000 000 and a total penalty payment of EUR 1 000 000 per day for that Member State's failure to comply with the judgment in *Commission* v *Hungary (Reception of applicants for international protection*). [12]

By that judgment, delivered on 17 December 2020, the Court ruled that Hungary had failed to fulfil its obligations under the Procedures, [13] Reception [14] and Return [15] Directives. More precisely, Hungary had failed to fulfil its obligations with regard, first, to access to the international protection procedure, second, to the detention of applicants for international protection in the transit zones of Röszke and Tompa, third, to the removal of illegally staying third-country nationals and, fourth, to the right of applicants for international protection to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

12 Judgment of 17 December 2020, Commission v Hungary (Reception of applicants for international protection) (C-808/18, EU:C:2020:1029; 'the 2020 Commission v Hungary judgment').

13 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) ('the Procedures Directive'). The Court established a failure to fulfil obligations under Article 6, Article 24(3), Article 43 and Article 46(5) of that directive.

14 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96) ('the Reception Directive'). The Court established a failure to fulfil obligations under Articles 8, 9 and 11 of that directive.

15 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ 2008 L 348, p. 98) ('the Return Directive'). The Court established that Hungary had failed to fulfil its obligations under Article 5, Article 6(1), Article 12(1) and Article 13(1) of that directive.

On 9 June 2021, the European Commission sent Hungary a letter of formal notice, in accordance with the procedure provided for in Article 260(2) TFEU, [16] in which it took the view that Hungary had not taken the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment. It therefore asked that Member State to submit its observations within two months.

Since it was not satisfied with Hungary's replies, the Commission brought an action for failure to fulfil obligations before the Court under Article 260(2) TFEU seeking a declaration that that Member State, despite having closed the transit zones of Röszke and Tompa, has failed to comply with that judgment and an order requiring it to pay a lump sum and a daily penalty payment until the judgment of the Court has been complied with in full.

The Court upholds the Commission's action.

Findings of the Court

In today's judgment, the Court finds that, on the date of expiry of the period prescribed in the letter of formal notice, namely 9 August 2021, Hungary had not taken the measures necessary to comply with the 2020 *Commission* v *Hungary* judgment. Those measures must necessarily be compatible with the provisions of EU law which were found to have been infringed in that judgment and must facilitate the proper application of those provisions. However, on the date of expiry of the period prescribed in the letter of formal notice, aside from the closure of the transit zones of Röszke and Tompa, the national legislation that was the subject of the 2020 *Commission* v *Hungary* judgment had not been amended so as to make it comply with those requirements. In particular, the amendment of national legislation that was the subject of the judgment in *Commission* v *Hungary (Declaration of intent prior to an asylum application)* [17] cannot be considered to be a measure complying with the 2020 *Commission* v *Hungary* judgment since it is not compatible with the obligations under Article 6 of Directive 2013/32, which was found to have been infringed in that latter judgment.

In addition, Hungary's failure to comply with that judgment has an extraordinarily serious impact on both the public interest and certain private interests, in particular the interests of third-country nationals and stateless persons wishing to apply for international protection.

To begin with, the importance of the provisions that are the subject of the established failure to fulfil obligations must be highlighted. In that regard, first, the infringement of the fundamental provision that is Article 6 of the Procedures Directive systematically prevents any access to the international protection procedure, making it impossible for Hungary to apply the common policy on asylum in its entirety. The systematic and deliberate evasion by a Member State of the application of a common policy as a whole constitutes an unprecedented and exceptionally serious infringement of EU law, which represents a significant threat to the unity of EU law and to the principle of equality of the Member States, referred to in Article 4(2) TEU. Second, compliance with Article 46(5) of the Procedures Directive is essential in order to ensure, as regards applicants for international protection, the effectiveness of the principle of effective judicial protection of an individual's rights under EU law, which is a general principle of EU law stemming from the constitutional traditions common to the Member States. Third, the fundamental guarantees established by Articles 5, 6, 12 and 13 of the Return Directive constitute much of the content of the requirements applicable to the return of illegally staying third-country nationals, which is a vital component of the common immigration policy.

Next, Hungary's conduct has the effect of transferring to the other Member States its responsibility, including financial responsibility, for ensuring the reception of applicants for international protection

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16 Under Article 260(1) and (2) TFEU, a Member State which the Court has found to have failed to fulfil an obligation under the Treaties is required to take the necessary measures to comply with the judgment of the Court, and the Commission may bring the matter before the Court if it considers, after giving the Member State concerned the opportunity to submit its observations, that such measures have not been taken. If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

17 Judgment of 22 June 2023, Commission v Hungary (Declaration of intent prior to an asylum application) (C-823/21, EU:C:2023:504).

in the European Union, for examining applications in accordance with the procedures for granting and withdrawing that protection, and for ensuring arrangements for the return of illegally staying third-country nationals that comply with EU law. Such conduct seriously undermines the principle of solidarity and fair sharing of responsibility between the Member States in the area of asylum. In that regard, the Court recalls that the principle of solidarity is one of the fundamental principles of EU law and is one of the values common to the Member States on which the European Union is founded, pursuant to Article 2 TEU. By unilaterally upsetting the balance between the advantages and obligations arising from its membership of the European Union, a Member State calls into question observance of the principle of equality of the Member States before EU law. That failure in the duty of solidarity accepted by the Member States by the fact of their accession to the European Union strikes at the very root of the EU legal order.

Moreover, the repetition of Hungary's unlawful conduct, which led to a number of other findings by the Court of infringements in the area of international protection, [18] is an aggravating circumstance. Hungary's conduct following the 2020 *Commission* v *Hungary* judgment shows that it has not acted in accordance with its duty of sincere cooperation to put an end to the failure to fulfil obligations established by the Court, which constitutes an additional aggravating circumstance.

Accordingly, in the light of the exceptional seriousness of the infringements at issue and Hungary's failure to cooperate in good faith in order to bring them to an end, the duration of the infringements and the capacity of that Member State to pay, the Court orders that Member State to pay the Commission a lump sum in the amount of EUR 200 000 000 and a penalty payment in the total amount of EUR 1 000 000 per day from today until the date of compliance with the 2020 *Commission* v *Hungary* judgment.

Judgment of the Court of Justice (Grand Chamber), 18 June 2024, A. (Request for the extradition of a refugee to Türkiye), C-352/22

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Directive 2011/95/EU – Article 21(1) – Directive 2013/32/EU – Article 9(2) and (3) – Definitive grant of refugee status by a Member State – Refugee residing in another Member State after that grant – Request for extradition submitted by the third State of origin of that refugee to the Member State of residence – Effect of the decision granting refugee status on the extradition procedure concerned – Article 18 and Article 19(2) of the Charter of Fundamental Rights of the European Union – Protection of that refugee against the extradition sought

In a reference from the Oberlandesgericht Hamm (Higher Regional Court, Hamm, Germany) for a preliminary ruling, the Grand Chamber of the Court of Justice clarifies the scope of the principle of non-refoulement in the context of an extradition request issued by a refugee's third country of origin to his Member State of residence, in a situation in which he was granted that status in another Member State.

In 2010, the Italian authorities granted refugee status, valid until 2030, to A., a Turkish national of Kurdish origin, on the ground that he was at risk of political persecution by the Turkish authorities

[18] Judgments of 2 April 2020, Commission v Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection) (C-715/17, C-718/17 and C-719/17, EU:C:2020:257); of 16 November 2021, Commission v Hungary (Criminalisation of assistance to asylum seekers) (C-821/19, EU:C:2021:930); and of 22 June 2023, Commission v Hungary (Declaration of intent prior to an asylum application) (C-823/21, EU:C:2023:504).

because of his support for the Kurdistan Workers' Party (PKK). A. has resided in Germany since July 2019.

On the basis of an arrest warrant issued by a Turkish court in June 2020, A. was the subject of an alert issued by the International Criminal Police Organization (Interpol) for his arrest with a view to his extradition to Türkiye for the purpose of a criminal prosecution for murder. After his arrest in Germany on 18 November 2020, A. was placed in temporary detention, then in detention pending extradition until 14 April 2022.

By an order made in November 2021, the Higher Regional Court, Hamm, the referring court, declared the extradition of A. to Türkiye to be admissible, considering itself in particular not to be bound by the Italian authorities' decision granting refugee status. Following a constitutional complaint brought by A., that order was, however, set aside by the Bundesverfassungsgericht (Federal Constitutional Court, Germany), which found that the referring court had failed to bring that question before the Court of Justice for a preliminary ruling.

In that context, after the case was brought back before it, the referring court, again seised of the request for A.'s extradition, decided to ask the Court whether a decision taken by a Member State granting refugee status has binding effect under EU law for the purposes of an extradition procedure conducted in another Member State.

Findings of the Court

By its judgment, the Court finds, first of all, that, since the decision of a Member State to allow a request for extradition issued by the State of origin in respect of a third-country national who has been granted refugee status in another Member State would have the effect of depriving that person of the rights and benefits laid down in Directive 2011/95, [19] the extradition procedure conducted in the first Member State must be regarded as implementing EU law, for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Therefore, the competent authority of the requested Member State cannot authorise the extradition to a third country of a national of that third country who has been granted refugee status by another Member State if that extradition would be contrary to the principle of non-refoulement, laid down in Article 21(1) of Directive 2011/95, read in conjunction with Article 18 and Article 19(2) of the Charter. [20]

In that regard, the Court states that as long as the requested individual qualifies as a refugee, Article 18 of the Charter precludes the extradition of that individual to the third country which he or she fled and in which he or she risks being persecuted. Moreover, where the person whose extradition is sought invokes a real risk of inhuman or degrading treatment if extradited, the requested Member State must verify, before carrying out any extradition, that the extradition will not prejudice the rights referred to in Article 19(2) of the Charter.

For the purpose of assessing the risk of infringement of Article 21(1) of Directive 2011/95 and of Article 18 and Article 19(2) of the Charter, the fact that another Member State granted the requested individual refugee status is a particularly substantial piece of evidence which the competent authority of the requested Member State must take into account, so that a decision granting refugee status must lead that authority to refuse extradition, in accordance with those provisions, provided that that refugee status has not been revoked or withdrawn by the Member State that granted it. The Common European Asylum System is based on the principle of mutual trust, in accordance with which it must be presumed, save in exceptional circumstances, that the treatment of applicants for international

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19 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

20 While Article 18 of the Charter affirms the right of asylum, Article 19(2) of the Charter lays down the principle of non-refoulement.

protection in each Member State complies with the requirements of EU law, the Geneva Convention [21] and the Convention for the Protection of Human Rights and Fundamental Freedoms. [22]

In addition, the provisions of Directives 2011/95 and 2013/32 [23] relating to the revocation and withdrawal of refugee status and the procedure they lay down would be circumvented if the requested Member State could extradite a third-country national who had been granted refugee status by another Member State to his or her country of origin. Such an extradition would, de facto, effectively end that status and deprive the person concerned of the effective enjoyment of the protection afforded by Article 18 of the Charter, of the rights and benefits provided for, as regards the content of international protection, by Chapter VII of Directive 2011/95, and of the procedural guarantees set out in Article 45 of Directive 2013/32.

Accordingly, on the basis of the principle of sincere cooperation, [24] the competent extradition authority of the requested Member State must initiate, as soon as possible, an exchange of information with the authority of the other Member State which granted the requested individual refugee status. On that basis, it is required to inform the latter authority of the request for extradition relating to that individual, to send it its opinion on that request and to obtain from it, within a reasonable period, both the information in its possession that led to refugee status being granted and its decision as to whether or not it is necessary to revoke or withdraw that individual's refugee status.

That exchange of information is intended to ensure that the competent extradition authority of the requested Member State is in a position to proceed on a fully informed basis with the checks which it is required to carry out under Article 18 and Article 19(2) of the Charter.

Moreover, the exchange of information enables the competent authority of the other Member State, if appropriate, to revoke or withdraw refugee status on the basis of Article 14 of Directive 2011/95, whilst fully respecting the guarantees set out in Article 45 of Directive 2013/32.

In view of the above, the Court states that it is only if the competent authority of the Member State which granted the requested individual refugee status decides to revoke or to withdraw that status on the basis of Article 14 of Directive 2011/95, and in so far as the competent extradition authority of the requested Member State reaches the conclusion that that individual is not or is no longer a refugee and that there is no serious risk that, in the event of that individual's extradition to the requesting third State, he or she would be subjected there to the death penalty, torture or other inhuman or degrading treatment or punishment, that EU law would not preclude extradition.

Consequently, under Article 21(1) of Directive 2011/95, read in conjunction with Article 18 and Article 19(2) of the Charter, where a third-country national who has been granted refugee status in one Member State is the subject, in another Member State, on whose territory he or she resides, of an extradition request from his or her country of origin, the requested Member State cannot authorise extradition unless it has initiated an exchange of information with the authority that granted the requested individual refugee status and where that status has not been revoked by that authority.

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21 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951.

22 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

23 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

24 The Court states that that principle, set out in the first subparagraph of Article 4(3) TEU, by virtue of which the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties, finds concrete expression in Article 36 of Directive 2011/95 and in Article 49 of Directive 2013/32.

Judgment of the Court of Justice (Grand Chamber), 18 June 2024, Bundesrepublik Deutschland (Effect of a decision granting refugee status), C-753/22

Link to the full text of the judgment

Reference for a preliminary ruling – Area of freedom, security and justice – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(a) – No possibility for the authorities of a Member State to reject an application for asylum as inadmissible on the ground that refugee status was previously granted in another Member State – Article 4 of the Charter of the Fundamental Rights of the European Union – Risk of being subjected to inhuman or degrading treatment in that other Member State – Examination by those authorities of that application for asylum despite the granting of refugee status in that other Member State – Directive 2011/95/EU – Article 4 – Individual examination

In a reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the Court of Justice, sitting as the Grand Chamber, rules on whether the authorities of a Member State must carry out a new examination of an application for asylum despite the grant of refugee status in another Member State, where they cannot exercise the option provided by Directive 2013/32 [25] to reject that application as inadmissible.

QY, a Syrian national who was granted refugee status in Greece in 2018, made an application for international protection in Germany. Subsequently, a German administrative court considered that QY faced, in Greece, a serious risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'), with the result that she could not return there.

In October 2019, a competent German authority rejected QY's application for refugee status, but granted her subsidiary protection. QY brought an action against that decision, which was dismissed by the German administrative court seised on the ground that QY was not at risk of persecution in Syria. QY then brought an appeal before the referring court, claiming that the competent German authority was bound by the Greek authorities' recognition of refugee status.

The referring court states that, in the present case, QY's application for international protection could not be declared inadmissible on the ground that that status had been previously granted in Greece, since QY runs a serious risk of facing, in that Member State, inhuman or degrading treatment, within the meaning of Article 4 of the Charter. In those circumstances, it asks, in essence, whether, under EU law, the competent German authority was entitled to assess the merits of that application for international protection, without being bound by the fact that Greece has already granted QY such protection.

Findings of the Court

In the first place, the Court observes that Article 78(2)(a) TFEU provides that the European Parliament and the Council of the European Union are to adopt measures for a Common European Asylum System comprising 'a uniform status of asylum for nationals of third countries, valid throughout the Union'. Although that provision thus provides a legal basis for the adoption of EU acts containing such a uniform status, the fact remains that intervention by the EU legislature is necessary in order to give concrete effect to all the rights pertaining to that status which, granted by a Member State and recognised by all the others, is valid throughout the European Union.

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25 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60). Article 33(2)(a) of that directive provides that Member States may consider an application for international protection inadmissible if, inter alia, another Member State has granted international protection.

The EU legislature has not yet fully achieved the objective pursued by Article 78(2)(a) TFEU, namely a uniform status of asylum. In particular, it has not, at this stage, established a principle that Member States are obliged to recognise automatically the decisions granting refugee status that have been adopted by another Member State, nor has it specified the detailed arrangements for implementing such a principle. Although the Member States are thus, as EU law currently stands, free to make recognition of all of the rights relating to refugee status on their territory subject to the adoption, by their competent authorities, of a new decision granting that status, it is open to them to provide for automatic recognition of such decisions adopted by another Member State, by way of a more favourable provision. [26] However, it is common ground that Germany has not exercised that option.

In those circumstances, the Court determines, in the second place, the scope of the examination, by the competent authority of a Member State, of an application for international protection made by an applicant to whom another Member State has already granted refugee status.

In that context, it finds that where it is not possible for the competent authority of a Member State to declare inadmissible, under Article 33(2)(a) of Directive 2013/32, an application for international protection made by an applicant, to whom another Member State has already granted such protection, on account of a serious risk that that applicant will be subjected, in that other Member State, to inhuman or degrading treatment, within the meaning of Article 4 of the Charter, that authority must carry out a new, individual, full and up-to-date examination of that application in a new international protection procedure conducted in accordance with Directives 2011/95 and 2013/32. If the applicant qualifies as a refugee in accordance with Chapters II and III of Directive 2011/95, that authority must grant him or her refugee status, and it does not have any discretion.

In that regard, although that authority is not required to grant refugee status to that applicant on the sole ground that that status was previously granted to him or her by decision of another Member State, it must nevertheless take full account of that decision and of the elements supporting it. The Common European Asylum System, which includes common criteria for the identification of persons genuinely in need of international protection, is based on the principle of mutual trust, [27] in accordance with which it must be presumed, save in exceptional circumstances, that the treatment of applicants for international protection in each Member State complies with the requirements of EU law, including those of the Charter, the Convention relating to the Status of Refugees, [28] and the European Convention on Human Rights. [29]

Furthermore, having regard to the principle of sincere cooperation [30] and in order to ensure, as far as possible, the consistency of the decisions taken by the competent authorities of two Member States, on the need for international protection of the same third-country national or stateless person, it must be held that the competent authority of the Member State called upon to decide on the new application must, as soon as possible, initiate an exchange of information with the competent authority of the Member State which previously granted refugee status to the same applicant. In that regard, it is for the first of those authorities to inform the second of the new application, to send it its opinion on that new application and to obtain from it, within a reasonable time, the information in its possession that led to refugee status being granted. That exchange of information is intended to ensure that the authority of the Member State to which the new application has been made is in a

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26 See Article 3 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9) and Article 5 of Directive 2013/32.

27 See recital 12 of Directive 2011/95.

28 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951.

29 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

30 Pursuant to the principle of sincere cooperation, enshrined in the first subparagraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. Concrete expression is given to that principle in Article 36 of Directive 2011/95 and Article 49 of Directive 2013/32.

position to proceed on a fully informed basis with the checks which it is required to carry out under the international protection procedure.

IV. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

Judgment of the Court of Justice (Fourth Chamber), 20 June 2024, Greislzel, C-35/23

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Parental responsibility – Regulation (EC) No 2201/2003 – Articles 10 and 11 – Jurisdiction in cases of the wrongful removal of a child – Child's habitual residence in a Member State before the wrongful removal – Return procedure between a third country and a Member State – Concept of 'request for return' – The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction)

Ruling on a reference for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), the Court of Justice clarifies the scope of certain procedural rules applicable under Regulation No 2201/2003 [31] in the case of international abduction of a child in connection with a third country.

L was born in Switzerland in 2014 and has dual German and Polish nationality. Her father has resided in Switzerland since June 2013 for professional reasons, while her mother lived with L from January 2015 to April 2016 in Germany, where the father regularly visited them. In April 2016, the mother and L moved to Poland where, initially, the father visited them. From April 2017, the mother refused to allow the father his rights of access. She enrolled L in a kindergarten in Poland, without the father's consent, and informed the father that she intended to remain in Poland with their daughter.

In July 2017, the father lodged an application for the return of the child to Switzerland through the Swiss Central Authority [32] under the 1980 Hague Convention. [33] A Polish court dismissed that application on the ground that the father had given his consent for an indefinite period to the mother's move with L to Poland. The appeal brought by the father against that decision was dismissed.

Although he did not pursue a second application for return lodged in Germany, in July 2018 the father brought an application for custody before a German court seeking sole custody of the child, the right to determine the child's residence and the return of the child to the father's home in Switzerland. The court before which the application was brought dismissed it on the ground that it lacked international

31 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

32 Federal Office of Justice in Bern (Switzerland).

33 Convention on the Civil Aspects of International Child Abduction, concluded in The Hague on 25 October 1980 ('the 1980 Hague Convention').

jurisdiction. The father brought an appeal against that decision before the referring court, claiming that the jurisdiction of the German courts derives from Articles 10 and 11 of Regulation No 2201/2003.

The referring court is uncertain as to the applicability of those provisions, since the father has unsuccessfully initiated proceedings for the return of the child under the 1980 Hague Convention through the Central Authority of Switzerland, a third country which is not bound by Regulation No 2201/2003. It therefore decided to make a reference to the Court for a preliminary ruling.

Findings of the Court

In the first place, the Court rules on the scope of the rule of special jurisdiction in matters of parental responsibility laid down in Article 10 of Regulation No 2201/2003. In accordance with that article, the courts of the Member State where the child was habitually resident before the wrongful removal or retention retain, in principle and under certain conditions, their international jurisdiction.

As regards the 'wrongful removal or retention of the child', on which Article 10 of Regulation No 2201/2003 is based, the Court holds, first, that the definition of that concept [34]does not depend on the holder of rights of custody initiating proceedings, which, as the case may be, would have to take place subsequently, for the return of the child under the 1980 Hague Convention.

Next, Article 10(b)(i) of Regulation No 2201/2003, according to which the courts of the child's former habitual residence, in principle, no longer have jurisdiction in the absence of a request for return made within a period of one year, to the Member State on whose territory the child has been wrongfully removed or retained, does not specify that an application for return must have been made under the 1980 Hague Convention, nor does it exclude that it could have been made through a central authority of a third country. First, in accordance with Article 60 of Regulation No 2201/2003, the provisions of the 1980 Hague Convention do not take precedence over the provisions of that regulation in relations between Member States. Second, there is no obligation to rely on that convention in order to apply for the return of a child, since a return procedure may be based on other rules or provisions of international agreements, in particular bilateral provisions.

Finally, it cannot be accepted, given that Regulation No 2201/2003 is silent on the matter, that the application of Article 10 of that regulation is subject to the application of procedural rules, such as those set out in Article 11(6) and (7) of that regulation, [35] the main purpose of which is to govern the transmission and notification of information. [36]

In the second place, the Court notes, in the light, in particular, of the objectives of Regulation No 2201/2003, that neither an application for the return of the child to a State other than the Member State where that child was habitually resident immediately before the wrongful removal or retention, nor an application for custody of that child brought before the courts of that Member State, falls within the concept of 'request for return' within the meaning of Article 10(b)(i) of Regulation No 2201/2003.

Lastly, the Court states that it is clear from the wording of Article 11 of Regulation No 2201/2003 that that provision applies only between Member States, in conjunction with the 1980 Hague Convention. Accordingly, the obligations to inform and notify laid down in Article 11(6) and (7) of that regulation and the enforceability of the judgment referred to in Article 11(8) do not apply in the context of proceedings for the return of the child which have been commenced under that convention between

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34 See Article 2(11) of Regulation No 2201/2003.

35 Article 11 of that regulation supplements the implementation of return proceedings under the 1980 Hague Convention.

36 This concerns information in respect of a judgment of non-return, adopted pursuant to Article 13 of the 1980 Hague Convention, which must be communicated to the court with jurisdiction in the Member State where the child was habitually resident immediately before the wrongful removal or retention.

a third country and a Member State where the child is present following a wrongful removal or retention.

V. COMPETITION

1. ARTICLES 101 TFEU AND 102 TFEU

Judgment of the Court of Justice (First Chamber), 27 June 2024, Lupin v Commission, C-144/19 P

Link to the full text of the judgment

Judgment of the Court of Justice (First Chamber), 27 June 2024, Niche Generics v Commission, C-164/19 P

Link to the full text of the judgment

Judgment of the Court of Justice (First Chamber), 27 June 2024, Unichem Laboratories v Commission, C-166/19 P

Link to the full text of the judgment

Judgment of the Court of Justice (First Chamber), 27 June 2024, Mylan Laboratories and Mylan v Commission, C-197/19 P

Link to the full text of the judgment

Judgment of the Court of Justice (First Chamber), 27 June 2024, Teva UK and Others v Commission, C-198/19 P

Link to the full text of the judgment

Appeal – Competition – Pharmaceutical products – Market for perindopril – Article 101 TFEU – Agreements, decisions and concerted practices – Potential competition – Restriction of competition by object – Strategy to delay the market entry of generic versions of perindopril – Patent dispute settlement agreement

Judgment of the Court of Justice (First Chamber), 27 June 2024, Servier and Others v Commission, C-201/19 P

Link to the full text of the judgment

Appeal – Competition – Pharmaceutical products – Market for perindopril – Article 101 TFEU – Agreements, decisions and concerted practices – Potential competition – Restriction of competition by object – Strategy to delay the market entry of generic versions of perindopril – Patent dispute settlement agreement – Duration of the infringement – Concept of a single infringement – Annulment or reduction of the fine

Judgment Court of Justice (First Chamber), 27 June 2024, Biogaran v Commission, C-207/19 P

Appeal – Competition – Pharmaceutical products – Market for perindopril – Article 101 TFEU – Strategy to delay the market entry of generic versions of perindopril – Patent dispute settlement agreement – Licence and supply agreement

By seven judgments, the Court of Justice essentially dismisses the appeals brought by several manufacturers of medicines against the judgments of the General Court [37] which dismissed in part their actions for annulment of the decision by which the European Commission imposed fines on them for having participated in agreements on the market for the pharmaceutical product perindopril and, in respect of one of them, for having committed an abuse of a dominant position on that market. [38] In so doing, the Court of Justice clarifies the dividing line between legitimate action by manufacturers of medicines which consists in settling actual patent disputes in the pharmaceutical sector, on the one hand, and agreements which unlawfully delay the entry of manufacturers of generic medicines to the market for a pharmaceutical product under the guise of a patent dispute settlement agreement, on the other.

The Servier pharmaceutical group, the parent company of which, Servier SAS, is established in France (individually or jointly, 'Servier'), developed perindopril, a medicinal product in the class of angiotensin-converting enzyme (ACE) inhibitors, used in cardiovascular medicine and primarily intended for the treatment of hypertension and heart failure. The perindopril compound patent, filed with the European Patent Office (EPO) in 1981, expired during the 2000s.

The active pharmaceutical ingredient of perindopril takes the form of a salt, which is erbumine. In 1988, Servier filed a number of patents with the EPO relating to processes for the manufacture of that active ingredient, with an expiry date of 16 September 2008.

Two new patents relating to perindopril and the process for its manufacture were filed with the EPO by Servier in 2001 and were granted in 2004 ('the 947 and 948 patents'). Servier also obtained national patents relating to the 947 patent in several Member States before they were parties to the Convention on the Grant of European Patents.

As from 2003, a number of disputes arose between Servier and manufacturers of generic medicines which were preparing to market a generic version of perindopril. In that context, 10 generic manufacturers filed opposition proceedings against the 947 patent before the EPO; the EPO Technical Board of Appeal revoked the contested patent in May 2009. Several manufacturers of generic medicines have also challenged the validity of the 947 patent before certain national courts. Servier, for its part, has brought infringement actions and applications for interim injunctions against the manufacturers of generic medicines in question.

In order to bring those disputes to an end, Servier concluded, between 2005 and 2007, settlement agreements with several generic manufacturers, in particular with Niche Generics Ltd and its parent company Unichem Laboratories Ltd ('the Niche agreement'), Matrix Laboratories Ltd ('the Matrix agreement'), Teva UK Ltd ('the Teva agreement'), KRKA, tovarna zdravil, d.d. ('the Krka agreements') and Lupin Ltd ('the Lupin agreement').

In accordance with those agreements, the generic manufacturers undertook, inter alia, as appropriate, to limit or cease the manufacture, supply or marketing of the forms of perindopril

37 Judgments of 12 December 2018, Servier and Others v Commission (T-691/14, EU:T:2018:922); Niche Generics v Commission (T-701/14, EU:T:2018:921); Unichem Laboratories v Commission (T-705/14, EU:T:2018:915); Teva UK and Others v Commission (T-679/14, EU:T:2018:919); Lupin v Commission (T-680/14, EU:T:2018:908); Mylan Laboratories and Mylan v Commission (T-682/14, EU:T:2018:907); Biogaran v Commission (T-677/14, EU:T:2018:910).

38 Commission Decision C(2014) 4955 final of 9 July 2014 relating to a proceeding under Article 101 and Article 102 [TFEU] (Case AT.39612 – Perindopril (Servier)).

protected by Servier's abovementioned patents and no longer to challenge those patents. In return for those commitments and other clauses provided for in the abovementioned agreements, Servier undertook, inter alia, to make significant payments to those undertakings.

In that context, Biogaran SAS, a subsidiary of Servier specialised in the development of generic medicines, also concluded a licence and supply agreement with Niche Generics ('the Biogaran agreement').

By decision of 9 July 2014, the Commission found that the Niche, Matrix, Teva, Krka, Lupin and Biogaran agreements constituted restrictions of competition prohibited by Article 101 TFEU. It also considered that Servier had committed an abuse of a dominant position in breach of Article 102 TFEU, since those agreements formed part of a strategy intended to delay the entry of generic versions onto the perindopril market, in which that undertaking held a dominant position.

Thus, the Commission imposed on Servier fines totalling EUR 289 727 200 for the infringements of Article 101 TFEU, and a fine of EUR 41 270 000 for the infringement of Article 102 TFEU. The manufacturers of generic medicines involved were also given significant fines for having infringed Article 101 TFEU by participating in the agreements at issue.

Hearing actions brought by Servier and the manufacturers of generic medicines concerned, the General Court annulled the Commission decision in so far as it found an infringement of Article 101(1) TFEU in relation to the Krka agreements and an infringement of Article 102 TFEU, and cancelled the fines imposed respectively on Servier and Krka for those infringements. [39] In addition, it reduced the amount of the fine imposed on Servier for its participation in the Matrix agreement. [40] By contrast, the General Court confirmed all the other fines imposed.

Servier and the manufacturers of generic medicines whose actions had been dismissed brought appeals against the judgments of the General Court.

Findings of the Court

The concepts of potential competition and of restriction of competition by object

The Court of Justice examines, in the first place, the claims for annulment according to which the General Court erred in law in confirming the existence of potential competition between Servier and the manufacturers of generic medicines in question and in characterising the agreements at issue as restrictions of competition by object.

As a preliminary point, the Court notes that, for the purposes of the examination under Article 101(1) TFEU of collusive practices in the form of horizontal cooperation agreements between undertakings, such as the agreements at issue, it must be determined, at an initial stage, whether those practices may be classified as a restriction of competition by undertakings that are in competition with each other, even if only potentially.

If that is the case, it is necessary to ascertain, at a second stage, whether, in the light of their economic characteristics, those practices fall within the characterisation of a restriction of competition by object. Where there is a restriction by object, there is no need to examine, nor a fortiori to prove, their effects on competition. On the other hand, where the anticompetitive object of an agreement between undertakings or a concerted practice is not established, it is necessary to examine its effects.

In the light of those considerations, the Court of Justice rejects, first, the complaints alleging that the General Court applied a broad interpretation of the concept of potential competition and reversed the burden of proof borne by the Commission.

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39 Judgments of 12 December 2018, *Krka* v *Commission* (T-684/14, EU:T:2018:918), and *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922).

40 Judgment of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922).

The Court begins by recalling that, in the specific context of the opening of the market for a medicinal product to the manufacturers of generic medicines, it has already held that, in order to assess whether one of those manufacturers, although not present in a market, is a potential competitor of a manufacturer of originator medicines present in that market, it is necessary to determine whether there are real and concrete possibilities of the former moving into that market and competing with the latter. To that end, it is necessary to assess whether the manufacturer of generic medicines had taken sufficient preparatory steps to impose competitive pressure on the manufacturer of originator medicines. It must also be determined that the market entry of the manufacturer of generic medicines does not meet insurmountable barriers.

On the latter point, the Court states that, although the existence of patents protecting an originator medicine or one of its manufacturing processes is indisputably part of the economic and legal context characterising the relationships of competition between the holders of those patents and the manufacturers of generic medicines, the fact remains that the existence of a patent which protects the manufacturing process of an active ingredient that is in the public domain cannot, as such, be regarded as an insurmountable barrier to the market entry of a manufacturer of generic medicines. It follows that the existence of such a patent does not mean that a manufacturer of generic medicines which has in fact a firm intention and an inherent ability to enter the market, and which, by the steps taken, shows a readiness to challenge the validity of that patent and to take the risk, upon entering the market, of being subject to infringement proceedings brought by the patent holder, cannot be characterised as a potential competitor of the manufacturer of the originator medicine concerned.

In addition, although the perception on the part of a manufacturer of generic medicines of the strength of a patent is one of the relevant factors among others, such as the preparatory steps taken with a view to entering the market, for assessing the intentions of that manufacturer and, therefore, any firm intention on its part to make such an entry, that perception is not relevant, in principle, for the purpose of assessing the inherent ability of such a manufacturer actually to enter the market, nor, moreover, is it relevant for assessing the objective existence of insurmountable barriers to such entry.

Contrary to the claims of some of the appellants, the General Court did not, in that context, reverse the burden of proof in holding that, since the Commission established, on the basis of a body of consistent evidence, the existence of potential competition between Servier and the manufacturers of generic medicines in question, it was for those manufacturers to refute the existence of such competition by adducing evidence to the contrary. Moreover, such a burden of proof does not constitute a *probatio diabolica*, since it is sufficient for the undertakings in question to prove a positive fact, namely the existence of technical, regulatory, commercial or financial difficulties which constitute insurmountable barriers to one of them entering the market.

Second, the Court of Justice rejects the grounds of appeal according to which the General Court characterised the agreements at issue as restrictions of competition by object on the basis of incorrect criteria.

Having observed that that characterisation as restrictions of competition by object cannot be rejected on the ground that the Commission has no previous decision-making practice in that area, the Court of Justice rejects the complaints challenging the General Court's decision not to take into account the alleged positive effects of the agreements at issue on competition, since an examination of the effects of those agreements was not necessary, or even relevant, for the purpose of determining whether they may be characterised as a restriction of competition by object.

The General Court also did not err in rejecting the application of the case-law according to which a restriction ancillary to a legitimate agreement is not covered by the prohibition rule laid down in Article 101(1) TFEU if it is objectively necessary to the implementation of the legitimate agreement and proportionate to its objectives. That case-law requires that the main agreement be in no way anticompetitive, which is not the case with the agreements at issue.

In response to the complaints alleging that the General Court refused to take into consideration the appellants' intention to bring patent disputes to an end, the Court of Justice recalls that, while the objective aims of agreements from a competition standpoint are relevant for the purpose of assessing their possible anticompetitive object, the fact that the undertakings involved acted without having an intention to restrict competition and the fact that they pursued certain legitimate objectives are not decisive for the purposes of the application of Article 101(1) TFEU. Thus, the fact that the

negotiation of the agreements at issue might reflect an economically rational strategy from the appellants' point of view in no way demonstrates that the pursuit of that strategy is justifiable from the point of view of competition law.

Lastly, the Court rejects the arguments concerning the importance that should be attached to the reverse payments provided for in the agreements at issue, namely the payments made by Servier in favour of the manufacturers of generic medicines, for the purpose of characterising those agreements as a restriction of competition by object.

In that regard, the Court recalls that, while an agreement to settle a patent dispute may, under certain conditions, be concluded entirely lawfully on the basis of the parties' recognition of the validity of the patent in question, characterisation of such an agreement as a restriction of competition by object also depends on other characteristics of the agreement and on the circumstances in which it was concluded, as a result of which the agreement can, if applicable, be regarded as revealing a sufficient degree of harm to competition.

Accordingly, the presence of non-challenge and non-marketing clauses in a settlement agreement may give rise to characterisation as a restriction of competition by object where it is apparent that the manufacturer of generic medicines does not agree to those clauses on the basis of its recognition of the validity of the patent held by the manufacturer of originator medicines, but on the basis of a payment to it by the latter.

Consequently, where a patent dispute settlement agreement which contains non-challenge and non-marketing clauses involves transfers of value by the manufacturer of originator medicines in favour of the manufacturer of generic medicines, it is necessary to ascertain, first, whether the net gain from those transfers may be fully justified by the need to compensate for the costs of or disruption caused by the dispute to which the agreement relates, or by the need to provide remuneration for the actual and proven supply of goods or services from the manufacturer of generic medicines to the manufacturer of the originator medicine. If that is not the case, it must be ascertained, second, whether those transfers can have no explanation other than the commercial interest of those manufacturers of medicines not to engage in competition on the merits. For the purposes of that examination, it is necessary to determine whether the net gain from the transfers of value was sufficiently large actually to act as an incentive for the manufacturer of generic medicines to refrain from entering the market concerned, and there is no requirement that that net gain be necessarily greater than the profits which it would have made if it had been successful in the patent proceedings.

In that context, the Court of Justice states, in addition, that the General Court did not err in law in holding that certain costs reimbursed by Servier, such as any compensation owed to third parties by the manufacturers of generic medicines, could not be regarded as inherent in the settlement of the dispute. Nor, in that regard, did the General Court reverse the burden of proof by requiring the parties to the agreements at issue to demonstrate that those costs were inherent in the settlement in question.

The application of Article 101(1) TFEU to the agreements at issue

Having thus confirmed the General Court's interpretation of the concepts of potential competition and of restriction of competition by object, the Court of Justice carries out, in the second place, a detailed examination of the agreements at issue in the light of that reasoning.

A. The Niche and Matrix agreements

As regards the Niche and Matrix agreements, the Court observes that the common strategy of Niche Generics ('Niche'), its parent company Unichem Laboratories ('Unichem') and Matrix Laboratories ('Matrix') was to develop a generic version of perindopril and market it in the territory of the European Union. In that context, Matrix was responsible for producing the active ingredient while Unichem was responsible for the production of a generic version of perindopril in tablet form, using that active ingredient. The marketing of that medicinal product, including its regulatory aspects, was entrusted to Niche.

As regards Matrix, the Court also states that the company Mylan Inc. increased its holding in the capital of Matrix to 71.5% in January 2007, and to more than 97% in 2011. Since 5 October 2011, Matrix has been known as Mylan Laboratories.

In the light of the foregoing, the Court of Justice observes that the General Court did not err in law in finding that the transfers of value made by Servier pursuant to the Niche and Matrix agreements were intended to induce Niche, Unichem and Matrix to refrain from entering the perindopril market in the European Union. Moreover, since the patent-related obstacles to the entry of those manufacturers of generic medicines to the perindopril market were not insurmountable, those obstacles cannot call into question the inducive nature of the transfers of value established. Furthermore, the alleged absence of anticompetitive intent on the part of the parties to the Niche and Matrix agreements is not decisive for the purposes of the application of Article 101(1) TFEU.

The Court of Justice also rejects the complaints according to which the General Court erred in law in confirming that Niche and Matrix did not participate in a single infringement, but rather in two separate infringements, for which the Commission was entitled to impose individual fines. Since characterisation as a single infringement requires that each of the instances of anticompetitive conduct concerned form part of the same overall plan as a result of their identical anticompetitive object, the General Court correctly applied that test in holding that, in view of the absence of a common plan between Niche and Matrix, the Niche and Matrix agreements constituted two separate infringements.

As regards Mylan's liability for the infringement arising from the Matrix agreement and Unichem's liability for the infringement arising from the Niche agreement, the Court of Justice considers that the General Court correctly held that liability for Matrix's and Niche's conduct could be imputed to Mylan and Unichem respectively in their capacity as parent companies, since Matrix and Niche did not determine independently their own conduct on the market, but essentially carried out the instructions given to them by their parent companies, having regard especially to the economic, organisational and legal links between them.

As regards Unichem, the Court of Justice notes, moreover, that it is apparent from the findings of the General Court that both Unichem and its subsidiary Niche participated directly in the infringement arising from the Niche agreement. Since Unichem had not validly disputed the evidence demonstrating that direct participation before the General Court, that evidence was sufficient, in accordance with the principle of personal responsibility, to impute liability to it for that infringement.

Furthermore, the fact that Unichem is situated in a third country also does not prevent the application of Article 101 TFEU to it, since the Niche agreement was implemented in the European Union both by Servier and by Niche.

B. The Teva and Lupin agreements

As regards the application of Article 101(1) TFEU to the Teva agreement, the Court of Justice confirms the General Court's assessment that the net gain from the transfers of value provided for in that agreement induced Teva UK to refrain from entering the perindopril market, which justifies the characterisation of that agreement as a restriction of competition by object. Moreover, the line of argument according to which the Teva agreement had the legitimate objective of allowing Teva to enter the market in the United Kingdom by marketing a generic version of perindopril supplied by Servier is not capable of calling that characterisation into question, since the fact that those undertakings acted without having an intention to prevent, restrict or distort competition and the fact that they pursued certain legitimate objectives are not decisive for the purposes of the application of Article 101(1) TFEU.

As regards the Lupin agreement, the Court of Justice, by contrast, upholds Servier's complaint alleging that the General Court erred in law in confirming the Commission's conclusion that the infringement relating to that agreement continued on the Belgian, Czech, Irish and Hungarian markets after the marketing of a generic version of perindopril by the medicine manufacturer Sandoz, even though the introduction of that generic version on the French market had been accepted by the Commission as marking the end of the infringement resulting from the Lupin agreement on that national market.

C. The Biogaran agreement

Under the Biogaran agreement, Niche undertook, inter alia, to transfer to Biogaran marketing authorisation files for three medicinal products other than perindopril, and a marketing authorisation obtained in France for one of those three medicinal products. In return, Biogaran was to pay Niche

the sum of 2.5 million pounds sterling (GBP), which was non-refundable, even if those marketing authorisations were not obtained.

Taking the view that the Biogaran agreement had constituted an additional inducement intended to persuade Niche not to enter the perindopril market and revealed Biogaran's direct involvement in the infringement committed by Servier, the Commission imposed a significant fine on Servier and Biogaran, jointly and severally, for the infringement of Article 101 TFEU.

Since the General Court confirmed that analysis and the fine imposed by the Commission, the Court of Justice observes that it is essential to examine all the contractual arrangements in question as forming a whole. In the light, inter alia, of the economically inexplicable transfers of value resulting from the Biogaran agreement in favour of Niche, the Court of Justice thus finds that the General Court did not err in law in holding that the Biogaran agreement was an agreement ancillary to the Niche agreement intended to pay Niche additional remuneration in order to induce it to refrain from entering the perindopril market by means of the Niche agreement.

The imposition of the fines

Lastly, the Court rejects the various complaints relating to the imposition and calculation of the fines, with the exception of those raised by Servier relating to the duration of the infringement arising from the Lupin agreement. In particular, the Court rejects the arguments according to which, when faced with a novel situation such as that in the present case, characterised by a lack of previous decisions or case-law, and which is complex, the Commission could not impose fines without infringing the principle of legality of criminal offences and penalties.

In the latter regard, the Court recalls that the principle of legality of criminal offences and penalties indeed requires the law to give a clear definition of offences and the penalties which they attract, but that it does not preclude the gradual, case-by-case clarification of the rules on criminal liability by judicial interpretation, provided that the result was reasonably foreseeable at the time the offence was committed. In view of the scope of the prohibition laid down in Article 101(1) TFEU, Servier could not have been unaware that, by paying the manufacturers of generic medicines not to enter the perindopril market, it was engaging in conduct prohibited by that provision. Conversely, the manufacturers of generic medicines could reasonably have expected that, by agreeing to be paid by Servier to stay out of the perindopril market, their conduct was caught by the prohibition laid down in Article 101(1) TFEU. It follows that, despite the complexity of the agreements at issue and their context, the undertakings involved could not have been unaware of the unlawful nature of those agreements.

Conclusion

In the light of the foregoing, the Court dismisses in their entirety the various appeals brought by the manufacturers of medicines, with the exception of that brought by Servier, which is dismissed only in part. As regards the latter appeal, the Court upholds more specifically the complaints seeking to challenge the duration of the infringement relating to the Lupin agreement and, accordingly, the complaints relating to the calculation of the fine imposed on Servier in respect of its participation in that agreement. Taking the view, moreover, that the state of the proceedings permits final judgment to be given as regards those complaints, the Court, first, finds that the infringement relating to the Lupin agreement ended on the Belgian, Czech, Irish and Hungarian markets when the generic version of perindopril produced by Sandoz arrived on the French market, and, second, sets the fine imposed on Servier in respect of its participation in that agreement at EUR 34 745 100.

Judgment of the Court of Justice (First Chamber), 27 June 2024, Commission v Krka, C-151/19 P

Link to the full text of the judgment

Appeal – Competition – Pharmaceutical products – Market for perindopril – Article 101 TFEU – Agreements, decisions and concerted practices – Market sharing – Potential competition – Restriction of competition by object – Strategy to delay the market entry of generic versions of perindopril – Patent dispute settlement agreement – Patent licence agreement – Technology assignment and licence agreement

Judgment of the Court of Justice (First Chamber), 27 June 2024, Commission v Servier and Others, C-176/19 P

Link to the full text of the judgment

Appeal – Competition – Pharmaceutical products – Market for perindopril – Article 101 TFEU – Agreements, decisions and concerted practices – Market sharing – Potential competition – Restriction of competition by object – Strategy to delay the market entry of generic versions of perindopril – Patent dispute settlement agreement – Patent licence agreement – Technology assignment and licence agreement – Article 102 TFEU – Relevant market – Abuse of dominant position

The Court of Justice upholds the appeals brought by the European Commission against two judgments of the General Court [41] which annulled in part the decision by which the Commission found the existence of agreements and an abuse of a dominant position on the market for the pharmaceutical product perindopril and imposed fines on the manufacturers of medicines involved. [42] In so doing, the Court of Justice clarifies the dividing line between legitimate action by manufacturers of medicines which consists in settling actual patent disputes in the pharmaceutical sector, on the one hand, and agreements which unlawfully share the market for a pharmaceutical product under the guise of a patent dispute settlement agreement, on the other.

The Servier pharmaceutical group, the parent company of which, Servier SAS, is established in France (individually or jointly, 'Servier'), developed perindopril, a medicinal product in the class of angiotensin-converting enzyme inhibitors, used in cardiovascular medicine and primarily intended for the treatment of hypertension and heart failure. The perindopril compound patent, filed with the European Patent Office (EPO) in 1981, expired during the 2000s.

The active pharmaceutical ingredient of perindopril takes the form of a salt, which is erbumine. In 1988, Servier filed a number of patents with the EPO relating to processes for the manufacture of that active ingredient, with an expiry date of 16 September 2008.

A new patent relating to perindopril and the process for its manufacture was filed with the EPO by Servier in 2001 and was granted in 2004 ('the 947 patent'). Servier also obtained national patents relating to the 947 patent in several Member States before they were parties to the Convention on the Grant of European Patents.

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41 Judgments of 12 December 2018, *Servier and Others* v *Commission* (T-691/14, EU:T:2018:922), and *Krka* v *Commission* (T-684/14, EU:T:2018:918) (together, 'the judgments under appeal').

42 Commission Decision C(2014) 4955 final of 9 July 2014 relating to a proceeding under Article 101 and Article 102 [TFEU] (Case AT.39612 – Perindopril (Servier)) ('the decision at issue').

As from 2003, a number of disputes arose between Servier and manufacturers of generic medicines which were preparing to market a generic version of perindopril. In that context, 10 generic manufacturers filed opposition proceedings against the 947 patent before the EPO; the EPO Technical Board of Appeal revoked the contested patent in May 2009. Several manufacturers of generic medicines have also challenged the validity of the 947 patent before certain national courts. Servier, for its part, has brought infringement actions and applications for interim injunctions against the manufacturers of generic medicines in question, including the Slovenian company KRKA, tovarna zdravil, d.d. ('Krka').

In order to bring those disputes to an end, Servier concluded, between 2005 and 2007, settlement agreements with several generic manufacturers. With Krka, Servier thus concluded a settlement agreement covering the 947 patent and the equivalent national patents, a licence agreement and an assignment and licence agreement ('the Krka agreements'). Those agreements covered all the States that were members of the European Union at the material time, as well as non-members of the European Union constituting Krka's core markets.

According to the Commission, Servier and Krka concluded those agreements with the unlawful aim of dividing the territory of the countries covered into two spheres of influence, comprising, for each of them, their core markets, within which they could operate in the assurance, in the case of Servier, that it would not be subject to competitive pressure from Krka beyond the limits resulting from those agreements and, in the case of Krka, that it would not run the risk of being sued for infringement by Servier.

By decision of 9 July 2014, [43] the Commission found that the agreements concluded by Servier with Krka and the other generic manufacturers constituted restrictions of competition prohibited by Article 101 TFEU. It also considered that Servier had infringed Article 102 TFEU by drawing up and implementing an exclusionary strategy covering the market for perindopril and the technology market relating to the active ingredient of that medicinal product in France, the Netherlands, Poland and the United Kingdom.

Thus, the Commission imposed on Servier fines totalling EUR 289 727 200 for the infringements of Article 101 TFEU, including EUR 37 661 800 for its participation in the Krka agreements, and a fine of EUR 41 270 000 for the infringement of Article 102 TFEU. Krka, for its part, was fined EUR 10 million for having infringed Article 101 TFEU.

Hearing actions brought by Servier and Krka, the General Court found that the Commission had erred in law in characterising the Krka agreements as an infringement of Article 101(1) TFEU without having established the existence of a restriction of competition by object or by effect. As regards the infringement of Article 102 TFEU of which Servier was accused, the General Court considered that the Commission's definition of the perindopril market was vitiated by errors of assessment such as to invalidate its findings relating to Servier's dominant position on the relevant market.

Consequently, by two judgments delivered on 12 December 2018, [44] the General Court annulled the decision at issue in so far as it finds an infringement of Article 101 TFEU in relation to the Krka agreements and an infringement of Article 102 TFEU, and cancelled the fines imposed respectively on Servier and Krka in respect of those infringements.

The Commission brought two appeals before the Court of Justice against those judgments of the General Court.

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43 See footnote 2.

44 See footnote 1.

Findings of the Court

The infringement of Article 101 TFEU

A. Existence of potential competition between Servier and Krka

The Court of Justice examines, in the first place, the Commission's complaints alleging that the General Court erred in its interpretation and application of the concept of potential competition.

As a preliminary point, the Court notes that, for the purposes of the examination under Article 101(1) TFEU of collusive practices in the form of horizontal cooperation agreements between undertakings, such as the Krka agreements, it must be determined, at an initial stage, whether those practices may be classified as a restriction of competition by undertakings that are in competition with each other, even if only potentially. If that is the case, it is necessary to ascertain, at a second stage, whether, in the light of their economic characteristics, those practices fall within the characterisation of a restriction of competition by object. Where the anticompetitive object of those practices is not established, it is necessary to examine their effects.

That clarification having been made, the Court of Justice finds the complaints alleging errors in the interpretation and application of the concept of potential competition to be effective, since the General Court had examined several recitals of the decision at issue relating to the issue of potential competition between Krka and Servier, as well as certain complaints put forward in that regard by Servier.

As regards the substance, the Court of Justice finds that, by holding that, at the time the Krka settlement and licence agreements were concluded, there were consistent indications capable of leading Servier and Krka to believe that the 947 patent was valid, the General Court inferred from those indications that competition between those undertakings on the national markets within the European Union was now precluded and that there was therefore no potential competition between them.

In order to reach such a conclusion as to the absence of potential competition, the General Court should have ascertained whether the Commission had failed to establish that, on the date on which the Krka agreements were concluded, there were real and concrete possibilities for Krka to enter the relevant market and compete with Servier, in view of sufficient preparatory steps and the absence of insurmountable barriers to that entry.

However, instead of carrying out the necessary verifications on that point, the General Court merely stated that Servier and Krka were convinced that the 947 patent was valid and that Krka's conduct consisting in maintaining competitive pressure on Servier could be explained by Krka's desire to strengthen its position in potential negotiations with a view to reaching a settlement agreement accompanied by a licence agreement. In so doing, the General Court was mistaken as to the legal relevance of the patent situation found to exist on the markets in question, as well as of the parties' intentions. It also failed to state the reasons for its implicit finding that Servier and Krka were no longer potential competitors, despite the evidence in the decision at issue aimed at demonstrating the contrary.

Furthermore, the Court of Justice points out that, in its examination of the context in which the Krka settlement and licence agreements were concluded, the General Court not only distorted the clear and precise terms of a decision of a United Kingdom court concerning a counterclaim for annulment of the 947 patent brought by Krka, but also the meaning and scope of the decision at issue as regards the effects of a decision of the EPO Opposition Division, which had validated that patent.

Thus, the Court of Justice upholds the Commission's complaints alleging that the General Court erred in its interpretation and application of the concept of potential competition.

B. Characterisation of the Krka agreements as restrictions of competition by object

In the second place, the Court of Justice finds that the General Court erred in law in concluding that there was no restriction of competition by object.

In the judgments under appeal, the General Court held that, where there is a genuine dispute relating to a patent, an agreement settling that dispute containing competition-restricting clauses and which is linked to a licence agreement concerning that patent can be characterised as a restriction of

competition by object only if the Commission can demonstrate that that licence agreement does not constitute a transaction concluded at arm's length and thus masks a reverse payment.

However, according to the Court, that reasoning disregards the very nature of the agreements at issue, which consist not in a simple patent dispute settlement agreement in return for a reverse payment, but in an agreement to divide markets into two areas, one of which does not, moreover, fall within the scope of the infringement of Article 101 TFEU.

That error of law led the General Court to verify the characterisation of the unlawful practice attributed to Servier and Krka as a restriction of competition by object by analysing the form and legal characteristics of the agreements intended to implement that practice, whereas it was incumbent on that court to assess the degree of economic harm of those agreements by carrying out a detailed analysis of their characteristics, their objectives and the economic and legal context of which they form part.

Furthermore, in holding that, since the Krka settlement and licence agreements had not reserved a part of the market for Krka, it could not be concluded that there was market-sharing, the General Court also erred in its interpretation of Article 101(1)(c) TFEU, since the prohibition of agreements which share markets, laid down in that provision, is not limited to agreements establishing a 'hermetic' division between the markets.

In addition, the General Court made another error of law by introducing, in its reasoning relating to the absence of a restriction of competition by object, considerations relating to the allegedly hypothetical nature of the potential effects of the agreements at issue, whereas there is no need to investigate or, a fortiori, to demonstrate the effects on competition of practices classified as restrictions of competition by object, including in the context of any examination of whether the relevant conduct reveals the degree of harm required in order to be characterised as such.

Similarly, by criticising the Commission for failing to demonstrate, in essence, that either Servier or Krka intended to restrict competition between them, although no such demonstration was required in order to establish the existence of a restriction of competition by object, the General Court also erred in law.

Moreover, the General Court infringed the principle that evidence may be freely adduced by holding that there is a distinction in law, as regards the taking into account of fragmentary and sparse evidence in order to establish the existence of an infringement, between situations in which the content of anticompetitive agreements, as in the present case, is available to the Commission and those in which that content is not available to it. Next, the General Court made a further error of law by holding that inferences drawn from partial extracts of emails or other documents purporting to establish the intentions of the parties cannot easily call into question a finding based on the actual content of the agreements at issue.

Lastly, the Court of Justice recalls that the possibility that a patent licence may have pro-competitive effects in certain geographical markets is entirely irrelevant for the purpose of assessing whether it should be characterised as a restriction of competition by object under Article 101(1) TFEU. By taking into account the positive effects of the Krka licence agreement in Krka's core markets, the General Court therefore erred in its interpretation and application of Article 101(1) TFEU, especially since Krka's core markets do not fall within the geographical scope of the infringement of Article 101 TFEU.

In the light of the errors referred to above, the Court of Justice concludes that the General Court's reasoning relating to the absence of a restriction of competition by object brought about by the Krka agreements is, in its entirety, vitiated by illegality.

C. Characterisation of the Krka agreements as a restriction of competition by effect

In the third place, the Court of Justice criticises the General Court's conclusion that the Commission had not established that the Krka agreements had had the effect of restricting competition, since the Commission had failed to prove that, in the absence of the agreements at issue, Krka would probably have entered Servier's core markets.

In that regard, the Court recalls that, in order to assess the existence of anticompetitive effects caused by an agreement between undertakings, it is necessary to compare the competitive situation resulting from that agreement and the situation that would exist in its absence. That 'counterfactual' method

requires taking into consideration the actual context in which that agreement is situated. Thus, the counterfactual scenario, envisaged on the basis of the absence of that agreement, must be realistic and credible.

In the light of that clarification, the Court of Justice holds that the General Court misconstrued, in three main respects, the characteristics of the counterfactual method for the purpose of applying Article 101 TFEU.

First, the General Court held that the assessment of the anticompetitive effects of the Krka settlement agreement was based on a hypothetical approach and an incomplete examination of those effects, since the Commission had not included in the counterfactual scenario the actual course of events subsequent to that agreement. However, that reasoning of the General Court disregards the fact that the counterfactual scenario which, by definition, is hypothetical, in the sense that it has not materialised, cannot be based on matters subsequent to the conclusion of that agreement.

Second, the General Court erred in holding that the case-law according to which an agreement between undertakings may be characterised as a restriction of competition by effect by reason of its potential effects ceases to be applicable once that agreement has been implemented, on the ground that the actual effects of that agreement on competition can be observed. Where, as in the present case, an agreement leads not to a change but, on the contrary, to keeping unchanged the number or the conduct of competing undertakings already present within a market, a mere comparison between the situations found to exist on that market before and after the implementation of that agreement would be insufficient to support the conclusion that there has been no anticompetitive effect, since the anticompetitive effect arises from the certain disappearance, as a result of that agreement, of a source of competition which, at the time that agreement is concluded, remains potential.

Third, it follows from the case-law that, when it establishes the counterfactual scenario for the purpose of examining a patent dispute settlement agreement between a manufacturer of originator medicines and a manufacturer of generic medicines, the Commission is not required to make a definitive finding in relation to the chances of success of the manufacturer of generic medicines in the patent dispute or to the probability of the conclusion of a less restrictive agreement. It follows that the General Court erred in its interpretation and application of Article 101(1) TFEU by holding that the Commission had failed to prove that, in the absence of the settlement agreement, Krka would probably have entered the relevant markets and that the continuation of the litigation challenging the validity of the 947 patent would probably, or even plausibly, have allowed a faster or more complete invalidation of that patent.

The Court of Justice concludes that the errors of law thus identified vitiate with illegality the entirety of the General Court's reasoning rejecting the characterisation of the Krka agreements as a restriction of competition by effect.

The infringement of Article 102 TFEU

In the fourth place, the Court of Justice rejects the General Court's conclusion that the definition of the relevant product market adopted by the Commission for the purposes of its examination of the existence of an abuse of a dominant position by Servier was vitiated by errors such as to invalidate that examination. In that regard, the General Court had found, inter alia, that the Commission wrongly limited the relevant market to perindopril alone, to the exclusion of other medicinal products in the class of angiotensin-converting enzyme inhibitors ('the ACE medicinal products').

On that point, the Court recalls that the definition of the relevant market, which is a prerequisite for the assessment of a possible dominant position within the meaning of Article 102 TFEU, involves defining, first, the product market and then, second, the geographical market for the product.

It is also apparent from the case-law that the concept of the relevant market presupposes that there is a sufficient degree of interchangeability between the products or services which form part of it. As regards, more specifically, the examination of the economic substitutability between medicinal products, it must be assessed in the light of the shifts in sales between medicinal products intended for the same therapeutic indication, brought about by the changes in the relative prices of those medicinal products. A finding that there is no such substitutability reveals the existence of a distinct market, whatever the reasons for that finding.

Since the Commission concluded that there was no interchangeability between perindopril and the other ACE medicinal products in the light of the finding, not disputed by Servier, of the relative inelasticity of demand for perindopril as compared with the sharp fall in the prices of other ACE medicinal products on the markets concerned, the General Court erred in law by criticising the Commission for having limited the relevant market to perindopril alone.

Since the General Court then held that the Commission's conclusion as to Servier's dominant position on the technology market relating to the active ingredient of perindopril was based on an incorrect definition of the relevant market, the Court of Justice holds that those findings of the General Court are based on an incorrect premiss and, therefore, are also vitiated by illegality.

Since the Commission's grounds of appeal relating to the abovementioned errors have been upheld, the Court sets aside the judgments under appeal in part.

The actions for annulment brought by Servier and Krka

The Court of Justice considers, in the fifth place, that the state of the proceedings permits final judgment to be given concerning the pleas in law put forward by Servier and Krka before the General Court in order to challenge the characterisation, in the decision at issue, of the Krka settlement and licence agreements as a restriction of competition by object and the characterisation of the Krka settlement agreement and the Krka assignment and licence agreement as a restriction of competition by effect.

As regards, first, the characterisation of the Krka settlement and licence agreements as a restriction of competition by object, the Court ascertains, at an initial stage, whether the Commission was entitled to characterise those agreements as a restriction of potential competition exerted by Krka on Servier. To that end, it examines whether, on the date on which those agreements were concluded, there were real and concrete possibilities for Krka to enter the perindopril market and compete with Servier.

In that respect, the Court emphasises that the existence of a patent which protects the manufacturing process of an active ingredient that is in the public domain cannot, as such, be regarded as an insurmountable barrier to the market entry of generic medicines based on that active ingredient. It follows that the existence of such a patent does not mean that a manufacturer of generic medicines which has in fact a firm intention and an inherent ability to enter the market, and which, by the steps taken, shows a readiness to challenge the validity of that patent and to take the risk, upon entering the market, of being subject to infringement proceedings brought by the patent holder, cannot be characterised as a potential competitor of the manufacturer of the originator medicine concerned.

As regards Krka's firm intention to continue its efforts to market its perindopril despite the legal defeats it had suffered in 2006 in patent disputes between it and Servier, the Court observes that it is apparent from the evidence cited by the Commission in the decision at issue that Krka had not ceased its efforts to enter Servier's core markets.

Nor, moreover, is the fact that Krka negotiated with Servier with the aim of concluding the Krka settlement and licence agreements sufficient to demonstrate that Krka no longer had the firm intention to compete with Servier.

In view of the foregoing, the Court concludes that Krka was a potential competitor of Servier at the time of the conclusion of the Krka settlement and licence agreements.

At a second stage, the Court determines whether the Commission was wrong to consider that the object of the Krka settlement and licence agreements was to share the perindopril markets.

In that regard, it states that the fact that patent dispute settlement agreements, like licence agreements associated with such agreements, may be concluded in pursuit of an objective which may be legitimate cannot exclude them from the application of Article 101 TFEU if it is established that those agreements have the aim of restricting competition. In the present case, it is also clear from the wording of the Krka settlement and licence agreements and the circumstances surrounding their conclusion that they are economically connected and cannot be examined separately.

The combined effect of the Krka licence agreement, by which Servier decided not to oppose the marketing by Krka of a generic version of perindopril on Krka's core markets, and of the settlement

agreement, which provides for a non-infringement obligation on the part of Krka with respect to Servier's core markets, amounts, from an economic point of view, to a quid pro quo, enabling Servier and Krka to maintain a more favourable position on their respective core markets. A set of agreements of that sort entails, in principle, a sharing of those markets and, therefore, a restriction of competition by object, which cannot be put in context or offset by any positive or pro-competitive effects on any market whatsoever.

In the light of those factors, the Court holds that the evidence put forward in the decision at issue demonstrates the existence of a practice aimed, for Servier and Krka, at sharing the perindopril market by means of the Krka settlement and licence agreements, and is sufficient to justify the characterisation of that practice as a restriction of competition by object.

As regards, second, the characterisation of the Krka settlement agreement and the Krka assignment and licence agreement as a restriction of competition by effect, the Court recalls that it was for the Commission to compare the competitive situation resulting from those agreements with the competitive situation resulting from a realistic and credible counterfactual scenario. In so far as, in the present case, the restriction of competition at issue related to the elimination of the source of potential competition exerted by Krka on Servier, the analysis of the counterfactual scenario corresponded, in essence, to the analysis of the existence of that potential competition.

In the light of those clarifications, the Court finds that the Commission was entitled to consider that Krka represented one of the most immediate threats for Servier, on account of the fact that it had real and concrete possibilities of entering the markets in France, the Netherlands and the United Kingdom. In the absence of the Krka agreements, that possibility of entry by Krka, by means of its perindopril, would not have been eliminated. Consequently, the Commission established that the elimination, through the implementation of those agreements, of that source of potential competition had the effect of appreciably restricting competition. That effect, which is neither hypothetical nor potential, but real, is such as to justify the characterisation as a restriction of competition by effect adopted in the decision at issue.

After thus ruling on certain pleas in law put forward by Servier and Krka before the General Court, the Court of Justice finds that the state of the proceedings does not, however, permit final judgment to be given in its entirety. Therefore, it refers the case back to the General Court for it to rule on the characterisation of the Krka assignment and licence agreement as a restriction of competition by object, and, in *Commission* v *Servier and Others* (C-176/19 P), on the remaining pleas relating to the infringement of Article 102 TFEU and on the pleas put forward in the alternative seeking to challenge the amount of the fine.

2. FINES

Judgment of the Court of Justice (Grand Chamber), 11 June 2024, Commission v Deutsche Telekom, C-221/22 P

Link to the full text of the judgment

Appeal – Competition – Articles 266 and 340 TFEU – Judgment reducing the amount of a fine imposed by the European Commission – Repayment by the Commission of the amount unduly collected – Obligation to pay interest – Characterisation – Compensation at a standard rate for loss of enjoyment of the unduly paid amount of the fine – Rate applicable

The Court of Justice, sitting as the Grand Chamber, dismisses the appeal brought by the European Commission against a judgment of the General Court ordering it to pay EUR 1 750 522 to Deutsche Telekom AG as compensation for the harm caused by that institution's refusal to pay interest on the amount to be repaid to that undertaking following the reduction of a fine which the latter had provisionally paid.

On 15 October 2014, [45] the Commission imposed on Deutsche Telekom a fine of approximately EUR 31 070 000 for abuse of a dominant position on the Slovak market for broadband telecommunications services.

Deutsche Telekom brought an action for annulment of that decision, while provisionally paying that fine on 16 January 2015. By judgment of 13 December 2018, [46] the General Court upheld that action in part and reduced the amount of the fine by EUR 12 039 019. On 19 February 2019, the Commission repaid that amount to Deutsche Telekom.

However, by letter of 28 June 2019, the Commission refused to pay interest to Deutsche Telekom for the period between the date of payment of the fine and the date of reimbursement of the portion of the fine held not to be due ('the relevant period').

Following an action brought by Deutsche Telekom, the General Court [47] held, inter alia, that the Commission's refusal to pay interest constitutes a sufficiently serious infringement of the first paragraph of Article 266 TFEU, [48] capable of giving rise to non-contractual liability on the part of the European Union. Given the direct causal link between that infringement and the harm consisting in the loss, during the relevant period, of default interest on the amount of the fine that had been unduly collected, the Court awarded Deutsche Telekom compensation in the amount of EUR 1 750 522 calculated on the basis of an application, by analogy, of the interest rate provided for in Article 83(2)(b) of Delegated Regulation No 1268/2012, [49] namely the European Central Bank (ECB) refinancing rate in force in January 2015, increased by 3.5 percentage points.

The Commission brought an appeal against that judgment before the Court of Justice.

Assessment of the Court

First of all, the Court of Justice rejects the plea of inadmissibility raised by Deutsche Telekom, alleging that the appeal is, in actual fact, directed not against the judgment under appeal, but against the judgment of the Court of Justice in *Printeos* [50] on which the General Court relied in its judgment.

On that point, the Court of Justice observes that the Commission, like any other party to an appeal, must retain the opportunity to call into question the legal principles which the General Court applied in the judgment under appeal, even if those principles were developed in judgments which cannot or can no longer be the subject of an appeal.

In the present case, the Commission had itself argued that its appeal sought to invite the Court of Justice to reconsider its case-law resulting from the judgment in *Printeos*, as applied by the General Court in the judgment under appeal. Since the arguments put forward by the Commission also identify with sufficient precision the contested elements of the judgment under appeal and the grounds on which that judgment is, in its view, vitiated by errors of law, the Court of Justice declares the appeal admissible.

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45 Commission Decision C(2014) 7465 final of 15 October 2014 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom), rectified by Decision C(2014) 10119 final of 16 December 2014, and also by Decision C(2015) 2484 final of 17 April 2015.

46 Judgment of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930).

47 Judgment of 19 January 2022, *Deutsche Telekom* v *Commission* (T-610/19, EU:T:2022:15; 'the judgment under appeal').

48 That provision requires the institutions whose act is annulled by a judgment of a Court of the European Union to take all the necessary measures to comply with that judgment.

49 Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p.1).

50 Judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39).

As to the substance, the Court rejects, in the first place, the Commission's ground of appeal alleging that the General Court erred in law in its interpretation of Article 266 TFEU.

In that regard, the Court of Justice points out that, under the first paragraph of Article 266 TFEU, the institution whose act has been declared void must take the necessary measures to comply with that judgment with *ex tunc* effect. That entails, inter alia, the payment of sums unduly collected on the basis of that act and the payment of interest. In that context, the payment of interest constitutes a measure giving effect to a judgment annulling a measure that is designed to compensate, at a standard rate, for the loss of enjoyment of the monies owed and to encourage the debtor to comply with that judgment as soon as possible.

More generally, where sums of money have been received in breach of EU law, whether by a national authority or an institution, body, office or agency of the European Union, those sums of money must be repaid and that refund must bear interest covering the entire period from the date of payment of those sums of money to the date of their repayment, which constitutes the expression of a general principle of recovery of sums paid but not due.

It follows that the General Court did not err in law in holding that the Commission infringed the first paragraph of Article 266 TFEU by refusing to pay interest to Deutsche Telekom on the amount of the fine unduly collected in respect of the relevant period.

The validity of that conclusion is not called into question by the fact that the General Court has on several occasions classified the interest payable by the Commission in the present case as 'default interest', a concept which refers to the existence of a delay in payment by a debtor and to an intention to penalise that debtor. However questionable that description may be, having regard to the purpose of the interest concerned, the fact remains that the General Court considered that the Commission was required to pay interest upon repayment of the amount unduly collected, with a view to compensating Deutsche Telekom at a standard rate for the loss of enjoyment of that amount, in accordance with the principles set out above.

Similarly, the General Court did not err in law in rejecting the Commission's arguments based on Article 90(4)(a) of Delegated Regulation No 1268/2012, according to which the Commission is to reimburse the amounts unduly collected from the third party concerned, together with the 'interest yielded'. That potential obligation to pay interest actually yielded is without prejudice to the Commission's obligation, in any event, under the first paragraph of Article 266 TFEU, to compensate the undertaking concerned at a standard rate for loss of enjoyment resulting from the transfer to the Commission of the sum of money corresponding to the amount of the fine unduly paid, including where the investment of the amount of the fine provisionally paid by that undertaking has not yielded a return.

The Court of Justice also endorses the General Court's analysis that the Commission's obligation to pay interest from the date of provisional collection of the fine does not undermine the deterrent function of fines, which must be reconciled with the requirements of effective judicial protection. In any event, the deterrent effect of the fines cannot be relied on in the context of fines that have been annulled or reduced by a Court of the European Union, since the Commission cannot rely on an act declared to be unlawful for the purposes of deterrence.

In the second place, the Court of Justice analyses the Commission's ground of appeal that the General Court erred in law in finding that the interest rate payable to Deutsche Telekom is at the ECB refinancing rate increased by 3.5 percentage points, by analogy with Article 83(2)(b) of Delegated Regulation No 1268/2012.

It points out in that regard that it is apparent from the case-law of the Court of Justice that, for the purposes of determining the amount of interest that must be paid to an undertaking which paid a fine imposed by the Commission, following the annulment or reduction of that fine, the Commission must apply Article 83 of Delegated Regulation No 1268/2012 then in force, which provided for several interest rates for amounts receivable not repaid on the deadline.

The Court of Justice notes that the rate laid down in Article 83(2)(b), applied by analogy by the General Court in the present case, does not fix the rate of interest corresponding to compensation at a standard rate such as that at issue in the present case, but the separate situation of late payment. That is precisely the reason why the General Court applied that provision by analogy. In applying, by

analogy, the ECB refinancing rate increased by 3.5 percentage points, which does not appear unreasonable or disproportionate in the light of the purpose of the interest concerned, the General Court did not err in law in the exercise of the jurisdiction conferred on it in proceedings seeking to establish the non-contractual liability of the European Union.

The Court of Justice also rejects the argument put forward by the Commission in the alternative that the rate of 1.55% provided for in Article 83(4) of Delegated Regulation No 1268/2012 should be applied by analogy to a situation where a financial guarantee has been provided.

In that regard, the Court of Justice states that an undertaking which, while having brought an action against the Commission's decision to impose a fine on it, paid that fine on a provisional basis is not in the same situation as an undertaking providing a bank guarantee pending the exhaustion of legal remedies. Since the latter undertaking has not transferred the sum of money corresponding to the amount of the fine imposed, the Commission may not be required to repay to it an amount unduly collected. The only financial loss that may have been sustained by the undertaking concerned is the consequence of its own decision to provide a bank guarantee.

Finally, the Court of Justice highlights the fact that, if the Commission were to consider that the current regulatory provisions do not adequately take into account a situation such as that giving rise to the present case, it would be for the Commission or, as the case may be, the EU legislature to close that loophole. That being so, in view of the fact that the Commission's obligation to pay interest on the repayment of a fine annulled in whole or in part by a Court of the European Union stems from the first paragraph of Article 266 TFEU, any new method or mechanism for calculating that interest must comply with the objectives pursued by such interest. Consequently, the interest rate applicable to that interest cannot be limited to compensating monetary depreciation, without covering compensation at a standard rate for the temporary loss of the use of the funds corresponding to the amount unduly collected by the Commission.

For those reasons, the Court of Justice rejects the Commission's second ground of appeal and, therefore, dismisses the appeal in its entirety.

3. STATE AID

Judgment of the Court of Justice (Second Chamber), 13 June 2024, Commission v Netherlands (Determining the compatibility of a measure not classified as State aid), C-40/23 P

Link to the full text of the judgment

Appeal – State aid – Law prohibiting the use of coal for the production of electricity – Early closure of a coal-powered power plant – Award of compensation – Decision declaring the measure compatible with the internal market without stating whether State aid exists – Exercise of the European Commission's powers

Dismissing the appeal brought by the European Commission against the judgment of the General Court of 16 November 2022 [51] in a case between it and the Kingdom of the Netherlands, the Court of Justice clarifies the conditions for the exercise of the Commission's power to examine the compatibility of a national measure with the internal market in the light of Articles 107 and 108 TFEU.

[51] Judgment of 16 November 2022, *Netherlands* v *Commission* (T-469/20, EU:T:2022:713).

In its judgment, the General Court had considered that the Commission could not decide on the compatibility of a national measure with the internal market without first establishing whether that measure constituted State aid within the meaning of Article 107(1) TFEU.

In 2019, the Netherlands authorities notified the Commission of a draft law prohibiting the use of coal for the production of electricity, in accordance with Directive 2015/1535. [52] That law sought to reduce carbon dioxide (CO_2) emissions in the Netherlands and provided for compensation for the damage caused to a coal-fired power plant disproportionately affected, as compared with other power plants, by the prohibition on using coal for the production of electricity. However, it was not notified to the Commission under Article 108(3) TFEU.

Following the notification of the draft law under Directive 2015/1535, the Commission, acting on its own initiative, began to examine the information concerning alleged aid and concluded, by decision of 12 May 2020, [53] that the measure at issue was compatible with the internal market, in accordance with Article 107(3)(c) TFEU, [54] without, however, having found that that measure conferred an advantage on the beneficiary and therefore constituted State aid.

The Kingdom of the Netherlands then brought an action for annulment of that decision before the General Court, alleging that the Commission had exceeded its powers and created legal uncertainty. Following the annulment of that decision by the General Court, the Commission brought an appeal against the judgment of the General Court before the Court of Justice.

Findings of the Court

In support of its appeal, the Commission maintained in particular that, by finding that it had no power to decide that a measure is compatible with the internal market without first having classified it as State aid, the interpretation of the General Court of Article 107(3) TFEU was too restrictive. According to the Commission, the term 'aid' in that article also covers measures whose classification as State aid remains uncertain.

In that regard, the Court of Justice observes that although the term 'aid' is used according to the usual meaning in everyday language in Article 107(1) TFEU, it refers, by contrast, only to State aid in Article 107(3). It follows from Article 107(1) TFEU that only measures which fulfil the conditions arising from paragraph 1 and which, consequently, constitute State aid are, save as otherwise provided in the Treaty, incompatible with the internal market. Therefore, Article 107(3) TFEU, which, by way of exception to that provision, lists the measures which may be considered to be compatible with the internal market, can concern only State aid.

Although it is true that Article 107 TFEU neither lays down procedural rules nor directly concerns the Commission's powers, the fact remains that it is apparent from that provision that the classification of a measure as State aid within the meaning of paragraph 1 of that provision is a precondition for the possible application of the exception laid down in paragraph 3. The European Union thus has the power to decide on the compatibility with the internal market of measures constituting State aid, and has no power to decide on the compatibility with the internal market of measures which have not been established as being State aid. Articles 108 TFEU confers on the Commission, subject to review by the Court of Justice, the exercise of that power. The EU institutions may only act within the limits of the powers conferred on them.

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52 Directive of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ 2015 L 241, p. 1).

53 Commission Decision C(2020) 2998 final of 12 May 2020 on State aid SA.54537 (2020/NN) – Netherlands, Prohibition of coal for the production of electricity in the Netherlands ('the decision at issue').

54 Under Article 107(3)(c) TFEU, 'the following may be considered to be compatible with the internal market: … (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

In the light of the foregoing, the Court of Justice considers that the General Court was fully entitled to annul the decision at issue.

VI. APPROXIMATION OF LAWS

1. COPYRIGHT

Judgment of the Court of Justice (First Chamber), 20 June 2024, GEMA, C-135/23

Link to the full text of the judgment

Reference for a preliminary ruling – Intellectual property – Copyright and related rights – Directive 2001/29/EC – Article 3(1) – Communication to the public – Concept – Mere provision of physical facilities – Provision in apartments of television sets equipped with an indoor antenna enabling signals to be picked up and broadcasts to be made – Profit-making nature – Principle of technological neutrality

Ruling on a request for a preliminary ruling from the Amtsgericht Potsdam (Local Court, Potsdam, Germany), the Court of Justice clarifies the concept of 'communication to the public' of a protected work, within the meaning of Article 3(1) of Directive 2001/29/EC, [55] in the context of the provision, by the operator of an apartment building, of television sets equipped with an indoor antenna enabling signals to be picked up and broadcasts to be made.

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA), a collective management organisation that handles music copyright, brought a claim for damages under copyright law against GL, the operator of an apartment building comprising 18 rented apartments, on the ground that GL provides, in those apartments, such television sets.

In order to resolve that dispute, the referring court seeks to ascertain, in essence, whether the concept of 'communication to the public', referred to in Article 3(1) of Directive 2001/29 ('the concept of "communication to the public"'), covers the provision of such television sets.

Findings of the Court

At the outset, the Court recalls that the concept of 'communication to the public' includes two cumulative criteria, namely the act of communication of a work and the communication of that work to a public, and requires an individual assessment. According to the case-law of the Court, it is, in particular, the indispensable role of the user in order to give his or her customers access to protected works and the deliberate nature of his or her intervention, in particular if that intervention is of a profit-making nature, which makes it possible to distinguish between, on the

55 Under Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

one hand, the 'communication to the public' and, on the other hand, the 'mere provision of physical facilities'. [56]

The Court finds that, although it is for the national court to determine whether the building operator in the main proceedings carries out an act of 'communication to the public', it is for the Court to provide it with useful indications in that regard to enable the national court to decide the case before it.

In that regard, the Court notes, in the first place, that the operator of an apartment building, by installing in those apartments television sets and indoor antennae that, without further intervention, pick up signals and enable broadcasts to be made, in particular of music, deliberately makes an intervention in order to give its clientele access to those broadcasts, within rented apartments and during the rental period, irrespective of whether the latter avails itself of that opportunity. In addition, that intervention of the operator must be considered to be an additional service performed with the aim of obtaining some benefit. Thus, the offer of such a service makes it possible to establish that the communication is of a profit-making nature. In that regard, the fact that the television sets are connected to an 'indoor' antenna rather than a 'central' antenna is irrelevant, since such a distinction between the antennae is not consistent with the principle of technological neutrality.

In the second place, as regards the question whether the protected works are actually communicated to a public, the Court points out that the concept of 'public' refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of people. Thus, that concept involves a certain *de minimis* threshold, which excludes from that concept a group of persons concerned that is too small, or insignificant. In order to determine that number, account should be taken, in particular, of the number of persons able to access the work at the same time, but also in succession. If the referring court were to find that the apartments in the building at issue in the main proceedings are let on a short-term basis, in particular as tourist accommodation, their tenants should be classified as a 'public', since together they constitute an indeterminate number of potential recipients.

In the third place, the Court states that, in order to be categorised as a 'communication to the public', a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holder when it authorised the initial communication of its work to the public. In that regard, tenants of apartments in a building that are let on a short-term basis, in particular as tourist accommodation, are capable of constituting such a 'new' public, since those persons, although within the catchment area of that broadcast, could not, without the intervention of the operator of that apartment building, involving the installation of television sets equipped with indoor antennae in those apartments, enjoy the broadcast works. By contrast, if the referring court were to find that those apartments are let to tenants who establish their residence there, those tenants cannot be regarded as a 'new public'.

Therefore, the Court finds that the concept of 'communication to the public' must be interpreted as meaning that it covers the deliberate provision, by the operator of a rented apartment building, of television sets equipped with an indoor antenna that, without further intervention, pick up signals and enable broadcasts to be made, provided that the tenants of those apartments can be regarded as a 'new public'.

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56 According to recital 27 of Directive 2001/29, 'the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of [that] Directive.'

2. EUROPEAN UNION TRADEMARK

Judgment of the Court of Justice (Fifth Chamber), 20 June 2024, EUIPO v Indo European Foods, C-801/21 P

Link to the full text of the judgment

Appeal – EU trade mark – Application for EU figurative mark Abresham Super Basmati Selaa Grade One World's Best Rice – Earlier non-registered United Kingdom word mark BASMATI – Regulation (EC) No 207/2009 – Article 8(4) – Regulation (EU) 2017/1001 – Article 72 – Relative ground for refusal – Opposition – Appeal before the Board of Appeal – Dismissal – Action before the General Court – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Articles 126 and 127 – Transition period – Effects of the end of the transition period on the protection of the earlier mark – Circumstances after the adoption of the decision at issue – Continuance of the purpose of the action and of the interest in bringing proceedings

The Court of Justice, hearing an appeal brought by the European Union Intellectual Property Office (EUIPO), which it dismisses, rules on the issue of the continuing existence of the purpose of the action and on the issue of the opponent's continuing interest in bringing proceedings, following the disappearance, on a date subsequent to the decision confirming the rejection of the opposition and to the bringing of an action before the General Court against that decision, of the protection conferred on the earlier right due to the end of the transition period established by the Agreement on the withdrawal of the United Kingdom from the European Union. [57]

On 14 June 2017, Mr Chakari filed an application with EUIPO for registration of the EU figurative mark Abresham Super Basmati Selaa Grade One World's Best Rice, for goods made from rice. Indo European Foods Ltd filed a notice of opposition [58] on the basis of the earlier non-registered United Kingdom word mark BASMATI, which, under the applicable law in the United Kingdom, would allow it to prevent the use of the mark applied for. The Opposition Division rejected the opposition.

Subsequently, by decision of 2 April 2020 ('the decision at issue'), the Board of Appeal upheld the rejection of the opposition on the ground that Indo European Foods had failed to prove that the name 'basmati' would allow it to prohibit the use of the mark applied for in the United Kingdom.

By judgment of 6 October 2021, [59] the General Court annulled the decision at issue. It held, first, that the United Kingdom's withdrawal from the European Union had not caused the dispute to become devoid of purpose, given that the decision at issue had been adopted in the course of the transition period during which the earlier mark concerned continued to receive the same protection as it would have received had the United Kingdom not withdrawn from the European Union. Second, it held that Indo European Foods' interest in bringing proceedings continued to exist.

EUIPO therefore brought an appeal against that judgment, raising a single ground of appeal alleging infringement of the requirement that the applicant should continue to have an interest in bringing proceedings.

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57 Articles 126 and 127 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7).

58 Based on Article 8(4) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

59 Judgment of 6 October 2021, *Indo European Foods* v *EUIPO – Chakari (Abresham Super Basmati Selaa Grade One World's Best Rice)* (T-342/20, EU:T:2021:651).

Findings of the Court

In the first place, the Court of Justice rules on the General Court's examination of whether the purpose of the dispute continued to exist. Thus, the Court of Justice finds that EUIPO's line of argument that the General Court confused the issue of the continuing interest in bringing proceedings with the date on which the legality of a contested decision must be assessed is based on a misreading of the General Court's judgment. As regards the purpose of the dispute, the General Court merely examined whether it continued to exist in the light of the end of the transition period which had occurred during the proceedings before it.

Furthermore, the Court of Justice states that, according to settled case-law, the purpose of the action must, like the interest in bringing proceedings, continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action or, as the case may be, the appeal must be liable, if successful, to procure an advantage for the party bringing it. It also points out that, where a decision which is the subject of an action for annulment before the General Court has not been formally withdrawn, the General Court is justified in finding that the dispute retains its purpose. Such a finding is not called into question by the fact that the contested decision lapsed after the action was brought.

In the present case, the Court of Justice states that, in order to find that the action had not become devoid of purpose, the General Court relied on the finding that the subject matter of the dispute was the decision at issue, which was adopted before the end of the transition period. Given that EUIPO does not dispute either that, on the date on which the General Court ruled, the decision at issue had not been formally withdrawn, or that the end of the transition period did not have the effect of retroactively eliminating that decision, it concludes that EUIPO's line of argument is therefore unfounded.

In the second place, the Court of Justice examines the issue of the assessment of whether there is a continuing interest in bringing proceedings. In that regard, it rejects EUIPO's argument that the General Court failed to take into account the specific nature of opposition proceedings, the essential function of a trade mark, the principle of territoriality and the unitary character of an EU trade mark.

First of all, that line of argument is based on the premiss that, in the case of an action brought against a decision of a Board of Appeal rejecting an opposition, the question of whether an interest in bringing proceedings before the General Court continues to exist must be assessed solely in the light of the legal interests protected by the applicable EU trade mark regulation and thus depends solely on whether there can still be a risk of conflict when the General Court rules. That premiss presupposes limiting the factors which may be taken into consideration in order to assess whether an applicant bringing an action under Article 72 of Regulation 2017/1001 [60] continues to have an interest in bringing proceedings, as compared with an applicant bringing an action under Article 263 TFEU, and is not supported either in the applicable legislation or in the case-law.

Next, the Court of Justice states that the existence of an interest in bringing an action for annulment requires that, through its outcome, the action must be capable of procuring an advantage to the person which brought it. Thus, the question of whether, as regards a decision rejecting an opposition to the registration of an EU trade mark, the person who has filed such an opposition is likely to derive an advantage from an action brought before the General Court must be assessed in the light of the specific circumstances, in view of all the consequences that may follow from a possible finding of unlawfulness vitiating that decision and in view of the nature of the damage allegedly suffered. In the present case, first, the General Court was entitled to find that the purpose of the action had not disappeared. Second, the decision at issue upheld the rejection of the opposition on the basis of the finding that the conditions for the application of Article 8(4) of Regulation 2017/1001 were not

60 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

satisfied. Therefore, since it is the infringement of that provision by the Board of Appeal which Indo European Foods invoked in support of its action before the General Court, and since the decision at issue is detrimental to the economic interests of Indo European Foods, the annulment of that decision would be capable of procuring an advantage for it.

Lastly, the fact that the other party before the Board of Appeal could, if the appeal before that body were successful, convert his trade mark application into national trade mark applications in all the Member States as from the end of the transition period, has no bearing on Indo European Foods' interest in bringing proceedings against the decision at issue.

In the third place, the Court of Justice analyses the line of argument by which EUIPO claims that the General Court infringed Article 72(6) of Regulation 2017/1001 regarding EUIPO's measures to comply with judgments of the EU Courts, in so far as the General Court required EUIPO not to examine whether there was a continuing interest in bringing proceedings and required it not to take into account the legal effects of the end of the transition period provided for by the Agreement on the withdrawal of the United Kingdom from the European Union.

First, the Court of Justice states that, although the institution, body, office or agency whose act has been declared void is required, in order to comply with a judgment annulling an act and to comply with it fully, to have regard to the operative part of that judgment and the grounds which constitute the essential basis for it, it is not, however, for the General Court to issue orders to EUIPO. Second, it states that the General Court confined itself, in essence, to finding that Indo European Foods had an interest in bringing proceedings before the General Court. Consequently, it cannot be held that the General Court imposed those alleged obligations on EUIPO.

3. PUBLIC PROCUREMENT

Judgment of the Court of Justice (Fifth Chamber), 6 June 2024, INGSTEEL, C-547/22

Link to the full text of the judgment

Reference for a preliminary ruling – Review procedures in respect of the award of public supply and public works contracts – Directive 89/665/EEC – Article 2(1)(c) – Compensation awarded to a tenderer unlawfully excluded from a procedure for the award of a public contract – Scope – Loss of opportunity

Ruling on a reference for a preliminary ruling from the Okresný súd Bratislava II (District Court, Bratislava II, Slovakia), the Court interprets Article 2(1)(c) of Directive 89/665 [61]. In essence, the referring court asks whether that article must be interpreted as precluding national legislation or a national practice which excludes the possibility, for a tenderer who has been excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned. More specifically, it asks the Court to clarify whether that provision must be interpreted as meaning that persons harmed by an infringement of EU public procurement law and who are thus entitled to be compensated include not only those who have suffered loss as a result of not having obtained a public contract, namely their loss of profit, but also those who have suffered loss linked to the lost opportunity to participate

61 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 (OJ 2007 L 335, p. 31) ('Directive 89/665').

in the procedure for the award of that contract and to make a profit as a result of such participation. In the present case, Article 17 of Law No 514/2003 [62] expressly refers, as recoverable damage, only to 'actual damage' and 'loss of profit' and not to 'loss of opportunity'.

The request has been made in proceedings between INGSTEEL spol. s r. o. and the Slovak Republic, acting through the Úrad pre verejné obstarávanie (Public Procurement Regulatory Authority, Slovakia; 'the defendant in the main proceedings'), concerning an action for damages brought by that company following the unlawful exclusion of the association of which it was a member ('the tendering association') from a procedure for the award of a public contract initiated by Slovenský futbalový zväz (Slovak Football Association; 'the contracting authority').

More specifically, the contracting authority decided to exclude the tendering association from that procedure for the award of a public contract, taking the view that that association had not satisfied the requirements of the contract notice relating, in particular, to its economic and financial standing. Following actions brought by that association, the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), making a request for a preliminary ruling to the Court that gave rise to the judgment in *INGSTEEL and Metrostav* [63], annulled the decisions confirming that exclusion decision. The defendant in the main proceedings then adopted a new decision ordering the contracting authority to cancel the exclusion of the tendering association from the procedure at issue. Since that procedure had in the meantime been closed, the applicant in the main proceedings brought an action before the referring court seeking damages for the loss allegedly suffered.

Findings of the Court

According to settled case-law, the Court interprets the provision of EU law at issue by taking into account not only its wording but also the context in which it appears and the objectives pursued by the legislation of which it forms part.

First, as regards the wording of Article 2(1)(c) of Directive 89/665, the Court finds that that provision, which is worded in broad terms, provides that the Member States are to ensure that damages are awarded to persons harmed by an infringement of EU law on the award of public contracts, which, in the absence of any indication to distinguish different categories of harm, may cover any type of damage suffered by those persons, including that arising from the loss of the opportunity to participate in the procedure for the award of a contract.

Secondly, it considers that that finding is supported by the context of the provision at issue. Individuals harmed by a breach of EU law attributable to a Member State have a right to compensation where three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the damage sustained. Furthermore, compensation for loss or damage caused by infringements of EU law must be commensurate with the loss or harm sustained, in that it must, where appropriate, enable the loss or harm actually sustained to be made good in full. Article 2(1)(c) of Directive 89/665 gives concrete expression to those principles, inherent in the EU legal order.

In that regard and in accordance with Article 1(3) of Directive 89/665, the review procedures provided for by that directive must be available at least to any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement. No possibility of limiting that access is established by that directive. The action for damages provided for in Article 2(1)(c) of that directive was thus envisaged by the EU legislature as being the legal remedy of last resort, which must remain available to persons harmed by an infringement of EU law

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62 Zákon č. 514/2003 Z. z. o zodpovednosti za škodu spôsobenú, pri výkone verejnej moci (Law No 514/2003 on liability for damage caused in the exercise of public authority) of 28 October 2003 (No 215/2003 Z. z), in the version applicable to the dispute in the main proceedings ('Law No 514/2003').

63 Judgment of 13 July 2017, INGSTEEL and Metrostav (C-76/16, EU:C:2017:549).

where they are de facto deprived of any possibility of benefiting from the effectiveness of one of the other remedies provided for in that provision.

That is, in particular, the case of an unlawfully excluded tenderer who, having requested and obtained the annulment of its exclusion from a procedure for the award of a public contract such as that at issue in the main proceedings, is, however, no longer able, on account of the closure of that procedure in the meantime, to benefit from the effects of that annulment. While damage may result from the failure to obtain, as such, a public contract, it must be held that it is possible for the tenderer who has been unlawfully excluded to suffer separate damage, which corresponds to the lost opportunity to participate in the procedure for the award of a public contract concerned in order to obtain that contract. Such damage must be recoverable under Article 2(1)(c) of Directive 89/665.

Thirdly, the Court considers that the broad interpretation of Article 2(1)(c) of Directive 89/665 is supported by the objective pursued by that directive, of not excluding any type of harm from the scope of that directive.

In that regard, it points out that, although Directive 89/665 cannot be regarded as providing for complete harmonisation and, therefore, as envisaging all possible remedies in public procurement matters, the fact remains that, as stated in the sixth recital of that directive, the directive stems from the intention of the EU legislature to ensure that, in all Member States, adequate procedures permit not only the annulment of decisions taken unlawfully but also the compensation of persons harmed by an infringement of EU law. Consequently, in order not to compromise that objective, as the Court has held with regard to loss of profit, the total exclusion, in respect of the damage for which compensation may be granted, of the loss of the opportunity to participate in a procedure for the award of a public contract in order to obtain that contract, cannot be accepted in the event of an infringement of EU law since, especially in the case of economic or commercial disputes, such total exclusion of that loss of opportunity would be such as to make it practically impossible to make good the damage suffered.

Article 2(1)(c) of Directive 89/665 must therefore be interpreted as meaning that the damages which persons harmed by an infringement of EU public procurement law may claim under that provision may cover the loss or damage suffered as a result of the loss of opportunity. However, although that article requires that damages may be awarded to persons harmed by an infringement of EU public procurement law, it is, in the absence of EU provisions in that field, for the domestic legal system of each Member State to determine the criteria by reference to which damage resulting from the loss of an opportunity to participate in a procedure for the award of a public contract in order to obtain that contract must be established and assessed, provided that the principles of equivalence and effectiveness are observed.

In the present case, the Court notes that it is apparent from the request for a preliminary ruling that Article 17 of Law No 514/2003 expressly refers, as recoverable damage, only to ‘actual damage’ and ‘loss of profit’. It then recalls that, according to the case-law of the Court, in order to ensure the effectiveness of all provisions of EU law, the principle of primacy requires, inter alia, national courts to interpret, to the fullest extent possible, their national law in conformity with EU law and that that obligation to interpret national law in conformity with EU law requires national courts, where appropriate, to change established, and even settled, case-law if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive.

In conclusion, the Court holds that Article 2(1)(c) of Directive 89/665 precludes national legislation or a national practice which, as a matter of principle, excludes the possibility, for a tenderer excluded from a procedure for the award of a public contract because of an unlawful decision of the contracting authority, of being compensated for the damage suffered as a result of the loss of the opportunity to participate in that procedure with a view to obtaining the contract concerned.

VII. ECONOMIC AND MONETARY POLICY

1. BANKING UNION – SINGLE RESOLUTION MECHANISM

Judgment of the Court of Justice (Grand Chamber), 18 June 2024, Commission v SRB, C-551/22 P

Link to the full text of the judgment

Appeal – Economic and monetary policy – Banking Union – Regulation (EU) No 806/2014 – Single resolution mechanism – Resolution procedure applicable where an entity is failing or is likely to fail – Article 18(7) – Adoption by the Single Resolution Board of a resolution scheme – Endorsement of that scheme by the European Commission – Article 86(2) – Act against which proceedings may be brought – Action for annulment – Admissibility

Hearing an appeal brought by the European Commission against the judgment of the General Court of 1 June 2022 in *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB*, [64] the Grand Chamber of the Court of Justice upholds that appeal and, giving final judgment on the substance, dismisses as inadmissible the action brought before the General Court by Fundación and Stiftung für Forschung und Lehre against the decision of the Single Resolution Board (SRB) of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español SA [65] ('the resolution scheme at issue'), adopted on the basis of Regulation (EU) No 806/2014. [66]

At the end of its analysis, the Court rules that the resolution scheme at issue does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU and, consequently, sets aside the judgment under appeal in so far as it declared admissible the action for annulment of that scheme. The Court bases that analysis, in particular, on the principles of delegation of powers to agencies identified in the judgment of 13 June 1958, *Meroni* v *High Authority*, [67] and recalled in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*. [68]

Findings of the Court

The Court recalls that an action for annulment may be brought, under the fourth paragraph of Article 263 TFEU, read in conjunction with the first paragraph thereof, against all measures or acts adopted by the EU institutions, bodies, offices and agencies, whatever their form, which are intended to produce legal effects binding on and are capable of affecting the interests of a natural or legal person by bringing about a distinct change in their legal position. In order to ascertain whether an act produces such effects and may accordingly form the subject matter of such an action, it is necessary to examine the substance of that act and to assess those effects in the light of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution, body, office or agency which adopted the act.

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64 Judgment of 1 June 2022, *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB*, T-481/17, EU:T:2022:311; 'the judgment under appeal').

65 Decision SRB/EES/2017/08 of the Executive Session of the Single Resolution Board (SRB) of 7 June 2017 on the adoption of a resolution scheme in respect of Banco Popular Español SA.

66 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) ('the SRM Regulation').

67 Judgment of 13 June 1958, *Meroni* v *High Authority* (9/56, EU:C:1958:7).

68 Judgment of 22 January 2014, *United Kingdom* v *Parliament and Council* (C-270/12, EU:C:2014:18).

As regards, in the first place, the content of the resolution scheme at issue, the Court finds that that scheme had not yet been endorsed at the time of its adoption during the Executive Session of the SRB on 7 June 2017, since it was then notified to the Commission for endorsement, on which its entry into force depended and, in so doing, the production by that scheme of binding legal effects.

As regards, in the second place, the context in which the resolution scheme at issue was adopted, the Court notes that, as stated in its preamble, its legal basis is the SRM Regulation. [69] The scheme put in place by that regulation is based on the finding [70] that the exercise of the resolution powers provided for therein falls within the EU policy for the resolution of banking institutions, which only EU institutions may establish, and that there remains a margin of discretion in the adoption of each resolution scheme, given inter alia the considerable impact of the resolution decisions on the financial stability of the Member States and on the European Union as such, as well as on the fiscal sovereignty of the Member States. For those reasons, the EU legislature considered it necessary to provide for the adequate involvement of the Council of the European Union and the Commission, namely involvement that strengthens the necessary operational independence of the SRB while respecting the principles of delegation of powers to agencies.

In that last regard, the Court recalls that in the judgments in *Meroni* v *High Authority* and *United Kingdom* v *Parliament and Council*, the Court held, in essence, that the consequences resulting from a delegation of powers are very different depending on whether the delegation involves clearly defined executive powers the exercise of which can be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a 'discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy'. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an 'actual transfer of responsibility'. The Court notes that, in the case that led to the judgment in *Meroni* v *High Authority*, it held that the delegation of powers at issue, in so far as it allowed the bodies concerned a 'degree of latitude which implies a wide margin of discretion', could not be considered to be compatible with the 'requirements of the Treaty', while stating that, in reserving to itself only the power to refuse its approval of the decisions of those bodies, the High Authority had not retained sufficient powers to avoid such a transfer of responsibility.

According to the Court, the case-law resulting from that judgment is based on the premiss that the balance of powers, which is characteristic of the institutional structure of the European Union, is a fundamental guarantee granted by the Treaties and that to delegate a broad discretionary power would render that guarantee ineffective, by entrusting it to bodies other than those which the Treaties have established to effect and supervise the exercise thereof within the limits of their respective functions. The broad discretionary power referred to in that case-law relates, in particular, to the fundamental issues of the policy area concerned, which imply a wide margin of discretion in order to reconcile various objectives which are sometimes contradictory.

The Court adds that it is apparent, specifically, from that case-law that the applicability of the principles concerning the delegation of powers to agencies identified by that case-law depends not on the individual or general nature of the acts which the agencies are authorised to adopt, but solely on whether the delegation relates to a broad discretionary power or, on the contrary, to executive powers which are precisely delineated.

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69 Article 18 in particular.

70 See, in essence, recitals 24 and 26 of the SRM Regulation.

The scheme put in place by the SRM Regulation [71] is intended to give concrete expression to the principles identified in the judgment in *Meroni* v *High Authority* and recalled in the judgment in *United Kingdom* v *Parliament and Council*.

Admittedly, the SRB is responsible for adopting all resolution decisions relating to, inter alia, financial institutions and groups which are considered to be significant for financial stability in the European Union, and for other cross-border groups. [72] In that respect, it is to adopt a resolution scheme in relation to those entities and groups only when it assesses, on receiving the communication of the ECB's assessment that the entity concerned is failing or is likely to fail, or on its own initiative, [73] that the conditions for resolution, [74] which relate to whether the entity is failing or is likely to fail, the absence of alternative measures with regard to resolution and whether a resolution action is necessary in the public interest, are met. In that case, the SRB adopts [75] a resolution scheme which places the entity concerned under resolution and determines the application to that entity of the resolution tools [76] and the use of the Single Resolution Fund.

However, regardless of the wide margin of discretion conferred on the SRB concerning whether and by what means the entity concerned is to be the subject of a resolution procedure, that discretion is circumscribed by objective criteria and conditions delimiting the SRB's scope of action and relating both to the resolution tools and conditions. [77] In addition, the SRM Regulation provides for the participation of the Commission and of the Council in the procedure leading to the adoption of a resolution scheme, which, in order to enter into force, must be endorsed by the Commission and, where relevant, the Council.

Therefore the SRB is to inform the Commission of any action it takes in order to prepare for resolution and exchanges, with the Commission and the Council, all information necessary for the performance of their tasks. [78] Moreover, the Commission is to designate a representative entitled to participate in the meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that representative is entitled to participate in the debates and is to have access to all documents. [79] In addition, the SRB is required to transmit the resolution scheme to the Commission immediately after its adoption, and within 24 hours from the transmission, the Commission either endorses that scheme or objects to it with regard to the discretionary aspects of that scheme, excluding those relating to compliance with the criterion of public interest and the amount earmarked for the use of the Single Resolution Fund. [80] As regards the latter discretionary aspects, the Commission may, within 12 hours from the transmission, propose to the Council to object. [81] Lastly, the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB. [82] Once that scheme

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71 As is apparent from recitals 24 and 26 of the SRM Regulation.

72 Pursuant to Article 7(2) of the SRM Regulation.

73 Pursuant to Article 18(1) and (6) of the SRM Regulation.

74 Referred to in Article 18(1)(a) to (c) of the SRM Regulation.

75 On the basis of Article 18(6) of the SRM Regulation.

76 Referred to in Article 22(2) of the SRM Regulation.

77 Pursuant to Article 18(1) and (4) to (6) of the SRM Regulation.

78 Pursuant to Article 30(1) and (2) of the SRM Regulation.

79 Pursuant to Article 43(3) of the SRM Regulation.

80 First to third subparagraphs of Article 18(7) of the SRM Regulation.

81 Third subparagraph of Article 18(7) of the SRM Regulation.

82 Fifth subparagraph of Article 18(7) of the SRM Regulation.

has been endorsed, the Commission must then fully assume the responsibilities conferred on it by the Treaties.

In the light of all those considerations, the Court concludes that the provisions of Article 18 of the SRM Regulation, on the basis of which the resolution scheme at issue was adopted, are such as to avoid a 'transfer of responsibility' within the meaning of the case-law resulting from the judgment in *Meroni* v *High Authority*. While conferring on the SRB the power to assess whether the conditions for the adoption of a resolution scheme are met in the present case and the power to determine the tools necessary for the purposes of such a scheme, those provisions confer on the Commission, or, as the case may be, on the Council, the responsibility for the final assessment of the discretionary aspects of the scheme. Those aspects fall within the scope of EU policy for the resolution of credit institutions and involve a balancing of various objectives and interests, relating to the safeguarding of the financial stability of the European Union and the integrity of the internal market, the taking into account of the budgetary sovereignty of the Member States and the protection of the interests of shareholders and creditors.

As regards, in the third place, the SRB's powers, the Court holds that the interpretation adopted by the General Court, according to which a resolution scheme may produce binding legal effects irrespective of the Commission's endorsement decision, disregards both the powers conferred on the SRB by the SRM Regulation and the case-law resulting from the judgment in *Meroni* v *High Authority*.

While the SRM Regulation provides [83] that the SRB is responsible for drawing up and adopting a resolution scheme, it does not confer on it the power to adopt an act producing independent legal effects. In the resolution procedure, the endorsement by the Commission is an essential element for the entry into force of the resolution scheme.

That endorsement is also decisive for the content of the resolution scheme at issue. On the one hand, while the SRM Regulation allows the Commission to endorse such a scheme without having raised any objections with regard to its discretionary aspects or proposed to the Council to do so, it also allows the Commission and the Council to substitute their own assessment for that of the SRB as regards those discretionary aspects by objecting thereto, [84] in which case the SRB is required to modify that scheme, within eight hours, in accordance with the reasons expressed by the Commission or the Council, so that that scheme may enter into force. [85] On the other hand, an objection by the Council on the ground that the public interest criterion is not fulfilled has the effect of ultimately preventing the resolution under that regulation of the entity concerned, that entity then having to be wound up in an orderly manner in accordance with the applicable national law. [86]

In the present case, as it expressly stressed in the decision endorsing the resolution scheme at issue, [87] the Commission expressed its 'agreement' with the content thereof and with 'the reasons provided by the SRB of why resolution is necessary in the public interest'. The discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution. Contrary to what the General Court held, a distinction, therefore, cannot be drawn between those discretionary aspects and those technical aspects, for the purposes of determining the act against which an action may be brought in the context of a resolution scheme endorsed in its entirety by the Commission.

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83 Pursuant to Articles 7 and 18 of the SRM Regulation.

84 Article 18(7) of the SRM Regulation.

85 Seventh subparagraph of Article 18(7) of the SRM Regulation.

86 Article 18(8) of the SRM Regulation.

87 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español SA (OJ 2017 L 178, p. 15), recital 4, as corrected on 6 December 2017 (OJ 2017 L 320, p. 31).

Thus, it is only by the Commission's endorsement decision that the resolution action adopted by the SRB in the resolution scheme at issue was definitively fixed and that that action produced binding legal effects, with the result that it is the Commission, and not the SRB, which must answer for that resolution action before the EU judicature.

The Court thus concludes that it is apparent from its content, the context in which it was adopted and the powers of the SRB that the resolution scheme at issue did not produce binding legal effects capable of affecting the interests of a legal or natural person, with the result that it does not constitute an act against which an action for annulment may be brought under the fourth paragraph of Article 263 TFEU.

The Court adds that, first, contrary to what the General Court held, it cannot be inferred from Article 86(1) and (2) of the SRM Regulation that the resolution scheme at issue was capable of forming the subject matter of an action for annulment before the General Court, when it did not constitute the outcome of the resolution procedure at issue, that outcome having materialised only through the endorsement of that scheme by the Commission, and it did not produce independent legal effects.

Indeed, the provisions of a regulation cannot alter the system of remedies laid down by the FEU Treaty. In addition, it is apparent from the very wording of Article 86 of the SRM Regulation that the actions it concerns must be brought before the Court 'in accordance with Article 263 [TFEU]', which presupposes that they satisfy the condition, set out therein, relating to the challengeable nature of the contested act.

It is true that the Court notes that, in the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, [88] it held, in essence, that a resolution scheme may, as the outcome of a complex resolution procedure, be subject to judicial review before the EU judicature. However, in the case which gave rise to that judgment, the Court of Justice was called upon to assess the legality of a decision of the General Court holding as inadmissible actions for annulment brought not against such a scheme but against preparatory measures of the European Central Bank which had found that entities were failing or were likely to fail. [89] The considerations set out in that judgment must therefore be read in the light of the Court's settled case-law on complex procedures from which it is apparent that, in a procedure of that sort, acts adopted during the preparatory stages leading to the adoption of the definitive act cannot, where they do not produce independent legal effects, form the subject matter of an action for annulment.

Secondly, the Court holds that the General Court was wrong in finding, in the judgment under appeal, that the failure to recognise that the resolution scheme at issue is actionable would lead to an infringement of the right of the applicants at first instance to effective judicial protection.

A Commission endorsement decision, such as that at issue in the present case, displays the features of an act against which an action for annulment may be brought under the fourth paragraph of Article 263 TFEU. In an action for annulment brought against such a decision, it is open to the natural or legal persons concerned to plead the illegality of the resolution scheme approved by that institution, thereby giving it binding legal effects, which is capable of guaranteeing them sufficient judicial protection. Moreover, the Court recalls that the Commission is, by that approval, deemed to endorse the information and grounds contained in that scheme, with the result that it must, if necessary, answer to the EU judicature.

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88 Judgment of 6 May 2021, *ABLV Bank and Others* v *ECB* (C-551/19 P and C-552/19 P, EU:C:2021:369, paragraphs 56 and 66).

89 Within the meaning of Article 18(1) of the SRM Regulation.

2. PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the Court of Justice (Tenth Chamber), 5 June 2024, Malacalza Investimenti and Malacalza v ECB, T-134/21

Link to the full text of the judgment

Non-contractual liability – Economic and monetary policy – Prudential supervision of credit institutions – Decisions taken by the European Central Bank (ECB) concerning Banca Carige – Articles 4 and 16 of Regulation (EU) No 1024/2013 – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Legitimate expectations – Conflict of interests – Proportionality – Equal treatment – Right to property – Plea of illegality

Ruling in the extended five-judge composition, the General Court dismisses the action for damages brought by Malacalza Investimenti Srl and Mr Vittorio Malacalza seeking compensation in respect of the harm which they claim to have suffered as a result of the unlawful conduct of the European Central Bank (ECB) in the exercise of its prudential supervisory function of Banca Carige ('the bank'), an Italian credit institution, between 2014 and 2019. The Court rules on the non-contractual liability of the ECB in relation to the prudential supervision of credit institutions and provides clarification as regards, inter alia, the interpretation of the rules of law conferring rights on individuals and the assessment of the existence of a sufficiently serious infringement by the ECB of several applicable provisions.

The bank is subject to direct prudential supervision by the ECB. Malacalza Investimenti and Mr Malacalza, the applicants, are among its shareholders. Mr Malacalza was a member and vice-president of the board of directors of that bank between 2016 and 2018. On 9 December 2016, the ECB adopted an early intervention measure against the bank, requesting that it submit a strategic plan and an operational plan to reduce the issue of non-performing loans, including a clear indication of the measures to be taken and the schedule for doing so ('the early intervention measure'). In view of the bank's failures in its attempt to issue capital instruments in 2018 and on account of disagreements within the board of directors which led to the resignation of certain members and to the formation of a new board, the ECB, by decision of 14 September 2018, asked the bank to obtain approval from its board of directors of a new plan to restore and ensure sustainable compliance with the financial requirements by 31 December 2018 at the latest. Following the rejection of an increase in capital, by an extraordinary general meeting of the shareholders, several members of the board of directors resigned, leading to its disqualification under the statutes of the bank and the Italian Civil Code.

On 1 January 2019, the ECB decided to place the bank under temporary administration ('the decision to place the bank under temporary administration') pursuant to a legislative decree relating to the laws on banking and credit [90] and transposing Article 29 of Directive 2014/59 [91] ('the Consolidated Law on Banking'). The effect of that decision was the dissolution of the board of directors and the replacement of its former members by three temporary administrators, whose task was to take the necessary steps to ensure that the bank complied with the financial requirements on a sustainable basis. That measure was extended three times in 2019. By letter of 18 September 2019, the ECB

90 Decreto legislativo n. 385 – Testo unico delle leggi in materia bancaria e creditizia (Legislative Decree No 385 consolidating the laws on banking and credit) of 1 September 1993 (GURI No 230 of 30 September 1993, and Ordinary Supplement to GURI No 92).

91 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, 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).

considered that the proposed capital increase was not contrary to the sound and prudent management of the bank and an extraordinary general meeting of shareholders finally approved it on 20 September 2019. After its implementation, on 31 January 2020, a new board of directors and a new supervisory board were elected, thus putting an end to the temporary administration of the bank.

Findings of the Court

As regards the ECB's failure to correct misleading statements made on the soundness of the bank by its directors, the Court notes, in the first place, that the Consolidated Law on Banking [92] imposes on the ECB a general obligation to publish categories of information on credit institutions in the public interest. However, no obligation to react in a specific way is imposed on it directly or indirectly, when statements are made, by certain shareholders, concerning the soundness of certain institutions subject to its supervision, that are construed as misleading by other stakeholders.

Admittedly, those statements, in so far as they could have been made by the bank's directors, could have a form of credibility capable of affecting the value of the shares and of causing harm to the applicants. However, the Court recalls that the existence of alleged financial damage is not sufficient, in itself, to give rise to non-contractual liability on the part of the European Union. Thus, unlawful conduct must be established by the applicants, who must demonstrate that a rule conferring rights on individuals has been breached in a sufficiently serious manner. That is not the case here.

In the second place, Article 53a of the Consolidated Law on Banking [93] provides that, where the situation so requires, the supervisory authority may adopt specific measures in respect of one or more banks or the banking system as a whole. In the light of its wording, the Court holds that that article is irrelevant when determining whether the ECB is under an obligation to correct such statements and rejects the first claim of unlawfulness alleged in respect of its conduct.

As regards the allegation of a breach of EU rules by the ECB in its relations with the bank's board of directors, the Court notes, in the first place, that the conduct alleged against the ECB bears no relation to Article 4 of Regulation No 1024/2013.[94] That provision concerns the allocation of different tasks in prudential matters between the national authorities and the ECB, which is exclusively competent to carry out a certain number of them. The provision seeks to implement the objective of organising a regulatory system relating to an area of activity for the benefit of the public interest without granting, in itself, rights to individuals. In the second place, Article 16(1) and (2) of Regulation No 1024/2013 empowers the ECB to require credit institutions to take various measures at an early stage where those institutions do not comply or risk failing to comply with the prudential requirements, or present weaknesses preventing those institutions from ensuring sound management or satisfactory risk coverage. The Court considers that such a provision merely grants authorisation and does not, in itself, contain rules conferring rights on individuals, but structures the system of banking supervision in the public interest. Thus, the Court rejects the second claim of unlawfulness alleged.

As regards the ECB's approval of an increase in capital allegedly contrary to the shareholders' pre-emption rights provided for in the bank's statutes, after finding that Article 56 of the Consolidated Law on Banking applies to the ECB, by virtue of Regulation No 1024/2013, the Court notes that, according to that article, the supervisory authority is to ascertain whether the amendments made to the statutes of credit institutions are compatible with the constraints arising from sound and prudent management before their entry in the companies register. That verification relates to the compatibility of the amendment to the statutes, not with the shareholders' pre-emption rights, but

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92 In the present case, Article 53(1)(da) and Article 67(1)(e) of the Consolidated Law on Banking, concerning the publication by the ECB of information on credit institutions in order to ensure transparency of the markets and thus their proper functioning and the stability of the financial system.

93 According to Article 53a(1)(d) of the Consolidated Law on Banking.

94 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

with the requirement of sound and prudent management. Therefore, the objective to be taken into account is the stability of the credit institution and, more broadly, of the financial system as a whole. Consequently, the Court considers that that provision does not confer rights on individuals.

As regards the challenge to the appointment by the ECB of certain temporary administrators who had a conflict of interests, the Court notes, first of all, that the annulment by the Court of the decision to place the bank under temporary administration [95] does not prevent it from being examined in the present proceedings. Next, the Court clarifies, first, that that annulment did not occur on the basis of a conflict of interests and, second, that the action for damages constitutes an autonomous form of action subject to its own operating conditions. Lastly, it follows from the Consolidated Law on Banking [96] that temporary administrators must, inter alia, be free from conflicts of interest. That requirement falls, in general, within the scope of the principle of impartiality, which, according to the case-law, is intended to protect, first, the public interest and, second, the interest of individuals who might be adversely affected as a result of the presence of that conflict of interests. Thus, that principle creates, in relation to those individuals, a subjective right which, if it is breached in a sufficiently serious manner, is capable of incurring non-contractual liability of the European Union for any damage caused by an institution in the performance of its tasks, which therefore confers rights on individuals.

In determining whether the ECB committed a sufficiently serious infringement of that provision, the Court notes that, in order to justify the adoption of the decision to place the bank under temporary administration, the ECB did not state that that decision was justified by the existence of 'serious irregularities' committed 'in the administration' of the bank.[97] In the present case, if irregularities had been committed, only an action for damages against the former members of the administrative bodies would have been capable of allowing compensation to be paid by those persons for the damage suffered by the shareholders. In such a situation, it might have been inappropriate to appoint one of those former members as a temporary administrator. However, the situation was different in the present case, since the decision to place the bank under temporary administration was based on the 'significant deterioration in the situation of the bank'.

Furthermore, the financial difficulties affecting the bank preceded the appointment of the two temporary administrators concerned. Moreover, the Court recalls that, in the performance of its prudential tasks, the ECB enjoys a wide discretion. On that basis, the Court considers that the ECB exercised its discretion in a reasonable manner by appointing as temporary administrators persons who were sufficiently well acquainted with the bank's affairs to act expeditiously when faced with the crisis situation experienced by the bank. The Court adds that, admittedly, the aforementioned action for damages in respect of the former members is brought, for the duration of the temporary administration, by the temporary administrators. However, as soon as the bank's ordinary management was resumed, in accordance with Italian law and the bank's statutes, an action for damages could have been brought, in particular by the shareholders' meeting, against the two administrators concerned. The Court considers that the ECB remained within reasonable bounds in exercising its discretion when appointing the persons concerned as temporary administrators, and thus concludes that no sufficiently serious breach has been established.

As regards the ECB's adoption of the early intervention measure, the Court states, first, concerning that adoption on the basis of a mere risk of infringement of the regulatory framework, that Article 69*octiesdecies* of the Consolidated Law on Banking [98] applies to the ECB under Regulation No 1024/2013. In so far as that provision merely gives the supervisory authority, at the end of its

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95 Judgment of 12 October 2022, *Corneli* v *ECB* (T-502/19, EU:T:2022:627).

96 Article 71(6) of the Consolidated Law on Banking.

97 Within the meaning of Article 69*octiesdecies*(1)(b) of the Consolidated Law on Banking, read in conjunction with Article 70 thereof.

98 In the present case, Article 69*octiesdecies*(1)(a).

assessment, the power to adopt an early intervention measure, provided that certain conditions are met, it does not confer rights on individuals. Indeed, the early intervention measure was adopted to ensure the implementation of the objective of public interest. Thus, the reason given by the ECB for adopting that measure was the risk of infringement of the requirements established by the applicable regulatory framework, and in particular in the light of the criteria laid down in that provision, which refers to the existence of a rapid deterioration in the situation of the supervised entity as one of the indications of a possible breach by that entity of the own funds requirements. In those circumstances, the Court considers that, since it pursues an objective of public interest, the provision in question is not intended to confer rights on individuals.

Second, concerning the obligation laid down in the early intervention measure to dispose of allegedly non-performing loans on less advantageous terms, after finding that Article 69*noviesdecies* of the Consolidated Law on Banking applied to the ECB, the Court points out that that provision merely gives the supervisory authority the power, under certain conditions, to request that credit institutions prepare or implement a plan to negotiate a debt restructuring. Accordingly, it does not in itself confer rights on individuals. Thus, in the present case, it is in order to achieve an objective of public interest that the ECB requested, in the early intervention measure, that the bank submit a strategic plan and an operational plan, without, however, requiring the bank to give up non-performing loans, let alone at defined prices during a given period. However, those plans had to be prepared and approved by the bank, which was responsible, in particular, for identifying and implementing the appropriate measures, by stating, for example, the non-performing loans that could be disposed of and the terms of the disposal. Moreover, that provision does not preclude the early intervention measure from indicating minimum targets and setting deadlines for the reduction of non-performing loans. In those circumstances, the Court considers that Article 69*noviesdecies* pursues an objective of public interest without being intended to confer rights on individuals.

Third, concerning compliance, within a given period, with the requirements imposed in respect of own funds, the Court recalls that Article 16 of Regulation No 1024/2013 confers powers on the ECB in the field of prudential supervision by pursuing an objective of public interest without conferring rights on individuals.

Fourth, concerning the breach of the principle of equal treatment on account of the adoption of the early intervention measure, the Court notes that, in the exercise of its prudential tasks, the ECB is to carry out technical assessments taking into account a wide range of variables, [99] which goes hand in hand with a broad discretion. To that extent, the ECB found that there had been a breach of the asset requirements, but also referred to several factors showing, in its view, the fragility of that institution. However, the applicants have not linked that particular situation to the decisions taken by the ECB in such a way as to establish the existence of a genuine difference in treatment between the bank and other Italian credit institutions.

Fifth, concerning the breach of the principle of proportionality, the Court recalls that the ECB enjoys a broad discretion in the exercise of its prudential supervision tasks. In order to justify the adoption of the early intervention measure, the ECB analysed the proportionality of the obligation which it intended to adopt with regard to loans forming part of the bank's assets but which did not have the performance characteristics it considered necessary for compliance with the own funds requirements of EU legislation. Thus, it was entitled to take the view, in view of the risk faced by the bank, that it was appropriate and necessary to adopt the early intervention measure without there being alternatives to put a satisfactory end to the difficulties which the bank was experiencing at that time. Therefore, the Court considers that the applicants have failed to identify factors to the effect that, by adopting that measure, the ECB seriously and manifestly breached the principle of proportionality.

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99 Including, in particular, levels of capital and liquidity, business models, governance, risks, systemic impact and macroeconomic scenarios.

Lastly, concerning the plea of illegality raised by the applicants in respect of the early intervention measure, the Court recalls that such a plea applies only to acts of general application, which themselves relate to objectively determined situations and produce legal effects with respect to categories of persons envisaged in the abstract, failing which that plea will be inadmissible. That is not the case here in that the early intervention measure was addressed specifically by the ECB to the bank, imposing obligations specific to that bank. Accordingly, the Court rejects the plea of illegality as inadmissible.

VIII. SOCIAL POLICY: ORGANISATION OF WORKING TIME

Judgment of the Court of Justice (Second Chamber), 20 June 2024, Artemis security, C-367/23

Link to the full text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 9(1)(a) – Obligation to assess the health of night workers – Employer's failure to comply with that obligation – Right to compensation – Need to establish the existence of specific harm

Hearing a reference for a preliminary ruling from the Cour de cassation (Court of Cassation, France), the Court of Justice has clarified certain rules relating to night work under Directive 2003/88/EC [100] and to the right to compensation in the event of a failure to comply with those rules.

EA was recruited on 1 April 2017 by Artemis security SAS ('Artemis') as a fire safety and personal assistance service officer. Having been transferred from day work to night work, EA brought an action before the conseil de prud'hommes de Compiègne (Labour Tribunal, Compiègne, France) seeking, inter alia, an order that Artemis pay him damages on the ground, first, that his employment contract had been amended by Artemis unilaterally and, secondly, that he had not received the enhanced medical check-ups applicable for night work.

EA's claim for damages was dismissed and he brought an appeal before the cour d'appel d'Amiens (Court of Appeal, Amiens, France), which upheld that dismissal on the ground that EA had not proved the existence and nature of the harm which he claimed to have suffered as a result of not being given the enhanced medical check-ups required for night work. In support of his appeal against that judgment before the referring court, EA is maintaining that the finding that the protective provisions on enhanced medical check-ups for night work have not been complied with in itself entitles the worker concerned to compensation and that, by dismissing his claim for compensation, the cour d'appel d'Amiens (Court of Appeal, Amiens) infringed the code du travail (Labour Code), [101] read in conjunction with Article 9 of Directive 2003/88.

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100 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

101 Specifically, Article L. 3122-11 of that code, which provides that 'every night worker shall receive regular one-to-one medical check-ups in accordance with the conditions laid down in Article L. 4624-1.'

In that regard, the referring court questions, inter alia, whether the failure by an employer to comply with national measures intended to implement the health assessment of night workers provided for by Article 9(1)(a) of Directive 2003/88 [102] in itself gives rise to a right to compensation, without the need to prove the existence of specific harm on the part of the worker concerned.

Findings of the Court

The Court recalls, first of all, that no provision of EU law is intended to define the rules relating to any compensation which a worker assigned to night work may claim in the event of an infringement, by his or her employer, of the national rules relating to the health assessment provided for in the event of such an assignment intended to implement Article 9(1)(a) of Directive 2003/88. It is therefore for the legal order of each Member State to lay down the detailed rules intended to safeguard the rights which individuals derive from that provision and, in particular, the conditions under which such a worker may obtain compensation for that infringement, subject to compliance with the principles of equivalence and effectiveness.

As regards the principle of effectiveness, since the obligations to assess the health of night workers laid down in that article have, in the present case, been transposed into national law, the worker concerned must be able to compel his or her employer to fulfil those obligations, if necessary by bringing proceedings for the proper performance of those obligations before the courts having jurisdiction in accordance with the requirements stemming from Article 47 of the Charter of Fundamental Rights of the European Union. The exercise of the right to effective judicial protection is thus such as to contribute to ensuring the effectiveness of the right to a health assessment enjoyed by a night worker under Article 9(1)(a) of Directive 2003/88.

The fact that a night worker may obtain adequate compensation in the event of a failure by the employer to comply with the obligations laid down in that article also contributes to ensuring such effectiveness, it being required that that compensation must enable the loss or damage actually suffered to be made good. The worker's right to seek compensation for loss or damage reinforces the operational nature of the protection rules laid down in Article 9(1)(a) and is likely to discourage the reoccurrence of unlawful conduct. Payment to the person injured of compensation which covers in full the loss or damage sustained is capable of ensuring that such loss or damage is effectively compensated or compensated in a way which is dissuasive and proportionate. Thus, in view of the compensatory function of the right to compensation in the present case provided for by the national law applicable, full compensation for the loss or damage actually suffered is sufficient, without the need to require the employer to pay punitive damages.

Moreover, the applicable national law contains, in that regard, specific rules for imposing fines in the event of an infringement, by the employer, of the national provisions transposing Article 9(1)(a) of Directive 2003/88. Those specific rules contribute to ensuring the effectiveness of the right to a health assessment enjoyed by night workers under that provision. Such rules, the purpose of which is essentially punitive, are not conditional on the existence of harm. Thus, although such punitive rules and those governing contractual or quasi-tortious liability are complementary in that both require compliance with that provision of EU law, they nevertheless have distinct functions.

In those circumstances, the Court concludes that it is not apparent, subject to verification by the referring court, that the national legislation at issue is capable of undermining the effectiveness of the rights deriving from Article 9(1)(a) of Directive 2003/88.

Lastly, in the light of the purpose of the health assessment measures introduced by that article, unlike the requirements relating to working time stemming from Article 6(b) and Article 8 of Directive 2003/88, failure to comply with which in itself causes detriment to the worker concerned, it is not

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[102] Article 9, headed 'Health assessment and transfer of night workers to day work', provides in paragraph 1: 'Member States shall take the measures necessary to ensure that: (a) night workers are entitled to a free health assessment before their assignment and thereafter at regular intervals; …'

inevitable that not having a medical appointment which should have preceded the worker's assignment to night work or regular medical check-ups following that assignment, as provided for in Article 9(1)(a) of that directive, will adversely affect the health of the worker concerned or cause damage for which compensation may be awarded. Whether or not such damage occurs will depend on the individual health situation of each worker, and, furthermore, work performed at night may differ in terms of difficulty and stress.

IX. ENVIRONMENT: INTEGRATED POLLUTION PREVENTION AND CONTROL

Judgment of the Court of Justice (Grand Chamber), 25 June 2024, Ilva and Others, C-626/22

Link to the full text of the judgment

Reference for a preliminary ruling – Environment – Article 191 TFEU – Industrial emissions – Directive 2010/75/EU – Integrated pollution prevention and control – Articles 1, 3, 8, 11, 12, 14, 18, 21 and 23 – Articles 35 and 37 of the Charter of Fundamental Rights of the European Union – Procedures for the grant and reconsideration of a permit to operate an installation – Measures for the protection of the environment and human health – Right to a clean, healthy and sustainable environment

Seised by a request for a preliminary ruling from the Tribunale di Milano (District Court, Milan, Italy), the Court of Justice, sitting as the Grand Chamber, has specified the conditions for a permit to operate an installation under Directive 2010/75 on industrial emissions. [103]

The Ilva steelworks ('the Ilva plant') is located in the municipality of Taranto (Italy) and operated on the basis of an 'Integrated Environmental Permit', granted in 2011.

Despite the seizure of its assets in 2012, that plant was authorised, under special derogatory rules, to continue its production activity for a duration of 36 months, provided it comply with a plan of environmental and health protection measures. The cut-off date for compliance with that plan has been extended several times, over a total period of several years, even though the activity at issue posed serious and significant threats to the integrity of the environment and the health of the surrounding populations.

In that context, approximately 300 000 inhabitants of the municipality of Taranto and the adjacent municipalities have brought a collective action before the referring court seeking, inter alia, that the Ilva plant or certain parts of that plant cease operation on account of the pollution caused by its industrial emissions and the resulting damage to human health.

Since the Italian legislation does not render the grant or reconsideration of an industrial operating permit subject to a prior assessment of the effects of the installation on human health, the referring court decided to make a request for a preliminary ruling to the Court of Justice as regards the need for such an assessment, as regards the scope of the examination by the competent authorities and as regards the period granted to the operator of an installation to comply with the conditions set in the permit issued.

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[103] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17).

Findings of the Court

First, so far as concerns the need to carry out an assessment covering the effects of the activity of the installation at issue on human health, the Court points out that the protection and improvement of the quality of the environment and the protection of human health are two closely linked components of EU policy on the environment. By establishing rules concerning the integrated prevention and control of pollution imputable to industrial activities, Directive 2010/75 puts into concrete terms the European Union's obligations concerning environmental protection and the protection of human health, which stem, inter alia, from Article 191 TFEU, thereby contributing to safeguarding the right of everyone to live in an environment which is adequate for personal health and well-being. The Court refers, in this connection, to Articles 35 and 37 of the Charter of Fundamental Rights of the European Union and notes the close link between the protection of the environment and that of human health.

The operating permit conditions provided for by that directive include the obligation on the operator to take all the appropriate preventive measures against 'pollution' and measures to monitor the emissions into the environment. That operator must also ensure that its operation does not cause any 'significant pollution'. In addition, the permit conditions are reconsidered where the 'pollution' caused by the installation warrants such a reconsideration. The frequency of that reconsideration must be adapted to the extent and nature of the installation and take account, inter alia, of the specific local characteristics of the place in which the industrial activity is taking place, in particular its proximity to dwellings.

In that regard, the Court observes that the concept of 'pollution', referred to in Directive 2010/75, includes the harm caused, or which may be caused, both to the environment and to human health. That close link between the protection of the quality of the environment and that of human health is, moreover, borne out by, in addition to the provisions of primary EU law, several provisions of Directive 2010/75 and the case-law of the European Court of Human Rights. As regards specifically the pollution caused by the Ilva plant, the latter court has found an infringement of the applicants' right to respect for private and family life on the basis of the pollutant effects of the emissions from that plant both on the environment and on human health. [104]

It follows that the operator of an installation falling within the scope of Directive 2010/75 must, in its permit application, provide adequate information concerning the emissions from its installation and must also, throughout the period of operation, ensure compliance with the obligations and measures provided for under that directive, by a continuous assessment of the effects of the activities of that installation on the environment and on human health.

Likewise, it is for the competent national authorities to provide that such an assessment forms an integral part of the procedures for the grant and reconsideration of an operating permit and constitutes a prerequisite to its grant or reconsideration. Where that assessment reveals results showing the unacceptable nature of the danger to the health of a large population exposed to polluting emissions, the permit concerned must be reconsidered in a short time frame. In the present case, the effects on the environment and on human health of polluting substances from the Ilva plant, namely fine PM 2.5 and PM10 particulate matter, copper, mercury and naphthalene from diffuse sources, was not assessed in connection with the environmental permits at issue.

Secondly, so far as concerns the scope of the assessment to be carried out by the competent authorities, the latter must take into account, in addition to the polluting substances that are foreseeable having regard to the nature and type of industrial activity concerned, all those substances which are the subject of emissions scientifically recognised as harmful which are liable to be emitted from the installation concerned, in significant quantities, having regard to their nature and their potential to transfer pollution from one medium to another. In accordance with the preventive

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104 ECtHR, 24 January 2019, *Cordella and Others v. Italy*, CE:ECHR:2019:0124JUD005441413.

principle, the identification of the quantity of polluting substances the emission of which may be authorised must be linked to the degree of harmfulness of the substances concerned.

Accordingly, the operator of an installation is subject to the obligation to provide, in its application for an operating permit, information on the nature, quantity and potential harmful effect of the emissions likely to be produced by that installation, in order for the competent authorities to be able to set limit values for those emissions, with the sole exception of those which, by their nature or quantity, are not likely to constitute a risk to the environment or to human health.

The procedure for reconsideration of a permit cannot be restricted, for its part, to setting limit values only for the polluting substances whose emission was foreseeable and was taken into consideration in the initial authorisation procedure. In that regard, it is necessary to take into account the experience gained from operation of the installation concerned and, therefore, the emissions actually established. If compliance with environmental quality standards requires that stricter emission limit values be imposed on the installation concerned, additional measures must then be included in the permit, without prejudice to other measures which may be taken to comply with those standards.

Thirdly, as regards the period granted to the operation of an installation in order to comply with the operating permit, the Court states, as a preliminary point, that, in respect of installations such as the Ilva plant, the competent national authorities had, under Directive 2010/75, until 28 February 2016 to adapt the permit conditions to the new techniques available. Where the permit conditions for the operation of an installation are infringed, the Member States are required, under that directive, to take the necessary measures to ensure that those conditions are complied with immediately.

In the light of those considerations, the Court concludes that Directive 2010/75 precludes national legislation under which the period granted to the operator of an installation to comply with the measures for the protection of the environment and human health provided for in the permit to operate that installation has been repeatedly extended, whereas serious and significant risks to the integrity of the environment and human health have been identified. It adds that, where the activity poses such risks, the operation of the installation concerned is, in accordance with that directive, to be suspended.

X. JUDGMENTS PREVIOUSLY DELIVERED

1. APPROXIMATION OF LAWS: INFORMATION SOCIETY SERVICES

Judgment of the Court of Justice (Second Chamber), 30 May 2024, Expedia, C-663/22

Link to the full text of the judgment

Reference for a preliminary ruling – Regulation (EU) 2019/1150 – Articles 1, 15, 16 and 18 – Objective – Application – Monitoring – Review – Measures adopted by a Member State – Obligation to provide information on the economic situation of a provider of online intermediation services

On a reference for a preliminary ruling from the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the Court of Justice interprets, for the first time,

Regulation 2019/1150 [105] by providing clarification of the discretion available to the Member States when adopting national measures in order to ensure the adequate and effective enforcement of that regulation. [106]

Expedia Inc., a company whose registered office is in Seattle (United States of America), manages IT platforms allowing the provision of online accommodation and travel reservation services. As an online intermediation service provider in Italy, it is subject to the obligation to send to the Autorità per le Garanzie nelle Comunicazioni (Communications Regulatory Authority, Italy) ('AGCOM') a document entitled 'informativa economica di sistema' (Economic System Information), [107] in which information on its economic situation must be inserted. Failure to send that declaration to AGCOM or the communication of inaccurate data are subject to penalties.

Since the referring court had doubts as to the compatibility of such an obligation with EU law, it decided to ask the Court, in essence, whether Regulation 2019/1150 must be interpreted as justifying the adoption by a Member State of measures under which, on pain of penalties, providers of online intermediation services are subject, with a view to providing their services in that Member State, to the obligation to send periodically to an authority of that Member State a document relating to their economic situation, in which it is necessary to set out a large amount of information relating, inter alia, to the revenues of those providers.

Findings of the Court

As a preliminary point, the Court recalls that, in so far as the implementation of certain provisions of a regulation so requires, the Member States may, under certain conditions, adopt measures for its implementation.

In the present case, the Court aims to identify the objective pursued by Regulation 2019/1150 and the provisions thereof that confer a role on the Member States for its implementation.

In the first place, the Court notes that Regulation 2019/1150 [108] imposes on the service providers concerned specific obligations relating to the transparency and fairness of the conditions applied to business users of online intermediation services [109] and lays down provisions concerning the out-of-court and judicial resolution of disputes between such providers and those business users. Thus, the information which the Member States may be called upon to provide to the European Commission, under Articles 16 and 18 of Regulation 2019/1150, must be relevant for the purpose of enabling that institution to monitor the development of relations, in particular, between providers of online intermediation services and those business users or to draw up reports on the evaluation of that regulation.

Since the objective of Regulation 2019/1150 is to establish a fair, predictable, sustainable and trusted environment for online business operations within the internal market, in which business users of online intermediation services are afforded appropriate transparency, fairness and effective redress

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105 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ 2019 L 186, p. 57).

106 It should be noted that the judgments delivered on the same day in Joined Cases C-662/22 and C-667/22, *Airbnb Ireland and Amazon Services Europe*, Joined Cases C-664/22 and C-666/22, *Google Ireland and Eg Vacation Rentals Ireland*, and in Case C-665/22, *Amazon Services Europe*, which concern, inter alia, the interpretation of Regulation 2019/1150, concern an issue similar to that at issue in the present case. However, those judgments focus on the interpretation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1), and its relationship with that regulation.

107 Following amendments made to the legal framework adopted by the Italian authorities, and, inter alia, the adoption by AGCOM of *delibera n. 161/21/CONS – Modifiche alla delibera n. 397/13 del 25 giugno 2013 'Informativa Economica di Sistema'* (Decision No 161/21/CONS on Modifications to Decision No 397/13 of 25 June 2013 'Economic System Information').

108 See recitals 7 and 51 and Article 1(1) of Regulation 2019/1150.

109 See Article 2(1) of Regulation 2019/1150.

possibilities, the information gathered by the national authorities can be classified as 'relevant', within the meaning of Articles 16 and 18 of that regulation, only if it has a sufficiently direct link with that objective. By contrast, a Member State cannot, under the application of Regulation 2019/1150, gather arbitrarily selected information on the ground that it may subsequently be requested by the Commission in the exercise of its task of monitoring and reviewing that regulation, since that regulation does not require the Member States to gather, on their own initiative, such information.

In the second place, where a Member State entrusts an administrative authority with the task of monitoring, in accordance with Article 15 of Regulation 2019/1150, the enforcement of that regulation, the information which that authority may gather, in exercising that task, is appropriate for attaining the objective of that regulation only if it has a sufficiently direct link with it. That is not the case for information relating to the economic situation of providers of online intermediation services with regard to the objective of Regulation 2019/1150. The information required of the service providers on the basis of Regulation 2019/1150 must concern the conditions of the service provided, in order, inter alia, to enable the competent authorities to know and assess the fairness of the contractual conditions laid down by those providers to business users of online intermediation services within the European Union. The link between, on the one hand, the economic situation of a provider of such services and, on the other hand, the arrangements under which those services are provided for the benefit of those business users, assuming that they exist, can only be indirect.

Consequently, the Court considers that Regulation 2019/1150 does not justify, with a view to the adequate and effective implementation of that regulation, the adoption by a Member State of measures under which, on pain of penalties, providers of online intermediation services are subject, for the purposes of providing their services in that Member State, to the obligation to send periodically to an authority of that Member State a document relating to their economic situation, in which it is necessary to set out a large amount of information relating, in particular, to the revenue of those service providers.

2. ECONOMIC AND MONETARY POLICY: SINGLE RESOLUTION MECHANISM

Judgment of the Court of Justice (Grand Chamber), 29 May 2024, Portigon v SRB, T-360/21 P

Link to the judgment as published in extract form

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 2021 ex ante contributions – Plea of illegality – Legal basis of Regulation No 806/2014 – Article 114 TFEU – Equal treatment – Commission's margin of discretion – SRB's margin of discretion – Duty to state reasons

Hearing an action for annulment, which it upholds, the General Court annuls the decision of the Single Resolution Board (SRB) setting the 2021 *ex ante* contributions [110] to the Single Resolution Fund (SRF), on account of the SRB's failure to fulfil its obligation to state reasons relating to the determination of the annual target level. Furthermore, the Court rules on the compatibility of

[110] Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 *ex ante* contributions to the Single Resolution Fund ('the contested decision').

Regulation No 806/2014 [111] and, for the first time, that of Directive 2014/59, [112] taken together, with Article 114(1) and (2) TFEU, providing clarifications as to the concept of 'fiscal provisions', having regard to the characteristics of the *ex ante* contributions. Moreover, the Court provides clarifications regarding the powers of the SRB in determining risk indicators and sub-indicators concerning the adjusting multiplier of the *ex ante* contributions according to the risk profile of the credit institutions, drawing a distinction between the delegation of power to the European Commission within the meaning of Article 290 TFEU and the grant of discretion to the SRB, and regarding the account taken of public financial support, prior to Directive 2014/59, in the calculation of that multiplier.

Portigon is a credit institution established in Germany. On 14 April 2021, the SRB adopted the contested decision in which it set [113] the 2021 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant.

Findings of the Court

In the first place, as regards the pleas alleging that provisions of Regulation No 806/2014 and of Directive 2014/59 are unlawful in the light of the provisions of the Treaties, which the Court rejects, the applicant contested, in particular, the legal basis – namely Article 114 TFEU – pursuant to which the provisions at issue were adopted, on the one hand, and the choice to apply paragraph 1 of that article, whereas the *ex ante* contributions are fiscal in nature and, therefore, fall within the scope of paragraph 2 thereof.

To begin with, as regards the challenge to the legal basis relied upon, the Court notes that the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review, which include the aim and the content of that measure. Legislative acts adopted on the basis of Article 114(1) TFEU must, first, comprise measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States and, second, have as their object the establishment and functioning of the internal market.

First of all, the Court notes that Article 114 TFEU may be used as a legal basis only where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market. It is clear, from the recitals of Regulation No 806/2014, that that regulation seeks to weaken the ties between the perceived fiscal position of individual Member States and the funding costs of banks and undertakings operating in those Member States, as well as to place the responsibility of financing the stabilisation of the financial system on the financial industry as a whole. Thus, Regulation No 806/2014 establishes, inter alia, uniform rules and a uniform procedure for the resolution of institutions, which should be applied by the SRB, in order to address the threats encountered. Similarly, Directive 2014/59 establishes, inter alia, harmonised rules and a harmonised procedure for the resolution of institutions, in order to address the concerns of the EU legislature set out in the recitals of that directive. The SRF and the national financing arrangements are essential elements of those rules and that procedure, which make it possible, as is apparent from Regulation No 806/2014 and from Directive 2014/59, to ensure the efficient exercise of resolution powers and to contribute to the financing of the resolution tools while ensuring their efficient application. In order to ensure sufficient financial means in the SRF and the national financing arrangements, they are financed, inter alia, by the *ex ante* contributions paid by the institutions.

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111 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).

112 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, 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).

113 In accordance with Article 70(2) of Regulation No 806/2014.

Consequently, the payment of those contributions ensures the efficient application of the uniform or harmonised rules and the uniform or harmonised procedure for the resolution of institutions, and therefore the purpose of Regulation No 806/2014 and Directive 2014/59 is to improve the conditions for the establishment and functioning of the internal market.

Furthermore, as regards the condition laid down in Article 114(1) TFEU, namely that the EU measure concerned must comprise measures for the approximation of the provisions laid down in Member States, it is apparent, first, that there was no unified decision-making process for the resolution of institutions in the Union and, second, that there were significant substantive and procedural differences between the laws, regulations and administrative provisions governing the insolvency of the institutions in the Member States. In that context, the EU legislature established rules and a procedure, which are uniform within the banking union and harmonised between the Member States, for the resolution of institutions, as well as a uniform procedure for the collection of the *ex ante* contributions in order to ensure the efficient application of those rules and procedures.

The Court concludes that Regulation No 806/2014 and Directive 2014/59 satisfy the conditions set out in Article 114(1) TFEU.

Secondly, with regard to the choice to apply Article 114(1) TFEU, whereas the contributions come within the scope of the provisions of Article 114(2) on account of their fiscal nature, the Court holds that the provisions of Regulation No 806/2014 and of Directive 2014/59 which require institutions to pay *ex ante* contributions and specify the methods for their calculation do not constitute 'fiscal provisions' within the meaning of Article 114(2) TFEU.

A levy paid by economic operators in a particular sector is not fiscal in nature in a situation where, in particular, it is directly allocated solely to the financing of expenditure in that sector and where that expenditure is necessary for the functioning of that sector in order, in particular, to stabilise it. That reasoning also applies in the case of *ex ante* contributions, which follow an insurance-based logic and which are paid by economic operators in a particular sector in order to finance exclusively expenditure of that sector.

It is true that, since Regulation No 806/2014 and Directive 2014/59 do not establish any automatic link between the payment of the *ex ante* contribution and the resolution of the institution concerned, the *ex ante* contributions cannot be regarded as insurance premiums which could be paid monthly and reimbursed. The fact remains that the institutions benefit in two respects from the SRF and the national financing arrangements, which are financed specifically by their *ex ante* contributions. First, where institutions are failing or are likely to fail, their financial situation may be remedied in the context of a resolution procedure which may be initiated in their favour. Such a procedure thus allows the financial means of the SRF or of the national financing arrangements to be used for the benefit of such institutions, it being recalled that those means were provided by the institutions' contributions. Second, all institutions benefit from their *ex ante* contributions through the stability of the financial system, which is ensured by the SRF and the national financing arrangements.

It follows that it is from an insurance-based rather than a tax-based perspective that the SRF and the national financing arrangements seek to ensure the stability of the financial sector as a whole, with the objective of ensuring protection against its own crisis for the benefit of all institutions. That insurance-based purpose is also reflected in the calculation of the *ex ante* contributions, given that they are not the result of applying a certain rate to a basis of assessment but rather are the result of the setting of a final target level, and thereafter of an annual target level, which is then divided between the institutions. It follows from the foregoing that the institutions pay the *ex ante* contributions in an insurance-based logic, it being recalled that those contributions are directly allocated solely to the financing of the expenditure of the financial sector of which those institutions are part and that that expenditure is necessary for the functioning of that sector in order, inter alia, to stabilise it should certain institutions fail and to limit contagion effects.

In the second place, as regards the plea alleging that the sub-delegation of power by the Commission to the SRB is unlawful, the Court, in accordance with its related case-law, [114] recalls that the provisions in Article 6(5) to (7) and Article 7(4) of Delegated Regulation 2015/63[115], which relate to risk pillar IV, confer discretion on the SRB. However, the grant of such discretion does not equate to a delegation of power by the Commission to the SRB within the meaning of Article 290(1) TFEU.

In that regard, the Court draws a distinction between such a power of delegation as provided for in Article 290(1) TFEU [116] and the power to apply – legislative or non-legislative – acts of general application to persons or situations falling within the scope of such acts. However, first, Delegated Regulation 2015/63 does not contain any provision by which the Commission conferred on the SRB a delegated power for the purpose of adopting acts of general application which supplement or amend certain elements of Directive 2014/59, Regulation No 806/2014 or that delegated regulation. By contrast, several provisions of that delegated regulation [117] confirm the power granted to the SRB by Directive 2014/59 and by Regulation No 806/2014 to apply those acts of general application by calculating the *ex ante* contributions of the institutions which fall within their scope. Second, despite the name given to risk pillar IV, contained in Article 6(1)(d) of Delegated Regulation 2015/63, namely 'Additional risk indicators to be determined by the resolution authority', the main principles regarding the application of that risk pillar were specified by the Commission itself in Article 6(5) to (8) of that delegated regulation. Similarly, the Commission determined the rules governing the weight applied to the risk indicators within that risk pillar in Article 7(4) of the delegated regulation.

The Court therefore takes the view that Delegated Regulation 2015/63 did not confer on the SRB the power to adopt acts of general application within the meaning of Article 290(1) TFEU, and it rejects this plea of illegality.

In the third and final place, as regards the assignment by the contested decision of the classification of an 'institution undergoing restructuring' to the applicant, on account of public financial support granted before the entry into force of Directive 2014/59, which resulted in an increase in its risk adjustment multiplier , the Court recalls that Article 6(5)(c) of Delegated Regulation 2015/63 provides that risk pillar IV consists, amongst other risk indicators, of the risk indicator 'extent of previous extraordinary public financial support'. Pursuant to Directive 2014/59, [118] read together with Delegated Regulation 2015/63, [119] 'extraordinary public financial support' means State aid within the meaning of Article 107(1) TFEU, or any other public financial support at supranational level, which, if it were granted at national level, would constitute State aid, provided in order to preserve or restore the viability, liquidity or solvency of an institution.

In the present case, the Court finds, first, that the applicant underwent restructuring after receiving State aid within the meaning of Article 107(1) TFEU. Second, the fact that that aid was granted before the entry into force of Directive 2014/59 has no bearing on the fact that that aid falls within the scope of Article 6(5)(c) of Delegated Regulation 2015/63, read together with Article 2(1)(28) of that directive. Neither the wording of Article 2(1)(28) of Directive 2014/59 nor that of Article 6(8)(a) of Delegated Regulation 2015/63 contains any provision which limits the temporal application of the latter provision.

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114 Judgment of 20 December 2023, *Landesbank Baden-Württemberg* v *SRB* (T-389/21, EU:T:2023:827, paragraphs 73 to 85).

115 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).

116 Namely, the power to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act.

117 In particular Articles 4 and 6 to 9 of Delegated Regulation 2015/63.

118 See Article 2(1)(28) of Directive 2014/59.

119 See the first paragraph of Article 3 of Delegated Regulation 2015/63.

The Court therefore considers that the SRB was right to take the view that the applicant fell within the scope of Article 6(8)(a) of Delegated Regulation 2015/63 and to apply to it, in accordance with that provision, the maximum value for the risk indicator 'extent of previous extraordinary public financial support'.

Judgment of the Court of Justice (First Chamber), 29 May 2024, Hypo Vorarlberg Bank v SRB (2022 ex ante contributions), T-395/22 P

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the Single Resolution Board (SRB) on the calculation of the ex ante contributions for the 2022 contribution period – Determination of the annual target level of the SRF – Ceiling provided for in the first and fourth subparagraphs of Article 70(2) of Regulation (EU) No 806/2014 – Article 291(2) TFEU – Article 70(7) of Regulation No 806/2014 – Implementing Regulation (EU) 2015/81 – Implementing powers conferred on the Council – Duly justified specific cases – Scope of the implementing powers – Limitation of the temporal effects of the judgment

Hearing an action for annulment against the decision of the Single Resolution Board (SRB) determining the 2022 *ex ante* contributions to the Single Resolution Fund (SRF), [120] which it upholds, the General Court upholds the plea of illegality in respect of Article 70(7) of Regulation No 806/2014, [121] on the ground that that regulation does not set out the reasons why the conferral of the implementing power on the Council of the European Union laid down in that provision, as regards the rules for calculating those contributions, constitutes a duly justified specific case within the meaning of Article 291(2) TFEU. In addition, it clarifies the scope of that power, by upholding the plea of illegality in respect of Article 8(1)(g) of Implementing Regulation 2015/81. [122]

Hypo Vorarlberg Bank AG, the applicant, is a credit institution established in Austria. On 11 April 2022, the SRB adopted the contested decision in which it set [123] the 2022 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant. The applicant seeks the annulment of the contested decision in so far as that decision concerns it.

Findings of the Court

In the first place, the Court notes first of all that Regulation No 806/2014 [124] does not provide any justification concerning the reasons why the EU legislature decided to confer the implementing power relating to the application of the method of calculating the *ex ante* contributions on the Council ('the power in question'). That regulation refers only to the purpose and the content of the implementing acts to be adopted and to the decision to confer on the Council the power to adopt them, without

120 Decision SRB/ES/2022/18 of the Single Resolution Board of 11 April 2022 on the calculation of the 2022 *ex ante* contributions to the Single Resolution Fund ('the contested decision').

121 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).

122 Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to *ex ante* contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

123 In accordance with Article 70(2) of Regulation No 806/2014.

124 See recital 114.

providing any information as to the reasons why that power was conferred on the Council, rather than the European Commission.

Next, the Court observes that Regulation No 806/2014 does not contain any other reasoning capable of revealing the specific reasons justifying that conferral. In addition, although it is possible, in certain circumstances, for such a conferral to be justified by the context in which it occurs, the Court finds, first, that the parties did not rely on any specific circumstance arising from the context in which Regulation No 806/2014 was adopted that would be capable of revealing such reasons. Second, neither Regulation No 806/2014 nor any other legislative act of the European Union contains any reasoning capable of justifying the conferral of that power on the Council, on account of the specific role that that institution would be called on to perform in the field of calculating the *ex ante* contributions. Lastly, the Court rejects the argument raising 'political reasons' as the ground for conferring that power. No such justification is apparent from Regulation No 806/2014 and it does not satisfy, given its general nature, the requirements arising from case-law, since that justification is neither detailed nor related to the nature or the content of Regulation No 806/2014. Accordingly, the Court concludes that Regulation No 806/2014 does not contain any justification concerning the conferral of the power in question on the Council, rather than the Commission, and upholds the plea of illegality, declaring Article 70(7) of Regulation No 806/2014 inapplicable in the present case under Article 277 TFEU. Consequently, Implementing Regulation 2015/81, which was adopted by the Council on the basis of that provision and of which the contested decision is an implementing measure, is likewise inapplicable in the present case.

In the second place, with regard to the plea of illegality in respect of Article 8(1) of Implementing Regulation 2015/81, the Court finds, first, that it follows from the wording of Regulation No 806/2014 [125] that the method of calculating the basic annual contribution of the institutions concerned is based on the determination of the net liabilities of each institution concerned as a proportion of the total net liabilities of all of the institutions authorised 'in the territories of all of the participating Member States'. Thus, the data from all of those institutions are taken into account to calculate the *ex ante* contribution of each institution, at the very least as regards its first component, namely the basic annual contribution. Second, the method of calculation introduced by Regulation No 806/2014, and in particular the rule determining the base of the data to be taken into account for the purposes of that method, applies fully to each year of the initial period, including the 2022 contribution period.

However, the very purpose of the 'adjusted methodology', introduced by Implementing Regulation 2015/81, [126] is to provide that a proportion of the *ex ante* contributions is calculated, for almost the entirety of the initial period, in accordance with a different database from that provided for in Regulation No 806/2014. Thus, in accordance with Implementing Regulation 2015/81, read in conjunction with Directive 2014/59, 127 for the purpose of the calculation of a proportion of the ex ante contributions for that period, only the data communicated by institutions which are authorised in the territory of the participating Member State concerned are taken into account, to the exclusion of those communicated by institutions authorised in the territories of the other participating Member States, whereas the method of calculation in Regulation No 806/2014 specifically takes into account those latter data for the purpose of the calculation of the basic annual contribution. It follows that Implementing Regulation 2015/81 changes the very basis of the method of calculating *ex ante* contributions provided for in Regulation No 806/2014, by altering the base of the data to be taken

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125 See Article 70(1) and point (a) of the second subparagraph of Article 70(2).

126 See Article 8(1).

127 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, 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).

into account in the context of that method. As a result, the amounts of the institutions' *ex ante* contributions, calculated according to the 'adjusted methodology', are necessarily different from those which would have resulted from the application of the method in Regulation No 806/2014. The extent of that alteration is exacerbated by the fact that it covers seven of the eight years of the initial period, and therefore that method is deprived of its full effects for almost the entirety of that period.

Secondly, the Court observes that, when the institution concerned adopts implementing measures on the basis of Article 291(2) TFEU, it must simply specify the basic act without altering its legislative content. Thus, assuming that, by introducing the 'adjusted methodology', the Council pursued the objective of preventing distortions between banking sector structures of the Member States, [128] it had to comply with the limits imposed on the implementing power conferred on it, by simply specifying the method of calculation in Regulation No 806/2014.

Thirdly, the General Court recalls that the calculation of the *ex ante* contributions to the SRF is governed by Article 70 of Regulation No 806/2014 and not by Article 103 of Directive 2014/59, which concerns the *ex ante* contributions to the national resolution financing arrangements. It is true that, in accordance with that regulation, the adjustment of the *ex ante* contributions in proportion to the risk profile must be based on the criteria laid down in Directive 2014/59. In addition, under that regulation, the Council is to adopt the implementing acts 'within the framework of the delegated acts' adopted by the Commission pursuant to Directive 2014/59 in order to specify the concept of adjustment of the contributions in proportion to the institutions' risk profile. However, Regulation No 806/2014 refers only to the concept of adjustment of the *ex ante* contributions in proportion to the risk profile as provided for in Directive 2014/59. In that context, even if the Council were required to take into account both that concept of adjustment of the contributions in proportion to the risk profile and the delegated acts adopted by the Commission to specify that concept, it is not apparent from Regulation No 806/2014, Directive 2014/59 or those delegated acts that the Council was empowered to introduce an adjusted method of calculation, in the context of which a proportion of the basic annual contributions was calculated on the national base, [129] that is to say, that defined in Directive 2014/59.

Fourthly, the General Court finds that there is no provision of Regulation No 806/2014 or of Directive 2014/59 under which the Council is empowered to introduce a method for calculating the *ex ante* contributions based on a gradual abolition of the method of calculation based on the national base and its gradual replacement with the method based on the union base. [130] Although the Council could thus pursue the legitimate objective of preventing distortions between banking sector structures of the Member States and it is not ruled out that the adjusted methodology is necessary to that end, the fact remains that it was for the EU legislature to provide for the gradual replacement of the method based on the national base with that based on the union base and, if appropriate, to empower the Council to specify the rules for its application in an implementing act. The Council could not therefore provide for such a transition without exceeding the limits imposed on its implementing power.

The Court therefore observes that Implementing Regulation 2015/81 alters the legislative content of Regulation No 806/2014 as regards the method of calculating the *ex ante* contributions and considers that, by adopting Article 8(1) of Implementing Regulation 2015/81, the Council exceeded the implementing powers conferred by Regulation No 806/2014, read in conjunction with Article 291(2) TFEU.

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128 See point (b) of the second subparagraph of Article 70(2) of Regulation No 806/2014.

129 That is to say, on the basis of the data communicated by institutions authorised in the territory of the participating Member State concerned.

130 That is to say, on the basis of the data communicated by all of the institutions authorised in the territories of all of the participating Member States.

In view of the heads of illegality which vitiate the contested decision, the General Court annuls the contested decision in so far as it concerns the applicant. Nonetheless, in the circumstances of the present case, it has decided to maintain the effects of that decision until the entry into force, within a reasonable period which cannot exceed 12 months from the date of delivery of the present judgment, of the measures necessary to comply with the judgment.

3. INTERNATIONAL AGREEMENTS : INTERPRETATION OF AN INTERNATIONAL AGREEMENT

Judgment of the Court of Justice (First Chamber), 30 May 2024, Finanzamt Köln-Süd (Voluntary assessment requested by a partially taxable person), C-627/22

Link to the full text of the judgment

Reference for a preliminary ruling – Agreement between the European Union and the Swiss Confederation on the free movement of persons – Worker from a Member State who has transferred his residence to Switzerland – Tax concessions – Income tax – 'Voluntary assessment' mechanism – Taxpayers who may benefit therefrom – Restriction to partially taxable employed persons resident in a Member State or in a State party to the Agreement on the European Economic Area (EEA) – Equal treatment

In a dispute relating to a Member State's tax treatment of income from the employment of one of its nationals with a national undertaking established in its territory, when that national has transferred his residence to Switzerland, the Court held that the AFMP [131] precludes a tax regime whereby taxpayers are treated differently by reason of their residence.

From 2017 to 2019, AB, a German national, was employed by a company established in Germany, while teleworking from his home in Switzerland and as part of business trips to Germany.

At that time, AB was partially liable to tax in Germany in respect of that German income and his entire salary was subject to wage tax that was withheld at source by his employer. In addition to his income from employment, AB received income from the rental and leasing of two properties situated in Germany.

After he incurred occupational expenses, namely expenses in connection with the use of a personal vehicle and other travel expenses linked to his taxable activity in Germany, AB submitted a request for an income tax assessment that allowed occupational expenses to be taken into account and the German wage tax already paid by virtue of having been withheld at source to be offset against the calculated amount of German income tax.

The tax authority denied that request, since it was limited to workers who have their place of residence or habitual abode in an EU Member State or in a State party to the EEA Agreement. [132]

Following several unsuccessful administrative complaints, AB brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany), the referring court. According to AB, the denial

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131 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6), as last adapted by the Protocol of 4 March 2016 regarding the participation of the Republic of Croatia as a Contracting Party, following its accession to the European Union (OJ 2017 L 31, p. 3; 'the AFMP').

132 Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

of voluntary assessment to taxpayers who are resident in a Member State or in another State party to the EEA Agreement is contrary to the AFMP.

In order to resolve that dispute, the referring court seeks to ascertain, in essence, whether such a tax regime, which reserves certain tax concessions to taxpayers who reside in a Member State or in a State party to the EEA Agreement, to the exclusion of nationals of a Member State who reside in Switzerland and receive income from employment in that Member State, is compatible with Articles 7 and 15 of the AFMP, read in conjunction with Article 9(2) of Annex I to the AFMP.

The Court of Justice answers that question in the negative.

Findings of the Court

First of all, the Court considers that AB falls within the scope of the AFMP as an employed frontier worker within the meaning of Article 7 of Annex I to the AFMP [133] or, if the condition of returning to the place of residence is not satisfied, as an employed person within the meaning of Article 6 of that annex. [134]

That article does not preclude a national's State of origin from being regarded as the 'host State', in a situation such as that at issue in the main proceedings, or preclude that national from being regarded as an 'employed person' there within the meaning of Chapter II of Annex I to the AFMP. The right of residence laid down by the AFMP, namely the right of nationals of one Contracting Party to establish their residence in the territory of the other Contracting Party regardless of the pursuit of an economic activity, supports that analysis.

Therefore, an employed person such as AB, who is a national of a Contracting Party and has exercised his right to freedom of movement and is employed in his State of origin, may, in accordance with the case-law of the Court, [135] rely on Article 9 of Annex I to the AFMP, which enshrines the principle of equal treatment, with regard to his State of origin, in order to enjoy the same tax concessions as national employed persons. Such recognition thus enables that employed person to benefit fully from the right of residence provided for by the AFMP, while maintaining his economic activity in his country of origin.

The Court then recalls that, in accordance with the case-law prior to the date of signature of the AFMP, the principle of equal treatment prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other distinguishing criteria, such as the criterion of residence, lead in fact to the same result and that that case-law is also valid with regard to the application of that agreement, in accordance with Article 16(2) thereof. Consequently, legislation that provides, as regards the possibility of obtaining a tax concession, for a difference in treatment on the basis of the employed person's residence is liable to lead to the same result as discrimination by reason of nationality prohibited by Article 9(2) of Annex I to the AFMP.

Although such different treatment is permitted in tax matters, according to Article 21(2) of the AFMP, with regard to taxpayers whose situation is not comparable, that provision cannot serve as a basis for denying an employed person a tax concession on the sole ground that his or her place of residence is in Switzerland and not in Germany, since the German legislation treats the situation of resident taxpayers in the same way as certain non-resident taxpayers and there is nothing to show that the

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133 Article 7(1) of Annex I to the AFMP defines an employed frontier worker as a national of a Contracting Party who has his or her residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his or her place of residence as a rule every day, or at least once a week.

134 Under Article 6 of that annex, a national of a Contracting Party who is employed by an employer in the host State is to be regarded as an employed person.

135 See judgments of 28 February 2013, *Ettwein* (C-425/11, EU:C:2013:121, paragraphs 33 and 39); of 19 November 2015, *Bukovansky* (C-241/14, EU:C:2015:766, paragraphs 36 and 47); of 21 September 2016, *Radgen* (C-478/15, EU:C:2016:705, paragraphs 39 and 40); and of 26 February 2019, *Wächtler* (C-581/17, EU:C:2019:138, paragraph 53).

residence of a taxpayer specifically in Switzerland makes his or her situation objectively different from that of a taxpayer resident in Germany, for the purpose of taxing the wages received in Germany.

Furthermore, neither Article 21(3) of the AFMP [136] nor reliance on an overriding reason in the public interest relating to the alleged need to preserve the coherence of the German tax system can justify such a difference in treatment in the present case. Denying voluntary assessment does not appear to be capable of ensuring the imposition, payment and effective recovery of taxes or of forestalling tax evasion and, moreover, there is no direct link between the advantage of voluntary assessment and the offsetting of that advantage by a particular tax levy.

Last, the Court considers that it does not follow from the wording of Article 13 of the AFMP, which provides for a standstill clause, from the context of that article or from the objectives pursued by the AFMP that the States party to the AFMP have any right to maintain existing restrictions, which would be contrary to the objectives of the AFMP in relation to the free movement of persons.

4. EUROPEAN CIVIL SERVICE: RULES ON LANGUAGES OF NOTICES OF OPEN COMPETITION

Judgment of the Court of Justice (Chamber), 8 May 2024, France v Commission, T-555/22

Rules on languages – Notice of open competition for the recruitment of administrators and experts in the fields of defence industry and space – Restriction of the choice of language 2 to English – Regulation No 1 – Article 1d(1), Article 27 and Article 28(f) of the Staff Regulations – Discrimination on grounds of language – Interest of the service – Proportionality

Hearing an action brought by the French Republic, supported by three other Member States intervening in the proceedings, namely the Kingdom of Belgium, the Hellenic Republic and the Italian Republic, the General Court annuls notice of open competition EPSO/AD/400/22. The purpose of that competition was to draw up reserve lists from which to recruit administrators and experts in the fields of defence industry and space within the European Commission. In these proceedings, the Court rules for the first time on the lawfulness of the language regime of an open competition which restricts the choice of the second language of that competition to one official EU language (English) and stipulate that all the main tests in that competition must be taken only in that language.

In this case, the French Republic claimed that the notice of competition in question infringed Article 1d of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), read in the light of Articles 21 and 22 of the Charter of Fundamental Rights of the European Union, relating to the principle of non-discrimination and respect for linguistic diversity, respectively. The applicant explained that, in view of the use and usefulness of official EU languages other than English within the Commission, in particular French, the plea alleging the need for persons recruited to be immediately operational was no justification for such a restriction, since the latter did not meet the real needs of the service. The applicant added that, in any event, the Commission had failed to demonstrate that such discrimination was proportionate.

136 Article 21(3) of the AFMP provides, inter alia, that that agreement is not to prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under the national tax legislation of a Contracting Party.

Findings of the Court

As a preliminary point, the Court states that limiting the choice of the second language of candidates in a competition to a restricted number of languages, to the exclusion of the other official languages, constitutes discrimination on grounds of language, which is in principle prohibited under Article 1d(1) of the Staff Regulations. Certain potential candidates who have a satisfactory knowledge of at least one of the designated languages are favoured since they may participate in the competition and thus be recruited as officials or servants of the European Union, whereas others who do not have such knowledge are excluded.

The broad discretion enjoyed by the EU institutions with regard to the organisation of their departments, like the European Personnel Selection Office (EPSO) where the latter exercises the powers conferred on it by those institutions, is therefore governed in mandatory terms by Article 1d of the Staff Regulations. Therefore, differences of treatment based on language resulting from a restriction on the language regime of a competition to a limited number of official languages can only be accepted if such a restriction is objectively justified and proportionate to the real needs of the service. In addition, any requirement relating to specific language skills must be based on clear, objective and foreseeable criteria enabling candidates to understand the reasons for that requirement and allowing the Courts of the European Union to review the lawfulness thereof.

Discrimination on grounds of language may be justified by the interest of the service in having officials with a command of the language or languages used by the service in question so that they will be immediately operational. However, it is for the institution which has limited the language regime of a selection procedure to a restricted number of official languages of the European Union to establish that such a restriction is indeed appropriate for the purpose of meeting the real needs relating to the duties that the persons recruited are required to carry out, that it is proportionate to those needs and that it is based on clear, objective and foreseeable criteria. The Court, for its part, must carry out an actual assessment of the objectively justified and proportionate nature of that restriction in the light of those needs.

First, with regard to the objective justification for the language restriction by the real needs of the service, such a restriction must relate to the duties that the persons recruited will be required to perform. In other words, it is for the Commission to demonstrate that the duties described in the notice of competition require in themselves a command of English at B2 level. In the present case, however, the Commission does not link the need for the persons recruited to have a command of English at B2 level in order to be immediately operational to the particular duties those persons will be required to perform, but to the mere circumstance that those persons will have to perform those duties in services in which the current staff use mainly English in carrying out those duties. Such a line of argument, which amounts merely to saying that duties must be carried out in English because they are currently being carried out in that language, does not therefore, as a matter of principle, establish that the language restriction at issue is suitable for meeting the real needs of the service in respect of the duties which the persons recruited will be called upon to perform. Moreover, the existence of an alleged ‘established fact’ is not consistent with the situation of a recently established service in the process of building up its staff at the time of the publication of the notice of competition. In any event, the Court states that the Commission’s line of argument is not sufficiently substantiated by the documents submitted to that effect. It follows that the Commission has failed to demonstrate that the language restriction was justified.

Secondly, as regards the proportionality of the language restriction, it is a matter for the institutions to weigh up the legitimate objective justifying the restriction of the number of languages of competitions against the opportunities for recruited officials to learn, within the institutions, the languages necessary in the interest of the service. By not having carried out such a weighing up, the Commission has failed to demonstrate to the requisite legal standard that the language restriction at issue was proportionate to the needs of the service.

5. COMMON FOREIGN AND SECURITY POLICY : RESTRICTIVE MEASURES

Judgment of the General Court (Ninth Chamber), 29 May 2024, Belavia v Council, T-116/22

Link to the full text of the judgment

Common foreign and security policy – Restrictive measures taken because of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine – Freezing of funds – Lists of persons, entities and bodies to whom the freezing of funds and economic resources applies – Registering and maintaining the applicant's name on the lists – Organisation of activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union or contribution to those activities – Benefit derived from the Lukashenko regime – Error of assessment

In its judgment, the General Court dismisses the action for annulment brought by Belavia – Belarusian Airlines AAT against the acts by which that company was included in 2021, [137] and then maintained in 2023, [138] by the Council of the European Union, on the list of persons and entities subject to restrictive measures on account of the situation in Belarus. This case allows the Court to interpret, for the first time, the criterion for inclusion laid down in Article 4(1)(c)(i) of Decision 2012/642 [139] relating to organising activities by the Lukashenko regime that facilitate the illegal crossing of the external borders of the European Union.

This judgment has been brought in connection with a series of restrictive measures adopted by the European Union since 2004 in view of the situation in Belarus with regard to democracy, the rule of law and human rights. The funds and economic resources of the applicant, a State-owned national flag carrier airline, were frozen on the grounds that it was benefiting from and supporting the Lukashenko regime and that it was contributing to the activities of that regime facilitating the illegal crossing of the external borders of the European Union, by its involvement in bringing third-country nationals wishing to cross the external borders of the European Union from the Middle East to Belarus.

Findings of the Court

Regarding, in the first place, the initial inclusion of the applicant on the lists on the basis of the criterion laid down in Article 4(1)(c)(i) of Decision 2012/642, the Court considers that the Council had a sufficiently detailed, precise and consistent body of evidence to establish that third-country nationals intending to cross the external borders of the European Union without complying with the relevant legislation travelled to Minsk (Belarus) on flights operated by the applicant from Lebanon, the United Arab Emirates and Türkiye. Moreover, the Council had sufficient evidence to allege that, in order to facilitate this practice, the applicant expanded the number of flights on existing routes and that local tour operators acted as intermediaries in selling the applicant's tickets to those persons, thereby helping the applicant to keep a low profile.

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137 Council Implementing Decision (CFSP) 2021/2125 of 2 December 2021 implementing Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2021 L 430I, p. 16) and Council Implementing Regulation (EU) 2021/2124 of 2 December 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus (OJ 2021 L 430I, p. 1).

138 Council Decision (CFSP) 2023/421 of 24 February 2023 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 41) and Council Implementing Regulation (EU) 2023/419 of 24 February 2023 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine (OJ 2023 L 61, p. 20).

139 Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ 2012 L 285, p. 1) and Article 2(4) of Regulation No 765/2006, as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012 (OJ 2012 L 307, p. 1).

The Court goes on to reject the applicant's arguments challenging that body of evidence. Thus, first, the applicant claimed, inter alia, that, in 2021, it transported fewer passengers than other airlines which also operate on the routes between Istanbul (Türkiye) and Minsk and Dubai (United Arab Emirates) and Minsk and that the number of persons which it transported on the route between Beirut (Lebanon) and Minsk is lower than that of persons transported on other routes to or from third countries other than Lebanon. The Court states that, nevertheless, those facts do not show that the applicant did not contribute, by its own operations transporting persons from Lebanon, the United Arab Emirates and Türkiye to Belarus, to the activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union. In addition, according to data submitted by the applicant, in 2021, the number of passengers it transported from Istanbul or Beirut to Minsk increased substantially.

Second, the applicant's allegations that its flights to Lebanon, the United Arab Emirates and Türkiye were not chartered by the Belarusian State and, moreover, that its own transport operations were profitable are not capable of showing that those flights and operations were not part of the activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union. It is apparent from the evidence in the file that the Lukashenko regime organised the transport of third-country nationals to Belarus by air by supporting the issuing of visas for Belarus, that the effect of that measure was to increase demand for air transport services to Belarus and that some airlines profited from the commercial operation of flights meeting that demand.

Third, the fact that the applicant carried out the requisite checks when checking in its passengers, regarding, inter alia, the requirement to possess a visa, does not rule out the applicant having participated in the activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union.

Last, the Court observes that it is not apparent from the evidence produced by the Council that, as set out in the grounds at issue, the applicant opened new flight routes in order to facilitate transporting third-country nationals to Belarus. However, that finding is not enough to annul the initial acts. The Council's reasoning in support of the assessment that the applicant contributed to the activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union, which are sufficiently precise and detailed and free from errors of assessment of the facts or errors of law, constitutes in itself a sufficient basis for justifying the inclusion of the applicant's name on the lists at issue.

With regard, in the second place, to the maintenance of the applicant's name on the lists based on that same criterion, the Court recalls that it is for the Council, in the course of the periodic review of restrictive measures, to conduct an updated assessment of the situation and to appraise the impact of the previously adopted measures in the light of their objectives in respect of the persons concerned. In order to justify such maintenance, the Council may base its decision on the same evidence justifying the initial inclusion, provided that the grounds for inclusion remain unchanged and the context has not changed in such a way that that evidence is now out of date. In the present case, the Court observes that the Council acknowledges implicitly that the evidence justifying the adoption of the initial acts, relating to the flights operated by the applicant from Lebanon and the United Arab Emirates, had become obsolete. Moreover, the Court takes the view that the fact that the applicant continued to operate flights on the route between Istanbul and Minsk was not sufficient to justify maintaining its name on the lists. As a result, the Council has not shown to the requisite legal standard that, when the maintaining acts were adopted, the applicant was still involved in the activities of the Lukashenko regime facilitating the illegal crossing of the external borders of the European Union due to the flights it operated between Istanbul and Minsk.

However, the Court considers that the Council had a sufficiently detailed, precise and consistent body of evidence to establish that the applicant had derived a concrete benefit from the public statements made by President Lukashenko announcing that the Belarusian State would give all possible support to the applicant.

Nota bene:

The résumés of the following cases are currently being finalised and will be published in a future issue of the Monthly Case-Law Digest :

- Judgment of the Court of Justice (Fourth Chamber), 13 June 2024, BibMedia, C-737/22, EU:C:2024:495
- Judgment of the General Court (Third Chamber, Extended Composition), 5 June 2024, BNP Paribas v ECB, T-186/22, EU:T:2024:353