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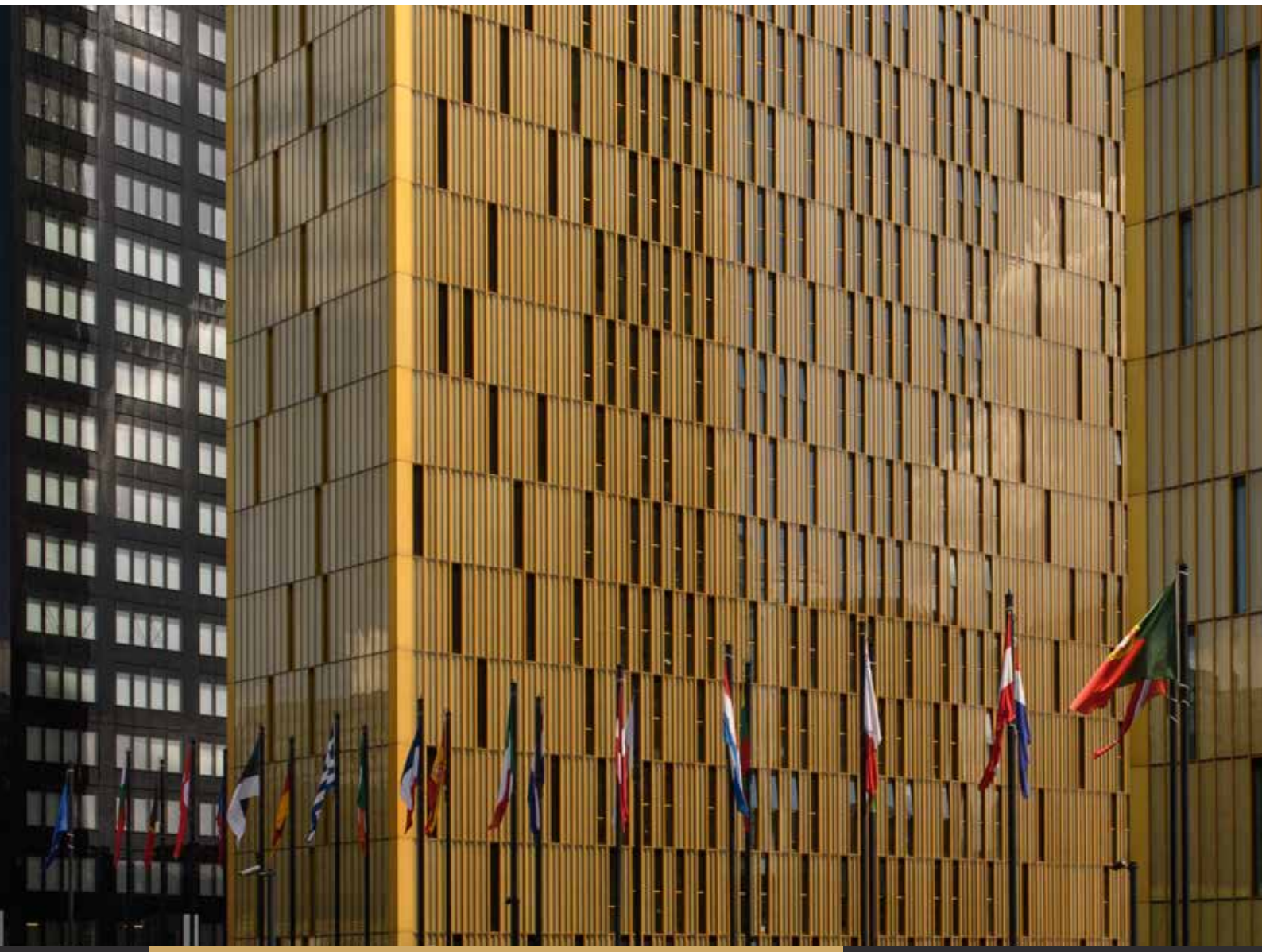

ANNUAL REPORT 2018
JUDICIAL ACTIVITY

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Synopsis of the judicial activity of the Court of Justice and the General Court

Luxembourg, 2019

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KOEN LENAERTS

President of the Court of Justice
of the European Union

One hundred years ago, Europe was devastated by a particularly deadly conflict. Today, more than 500 million citizens of all generations are witnessing an unprecedented historical journey that has given rise to a Community and then a European Union, a carrier of fundamental values common to its Member States and a guarantor, through its institutions, of peace, freedom, democracy, the rule of law and respect for human rights.

This tremendous achievement, patiently built over several decades, must remain engraved in our collective memory at this difficult time in European history.

As I write this preface, the future remains uncertain about the outcome of the political process that began after the referendum on the United Kingdom's membership of the European Union on 23 June 2016. The migration crisis affecting our continent is, beyond its dramatic human dimension, a source of sometimes intense tensions between Member States and fuels reflexes of identity withdrawal in many public opinions. Concerns about respect for the values inherent in the rule of law have also emerged in some Member States.

These sources of crisis or tension have a direct impact on the activities of our institution. Over the past year, the Court of Justice has thus had to deal with the first questions relating to Brexit, including whether a Member State, after having notified the European Council of its intention to leave the Union, may revoke that notification. Asylum cases continue to flow in, draining in their wake issues that, under the guise of a highly technical nature, involve considerable human and societal challenges. Several cases, related to respect for the rule of law, have also been brought before the Court of Justice.

In this troubled climate, the Court of Justice of the European Union must remain a stable and fundamental pillar of the European project. It is up to it to work, through the unwavering commitment of all its Members and staff, towards consolidating the founding values of this project. To contribute, through high-quality, effective and transparent justice, to restoring the confidence of all — citizens, workers, consumers, businesses, political decision-makers and public managers — in European integration. To tirelessly establish itself as a guarantor of the fundamental values inherent in a Union governed by the rule of law, values that cannot tolerate any form of concession or compromise.

At the institutional level, 2018 was marked by a partial renewal of the Court of Justice, which welcomed six new talented and enthusiastic Members last October. I would like to take the opportunity of this Preface to reiterate my warmest thanks to the six Members who have left the institution for their unfailing dedication to its activities and, through them, to the European cause.

Statistically, 2018 was an exceptional year in two respects. First of all, in terms of productivity, with a record number of cases closed by each of the two courts (760 by the Court of Justice and 1 009 by the General Court), representing a historical level of 1 769 cases closed by the institution over the course of a year. At the level of cases filed subsequently. Indeed, the overall number of cases brought before both courts continues its upward trend (1 683 new cases compared to 1 656 in 2017), with, in particular, a record number of 849 new cases for the Court of Justice (compared to 739 in 2017), due both to the increase in the number of preliminary rulings and to the increase in the number of direct actions and appeals against the decisions of the General Court (which amounted to 63 and 199 new cases respectively, compared to 46 and 147 in 2017).

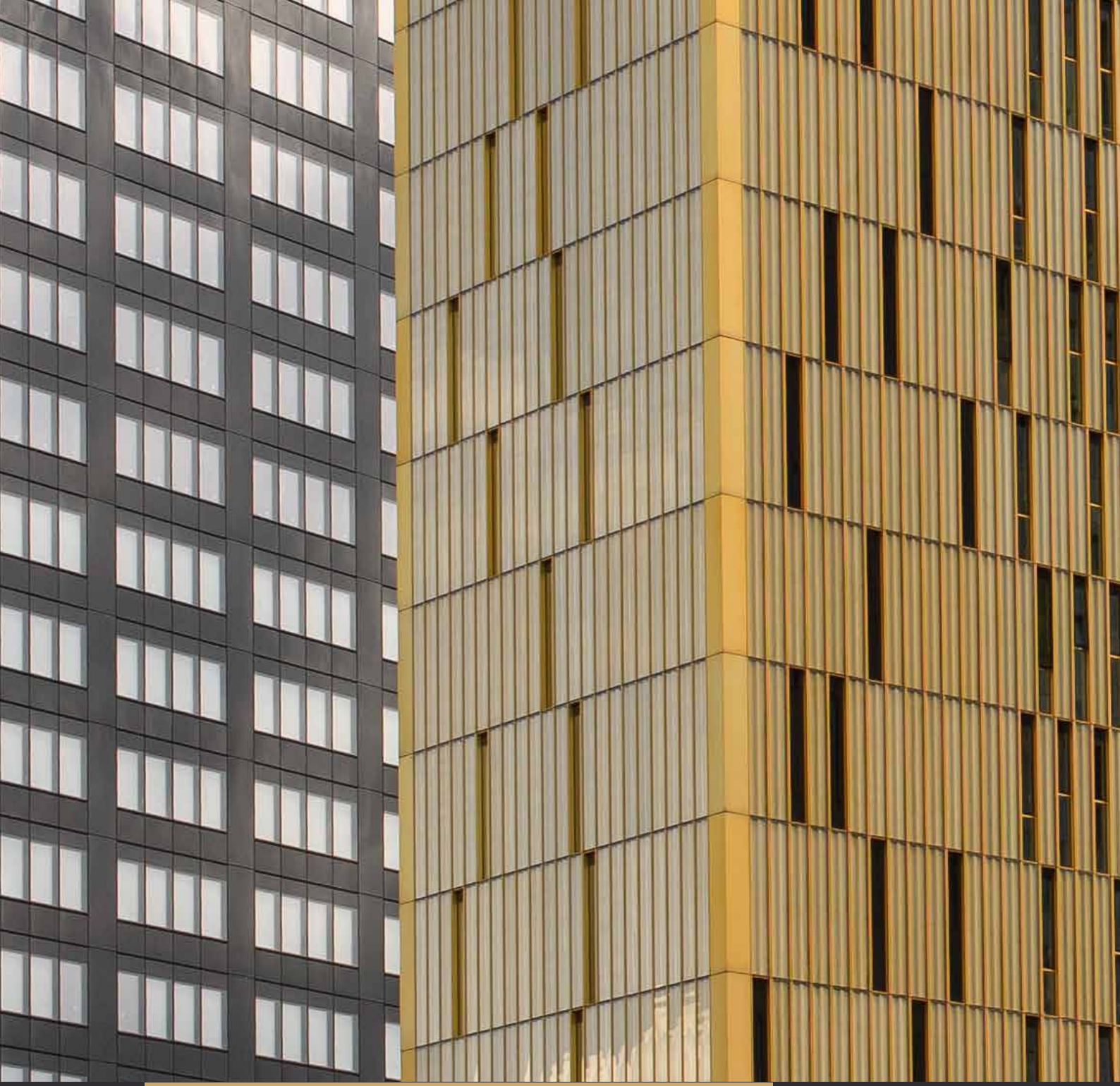
This latest statistical development highlights the need for measures to relieve the Court of Justice. In this context, I welcome the progress made by the Union's legislative authorities in the discussions on one of the important aspects of the request made to them to this end by the Court of Justice in March 2018, namely the introduction of a mechanism for the prior admission of certain categories of appeals. These advances raise hopes that this mechanism will come into force in the second quarter of 2019.

As part of the events that marked 2018, I would also like to mention the opening of the European Union Judicial Network, a real platform for exchanges between the Court of Justice of the European Union and the constitutional and supreme courts of the Member States.

Finally, on 1 December 2018, the 'e-Curia' application became the exclusive method of exchanging judicial documents between the General Court and the parties' representatives. This application now allows the two courts that make up the institution to optimise business management by deriving the greatest benefit from the immediacy of dematerialised communications and to save a considerable volume of paper, thus reducing the institution's carbon footprint, in line with its commitments under the EMAS (*Eco Management and Audit Scheme*) environmental management system.

This report provides the reader with a complete overview of the institution's development and activity during 2018. As in previous years, a substantial part is devoted to a review of the main developments in the case-law of the Court of Justice and the General Court. Separate statistics for each court, preceded by a brief introduction, supplement and illustrate the analysis.

I would like to take this opportunity to warmly thank my colleagues and the entire staff of the institution for the outstanding work carried out by them during the year.



CHAPTER I
THE COURT OF JUSTICE

A | THE COURT OF JUSTICE: CHANGES AND ACTIVITY IN 2018

By Mr **Koen Lenaerts**, President of the Court of Justice

This first chapter summarises the activities of the Court of Justice in 2018. It begins, in this first part (A), by describing briefly how the Court of Justice evolved during the past year and providing an overview of its judicial activity. The second part (B) presents, as it does each year, the main developments in the case-law, arranged by subject matter. The third and fourth parts set out the activity of the Court Registry during the reference period (C) and the statistics relating to the past judicial year (D), and the fifth part sets out the Court's composition during 2018 (E).

1.1. 2018 was characterised by the partial renewal of the Court of Justice. The formal sitting held on 8 October 2018 for that occasion was used to pay tribute to Antonio Tizzano (Advocate General from 2000 to 2006; judge at the Court since 2006; President of a chamber of five judges from 2009 to 2015 and Vice-President of the Court from October 2015 to October 2018), to José Luís da Cruz Vilaça (Advocate General between 1986 and 1988; judge and President of the General Court from 1989 to 1995; judge at the Court from 2012 to 2018 and President of a chamber of five judges from October 2015 to October 2018), to Melchior Wathelet (judge at the Court between 1995 and 2003 and Advocate General from 2012 to 2018, holding the position of First Advocate General from October 2014 to October 2018), to Anthony Borg Barthet (judge at the Court from 2004 to 2018), Paolo Mengozzi (judge at the General Court from 1998 to 2006 and Advocate General at the Court from 2006 to 2018) and Egidijus Jarašiūnas (judge at Court from 2010 to 2018).

On that same occasion, six new members entered into office, namely Peter George Xuereb (Malta), Nuno José Cardoso da Silva Piçarra (Portugal), Lucia Serena Rossi (Italy) and Irmantas Jarukaitis (Lithuania), as judges, and Gerard Hogan (Ireland) and Giovanni Pitruzzella (Italy), as Advocates General.

1.2. As regards the functioning of the institution, no changes were made during 2018 in respect of the implementation of the reform of the judicial structure of the European Union resulting from Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14), which is set to double the number of judges at the General Court by September 2019.

2. As regards statistics — and without prejudice to the more detailed comments set out in Part C of this chapter of the annual report — three main trends emerge from a reading of the statistics relating to the past year.

The first trend concerns the number of cases brought before the Court, which remains an upward trend. In fact, with 849 new cases, the Court recorded the highest number of cases in its history. Just as in 2017, requests for preliminary ruling accounted for the lion's share of those cases (568 new requests, accounting for more than two thirds of all of the cases brought before the Court in 2018), but the number of actions for the failure of a Member State to fulfil obligations and appeals also increased notably, with 57 and 199 new cases, respectively.

The second striking aspect of those statistics concerns the high number of cases closed by the Court over the past year — 760 cases, which is an unprecedented number — and, especially, the number of cases closed by the Grand Chamber of the Court (80 cases). Those figures bear witness to both the scope of the work undertaken by the Court and the importance of the cases brought before it.

Finally, it should be pointed out that, in spite of the increase in the number of cases, the average duration of proceedings before the Court remained at a very satisfactory level in 2018. The average duration of proceedings concerning a request for a preliminary ruling was 16 months, whereas the average duration of cases regarding direct actions and appeals was 18.8 months and 13.4 months, respectively. In spite of their high number (12), cases adjudicated on under the urgent preliminary ruling procedure over the course of 2018 were also able to be closed in 3.1 months, on average, which is in line with the objective which the Court set itself when that derogating procedure was put in place in 2008.

B | CASE-LAW OF THE COURT OF JUSTICE IN 2018

I. Withdrawal of a Member State from the European Union

Following the United Kingdom's decision to withdraw from the European Union, the Court adjudicated on two requests for a preliminary ruling relating to that Member State's notification of its intention to leave.

In the first place, in the judgment in ***Wightman and Others*** (C-621/18, EU:C:2018:999) of 10 December 2018, the Full Court held, under the expedited procedure, [1] that *Article 50 TEU allows a Member State to revoke unilaterally the notification of its intention to withdraw from the European Union.* That request for a preliminary ruling had been submitted by the Court of Session, Inner House, First Division (Scotland), in judicial review proceedings brought by members of the UK Parliament, the Scottish Parliament and the European Parliament to determine whether and how the notification referred to in Article 50 TEU could be revoked before expiry of the two-year period provided for in paragraph 3 of that provision, with the effect that such revocation would result in the United Kingdom remaining in the European Union.

In response to the UK Government and the Commission's arguments that the case was inadmissible, the Court pointed out that the question of interpretation referred to it by the national court was relevant and not hypothetical, given that it was precisely the point at issue in the case pending before that court. The fact that the action in the main proceedings seeks a declaratory remedy does not, moreover, prevent the Court from ruling on a question referred for a preliminary ruling, provided that the action is permitted under national law and the question meets an objective need for the purpose of settling the dispute properly brought before the national court.

As regards the interpretation of Article 50 TEU, the Court first of all noted that that article does not explicitly deal with the revocation of an intention to withdraw. Next, it observed that Article 50 TEU pursues two objectives. First, it enshrines the sovereign right of a Member State to withdraw from the European Union, since that decision need not be taken in concert with the other Member States or with the EU institutions. Secondly, Article 50 TEU establishes a procedure to enable such withdrawal to take place in an orderly fashion. The sovereign nature of the right of withdrawal supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the European Union, for as long as a withdrawal agreement concluded between the EU and that Member State has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended, has not expired. Revocation may thus be decided upon unilaterally, in accordance with the constitutional requirements of the Member State concerned. It reflects a sovereign decision to retain the status of Member State of the European Union, a status which is neither suspended nor altered by that notification. Concerning, lastly, the context of Article 50 TEU, the Court made clear that it would be inconsistent with the EU Treaties' purpose of creating an ever closer union among the peoples of Europe to force the withdrawal of a Member State which, having notified its intention to withdraw from the European Union in accordance with its constitutional rules and following a democratic process, decides to revoke the notification

1| Order of the President of the Court of 19 October 2018, ***Wightman and Others*** (C-621/18, EU:C:2018:851).

of that intention through such a process. To subject the right to revoke to the unanimous approval of the European Council would transform a unilateral sovereign right into a conditional right and would be incompatible with the principle that a Member State cannot be forced to leave the European Union against its will.

The Court also explained that revocation of the notification of an intention to withdraw must be submitted in writing to the European Council and must be unequivocal and unconditional, that is to say that the purpose of such revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end.

In the second place, reference must be made to ***RO*** (C-327/18 PPU, EU:C:2018:733), delivered on 19 September 2018 by the First Chamber under the urgent preliminary ruling procedure. In that judgment, the Court held that *mere notification by a Member State of its intention to withdraw from the European Union is not an exceptional circumstance capable of justifying a refusal to execute a European arrest warrant issued by that Member State under Framework Decision 2002/584.* [2] The main action concerned proceedings before the Irish authorities relating to the execution of two arrest warrants issued by the courts of the United Kingdom. RO objected to being surrendered to the authorities of that Member State on the ground, in particular, that after its withdrawal from the European Union ('Brexit'), he would no longer be able to rely on the rights that he derives from Framework Decision 2002/584 or to have the conformity with EU law of the implementation of those rights by the United Kingdom reviewed by the Court. The national court's concerns in that respect stemmed from the fact that RO was at risk of being detained by the UK authorities after Brexit and from uncertainty as to the arrangements which would be in place between the European Union and the United Kingdom after its withdrawal.

After recalling that the execution of a European arrest warrant is the rule and a refusal to execute is an exception which must be interpreted strictly, the Court observed that the notification by a Member State of its intention to withdraw from the European Union in accordance with Article 50 TEU does not have the effect of suspending the application of EU law in that Member State. Consequently, the provisions of the framework decision and the principles of mutual trust and mutual recognition inherent in that decision continue in full force and effect in that Member State until the time of its actual withdrawal from the EU. Even though it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU with a view to the application of the European arrest warrant mechanism being suspended, the Court considered that such refusal to execute would be tantamount to unilateral suspension by a Member State of the provisions of the framework decision.

However, the Court found that it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after the withdrawal from the European Union of the issuing Member State, the person who is the subject of the arrest warrant is at risk of being deprived of his fundamental rights and the other rights he derives, in essence, from the framework decision. Nevertheless, it is essential that that authority be able to presume that, with respect to the person who is to be surrendered, the issuing Member State will apply the content of the rights derived from the framework decision that are applicable in the period subsequent to the surrender, after its withdrawal from the European Union. Such a presumption can be made if the national law of the issuing Member State incorporates the substantive content of those rights, particularly because of the continuing participation of that Member State in international conventions, even after its withdrawal from the European Union. In the case in point, the Court noted that the United Kingdom is a party

2| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

to the European Convention on Extradition of 13 December 1957 and has therefore incorporated into its national law rights and obligations which mirror those resulting from Articles 27 and 28 of that framework decision. In addition, the United Kingdom is a party to the European Convention on Human Rights and Fundamental Freedoms ('ECHR') and Brexit will thus have no effect on the obligation to have due regard to Article 3 thereof enshrining the prohibition of torture and inhuman or degrading treatment or punishment, which corresponds to Article 4 of the Charter of Fundamental Rights of the European Union ('the Charter'). Consequently, the United Kingdom's decision to withdraw from the European Union cannot justify the refusal to execute a European arrest warrant issued by a judicial authority of that Member State on the ground that the person surrendered would run the risk of suffering inhuman or degrading treatment within the meaning of those provisions.

II. Fundamental Rights

In 2018, the Court ruled on numerous occasions on fundamental rights in the EU legal order. A number of those decisions are covered in this report. [3] The decisions set out in this section provide considerable guidance concerning the possibility of relying on the Charter in disputes between individuals, proceedings relating to the alleged breach of fundamental rights enshrined in the Charter, and the scope of some of the rights and principles laid down in the Charter.

1. Possibility of relying on the Charter of Fundamental Rights of the European Union in disputes between individuals

In its judgments in ***Egenberger*** (C-414/16, EU:C:2018:257) of 17 April 2018 and ***IR*** (C-68/17, EU:C:2018:696) of 11 September 2018, the Grand Chamber of the Court ruled, inter alia, on *the judicial protection for individuals flowing from Articles 21 and 47 of the Charter in relation to the application, by a church or by establishments under the authority of a church, of conditions of a religious nature in the context of employment relationships.*

The case giving rise to the judgment in ***Egenberger*** (C-414/16) concerned the rejection of a job application submitted by a person of no denomination for a position with Protestant Work for Diaconate and Development, an association governed by private law which is an auxiliary organisation of the Protestant Church in Germany. According to the offer of employment, applicants had to belong to a Protestant church or a church belonging

3| The following judgments are included: judgment of 19 September 2018, ***RO*** (C-327/18 PPU, EU:C:2018:733), presented in Section I 'Withdrawal of a Member State from the European Union'; judgment of 13 November 2018, ***Raugevicius*** (C-247/17, EU:C:2018:898), presented in Section III 'Citizenship of the Union'; judgments of 24 April 2018, ***MP (Subsidiary protection of a person previously a victim of torture)*** (C-353/16, EU:C:2018:276), of 25 January 2018, ***F*** (C-473/16, EU:C:2018:36), and of 4 October 2018, ***Ahmedbekova*** (C-652/16, EU:C:2018:801), presented in Section VIII 'Border controls, asylum and immigration'; judgments of 19 September 2018, ***C.E. and N.E.*** (C-325/18 PPU and C-375/18 PPU, EU:C:2018:739), and of 17 October 2018, ***UD*** (C-393/18 PPU, EU:C:2018:835), presented in 'Judicial cooperation in civil matters'; judgments of 25 July 2018, ***Minister for Justice and Equality (Deficiencies in the system of justice)*** (C-216/18 PPU, EU:C:2018:586) and ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)*** (C-220/18 PPU, EU:C:2018:589), and of 5 June 2018, ***Kolev and Others*** (C-612/15, EU:C:2018:392), presented in Section X 'Judicial cooperation in criminal matters'; judgments of 26 April 2018, ***Donnellan*** (C-34/17, EU:C:2018:282), and of 2 October 2018, ***Ministerio Fiscal*** (C-207/16, EU:C:2018:788), presented in Section XIV 'Approximation of laws'; judgments of 4 October 2018, ***Hein*** (C-385/17, EU:C:2018:1018), and of 13 December 2018, ***Dicu*** (C-12/17, EU:C:2018:799), presented in Section XVI 'Social policy'; and judgment of 31 May 2018, ***Sziber*** (C-483/16, EU:C:2018:367), presented in Section XVII 'Consumer protection'.

to the Working Group of Christian Churches in Germany. Since the applicant considered that she had been discriminated against on grounds of religion because she was not called to an interview, she sued Protestant Work in the German courts to secure compensation.

After providing useful guidance on the interpretation of Directive 2000/78 [4] for the resolution of the dispute in the main proceedings, [5] the Court stated that where it is not possible to interpret national law in conformity with that directive, the national court is required to ensure, within its jurisdiction, the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law, notwithstanding the fact that the dispute in the main proceedings is between two individuals. The Court pointed out that both Article 21 (prohibition of all discrimination on grounds of religion or belief) and Article 47 (right to effective judicial protection) of the Charter are sufficient in themselves to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law and do not need to be made more specific by provisions of EU or national law. According to the Court, that conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the Treaty on the Functioning of the European Union or the Charter, and may also be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute. Furthermore, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests at issue, such as respect for the status of churches laid down in Article 17 TFEU, the Court considers that it will have to take into consideration, inter alia, the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in the circumstances of the particular case.

At issue in the case giving rise to the judgment in ***IR*** (C-68/17) was whether an organisation, the ethos of which is based on religion or belief, was entitled to require its employees to act in good faith and with loyalty to that ethos. The main proceedings were specifically concerned with the dismissal by a German Catholic hospital of a head doctor, a Catholic, because he had remarried in a civil ceremony after divorcing his first wife whom he had married in accordance with the Roman Catholic rite. The employment contract between the head doctor and the Catholic hospital referred to canon law, which considered a remarriage of that kind to be a serious breach of the head doctor's duty of loyalty to the ethos of the hospital for which he worked, warranting his dismissal.

In line with its decision in *Egenberger*, the Court first of all provided useful guidance on the interpretation of Directive 2000/78 for the resolution of the dispute in the main proceedings. [6] Next, it recalled that a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as

4| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

5| See the presentation of that judgment in Section XVI.1 'Equal treatment in employment and social security'.

6| See the presentation of that judgment in Section XVI.1 'Equal treatment in employment and social security'.

the principle prohibiting -discrimination on grounds of religion or belief enshrined in Article 21 of the Charter, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying if need be any contrary provision of national law.

The Grand Chamber of the Court took a similar approach in its judgments in ***Max-Planck-Gesellschaft zur Förderung der Wissenschaften*** (C-684/16, EU:C:2018:874) and ***Kreuziger*** (C-619/16, EU:C:2018:872), delivered on 6 November 2018. In both judgments, the Court *held that national legislation under which a worker automatically loses any paid annual leave not taken before the end of the reference period to which that leave relates (Case C-619/16) or before the termination of the employment relationship (Case C-684/16), without payment of an allowance in lieu thereof, where the worker has not asked to exercise his right to annual leave in good time, was incompatible with Article 7 of Directive 2003/88* [7] *and Article 31(2) of the Charter.* In the main actions, workers had been refused, pursuant to such national legislation, payment of an allowance in lieu of paid leave not taken before the end of their employment relationship. [8]

As regards the implementation in the main actions of a worker's right to an allowance in lieu of annual leave not taken before the end of his employment relationship, flowing from Article 7(2) of Directive 2003/88, the Court found that that provision fulfils the criteria of unconditionality and sufficient precision and thus meets the conditions required for it to have direct effect. As *Kreuziger* involved a dispute between a worker and his former employer having the status of a public authority, the referring court in that case was therefore required to disapply national rules or practices capable of precluding payment of the allowance in lieu laid down in that provision, provided that it was established that the worker met the requirements set out therein. [9]

Since, on the other hand, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* involved a dispute between a worker and his former employer who was a private individual, the Court recalled that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties. However, as the right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are required only to specify the exact duration of paid annual leave and, where appropriate, certain conditions for the exercise of that right, the Court held that Article 31(2) of the Charter is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter. That being the case in the main proceedings, the Court concluded that in the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, it is required to ensure, within its jurisdiction, the judicial protection flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation.

The Court, sitting as the Grand Chamber, reached the same conclusion in its judgment in ***Bauer and Willmeroth*** (C-569/16 and C-570/16, EU:C:2018:871) of 6 November 2018, which again concerned *the right of workers to paid annual leave, guaranteed by Article 7 of Directive 2003/88 and Article 31(2) of the Charter, specifically whether*

7| 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).

8| See the presentation of those judgments and of the judgments in ***Dicu*** (C-12/17, EU:C:2018:799) and ***Hein*** (C-385/17, EU:C:2018:1018) in Section XVI.5 'Right to paid annual leave'.

9| As regards the case-law on the possibility for individuals to rely on the provisions of a directive that has not been transposed or has been incorrectly transposed and on the extent of the duty of national courts called upon to apply provisions of EU law to give full effect to those provisions by disapplying if need be any contrary provision of national law, see Section V 'EU law and national law'.

a deceased worker's right to an allowance in lieu of leave not taken may be passed on by inheritance to his heirs. In the case in point, two German employers — one having the status of a public authority and the other being a private individual — had refused to pay the widows of their deceased employees an allowance in lieu of the paid annual leave not taken by their spouses before their death. Against that background, the referring court enquired whether, in the light of the Court's case-law [10] according to which a worker's right to paid annual leave does not lapse upon his death, the same applied where national law precludes such an allowance in lieu from forming part of the estate of the deceased.

In the first place, the Court confirmed that it follows not only from Article 7(2) of Directive 2003/88 but also from Article 31(2) of the Charter that, in order to prevent the fundamental right to paid annual leave acquired by that worker from being retroactively lost, including the financial aspect of that right, the right of the person concerned to an allowance in lieu of leave which has not been taken may be passed on by inheritance to his legal heirs.

In the second place, the Court ruled that if national law precludes that possibility and is therefore incompatible with EU law, the heirs may directly rely on EU law, both against a public and a private employer. In the latter case, the Court recalled that where it is impossible to interpret the applicable national legislation in a manner consistent with Article 7 of Directive 2003/88 and Article 31(2) of the Charter, the national court hearing a dispute between the legal heir of a deceased worker and the former employer of that worker must ensure, within its jurisdiction, the judicial protection flowing from Article 31(2) of the Charter and to guarantee the full effectiveness thereof by disapplying if need be that national legislation.

The Court thus concluded that the obligation of the national court to ensure that the legal heir of the deceased worker receives payment from the employer of an allowance in lieu of paid annual leave acquired and not taken by the worker before his death is dictated by Article 7 of Directive 2003/88 and Article 31(2) of the Charter where the dispute is between the legal heir and an employer which has the status of a public authority, and by the second of those provisions where the dispute is between the legal heir and an employer who is a private individual.

2. Proceedings relating to the alleged breach of fundamental rights enshrined in the Charter

In the judgment in ***XC and Others*** (C-234/17, EU:C:2018:853), delivered on 24 October 2018, the Grand Chamber of the Court was required to adjudicate on *the application of domestic rules of procedure concerning breaches of fundamental rights enshrined in the ECHR to breaches of rights enshrined in the Charter.* The request for a preliminary ruling was made in proceedings for mutual legal assistance in criminal matters, initiated before the Austrian judicial authorities at the request of the Public Prosecutor's Office for the Canton of St Gallen, Switzerland, with a view to interviewing three individuals suspected in Switzerland of having committed the offence of tax evasion within the meaning of the Swiss law governing value added tax and other criminal offences. The applicants objected to the organisation of the interviews, claiming that several sets of criminal proceedings existed in respect of the same offences and that those proceedings had been concluded in Germany and Liechtenstein. The Austrian court hearing the case, ruling at last instance, found that there were no elements pointing to an infringement of the principle *ne bis in idem*, as recognised by Article 50 of

10| Judgment of the Court of 12 June 2014, ***Bollacke*** (C-118/13, EU:C:2014:1755).

the Charter and the Convention implementing the Schengen Agreement (CISA). [11] The applicants thereafter applied to the Supreme Court for a rehearing of the criminal proceedings, arguing that the grant of the requests for mutual legal assistance at issue infringed a number of their fundamental rights enshrined not only in the ECHR, but also in the CISA and the Charter. Since the rehearing of criminal proceedings is possible under Austrian law only where there has been a breach of rights guaranteed by the ECHR, as determined by the European Court of Human Rights (ECtHR) or the Supreme Court, the national court enquired whether the rehearing of criminal proceedings also had to be ordered in cases of breach of fundamental rights enshrined in EU law.

The Court first of all pointed out that in the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness.

Regarding the principle of equivalence, the Court considered that the differences between the rehearing procedure provided for in Austrian law and actions for protecting rights which individuals derive from EU law are such that those actions cannot be regarded as similar. The Court observed that the rehearing of criminal proceedings provided for in Austrian law is justified by the very nature of the ECHR and was introduced precisely in order to take account of the fact that, under Article 35(1) of the ECHR, proceedings may be brought before the ECtHR only after all domestic remedies have been exhausted and thus following a decision of a national court adjudicating at last instance and with the force of *res judicata*. By contrast, under EU law, it is for the Court of Justice and the national courts and tribunals to ensure the full application of EU law and to ensure judicial protection of an individual's rights under that law, those bodies being under a duty to give full effect to it. That judicial system also has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which requires national courts ruling at last instance to bring the matter before the Court where a question relating to an interpretation of EU law arises. That constitutional framework guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order before a national decision with the force of *res judicata* even comes into existence.

As regards the principle of effectiveness, the Court found, in view of the documents before it, that it had been open to the applicants, under Austrian law, to plead before the national courts an infringement of their rights deriving from Article 50 of the Charter and Article 54 of the CISA and that those courts had considered those complaints. In those circumstances, the effectiveness of EU law appeared to have been ensured without it being necessary to add to it the rehearing procedure provided for in Austrian law.

In conclusion, in the light of, inter alia, the differences between the national criminal rules at issue and actions for protecting rights guaranteed by the EU legal order, especially the Charter, the Court held that EU law does not require a national court to extend to infringements of EU law, in particular to infringements of the fundamental right guaranteed by Article 50 of the Charter and Article 54 of the CISA, a remedy under national law permitting, only in the event of infringement of the ECHR or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of *res judicata*.

11| 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, signed in Schengen on 19 June 1990 (OJ 2000 L 239, p. 19).

3. Principles and fundamental rights enshrined in the Charter

In the following eight judgments, the Court was called upon to rule on the content and scope of different principles and rights enshrined in the Charter, such as the right to respect for private and family life, freedom of religion, the right to a fair trial and the principle *ne bis in idem*. [12]

3.1. Right to respect for private and family life

By its judgment in ***Coman and Others*** (C-673/16, EU:C:2018:385) delivered on 5 June 2018, the Court, sitting as the Grand Chamber, provided clarification on *the right to respect for private and family life as recognised by the Charter and the derived right of residence on which a third country national may rely, on the basis of Article 21 TFEU, in his capacity as husband of an EU citizen where the spouses are of the same sex.* This reference for a preliminary ruling concerned a Romanian national and a US national who were married in Brussels in 2010. In 2012, they applied to the Romanian authorities to allow the US national, in his capacity as member of the Romanian national's family, to reside lawfully in Romania for more than 3 months. That application was based on Directive 2004/38, [13] which enables the spouse of an EU citizen who has exercised his freedom of movement to join his husband in the Member State in which the husband is living. The Romanian authorities informed them that the US national had a right of residence for only 3 months, on the ground that he could not be classified in Romania as a 'spouse' of an EU citizen because that Member State does not recognise marriage between persons of the same sex. Following an objection of unconstitutionality raised by the homosexual couple before the Romanian Constitutional Court, that court asked the Court of Justice whether the US national concerned could be regarded as the 'spouse' of an EU citizen who has exercised his freedom of movement and must therefore be granted a right of permanent residence in Romania.

The Court pointed out, first of all, that the term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen.

It went on to make clear that the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that State, for the sole purpose of granting a derived right of residence to a third country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and falls within the competence of the Member States. That obligation does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex; it is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that State, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law. An obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third country national does not thus undermine the national identity or pose a threat to the public policy of the Member State concerned.

12| The Court also adjudicated on several occasions on the principle of non-discrimination as set out in Directive 2000/78 and Directive 79/7. That case-law is presented in Section XVI.1 'Equal treatment in employment and social security'.

13| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

Lastly, the Court pointed out that, as regards the term 'spouse' within the meaning of Directive 2004/38, the right to respect for private and family life guaranteed by Article 7 of the Charter is a fundamental right. That right has the same meaning and the same scope as the right guaranteed by Article 8 of the ECHR. According to the case-law of the ECtHR, the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation. [14]

Thus, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third country national a right of residence in its territory on the ground that the law of that Member State does not recognise marriage between persons of the same sex.

3.2. Freedom of religion

By the judgment in ***Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*** (C-426/16, EU:C:2018:335), delivered on 29 May 2018, the Court, sitting as the Grand Chamber, ruled on *the validity of Regulation No 1099/2009* [15] *by declaring that the rule that ritual slaughter without stunning may take place only in an approved slaughterhouse does not infringe freedom of religion as enshrined in Article 10 of the Charter.* At issue in the main proceedings was a decision taken by the Minister for the Flemish Region responsible for animal welfare in 2014 announcing that he would no longer issue approvals to temporary slaughterhouses because such approvals were contrary to Regulation No 1099/2009, under which ritual slaughter without prior stunning could be carried out only in approved slaughterhouses, meeting a set of regulatory requirements deriving from EU law. Various Muslim associations and umbrella organisations of mosques brought legal proceedings against the Flemish Region in 2016 in which they challenged, inter alia, the validity of that regulation, particularly in the light of freedom of religion enshrined in Article 10 of the Charter.

The Court recalled, as a preliminary point, that the right to freedom of conscience and religion protected by Article 10(1) of the Charter includes, inter alia, the freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance, and that the Charter uses the word 'religion' in a broad sense, covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public. [16] It follows that the specific methods of slaughter prescribed by religious rites within the meaning of Article 4(4) of Regulation No 1099/2009 fall within the scope of Article 10(1) of the Charter and possible theological differences on that subject cannot in themselves invalidate that classification.

14| ECtHR, 7 November 2013, ***Vallianatos and Others v. Greece***, CE:ECHR:2013:1107JUD002938109, § 73; ECtHR, 14 December 2017, ***Orlandi and Others v. Italy***, CE:ECHR:2017:1214JUD002643112, § 143.

15| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

16| See, to that effect, judgments of 14 March 2017, ***G4S Secure Solutions,*** C-157/15, EU:C:2017:203, paragraphs 27 and 28, and ***Bougnaoui and ADDH***, C-188/15, EU:C:2017:204, paragraphs 29 and 30.

As regards the validity of Regulation No 1099/2009, the Court observed that that regulation makes ritual slaughter without stunning subject to the same technical conditions as those which apply, in principle, to any slaughter of animals within the European Union, regardless of the method followed. It considered that the obligation to carry out ritual slaughter in an approved slaughterhouse simply aims to organise and manage, from a technical point of view, the freedom to carry out slaughter without prior stunning for religious purposes. That technical framework is not in itself of such a nature as to place a restriction on the right to freedom of religion of practising Muslims during the Feast of Sacrifice. The obligation to use an approved slaughterhouse applies in a general and neutral manner to any party that organises slaughtering of animals, irrespective of any connection with a particular religion, and thereby concerns in a non-discriminatory manner all producers of meat in the European Union. The Court also pointed out that the EU legislature had reconciled compliance with the specific methods of slaughter prescribed by religious rites with those of the essential rules laid down by Regulations No 1099/2009 and No 853/2004 [17] with regard to the protection of the welfare of animals at the time of killing and the health of consumers of meat.

3.3. Right to a fair trial

On 27 February 2018, in the judgment in ***Associação Sindical dos Juízes Portugueses*** (C-64/16, EU:C:2018:117), the Grand Chamber of the Court adjudicated on *the validity, in the light of the principle of judicial independence, of salary reductions applied to the judges of the Court of Auditors, Portugal.* Due to mandatory requirements linked to eliminating Portugal's excessive budget deficit and in the context of an EU programme of financial assistance to that Member State, the Portuguese legislature had temporarily reduced the remuneration of a large part of the Portuguese public administration. The Trade Union of Portuguese Judges brought legal action against those measures, arguing that they infringed the principle of judicial independence. It was against that background that the national court asked the Court whether those measures were compatible with Article 19 TEU and Article 47 of the Charter.

The Court first of all pointed out that Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. It recalled that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. Every Member State must therefore ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. Accordingly, since the Court of Auditors may rule, as a court or tribunal, on questions concerning the application or interpretation of EU law, Portugal must ensure that that court meets the requirements essential to effective judicial protection.

The Court held that in order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy. The guarantee of independence is required not only at EU level, but also at the level of the Member States as regards national courts. That concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is protected against external interventions or pressure liable to impair

17| Regulation (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55, and corrigendum OJ 2004 L 226, p. 22).

the independent judgment of its members and to influence their decisions. According to the Court, the receipt of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence.

The Court nevertheless found that the salary-reduction measures at issue had not been applied only to the members of the Court of Auditors and were therefore in the nature of general measures seeking a contribution from all members of the national public administration to the austerity effort. In addition, those measures were temporary and were brought definitively to an end on 1 October 2016. Therefore, the Court ruled that the second subparagraph of Article 19(1) TEU does not preclude general salary-reduction measures, such as those at issue in the main proceedings, linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme.

Also on the basis of the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, the Court, sitting as the Grand Chamber, made an interim order on 17 December 2018 in ***Commission*** v ***Poland*** (C-619/18 R, EU:C:2018:1021), *requiring the Republic of Poland to suspend immediately the application of the provisions of national legislation relating to the lowering of the retirement age for judges of the Polish Supreme Court.* The application for interim relief had been submitted in the context of an action for failure to fulfil obligations [18] brought by the European Commission claiming that, first, by lowering the retirement age of Supreme Court judges and applying that measure to sitting judges appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic of Poland the discretion to extend the active judicial function of the judges of that court beyond the newly established retirement age, the Republic of Poland had failed to fulfil its obligations under those provisions. [19]

Since the Court hearing an application for interim measures may order interim relief only if it is established that such an order is justified, prima facie, in fact and in law (*fumus boni juris*) and that it is urgent, the Court recalled, in the first place, that the *fumus boni juris* requirement is met where at least one of the pleas in law put forward in support of the main action appears, prima facie, not unfounded. Without ruling on the merits of all the pleas put forward in the action for failure to fulfil obligations, the Court, in this case, took the view that it could not be ruled out, prima facie, that the national provisions challenged by the Commission infringe the Republic of Poland's obligation, under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, to ensure that bodies, such as the Supreme Court, which come within its judicial system in the fields covered by EU law, meet the requirements of effective judicial protection, including the right of access to an 'independent' tribunal.

Regarding the urgency requirement, the Court found, in the second place, that the examination of that requirement entails an assessment as to whether the application of the national provisions at issue pending delivery of the Court's final judgment on the action for failure to fulfil obligations is likely to cause serious and irreparable damage to the EU legal order. The Court observed that the independence of national courts and tribunals is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU and is also crucial in the context of EU measures in the field of judicial cooperation in civil and criminal matters, which are based on mutual trust between Member States vis-à-vis their respective legal systems. The fact that the independence of the Polish Supreme Court may not be ensured pending delivery of the final judgment is, therefore, likely to cause serious damage to the EU legal order and, accordingly, to the rights that individuals derive from EU law, and to the values, set out in

18| Case C-619/18, ***Commission*** v ***Poland,*** pending as of 31 December 2018.

19| That interim order followed an earlier interim order made by the Vice-President of the Court *inaudita altera parte,* -by which the Court provisionally granted the Commission's application for interim relief (order of 19 October 2018, ***Commission*** v ***Poland*** (C-619/18 R, not published, EU:C:2018:852)).

Article 2 TEU, on which the EU is based, including that of the rule of law. Moreover, that serious damage is likely to be irreparable since, first, as a court ruling at last instance, the Polish Supreme Court delivers decisions, including in cases giving rise to the application of EU law, with the force of *res judicata* which are thus capable of producing irreversible effects vis-à-vis the EU legal order. Secondly, the application of the national provisions at issue pending delivery of the final judgment is likely to undermine the trust of the Member States and their courts in the legal system of the Republic of Poland, which could result in them refusing to recognise and enforce judicial decisions handed down by the Polish courts.

Lastly, the Court weighed up the general interest of the European Union invoked by the Commission in support of its application for interim relief and the Republic of Poland's interest in the immediate application of the national provisions at issue. The Court noted that the interim measures requested were such as to ensure that its final judgment could be enforced if the action for failure to fulfil obligations was ultimately upheld. If those interim measures were not, however, ordered but the action for failure to fulfil obligations was upheld, the general interest of the European Union in the proper working of its legal order could be seriously and irreparably affected pending the final judgment. The Court also considered that if the interim measures requested were granted, the Republic of Poland's interest in the proper working of the Supreme Court was not likely to be thus affected if the action for failure to fulfil obligations was ultimately dismissed, given that that grant would merely have the effect of maintaining, for a limited period, the application of the legal system which existed before the adoption of the Law on the Supreme Court. Accordingly, the Court concluded that the balance of competing interests fell in favour of granting the interim measures requested by the Commission.

3.4. The principle *ne bis in idem*

In three judgments delivered on 20 March 2018 (***Menci***, C-524/15, EU:C:2018:197, ***Garlsson Real Estate and Others,*** C-537/16, EU:C:2018:193, and ***Di Puma and Zecca***, C-596/16 and C-597/16, EU:C:2018:192), the Grand Chamber of the Court adjudicated *on the compatibility with the principle* ne bis in idem *of the duplication of administrative proceedings or penalties of a criminal nature and criminal proceedings or penalties.* The principle *ne bis in idem* is set out in Article 50 of the Charter and is also the subject of Article 4 of Protocol No 7 to the ECHR. It prohibits the prosecution or the imposition of criminal penalties on the same person more than once for the same offence. Furthermore, according to the Court, it confers on individuals a directly applicable right in the context of a dispute.

In the main actions at issue, the applicants had received administrative fines for failing to pay value added tax (VAT) due (*Menci*), for engaging in market manipulation (*Garlsson Real Estate and Others)* and for insider dealing (*Di Puma and Zecca*). This conduct had also resulted in criminal proceedings. Although those proceedings were still ongoing in *Menci*, they had led to a prison sentence, subsequently extinguished as a result of a pardon, in *Garlsson Real Estate and Others* and to an acquittal, on the ground that the acts constituting the offence were not established, in *Di Puma and Zecca*.

In the first place, the Court observed that the administrative and criminal proceedings and penalties at issue amounted to the implementation of EU law for the purposes of Article 51(1) of the Charter. They sought, in particular, to implement Article 325 TFEU and the provisions of Directive 2006/112 [20] (*Menci*) and Directive

20 | Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

2003/6 [21] (*Garlsson Real Estate and Others* and *Di Puma and Zecca*). Consequently, they must respect the fundamental right guaranteed by Article 50 of the Charter.

In the second place, in *Menci* and *Garlsson Real Estate and Others,* the Court recalled the relevant criteria for assessing whether proceedings and penalties are criminal in nature and whether the same offence exists. The Court first of all referred to the judgments in *Bonda* [22] and *Åkerberg Fransson*, [23] according to which the criminal nature of proceedings and penalties must be assessed in the light of three criteria: the legal classification of the offence under national law, the intrinsic nature of the offence and the degree of severity of the penalty that the person concerned is liable to incur. As regards the assessment of the existence of the same offence, the Court made clear that the relevant criterion was the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which resulted in the final acquittal or conviction of the person concerned.

In the third place, the Court stated that a duplication of criminal proceedings/penalties and administrative proceedings/penalties of a criminal nature could constitute a limitation of the principle *ne bis in idem*. Such a limitation may, however, be justified on the basis of Article 52(1) of the Charter if, in accordance with that article, it is provided for by law, if it respects the essence of the principle *ne bis in idem* and, subject to the principle of proportionality, if it is necessary and genuinely meets objectives of general interest recognised by the EU.

National legislation permitting such duplication must thus pursue an objective of general interest which is such as to justify that duplication, it also being necessary for the proceedings and penalties to pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue. That requirement is genuinely met by the objective of ensuring the collection of all VAT due (*Menci*), the objective of protecting the integrity of the financial markets of the EU, and the objective of ensuring public confidence in financial instruments (*Garlsson Real Estate and Others* and *Di Puma and Zecca*).

Next, the duplication of proceedings and penalties of a criminal nature must not exceed, in compliance with the principle of proportionality, what is appropriate and necessary in order to attain the objectives pursued. Concerning whether the measure is appropriate, where there is a choice between several measures, recourse must be had to the least onerous and the disadvantages caused by it must not be disproportionate to the aims pursued. As to whether the measure is necessary, national legislation must establish clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such duplication. Furthermore, it must ensure that the disadvantages resulting, for the persons concerned, from that duplication are limited to what is strictly necessary in order to achieve the objective pursued. That requirement means that national legislation must contain rules, first, ensuring that proceedings are coordinated which limit the additional disadvantages to what is strictly necessary and, secondly, allowing it to be guaranteed that the severity of all of the penalties imposed corresponds to the seriousness of the offence concerned. It is for the national court to determine whether those conditions are satisfied and to assess the proportionality of the practical application of the national legislation.

The Court also considered that the conditions to which Articles 50 and 52(1) of the Charter subject a possible duplication of criminal proceedings and penalties and administrative proceedings and penalties of a criminal nature ensure a level of protection of the principle *ne bis in idem* which is not in conflict with that guaranteed

21| Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

22| Judgment of the Court of 5 June 2012, ***Bonda*** (C-489/10, EU:C:2012:319).

23| Judgment of the Court of 26 February 2013, ***Åkerberg Fransson*** (C-617/10, EU:C:2013:105).

by Article 4 of Protocol No 7 to the ECHR, as interpreted by the European Court of Human Rights, which, in its recent case-law, [24] has stated that such duplication presupposes a sufficiently close connection between the proceedings at issue in substance and time.

On the basis of those considerations, the Court observed, in *Menci*, that the national legislation at issue, allowing criminal proceedings to be brought for failing to pay VAT after the imposition of an administrative penalty of a criminal nature, ensures that duplication does not exceed what is strictly necessary, particularly in that such legislation appears to limit criminal proceedings to offences which are particularly serious, concerning high amounts of unpaid VAT.

By contrast, in *Garlsson Real Estate and Others,* the Court held that the national legislation at issue, allowing administrative fine proceedings of a criminal nature to be brought for market manipulation when a criminal conviction has already been handed down, does not comply with the principle of proportionality. The criminal conviction is already such as to punish the offence committed in an effective, proportionate and dissuasive manner. Moreover, the Court made clear that that conclusion is not called into question by the fact that the penalty may subsequently be extinguished as a result of a pardon.

In *Di Puma and Zecca*, the question was whether Directive 2003/6, read in the light of Article 50 of the Charter, precludes national legislation extending to administrative penalty proceedings the *res judicata* effects of factual conclusions made in the context of criminal proceedings. That legislation thus prohibited administrative proceedings following a criminal judgment of acquittal, while Directive 2003/6 requires Member States to have rules on effective, proportionate and dissuasive administrative penalties for violations of the prohibition on insider dealing. The Court held that, in view of the importance of the principle of *res judicata* both in the legal order of the European Union and in national legal systems, such legislation was not contrary to EU law. Furthermore, where there exists a final judgment of acquittal holding that there are no factors constituting an offence, the bringing of administrative fine proceedings of a criminal nature would be incompatible with the principle *ne bis in idem*. Indeed, it would clearly exceed what is necessary in order to achieve the objective pursued. In that regard, the Court recalled that the protection conferred by the principle *ne bis in idem* also extends to situations in which a person has been finally acquitted.

24| See judgment of the ECtHR of 15 November 2016, ***A and B v. Norway*** (CE:ECHR:2016:1115JUD 002413011, § 132).

III. Citizenship of the Union

As regards European citizenship, a number of judgments must be mentioned. Seven are concerned with the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States under Articles 20 and 21 TFEU and Directive 2004/38. [25] Two other judgments relate to the extradition arrangements for Union citizens.

1. Restrictions on the right of residence of Union citizens and their family members

In the joined cases giving rise to the judgment in ***B and Vomero*** (C-316/16 and C-424/16, EU:C:2018:256), delivered on 17 April 2018, the Grand Chamber of the Court ruled on *the question of eligibility for protection against expulsion from a Member State,* provided for in Article 28(3)(a) of Directive 2004/38.

The first case involved a Greek national born in 1989 who, in 1993, following the separation of his parents, moved with his mother, who held both Greek and German nationality, to Germany where he had a right of permanent residence within the meaning of Article 16 of Directive 2004/38. He was given a prison sentence of 5 years and 8 months in 2013 and was placed in detention on 12 April 2013. In 2014, the German competent authority determined that he had lost his right of entry to and residence in Germany and ordered him to leave that Member State within 1 month. The second case concerned an Italian national who had moved to the United Kingdom in 1985. Between 1987 and 1999, he received several *convictions* in Italy and in the UK, none of which resulted in his imprisonment. He was convicted of manslaughter and sentenced to 8 years' imprisonment in 2002. He was released in July 2006. The UK competent authority ordered his deportation in 2007.

In its judgment, the Court first of all held that Article 28(3)(a) of Directive 2004/38 must be interpreted as meaning that it is a prerequisite of eligibility for the protection against expulsion provided for in that provision that the person concerned must have a right of permanent residence within the meaning of Article 16 and Article 28(2) of that directive. The Court noted that under Directive 2004/38, the protection against expulsion gradually increases in proportion to the degree of integration of the Union citizen concerned in the host Member State. Thus, whereas a citizen with a permanent right of residence may be expelled on 'serious grounds of public policy or public security', a citizen who can show that he has been resident for the preceding 10 years may be expelled only on 'imperative grounds of public security'. Accordingly, that enhanced protection linked to a 10-year period of residence in the host Member State is available to a Union citizen only if he first satisfies the eligibility condition for the lower level of protection, namely having a right of permanent residence after residing legally in the host Member State for a continuous period of 5 years.

Furthermore, the Court made clear that the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 must be calculated by counting back from the date of the decision ordering that person's expulsion and must, in principle, be continuous. It follows from the Court's case-law that periods of imprisonment may, by themselves and irrespective of periods of absence from the host Member State, lead, where appropriate, to a severing of the link with that

25| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

State and to the discontinuity of the period of residence. However, the fact that the person concerned was placed in custody by the authorities of that State cannot be regarded as automatically breaking the integrative links that that person had previously forged with that State and the continuity of his residence there. Consequently, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having 'resided in the host Member State for the previous 10 years' laid down in that provision may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, inter alia, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed and the conduct of the person concerned throughout the period of detention.

In the joined cases giving rise to the judgment in ***K. and H. F. (Right of residence and alleged war crimes)*** (C-331/16 and C-366/16, EU:C:2018:296), delivered on 2 May 2018, the Grand Chamber of the Court also ruled on the compatibility with Article 27(2) of Directive 2004/38 of a *restriction on the residence of a Union citizen or a member of his family suspected of having participated, in the past, in war crimes.*

The first case involved a person with both Croatian nationality and the nationality of Bosnia-Herzegovina who had been resident in the Netherlands since 2001. In 2015, he was declared to be an undesirable immigrant to the Netherlands on the ground that he was guilty of conduct within the scope of Article 1F(a) of the Geneva Convention, [26] in that he had knowledge of war crimes and crimes against humanity committed by special units of the Bosnian army and in that he himself had personally participated in those crimes. The second case concerned an Afghan national who arrived in the Netherlands in 2000 and moved to Belgium in 2011. His applications for residence in the Netherlands and Belgium had been rejected on the ground that he had committed crimes falling within the scope of Article 1F(a) of the Geneva Convention. Both persons brought actions against the decisions at issue.

In its judgment, the Court first of all observed that it is apparent from Article 27(1) of Directive 2004/38 that Member States may adopt measures which restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds, in particular, of public policy or public security. It considered that such a restriction on the freedom of movement and residence of a Union citizen or a third-country national family member of such a citizen, who has been the subject, in the past, of a decision excluding that person from refugee status under Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95, [27] may fall within the scope of the concept of 'measures taken on grounds of public policy or public security', within the meaning of the first subparagraph of Article 27(2) of Directive 2004/38. However, it recalled that measures justified on grounds of public policy or public security may be taken only if, following a case-by-case assessment by the competent national authorities, it is shown that the personal conduct of the individual concerned currently constitutes a genuine and sufficiently serious threat to a fundamental interest of society. Consequently, the fact that such a person, who applies for a right of residence

26| Convention relating to the Status of Refugees signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)). Article 1 of that convention states, in section F:

'The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes ...'.

27| 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).

in the territory of a Member State, has been the subject, in the past, of a decision excluding him from refugee status under the abovementioned article of the Geneva Convention or Article 12(2) of Directive 2011/95 does not enable the competent authorities of that Member State to consider automatically that the mere presence of that person in its territory constitutes, whether or not there is any risk of re-offending, a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, capable of justifying the adoption of measures taken on grounds of public policy or public security.

The Court made clear that the finding that there is such a threat must be based on an assessment, by the competent authorities of the host Member State, of the personal conduct of the individual concerned, taking into consideration the findings of fact in the decision to exclude that individual from refugee status and the factors on which that decision is based, particularly the nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted. That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding.

The Court also stated that, in accordance with the principle of proportionality, the competent authorities of the host Member State must, moreover, weigh the threat that the personal conduct of the individual concerned represents to the fundamental interests of the host society against the protection of the rights which Union citizens and their family members derive from the directive.

2. Derived right of residence of third country nationals who are family members of a Union citizen

Five judgments are worthy of note in this area. One of them is ***Coman and Others*** (C-673/16, EU:C:2018:385), which is considered in more detail in Section II 'Fundamental rights'.

On 8 May 2018, by its judgment in ***K.A. and Others (Family reunification in Belgium)*** (C-82/16, EU:C:2018:308), the Court, sitting as the Grand Chamber, provided clarification on *the derived right of residence on which third-country national family members of a Union citizen who has never exercised his right to freedom of movement may rely on the basis of Article 20 TFEU.* The main proceedings involved several third country nationals who had submitted applications for residence for the purposes of family reunification in their capacity as either a dependent relative in the descending line of a Belgian citizen, the parent of a Belgian minor or a lawfully cohabiting partner in a stable relationship with a Belgian citizen. Those applications had not been examined on the ground that the persons concerned had been the subject of an entry ban that remained in force, some of those decisions being justified by grounds relating to the existence of a threat to public policy.

The Court held, in the first place, that Article 20 TFEU precludes a practice of a Member State that consists in not examining such applications solely on the ground that the third country national concerned is the subject of an entry ban, without any examination of whether there exists a relationship of dependency between the Union citizen and that third country national of such a nature that, in the event of a refusal to grant a derived right of residence to the third country national, the Union citizen would, in practice, be compelled to leave the territory of the European Union to accompany the family member to his country of origin and thereby be deprived of the genuine enjoyment of the substance of the rights conferred by that status.

In the second place, the Court explained the circumstances in which such a relationship of dependency may come into being. The Court made clear that, unlike minors (and in particular young children), an adult is, as a general rule, capable of living an independent existence apart from the members of his family. Where the Union citizen is an adult, a relationship of dependency, capable of justifying the grant to the third country national concerned of a derived right of residence, is thus conceivable only in exceptional cases, where, in the light of all the relevant circumstances, any form of separation of the individual concerned from the member of his family on whom he is dependent is not possible. On the other hand, where the Union citizen is a minor, the assessment of the existence of a relationship of dependency must be based on consideration, in the best interests of the child, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties to each of his parents, and the risks which separation from the third country national might entail for that child's equilibrium.

In the third place, the Court stated that in the context of the main action, some factors had no bearing on the grant of a derived right of residence to the third country national concerned. Thus, it is immaterial that the relationship of dependency relied on by the third country national comes into being after the imposition on him of an entry ban. It is also immaterial that the decision may have become final at the time when the third country national submits his application for residence for the purposes of family reunification, or that that decision may be justified by non-compliance with an obligation to return. Moreover, where such a decision is justified on public policy grounds, such grounds cannot automatically lead to a refusal to grant a derived right of residence. That refusal must be the result of a specific assessment of all the circumstances of the individual case, in the light of the principle of proportionality, the best interests of the child and fundamental rights, indicating that the person concerned represents a genuine, present and sufficiently serious threat to public policy.

In the fourth place, the Court stated that under Directive 2008/115, [28] a return decision may not be adopted with respect to a third country national, who has previously been the subject of a return decision, accompanied by an entry ban that remains in force, without any account being taken of the details of his family life, and in particular the interests of a minor child of that third country national, referred to in an application for residence for the purposes of family reunification submitted after the adoption of such an entry ban, unless such details could have been provided earlier by the person concerned.

The Court had a further opportunity in two other cases to adjudicate on the derived right of residence on which third country nationals may rely in their capacity as family members of a Union citizen residing in his Member State of nationality. At issue in ***Altiner and Ravn*** (C-230/17, EU:C:2018:497), which resulted in the judgment of 27 June 2018, was an application for a residence permit submitted in Denmark by a Turkish minor as a family member of his father's Danish wife, following the couple's return to Denmark after a two-year stay in Sweden. In the judgment in ***Banger*** (C-89/17, EU:C:2018:570) of 12 July 2018, the South African partner of a UK national had applied to the United Kingdom for a residence card upon the couple's return to that Member State after a stay of some years in the Netherlands.

Directive 2004/38 was not applicable in either case since it governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third country nationals, who are family members of a Union citizen, in the Member State of which that citizen is a national. Such a derived right of residence may however, in

28| 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).

those circumstances, be based on Article 21(1) TFEU. Therefore, the Court pointed out that even though Directive 2004/38 does not cover the return of a Union citizen to his Member State of nationality, it should be applied by analogy to such a case.

Thus, in its judgment in *Altiner and Ravn*, the Court — relying, in particular, on Directive 2004/38 — examined the specific condition laid down in Danish law under which the entry into Danish territory of a third country national, who is a family member of a citizen returning to Denmark after having exercised his right of freedom of movement, or the submission of an application for a residence permit, must be 'the natural consequence' of the return of the citizen in question to that Member State. The Danish authorities had rejected the application for a residence permit submitted by the Turkish son of the husband of the Danish national on the ground that it had been submitted almost 9 months after the couple's return to Denmark.

The Court first of all considered that where, during the genuine residence of a Union citizen in a Member State other than that of which he is a national, family life is created or strengthened, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that that family life may continue when he returns to the Member State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned. Furthermore, under Directive 2004/38, the derived right of residence recognised to family members of a Union citizen is not subject to the condition that they be on the territory of that Member State within a certain period after the entry of that Union citizen.

Nevertheless, for the purpose of granting such a derived right of residence on the basis of Article 21(1) TFEU, the competent authorities of the Member State of which the Union citizen is a national are entitled to verify that such family life was not interrupted before the entry of the third country national to that Member State. In that connection, the Member State concerned may take into account, as an indication, the fact that the family member entered its territory a significant period of time after the Union citizen's return. The competent authorities must, however, in the context of an overall assessment, take account of other relevant factors capable of showing that, in spite of the time which elapsed between the return of the Union citizen and the entry of the family member to that citizen's Member State of origin, the family life created and strengthened in the host Member State has not ended.

By its judgment of 12 July 2018, *Banger*, the Court held that although the Member State of which a Union citizen is a national is not obliged to accord a right of entry and residence to his unregistered partner, a third country national with whom the Union citizen has a durable relationship, that Member State is nonetheless required to facilitate the provision of such a residence authorisation.

The Court found that a third country national having a durable relationship that is duly attested with a Union citizen who has exercised his right of freedom of movement and returns to the Member State of which he is a national in order to reside there, must not, when that Union citizen returns to that Member State, be the subject of less favourable treatment than that provided for under Directive 2004/38 for a third country national having a durable relationship that is duly attested with a Union citizen exercising his right of freedom of movement in Member States other than that of which he is a national. Point (b) of the first subparagraph of Article 3(2) of that directive provides, as regards the partner with whom the Union citizen has such a relationship, that the host Member State must, in accordance with its national legislation, 'facilitate' entry and residence for that partner. Therefore, if that directive was not applied by analogy, the Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened, with a third country national, in the host Member State during a period of genuine residence.

The Court added that Member States must make it possible for the partner of the Union citizen to obtain a decision on his application that is founded on an extensive examination of his personal circumstances and, in the event of refusal, is justified by reasons. When undertaking that examination, it is incumbent upon the competent authority to take account of the various factors that may be relevant in the particular case. Although Member States have wide discretion as regards the selection of the factors to be taken into account, they must ensure that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' used in point (b) of the first subparagraph of Article 3(2) of Directive 2004/38 and which do not deprive that provision of its effectiveness. In addition, the third country nationals concerned must have available to them a redress procedure to challenge decisions refusing to grant them a residence authorisation, since the provisions of Directive 2004/38 are to be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter. In that context, the national court must review whether the national legislation and its application have remained within the limits of the discretion set by that directive and, in particular, ascertain whether the refusal decision has a sufficiently solid factual basis and whether the procedural safeguards were complied with. [29]

Lastly, in the judgment in ***Diallo*** (C-246/17, EU:C:2018:499) delivered on 27 June 2018, the Court was required to provide guidance on *the period within which a decision concerning the issue of a residence card of a family member of a Union citizen must be adopted and notified under Article 10(1) of Directive 2004/38, and the consequences of the prescribed period being exceeded.* In the case in point, a Guinean national had applied, as a relative in the ascending line of a child of Netherlands nationality domiciled in Belgium, for a residence card of a family member of a Union citizen. The Belgian authorities refused that application, notifying him of their decision 6 months and 9 days after submission of the application. After the judicial annulment of that decision on the ground of failure to state reasons, the Belgian authorities adopted a new refusal decision, almost 1 year after submission of the application. According to national case-law, which the Belgian State claimed was applicable in this instance in the absence of specific rules under EU law in that regard, the authorities had, following the judicial annulment of its initial decision, a new period of 6 months for the purposes of Article 10(1) of Directive 2004/38 to deal with the application. The person concerned challenged that decision, arguing in particular that granting the competent national authority a further period of 6 months, following the annulment of an initial decision, rendered Article 10(1) of Directive 2004/38 redundant.

The Court made clear that the competent national authorities must, within the mandatory period of 6 months after the submission of the application for a residence card provided for in Article 10(1) of Directive 2004/38, examine the application, adopt a decision, notify that decision — in the positive or the negative — and, if it is positive, issue a residence card to the applicant. As regards the consequences of exceeding that sixth-month period, the Court pointed out that the residence card in question may not be issued to a third country national who does not meet the requirements set out in Directive 2004/38 for its allocation. In those circumstances, while there is nothing to prevent national legislation from providing that silence on the part of the competent administration for a period of 6 months from the lodging of the application constitutes a refusal, the very terms of Directive 2004/38 preclude that silence from constituting an acceptance. Accordingly, the competent national authorities may not be required to issue automatically a residence card of a family member of a Union citizen where the period of 6 months is exceeded, without finding beforehand that the person concerned actually meets the conditions for residing in the host Member State in accordance with EU law.

29 | In that regard, mention should also be made of the judgment in ***Coman and Others*** (C-673/16, EU:C:2018:385), presented in Section II.3.1 'Right to respect for private and family life', in which the Court also ruled on the derived right of residence on which a third country national may rely, on the basis of Article 21 TFEU, in his capacity as husband of an EU citizen in a case in which the spouses were of the same sex.

Lastly, concerning the effects of the judicial annulment of decisions refusing to issue a residence card, the Court held that, in such a situation, the authorities are required to adopt a new decision within a reasonable period of time, which cannot, in any case, exceed the period referred to in Article 10(1) of Directive 2004/38. The principle of effectiveness and the objective of rapid processing of applications inherent to Directive 2004/38 preclude national authorities automatically being allowed a new period of 6 months following the judicial annulment of an initial decision refusing to issue a residence card. The Court stated in that regard that the automatic opening of a new period of 6 months would render excessively difficult the exercise of the right of the family member of a Union citizen to obtain a decision on his application for a residence card.

3. Extradition of a Union citizen to a third State

In its judgments in ***Pisciotti*** (C-191/16, EU:C:2018:222) and ***Raugevicius*** (C-247/17, EU:C:2018:898), delivered respectively on 10 April 2018 and 13 November 2018, the Grand Chamber of the Court was called upon to examine whether *nationals of another Member State must benefit, in the light of the principle of non-discrimination on grounds of nationality and freedom of movement and residence of Union citizens, from a rule of the State of residence prohibiting the extradition of its own nationals.* This question arose, in *Pisciotti*, in the context of the application of the Agreement on extradition between the European Union and the United States of America [30] ('the EU-USA Agreement'), and, in *Raugevicius*, in the absence of any agreement with the requesting third State, concerning the enforcement of a custodial sentence.

In *Pisciotti*, the person concerned, an Italian national, had been accused in the United States of America of participating in anticompetitive agreements and practices in the market for marine hoses. When his flight from Nigeria to Italy made a stopover in Germany, he was arrested. On the basis of the EU-USA Agreement, he was then extradited to the United States where he was subsequently convicted. Mr Pisciotti brought an action in Germany claiming that it should be required to pay damages. He maintained that Germany had breached EU law and, in particular, the general principle of non-discrimination, by refusing to extend to him the benefit of the prohibition on extradition laid down in the German Basic Law for all German nationals.

Relying on its judgment in *Petruhhin*, [31] the Court first of all observed that although, where there is no extradition agreement, the rules on extradition fall within the competence of the Member States, the situations that fall within the scope of Article 18 TFEU, read in conjunction with the provisions of the FEU Treaty on citizenship of the Union, include those involving the exercise of the freedom to move and to reside within the territory of the Member States, as conferred by Article 21 TFEU. Consequently, where a Union citizen who has been the subject of a request for extradition to the United States has been arrested, for the purposes of potentially acceding to that request, in a Member State other than the Member State of which he is a national, the situation of that citizen falls within the scope of EU law since he has made use of his right to move freely within the European Union and the request for extradition was made under the EU-USA Agreement.

After observing that the EU-USA Agreement does not prevent the Germany-United States extradition treaty from allowing Germany not to extradite its own nationals, the Court pointed out that that discretion of a Member State must be exercised in accordance with primary law and, in particular, with the rules of the FEU Treaty on equal treatment and the freedom of movement of Union citizens. It took the view that unequal treatment which allows the extradition of a Union citizen who is a national of a Member State other than the requested Member State, while the extradition by the requested Member State of its own nationals is not

30| Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27).

31| Judgment of the Court of 6 September 2016, ***Petruhhin*** (C-182/15, EU:C:2016:630).

permitted, gives rise to a restriction of freedom of movement, within the meaning of Article 21 TFEU. Such a restriction must be based on objective considerations and must be proportionate to the legitimate objective pursued. The objective of preventing the risk of impunity for persons who have committed an offence must be considered a legitimate objective in EU law.

Concerning the requirement of proportionality, the Court found that the approach taken in *Petruhhin*, which emerged in a context characterised by the absence of an international agreement, may also be applied in a situation in which the EU-USA Agreement gives the requested Member State the option of not extraditing its own nationals. Thus, such a Member State which has received a request to extradite a national of another Member State is required to inform the Member State of that national and, should that Member State so request, surrender that citizen to it, in accordance with the provisions of Framework Decision 2002/584, [32] provided that that Member State has jurisdiction, pursuant to its national law, to prosecute the person for offences committed outside its national territory. The Court therefore concluded, in the light of the facts of the case, that Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition whilst not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a European arrest warrant and the latter Member State has not taken any action in that regard.

The Court also applied *Petruhhin* in its judgment in *Raugevicius*, delivered on 13 November 2018, in the context of an extradition request for the purpose of enforcing a sentence in the absence of EU legal provisions governing the extradition of nationals of Member States to Russia. The case concerned a request for the extradition of a person holding both Lithuanian and Russian nationality issued by the Russian authorities to the Finnish authorities for the purpose of enforcing a four-year prison sentence. Since Finnish law prohibits the extradition of only its own nationals out of the European Union, the person concerned opposed his extradition on the ground that he had lived in Finland for a considerable length of time and that he was the father of two children of Finnish nationality residing in that Member State. The Finnish court to which a request had been made for an opinion on whether there was any legal barrier to extradition enquired, in particular, whether the principles laid down by the Court in *Petruhhin* also applied in the case of an extradition request for the purpose of enforcing a sentence.

As in *Pisciotti*, the Court held that unequal treatment which allows the extradition of a Union citizen who is a national of a Member State other than the requested Member State, while the extradition by the requested Member State of its own nationals is not permitted, gives rise to a restriction of freedom of movement, within the meaning of Article 21 TFEU, which may be justified only if it is based on objective considerations and is proportionate to the legitimate objective of the national provisions. Since extradition pursues the legitimate objective of preventing the risk of impunity, the Court found that the non-extradition by a Member State of its nationals for the purpose of enforcing a sentence is generally counterbalanced by mechanisms enabling those nationals to serve their sentences in that Member State. Since that was possible under Finnish law, the Court examined whether there were alternative measures to the extradition of a national of another Member State which would be less prejudicial to that national's freedom of movement.

In that respect, the Court explained that although, in the absence of EU legal provisions on the extradition of nationals of Member States to Russia, Member States retain the power to adopt such provisions, those Member States are required to exercise that power in accordance with EU law, in particular Articles 18 and

32 | Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1).

21 TFEU. Since nationals of the requested Member State and nationals of other Member States who reside permanently in that Member State and thus demonstrate a certain degree of integration are in a comparable situation, the requested Member State is required to ensure that the latter nationals receive the same treatment as that accorded to its own nationals in relation to extradition. Such Union citizens must therefore benefit from the provision preventing extradition from being applied to nationals and may, under the same conditions as those nationals, serve their sentences in the requested Member State.

Lastly, the Court pointed out that in the event that the requested Member State intends to extradite a national of another Member State who does not permanently reside in its territory, the first Member State must check that the extradition will not infringe the rights guaranteed by the Charter, in particular Article 19.

IV. Institutional provisions

In the judgment in ***France*** v ***Parliament (Exercise of budgetary powers)*** (C-73/17, EU:C:2018:787), delivered on 2 October 2018, the Grand Chamber of the Court held that *the European Parliament may exercise some of its budgetary powers in Brussels, instead of Strasbourg, if that is required for the proper functioning of the budgetary procedure.* In that case, the French Republic, supported by the Grand-Duchy of Luxembourg, asked the Court to annul a number of acts of the Parliament concerning the adoption of the general budget of the EU for the financial year 2017 because they had been adopted at an additional plenary part-session in Brussels. According to the French Republic, under point (a) of the sole article of the Protocol concerning the seats of the institutions, [33] the Parliament is obliged to exercise the budgetary powers conferred on it by Article 314 TFEU entirely during the ordinary plenary part-sessions held in Strasbourg.

By its judgment, the Court noted that the Parliament is required to exercise the budgetary powers conferred upon it in compliance with the Treaties and the acts adopted thereunder.

Thus, in the first place, the Parliament must comply with the Protocol concerning the seats of the institutions, which forms an integral part of the Treaties.

In the second place, the Parliament is obliged to comply with the deadlines and time limits that the Treaty imposes on it for the exercise of its budgetary powers in plenary sitting, in order to ensure that the annual budget of the EU is adopted by the end of the year preceding the financial year in question. Thus, if the Parliament fails to take a decision at second reading on the joint text on the draft annual budget within the 14-day period laid down in Article 314(6) TFEU, and if the Council of the European Union rejects the joint text within that period, the budgetary procedure must be repeated in its entirety. In that situation, the Parliament loses the power arising under Article 314(7)(d) TFEU enabling it — should the Council reject the joint text on the draft annual budget — to decide alone on the adoption of the budget, acting by qualified majority in a further vote. If the Parliament fails to take such a decision, that also allows the Council to adopt alone the joint text on the draft annual budget. It is of particular importance for the transparency and democratic legitimacy of the EU's actions that the Parliament take a decision on the joint text in plenary session.

In the third place, the Protocol concerning the seats of the institutions and the Treaty provisions governing the budgetary procedure have the same legal value. Accordingly, the obligations deriving from the former cannot, as such, prevail over those deriving from the latter, and vice versa. Their application must be on a

33| Protocol (No 6) on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union, annexed to the TEU, TFEU and EAEC Treaty (OJ 2008 C 115, p. 265).

case-by-case basis and in a manner that reconciles those obligations and strikes a fair balance between them. Accordingly, although the Parliament is obliged to exercise its budgetary powers in an ordinary plenary part-session in Strasbourg, that obligation, arising under the Protocol concerning the seats of the institutions, does not preclude the annual budget from being debated and voted on during an additional plenary part-session in Brussels, if that is called for by essential requirements relating to the proper conduct of the budgetary procedure. It is the Parliament's responsibility to carry out the abovementioned reconciliation, in respect of which it has a discretion resulting from the essential requirements relating to the proper conduct of the budgetary procedure.

The Court's review thus concerns only the question whether the Parliament made errors of assessment by opting to exercise some of its budgetary powers in the course of an additional plenary part-session. In the case in point, the Court considered that the Parliament did not commit an error of assessment in the scheduling of its calendar of ordinary plenary part-sessions and by including the debate and vote on the joint text on the draft annual budget of the EU for the financial year 2017 on the agenda for the additional plenary part-session in Brussels on 30 November and 1 December. Against that background, the Court also held that the President of the Parliament did not commit an error of assessment by declaring, during that plenary part-session, that the annual budget of the EU for the financial year 2017 had been definitively adopted.

V. EU law and national law

In its judgment in ***Smith*** (C-122/17, EU:C:2018:631), delivered on 7 August 2018, the Grand Chamber of the Court held *that a national court, hearing a dispute between private persons, which finds that it is unable to interpret the provisions of its national law that are contrary to a provision of Directive 90/232* [34] *satisfying all the conditions required for it to produce direct effect, is not obliged, solely on the basis of EU law, to disapply those provisions of national law and a clause to be found, as a consequence of those provisions of national law, in an insurance contract*.

In this case, the Court was asked to elaborate on the consequences of its judgment in *Farrell*, [35] in which it had held that national provisions providing for an exclusion from compulsory motor insurance cover in respect of persons for whom no seats in a motor vehicle have been provided were contrary to Article 1 of Directive 90/232 and had found that that article fulfilled all the conditions required for it to produce direct effect. The referring court was uncertain as to the obligations that fall, under EU law, on a national court, hearing a dispute between private persons, where the applicable national legislation is manifestly incompatible with the provisions of that directive.

Recalling its settled case-law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual, the Court held that a national court is obliged to set aside a provision of national law that is contrary to a directive only where that directive is relied on against a Member State, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the State or which have been required by a Member State to perform a task in the public interest and, for that purpose, possess special powers beyond those which result from the normal rules applicable to relations between individuals. The extension of the possibility of relying on a provision of a directive that has not been transposed, or that has been incorrectly transposed, to the sphere of relationships between private persons is permissible only if that provision gives concrete

34| Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33).

35| Judgment of 19 April 2007, ***Farrell*** (C-356/05, EU:C:2007:229).

expression to a general principle of EU law. In that situation, it is the general principle, and not the directive giving concrete expression to it, which confers on private persons a right which they may rely on as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle where they consider that it is impossible to interpret those provisions in a manner that is consistent with EU law.

In the case in point, Directive 90/232, in providing in Article 1 that it is compulsory that insurance against civil liability in respect of the use of the motor vehicle at issue should cover personal injury to all the passengers, excluding the driver, that results from that use, does not give concrete expression to a general principle of EU law. Consequently, that provision — whether it has not been transposed or has been incorrectly transposed — cannot be relied on directly in a dispute between private persons. [36]

On 4 December 2018, by its judgment in ***Minister for Justice and Equality and Commissioner of An Garda Síochána*** (C-378/17, EU:C:2018:979), the Court, sitting as the Grand Chamber, ruled on whether a *national body established by law in order to ensure enforcement of EU law in a particular area must be able to disapply a rule of national law that is contrary to EU law*. The main proceedings concerned the setting of a maximum age for recruitment to the Irish police force and whether that limit constituted discrimination prohibited both by Directive 2000/78 [37] and by the Irish legislation transposing that directive. Under Irish law, although the Workplace Relations Commission (formerly 'the Equality Tribunal') is the body responsible for ensuring compliance with the obligations deriving from Directive 2000/78, only the High Court has jurisdiction to uphold an application to disapply or strike down a provision of national law that is contrary to EU law.

The Irish Supreme Court submitted a question to the Court for a preliminary ruling by which it essentially sought to ascertain whether such a restriction was compatible with EU law. In its reply, the Court first of all drew attention to the distinction between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that that provision is no longer valid for any purpose. Although the Member States have the task of designating the courts empowered to review the validity of a national provision, the Court pointed out that, on the other hand, national courts which are called upon to apply provisions of EU law are under a duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national legislation, without requesting or awaiting the prior setting-aside of such provision by legislative or other constitutional means. The principle of primacy of EU law requires all the bodies of the Member States, not only the courts, to give full effect to EU rules.

Thus, the Court held that if a body such as the Workplace Relations Commission, entrusted by law with the task of ensuring that the obligations stemming from the implementation of Directive 2000/78 are implemented and complied with, were unable to find that a national provision is contrary to that directive and, consequently, were unable to decide to disapply that provision, the EU rules in the area of equality in employment and occupation would be rendered less effective. The fact that in the present case national law permits individuals to bring an action before the High Court founded on the alleged incompatibility of a national provision with Directive 2000/78 and allows the High Court, if it upholds the action, to disapply the national provision at issue is not capable of calling the above conclusion into question.

36| In connection with the same directive, reference should also be made to the judgment in ***Juliana*** (C-80/17, EU:C:2018:661), presented in Section XIV.6 'Motor insurance'.

37| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

The Court therefore concluded that EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law.

VI. Proceedings of the European Union [38]

1. References for a preliminary ruling

Two judgments relating to the admissibility of requests for a preliminary ruling are worthy of mention under this heading, together with a judgment concerning the duty of courts ruling at last instance to submit a question to the Court in accordance with the third paragraph of Article 267 TFEU.

In its judgment in ***Georgsmarienhütte*** (C-135/16, EU:C:2018:582), delivered on 25 July 2018, the Grand Chamber of the Court was called upon to clarify its decision in *TWD* [39] (judgment of 9 March 1994, ***TWD Textilwerke Deggendorf***, C-188/92, EU:C:1994:90). It thus adjudicated on the *admissibility of a request for a preliminary ruling concerning the validity of a decision of the Commission declaring State aid to be unlawful, where the party relying on the invalidity of that decision before the referring court had not brought an action for annulment against the decision before the General Court, even though it had standing to do so under the fourth paragraph of Article 263 TFEU, but in a situation in which it was not, at first sight, excluded that the action before the referring court had been brought within the period laid down in the sixth paragraph of Article 263 TFEU.*

The origins of this case lie in the German Law on the promotion of electricity production from renewable energy of 2012. That law provided, inter alia, for the capping of a surcharge ('the EEG-surcharge') levied thereunder for electricity-intensive industries ('EEIs'). Thus, EEIs, which are large energy consumers, could limit their energy costs and preserve their international competitiveness. By Decision 2015/1585, [40] the Commission classified the capping of the EEG-surcharge as State aid incompatible with the internal market and ordered Germany to recover it from EEIs. In their action before the referring court against the decisions to revoke the capping from which they had benefited, four EEIs essentially claimed that the contested decision was invalid. The referring court thus decided to stay proceedings and refer a question to the Court about the validity of that decision.

The Court noted that, in particular for reasons of legal certainty, it is not possible for a recipient of State aid — which was the subject of a Commission decision that was directly addressed solely to the Member State from which that recipient comes — who could undoubtedly have challenged that decision on the basis of Article 263 TFEU and who allowed the mandatory period provided for in the sixth paragraph of that provision in order to bring such an action to lapse, effectively to call into question the legality of that decision before the national courts, in an action brought against the national measures implementing that decision.

38| In this regard, reference should be made, in connection with interim proceedings, to the order made on 17 December 2018 in ***Commission*** v ***Poland*** (C-619/18 R, EU:C:2018:1021), presented in Section II.3.3 'Right to a fair trial'.

39| Judgment of the Court of 9 March 1994, ***TWD*** (C-188/92, EU:C:1994:90).

40| Commission Decision (EU) 2015/1585 of 25 November 2014 in State aid proceedings SA.3395 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and energy-intensive users) (OJ 2015 L 250, p. 122, — 'the contested decision').

That exception is also justified where the recipient of the aid relies, before a national court, on the invalidity of the Commission decision before expiry of the time limit for challenging that decision. Where a person seeking to challenge an EU measure undoubtedly has standing under the fourth paragraph of Article 263 TFEU, that person is thus bound to make use of the remedy provided for in that provision by bringing an action before the General Court. The Court made clear in that regard that the action for annulment, which is complemented by the possibility of appealing against the ruling of the General Court, provides a particularly appropriate procedural framework for the thorough examination, both parties being duly heard, of legal and factual questions, particularly in technical and complex fields such as State aid.

In the light of those observations, the Court held that the applicants in the main proceedings, while they undoubtedly had standing to seek the annulment of the contested decision under the fourth paragraph of Article 263 TFEU, had not brought proceedings before the General Court. It follows that they could not rely on the invalidity of that decision in support of their actions before the referring court against the national measures implementing that decision. Since the validity of the contested decision had therefore not been properly challenged before the referring court, the Court found that the request for a preliminary ruling on the validity of that decision was inadmissible.

In the case giving rise to the judgment of 20 September 2018, ***Fremoluc*** (C-343/17, EU:C:2018:754), the Fourth Chamber of the Court was subsequently required to adjudicate — in a dispute which was confined in all respects within a single Member State — on *the admissibility of a reference for a preliminary ruling in a purely domestic case.* That question arose in the context of Belgian legislation granting a right of pre-emption to a government body on land with a view to developing social housing and providing for the allocation of that housing on a priority basis, for sale or rent, to private individuals with strong social, economic or socio-cultural ties with the area in question. In the main proceedings, Fremoluc NV, a company established in Belgium, had concluded a contract for the sale of several plots of land located in the province of Flemish Brabant with vendors also resident in Belgium, subject to the condition that no statutory pre-emption rights be exercised. The provincial body responsible for land and housing policy had nevertheless exercised those rights, acquiring the plots and reselling them thereafter. Proceedings having been brought before it by Fremoluc NV, the referring court enquired whether the national legislation at issue should be regarded as contrary to the rules on the freedoms of movement.

The Court first of all recalled its case-law, according to which, where the dispute in the main proceedings is confined in all respects within a single Member State, the provisions of the FEU Treaty and the measures adopted to implement them do not apply. The Court nonetheless pointed out that there were situations in which, even in such a scenario, it might prove necessary, in order to resolve the dispute in the main proceedings, for the provisions of the Treaties relating to the fundamental freedoms to be interpreted and, therefore, for such requests for a preliminary ruling to be declared admissible. It is, however, for the referring court to indicate to the Court, in accordance with Article 94 of the Rules of Procedure, in what way the dispute before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the fundamental freedoms that makes the preliminary ruling on interpretation necessary for it to give judgment in that dispute. In the case at hand, the Court observed that the request for a preliminary ruling merely stated that the priority rule in question in the main proceedings appeared to affect the nationals and undertakings of other Member States. In particular, the request did not provide any evidence which would help to confirm that nationals of other Member States, such as competitors of Fremoluc NV, were interested in making use of the fundamental freedoms in the dispute in the main proceedings. The Court therefore concluded that since it had not been demonstrated that there was a connecting factor between the subject matter or the circumstances of the dispute in the main proceedings, which was confined in all respects within a single Member State, and the provisions of EU law of which an interpretation was sought, the request for a preliminary ruling was inadmissible.

Lastly, by its judgment in ***Commission*** v ***France (Advance payment of tax)*** (C-416/17, EU:C:2018:811), delivered on 4 October 2018, the Fifth Chamber of the Court found that *the obligation to make a request for a preliminary ruling had been infringed by a court against whose decisions there was no remedy.* The action for failure to fulfil obligations brought against France sought a declaration from the Court, first, that French parent companies which receive dividends from foreign subsidiaries are subject to discriminatory and disproportionate treatment compared with French parent companies which receive dividends from French subsidiaries, in breach of EU law [41] as interpreted by the Court in *Accor*, [42] and, secondly, that the French Council of State had infringed its obligation to make a request for a preliminary ruling.

According to the Commission, the Council of State had found that the approach taken by the Court in *Accor* did not resolve the issue of the procedures for reimbursement of the advance payment, the levying of which had been found to be incompatible with Articles 49 and 63 TFEU by that judgment, and that that issue had subsequently been addressed by the Court in the judgment in *Test Claimants in the FII Group Litigation*. [43] However, the Council of State had then chosen to depart from that case-law, on the ground that the UK scheme at issue in that case was different from the French tax credit and advance payment scheme, although it could not be certain that its reasoning would be equally obvious to the Court. It had therefore decided to give judgment in the pending cases before it, relating to that issue, without making a request for a preliminary ruling to the Court of Justice.

As a preliminary point, the Court noted that the obligation of the Member States to comply with the provisions of the FEU Treaty is binding on all their authorities, including, for matters within their jurisdiction, the courts. Therefore, a Member State's failure to fulfil obligations may, in principle, be established under Article 258 TFEU whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution.

The Court also made clear that where there is no judicial remedy against the decision of a national court, that court is in principle obliged to make a request to the Court in accordance with the third paragraph of Article 267 TFEU where a question of the interpretation of the FEU Treaty is raised before it, and that the obligation to make a request laid down in that provision is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States. That court is not under such an obligation when it finds that the question raised is irrelevant or that the provision of EU law in question has already been interpreted by the Court or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt, and the existence of such a possibility must be assessed in the light of the specific characteristics of EU law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the European Union. In the instant case, the Court held that on account of the Council of State's failure to make a reference to the Court of Justice, in accordance with the procedure provided for in the third paragraph of Article 267 TFEU, even though its interpretation of the provisions of EU law was not so obvious as to leave no scope for any reasonable doubt, the French Republic had failed to fulfil its obligations under that article.

41| As regards that complaint, the Court pointed out that Articles 49 and 63 TFEU require a Member State which has a system for preventing economic double taxation as regards dividends paid to residents by resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies, unless a difference in treatment is justified by overriding reasons in the public interest. Accordingly, the Court found that the French Republic was required, in order to bring an end to the discriminatory treatment in the application of the tax mechanism seeking to avoid the economic double taxation of distributed dividends, to take into account the taxation levied earlier on the distributed profits resulting from the exercise of the tax powers of the Member State in which the dividends originated, within the limits of its own powers of taxation, irrespective of the level of the chain of interests on which that tax was levied, that is to say a subsidiary or a sub-subsidiary.

42| Judgment of 15 September 2011, ***Accor*** (C-310/09, EU:C:2011:581).

43| Judgment of 13 November 2012, ***Test Claimants in the FII Group Litigation*** (C-35/11, EU:C:2012:707).

2. Actions for annulment [44]

In relation to actions for annulment, three judgments are worthy of mention. The first two concern the admissibility of actions brought by a natural or legal person, while the third deals with the jurisdiction of the EU Courts to review acts of an institution adopted following a procedure providing for the participation of a national authority.

In two judgments of 13 March 2018, ***Industrias Químicas del Vallés*** v ***Commission*** (C-244/16 P, EU:C:2018:177) and ***European Union Copper Task Force*** v ***Commission*** (C-384/16 P, EU:C:2018:176), the Court, sitting as the Grand Chamber, confirmed the orders of the General Court under appeal [45] and adjudicated on *the interpretation of the verb 'entail' (implementing measures) used in the final limb of the fourth paragraph of Article 263 TFEU.* That provision enables a natural or legal person to bring an action for annulment against a regulatory act not entailing implementing measures if that act is of direct concern to them. By the orders under appeal, the General Court had dismissed actions for the annulment in part of Regulation 2015/408 [46] as inadmissible on the ground, in essence, that that regulation entailed, with regard to the appellants, implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU. The appellants (a company marketing plant protection products the contents of which include an active chemical substance, metalaxyl, and an association of producers of copper compounds) had sought the annulment in part of that regulation, in so far as it classifies those products as candidates for substitution, thus submitting them to the regime applicable to such substances laid down in Regulation No 1107/2009. [47]

In the first place, concerning the question whether Regulation 2015/408 entails implementing measures with regard to the appellants, the Court considered that the acts to be adopted by the Commission or by the Member States in order to implement the specific rules applicable to metalaxyl and copper compounds, laid down in Regulation No 1107/2009, would produce the legal effects of Regulation 2015/408 vis-à-vis the appellants and would therefore constitute implementing measures of the latter regulation. According to the Court, the wording of the final limb of the fourth paragraph of Article 263 TFEU does not require, for a measure to be classified as an implementing measure of a regulatory act, that that act be the legal base of that measure. The same measure may be an implementing measure both of the act the provisions of which constitute its legal base and of a different act where all or part of the legal effects of the latter act will be produced, vis-à-vis the applicant, only through the intermediary of that measure.

In the second place, concerning whether Regulation 2015/408 was of individual concern to the appellants, the Court found that the mere fact that an importer of metalaxyl had participated in the procedure that led to the inclusion of that substance in Annex I to Directive 91/414 [48] is not capable of distinguishing it. The importer is concerned by that regulation simply because of its objective quality as importer of metalaxyl and

44| The Court also examined the admissibility of the action for annulment brought before it in its judgment in ***Commission*** v ***Council (Antarctic MPAs)*** (C-626/15 and C-659/16, EU:C:2018:925), delivered on 20 November 2018. That judgment is presented in Section XIX.3 'External competence of the European Union'.

45| Orders of the General Court of 16 February 2016, ***Industrias Químicas del Vallés*** v ***Commission*** (T-296/15, not published, EU:T:2016:79), and of 27 April 2016, ***European Union Copper Task Force*** v ***Commission*** (T-310/15, not published, EU:T:2016:265).

46| Commission Implementing Regulation (EU) 2015/408 of 11 March 2015 on implementing Article 80(7) of Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market and establishing a list of candidates for substitution (OJ 2015 L 67, p. 18).

47| Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1.).

48| Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1).

seller of products containing that substance, on the same basis as any other economic operator that is, actually or potentially, in an identical situation. In the same vein, the members of the association of copper producers are concerned by Regulation 2015/408 simply because of their objective capacity as producers of copper compounds, and thus in the same capacity as any other economic operator that is, actually or potentially, in an identical situation, with the result that they are not individually concerned by that regulation.

Since none of the appellants therefore had standing to bring an action for annulment before the General Court, the General Court was correct in law to declare their actions to be inadmissible.

In its judgment of 6 November 2018, ***Scuola Elementare Maria Montessori*** v ***Commission*** (Joined Cases C-622/16 P to C-624/16 P, EU:C:2018:873), the Grand Chamber of the Court examined the *admissibility, in the light of the third limb of the fourth paragraph of Article 263 TFEU, of actions for annulment brought by competitors of beneficiaries of a State aid scheme against a decision of the Commission declaring that the national scheme in question does not constitute State aid and that aid granted under an unlawful scheme cannot be recovered.*

By the contested decision, [49] the Commission had found that the exemption from municipal tax on real property granted by Italy to non-commercial entities (such as ecclesiastical or religious institutions) carrying on certain activities (such as educational or accommodation activities) on the real property belonging to them was unlawful State aid. However, the Commission did not order recovery of the aid, since it considered this to be impossible. The Commission also found that the tax exemption provided for by the new Italian scheme of the single municipal tax, applicable in Italy as from 1 January 2012, did not constitute State aid. Scuola Elementare Maria Montessori ('Montessori'), a private educational establishment, and Mr Ferracci, the owner of a bed and breakfast, brought actions for annulment against the contested decision before the General Court, arguing that the decision had put them in an unfavourable competitive situation compared to ecclesiastical or religious institutions located nearby which carried on similar activities to theirs. The General Court having dismissed those actions as admissible but unfounded, [50] both the appellants and the Commission lodged appeals against the General Court's judgments.

In support of its appeals, the Commission essentially argued that by declaring the actions for annulment to be admissible under the third limb of the fourth paragraph of Article 263 TFEU, the General Court misinterpreted and misapplied each of the three cumulative conditions laid down in that provision.

The Court recalled that by the Treaty of Lisbon a third limb was added to the fourth paragraph of Article 263 TFEU, relaxing the conditions of admissibility of actions for annulment brought by natural or legal persons. That limb, without subjecting the admissibility of actions for annulment brought by such persons to the condition of individual concern, allows such actions to be brought against 'regulatory acts' which do not entail implementing measures and are of direct concern to the applicant. According to the Court, the concept of 'regulatory act' extends to all non-legislative acts of general application. In the field of State aid, the Court pointed out that decisions of the Commission authorising or prohibiting a national scheme are of general application. It went on to observe that a direct effect on the applicant as regards State aid cannot be deduced from the mere potential existence of a competitive relationship with the undertaking that received the aid. The applicant must adequately explain the reasons why the Commission's decision is liable to place him in an unfavourable competitive position and thus to produce effects on his legal situation.

49| Commission Decision 2013/284/EU of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy (OJ 2013 L 166, p. 24).

50| Judgments of the General Court of 15 September 2016, ***Scuola Elementare Maria Montessori*** v ***Commission*** (T-220/13, EU:T:2016:484), and ***Ferracci*** v ***Commission*** (T-219/13, EU:T:2016:485).

As regards the criterion relating to the absence of implementing measures, the Court noted that for the beneficiaries of an aid scheme, the national provisions establishing the scheme and the measures implementing those provisions indeed constitute implementing measures entailed by a decision declaring the aid scheme incompatible with the internal market or declaring it compatible with the internal market subject to compliance with commitments entered into by the Member State concerned. This reflects the fact that a beneficiary of an aid scheme can, where he satisfies the eligibility conditions under national law, request the *national* authorities to grant him the aid as it would have been granted if there were an unconditional decision declaring the scheme compatible with the internal market. The beneficiary of an aid scheme may therefore contest before the national courts a measure refusing that request, pleading the invalidity of the Commission's decision declaring the scheme incompatible with the internal market or compatible with that market subject to compliance with commitments entered into by the Member State concerned, in order to cause those courts to refer questions to the Court for a preliminary ruling on its validity.

The position is different, however, as regards the situation of the competitors of beneficiaries of unlawful aid which do not satisfy the eligibility conditions set out in the national measure. According to the Court, it would be artificial to require that competitor to request the national authorities to grant him that benefit and to contest the refusal of that request before a national court, in order to cause the national court to make a reference to the Court on the validity of the Commission's decision concerning that measure. The Court thus concluded that, in those circumstances, the decision had to be regarded as not entailing implementing measures with respect to such a competitor. In the light of those considerations, the Court found that the contested decision was a 'regulatory act' that was of direct concern to Montessori and Mr Ferracci and did not entail implementing measures with respect to them, and that the General Court was therefore entitled to declare their actions for annulment admissible. As regards the substance, the Court provided guidance on the examination to be carried out by the Commission to conclude that recovery of the unlawful aid was absolutely impossible. [51]

On 19 December 2018, in its judgment in ***Berlusconi and Fininvest*** (C-219/17, EU:C:2018:1023), the Court, sitting as the Grand Chamber, was called upon to explain the effects on the division of jurisdiction between the EU Courts and the courts of the Member States that result from the involvement of national authorities in the course of a procedure which leads to the adoption of an EU act. The European Central Bank (ECB) and the national supervisory authorities were involved in the procedure at issue in this case for authorising acquisitions of or increases in qualifying holdings in credit institutions. [52]

In the main proceedings, an action had been brought before the national court against a proposal for a decision of the Bank of Italy containing an adverse opinion as to the reputation of the applicants as acquirers of a holding in a credit institution and inviting the ECB to oppose the acquisition proposed by them. Before the national court, the applicants argued that the proposal for a decision in question disregarded the force of *res judicata* of a judgment of the Italian Council of State, in terms of which the acquisition was governed by legislation, which remained applicable, preceding the adoption of the reputation criteria. By way of defence, the Bank of Italy pleaded in particular that the national courts lacked jurisdiction to hear the action which it

51| In that regard, see Section XII 'Competition'.

52| See the procedure provided for in Articles 22 and 23 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ('CRD IV') (OJ 2013 L 176, p. 338), Articles 4(1)(c) and 15 of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions ('the SSM Regulation') (OJ 2013 L 287, p. 63), and Articles 85 to 87 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1, and corrigendum OJ 2018, L 65 p. 48).

claimed concerned preparatory acts containing nothing in the nature of a decision, which were directed at the adoption of a decision falling within the exclusive competence of an EU institution (the ECB) and which, just like the final decision, came under the jurisdiction of the EU Courts alone.

It was against that backdrop that the referring court asked the Court of Justice whether it was for the national courts or the EU Courts to review the legality of decisions to initiate procedures, measures of inquiry and proposed decisions adopted by a competent national authority, in this case the Bank of Italy, in an authorisation procedure relating to the acquisition of a qualified holding in a banking institution.

The Court found, first of all, that Article 263 TFEU confers upon the EU Courts exclusive jurisdiction to review the legality of acts adopted by an institution of the European Union, such as the ECB. Next, it drew a distinction between two situations: first, the situation where the EU institution has only limited or no discretion, so that the national authority's act is binding on the EU institution, and, secondly, the situation where the EU institution exercises, alone, the final decision-making power without being bound by a national authority's act. In the first case, it falls to the national courts to rule on any irregularities that may vitiate such a national act, by making a request to the Court for a preliminary ruling where appropriate. In the second case, on the other hand, it falls to the EU Courts not only to rule on the legality of the final decision adopted by the EU institution, but also to examine any defects vitiating the preparatory acts or the proposals of the national authorities that would be such as to affect the validity of that final decision.

In that regard, the Court points out that in order for a process involving the exclusive decision-making power of an EU institution to be effective, there must necessarily be a single judicial review in order to avoid risks of divergent assessments of the legality of the final decision, in particular where that decision follows a national authority's analysis and proposal. Where the EU legislature opts for such an administrative procedure, it seeks to establish between the EU institution concerned and the national authorities a specific cooperation mechanism which is based on the exclusive decision-making power of that institution. Consequently, it is apparent from Article 263 TFEU, read in the light of the principle of sincere cooperation referred to in Article 4(3) TEU, that acts adopted by a national authority in that type of procedure cannot be subject to review by the courts of the Member States.

In the case in point, the Court observed that the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition at the end of the procedure provided for in the banking union's single supervisory mechanism, for the effective and consistent functioning of which the ECB is responsible. Consequently, it is for the EU Courts alone to determine, as an incidental matter, whether the legality of the ECB's final decision is affected by any defects rendering unlawful the acts preparatory to that decision that were adopted by the Bank of Italy. That jurisdiction excludes any jurisdiction of national courts in respect of those acts.

VII. Freedoms of movement

1. Freedom of establishment

By its judgment in ***Bevola and Jens W. Trock*** (C-650/16, EU:C:2018:424), delivered on 12 June 2018, the Grand Chamber of the Court considered the compatibility with the freedom *of establishment of Danish tax legislation preventing resident companies from deducting losses definitively incurred by their permanent establishments located in another Member State, except by making use of the national international joint taxation scheme.*

The Court first of all recalled that even though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the activities pursued by a resident company in another Member State through a permanent establishment. Secondly, the Court pointed out that Danish tax legislation, by excluding from the taxable income of Danish companies, in principle, both the income and the expenditure attributable to their permanent establishments abroad, establishes a difference in treatment between Danish companies which possess a permanent establishment in Denmark and those whose permanent establishment is situated in another Member State. According to the Court, that difference is liable to make the exercise of its freedom of establishment by setting up permanent establishments in other Member States less attractive for a Danish company.

In the light of the objective pursued by that national legislation, namely to prevent double taxation of profits and, symmetrically, double deduction of losses of resident companies possessing such permanent establishments, the Court found that the difference in treatment at issue concerned situations that were objectively comparable.

The Court therefore examined the possible justifications for such a difference in treatment. It noted that the Danish legislation at issue may be justified by overriding reasons in the public interest relating to the balanced allocation of powers of taxation between the Member States, the coherence of the Danish tax system, and the need to prevent the risk of double deduction of losses, provided that it does not go beyond what is necessary to achieve those objectives. Regarding the necessity of the difference in treatment at issue in the particular case of the losses of the non-resident permanent establishment being definitive, the Court considered that there is no risk of double deduction of losses where there is no longer any possibility of deducting the losses of the non-resident permanent establishment in the Member State in which it is situated. In such a case, the national legislation thus goes beyond what is necessary for pursuing the overriding reasons in the public interest mentioned above. However, in order not to compromise the coherence of the Danish tax system, the Court took the view that the deduction of such losses can be allowed only on condition that the resident company demonstrates that they are definitive. [53]

Thus, the Court held that Article 49 TFEU precludes legislation of a Member State under which it is not possible for a resident company which has not opted for the national international joint taxation scheme to deduct from its taxable profits losses incurred by a permanent establishment in another Member State, where, first, that company has exhausted the possibilities of deducting those losses available under the law of the Member

53| See, in that regard, judgments of 13 December 2005, ***Marks & Spencer*** (C-446/03, EU:C:2005:763, paragraph 55), and of 3 February 2015, ***Commission*** v ***United Kingdom*** (C–172/13, EU:C:2015:50, paragraph 36).

State in which the establishment is situated and, secondly, it has ceased to receive any income from that establishment, so that there is no longer any possibility of the losses being taken into account in that Member State, which is for the national court to ascertain.

2. Freedom to provide services

In its judgment in ***X and Visser*** (C-360/15 and C-31/16, EU:C:2018:44), delivered on 30 January 2018, the Grand Chamber of the Court provided *guidance on the interpretation of Directive 2006/123* [54] in two cases: the first concerned administrative charges relating to the installation of electronic communications networks and the second concerned rules contained in a zoning plan under which certain geographical zones situated outside the city centre were exclusively designated for retail trade in bulky goods.

In the first case, the applicant company, responsible for constructing a fibre-optics network in a Dutch municipality, had challenged the fees charged by that municipality for authorisations so that the applicant could carry out cable-installation work. An appeal on a point of law having been brought before it, the national court was unsure whether the levying of the fees/charges at issue fell within the scope of Directive 2006/123.

The Court held that Directive 2006/123 is not applicable to fees/charges for the payment of which liability is connected with the right of undertakings authorised to provide electronic communications networks and services to install cables for a public electronic communications network. According to the Court, the liability to pay such fees/charges is attached to the right of undertakings authorised to provide electronic communications networks to install facilities within the meaning of Article 13 of Directive 2002/20, [55] which refers to fees for rights of use and rights to install facilities. The imposition of such fees/charges is thus a matter covered by Directive 2002/20, for the purposes of Article 2(2)(c) of Directive 2006/123, which excludes from the scope of the latter directive electronic communications services and networks and associated facilities and services with respect to such matters.

The second case concerned the adoption, by a Dutch municipality, of a zoning plan designating a zone outside the town centre as a commercial zone exclusively for retail trade in bulky goods, with a view to maintaining the viability of the city centre and preventing premises lying vacant in inner city areas. Since the applicant company wished to lease commercial premises in that zone to another undertaking that was interested in opening a retail outlet for shoes and clothing, it challenged the decision establishing the zoning plan claiming that it was incompatible with Directive 2006/123.

After finding that the activity of retail trade in goods constitutes a 'service' for the purposes of applying Directive 2006/123, the Court held that the provisions of Chapter III of that directive, on freedom of establishment of providers, must be interpreted as also applying to a situation where all the relevant elements are confined to a single Member State. It pointed out that neither the wording nor the scheme of Directive 2006/123 imposes any condition as to the existence of a foreign element and that the interpretation that the provisions of Chapter III of Directive 2006/123 are applicable not only to the provider who wishes to become established in another Member State but also to the provider who wishes to become established in his own Member State is consistent with the objectives pursued by that directive.

54| Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

55| Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21).

The Court considered that Directive 2006/123 does not preclude rules contained in a municipal zoning plan from prohibiting retail trade activity in goods other than bulky goods in geographical zones situated outside the city centre of that municipality, provided that the conditions of non-discrimination, necessity and proportionality are satisfied, which it is for the referring court to determine. Specifically as regards the condition of necessity, the Court made clear that the objective of protecting the urban environment is capable of constituting an overriding reason in the public interest that may justify a territorial restriction such as that at issue in the instant case.

In the judgment of 7 November 2018 in ***Commission*** v ***Hungary*** (C-171/17, EU:C:2018:881), the Court found that *by instituting and maintaining in force a national monopoly for mobile payment services, Hungary had failed to fulfil its obligations under Article 15(2)(d) of Directive 2006/123 and Article 56 TFEU.*

That case concerned the operation, by a Hungarian company wholly owned by the Hungarian State, of a national mobile payment system the use of which was mandatory in Hungary for the mobile payment of public parking charges, tolls for use of the road network, fares on public transport and fees connected with all the other services offered by a State body. The providers of those services were, in principle, bound to ensure customer access to them via the national mobile payment system. Being of the opinion that the system constituted an unlawful State monopoly, the Commission brought an action for failure to fulfil obligations under Article 258 TFEU.

The Court found, first of all, that Hungary had not committed a manifest error of assessment in classifying its national mobile payment service in question as a service of general economic interest ('SGEI'). However, since only SGEIs that existed at the date on which Directive 2006/123 entered into force are excluded from its scope, while the national monopoly in question came into being in 2014, the Court went on to examine the national mobile payment service in the light of the specific rules for SGEIs laid down in that directive.

The Court observed that by restricting access to the activity of providing mobile payment services to a single public undertaking, the national mobile payment system constituted a 'requirement' within the meaning of Article 15(2)(d) of Directive 2006/123 that had to satisfy the conditions of non-discrimination, necessity and proportionality laid down in paragraph 3 of that article. Since Hungary had itself accepted that there were less restrictive measures which did not restrict the freedom of establishment to the same extent, such as a system of concessions based on a competitive process, and given that Hungary had not shown that a less restrictive measure would have been likely to impede the attainment of the public service mission pursued, the Court concluded that Article 15(2)(d) of Directive 2006/123 had been infringed.

Lastly, since Article 16 of Directive 2006/123, which concerns the right of providers to provide services in a Member State other than that in which they are established, does not apply to SGEIs which are provided in another Member State, the Court examined, as the Commission submitted in the alternative, whether there had been a breach of Article 56 TFEU on account of the establishment of the national monopoly. Referring, in essence, to the reasons given in support of its finding that Article 15(2)(d) of Directive 2006/123 had been infringed, the Court considered that the Hungarian mobile payment system was also contrary to the freedom to provide services, as guaranteed by Article 56 TFEU.

In its judgment in ***Čepelnik*** (C-33/17, EU:C:2018:896), delivered on 13 November 2018, the Grand Chamber of the Court ruled that Article 56 TFEU *must be interpreted as precluding legislation of a Member State under which the competent authorities can order a commissioning party established in that Member State to suspend payments to his contractor established in another Member State, or even to pay a security in an amount equivalent to the price still owed for the works, in order to guarantee payment of the fine which might be imposed on that contractor in the event of a proven infringement of the labour law of the first Member State.*

The main action involved a dispute between a company established in Slovenia, as a service provider, and an Austrian commissioning party concerning the payment of construction work carried out by that company in Austria. While the applicant company claimed payment of the outstanding amount due in respect of the work carried out, the defendant argued that he had already been required to pay that sum as a security to the competent Austrian administrative authority, in order to guarantee the future payment of any fine that might be imposed on the applicant company for a breach of Austrian labour law following an on-the-spot check by the financial police. Since payment of that security had the effect of releasing the commissioning party under national law, that party had refused to pay the sum claimed. The service provider had therefore brought proceedings before the referring court, which thereafter submitted a request for a preliminary ruling to the Court.

The Court first of all held that national rules which require a commissioning party to suspend the payments owed to his contractor and to pay a security in an amount equivalent to the price still owed for the works where there are reasonable grounds for suspecting an administrative offence by the service provider against national legislation in the field of labour law entail a restriction on the freedom to provide services in so far as they are liable both to dissuade commissioning parties from the Member State concerned from having recourse to service providers established in another Member State and to dissuade those service providers from offering their services to those commissioning parties. Such measures are not only liable to bring forward the time when the recipient of the services concerned is required to pay the price still owed for the works and thus to deprive him of the possibility of retaining part of that sum as compensation for faulty or late performance of the works, but are also liable to deprive service providers established in other Member States of the right to claim from their Austrian customers payment of the price still owed for the works, thereby exposing them to the risk of delayed payment.

The Court then recalled that such a restriction may be justified by overriding reasons in the public interest, such as the objective of social protection of workers, combating fraud, particularly social security fraud, and preventing abuse, provided that it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. As regards the proportionality of the Austrian legislation at issue with respect to its objective, the Court first of all made clear that it enabled the competent authorities to require the commissioning party to suspend his payments to the service provider and to pay a security in the amount of the price still owed for the works solely on the basis of reasonable suspicion of an administrative offence even before a finding is made of fraud, abuse or a practice capable of affecting the protection of workers. Next, it pointed out that the national legislation did not make it possible for the service provider concerned to put forward his observations on the acts of which he was accused before the adoption of those measures. Lastly, the Court observed that the amount of the security could be fixed by the competent authorities without taking account of possible faults by the service provider and could therefore exceed, perhaps substantially, the amount that the commissioning party would in principle have to pay on completion of the works. The Court concluded that, for each of those three reasons, national legislation such as that at issue had to be regarded as going beyond what is necessary for attaining the objectives of the protection of workers and combating fraud, in particular social security fraud, and preventing abuse. That legislation was therefore contrary to Article 56 TFEU.

By its judgment in ***Danieli & C. Officine Meccaniche and Others*** (C-18/17, EU:C:2018:904), delivered on 14 November 2018, the Court ruled on *the compatibility with the freedom to provide services of measures taken by a Member State intended to restrict, by requiring a work permit, the posting of Croatian nationals and third country nationals in that Member State.* In this request for a preliminary ruling, the Court was specifically asked to adjudicate on whether the Republic of Austria was entitled to require workers transferred to an Italian undertaking providing a service in Austria to have a work permit when (i) those workers are Croatian nationals employed by a Croatian undertaking, or (ii) those workers are third country nationals legally employed by another Italian undertaking.

As regards the posting of Croatian nationals, the Court recalled, first, that under Chapter 2, paragraph 1 of Annex V to the Act of Accession of Croatia, [56] Article 45 and the first paragraph of Article 56 TFEU fully apply only, in relation to the freedom of movement of workers and the freedom to provide services involving temporary movement of workers as defined in Article 1 of Directive 96/71, [57] between Croatia on the one hand, and each of the Member States on the other hand, subject to the transitional provisions laid down in paragraphs 2 to 13. Secondly, the Court observed that the hiring out of manpower at issue in the main proceedings fell within the scope of Chapter 2, paragraph 2 of Annex V, under which, by way of derogation from Articles 1 to 6 of Regulation No 492/2011 [58] and until the end of the two-year period following the date of accession, the Member States will apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Croatian nationals. Thus, the Court held that Articles 56 and 57 TFEU and Chapter 2, paragraph 2 of Annex V to the Act of Accession of Croatia must be interpreted as meaning that, during the transitional period provided for in that last provision, a Member State is entitled to restrict, by the requirement of a work permit, the posting of Croatian workers who are employed by an undertaking which has its registered office in Croatia, when the posting of those workers takes place through their hiring out, within the meaning of Article 1(3)(c) of Directive 96/71, to an undertaking established in another Member State for the purposes of the provision of services in the first of those Member States by the latter undertaking.

On the other hand, regarding the posting of workers who are third country nationals, the Court held that a Member State retaining on a permanent basis a requirement for a work permit for third country nationals who are made available to an undertaking operating in that Member State, by an undertaking established in another Member State, constitutes a restriction on the freedom to provide services which exceeds what is necessary to achieve the public interest objective to avoid disturbances on the labour market, since third country nationals, when they return to their country of origin or residence after the completion of their work, do not purport to gain access to the labour market of that Member State. Consequently, the Court found that Articles 56 and 57 TFEU must be interpreted as meaning that a Member State is not entitled to require that third country nationals, hired out to an undertaking established in another Member State, by another undertaking which is also established in that other Member State, for the purposes of providing a service in the first of those Member States, must have a work permit.

3. Free movement of capital

In the judgment in ***SEGRO and Horváth*** (C-52/16 and C-113/16, EU:C:2018:157), delivered on 6 March 2018, the Grand Chamber of the Court held that the free movement of capital, guaranteed by Article 63 TFEU, precludes *legislation of a Member State cancelling, without compensation, all usufructs over agricultural land that are not held by a close relation of the owner of the land.* That legislation was applied in conjunction with Hungarian

56| Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ 2012 L 112, p. 21), annexed to the Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union (OJ 2012 L 112, p. 10).

57| Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

58| Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

rules under which foreign nationals and legal persons wishing to acquire a right of ownership over agricultural land in Hungary were subject to restrictions or were even precluded from acquiring such a right, so that the only way for them to invest in agricultural land was to acquire a right of usufruct.

The Court found, first of all, that by depriving the holder of the right of usufruct of the possibility of both using the agricultural land concerned and disposing of that right, the legislation at issue constitutes a restriction on the free movement of capital, irrespective of whether or not it provides for compensation for the usufructuaries. Since the requirement that a close family tie must exist with the owner of the land is such as to operate to the disadvantage of nationals of other Member States more than Hungarian nationals, it is also liable, added the Court, to conceal indirect discrimination based on the usufructuary's nationality or the origin of the capital.

As to whether that restriction could be justified, the Court held, in the first place, that the existence of the required family tie is not appropriate for securing the attainment of the objective relied on, which is to reserve productive land for the persons who farm it and to prevent it being acquired for speculative purposes. In the second place, concerning the justification based on the desire to penalise infringements of the Hungarian legislation on exchange controls, the Court observed that the family-tie criterion is unrelated to that legislation. In any event, other measures with less far-reaching effects could have been adopted for the purpose of penalising such infringements, such as, for example, administrative fines. Lastly, the Court held, in the third place, that the restriction at issue is also incapable of being justified by the desire to combat purely artificial arrangements aimed at circumventing the applicable legislation concerning the acquisition of agricultural property. By assuming that, whenever a person without a close family tie with the owner of agricultural land acquires a right of usufruct, he engages in abusive conduct, the Hungarian legislation lays down a general presumption of abusive practices which cannot, under any circumstances, be considered to be proportionate to the objective of combating such practices. [59]

In its judgment in ***Sofina and Others*** (C-575/17, EU:C:2018:943), delivered on 22 November 2018, the Court ruled that the *provisions of the FEU Treaty on the free movement of capital preclude certain provisions of the French General Tax Code providing for a withholding tax on the gross amount of nationally sourced dividends paid to loss-making non-resident companies, while dividends paid to loss-making resident companies are taxed only at a later stage, if they return to profitability.*

The Court first of all observed that that difference in tax treatment procures, for loss-making resident companies, at the very least a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results. Such a difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter (i) non-resident companies from investing in companies established in France, and (ii) investors residing in France from purchasing holdings in non-resident companies.

Since the national legislation at issue thus constitutes a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) TFEU, the Court subsequently considered whether that restriction could be justified under Article 65 TFEU, pursuant to which a difference in tax treatment may be regarded as compatible with the free movement of capital where it concerns situations which are not objectively comparable. In that regard, the Court noted that the difference in treatment at issue was not limited to the arrangements for collection of the tax and was not, therefore, justified by an objective difference in situation. Accordingly, the Court examined whether the difference in tax treatment could be justified by an overriding reason in the public interest. It found that that was not the case. The justification based on the objective of

59 | Also see, as regards that Hungarian legislation, Case C-235/17, ***Commission*** v ***Hungary (Usufructs over agricultural land)***, still pending.

maintaining the balanced allocation of powers of taxation between the Member States could not be accepted in so far as (i) the deferral of taxation on the dividends received by loss-making non-resident companies does not mean that the French State waives its right to tax income generated on its territory, and (ii) the French State consents to losses of tax revenue when resident companies cease trading without returning to profitability. The Court did not accept the justification on the grounds of the effective collection of tax, either, and found that if the advantage associated with the deferral of taxation on dividends distributed were granted to loss-making non-resident companies, that would have the effect of eliminating any restriction on the free movement of capital, but would not thereby impede the achievement of the aim of the effective collection of tax owed by those companies when they receive dividends from a resident company. The Court also referred in that connection to the mutual assistance mechanisms existing between the authorities of the Member States.

VIII. Border controls, asylum and immigration

1. Border controls

By its judgment in ***Touring Tours und Travel and Sociedad de transportes*** (C-412/17 and C-474/17, EU:C:2018:1005), delivered on 13 December 2018, the Court was required to interpret Article 67(2) TFEU and Articles 20 and 21 of Regulation No 562/2006 [60] in connection with *whether a Member State could require coach transport operators of cross-border services to check the passports and residence permits of passengers before entering that Member State.* In this instance, the German police authorities had taken the view that two coach travel operators, operating regular services to Germany which cross the German-Netherlands and German-Belgian borders, had transported to Germany, in breach of national law, a large number of third country nationals who were not in possession of the requisite travel documents. As a result, they had issued prohibition orders against those operators which were accompanied by a fine. According to the German authorities, the operators at issue were required to check, when inspecting tickets as the passengers boarded the coach, that passengers had the requisite travel documents and to refuse access to third country nationals who did not.

The Court pointed out, in particular, that since the checks at issue were carried out when the passengers boarded the coach at the start of the cross-border journey, they constituted checks within the *territo*ry of a Member State, referred to in Article 21 of that regulation, which are prohibited where they have an effect equivalent to border checks.

The Court concluded that Article 67(2) TFEU and Article 21 of Regulation No 562/2006 had to be interpreted as precluding legislation of a Member State which requires, in order to prevent the transport of third country nationals not in possession of the requisite travel documents to the national territory, every coach transport undertaking providing a regular cross-border service within the Schengen area to the territory of that Member State to check the passports and residence permits of passengers before they cross an internal border, and which allows, for the purposes of complying with that obligation to carry out checks, the police authorities to issue orders prohibiting such transport, accompanied by a threat of a recurring fine, against the undertakings concerned.

60| 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) (OJ 2006 L 105, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).

2. Asylum policy

Like last year, due to the magnitude of the European migration crisis which has been holding sway for some years now and, in consequence, the arrival of a high number of applicants for international protection in the European Union, the Court has had to deal with numerous cases relating to EU asylum policy. Seven of them merit special attention: one concerning Directive 2004/83; [61] another concerning Directive 2011/95; [62] three dealing at the same time with Directive 2011/95 and Directive 2013/32 [63] or Regulation No 604/2013 [64] ('the Dublin III Regulation'); one involving both the Dublin III Regulation and Regulation No 1560/2003; [65] and the last concerning Directive 2008/115. [66]

2.1. Refugee status

In the judgment in ***MP (Subsidiary protection of a person previously a victim of torture)*** (C-353/16, EU:C:2018:276), delivered on 24 April 2018, the Grand Chamber of the Court provided clarification on *the criteria to be met, by a person who has in the past been tortured in his country of origin, in order to be eligible for subsidiary protection*, for the purposes of Directive 2004/83 read in the light of Article 4 of the Charter. In the main proceedings, a Sri Lankan national had lodged an application for asylum in the United Kingdom. In support of that application, he submitted that he had been detained and tortured by the Sri Lankan security forces because he had been a member of the 'Liberation Tigers of Tamil Eelam' and that he would be at risk of further ill-treatment in his country of origin if he returned there. The UK authorities rejected his asylum application and decided not to grant him subsidiary protection on the ground that that risk had not been established. Nevertheless, the UK courts accepted that, in view of the severity of the person concerned's mental illness and the fact that he would be unable to access appropriate care in Sri Lanka, returning him to that country would be in breach of Article 3 of the ECHR.

The Court first of all pointed out that the fact that the person concerned had in the past been tortured by the authorities of his country of origin was not in itself sufficient justification for him to be eligible for subsidiary protection when there was no longer a real risk that such torture would be repeated. Furthermore, the risk of deterioration in his health could not be regarded, in itself, as inhuman or degrading treatment inflicted in

61| Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

62| 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).

63| 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).

64| Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (OJ 2013 L 180, p. 31).

65| Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (OJ 2003 L 222, p. 3), as amended by Commission Implementing Regulation (EU) No 118/2014 of 30 January 2014 (OJ 2014 L 39, p. 1).

66| 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).

his country of origin, even if it was the result of general shortcomings in the health system and the lack of appropriate treatment. The situation would be different, however, if it were clear that the authorities of the country of origin were not prepared to provide for his rehabilitation or if they adopted a discriminatory policy as regards access to healthcare, thus making it more difficult for certain ethnic groups or certain groups of individuals, of which that person forms part, to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.

In those circumstances, the Court held that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a risk of him committing suicide on account of trauma resulting from the torture to which he was subjected, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture.

2.2. Handling of applications for international protection

The judgments set out in this report on the handling of applications for international protection concern the procedures for examining and assessing such applications as well as the time limits applicable to the procedure for re-examining requests to take charge of or take back applicants.

In its judgment in ***F*** (C-473/16, EU:C:2018:36), delivered on 25 January 2018, the Court adjudicated on the interpretation of Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, in connection with whether *those provisions preclude the preparation and use of a psychologist's expert report in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation.* In the main action, F, a Nigerian national, had submitted an application for asylum to the Hungarian authorities claiming that he feared he would be persecuted in his country of origin on account of his homosexuality, a claim which, based on a psychologist's expert report, the competent Hungarian authorities did not consider to be credible. That expert report, which entailed an exploratory examination, an examination of personality and several personality tests, had concluded that it was not possible to confirm F's assertion relating to his sexual orientation.

The Court held, in the first place, that Article 4 of Directive 2011/95 does not preclude the authority responsible for examining applications for international protection, or, where legal action has been brought, the court or tribunal seised, from ordering that an expert report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert report, and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation. The Court stated that while it is not always necessary, in order to adjudicate on an application for international protection based on a fear of persecution on grounds of sexual orientation, to assess the credibility of the applicant's sexual orientation in the context of the assessment laid down in Article 4 of that directive, it cannot be ruled out that, in the specific context of the assessment of statements of that nature made by an applicant for international protection, certain forms of expert reports may prove useful and may be prepared without prejudicing the fundamental rights of that applicant. The Court nevertheless recalled that it is the exclusive task of the authorities responsible for examining applications,

under the relevant provisions of Directive 2005/85 [67] and Directive 2013/32, to carry out, acting under the supervision of the courts, the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95, so that both the authority in question and the courts hearing a possible action in that regard cannot base their decision solely on the conclusions of an expert report and be bound by those conclusions.

In the second place, the Court held that Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, must be interpreted as precluding the preparation and use of a psychologist's expert report, based on projective personality tests, the purpose of which is to provide an indication of the sexual orientation of an applicant for international protection in order to assess the veracity of that orientation, even if the performance of the psychological tests at issue is formally conditional upon the consent of the person concerned; such consent is not necessarily given freely, being *de facto* imposed on an applicant for international protection under the pressure of the circumstances. Although interference with an applicant's private life can be justified by the search for information enabling his actual need for international protection to be assessed, it is nevertheless for the determining authority to assess, under the court's supervision, whether the envisaged expert report, based on sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community, is appropriate and necessary to achieve that objective. The Court found, in particular, that the impact of the expert report at issue on the applicant's private life seemed disproportionate to the aim pursued, since the seriousness of the interference with the right to privacy was not proportionate to the benefit that it may possibly represent for the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95.

By its judgment in ***Alheto*** (C-585/16, EU:C:2018:584), of 25 July 2018, the Court, sitting as the Grand Chamber, ruled on the *specific criteria for handling applications for asylum lodged by persons registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).* An action having been brought before it against a decision rejecting an application for international protection submitted by a person of Palestinian origin, a Bulgarian court had a number of doubts regarding the interpretation of Directives 2011/95 and 2013/32 with respect to persons registered with UNRWA and enquired, in particular, whether a person registered with that agency who has fled the Gaza Strip and stayed in Jordan before travelling to the European Union should be considered to be sufficiently protected in Jordan, with the result that the application for international protection lodged in the European Union must be declared inadmissible.

The Court explained, first of all, that a court before which an action has been brought against a decision of the determining authority — defined in Article 2 of Directive 2013/32 as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases' — concerning an application for asylum or subsidiary protection is required to carry out a full and up-to-date examination of the file, taking into account all the facts and points of law which appear relevant, including those not in existence when the body in question adopted its decision.

The Court added that each Member State bound by Directive 2013/32 must order its national law in such a way that, in the event of annulment by a court of the decision of the administrative or quasi-judicial body in question and of the need for that body to take a new decision, that new decision on the application for asylum or subsidiary protection must be adopted within a short period of time and must comply with the assessment contained in the judgment annulling the decision.

67| Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

As regards the specific criteria to be applied when examining an application for asylum or subsidiary protection submitted by Palestinians, the Court pointed out that, in accordance with Article 12(1)(a) of Directive 2011/95, a Palestinian may not obtain asylum in the European Union for as long as he is a beneficiary of effective protection or assistance from UNRWA. That individual may obtain asylum in the EU only if he is in a position in which his personal safety is at serious risk, has unsuccessfully sought assistance from UNRWA and has been driven to leave the UNRWA area of operations owing to circumstances beyond his control.

The Court held that point (b) of the first paragraph of Article 35 of Directive 2013/32 must be interpreted as meaning that a person registered with UNRWA must, if he is a beneficiary of effective protection or assistance from that agency in a third country that is not the territory in which he habitually resides but which forms part of the area of operations of that agency, be considered as enjoying sufficient protection in that third country, within the meaning of that provision, when it agrees to readmit the person concerned after he has left its territory in order to apply for international protection in the European Union, recognises that protection or assistance from UNRWA and supports the principle of non-refoulement, thus enabling the person concerned to stay in its territory in safety under dignified living conditions for as long as necessary in view of the risks in the territory of habitual residence.

In the judgment in ***Ahmedbekova*** (C-652/16, EU:C:2018:801), delivered on 4 October 2018, the Court adjudicated on *the interpretation of Directives 2011/95 and 2013/32 by providing clarification on, in particular, the assessment of applications for international protection submitted by members of the same family unit and on the scope of the right to an effective remedy against a decision refusing such protection.* In the instant case, a family of Azerbaijani nationals, who had entered Bulgaria illegally, had had their applications for international protection rejected by the Bulgarian competent authority. In her action, one of the family members relied on both persecution of her husband by the Azerbaijani authorities and circumstances concerning her individually, claiming in particular that she risked being persecuted because of her political opinions, demonstrated among other things by her involvement in a complaint brought against Azerbaijan before the ECtHR.

In the first place, concerning the individual assessment of applications for international protection, the Court — after recalling that every decision on whether to grant refugee status or subsidiary protection status must be based on an individual assessment — made clear that it is necessary, in that context, to take account of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat. The Court also stated that although applications for international protection lodged separately by members of a single family may be subject to measures intended to address any interaction between applications, they must be subject to a single assessment. In addition, the Court pointed out that the assessment of one of those applications may not be suspended until the conclusion of the examination procedure in respect of another of those applications.

In the second place, concerning the qualification for being a refugee in the light of the applicant's involvement in a complaint brought against her country of origin before the ECtHR, the Court considered that such involvement cannot in principle be regarded, for the purposes of assessing the reasons for persecution referred to in Directive 2011/95, as proof of that applicant's membership of a 'particular social group', but must be regarded as a reason for persecution for 'political opinion' if there are valid grounds for fearing that involvement in bringing that claim would be perceived by that country as an act of political dissent against which it might consider taking retaliatory action.

In the third and last place, as regards the requirement for a full and *ex nunc* examination of both facts and points of law by the court hearing an action against a decision refusing international protection, the Court considered that such a court is, in principle, required to examine, where there are further representations and specifically after having asked the determining authority for an assessment of those representations, grounds for granting international protection or evidence which, whilst relating to events or threats which

allegedly took place before the adoption of the refusal decision, or even before the application for international protection was lodged, have been relied on for the first time during those proceedings. That court is not, however, required to do so if it finds that those grounds or evidence were relied on in a late stage of the appeal proceedings or are not presented in a sufficiently specific manner to be duly considered or, in respect of evidence, it finds that that evidence is not significant or insufficiently distinct from evidence which the determining authority was already able to take into account.

On 4 October 2018, by its judgment in ***Fathi*** (C-56/17, EU:C:2018:803), the Court ruled *on the determination, in the light of the Dublin III Regulation and Directive 2013/32, of the Member State responsible for examining an application for international protection made in one of the Member States by a third country national, on the scope of the burden of proving the existence of an act of persecution, and on the concept of 'act of persecution' within the meaning of Directive 2011/95.* In the case in point, an Iranian national of Kurdish origin had lodged an application for international protection with the State Agency for Refugees in Bulgaria, based on the persecution by the Iranian authorities he claimed to have suffered on grounds of religion and, in particular, because he had converted to Christianity. The competent Bulgarian authority conducted an examination on the merits of that application but no express decision was taken following the process of determining the Member State responsible. The competent authority rejected the application in issue as unfounded, taking the view that the applicant's account contained significant contradictions and that neither the existence of persecution or the risk of future persecution, nor the existence of a risk of the death penalty, had been established.

The Court considered, first, that Article 3(1) of the Dublin III Regulation must be interpreted as not precluding the authorities of a Member State from conducting an examination on the merits of an application for international protection, within the meaning of Article 2(d) of that regulation, without taking an express decision determining, on the basis of the criteria laid down by the regulation, that the responsibility for conducting such an examination lies with that Member State. The Court also found that Article 46(3) of Directive 2013/32 must be interpreted as meaning that, in an action brought by an applicant for international protection against a decision dismissing his application for international protection as unfounded, the court or tribunal with jurisdiction of a Member State is not required to examine of its own motion whether the criteria and mechanisms for determining the Member State responsible for examining that application, as provided for by the Dublin III Regulation, were correctly applied by the authorities that conducted that examination.

Secondly, concerning the scope of the burden of proving the existence of an act of persecution, the Court held that an applicant for international protection who claims that he is at risk of persecution for reasons based on religion cannot be required to make statements or produce documents concerning each of the components covered by Article 10(1)(b) of Directive 2011/95 in order to substantiate his religious beliefs (namely, the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief). The onus is, however, on the applicant to substantiate his claims in a credible manner by submitting evidence which permits the competent authority to satisfy itself that those claims are true.

Lastly, as regards the concept of 'act of persecution' within the meaning of Article 9(1) and (2) of Directive 2011/95, the Court considered that those provisions must be interpreted as meaning that the prohibition, on pain of execution or imprisonment, of conduct which is contrary to the State religion of the country of origin of the applicant for international protection may constitute an act of persecution, within the meaning of those provisions, if that prohibition may, in practice, be enforced by such penalties by the authorities of that country.

In its judgment in ***X and X*** (C-47/17 and C-48/17, EU:C:2018:900), delivered on 13 November 2018, the Grand Chamber of the Court adjudicated on *the time limits applicable, under Article 5(2) of Regulation No 1560/2003, to the procedure for re-examining a request to take charge of or take back an asylum seeker.* The main action concerned a Syrian national and an Eritrean national who had both lodged an application in the Netherlands for the grant of a temporary residence permit for an asylum seeker after previously lodging an application for international protection in another country (Germany and Switzerland, respectively), the Eritrean national having entered through Italy (it was not established that he had lodged an application for international protection there). Under Article 18(1)(b) of the Dublin III Regulation, the Netherlands authorities made requests to the German, Swiss and Italian authorities to take back the persons concerned. After those requests were refused, the Netherlands authorities made re-examination requests, on the basis of Article 5(2) of Regulation No 1560/2003, to the German and Italian authorities, to which the latter did not reply or to which they replied after expiry of the two-week time limit laid down in that provision.

After recalling that the EU legislature had, in the Dublin III Regulation, provided a set of mandatory time limits as a framework for the procedures for the processing by the requested Member State of take charge and take back requests, the Court stated that the mechanism set out in Article 5(2) of Regulation No 1560/2003, by which the requesting Member State may make a request for re-examination to the requested Member State, after the latter has refused to accept the take charge or take back request, constitutes an 'additional procedure', of an optional nature, the length of which must be strictly and foreseeably circumscribed. According to the Court, a re-examination procedure that is restricted only by a 'reasonable' period of time for reply, or that is of indefinite duration, would be incompatible with the objectives of the Dublin III Regulation, particularly the objective of rapid processing of applications for international protection.

Consequently, the Court held that Article 5(2) of Regulation No 1560/2003 must be interpreted as meaning that the Member State which receives a take charge or take back request under Articles 21 and 23 of the Dublin III Regulation, which, after making the necessary checks, has replied, in detail and stating full reasons, in the negative to that request within the time limits laid down in Articles 22 and 25 of that regulation and which, thereafter, receives a re-examination request within the time limit of 3 weeks provided for in Article 5(2) of Regulation No 1560/2003, must endeavour, in the spirit of sincere cooperation, to reply to the re-examination request within the period of 2 weeks laid down in that provision.

Where the requested Member State does not reply to the re-examination request within that period of 2 weeks, the additional re-examination procedure will be definitively terminated, with the result that the requesting Member State must, as from the expiry of that period, be considered to be responsible for the examination of the application for international protection, unless it still has available to it the time needed to lodge, within the mandatory time limits laid down for that purpose in Article 21(1) and Article 23(2) of the Dublin III Regulation, a further take charge or take back request.

2.3. Return decisions

In the judgment in ***Gnandi*** (C-181/16, EU:C:2018:465), delivered on 19 June 2018, the Grand Chamber of the Court ruled on *whether a return decision within the meaning of Directive 2008/115 may be adopted as soon as an application for international protection is rejected, and thus before the conclusion of any appeal proceedings*

that may be brought against that rejection. In the main proceedings, a Togolese national had submitted an application for international protection which was rejected and followed, a few days later, by a return decision in the form of an order to leave the Member State concerned.

The Court considered, first of all, that an applicant for international protection falls, as soon as his application is rejected by the determining authority, within the scope of Directive 2008/115. In that regard, the Court noted that the authorisation to remain in the territory of the Member State concerned for the purposes of exercising the right to an effective remedy against that rejection decision does not preclude the conclusion that, as soon as the rejection decision is adopted, the stay of the person concerned becomes, in principle, illegal.

The Court however pointed out that in respect of a return decision and a possible removal decision, the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy with automatic suspensory effect at least before one judicial body. Subject to strict compliance with that requirement, the sole fact that the stay of the person concerned is categorised as being illegal as soon as his application for international protection is rejected at first instance by the determining authority and that a return decision may, therefore, be adopted after that rejection decision or aggregated together in a single administrative act, does not infringe the principle of non-refoulement or the right to an effective remedy.

The Court also recalled that it is for the Member States to ensure an effective remedy against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which means, inter alia, that all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution thereof. In that regard, it is not sufficient for the Member State concerned to refrain from enforcing the return decision. On the contrary, it is necessary that all the legal effects of that decision be suspended and, in particular, that the period granted for voluntary departure does not start to run as long as the person concerned is allowed to remain and that, during that period, he is not placed in pre-deportation detention. In addition, the person concerned must retain his status as an applicant for international protection until a final decision has been adopted in relation to his application. Furthermore, Member States are required to allow applicants to rely on any change in circumstances that occurred after the adoption of the return decision, which may have a significant bearing on the assessment of their situation in the light of Directive 2008/115. Lastly, Member States are to ensure that applicants are informed in a transparent way of the observance of those guarantees.

3. Relations with Turkey

By its judgment in ***Yön*** (C-123/17, EU:C:2018:632), delivered on 7 August 2018, the Court was called upon *to interpret the standstill clause set out in Article 7 of Decision No 2/76* [68] *and in Article 13 of Decision No 1/80*, [69] decisions which were both adopted by the Association Council set up by the EEC-Turkey Association Agreement preventing the Member States and the Republic of Turkey from introducing new restrictions on the conditions

68| Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 36 of the Additional Protocol, signed on 23 November 1970 in Brussels and concluded, approved and confirmed on behalf of the Community by Council Regulation (EEC) No 2760/72 of 19 December 1972 (OJ 1977 L 361, p. 60).

69| Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association, annexed to the Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1973 C 113, p. 1).

of access to employment applicable to workers and members of their families legally present in their respective territories. In this instance, a Turkish national — the wife of a Turkish worker residing lawfully in Germany — had applied to the German authorities for a temporary residence permit for the purposes of family reunification. The application was rejected on the ground, first, that the person concerned had not shown that she had the linguistic knowledge required under German law and, secondly, that she had entered federal territory without the national visa required by a national provision introduced during the period from 20 December 1976 to 30 November 1980. That provision had actually tightened the conditions for the family reunification of third country nationals residing lawfully in Germany as employed persons in comparison to those existing at the time of the entry into force of Decision No 2/76 in that Member State.

The Court first observed that in the absence of a retroactive repeal of Decision No 2/76, it is the standstill clause laid down in Article 7 of that decision, not that laid down in Article 13 of Decision No 1/80, which is to apply in relation to any measure introduced by a Member State during the period from 20 December 1976 to 30 November 1980.

Next, referring to the approach taken in the judgments in *Dogan* [70] and *Tekdemir*, [71] the Court stated that a national measure which tightens the conditions for family reunification and affects the exercise by Turkish nationals lawfully residing in the Member State concerned of paid employment in the territory of that State constitutes a new restriction, within the meaning of Article 7 of Decision No 2/76, on the exercise by a Turkish national of the freedom of movement of workers in the Member State concerned and, therefore, falls within the material scope of that provision. Although such a measure may be justified by overriding reasons in the public interest relating to the effective control of immigration and the management of migratory flows, it may nevertheless be accepted only provided that the detailed rules relating to the implementation of that measure do not go beyond what is necessary to achieve the objective pursued.

IX. Judicial cooperation in civil matters

1. Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

On 5 July 2018, in its judgment in ***flyLAL-Lithuanian Airlines*** (C-27/17, EU:C:2018:533), the Court provided clarification on *the determination of the court with jurisdiction, under Regulation No 44/2001,* [72] *in a claim for compensation for damage allegedly caused by anticompetitive conduct committed in various Member States.* In the instant case, the applicant — a Lithuanian airline — had brought proceedings before the Lithuanian courts against another airline — Air Baltic — and Riga Airport (Latvia) seeking compensation for damage allegedly caused by conduct which it considered to be anticompetitive. That conduct, which included the airport giving discounts of up to 80% for aircraft take-off, landing and security services to, in particular, Air Baltic since November 2004, had been found to be contrary to EU competition rules by the Latvian Competition

70| Judgment of the Court of 10 July 2014, ***Dogan*** (C-138/13, EU:C:2014:2066).

71| Judgment of the Court of 29 March 2017, ***Tekdemir*** (C-652/15, EU:C:2017:239).

72| Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Council in proceedings which were separate from the main proceedings. The defendants claimed that the Lithuanian courts lacked jurisdiction to hear the dispute because the anticompetitive cartel targeted by the action and its effects had occurred not in Lithuania but in Latvia, between Riga Airport and the Latvian parent body of Air Baltic. The Lithuanian court of first instance found that the Lithuanian courts derived their jurisdiction from Regulation No 44/2001 on the basis, first, that the anticompetitive conduct that had caused damage to the applicant, in particular the application of predatory prices, alignment of flight times, illegal advertising, termination of direct flights and moving passenger traffic to Riga Airport, had taken place in Lithuania and, secondly, that Air Baltic operated in that Member State through its branch in Lithuania.

The Court recalled, first of all, that Article 5(3) of Regulation No 44/2001 grants the compensation claimant the right to bring proceedings in either the courts for the place where the damage occurred, or the courts for the place of the event giving rise to the damage. Thus, proceedings may lawfully be brought before a court on the basis of either of those two grounds of jurisdiction. It also made clear that loss of income consisting, inter alia, in loss of sales allegedly incurred as a result of anticompetitive conduct contrary to Articles 101 and 102 TFEU, may be regarded as 'damage' for the purposes of applying Article 5(3) of Regulation No 44/2001, which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which the harmful event occurred. The Court concluded that in the context of an action seeking compensation for damage caused by anticompetitive conduct, the 'place where the harmful event occurred' covers, inter alia, the place where the loss of income consisting in loss of sales occurred, that is to say, the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses. In addition, it held that in the context of an action seeking compensation for damage caused by anticompetitive conduct, the notion of 'place where the harmful event occurred' may be understood to mean either the place of conclusion of an anticompetitive agreement contrary to Article 101 TFEU, or the place in which the predatory prices were offered and applied, in cases where such practices constituted an infringement of Article 102 TFEU.

Furthermore, given that Air Baltic operated in Lithuania through a branch, the Court explained that the notion of a 'dispute arising out of the operations of a branch', within the meaning of Article 5(5) of Regulation No 44/2001, covers an action seeking compensation for damage allegedly caused by abuse of a dominant position consisting of the application of predatory pricing where a branch of the undertaking which holds the dominant position actually and significantly participated in that abusive practice, which is a matter for the referring court to verify.

In the judgment in ***Apple Sales International and Others*** (C-595/17, EU:C:2018:854), delivered on 24 October 2018, the Court was required to interpret *Article 23 of Regulation No 44/2001 with regard to a jurisdiction clause invoked during a dispute relating to the tortious liability allegedly incurred by a contracting party as a result of acts of unfair competition and abuse of a dominant position within the meaning of Article 102 TFEU.* In the main proceedings, the clause conferring jurisdiction on the Irish courts, which did not explicitly refer to disputes concerning liability incurred as a result of an infringement of competition law, was raised by the company Apple Sales International by way of an objection of lack of jurisdiction affecting the French court before which, in the instant case, an action for damages had been brought by a distributor of that company for, inter alia, abuse of a dominant position by that company.

The Court recalled, first, that it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope. Secondly, it pointed out that the scope of a jurisdiction clause is limited solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. However, although the anticompetitive conduct covered by Article 101 TFEU, namely an unlawful cartel, is in principle not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel, the anticompetitive conduct covered by Article 102 TFEU, namely the abuse of a dominant position, can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms. Accordingly, Article 23

of Regulation No 44/2001 must be interpreted as meaning that the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law. Lastly, the Court ruled that it is not a prerequisite for the application of a jurisdiction clause, in the context of such an action, that there be a finding of an infringement of competition law by a national or European authority, the existence or absence of such a prior finding by a competition authority having no connection with the considerations that must prevail when determining whether a jurisdiction clause is to apply in an action for damages allegedly suffered as a result of an infringement of competition rules.

2. Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

In the field of judicial cooperation in matrimonial matters and matters of parental responsibility, three judgments merit special attention: the first concerns the concept of rights of access, the second involves an application for the return of children and the third relates to the concept of the child's habitual residence.

By its judgment in ***Valcheva*** (C-335/17, EU:C:2018:359), delivered on 31 May 2018, the Court adjudicated on *the interpretation of the concept of 'rights of access' within the meaning of Regulation No 2201/2003.* [73] In this case, the applicant, a Bulgarian resident and maternal grandmother of a minor habitually resident in Greece with his father, wished to secure rights of access. Taking the view that she was unable to maintain quality contact with her grandson, and after she had unsuccessfully sought the support of the Greek authorities, she brought an action before the Bulgarian courts in order to determine the arrangements for her to exercise rights of access to her grandson. Following the dismissal of that action on the ground that Regulation No 2201/2003 provides for the jurisdiction of the courts of the Member State in which the child is habitually resident, in this case, the Greek courts, the Bulgarian national court referred a question to the Court for a preliminary ruling to ascertain whether that regulation applies to the rights of access of grandparents, with a view to determining the court with jurisdiction.

After finding that the concept of 'rights of access' within the meaning of Regulation No 2201/2003 must be interpreted autonomously, the Court pointed out that the EU legislature chose not to limit the range of persons who may exercise parental responsibility or hold rights of access. Consequently, the concept of 'rights of access' refers not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents. If rights of access did not concern all of those persons, questions relating to those rights could be determined not only by the court designated in accordance with Regulation No 2201/2003, but also by other courts which might consider themselves to have jurisdiction on the basis of private international law. There would be a risk that conflicting or even irreconcilable decisions might be adopted, as the rights of access granted to a relative of the child could adversely affect the rights of access granted to a holder of parental responsibility. The Court considered that, as a result, an application made by grandparents to be granted rights of access to their grandchildren was covered by Article 1(1)(b) of Regulation No 2201/2003 and therefore came within the scope of that regulation.

73| 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).

The Court also stated that since the granting of rights of access to a person other than the parents could interfere with the rights and duties of those parents, it is important, in order to avoid the adoption of conflicting measures and in the best interests of the child, that the same court — as a rule, the court of the child's habitual residence — should rule on rights of access.

In its judgment in ***C.E. and N.E.*** (C-325/18 PPU and C-375/18 PPU, EU:C:2018:739), delivered on 19 September 2018 under the urgent preliminary ruling procedure, the Court adjudicated on the issues raised by *the enforcement by one Member State of a judgment of another Member State requiring the return to that other Member State of several children who had been made wards of court there.*

The main proceedings involved a dispute between an English authority and the parents of three minors who had been removed by their parents to Ireland. Three days after the family's arrival in Ireland, a UK court issued an order making the three children wards of court, attributing rights of custody to the English authority and incorporating an order that the three children be returned. Following a decision by an Irish court recognising the wardship order and declaring it enforceable in Ireland ('the decision authorising enforcement'), the three children were handed over to the English authority and returned to the United Kingdom. Since the parents were not served with the decision authorising enforcement until the day after enforcement, they brought an action against that decision and also made an application for interim relief in order to suspend adoption proceedings in respect of the children which had been initiated at the same time in the United Kingdom. Against that background, the Irish court enquired whether the decision of the English court ordering the children's return could be declared enforceable in Ireland, even though the English authority concerned — before seeking recognition and enforcement, under Chapter III of Regulation No 2201/2003, of that decision in Ireland — had not exhausted the legal remedies available in Ireland under the 1980 Hague Convention. [74] It also asked, inter alia, whether the order requiring the children's return could be enforced before the decision authorising enforcement had been served on the parents and whether Regulation No 2201/2003 precluded a court of one Member State from adopting protective measures in the form of an injunction directed at a public body of another Member State, preventing that body from commencing or continuing, before the courts of that other Member State, proceedings for the adoption of children who are residing there.

The Court first of all pointed out that Regulation No 2201/2003 complements the 1980 Hague Convention and does not require a person, body or authority, where the international abduction of a child is alleged, to rely on that convention in applying for the child concerned's prompt return in the State of the child's habitual residence. Accordingly, a holder of parental responsibility may apply for the recognition and enforcement, in accordance with the provisions of Chapter III of Regulation No 2201/2003, of a decision relating to parental authority and the return of children that has been made by a court having jurisdiction under Chapter II, Section 2, of that regulation, even if that holder of parental responsibility has not submitted an application for return based on the 1980 Hague Convention. The Court considered that the decision on wardship and return, authorisation for the enforcement of which was sought from the Irish court, indeed fell within the scope *ratione materiae* of that regulation, since the return order was entailed by the decision relating to parental responsibility and is indissociable from it.

Next, as regards the fact that the order directing the children's return was enforced before service on the parents of the decision authorising enforcement, the Court found that the requirement for service of that decision ensures that the party against whom enforcement is sought has a right to an effective remedy. Consequently, enforcement of a decision directing that children be made wards of court and that they be

74| Convention on the Civil Aspects of International Child Abduction, concluded at The Hague on 25 October 1980.

returned, which has been declared enforceable in the requested Member State prior to service of the declaration of enforceability of that decision on the parents concerned, is, according to the Court, contrary to Article 33(1) of Regulation No 2201/2003, read in the light of Article 47 of the Charter.

Lastly, concerning the application for protective measures made in the context of adoption proceedings under way in the United Kingdom, seeking to prohibit the competent body from commencing or continuing such proceedings, the Court held that this is not precluded by Regulation No 2201/2003. The purpose and effects of judicial adoption proceedings differ from the purpose and effects of proceedings based on that regulation concerning the return of children and intended to preserve the right of appeal of the parents concerned. Furthermore, the protective measures sought have neither the purpose nor the effect of preventing the other party from seising an English court in respect of the same subject matter as that of the dispute pending before the Irish court. Accordingly, such an injunction is not capable of constituting a form of anti-suit injunction of the kind prohibited by the Court's case-law. [75]

In the judgment in ***UD*** (C-393/18 PPU, EU:C:2018:835) delivered on 17 October 2018 under the urgent preliminary ruling procedure, the Court was required to interpret *the concept of habitual residence of a child, for the purposes of Article 8(1) of Regulation No 2201/2003, in order to ascertain whether the physical presence of the child in a Member State is an essential ingredient for determining whether the court seised has jurisdiction.* The main proceedings involved a dispute between the mother, a Bangladeshi national, and the father, a British national, of a young child born in Bangladesh and resident there since birth, and concerned applications made by the mother for orders, first, that the child be made a ward of a UK court and, secondly, that she return with the child to the United Kingdom in order to participate in the proceedings before that court.

Having been called upon to rule, in the first place, on whether it had jurisdiction and on the territorial scope of Regulation No 2201/2003, the Court found that the general jurisdiction rule provided for in Article 8(1) of that regulation may apply to disputes involving relations between the courts of a single Member State and those of a third country, and not only relations between courts of a number of Member States.

In the second place, concerning the concept of habitual residence of the child, the Court held that neither the absence of the child's habitual residence because that child is not physically present in a Member State, nor the existence of courts of a Member State better placed to hear the cases of that child, even though the child never resided in that State, can establish the habitual residence of the child in a State in which that child has never been present. The Court concluded that Article 8(1) of Regulation No 2201/2003 must be interpreted to the effect that a child must have been physically present in a Member State in order to be regarded as habitually resident in that Member State, within the meaning of that provision. Circumstances such as the unlawful behaviour of one of the parents towards the other, with the consequence that their child was born in a third State and has resided there since birth, or the breach of the mother's or the child's fundamental rights, do not have any bearing in that regard.

75| Judgments of 27 April 2004, ***Turner*** (C-159/02, EU:C:2004:228), and of 10 February 2009, ***Allianz and Generali Assicurazioni Generali*** (C-185/07, EU:C:2009:69).

3. Regulation No 650/2012 on the creation of a European Certificate of Succession

The judgment in ***Mahnkopf*** (C-558/16, EU:C:2018:138) of 1 March 2018 deals with the scope of Regulation No 650/2012 [76] and Regulation 2016/1103. [77]

The main proceedings concerned the refusal by a German court to draw up a European Certificate of Succession — for the purpose of the sale of immovable property located in Sweden — designating the wife of the deceased and his son as coheirs in respect of half of the estate each, in accordance with the rule of intestate succession provided for under German law. That court, which had issued a national certificate of inheritance according to which the surviving spouse and the descendant each inherited one half of the deceased's assets, rejected the application for a European Certificate of Succession on the ground that the share allocated to the deceased's spouse was based, as regards one quarter of the estate, on a regime governing succession and, as regards another quarter of that estate, on the application of the matrimonial property regime provided for in Paragraph 1371(1) of the German Civil Code. In its view, the rule under which that other quarter was allocated, which relates to a matrimonial property regime and not a succession regime, could not fall within the scope of Regulation No 650/2012. The wife challenged that decision before the national court, which referred a number of questions to the Court for a preliminary ruling on the interpretation of that regulation.

The national court enquired, in particular, whether Article 1(1) of Regulation No 650/2012 had to be interpreted as meaning that a national provision which prescribes, on the death of one of the spouses, a fixed allocation of the accrued gains by increasing the surviving spouse's share of the estate, falls within the scope of that regulation, while Article 1(2) of Regulation No 650/2012, which applies to succession to the estates of deceased persons, lists exhaustively the matters excluded from the regulation's scope, which include, in point (d), 'questions relating to matrimonial property regimes'.

The Court considered that since Paragraph 1371(1) of the German Civil Code principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime, that rule of national law indeed related to the matter of succession for the purposes of Regulation No 650/2012. The Court found that that interpretation is not inconsistent with Regulation 2016/1103 which expressly excludes from its scope the 'succession to the estate of a deceased spouse'. Lastly, the Court pointed out that the classification of the share falling to the surviving spouse under the national provision at issue as succession-related allows information concerning that share to be recorded in the European Certificate of Succession and that, otherwise, the achievement of the objectives of the European Certificate of Succession would be impeded considerably.

76| Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ 2012 L 201, p. 107).

77| Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ 2016 L 183, p. 1).

X. Judicial cooperation in criminal matters

1. European arrest warrant

The Court delivered five noteworthy judgments in 2018 concerning the European arrest warrant. [78] They relate to the grounds for refusing to give effect to a European arrest warrant. The last two judgments presented below specifically concern the finding of systemic flaws in the judicial system of the Member State that issued the arrest warrant.

The judgment in ***Piotrowski*** (C-367/16, EU:C:2018:27), delivered on 23 January 2018 by the Grand Chamber of the Court, concerns the interpretation of Article 3(3) of Framework Decision 2002/584 [79] laying down *the obligation to refuse to execute a European arrest warrant issued against a person who may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing Member State.*

The main proceedings concerned the execution, in Belgium, of a European arrest warrant issued by a Polish court for the execution in Poland of two custodial sentences imposed by two judgments on a Polish national. The Belgian court hearing the request for execution had detained the person concerned with a view to his surrender to Poland for the purpose of executing the first judgment. On the other hand, it took the view that the European arrest warrant could not be executed in so far as the second judgment was concerned because the person concerned was 17 when he committed the offence with which he had been charged and, based on the assessment *in concreto* required under Belgian law, the conditions laid down in that law for the prosecution of a minor who had reached the age of 16 when the offence was committed were not satisfied.

In its judgment, the Court first of all observed that the ground for non-execution laid down in Article 3(3) of Framework Decision 2002/584 does not cover minors in general but refers only to those who have not reached the age required, under the law of the executing Member State, to be regarded as criminally responsible for the acts on which the warrant issued against them is based. It follows that that provision, having regard to its wording, does not permit, in principle, the executing judicial authorities to refuse to surrender minors who have reached the minimum age from which they may be regarded as criminally responsible under the law of the executing Member State for the acts on which the warrant issued against them is based.

The Court held that the provision in issue does not permit the executing judicial authority, in the absence of any express reference to that effect, to refuse to surrender a minor who is the subject of a European arrest warrant on the *basis of an assessment of that person's specific circumstances and of the acts on which the warrant issued against that person is based*. Such a substantive re-examination of the analysis previously conducted in connection with the judicial decision adopted in the issuing Member State would infringe and render ineffective the principle of mutual recognition, which implies that there is mutual trust as to the fact that each Member State accepts the application of the criminal law in force in the other Member States, even though the implementation of its own national law might produce a different outcome. Moreover, such a possibility would be incompatible with the objective of facilitating and accelerating judicial cooperation

78| In that connection, reference should also be made to the judgment in ***RO*** (C-327/18 PPU, EU:C:2018:733) of 19 September 2018, presented in Section I 'Withdrawal of a Member State from the European Union'.

79| Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

pursued by Framework Decision 2002/584. Therefore, in order to decide whether a minor who is the subject of a European arrest warrant is to be surrendered, the executing judicial authority must, under Article 3(3) of that framework decision, simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which such a warrant is based.

The judgment in ***Sut*** (C-514/17, EU:C:2018:1016), delivered on 13 December 2018, deals with the *optional grounds for non-execution of a European arrest warrant.* The main action concerned a Romanian national who had been given a custodial sentence in Romania for various traffic offences and for having caused an accident. Following the interested person's departure from Romania, the Romanian authorities had issued a European arrest warrant against him with a view to his surrender for the purpose of enforcing the judgment. After settling in Belgium, where he lives with his wife, the Belgian court of first instance had ordered execution of the European arrest warrant. The person concerned, who had applied for the sentence to be executed in Belgium, appealed against that decision on the basis of the national provision transposing into Belgian law Article 4(6) of Framework Decision 2002/584, under which the executing judicial authority may refuse to execute a European arrest warrant where that State undertakes to execute the sentence in accordance with its domestic law. The referring court nevertheless found that the offences covered by the European arrest warrant were punishable in Belgium by fines only and that Belgian law does not permit the conversion of a custodial sentence into a fine. However, having regard to the case-law of the Court which permits the executing judicial authority to give particular weight to the *possibilit*y of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires, the referring court asked the Court whether, in a case such as that in the main proceedings, the executing judicial authority could, for reasons related to the social rehabilitation of that person and his family, social and economic ties in Belgium, refuse to execute the arrest warrant.

The Court noted, first, that the application of the ground for optional non-execution provided for in Article 4(6) of Framework Decision 2002/584 requires two conditions to be satisfied, namely (i) that the requested person is staying in or is a national or a resident of the executing Member State, and (ii) that that State undertakes to enforce the sentence or detention order in accordance with its domestic law. Regarding the second condition, the Court found that that provision did not give any indication from which the second condition could be interpreted as automatically precluding a judicial authority of the executing Member State from refusing to execute a European arrest warrant where the law of that Member State provides only for a fine in response to the offence to which the warrant relates. It is clear from the wording of Article 4(6) of Framework Decision 2002/584 that that provision merely requires that the executing Member State undertake to enforce the custodial sentence set out in the European arrest warrant issued in accordance with its domestic law. In that regard, the Court made clear that although, in adopting Article 4(6) of Framework Decision 2002/584, the EU legislature wished to allow the Member States, for the purposes of facilitating the social rehabilitation of the requested person, to refuse to execute the European arrest warrant, it was nevertheless careful to require the executing Member State to undertake actually to enforce the custodial sentence imposed on the requested person, in order to avoid any risk of that person going unpunished.

Thus, the Court concluded that Article 4(6) of Framework Decision 2002/584 must be interpreted as meaning that, where a person who is the subject of a European arrest warrant issued for the purposes of enforcing a custodial sentence resides in the executing Member State and has family, social and working ties in that Member State, the executing judicial authority may, for reasons related to the social rehabilitation of that person, refuse to execute that warrant, despite the fact that the offence which provides the basis for that warrant is, under the national law of the executing Member State, punishable by fine only, provided that, in accordance with that national law, that fact does not prevent the custodial sentence imposed on the person requested from actually being enforced in that Member State.

The judgments in *Minister for Justice and Equality (Deficiencies in the system of justice)* and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*, delivered on 25 July 2018 in two urgent preliminary ruling procedures, clarify the case-law established in *Aranyosi and Căldăraru*. [80]

In its judgment in ***Minister for Justice and Equality (Deficiencies in the justice system)*** (C-216/18 PPU, EU:C:2018:586), the Court, sitting as the Grand Chamber, ruled on *whether an executing authority can refrain from giving effect to a European arrest warrant where there is a real risk of breach of the right to an independent tribunal on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary.* Having received a request to execute a European arrest warrant issued by a Polish court, an Irish executing authority enquired about the consequences for the execution of that request of recent changes made to the judiciary by the Polish Government, which resulted in the Commission adopting, on 20 December 2017, a reasoned proposal inviting the Council to determine, on the basis of Article 7(1) TEU, that there is a clear risk of a serious breach by Poland of the rule of law.

In that judgment, the Court first of all recalled that the refusal to execute a European arrest warrant is an exception to the principle of mutual recognition underlying the European arrest warrant mechanism. Against that background, limitations on the principles of mutual recognition and mutual trust between Member States may be imposed only 'in exceptional circumstances'. The Court observed in that regard that it had previously acknowledged, subject to certain conditions, [81] that the executing judicial authority has the power to bring the surrender procedure established by Framework Decision 2002/584 to an end where surrender may result in the requested person being subject to inhuman or degrading treatment within the meaning of Article 4 of the Charter. According to the Court, such power also exists where there is a real risk of breach of the person concerned's fundamental right to an independent tribunal and, by extension, of his fundamental right to a fair trial, as laid down in the second paragraph of Article 47 of the Charter. It made clear in that respect that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the rule of law, will be safeguarded.

Thus, where the person in respect of whom a European arrest warrant has been issued pleads, in order to oppose his surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies, which, according to him, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his fundamental right to a fair trial, the executing judicial authority is required to assess, first, whether there is a real risk that the individual concerned will suffer a breach of that fundamental right. The existence of such a risk must be assessed on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State. Information in a reasoned proposal addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment. It is only if the European Council were to adopt a decision determining, as provided for in Article 7(2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU, such as those inherent in the rule of law, and the Council were then to suspend Framework Decision 2002/584 in respect of that Member State, that the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by it, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his fundamental right to a fair trial will be affected. If the executing judicial authority finds that there is, in the issuing Member State, a real risk of

80| Judgment of the Court of 5 April 2016, ***Aranyosi and Căldăraru*** (C-404/15 and C-659/15 PPU, EU:C:2016:198) delivered in response to a request for a preliminary ruling from the same German court.

81| Judgment of the Court of 5 April 2016, ***Aranyosi and Căldăraru*** (C-404/15 and C-659/15 PPU, EU:C:2016:198).

breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk. The Court stated that the executing judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk.

The judgment in ***Generalstaatsanwaltschaft (Conditions of detention in Hungary)*** (C-220/18 PPU, EU:C:2018:589), delivered by the First Chamber under the urgent preliminary ruling procedure, also concerns *whether an executing authority may refrain from giving effect to a European arrest warrant where there is a risk of breach of the fundamental right of the person concerned not to suffer inhuman or degrading treatment on account of systemic or generalised deficiencies in detention conditions in the issuing Member State.* A Hungarian national residing in Germany had been prosecuted and sentenced *in absentia* in Hungary to a custodial sentence. A district court issued a European arrest warrant against him for the purpose of the execution of that sentence in Hungary. The executing German judicial authority, which had evidence of systemic or generalised deficiencies in detention conditions in Hungary, considered it necessary, in order to determine whether the person concerned could be surrendered to the Hungarian authorities, to obtain additional information from Hungary on the conditions in which he could be detained there. Specifically, it enquired about the extent of the assessment that it was required to undertake in the light of Framework Decision 2002/584 and the case-law of the ECtHR.

As in its judgment in *Minister for Justice and Equality (Deficiencies in the judicial system)* mentioned above, the Court observed that the principle of mutual recognition constitutes the 'cornerstone' of judicial cooperation in criminal matters and that non-execution is the exception. Nevertheless, even if the issuing Member State provides for legal remedies that make it possible to review the legality of detention conditions from the perspective of fundamental rights, the executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment.

On the extent of the assessment of the detention conditions in the issuing Member State, the Court considered that the executing judicial authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, the person concerned is likely to be detained, including on a temporary or transitional basis. Furthermore, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, the executing judicial authorities may take into account information provided by the authorities of the issuing Member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment. In the instant case, the Court found that the surrender of the person concerned to the Hungarian authorities appeared to be permitted without any breach of his fundamental right not to be subjected to inhuman or degrading treatment, a matter which must, however, be verified by the executing German judicial authority.

2. Common rules on criminal procedure

By its judgment in ***Kolev and Others*** (C-612/15, EU:C:2018:392), delivered on 5 June 2018, the Grand Chamber of the Court had occasion to provide clarification not only *on the extent of the Member States' obligations deriving from Article 325 TFEU, which deals with countering fraud and any other illegal activity affecting the financial interests of the Union, but also on the rights conferred, in particular, by Directive 2012/13* [82] *on accused persons in criminal proceedings.*

The applicants in the main proceedings were members of a group of eight customs officers who had been accused of corruption in Bulgaria in 2012. The charges against them had been drawn up immediately after their arrest, then stated in more detail in the course of 2013. After the referring court found that there were irregularities affecting those charges, the case was referred back to the competent prosecutor of the specialised prosecuting authority for him to draw up new charges. The time limits set for the investigation were extended on several occasions with the result that the referring court also set a time limit for the prosecutor to draw up those new charges. Since the new charges were, however, vitiated by infringements of essential procedural requirements, particularly on account of the fact that they had not been disclosed to the applicants, and as the prosecutor had not cured those infringements within the time limit set, the referring court ultimately suspended the case on 22 May 2015. The court before which the prosecutor and one of the applicants had lodged an appeal took the view that the referring court was required, under the Bulgarian Code of Criminal Procedure, to close the proceedings at issue relating to custom offences because the applicable limitation periods had expired.

Against that background, the referring court expressed doubts as to whether national legislation was compatible with EU law and asked the Court, if such a finding of compatibility were to be made, what measures it should take in order to ensure the full effectiveness of EU law and, above all, in order to ensure the protection of the rights of the defence and the right to a fair trial of the persons concerned.

The Court observed that Article 325(1) TFEU requires the Member States to provide for the application of penalties that are effective and that act as a deterrent in cases of contravention of EU customs legislation. That provision imposes on the Member States precise obligations as to the result to be achieved which are not subject to any condition regarding the application of the rules which that provision lays down. Consequently, it is for the national court to give full effect to those obligations by interpreting national legislation so far as at all possible in the light of Article 325(1) TFEU, or, as necessary, by disapplying that legislation. In the event that a number of measures could conceivably give effect to the obligations at issue, such as disregarding all the requirements or extending the time limits laid down in the national code of criminal procedure, it is for the national court to determine which of those measures to apply.

However, that court must satisfy itself, in that context, that the fundamental rights guaranteed by the Charter to the accused persons in the main proceedings are respected, particularly the rights of the defence and the right of accused persons to have their case heard within a reasonable time. Those rights cannot be defeated by the obligation to ensure the effective collection of the Union's resources. Regarding, in particular, the right of the accused person and his lawyer to be informed of the charges and to have access to the case material, the Court held that Article 6(3) of Directive 2012/13 must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of hearing of argument before the court, and after the commencement of that

82| Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

hearing but before the stage of deliberation, where the information thus disclosed is the subject of subsequent amendments, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings. Under Article 7(3) of that directive, it is for the national court to be satisfied that the defence has been granted a genuine opportunity to have access to the case materials, such access being possible, in some cases, at the stage mentioned above.

In its judgment in ***Milev*** (C-310/18 PPU, EU:C:2018:732), delivered on 19 September 2018 under the urgent preliminary ruling procedure, the Court adjudicated on *the interpretation, when examining the lawfulness of pre-trial detention, of Article 3 and Article 4(1) of Directive 2016/343*, [83] *relating to the presumption of innocence.*

The main proceedings concerned the review of the lawfulness of a Bulgarian national's pre-trial detention in the context of criminal proceedings for robbery with violence. The person concerned had been arrested with a view to being brought before the court responsible for deciding whether to remand him in custody pending trial. On the basis of witness evidence regarded as credible, the prosecutor's application to maintain the person concerned in pre-trial detention was upheld at first instance and confirmed on appeal, in both cases without considering any other evidence. A fresh application for review of the lawfulness of the pre-trial detention having been brought before it, the referring court decided to ask the Court about the relevant rules in that regard. It stated that in the light of new national case-law, national courts were required, when reviewing the lawfulness of pre-trial detention, to examine the existence of 'reasonable grounds' after having 'prima facie', rather than detailed, knowledge of the evidence.

The Court pointed out that Article 3 of Directive 2016/343 provides that the Member States are to ensure that suspects and accused persons are presumed innocent until proven guilty according to law and that Article 4(1) thereof provides that the Member States are to take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proven guilty according to law, judicial decisions in particular, other than those on guilt, do not refer to that person as being guilty, without prejudice to preliminary decisions of a procedural nature which are taken by judicial authorities and which are based on suspicion or on incriminating evidence.

The Court therefore held that Article 3 and Article 4(1) of Directive 2016/343 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty.

XI. Transport

In the judgment in ***Krüsemann and Others*** (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258), of 17 April 2018, the Court ruled that *a 'wildcat strike' by flight staff of an airline following the surprise announcement of a restructuring of that airline does not constitute an 'extraordinary circumstance' for the purposes of Article 5(3) of Regulation No 261/2004* [84] *which releases the airline of its obligation to pay compensation when a flight is cancelled or subject*

83| Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

84| Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

to a long delay. In the instant case, numerous flights booked with the air carrier TUIfly were delayed or cancelled after several members of that carrier's flight staff suddenly reported sick following the announcement by the air carrier's management of restructuring plans.

The Court first of all recalled that events may be classified as 'extraordinary circumstances', within the meaning of Article 5(3) of Regulation No 261/2004, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control. In that respect, the Court considered that an unexpected event need not necessarily be classified as an 'extraordinary circumstance', but that such an event may be considered to be inherent in the normal carrying out of the activity of the air carrier concerned. Since the restructuring and reorganisation of undertakings are part of normal business management measures and carriers may thus, in the ordinary course of business, face disagreements or conflicts with all or part of their members of staff, the Court concluded that the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the air carrier concerned. Accordingly, a 'wildcat strike' cannot be classified as falling within the scope of 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.

The judgment in ***Commission*** v ***Poland*** (C-530/16, EU:C:2018:430), of 13 June 2018, concerns *the concept of independence of the body responsible for investigating railway accidents, in terms of Article 21(1) of Directive 2004/49*. [85] The Court was, in particular, called upon to consider whether the body set up by the Republic of Poland, which is established within the ministry responsible for transport matters, is independent of the infrastructure manager and of the railway undertaking, in a situation where the Minister for Transport controls that infrastructure manager and that railway undertaking.

After observing that independence usually refers to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or pressure, the Court held, first of all, regarding the independence of the investigating body in terms of its legal structure, that although that body is part of the ministry responsible for transport matters and does not have separate legal personality, that situation per se does not establish that it has no independence, in terms of its legal structure, in relation to the infrastructure manager and the railway undertaking, who have their own, separate legal personality distinct from that of the ministry. The Court also found that Directive 2004/49 does not prohibit the integration per se of the investigating body into the ministry responsible for transport matters.

As for, secondly, the independence of the investigating body in terms of its organisation, the Court considered that Article 21(1) of Directive 2004/49, inasmuch as it requires that body to have organisational independence vis-à-vis in particular any infrastructure manager and any railway undertaking, precludes the authority that controls an infrastructure manager and a railway undertaking from appointing and dismissing all of the members of the investigating body, where that power is not regulated strictly by legislation, with the result that that authority is bound to take decisions on the basis of objective criteria which are clearly and exhaustively set out and verifiable. More specifically, in such circumstances, the broad freedom to appoint and dismiss conferred on the Minister for Transport is in itself liable to affect the independence of the members of the investigating body where the interests of the railway infrastructure manager and the railway undertaking controlled by the minister are at issue.

85| Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ 2004 L 164, p.44, and corrigendum OJ 2004 L 220, p. 16).

As regards, lastly, the independence of the investigating body in terms of its decision-making, the Court held that since publication of the decisions of that body is one of the fundamental purposes of the investigation procedure conducted on railway accidents and incidents, it is therefore incompatible with the decision-making independence required of the investigating body vis-à-vis the infrastructure manager and the railway undertaking for an authority that controls both of those bodies to be in a position to prevent the official publication of reports which may call into question the liability of the infrastructure manager and the railway undertaking in the accident or incident concerned.

XII. Competition

1. Article 101 TFEU

In the area of agreements, decisions and concerted practices, mention must be made of the judgment in ***F. Hoffmann-La Roche and Others*** (C-179/16, EU:C:2018:25), in which the Grand Chamber of the Court *found that the dissemination, by two pharmaceutical undertakings marketing two competing medicinal products, of information giving rise to concerns regarding the safety of using one of those medicinal products for indications not covered by its marketing authorisation (MA), in order to cause a shift in demand towards the other medicinal product, may constitute a restriction of competition 'by object'.*

The two medicinal products at issue, Lucentis and Avastin, are manufactured by the company Genentech and were authorised in the European Union by the Commission and the European Medicines Agency (EMA). Lucentis is authorised for the treatment of eye diseases and its commercial exploitation was entrusted to the Novartis group by way of a licensing agreement. Avastin, although authorised only for the treatment of tumorous diseases, is also prescribed for the treatment of eye diseases not covered by the marketing authorisation ('MA'). Roche, the parent company of Genentech, markets Avastin. Roche and Novartis disseminated information relating to adverse reactions resulting from the use of Avastin for treating diseases not covered by the MA, which led to them being fined by the Italian competition authority on the ground that they had concluded an agreement contrary to Article 101 TFEU by manipulating the perception of the risks of using Avastin in the field of ophthalmology. Roche and Novartis challenged the fines imposed and lodged an appeal before the Italian Council of State, which asked the Court to interpret the relevant EU competition rules.

The Court first of all pointed out that given the specific features of competition in the pharmaceutical sector, a national competition authority may, for the purpose of applying Article 101 TFEU, include in the relevant market, in addition to the medicinal products authorised for the treatment of the diseases concerned, another medicinal product whose MA does not cover that treatment but which is used for that purpose and is thus actually substitutable with the former. Even though medicinal products manufactured or sold illegally may not be regarded as substitutable with products manufactured and sold legally, the EU rules on pharmaceutical products prohibit neither the off-label prescription of a medicinal product nor its repackaging for such use, provided that certain conditions are met.

Next, the Court ruled that the restrictions of competition referred to by the Italian competition authority do not fall outside the scope of Article 101(1) TFEU because they are ancillary to the licensing agreement entered into for the commercial exploitation of the medicinal product Lucentis. In that regard, the Court explained that the dissemination of information referred to was designed to restrict not the commercial autonomy of the parties to the licensing agreement, but rather the conduct of third parties — particularly doctors — with

a view to reducing the prescription of Avastin in ophthalmology for the benefit of Lucentis. In those circumstances, the practices could not be regarded as ancillary to and objectively necessary for the implementation of the licensing agreement.

As to whether the dissemination of information referred to by the Italian competition authority could constitute a restriction of competition 'by object', the Court recalled that the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to certain types of coordination between undertakings which reveal a degree of harm to competition that is sufficient for it to be held that there is no need to examine their effects. Thus, referring to the regulatory framework consisting of Directive 2001/83 [86] and Regulation No 726/2004, [87] the Court concluded that an arrangement between two undertakings marketing two competing products, which concerns the dissemination, in a context of scientific uncertainty, to the EMA, healthcare professionals and the general public of misleading information relating to adverse reactions resulting from the use of one of those products for the treatment of diseases not covered by the MA for that product, with a view to reducing the competitive pressure resulting from such use on the use of the other medicinal product, must be regarded as being sufficiently harmful to competition to render an examination of its effects superfluous and, therefore, constitutes a restriction of competition 'by object' for the purposes of Article 101(1) TFEU. According to the Court, such an arrangement cannot be exempt under Article 101(3) TFEU since the dissemination of misleading information in respect of a medicinal product cannot be regarded as 'indispensable' within the meaning of that provision.

2. Concentrations

In its judgment in ***Ernst & Young*** (C-633/16, EU:C:2018:371), delivered on 31 May 2018, the Fifth Chamber of the Court adjudicated on *the scope of the prohibition of implementing a concentration prior to its notification and prior to the declaration of compatibility with the common market, as provided for in Article 7(1) of Regulation No 139/2004*. [88]

The main proceedings concerned the implementation of a merger agreement concluded on 18 November 2013 between several audit firms and, in particular, the fact that on the same day of its conclusion, one of the parties to the merger agreement had terminated a cooperation agreement it had entered into in 2010 with an international network of independent audit firms. After having approved the merger, the Danish Competition Council declared that the termination of the cooperation agreement had disregarded the prohibition, under the Danish Law on competition, of implementing a concentration prior to that approval. An action for annulment of that last decision having been brought before it, the national court decided to refer a question to the Court for a preliminary ruling to ascertain whether the termination of a cooperation agreement, in circumstances such as those of the instant case, could be regarded as bringing about the implementation of a concentration for the purposes of Article 7(1) of Regulation No 139/2004.

86| Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended.

87| Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1), as amended.

88| Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1).

First of all, the Court confirmed that it had jurisdiction to hear the request for a preliminary ruling, even though EU merger law did not apply in the dispute in the main proceedings and the Danish Law on competition did not contain direct reference to the relevant provisions of Regulation No 139/2004 or an exact reproduction of their contents. According to the Court, its jurisdiction derives from the Danish legislature's intention to harmonise national competition law on merger control with that of the European Union and from the explanations provided by the referring court to the effect that national law had to be interpreted, in particular, in the light of the Court's case-law.

Next, regarding the interpretation of Article 7(1) of Regulation No 139/2004, the Court observed that that provision merely provides that a concentration is not to be implemented either prior to its notification or until it has been declared compatible with the common market. Since the wording of that article does not, in itself, clarify the scope of that prohibition, the Court gave an interpretation that was based on the purpose and general scheme of that provision. Thus, the Court found that in order to ensure the effective control of concentrations in terms of their effect on the structure of competition in the European Union, Article 7(1) of Regulation No 139/2004 limits the prohibition it lays down only to concentrations as defined in Article 3 of that regulation, the implementation of which is characterised by the implementation of operations contributing to a lasting change in the control of the target undertaking. Therefore, the Court held that the termination of a cooperation agreement, in circumstances such as those at issue in this case, could not, in principle, be regarded as bringing about the implementation of a concentration for the purposes of Article 7(1), irrespective of whether the termination produced market effects.

3. State aid

In its judgment in ***Commission*** v ***FIH Holding and FIH Erhversbank*** (C-579/16 P, EU:C:2018:159) of 6 March 2018, setting aside the judgment under appeal of the General Court, [89] the Grand Chamber of the Court ruled on *the concept of selective advantage in State aid cases, particularly the application of the market economy operator principle.*

By the judgment under appeal, the General Court had annulled, on the ground of the misapplication of the private operator principle, a decision of the Commission classifying a number of measures taken by Denmark in favour of a banking group as State aid for the purposes of Article 107(1) TFEU. The appeal raised the question whether the Commission ought to have taken account of the financial risks to which the Danish State would have been exposed in the absence of the measures taken, even though those risks were the result of State aid previously granted to the same banking group.

The Court recalled, first of all, that having regard to the objective of Article 107(1) TFEU, the definition of 'aid', within the meaning of that provision, cannot cover a measure granted to an undertaking through State resources where that undertaking could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions under which such an advantage was granted is therefore made, as a rule, by applying the private operator principle.

Next, the Court considered whether the Commission should have taken account of the risk of financial losses to which the Danish State was exposed on account of the aid previously granted to the same banking group. The Court recalled that in order to assess whether the same measure would have been adopted in normal market conditions by a private operator in a situation as close as possible to that of the State, only the benefits and obligations linked to the capacity of the State as a private operator, to the exclusion of those linked to

89| Judgment of the General Court of 15 September 2016 (T-386/14, EU:T:2016:474).

its capacity as a public authority, are to be taken into account. Since the Danish State had granted the previous aid to the banking group concerned in the exercise of its prerogatives as a public authority, the resulting risks were also linked to its actions as a public authority and were not among the factors that a private operator would, in normal market conditions, have taken into account in its economic calculations. Such risks cannot, therefore, be taken into account when the private operator principle is applied to subsequent measures adopted by that Member State in support of the same banking group. The Court therefore found that the judgment under appeal should be set aside.

By its judgment in ***A-Brauerei*** (C-374/17, EU:C:2018:1024), delivered on 19 December 2018, the Court, sitting as the Grand Chamber, was required to adjudicate on *whether a tax advantage was selective for the purpose of its classification as State aid.* The main proceedings involved a dispute between a German tax office and a company concerning the former's refusal to grant the latter an exemption from real property transfer tax which was available, under German tax law, to companies in the context of restructuring procedures involving only companies of the same group, linked by a shareholding of at least 95% during a minimum, uninterrupted period of 5 years prior to that procedure and of 5 years thereafter. Against that background, the national court referred a question to the Court for a preliminary ruling to ascertain whether such a tax exemption constituted State aid of the kind prohibited by Article 107(1) TFEU and, in particular, whether the tax advantage conferred by it satisfied the condition relating to selectivity.

The Court found that the tax exemption at issue was such that it favoured only the groups of companies linked by a specific shareholding, which carry out restructuring procedures, whereas companies not forming part of such groups are excluded from that advantage even if they carry out restructuring procedures identical to those carried out by those groups. It therefore, as a preliminary matter, rejected the argument that that exemption was a non-selective general measure. Since the different groups of companies were in a comparable factual and legal situation in the light of the objective pursued by the tax regime concerned, the Court went on to find that the exemption was *a priori* selective.

However, the Court recalled that tax measures which are *a priori* selective may be justified by the Member State concerned if it demonstrates that those measures are the result of the nature or general structure of the system of which they form part. The tax exemption was, in actual fact, designed to avoid double taxation on real property transfers in the case of a restructuring procedure involving companies linked by a shareholding exceeding 95%, whereas, under the ordinary tax rules, such double taxation was precluded in other cases. The Court concluded that the *a priori* selective tax advantage was justified by an objective related to the proper functioning of the applicable general tax regime. Since the requirement, imposed as a condition for the application of that advantage, relating to the minimum period for holding such a shareholding appeared, moreover, to be justified by the intention of preventing abuse, by precluding shareholdings of more than 95% from being acquired for a short period for the sole purposes of benefiting from the tax exemption at issue, the Court held that the tax advantage in question did not satisfy the condition relating to selectivity set out in Article 107(1) TFEU.

In the judgment in ***Carrefour Hypermarchés and Others*** (C-510/16, EU:C:2018:751), delivered on 20 September 2018, the Fourth Chamber of the Court clarified the *scope of the concept of 'alterations to existing aid' within the meaning of Article 1(c) of Regulation No 659/1999*. [90] The dispute leading to the reference for a preliminary ruling arose in the context of a significant increase in revenue from taxes financing several authorised aid schemes when compared to the projections notified by the Member State.

90| Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

The three taxes at issue in the main proceedings were allocated to the aid scheme for the film and audiovisual industry established by France. By decisions adopted in 2006 [91] and 2007, [92] the Commission had declared that scheme to be incompatible with the internal market. However, the applicants in the main proceedings sought the repayment of tax paid by them on the sale and hire of video recordings, tax which they claimed had been collected in breach of Article 108(3) TFEU, since France had not notified the Commission of the increase between 2007 and 2011 in the aggregate revenue from the three taxes, which exceeded the 20% threshold of the original budget laid down in the second sentence of Article 4(1) of Regulation No 794/2004. [93]

The Court first of all observed that it was for the referring court to verify whether the three taxes indeed formed, during the relevant period, an integral part of the aid schemes at issue. On the assumption that they did, the Court next recalled that the first sentence of Article 4(1) of Regulation No 794/2004 gives a broad definition of the concept of 'alterations to existing aid' within the meaning of Article 1(c) of Regulation No 659/1999 and that that definition cannot be limited to statutory alterations to State aid schemes. However, the second sentence of that paragraph states that an increase in the original budget of an existing aid scheme by up to 20% is not to be considered an alteration to existing aid. Against that background, the Court found that the concept of 'budget of an aid scheme' cannot be regarded as being limited to the amount of aid actually allocated, since that amount is known only after the implementation of the aid scheme concerned. In the light of the preventive nature of the control established by Article 108(3) TFEU, that concept must, on the contrary, be interpreted as referring to the budgetary provision, that is to say, the amounts available to the body responsible for granting aid for that purpose. In the case of aid schemes financed by allocated taxes, it is the revenue from those taxes that is made available to the body responsible for the implementation of the scheme concerned which thus constitutes the 'budget' of the scheme.

In this instance, the Court ruled that an increase in the revenue from taxes financing several authorised aid schemes when compared to the projections notified to the Commission constitutes an 'alteration to existing aid' unless such increase remains below the 20% threshold referred to above. Since the actual increase in the overall revenue from the three taxes during the relevant period was well in excess of the projections submitted to the Commission, it should have been notified to the Commission in due time, that is to say, as soon as the French authorities could reasonably have foreseen that the 20% threshold would be exceeded.

Lastly, the Court found — subject to verification by the referring court — that the mere placing in reserve of part of the revenue of the body responsible for implementing the schemes in dispute, without reallocation of the amount concerned for purposes other than the granting of aid, and the levy for the benefit of the general State budget during the relevant period, were not such as to call into question the existence of an increase in the budget of those aid schemes compared to the authorised budget exceeding that threshold.

91| Commission Decision C(2006) 832 final of 22 March 2006 (State aid NN 84/2004 and N/95/2004 — France, Aid schemes for the film and audiovisual industry).

92| Commission Decision C(2007) 3230 final of 10 July 2007 (State aid N 192/2007 — France, Amendment of NN 84/2004 — Support for cinema and audiovisual production in France — Modernisation of the TV sector contribution to support the cinema and audiovisual industry).

93| Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 2004 L 140, p. 1).

In its judgment of 6 November 2018, ***Scuola Elementare Maria Montessori*** v ***Commission*** (Joined Cases C-622/16 P to C-624/16 P, EU:C:2018:873), the Grand Chamber of the Court, in particular, provided guidance on the examination to be carried out by the Commission to conclude that the recovery of unlawful aid is absolutely impossible. [94]

In that case, the Commission — after having classified as State aid an exemption from municipal tax on real property granted by Italy to non-commercial entities carrying on specific activities on the real property belonging to them — had decided not to order recovery of the aid in so far as such recovery would be absolutely impossible. [95] The Commission had also found that the tax exemption provided for by the new Italian scheme of the single municipal tax did not constitute State aid. Scuola Elementare Maria Montessori, a private educational establishment, and Mr Ferracci, the owner of a bed and breakfast, brought actions for annulment against the Commission's decision before the General Court, arguing that the decision had put them in an unfavourable competitive situation compared to ecclesiastical or religious institutions located nearby which carried on similar activities to theirs and which were entitled to the tax exemptions at issue. After the General Court dismissed their actions as admissible but unfounded, [96] both the appellants and the Commission lodged appeals against the General Court's judgments.

As regards the Commission's decision not to order recovery of the aid, the Court recalled that the adoption of an order to recover unlawful aid is the logical and normal consequence of a finding that it is unlawful. It is true that, in accordance with the second sentence of Article 14(1) of Regulation No 659/1999, the Commission may not require the recovery of aid if such recovery would be contrary to a general principle of EU law, such a 'no one is obliged to do the impossible'. However, the Court explained that recovery of unlawful aid may be considered to be objectively and absolutely impossible only if the Commission finds, following a detailed examination, that two conditions are satisfied, namely that the difficulties relied on by the Member State concerned are real and that there are no alternative methods of recovery.

Here, the Court found that the Commission could not conclude that it was absolutely impossible to recover the unlawful aid at issue by confining itself to observing that it was impossible to obtain the necessary information from the Italian land register and tax databases. The Commission should also have considered whether there were alternative methods that would allow recovery, even if only partial, of the aid. At the conclusion of its assessment, the Court therefore held that the Commission had failed to show that recovery of the aid was absolutely impossible. It set aside the General Court's judgment in so far as it endorsed the Commission's decision not to order recovery of the unlawful aid granted in the instant case and annulled the Commission's decision in so far as it did not order recovery of that aid.

94| In that judgment, the Court also examined the admissibility, in the light of the third limb of the fourth paragraph of Article 263 TFEU, of actions for annulment brought by competitors of beneficiaries of a State aid scheme against a decision of the Commission declaring that the national scheme in question does not constitute State aid and that aid granted under an unlawful scheme cannot be recovered. See, in that regard, Section VI 'Proceedings of the European Union', Subsection 2 'Actions for annulment'.

95| Commission Decision 2013/284/EU of 19 December 2012 on State aid SA.20829 (C 26/2010, ex NN 43/2010 (ex CP 71/2006)) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy (OJ 2013 L 166, p. 24).

96| Judgments of the General Court of 15 September 2016, ***Scuola Elementare Maria Montessori*** v ***Commission*** (T-220/13, EU:T:2016:484), and ***Ferracci*** v ***Commission*** (T-219/13, EU:T:2016:485).

XIII. Fiscal provisions

In the area of taxation, the judgments in *Scialdone* (C-574/15) and *Kolev and Others* (C-612/15) [97] are worthy of note, particularly in the light of Article 325 TFEU on countering fraud.

In its judgment in ***Scialdone*** (C-574/15, EU:C:2018:295), of 2 May 2018, the Court, sitting as the Grand Chamber, adjudicated on the *compatibility with Directive 2006/112,* [98] *Article 4(3) TEU and Article 325(1) TFEU of national legislation which provides that failure to pay the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence if a criminalisation threshold is exceeded which is higher than that applying to the offence of failing to pay withholding income tax.*

In the main action, criminal proceedings had been brought against the applicant in his capacity as sole director of a VAT-registered company for failing to pay VAT within the prescribed time limit. When that failure occurred, Italian law provided that such a failure was punishable by a custodial sentence where the taxable amount, in respect of VAT and income tax, exceeded EUR 50 000. However, following the events in the main proceedings, the Italian legislature increased the threshold from EUR 50 000 to 250 000 for VAT and to EUR 150 000 for withholding income tax. The national court considered that since the rule was more favourable than that which applied before, the amendment should apply retroactively and that the offending conduct no longer amounted to a criminal offence. Taking the view that the criminalisation threshold provided for the failure to pay withholding income tax is different from that provided for the failure to pay VAT, the Court enquired whether that difference in thresholds was compatible with EU law, given that it would entail better protection of national financial interests than of the European Union's financial interests.

Since Member States are under an obligation to ensure that all VAT is collected and given that the financial interests of the European Union include, in particular, revenue arising from VAT, the Court stated that even though the penalties established by Member States in order to counter infringements of harmonised VAT rules fall within their procedural and institutional autonomy, that autonomy is nevertheless limited by, first, the principle of equivalence, which means that those penalties must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests, and, secondly, the principle of effectiveness, which requires that such penalties be effective and dissuasive.

As regards, in the first place, the principle of effectiveness, the Court found that although a failure to pay VAT does not constitute 'fraud' within the meaning of Article 325(1) TFEU, in so far as the taxable person has duly complied with his obligations to declare VAT, it nonetheless amounts to an 'illegal activity' for the purposes of that article requiring the application of effective, proportionate and dissuasive penalties. In this case, given the severity of the fines provided for in the national legislation at issue and the addition of default interest, the Court considered that fines of that kind are such as to lead taxable persons to abandon any notion to delay or omit VAT payment and are thus dissuasive in nature. In addition, those fines encourage defaulting taxable persons to discharge the amount of tax payable as soon as possible and may, therefore, be regarded, in principle, as effective. Such a conclusion cannot, moreover, be called into question by the fact that the taxable person is a legal person and that those same penalties are applied to that legal person and not its managers. The criminalisation threshold of EUR 250 000 for the offence of failing to pay VAT was not, therefore, held to be incompatible with the principle of effectiveness.

97| That judgment is presented in Section X.2 'Common rules on criminal procedure'.

98| Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

As regards, in the second place, the principle of equivalence, although both the failure to pay VAT and the failure to pay withholding income tax are characterised by non-compliance with the obligation to pay the tax due within the time limit prescribed by law and, in providing that both such forms of conduct constitute an offence, the Italian legislature pursued the same objective, namely to ensure that the Italian Treasury is paid tax in good time and, thus, that all tax revenue is collected, the Court held that those taxes can be distinguished by both their constituent elements and the difficulty involved in their detection, so that the offences cannot be regarded as being of a similar nature and importance. The principle of equivalence does not thus preclude a difference such as that between the criminalisation thresholds at issue. Accordingly, the Court ruled that Directive 2006/112, read in conjunction with Article 4(3) TEU and Article 325(1) TFEU, must be interpreted as not precluding national legislation which provides that failure to pay the VAT resulting from the annual tax return for a given financial year constitutes a criminal offence only when the amount of unpaid VAT exceeds a criminalisation threshold of EUR 250 000, whereas a criminalisation threshold of EUR 150 000 is laid down for the offence of failing to pay withholding income tax.

XIV. Approximation of laws

1. Copyright

In its judgment in ***Renckhoff*** (C-161/17, EU:C:2018:634), delivered on 7 August 2018, the Court was required to examine *the concept of 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.* [99] The main proceedings involved a dispute between the *Land* of North Rhine-Westphalia (Germany) and a photographer concerning the unauthorised use by a pupil of a school for which that *Land* was responsible of a photograph taken by that photographer, which was freely accessible on one website, to illustrate a school presentation posted by that school on another website.

The Court stated that the posting on one website of a photograph previously posted on another website, after it has been previously copied onto a private server, must be treated as 'making available' and therefore an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29. Such a posting gives visitors to the website on which it is posted the opportunity to access the photograph on that website.

The Court considered that the posting of a work protected by copyright on one website other than that on which the initial communication was made with the consent of the copyright holder must be treated as making such a work available to a new public. The public taken into account by the copyright holder when he consented to the communication of his work on the website on which it was originally published is composed solely of users of that site and not of users of the website on which the work was subsequently published without the consent of the rightholder, or other internet users.

99| 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).

The Court also found that such posting must be distinguished from the making available of protected works by means of a clickable link leading to another website on which the initial communication was made. [100] Unlike hyperlinks which contribute to the sound operation of the internet, the publication on a website without the authorisation of the copyright holder of a work which was previously communicated on another website with the consent of that copyright holder does not contribute, to the same extent, to that objective.

In those circumstances, the Court ruled that the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

By judgment of 13 November 2018, ***Levola Hengelo*** (C-310/17, EU:C:2018:899), the Court, sitting as the Grand Chamber, adjudicated on whether *the taste of a food product may be eligible for copyright protection under Directive 2001/29.* The dispute in the main proceedings was between two Netherlands companies that produce foodstuffs and concerned the alleged infringement by one of them of the other's copyright relating to the taste of a spreadable dip with cream cheese and fresh herbs, known as 'Heksenkaas' or 'Heks'nkaas'.

According to the Court, the taste of a food product can be protected by copyright under Directive 2001/29 only if such a taste can be classified as a 'work' within the meaning of the directive. In that regard, it recalled that two cumulative conditions must be satisfied for subject matter to be classified as a 'work'. First, the subject matter concerned must be original in the sense that it is the author's own intellectual creation. Secondly, only something which is the expression of the author's own intellectual creation may be classified as a 'work' within the meaning of Directive 2001/29. In addition, the Court held that for there to be a 'work' as referred to in Directive 2001/29, the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form.

According to the Court, the taste of a food product cannot, however, be pinned down with precision and objectivity. The taste of a food product will be identified essentially on the basis of taste sensations and experiences, which are subjective and variable since they depend, inter alia, on factors particular to the person tasting the product concerned, such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed. Moreover, it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind.

In those circumstances, the Court ruled that Directive 2001/29 precludes (i) the taste of a food product from being protected by copyright under that directive and (ii) national legislation from being interpreted in such a way that it grants copyright protection to such a taste.

2. Intellectual property

In the field of intellectual property, four judgments are worthy of note. The first deals with the interpretative criteria applicable to the claims in a basic patent and the following three concern EU trade mark law.

100| See, in that regard, the judgment of the Court of 13 February 2014, ***Svensson and Others*** (C-466/12, EU:C:2014:76).

On 25 July 2018, in its judgment in ***Teva UK and Others*** (C-121/17, EU:C:2018:585), the Court was called upon to rule on the *interpretative criteria applicable to the claims in a basic patent for the purposes of ascertaining whether a product that is the subject of a supplementary protection certificate ('SPC') is protected by a basic patent in force, within the meaning of Article 3(a) of Regulation No 469/2009.* [101] The dispute in the main proceedings was between a pharmaceutical company which marketed an antiretroviral medicinal product and undertakings which intended to market generic versions of that medicinal product in the United Kingdom. Those undertakings challenged the validity of the SPC granted for that medicinal product, arguing that, in order to meet the condition laid down in Article 3(a) of that regulation, the active ingredients of the product concerned must, in accordance with the Court's case-law, [102] be specified in the wording of the claims.

The Court noted, first of all, that Regulation No 469/2009 does not, in principle, preclude an active ingredient which is given a functional definition in the claims of a basic patent being regarded as protected by that patent, on condition that it is possible to reach the conclusion on the basis of those claims, interpreted inter alia in the light of the description of the invention, as required by Article 69 of the Convention on the Grant of European Patents [103] and the Protocol on the interpretation of that article which forms an integral part of that convention, that the claims relate, implicitly but necessarily and specifically, to the active ingredient in question. Therefore, a product cannot be considered to be protected by a basic patent in force within the meaning of Article 3(a) of Regulation No 469/2009 unless the product which is the subject of the SPC is either expressly mentioned in the claims of that patent or those claims relate to that product necessarily and specifically.

Secondly, the Court explained that it is not the purpose of the SPC to extend the protection conferred by the basic patent beyond the invention which that patent covers and that it would be contrary to the objective of Regulation No 469/2009 to grant an SPC for a product which does not fall under the invention covered by the basic patent, inasmuch as such an SPC would not relate to the results of the research claimed under that patent. Thus, for the purposes of the application of Article 3(a) of that regulation, the claims of the basic patent must be construed in the light of the limits of that invention, as it appears from the description and the drawings of that patent. In that connection, the Court made clear that for the purposes of determining whether a product falls under the invention covered by a basic patent, that product must be identifiable specifically by a person skilled in the art in the light of all the information disclosed by the basic patent and of the prior art at the filing date or priority date of that patent.

In the case giving rise to the judgment of 12 June 2018, ***Louboutin and Christian Louboutin*** (C-163/16, EU:C:2018:423), the Court, sitting as the Grand Chamber, was required to clarify whether a *sign consisting of a particular colour applied to a specific part of a product consists of a shape within the meaning of Article 3(1)(e)(iii) of Directive 2008/95.* [104]

101| Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (OJ 2009 L 152, p. 1).

102| Judgment of the Court of 24 November 2011, ***Medeva*** (C-322/10, EU:C:2011:773).

103| Convention on the Grant of European Patents, signed in Munich on 5 October 1973.

104| Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

This judgment was delivered in a dispute between, on the one hand, Mr Christian Louboutin and Christian Louboutin SAS and, on the other, a Netherlands company concerning the sale by the latter of shoes which allegedly infringed the trade mark owned by Mr Louboutin, consisting of the colour red (Pantone 18-1663TP) applied to the sole of a high-heeled shoe.

The Court first noted that in the context of trade mark law, the concept of 'shape' is usually understood as a set of lines or contours that outline the product concerned. It does not follow from Directive 2008/95, the case-law of the Court, or the usual meaning of that concept, that a colour per se, without an outline, may constitute a 'shape'.

Secondly, the Court pointed out that while it is true that the shape of the product or of a part of the product plays a role in creating an outline for the colour, it cannot, however, be held that a sign consists of that shape in the case where the registration of the mark did not seek to protect that shape but sought solely to protect the application of a colour to a specific part of that product. In any event, a sign, such as that at issue in the main proceedings, cannot be regarded as consisting 'exclusively' of a shape, where, as in the present instance, the main element of that sign is a specific colour designated by an internationally recognised identification code.

In those circumstances, the Court ruled that Article 3(1)(e)(iii) of Directive 2008/95 must be interpreted as meaning that a sign consisting of a colour applied to the sole of a high-heeled shoe, such as that at issue in the main proceedings, does not consist exclusively of a 'shape', within the meaning of that provision.

In the judgment in ***Mitsubishi Shoji Kaisha and Mitsubishi Caterpillar Forklift Europe*** (C-129/17, EU:C:2018:594), delivered on 25 July 2018, the Court adjudicated on *the limits of the rights conferred on trade mark proprietors by Regulation No 207/2009* [105] *and Directive 2008/95 governing distinctive signs.* This judgment was delivered in the context of a dispute between, on the one hand, two companies belonging to the Mitsubishi group and, on the other, third-party companies established in Belgium concerning the marketing by the latter of Mitsubishi forklift trucks acquired outside the European Economic Area (EEA), from which the Belgian companies had removed all signs identical to the marks of which Mitsubishi was the proprietor and to which they had affixed their own signs.

First, the Court observed that the removal of signs identical to the mark prevents the goods for which that mark is registered from bearing that mark the first time that they are placed on the market in the EEA and, hence, deprives the proprietor of that trade mark of the benefit of the essential right to control the initial marketing in the EEA of goods bearing that mark. Secondly, according to the Court, the removal of the signs identical to the mark and the affixing of new signs to the goods with a view to their first placing on the market in the EEA adversely affects the functions of the mark. Thirdly, the Court considered that by infringing the trade mark proprietor's right to control the first placing of goods bearing that mark on the market in the EEA and by adversely affecting the functions of the mark, the removal of the signs identical to the mark and the affixing of new signs to the goods by a third party, without the consent of the proprietor, with a view to importing into or placing those goods on the market in the EEA and with the aim of circumventing the proprietor's right to prohibit the importation of those goods bearing its mark, is contrary to the objective of ensuring undistorted competition.

Finally, against that background, the Court provided clarification on the concept of 'use in the course of trade', within the meaning of Article 5 of Directive 2008/95 and Article 9 of Regulation No 207/2009, pointing out that an operation consisting, on the part of the third party, of removing signs identical to the trade mark in

105| Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

order to affix its own signs, involves active conduct on the part of that third party, which, since it is done with a view to importing those goods into the EEA and marketing them there and is therefore carried out in the exercise of a commercial activity for economic advantage, may be regarded as a use in the course of trade.

For all of those reasons, the Court ruled that Article 5 of Directive 2008/95 and Article 9 of Regulation No 207/2009 must be interpreted as meaning that the proprietor of a mark is entitled to oppose a third party, without his consent, removing all the signs identical to that mark and affixing other signs to the products placed in the customs warehouse, as in the main proceedings, with a view to importing them or trading them in the EEA where they have never yet been marketed.

By its judgment in ***Bundesverband Souvenir — Geschenke — Ehrenpreise*** v ***EUIPO*** (C-488/16 P, EU:C:2018:673), delivered on 6 September 2018, the Court confirmed the judgment under appeal of the General Court [106] and held that the *word mark 'NEUSCHWANSTEIN' ('the contested trade mark') is not descriptive for the purposes of Article 7(1)(c) of Regulation No 207/2009.*

In the first place, in the case of goods sold as souvenirs in the context of the operation of a castle, the Court held that the General Court had been right to find that the goods covered by the contested trade mark were everyday consumer goods and that the services concerned were everyday services facilitating the management and operation of the castle. Furthermore, it noted that the fact that those goods were sold as souvenir items is irrelevant for the purpose of assessing the descriptive character of the name 'Neuschwanstein'. The souvenir function ascribed to a product is not an objective characteristic inherent to the nature of that product, since that function is determined by the free will of the buyer and is focused solely on that buyer's intentions. Accordingly, in the mind of the relevant public, the memory to which the name 'Neuschwanstein' relates is not an indication of a quality or an essential characteristic of the goods and services covered by the contested trade mark.

In the second place, the Court considered that the mere fact that the goods and services concerned are offered in a particular place cannot constitute a descriptive indication of the geographical origin of those goods and services, in so far as the place where those goods and services are sold is not capable, as such, of designating characteristics, qualities or distinctive features connected with the geographical origin of those goods and services, such as a craft, a tradition or a climate which is a characteristic of a particular place. In that regard, it observed that Neuschwanstein Castle is famous not for the souvenir items it sells or the services it offers, but for its unusual architecture. Furthermore, the contested trade mark is not used to market specific souvenir products and to offer particular services for which it would be traditionally known. Therefore, the Court concluded that the General Court had not erred in law in finding that, as Neuschwanstein Castle is not, as such, a place where goods are produced or services are rendered, the contested trade mark could not be indicative of the geographical origin of the goods and services it covers.

3. Protection of personal data

In the field of data protection, three judgments merit special attention: the first required the Court to clarify the concept of 'controller' of personal data, the second concerns the responsibility of a religious community for the treatment of such data, and the third deals with access to personal data in the context of criminal proceedings.

106| Judgment of the General Court of 5 July 2016, ***Bundesverband Souvenir — Geschenke — Ehrenpreise*** v ***EUIPO — Freistaat Bayern (NEUSCHWANSTEIN)*** (T-167/15, not published, EU:T:2016:391).

On 5 June 2018, in its judgment in ***Wirtschaftsakademie Schleswig-Holstein*** (C-210/16, EU:C:2018:388), the Court, sitting as the Grand Chamber, ruled on *the interpretation of the concept of 'controller' referred to in Article 2(d) of Directive 95/46,* [107] *and on the extent of the powers of intervention of supervisory authorities with regard to the processing of personal data which involves the participation of several parties.* In the main proceedings, the German data protection authority, in its capacity as supervisory authority within the meaning of Article 28 of Directive 95/46, had ordered a German company, operating in the field of education and offering educational services by means of a fan page hosted on the social networking site Facebook, to deactivate its page. According to that authority, neither the company nor Facebook informed visitors to the fan page that Facebook, by means of cookies, collected personal data concerning them and that the company and Facebook then processed the data.

The Court first of all considered that the administrator of a fan page hosted on Facebook, such as the company at issue in the main proceedings, takes part, by its definition of parameters (depending in particular on its target audience and the objectives of managing and promoting its activities), in the determination of the purposes and means of processing the personal data of the visitors to that page. According to the Court, that administrator must therefore be categorised as a controller responsible for such processing within the European Union, jointly with Facebook Ireland (the subsidiary in the European Union of the US company Facebook), within the meaning of Article 2(d) of Directive 95/46.

Next, by interpreting Articles 4 and 28 of Directive 95/46, the Court ruled that where an undertaking established outside the European Union (such as the US company Facebook) has several establishments in different Member States, the supervisory authority of a Member State is entitled to exercise the powers conferred on it by Article 28(3) of that directive with respect to an establishment of that undertaking situated in the territory of that Member State (in this case, Facebook Germany) even if, as a result of the division of tasks within the group, first, that establishment is responsible solely for the sale of advertising space and other marketing activities in the territory of that Member State and, secondly, exclusive responsibility for collecting and processing personal data belongs, for the entire territory of the European Union, to an establishment situated in another Member State (in this case, Facebook Ireland).

Furthermore, the Court stated that where the supervisory authority of a Member State intends to exercise with respect to an entity established in the territory of that Member State the powers of intervention referred to in Article 28(3) of Directive 95/46, on the ground of infringements of the rules on the protection of personal data committed by a third party responsible for the processing of that data whose seat is in another Member State (in this case, Facebook Ireland), that supervisory authority is competent to assess, independently of the supervisory authority of the other Member State (Ireland), the lawfulness of such data processing and may exercise its powers of intervention with respect to the entity established in its territory without first calling on the supervisory authority of the other Member State to intervene.

In the judgment in ***Jehovan todistajat*** (C-25/17, EU:C:2018:551), of 10 July 2018, the Grand Chamber of the Court adjudicated on the *responsibility of a religious community for the processing of personal data carried out in the context of door-to-door preaching organised, coordinated and encouraged by that community.* In the main proceedings, the Finnish data protection authority had adopted a decision prohibiting the Jehovah's Witnesses community from collecting or processing personal data in the course of door-to-door preaching carried out by its members unless the requirements for processing such data laid down in Finnish law were satisfied. The members of that community take notes in the course of their door-to-door preaching about visits to persons who are unknown to themselves or that Community. Those data are collected as a memory aid and

107| Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p 31).

in order to be retrieved for any subsequent visit without the knowledge or consent of the persons concerned. The Jehovah's Witnesses community had established guidelines on the taking of such notes which appear in at least one of its magazines which is dedicated to preaching.

The Court considered, first of all, that the collection of personal data by members of a religious community in the course of door-to-door preaching and the subsequent processing of those data does not fall within the exceptions to the scope of Directive 95/46 since it does not constitute either the processing of personal data for the purpose of activities referred to in Article 3(2), first indent, of that directive or the processing of personal data carried out by a natural person in the course of a purely personal or household activity, within the meaning of Article 3(2), second indent, thereof.

Secondly, the Court — after recalling that Directive 95/46 applies to the manual processing of personal data only where the data processed form part of a filing system or are intended to form part of a filing system — found that the concept of 'filing system', referred to in Article 2(c) of that directive, covers a set of personal data collected in the course of door-to-door preaching, consisting of the names and addresses and other information concerning the persons contacted, if those data are structured according to specific criteria which, in practice, enable them to be easily retrieved for subsequent use. In order for such a set of data to fall within that concept, it is not necessary that they include data sheets, specific lists or other search methods.

Lastly, the Court considered that the obligation for every person to comply with the rules of EU law on the protection of personal data cannot be regarded as an interference in the organisational autonomy of religious communities. In that connection, it concluded that Article 2(d) of Directive 95/46, read in the light of Article 10(1) of the Charter, must be interpreted as meaning that it supports the finding that a religious community is a controller, jointly with its members who engage in preaching, for the processing of personal data carried out by the latter in the context of door-to-door preaching organised, coordinated and encouraged by that community, without it being necessary that the community has access to those data, or to establish that that community has given its members written guidelines or instructions in relation to the data processing.

By its judgment in ***Ministerio Fiscal*** (C-207/16, EU:C:2018:788), of 2 October 2018, the Grand Chamber of the Court ruled on *whether, in the light of Directive 2002/58,* [108] *access to personal data retained by providers of electronic communications services may be justified in cases of criminal offences.* At issue in the main proceedings was the refusal by a Spanish investigating magistrate to grant a request made in the context of an investigation into the robbery of a wallet and mobile telephone. In particular, the police had asked the investigating magistrate to grant access, over a period of 12 days from the date of the robbery, to data identifying the users of telephone numbers activated with the stolen telephone. That request was refused on the ground that the acts giving rise to the criminal investigation did not constitute a 'serious' offence — that is, an offence punishable under Spanish law by a term of imprisonment of more than 5 years — access to identification data being possible only in respect of that category of offences.

After pointing out that the access of public authorities to personal data retained by providers of electronic communications services in connection with a criminal investigation falls within the scope of Directive 2002/58, the Court recalled that the access of public authorities to data for the purpose of identifying the owners of SIM cards activated with a stolen mobile telephone, such as the surnames, forenames and, if need be, addresses of the owners of the SIM cards, constitutes an interference with the fundamental right to respect for private life and the fundamental right to the protection of personal data enshrined in the Charter,

108| Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

even in the absence of circumstances which would allow that interference to be defined as 'serious', without it being relevant that the information in question relating to private life is sensitive or whether the persons concerned have been inconvenienced in any way as a result of that interference. However, the Court made clear that such interference is not sufficiently serious to entail that access being limited, in the area of prevention, investigation, detection and prosecution of criminal offences, to the objective of fighting serious crime. Although Directive 2002/58 contains an exhaustive list of the objectives capable of justifying national legislation governing public authorities' access to the data concerned and thereby derogating from the principle of confidentiality of electronic communications, it being necessary for such access to correspond, genuinely and strictly, to one of those objectives, the Court observed that as regards the objective of preventing, investigating, detecting and prosecuting criminal offences, the wording of Directive 2002/58 does not limit that objective to the fight against serious crime alone, but refers to 'criminal offences' generally.

Against that background, the Court stated that although, in its judgment in *Tele2 Sverige and Watson and Others*, [109] it had held that only the objective of fighting serious crime is capable of justifying public authorities' access to personal data retained by providers of communications services which, taken as a whole, allow precise conclusions to be drawn concerning the private lives of the persons whose data is concerned, that interpretation was based on the fact that the objective pursued by legislation governing that access must be proportionate to the seriousness of the interference with the fundamental rights in question that that access entails. Thus, in accordance with the principle of proportionality, serious interference can be justified, in areas of prevention, investigation, detection and prosecution of criminal offences, only by the objective of fighting crime which must also be defined as 'serious'. By contrast, when the interference that such access entails is not serious, that access is capable of being justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally.

In the instant case, the Court considered that access to only the data referred to in the request at issue could not be defined as a 'serious' interference with the fundamental rights of the persons whose data is concerned, as those data do not allow precise conclusions to be drawn in respect of their private lives. The Court concluded that the interference that access to such data entails is capable of being justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally, without it being necessary that those offences be defined as 'serious'.

4. Public procurement

In the judgment in ***Commission*** v ***Austria (State printing office)*** (C-187/16, EU:C:2018:194), delivered on 20 March 2018, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the Commission against the Republic of Austria seeking *a declaration that, first, by directly awarding service contracts for the production of official documents to a printing company and, secondly, by maintaining national provisions which require contracting authorities to award those service contracts directly to that company, that Member State failed to fulfil its obligations under Articles 49 and 56 TFEU, Articles 4 and 8 of Directive 92/50,* [110] *and Articles 14 and 20 of Directive 2004/18.* [111]

109| Judgment of the Court of 21 December 2016, ***Tele2 Sverige and Watson and Others*** (C-203/15 and C-698/15, EU:C:2016:970).

110| Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

111| Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

According to the Court, even though Article 4(2) of Directive 92/50 and Article 14 of Directive 2004/18 afford the Member States discretion in deciding the measures considered to be necessary for the protection of their essential security interests, those articles cannot, however, be construed as conferring on Member States the power to derogate from the provisions of the FEU Treaty simply by invoking those interests. A Member State which wishes to avail itself of those derogations must show that such derogation is necessary in order to protect its essential security interests. Accordingly, a Member State which wishes to avail itself of those derogations must establish that the protection of such interests could not have been attained within a competitive tendering procedure as provided for by Directives 92/50 and 2004/18.

Concluding that the Republic of Austria had not shown that the objective of preventing the disclosure of sensitive information relating to the production of the official documents in question could not have been achieved within a competitive tendering procedure, the Court found that the failure to comply with the public procurement procedures laid down by those directives was disproportionate having regard to that objective.

In its judgment in ***Vossloh Laeis*** (C-124/17, EU:C:2018:855), delivered on 24 October 2018, the Court shed light on *the obligation for an economic operator to collaborate with the contracting authority in order to demonstrate its reliability.* In the main proceedings, the contracting authority had established a qualification system, within the meaning of Article 77 of Directive 2014/25, [112] the purpose of which was to select undertakings to supply it with railway lines. The undertaking Vossloh Laeis had been excluded from that system on the ground that the national competition authority had fined it for having participated in a cartel for a number of years. The contracting authority, which was one of the parties affected by that cartel and which had doubts about the reliability of that undertaking, asked Vossloh Laeis to forward it the decision of the national competition authority imposing the fine. Taking the view that the explanations provided by that undertaking did not demonstrate that it had taken sufficient steps to reform itself, as required under national law, the contracting authority definitively excluded it from the qualification procedure. Against that background, the national court referred a question to the Court for a preliminary ruling on the compatibility of national law with EU public procurement law.

First of all, the Court found that it is apparent from recital 102 of Directive 2014/24 [113] that, where an operator has adopted compliance measures aimed at remedying the consequences of any criminal offences or misconduct and at effectively preventing further occurrences of the misbehaviour, by offering sufficient guarantees, that operator should no longer be excluded on that ground alone. In addition, according to that recital, it is for the Member States to determine the exact procedural and substantive conditions applicable where the economic operator requests that compliance measures taken with a view to possible admission to the procurement procedure be examined and the Member States should, in particular, be free to decide whether to allow the individual contracting authorities to carry out the relevant assessments or to entrust other authorities on a central or centralised level with that task. Where the Member States authorise the contracting authority to carry out the relevant evaluations, it is for the contracting authority to assess not only whether there exists a ground for exclusion of an economic operator, but also whether, as the case may be, that economic operator has actually re-established its reliability.

Next, the Court observed that in situations in which there is a specific procedure regulated by EU law or by national law for pursuing certain offences and in which specific bodies are entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of

112| Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243).

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

the evidence provided, rely in principle on the outcome of such a procedure. Against that background, the Court considered that the clarification of the facts and circumstances by the investigating authorities, as provided for in Article 57(6) of Directive 2014/24, does not relate to the same objective as that pursued by the examination of the reliability of the economic operator which adopted measures provided for in that provision and which must provide the contracting authority with evidence demonstrating that they are sufficient for the purpose of its admission to the procurement procedure. Thus, in so far as the respective duties of the contracting authority and of the investigating authorities so require, the economic operator wishing to establish its reliability despite the existence of a relevant ground for exclusion must collaborate effectively with the national authorities to which those respective duties have been entrusted, regardless of whether this is the contracting authority or the investigating authority. The Court nevertheless pointed out that that collaboration with the contracting authority must be limited to the measures which are strictly necessary for the effective pursuit of the objective of the examination of the reliability of the economic operator.

In those circumstances, the Court concluded that Article 80 of Directive 2014/25, read in conjunction with Article 57(6) of Directive 2014/24, does not preclude a provision of national law which requires an economic operator wishing to demonstrate its reliability despite the existence of a relevant ground for exclusion to clarify the facts and circumstances relating to the criminal offence or the misconduct committed in a comprehensive manner by actively cooperating not only with the investigating authority, but also with the contracting authority, in the context of the latter's specific role, in order to provide it with proof of the re-establishment of its reliability, to the extent that that cooperation is limited to the measures strictly necessary for that examination.

5. Mutual assistance in the recovery of tax claims

By its judgment in ***Donnellan*** (C-34/17, EU:C:2018:282), delivered on 26 April 2018, the Court provided guidance on *the circumstances in which an authority of a Member State may refuse to enforce a request for recovery concerning a claim relating to a fine imposed in another Member State, within the framework of the system of mutual assistance established by Directive 2010/24.* [114]

A fine had been imposed in 2009 on Mr Donnellan, an Irish national and driver of heavy goods vehicles, following the discovery in 2002 by Greek customs agents of contraband in his vehicle. In 2012, the Greek authorities sent the requested Irish authority a request for recovery, which was accompanied by the uniform instrument provided for in Directive 2010/24. In that request, the Greek authorities thus sent, in accordance with Article 12(1) of that directive, information permitting enforcement in Ireland. In the present case, notwithstanding the statement, contained in the request for recovery that recovery procedures had been applied in Greece, it was not until 2012, when the Irish tax authority sent the person concerned the request for payment accompanied by the uniform instrument, that that person became aware of the fact that, several years earlier, a fine had been imposed on him in Greece. Since the person concerned had not been able to bring an action in time in Greece to challenge the decision imposing that fine on him, he brought proceedings in Ireland seeking relief from the enforcement of the request for recovery at issue. In those circumstances, the national court asked the Court whether the authority of the requested Member State could refuse enforcement of a request for recovery on grounds related to the fundamental right of the person concerned to an effective remedy set out in Article 47 of the Charter.

114| Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1).

The Court noted that while falling within the area of the internal market, the system of mutual assistance established by Directive 2010/24 is based on the principle of mutual trust between the national authorities concerned. Thus, far from giving the bodies of the requested Member State the power to review the acts of the applicant Member State, Article 14(2) of that directive explicitly limits the power of review of those bodies to acts of the requested Member State. However, the requested authority may, exceptionally, decide not to grant its assistance to the applicant authority where, inter alia, enforcement is liable to be contrary to public policy. Thus, in a situation such as that at issue in the main proceedings, in which an authority of one Member State requests an authority of another Member State to recover a claim relating to a fine of which the person concerned was unaware, with the result that that person was not able to raise the matter before the courts of the applicant Member State under conditions compatible with the right to an effective remedy, the authority of the requested Member State may refuse enforcement of that request, on the ground that the decision imposing that fine was not properly notified to the person concerned before the request for recovery was made to the requested authority under Directive 2010/24.

6. Motor insurance

In the field of motor insurance, reference should be made to the judgment in ***Smith*** (C-122/17, EU:C:2018:631), delivered on 7 August 2018, [115] and the judgment in ***Juliana*** (C-80/17, EU:C:2018:661) of 4 September 2018.

In the second judgment, the Court adjudicated on the insurance obligation provided for in Article 3(1) of Directive 72/166 [116] where the owner of a motor vehicle had stopped driving that vehicle and had parked it in the yard of her house, but had not taken any steps formally to withdraw it from use. The Court pointed out, first of all, that such a vehicle, in so far as it is capable of being driven, corresponds to the concept of 'vehicle' within the meaning of Article 1(1) of Directive 72/166 and, consequently, does not cease to be subject to the insurance obligation simply because its owner no longer intends to drive it and immobilises it on private land. Next, the Court found that in the case of an accident involving a vehicle whose owner has failed to comply with the obligation to insure that vehicle under national law, the compensation body referred to in Article 1(4) of Directive 84/5 [117] may bring an action not only against the person or persons responsible for the accident, but also against that owner, irrespective of the civil liability of the latter in the occurrence of the accident.

115| That judgment is presented in Section V 'EU law and national law'.

116| Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972, First Series (II), p. 360).

117| Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17).

XV. Economic and monetary policy [118]

In its judgment in ***Weiss and Others*** (C-493/17, EU:C:2018:1000), delivered on 11 December 2018, the Court, sitting as the Grand Chamber, *confirmed the validity of Decision 2015/774* [119] *by which the European Central Bank established the secondary markets public sector asset purchase programme ('the PSPP'), under which the Eurosystem central banks are to purchase eligible marketable debt securities on the secondary markets from eligible counterparties under specific conditions.*

In the first place, the Court found that taking account of the objective of Decision 2015/774 and of the means provided for achieving that objective, that decision indeed fell within the sphere of monetary policy. The specific objective set out in recital 4 of that decision — namely, to contribute to a return of inflation rates to levels below, but close to, 2% over the medium term — can be attached to the primary objective of the Union's monetary policy, as set out in Article 127(1) TFEU and Article 282(2) TFEU, namely the maintenance of price stability.

In the second place, the Court considered that Decision 2015/774 did not infringe the principle of proportionality. In that regard, the Court pointed out that the PSPP was adopted in a context characterised, on the one hand, by persistently low inflation that risked triggering a cycle of deflation and, on the other, by an inability to counter that risk by means of the other instruments available to the European System of Central Banks (ESCB) for increasing inflation rates. In those circumstances, in view of the foreseeable effects of the PSPP and given that it does not appear that the ESCB's objective could have been achieved by any other type of monetary policy measure entailing more limited action on the part of the ESCB, the Court held that the PSPP, in its underlying principle, did not manifestly go beyond what was necessary to achieve that objective.

Lastly, as regards the compatibility of Decision 2015/774 with the prohibition of monetary financing laid down in Article 123(1) TFEU, the Court took the view that the intervention by the ESCB provided for by that programme could not be equated with a measure granting financial assistance to a Member State. Under the PSPP, the ESCB is not entitled to purchase bonds directly from public authorities and bodies of the Member States, but only to do so indirectly, on the secondary markets. Against that background, the Court held that the fact that the PSPP procedures make it possible to foresee, at the macroeconomic level, that there will be a purchase of a significant volume of bonds issued by public authorities and bodies of the Member States does not afford a given private operator such certainty that he can act, *de facto*, as an intermediary of the ESCB for the direct purchase of bonds from a Member State. In the same vein, it concluded that Decision 2015/774 does not reduce the impetus of the Member States concerned to conduct a sound budgetary policy, since a Member State cannot rely on the financing possibilities to which the implementation of the PSPP may give rise in order to abandon a sound budgetary policy, without ultimately running the risk (i) of the bonds that it issues being excluded from the PSPP because they have been downgraded or (ii) of the ESCB selling the bonds of that Member State which it had previously purchased.

In the cases giving rise to the judgments in ***Baumeister*** (C-15/16, EU:C:2018:464) and ***Buccioni*** (C-594/16, EU:C:2018:717), the Court had the opportunity to rule on the scope of the obligation of professional secrecy which is imposed on national financial markets supervisory authorities and national banking supervisors.

118| Also see, in this connection, the judgment of 19 December 2018, ***Berlusconi and Fininvest*** (C-219/17, EU:C:2018:1023), presented in Section VI.2 'Actions for annulment'.

119| Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ 2015 L 121, p. 20), as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 (OJ 2017 L 16, p. 51).

The first judgment, which was delivered by the Grand Chamber of the Court on 19 June 2018, *concerns the concept of 'confidential information', within the meaning of Article 54(1) of Directive 2004/39*, [120] and resulted in the Court clarifying its case-law beginning with the judgment in *Altmann and Others*. [121] At issue in the main proceedings was a decision by which the German Federal Financial Supervisory Authority had refused to grant a request made by an investor, who had suffered loss as a result of the fraudulent conduct of a German undertaking, seeking access to documents received or drawn up by the authority in the context of its monitoring of that undertaking.

The Court held, first, that all information relating to the supervised entity and communicated by it to the competent authority, and all statements of that authority in its supervision file (including its correspondence with other bodies), do not constitute, unconditionally, confidential information that is covered by the obligation to maintain professional secrecy. Only information (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of investment firms by the directive, is to be so classified.

Next, the Court explained that information that could constitute business secrets loses, generally, its secret nature when it is at least 5 years old. Exceptionally, this may not be the case where a party relying on its secrecy shows that, despite its age, the information still constitutes an essential element of its commercial position or that of interested third parties. The Court nonetheless observed that such considerations have no bearing in relation to information the confidentiality of which might be justified for reasons other than the importance of that information with respect to the commercial position of the undertakings concerned, such as information relating to prudential supervision methodology and strategy.

Lastly, the Court made clear that the Member States remain free to extend the protection against disclosure to the entire contents of the supervision files of the competent authorities or, conversely, to permit access to information that is in the possession of the competent authorities which is not confidential information within the meaning of Directive 2004/39. The sole aim of the directive is to impose on the competent authorities the obligation to refuse, as a general rule, to disclose confidential information.

In the second judgment, delivered on 13 September 2018, the Court adjudicated on *whether Directive 2013/36* [122] *precludes national financial supervisory authorities from disclosing confidential information to a person who so requests in order to be able to institute civil or commercial proceedings with a view to protecting proprietary interests which were prejudiced as a result of the compulsory liquidation of a credit institution.* The main proceedings arose from an action brought by a private individual against the Bank of Italy, the Italian banking supervisor, concerning the latter's decision to refuse him access to a number of documents regarding the supervision of a credit institution that was compulsorily wound up. The applicant had submitted the request for access in order to assess whether he could potentially bring proceedings against the Bank of Italy for the pecuniary loss he claimed to have suffered.

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

121| Judgment of the Court of 12 November 2014, ***Altmann and Others*** (C-140/13, EU:C:2014:2362).

122| Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

The Court pointed out that by the third subparagraph of Article 53(1) of Directive 2013/36, the EU legislature sought to allow the competent authority to disclose confidential information not concerning third parties involved in attempts to rescue the credit institution, for use in civil or commercial proceedings, only to persons directly concerned by the bankruptcy or compulsory liquidation of the credit institution, under the supervision of the competent courts. In that context, the needs of the proper administration of justice would be undermined if the applicant were obliged to bring civil or commercial proceedings in order to obtain access to confidential information in the possession of the competent authorities.

Consequently, according to the Court, the possibility of excluding the obligation of professional secrecy, pursuant to the third subparagraph of Article 53(1) of that directive, requires that the request for disclosure must relate to information in respect of which the applicant puts forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of civil or commercial proceedings which are under way or to be initiated, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used. In any event, it is for the competent authorities and courts, before disclosing each piece of confidential information requested, to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality of the information covered by the obligation of professional secrecy.

XVI. Social policy

In relation to social policy, several judgments deserve to be mentioned. They concern the principle of equal treatment in employment and social security; the protection of pregnant workers and workers who have recently given birth or who are breastfeeding; the protection of fixed-term workers; the organisation of working time; the right to paid annual leave; and the interpretation of EU rules on the coordination of social security systems.

1. Equal treatment in employment and social security

In its judgment in ***Ruiz Conejero*** (C-270/16, EU:C:2018:17), delivered on 18 January 2018, the Court was required to rule *on the compatibility with Directive 2000/78* [123] *of the dismissal of an employee due to intermittent absences from work, even where justified, resulting from illnesses linked to his disability.* The main proceedings concerned a cleaning agent whose various health problems had led to the recognition of his disability. He had been dismissed on the ground that the cumulative duration of his absences, albeit justified, exceeded the limits laid down in national law in the Workers' Statute. The person concerned claimed that his dismissal constituted discrimination based on disability.

After recalling that, in given circumstances, the obesity of a worker, which entails a limitation of capacity capable of hindering his full and effective participation in professional life on an equal basis with other workers, is covered by the concept of 'disability' within the meaning of Directive 2000/78, the Court found that, compared with a worker without a disability, a worker with a disability has the additional risk of being absent by reason of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence because of illness. Since the national rule at issue on termination of the employment contract applied in the same

123| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

way to persons with disabilities as to persons without disabilities who have been absent from work, the Court considered that it is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78. However, the Court took the view that combating absenteeism at work may be regarded as a legitimate aim, within the meaning of that provision, since it concerns a measure of employment policy. That being the case, it invited the referring court to take account of all factors for the purpose of assessing whether the national legislation at issue went beyond what is necessary to achieve the aim pursued.

Therefore, the Court held that Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a disability suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, does not go beyond what is necessary in order to achieve that aim, which is a matter for the referring court to assess.

In the judgments in ***Egenberger*** and ***IR***, also presented in Subsection 1 of Section II 'Fundamental rights' of this report, the Grand Chamber adjudicated on *the interpretation of Directive 2000/78 in the light of the occupational activities of churches and other organisations the ethos of which is based on religion or belief* and, in particular, on the question of effective judicial review of conditions of a religious nature for positions within a church, or establishments under the authority of a church, in the light of Articles 21 and 47 of the Charter.

In the judgment in ***Egenberger*** (C-414/16, EU:C:2018:257), delivered on 17 April 2018, the main proceedings concerned the rejection of a job application submitted by a person of no denomination for a position with Protestant Work for Diaconate and Development, an association governed by private law which is an auxiliary organisation of the Protestant Church in Germany. According to the offer of employment, applicants had to belong to a Protestant church or a church belonging to the Working Group of Christian Churches in Germany. Since the applicant considered that she had been discriminated against on grounds of religion because she was not called to an interview, she sued Protestant Work in the German courts to secure compensation.

The Court held that in accordance with Article 4(2) of Directive 2000/78, Member States may maintain national provisions such as those applicable in the main action, under which organisations the ethos of which is based on religion or belief may lay down, in the context of recruitment procedures, a requirement related to religion or belief. That possibility is, however, subject to the condition set out in that provision that 'a person's religion or belief [must] constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.

Since the applicable national law in the main proceedings limited the judicial review of compliance with that condition to a review of plausibility on the basis of the church's self-perception, the referring court enquired whether such a restricted review was consistent with Directive 2000/78.

The Court first noted that the objective of Article 4(2) of Directive 2000/78 is to ensure a fair balance between the right of autonomy of churches (and other organisations whose ethos is based on religion or belief), on the one hand, and, on the other hand, the right of workers not to be discriminated against on grounds of religion or belief, inter alia in the context of recruitment procedures. In that respect, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights. Where a church (or other organisation whose ethos is based on religion or belief) asserts, in support of an act or decision such as the rejection of an application for employment by it, that by reason of the nature of the activities in question or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational

requirement, having regard to the ethos of that church, it must be possible for such an assertion to be the subject of effective judicial review in accordance with Article 47 of the Charter, such review not being contrary to Article 17 TFEU.

Concerning the concept of 'genuine, legitimate and justified occupational requirement' within the meaning of Article 4(2) of Directive 2000/78, the Court held that such a requirement must be necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must, moreover, comply with the principle of proportionality.

The judgment in ***IR*** (C-68/17, EU:C:2018:696), delivered on 11 September 2018, was concerned with the dismissal by a German Catholic hospital of a head doctor, a Catholic, because he had remarried in a civil ceremony after divorcing his first wife whom he had married in accordance with the Roman Catholic rite. The employment contract between the head doctor and the Catholic hospital referred to canon law, which considered a remarriage of that kind to be a serious breach of the head doctor's duty of loyalty to the ethos of the hospital, warranting his dismissal.

In line with the judgment in *Egenberger*, the Court recalled that the decision of a church or an organisation the ethos of which is based on religion or belief to subject, under national law, its employees performing managerial duties to different requirements to act in good faith and with loyalty to that ethos depending on the faith or lack of faith of such employees had to be amenable to effective judicial review. That review must make it possible to ensure, bearing in mind inter alia the nature of the occupational activities concerned or the context in which they are carried out, that the criteria set out in Article 4(2) of Directive 2000/78 are satisfied and that the religion or belief is a genuine, legitimate and justified occupational requirement in the light of the ethos of the church at issue, with due regard to the principle of proportionality. In the instant case, the Court considered that adherence to the notion of marriage advocated by the Catholic Church did not appear to be a genuine requirement of the occupational activity at issue, namely the provision by the applicant, in a hospital setting, of medical advice and care and the management of the internal medicine department which he headed. This is moreover corroborated by the fact that positions of medical responsibility entailing managerial duties similar to that occupied by the applicant were entrusted to employees of the hospital who were not of the Catholic faith.

By its judgment in ***MB (Change of gender and retirement pension)*** (C-451/16, EU:C:2018:492), delivered on 26 June 2018, the Grand Chamber of the Court adjudicated on *Directive 79/7* [124] *on equal treatment for men and women in matters of social security benefits.* In this case, UK legislation set different retirement ages for women born before 6 April 1950 and men born before 6 December 1953, namely 60 and 65, respectively. Here, an individual who was born a male and had married a woman, and who subsequently underwent sex reassignment surgery, was refused, as a woman, a retirement pension because she did not hold a full certificate of recognition of her change of gender, something which could be obtained only after the annulment of her marriage, when she wished to remain married.

Noting that the legislation at issue treated less favourably persons who have changed gender after marrying than it treated persons who have retained their birth gender — since the requirement in dispute that the marriage must be annulled applied only to the former — the Court considered that the legislation was liable to be incompatible with Directive 79/7 if the respective situation of those two categories of person was comparable. In the light of the purpose and the conditions for the grant of the pension at issue, designed to

124| Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

protect against the risks of old age by conferring on the person concerned a right to a retirement pension acquired on the basis of the contributions paid during that person's working life, irrespective of marital status, the Court considered that those situations were indeed comparable.

Consequently, and since the objective invoked by the UK Government of avoiding marriage between persons of the same sex does not come within any of the derogations, permitted under Directive 79/7, from the prohibition of discrimination on grounds of sex, the Court concluded that the legislation at issue constituted direct discrimination on grounds of sex and was, therefore, incompatible with Directive 79/7.

2. Protection of pregnant workers and workers who have recently given birth or who are breastfeeding

In its judgments in *Porras Guisado* and *González Castro*, the Court adjudicated on *the protection afforded by Directive 92/85* [125] *to pregnant workers and workers who have recently given birth or who are breastfeeding.*

In the judgment in ***Porras Guisado*** (C-103/16, EU:C:2018:99), delivered on 22 February 2018, the Court considered *the protection afforded to pregnant workers in the context of a collective redundancy within the meaning of Directive 98/59*. [126] In this instance, a Spanish company had opened a period of consultation with its workers' representatives with a view to carrying out a collective redundancy. In accordance with the agreement drawn up by the special negotiating body establishing the criteria to be applied in selecting the workers to be made redundant as well as the criteria for establishing priority status for retention in the company, the company notified a worker, who was pregnant at the time, of her dismissal by letter. The worker in question challenged her dismissal before the courts.

The Court held that Directive 92/85 does not preclude national legislation which allows the dismissal of a pregnant worker on account of a collective redundancy. Although a dismissal decision taken for reasons essentially connected with the worker's pregnancy is incompatible with the prohibition on dismissal laid down in that directive, a dismissal decision taken during the period from the beginning of pregnancy to the end of the maternity leave for reasons unconnected with the worker's pregnancy is not, by contrast, contrary to Directive 92/85, provided that the employer gives substantiated grounds for dismissal in writing and that the dismissal of the person concerned is permitted under the legislation and/or practice of the Member State concerned. It follows that reasons not related to the individual worker concerned, which may be relied on in the context of collective redundancies within the meaning of Directive 98/59, fall within the exceptional cases not connected with the condition of pregnant workers within the meaning of Directive 92/85.

As regards, moreover, the employer's obligation to give substantiated grounds for dismissal in writing, this may be limited to setting out the reasons not related to the pregnant worker for making the collective redundancy (namely, economic or technical reasons or reasons relating to the undertaking's organisation or production), provided that the objective criteria chosen to identify the workers to be made redundant are cited.

125| Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1).

126| Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

Furthermore, the Court held that Directive 92/85 precludes national legislation which does not prohibit, in principle, the dismissal of a worker who is pregnant, has recently given birth or is breastfeeding as a preventative measure, but which provides, by way of reparation, only for that dismissal to be declared void when it is unlawful. In that respect, the Court considered that protection by way of reparation, even if it leads to the reintegration of the worker dismissed and the payment of wages not received because of dismissal, cannot replace protection by way of prevention.

Lastly, the Court took the view that Directive 92/85 does not preclude national legislation which, in the context of a collective redundancy, makes no provision for pregnant workers and workers who have recently given birth or are breastfeeding to be afforded, prior to that dismissal, priority status in relation to being either retained or reassigned to another post. Nevertheless, since that directive contains only minimum requirements, it is open to Member States to provide higher protection for pregnant workers, workers who have recently given birth and workers who are breastfeeding.

By its judgment in ***González Castro*** (C-41/17, EU:C:2018:736), delivered on 19 September 2018, the Court also ruled on the question of *the protection of the safety and health of workers who are breastfeeding and who carry out shift work performed in part at night.* In the present case, the applicant, a security guard who performed her duties on the basis of rotating shifts, part of which were worked at night, had sought the suspension of her employment contract and the grant of an allowance for risks during breastfeeding. To that end, she had asked the body providing cover for risks relating to accidents at work and occupational diseases to issue her with a medical certificate attesting to the existence of a risk to breastfeeding posed by her work. That request was refused.

In the first place, the Court held that Directive 92/85 applies to a situation in which the worker concerned does shift work during which only part of her duties are performed at night. Since that directive does not contain any details as regards the exact scope of the concept of 'night work' laid down in Article 7, the Court considered that the work at issue had to be regarded as performed during 'night time' within the meaning of Directive 2003/88 [127] and that the person concerned should therefore be classified as a 'night worker' in the light of that directive. The Court took the view that Directive 92/85 should not be interpreted either less favourably than Directive 2003/88, or in a way contrary to the purpose of Directive 92/85, which is to strengthen the protection enjoyed by pregnant workers and workers who have recently given birth or are breastfeeding. In order to benefit from that protection in the context of night work, the worker concerned must however submit a medical certificate stating that this is necessary for her safety or health.

In the second place, the Court recalled that under Directive 2006/54, [128] the Member States are required to take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment. Next, the Court found that the rules of reversal of the burden of proof apply provided that the worker concerned adduces factual evidence to suggest that the assessment of the risks posed by her work did not include a specific assessment taking into account her individual situation and thus permitting the presumption that there is direct discrimination on the grounds of sex.

127| 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).

128| Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

Likewise, the assessment of the risks posed by the work of pregnant workers and workers who have recently given birth or are breastfeeding cannot be subject to less stringent requirements than those applying under the general scheme established by that directive which sets out the actions to be taken in relation to all activities liable to involve a specific risk to those workers. That assessment must include a specific assessment taking into account the individual situation of the worker concerned in order to ascertain whether her health or safety, or that of her child, is exposed to a risk. If there is no such assessment, the situation amounts to less favourable treatment of a woman related to pregnancy or maternity leave, within the meaning of Directive 92/85, and constitutes direct discrimination on grounds of sex, within the meaning of Directive 2006/54, enabling the application of the rules of reversal of the burden of proof.

3. Protection of fixed-term workers

In its judgments in ***Grupo Norte Facility*** (C-574/16, EU:C:2018:390) and ***Montero Mateos*** (C-677/16, EU:C:2018:393), delivered on 5 June 2018, the Grand Chamber of the Court adjudicated on *the interpretation of Clause 4(1) of the framework agreement on fixed-term work,* [129] *which prohibits fixed-term workers being treated in a less favourable manner than comparable permanent workers unless different treatment is justified on objective grounds.*

In the first case, a fixed-term worker had replaced another worker who had taken partial retirement. The relief employment contract of the former terminated when the replaced worker took full retirement. The second case concerned a fixed-term worker hired on the basis of a temporary replacement contract in order to replace a permanent worker and subsequently to cover a vacant post temporarily. After the organisation of a recruitment procedure, the post held by the fixed-term worker was assigned to a person who had been selected following that procedure and the employer terminated the interested person's contract upon its expiry. The fixed-term workers concerned thus brought an action, in the first case, against the refusal to offer a permanent contract at the end of the fixed-term contract and, in the second case, against the termination of the contract upon expiry of the agreed term. Under Spanish law, compensation was payable at the end or upon the termination of a fixed-term contract on objective grounds. By contrast, no compensation was payable at the end of a temporary replacement contract and less compensation was payable at the end of a relief contract than that provided for in the event of termination of a permanent contract. The grant and amount of the compensation concerned was therefore at issue in these two cases.

The Court noted, first of all, that Clause 4(1) of the framework agreement prohibits, with regard to employment conditions, less favourable treatment of fixed-term workers as compared with permanent workers, on the sole ground that they are employed for a fixed term, unless different treatment is justified on objective grounds.

Next, the Court held that the termination of the relief and temporary replacement contracts took place in a significantly different context, from a factual and legal point of view, to that in which the employment contract of a permanent worker is terminated on one of the grounds set out in Spanish law. It follows from the definition of 'fixed-term contract' in Clause 3(1) of the framework agreement that a contract of that kind ceases to have any future effect on expiry on the term stipulated in the contract, that term being identified as the completion of a specific task, a specific date being reached or the occurrence of a specific event. Thus, the parties to a fixed-term employment contract such as a relief contract or a temporary replacement contract

129| Framework agreement on fixed-term work concluded on 18 March 1999, which is annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

are aware, from the moment of its conclusion, of the date or event which determines its end. That term limits the duration of the employment relationship without the parties having to make their intentions known in that regard after entering into the contract.

By contrast, the termination of a permanent employment contract on one of the grounds set out in the applicable law, on the initiative of the employer, is the result of circumstances arising which were not foreseen at the date the contract was entered into and which disrupt the normal continuation of the employment relationship. Thus, it is precisely in order to compensate for the unforeseen nature of the termination of the employment relationship for such a reason and, accordingly, the frustration of any legitimate expectation the worker may have had at that date as regards the stability of that relationship, that Spanish law requires compensation equivalent to 20 days' remuneration per year of service to be paid to the dismissed worker. The Court thus concluded that the specific, or different, purposes, under Spanish law, of the compensation amounts at issue in the cases before the court, and the specific context in which those amounts are paid, constitute objective grounds justifying the different treatment at issue between fixed-term workers and permanent workers.

In the second case, the Court pointed out, however, that the person concerned could not have known, at the time she entered into her temporary replacement contract, the exact date on which the post she occupied under that contract would be permanently filled, nor that the duration of that contract would be unusually long. Therefore, it invited the referring court to consider whether, in the light of the fact that the point at which the contract would end was unforeseeable and its unusually long duration, the contract should be redefined as a permanent contract.

4. Organisation of working time

In the judgment in ***Sindicatul Familia Constanţa and Others*** (C-147/17, EU:C:2018:926), delivered on 20 November 2018, the Court, sitting as the Grand Chamber, was called upon to rule on the *scope of Directive 2003/88, read in conjunction with Directive 89/391 to encourage improvements in the safety and health of workers at work.* [130] The case concerned foster parents responsible for taking into their own homes, on a full-time basis, children who have been withdrawn from the custody of their parents permanently or temporarily and to provide for the upbringing and maintenance of those children. Care giving constituted their principal activity in return for which they received compensation from the competent authority with which they had signed an employment contract. In view of the children's needs, their entitlement to take annual leave without the children was conditional on securing authorisation from the employer. Furthermore, they did not receive additional compensation for the fact that they must continuously attend to the children's needs without having the right to predetermined rest periods. A number of those foster parents submitted a request seeking a 100% increase in their base salary in respect of work performed on weekly rest days and during statutory leave and public holidays, as well as compensation equal to the allowance relating to paid annual leave.

The Court held that although such foster parents are 'workers' within the meaning of Directive 2003/88, the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into the household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88, which is defined by reference to the scope of Directive 89/391.

130| Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

According to the Court, since the work contributes to the protection of minors, which is a task in the public interest forming part of the essential functions of the State, and the specific nature of that activity compared to other child-protection-related activities results from the fact that it aims to integrate the foster child on a continuous and long-term basis into the home and family of the foster parent, it must be regarded as falling within the first subparagraph of Article 2(2) of Directive 89/391, under which that directive is not applicable where characteristics peculiar to certain specific public service activities inevitably conflict with it.

The Court, in particular, made clear that the integration, on a continuous and long-term basis, into the home and family of a foster parent, of children who on account of their difficult family situation are particularly vulnerable, constitutes an appropriate measure to safeguard the best interests of the child, as enshrined in Article 24 of the Charter. In those circumstances, regularly granting foster parents the right to be separated from their foster child after a certain number of hours of work, or during periods such as weekly or annual rest days, which are generally considered opportune times to develop family life, would go directly against the objective pursued by the national authorities to integrate foster children, on a continuous and long-term basis, into the home and family of the foster parent.

As regards Article 31(2) of the Charter, which lays down the fundamental right to paid annual leave, the Court also explained that Romanian law requires that the contract concluded between the foster parent and the employer include provisions relating to the planning of the foster parent's free time in accordance with, inter alia, the programme of the foster child, and grants foster parents a right to paid annual leave, but makes their right to take that leave without their foster child contingent on authorisation from the employer, who must ensure the successful execution of the task of protecting the child concerned. It therefore considered that the statutory limitations placed on those foster parents' right to periods of daily and weekly rest and to paid annual leave respect the essence of that right and are necessary for the achievement of the public service objective, recognised by the European Union, namely the protection of the best interests of the child.

5. Right to paid annual leave

As regards the right to paid annual leave, five judgments are worthy of note. The first concerns the issue of taking parental leave into account when determining a worker's entitlement to paid annual leave. Three other judgments deal with paid annual leave not taken and, in particular, one of those judgments considers whether a deceased worker's right to an allowance in that respect can be transferred by inheritance. The fifth judgment tackles the question of taking account of periods of short-time work for the purpose of calculating the remuneration to be paid in respect of paid annual leave.

By its judgment in ***Dicu*** (C-12/17, EU:C:2018:799), delivered on 4 October 2018, the Grand Chamber of the Court adjudicated on whether *the amount of time spent by a worker on parental leave during the reference period should be treated as a period of actual work for the purpose of determining paid annual leave entitlement under Article 7 of Directive 2003/88.* The main proceedings concerned a Romanian magistrate who, after taking maternity leave, took parental leave, lasting various months in 2015, in order to care for a child under the age of two, immediately following which she took 30 days of paid annual leave. She subsequently asked her employer to allow her to take the remaining 5 days of paid annual leave to which she claimed she was entitled in respect of the current year. That request was rejected on the ground that, under Romanian law, the duration of paid annual leave is commensurate with the period of time actually worked during the current year and, in that regard, the period of parental leave the person concerned took in 2015 could not be regarded as a period of actual work for the purpose of determining her paid annual leave entitlement.

After noting that the right to paid annual leave, as set out in Article 31(2) of the Charter, of at least 4 weeks, laid down in Article 7 of Directive 2003/88, is regarded as a particularly important principle of EU social law, the Court observed that the purpose of the right to paid annual leave is based on the premiss that the worker actually worked during the reference period. The objective of allowing the worker to rest presupposes that the worker has been engaged in activities which justify, for the protection of his safety and health as provided for in Directive 2003/88, his being given a period of rest, relaxation and leisure. Accordingly, entitlement to paid annual leave must, in principle, be determined by reference to the periods of actual work completed under the employment contract.

The Court stated that, admittedly, under its case-law, in certain specific situations in which workers are unable to perform their duties because they are, for instance, on duly certified sick leave or maternity leave, the right to paid annual leave cannot be made subject to a condition that the worker has actually worked. In those situations, the workers at issue are to be treated in the same way as those who have in fact worked during the period in question. [131] According to the Court, the situation of workers on parental leave is nevertheless different from that resulting from an inability to work due to their state of health or the situation of a worker exercising her right to maternity leave. First and foremost, parental leave is not unforeseeable and, in most cases, is a reflection of the worker's wish to take care of a child. Furthermore, a worker on parental leave is not subject to physical or psychological constraints caused by an illness. Unlike parental leave, maternity leave is intended, moreover, to protect a woman's biological condition during pregnancy and, thereafter, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth. Against that background, the Court concluded that Article 7 of Directive 2003/88 is to be interpreted as not precluding a provision of national law which, for the purpose of determining a worker's entitlement to paid annual leave, as guaranteed by that article for a worker in respect of a given reference period, does not treat the amount of time spent by that worker on parental leave during that reference period as a period of actual work.

In its judgments in ***Kreuziger*** (C-619/16, EU:C:2018:872) and ***Max-Planck-Gesellschaft zur Förderung der Wissenschaften*** (C-684/16, EU:C:2018:874), delivered on 6 November 2018, [132] the Grand Chamber of the Court held that national legislation under which a worker automatically loses any paid annual leave not taken before the end of the reference period to which that leave relates or before the termination of the employment relationship, without payment of an allowance in lieu thereof, where he has not asked to exercise his right to annual leave in good time, was incompatible with Article 7 of Directive 2003/88 and Article 31(2) of the Charter. In the main actions, workers had been refused, pursuant to such national legislation, payment of an allowance in lieu of paid leave not taken before the end of their employment relationship. One particularity of the *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* case was that, approximately 2 months before the employment relationship was terminated, the employer had invited the worker to take his leave, but did not force him to do so.

The Court recalled, first, that where an employment relationship is terminated, the worker is entitled under Article 7(2) of Directive 2003/88 to an allowance in lieu of annual leave not taken. Next, the Court considered that where national law provides that in the event that the worker did not ask to exercise his right to paid annual leave prior to the termination of the employment relationship, he automatically loses that right and the corresponding allowance in lieu of leave not taken, without prior verification that the worker was in fact given the opportunity, in particular through the provision of sufficient information by the employer, to exercise that right, fails to have regard to the limits which are binding on Member States when specifying the conditions

131| See, in that regard, judgments of the Court of 24 January 2012, ***Dominguez*** (C-282/10, EU:C:2012:33); of 20 January 2009, ***Schultz-Hoff and Others*** (C-350/06 and C-520/06, EU:C:2009:18); and of 18 March 2004, ***Merino Gómez*** (C-342/01, EU:C:2004:160).

132| These judgments are also presented under Section II 'Fundamental rights'.

for the exercise of that right. However, if the employer is able to discharge its burden of proving that it was deliberately and in full knowledge of the ensuing consequences that the worker refrained from taking the paid annual leave to which he was entitled after having been given the opportunity actually to exercise his right thereto, Article 7 of Directive 2003/88 and Article 31(2) of the Charter do not preclude the loss of that right or, in the event of the termination of the employment relationship, the corresponding absence of an allowance in lieu of the paid annual leave not taken. [133]

In the judgment in ***Bauer and Willmeroth*** (C-569/16 and C-570/16, EU:C:2018:871) of 6 November 2018, the Grand Chamber of the Court again adjudicated on *the right of workers to paid annual leave, guaranteed by Article 7 of Directive 2003/88 and Article 31(2) of the Charter, specifically whether a deceased worker's right to an allowance in lieu of leave not taken may be passed on by inheritance to his heirs.* Inter alia, the Court confirmed [134] that it follows not only from Article 7(2) of Directive 2003/88 but also from Article 31(2) of the Charter that, in order to prevent the fundamental right to paid annual leave acquired by that worker from being retroactively lost, including the financial aspect of that right, the right of the person concerned to an allowance in lieu of leave which has not been taken may be passed on by inheritance to his legal heirs. [135]

In its judgment in ***Hein*** (C-385/17, EU:C:2018:1018), delivered on 13 December 2018, the Court ruled on *the possibility of taking account of periods of short-time work for the purpose of calculating the remuneration to be paid in respect of paid annual leave guaranteed by Article 7 of Directive 2003/88.* The dispute in the main proceedings was between a German worker and his employer concerning the calculation of remuneration for paid leave, namely the payment to which the worker was entitled in respect of his paid leave. Having regard to the worker's periods of short-time work during the reference year, the employer had calculated the amount of his remuneration for paid leave on the basis of a gross hourly wage that was lower than his normal wage. In that regard, the employer had taken account of the provisions of a collective agreement governing the employment relationship.

The Court first of all considered that an increase in the entitlement to paid annual leave beyond the minimum required by Article 7(1) of Directive 2003/88 or the possibility of obtaining entitlement to unbroken paid annual leave are measures favourable to workers which go beyond the minimum requirements laid down in that provision and, as a result, are not governed by it. Those measures cannot, however, serve to compensate for the negative effect that a reduction in the remuneration due for annual leave has on the worker without undermining the right to paid annual leave under that provision, an integral part of which is the right for the worker to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment.

Accordingly, the Court held that Article 7(1) of Directive 2003/88 and Article 31(2) of the Charter must be interpreted as precluding national legislation which, for the purpose of calculating remuneration for paid annual leave, allows collective agreements to provide for account to be taken of reductions in earnings resulting from the fact that during the reference period there were days when no work was actually performed owing to short-time working, with the consequence that the worker receives, for the duration of the minimum period of annual leave to which he is entitled under Article 7(1) of the directive, remuneration for paid leave that is lower than the normal remuneration which he receives during periods of work.

133| As regards the possibility of relying on Article 31 of the Charter in disputes between private parties, see the presentation of these judgments in Section II.1 'Possibility of relying on the Charter in disputes between individuals'.

134| See, in that regard, judgment of 12 June 2014, ***Bollacke*** (C-118/13, EU:C:2014:1755).

135| As regards the possibility of relying on Article 31 of the Charter in disputes between private parties, see the presentation of this judgment in Section II.1 'Possibility of relying on the Charter in disputes between individuals'.

The Court took the view that it was not appropriate to limit the temporal effects of its judgment and that EU law must be interpreted as precluding national courts from protecting, on the basis of national law, the legitimate expectation of employers that the case-law of the highest national courts, which confirmed the lawfulness of the provisions of the collective agreement at issue concerning paid annual leave, will continue to apply.

6. Coordination of social security systems

In this field, reference should be made to the judgments in *Altun and Others* and *Alpenrind and Others* relating to the posting of workers. These judgments provide clarification on the effects of the E 101 certificate, now the A 1 certificate, by which the competent institution of the Member State in which an undertaking employing the posted workers is established declares that its own social security system will remain applicable to those workers.

In ***Altun and Others*** (C-359/16, EU: C:2018:63), delivered on 6 February 2018, the Grand Chamber of the Court ruled on *whether the courts of the host Member State may, in the context of Regulation No 1408/71,* [136] *annul or disregard an E 101 certificate,* [137] *where that certificate was fraudulently obtained or relied on.* At issue in the main proceedings was the issue by the competent Bulgarian institution of E 101 certificates, showing that Bulgarian workers posted by Bulgarian undertakings to work in Belgium were registered for social security. A judicial investigation conducted in Bulgaria through letters rogatory, ordered by a Belgian investigating magistrate, had found that those Bulgarian undertakings carried out no significant activity in Bulgaria. The Belgian authorities thus sent to the competent Bulgarian institution a reasoned request for review or withdrawal of the certificates at issue. In its reply, the competent Bulgarian institution sent a summary of the certificates, without giving any consideration to the facts established by the Belgian authorities.

The Court first of all recalled its case-law, [138] under which in so far as the E 101 certificate establishes a presumption that the worker concerned is properly registered with the social security system of the Member State in which the undertaking employing him is established, it is binding on the competent institution of the Member State in which that person actually works. For as long as an E 101 certificate is not withdrawn or declared invalid, the competent institution of the Member State in which an employee actually works must take account of the fact that that person is already subject to the social security legislation of the Member State in which the undertaking employing him is established, and that institution cannot therefore subject the worker in question to its own social security system.

136| Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971, First Series (II), p. 416), in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) and Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1).

137| This is a standard form drawn up by the Administrative Commission on Social Security for Migrant Workers, known since 1 May 2010 as certificate A 1 certificate.

138| Judgment of 27 April 2017, ***A-Rosa Flussschiff*** (C-620/15, EU:C:2017:309).

However, the Court considered that the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law. Consequently, it held that if the institution that issued the E 101 certificates, before which the institution of the Member State to which the workers have been posted has brought the matter, fails to carry out a review of the grounds for the issue of those certificates within a reasonable period of time, it must be possible for the concrete evidence suggesting that those certificates were obtained fraudulently to be relied on in judicial proceedings, in order to satisfy the court of the Member State to which the workers have been posted that the certificates should be disregarded.

By its judgment in ***Alpenrind and Others*** (C-527/16, EU:C:2018:669), delivered on 6 September 2018, the Court had the opportunity to *clarify the effects of an A 1 certificate, issued under Article 12(1) of Regulation No 883/2004* [139] *by the competent institution of the Member State in which the undertaking employing the posted workers is established.* The main proceedings concerned an Austrian company which, between 2012 and 2014, had used workers posted to Austria by a Hungarian company. Before and after that period, the work had been carried out by workers from another Hungarian company. Regarding the workers posted by the first Hungarian company, the Hungarian social security institution had issued, sometimes retroactively and sometimes in cases where the Austrian social security institution had already determined that the workers concerned were subject to compulsory insurance in Austria, A 1 certificates showing that the Hungarian social security regime was applicable. The decision of the Austrian social security institution establishing that the workers were subject to compulsory insurance in Austria was challenged before the Austrian courts. The Administrative Commission for the Coordination of Social Security Systems, before which the competent Austrian and Hungarian authorities had brought the matter, concluded that Hungary had wrongly declared itself competent with regard to the workers concerned and, therefore, that the A 1 certificates should be withdrawn.

The Court held, first, that an A 1 certificate issued by the competent institution of a Member State (in this case, Hungary) binds both the social security institutions and the courts of the Member State in which the activity is carried out (in this case, Austria) so long as that certificate has not been withdrawn or declared invalid by the Member State in which it was issued. The same applies where the competent authorities of the Member States concerned have brought the matter before the Administrative Commission for the Coordination of Social Security Systems and it has concluded that the certificate at issue was incorrectly issued and should be withdrawn. The Court observed that the role of the Administrative Commission is limited in that context to reconciling the views of the competent authorities of the Member States which brought the matter before it and that its conclusions have the status only of an opinion.

Next, the Court considered that an A 1 certificate may apply with retroactive effect, even though, at the date on which that certificate was issued, the competent institution of the Member State in which the activity is carried out had already decided that the worker concerned had to be subject to the compulsory insurance of that Member State.

Lastly, the Court held that where a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer, the latter employee cannot remain subject to the legislation of the Member State in which his employer normally carries out its activities. As a general rule, a worker is subject to the social security system of the Member State in which he pursues his activities, particularly in order to guarantee as effectively as possible equality of treatment for all persons occupied in the territory of a Member State. It is only under certain conditions that the EU legislature has provided for the possibility for a posted worker to remain subject to the social security system of the Member State in

139| Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35).

which his employer normally carries on its activities. Thus, the legislature excluded that possibility where a posted worker replaces another person. According to the Court, such a replacement occurs where a worker who is posted by his employer to carry out work in another Member State is replaced by another worker posted by another employer. The fact that the employers of the two workers concerned have their registered offices in the same Member State or that they may have personal or organisational links is irrelevant in that respect.

XVII. Consumer protection

In its judgment in ***Karel de Grote —Hogeschool Katholieke Hogeschool Antwerpen*** (C-147/16, EU:C:2018:320), delivered on 17 May 2018, the Court ruled that *Directive 93/13* [140] *on unfair terms in consumer contracts may apply to an educational establishment.* The dispute in the main proceedings was between an educational establishment and one of its students, who owed the establishment an amount of money in respect of registration fees and costs connected with a study trip. The parties had concluded a repayment agreement providing for interest of 10% per annum in the event of non-payment and an indemnity to cover debt collection costs.

In the first place, the Court stated that a national court giving judgment in default and which has the power, under national procedural rules, to examine of its own motion whether the term upon which the claim is based is contrary to national public policy laws is required to examine of its own motion whether the contract containing that term falls within the scope of Directive 93/13 and, if so, whether that term is unfair within the meaning of that directive.

In the second place, the Court was asked whether an educational establishment which, by contract, has granted one of its students repayment facilities for sums due by the latter, must be regarded, in the context of that contract, as a 'seller or supplier' within the meaning of Article 2(c) of Directive 93/13, with the result that the contract falls within the scope of that directive. The Court noted in that regard that the EU legislature intended a broad definition to be given to that notion. It is a functional concept, requiring determination of whether the contractual relationship is amongst the activities undertaken as part of a person's trade, business or profession. The Court considered that by providing, in that contract, a service which is complementary and ancillary to its educational activity, an educational establishment acts as a 'seller or supplier' within the meaning of Directive 93/13.

The judgment in ***Sziber*** (C-483/16, EU:C:2018:367), delivered on 31 May 2018, gave the Court the opportunity to rule on *the compatibility with Article 7 of Directive 93/13 of national legislation imposing additional procedural requirements when the fairness of terms in consumer contracts is challenged.* The main proceedings involved a dispute between an individual and a Hungarian bank concerning an application for a declaration of unfairness of certain terms inserted into a loan agreement, for the purchase of a dwelling, paid out and repaid in Hungarian forints (HUF), but registered in Swiss francs (CHF) on the basis of the exchange rate in force on the day of payment.

140| Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

The Court recalled, first of all, that EU law does not harmonise the procedures which apply for the assessment of an allegedly unfair contractual term. Those procedures are thus a matter for the *national* legal order of the Member States, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and that they afford effective judicial protection, as provided for in Article 47 of the Charter (principle of effectiveness).

In the course of its examination of compliance with the principle of equivalence, the Court noted that the imposition of additional procedural requirements on consumers deriving rights from EU law does not, in itself, mean that those procedural requirements are less favourable. Indeed, it is important to analyse the situation taking account of the role of the procedural provisions concerned in the procedure viewed as a whole, of the conduct of that procedure and of the special features of those provisions, before the national instances.

The Court therefore interpreted Article 7 of Directive 93/13 as meaning that it does not preclude, in principle, national legislation which lays down specific procedural requirements in respect of actions brought by consumers who concluded loan agreements denominated in foreign currency, containing a term on the difference in exchange rates and/or a term on the power to make unilateral amendments, provided that a finding that terms in such an agreement were unfair would restore the legal and factual situation that the consumer would have been in had those unfair terms not existed.

Lastly, as regards the scope of Directive 93/13, the Court made clear that it also applies to situations without a cross-border element. It pointed out that the rules contained in the EU legislation that harmonises, across the Member States, a specific field of law apply irrespective of the purely internal nature of the situation at issue in the main proceedings.

XVIII. Environment

1. Protection of the marine environment [141]

In its judgment in ***Bosphorus Queen Shipping*** (C-15/17, EU:C:2018:557), delivered on 11 July 2018, the Court was required to adjudicate on, inter alia, *the interpretation, as a matter of EU law, of Article 220(6) of the United Nations Convention on the Law of the Sea* [142] *and, by extension, of Article 7(2) of Directive 2005/35.* [143] This case afforded the Court the opportunity to clarify, for the first time, the circumstances in which a coastal State may, as a matter of EU law, assert jurisdiction in its exclusive economic zone against a foreign vessel in order to protect the marine environment without unduly interfering with the freedom of navigation recognised

141| Also see, in this connection, the judgment of 20 November 2018, ***Commission*** v ***Council (Antarctic MPAs)*** (C-626/15 and C-659/16, EU:C:2018:925), presented in Section XIX.3 'External competence of the European Union'.

142| United Nations Convention on the Law of the Sea, which was signed at Montego Bay on 10 December 1982 and entered into force on 16 November 1994 (United Nations Treaty Series, vol. 1833, 1834 and 1835, p. 3) (OJ 1998 L 179, p. 3). The convention was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof (OJ 1998 L 179, p. 1).

143| Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ 2005 L 255, p. 11), as amended by Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 (OJ 2009 L 280, p. 52).

by that convention. These questions were submitted in proceedings between a company which owns a Panama-registered vessel and the Rajavartiolaitos (Finnish Border Protection Agency) concerning a fine imposed by the latter on that company on account of an oil spill by that vessel in the Finnish exclusive economic zone.

First, the Court declared that it had jurisdiction to interpret the Convention on the Law of the Sea; since it was signed and approved by the European Union, its provisions are an integral part of the EU legal order and are binding on it.

Next, the Court considered that the authors of the convention intended to confer on coastal States the right to take a particularly drastic measure where the violation committed by a vessel causes or threatens to cause substantial damage to that State and there is clear objective evidence both of the commission by that vessel of a violation and of its consequences. Regarding the assessment of the seriousness of the damage caused to the resources and related interests of the coastal State, the Court made clear that account should be taken, in particular, of the cumulative nature of the damage to those resources and related interests and the foreseeable harmful consequences of discharge on them, not only on the basis of the available scientific data, but also with regard to the nature of the harmful substances contained in the discharge concerned and the volume, direction, speed and the period of time over which the oil spill spreads.

As to whether the coastal State is able to impose measures that are more stringent, but consistent with international law, than those set out in Article 7(2) of Directive 2005/35, the Court held that that provision cannot be regarded as authorising such measures, which risk disturbing the fair balance between the interests of the coastal State and those of the flag State.

2. Protected sites

On 17 April 2018, in the judgment in ***Commission*** v ***Poland (Białowieża Forest)*** (C-441/17, EU:C:2018:255), the Court, sitting as the Grand Chamber, upheld in its entirety *an action for failure to fulfil obligations alleging that the Republic of Poland had failed to fulfil its obligations arising from Directives 92/43* [144] *and 2009/147* [145] *on account of forest management operations implemented at the 'Puszcza Białowieska' Natura 2000 site,* a site of Community importance and a special protection area for birds, on the ground that those operations resulted in the loss of part of that site.

As regards Directive 92/43, the Court observed that authorisation for a plan or project on a protected site, as referred to in Article 6(3) of that directive, may be given only on condition that the competent authorities have become certain, on the date of adoption of the decision authorising implementation of the project, that it will not have lasting adverse effects on the integrity of the site concerned. In this case, the Court found that as the Polish authorities did not have all the data relevant for assessing the implications of the active forest management operations at issue for the integrity of the site concerned, they did not carry out an appropriate assessment of those implications before the authorisation decisions were adopted and, therefore, failed to fulfil their obligation arising from Directive 92/43. In addition, in order to establish an infringement of the second sentence of Article 6(3) of Directive 92/43, the Commission, in the light of the precautionary principle laid down in that provision, does not have to prove a causal relationship between the operations

144| Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

145| Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

at issue and the adverse effect on the integrity of habitats and species, it being sufficient for it to establish the existence of a probability or risk that those operations may give rise to such an effect. Active forest management operations which consist in removing and felling a significant number of trees on a Natura 2000 site may, by their very nature, cause lasting harm to the ecological characteristics of that site, since they are inevitably liable to bring about the disappearance or the partial and irreparable destruction of the protected habitats and species present on that site. Lastly, the Court pointed out that compliance with Article 12(1)(a) and (d) of Directive 92/43 requires Member States to implement concrete and specific protection measures.

Next, as regards Directive 2009/147, the Court found that that directive prohibits, in particular, the deliberate destruction of, or damage to, the nests and eggs of the bird species referred to in Annex I thereto, the removal of their nests and the deliberate disturbance of those species, in so far as the disturbance in question would be significant having regard to the objectives of the directive. In that connection, the Court considered that the decisions of the Polish authorities at issue, the implementation of which would inevitably lead to deterioration or destruction of the breeding sites or resting places of the bird species concerned, do not contain concrete and specific protection measures that would both enable deliberate interference affecting the life and habitat of those birds to be excluded from their scope and make it possible to ensure actual observance of the above prohibitions.

3. Release of genetically modified organisms (GMOs) into the environment

On 25 July 2018, by its judgment in ***Confédération paysanne and Others*** (C-528/16, EU:C:2018:583), the Court, sitting as the Grand Chamber, adjudicated *on whether organisms obtained by mutagenesis fall within the scope of Directive 2001/18 on genetically modified organisms (GMOs)* [146] *and on the conditions under which such organisms may be included in the common catalogue of varieties of agricultural plant species established by Directive 2002/53*. [147] In this case, a French agricultural union and eight associations concerned with the protection of the environment and the dissemination of information on the dangers of GMOs had asked the referring court to annul the decision of the French Prime Minister refusing their request that he revoke the national provision exempting organisms obtained by mutagenesis from the obligations imposed by the directive on GMOs.

The Court considered, first of all, that the directive on GMOs must be interpreted as meaning that organisms obtained by means of techniques/methods of mutagenesis constitute genetically modified organisms within the meaning of that provision, in so far as the techniques and methods of mutagenesis alter the genetic material of an organism in a way that does not occur naturally. By contrast, organisms obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record do not come within the scope of that directive. The Court nevertheless made clear in relation to the last point that, to the extent to which the EU legislature has not regulated those organisms, Member States have the option of defining their legal regime by subjecting them, in compliance with EU law, in particular the rules on the free movement of goods set out in Articles 34 to 36 TFEU, to the obligations laid down by the directive on GMOs or to other obligations.

146| Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (OJ 2001 L 106, p. 1).

147| Council Directive 2002/53/EC of 13 June 2002 on the common catalogue of varieties of agricultural plant species (OJ 2002 L 193, p. 1), as amended by Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 (OJ 2003 L 268, p. 1).

Next, in response to the question whether the directive on GMOs may also be applicable to organisms obtained by mutagenesis techniques that have emerged since its adoption, the Court answered in the affirmative. The risks linked to the use of these new mutagenesis techniques might prove to be similar to those that result from the production and release of a GMO through transgenesis, since the direct modification of the genetic material of an organism through mutagenesis makes it possible to obtain the same effects as the introduction of a foreign gene into that organism (transgenesis) and those new techniques make it possible to produce genetically modified varieties at a rate and in quantities quite unlike those resulting from the application of conventional methods of mutagenesis. In view of these similar risks, excluding organisms obtained by new mutagenesis techniques from the scope of the directive on GMOs would compromise the objective pursued by that directive, which is to avoid adverse effects on human health and the environment, and would fail to respect the precautionary principle which that directive seeks to implement.

Lastly, the Court held that although varieties obtained by mutagenesis which come within the scope of the directive on GMOs must satisfy a condition, laid down in Directive 2002/53, according to which a genetically modified variety may be accepted for inclusion in the 'common catalogue of varieties of agricultural plant species the seed of which may be marketed' only if all appropriate measures have been taken to avoid risks to human health and the environment, by contrast, varieties obtained by means of mutagenesis techniques which have conventionally been used in a number of applications and have a long safety record are exempt from that obligation. It would be inconsistent to impose obligations, with regard to the health and environmental risk assessment, on genetically modified varieties within the meaning of Directive 2002/53 from which they are explicitly exempted by the directive on GMOs.

4. Aarhus Convention

In its judgment in ***North East Pylon Pressure Campaign and Sheehy*** (C-470/16, EU:C:2018:185), delivered on 15 March 2018, the Court ruled on questions submitted for a preliminary ruling enquiring about the *effectiveness of judicial remedies in connection with public participation in decision-making, guaranteed by Article 9 of the Aarhus Convention* [148] *and Article 11 of Directive 2011/92*. [149] This case involved a dispute concerning the determination of costs associated with the rejection of an application for leave to apply for judicial review of the consent process prior to the installation of pylons carrying high-voltage cables with a view to connecting the electricity grids of Ireland and Northern Ireland. The national court had refused to grant leave to apply for judicial review on the ground that such judicial review would be premature because the Irish planning appeals board had not yet adopted a final decision on prior consent. The defendant had been ordered to pay costs in excess of EUR 500 000.

The Court found, in the first place, that Article 11(4) of Directive 2011/92 must be interpreted as meaning that the requirement that certain judicial procedures not be prohibitively expensive applies to a judicial procedure for determining whether leave may be granted to bring a challenge in the course of a development consent process, a fortiori where that Member State has not determined at what stage a challenge may be brought.

148| Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1).

149| Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1).

In the second place, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation.

Next, as regards the costs relating to the part of the challenge based on national environmental law, the Court interpreted Article 9(3) and (4) of the Aarhus Convention as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive also applies to the part of a challenge seeking to ensure that national environmental law is complied with. Although those provisions do not have direct effect, it is for the national court, in so far as it is at all possible, to give an interpretation of national procedural law which is consistent with them.

Lastly, the Court considered that a Member State may derogate from the requirement that procedures not be prohibitively expensive, laid down by Article 9(4) of the Aarhus Convention and Article 11(4) of Directive 2011/92, even where a challenge is deemed frivolous or vexatious, or where there is no link between the alleged breach of national environmental law and damage to the environment.

On 4 September 2018, by its judgment in ***ClientEarth*** v ***Commission*** (C-57/16 P, EU:C:2018:660), the Court, sitting as the Grand Chamber, upheld the appeal lodged by ClientEarth against a judgment of the General Court [150] dismissing its actions for the annulment of *decisions of the Commission refusing access to two impact assessments carried out by the Commission: one concerning the implementation of the 'access to justice' pillar of the Aarhus Convention and another concerning the revision of the EU legal framework on environmental inspections and surveillance at national and EU level.* The General Court had held that since disclosure of the documents at issue was liable to undermine the Commission's decision-making process for developing legislative proposals, they were covered by a general presumption of confidentiality, those documents belonging, moreover, to one and the same category of documents.

The Court first of all recalled the importance of transparency in the legislative process and noted that even though the Commission does not itself act in a legislative capacity, it is a key player in that process. According to the Court, the impact assessments at issue, which were drawn up with a view to the potential adoption of legislative initiatives, were key tools for ensuring that the Commission's initiatives and EU legislation would be developed on the basis of transparent, comprehensive and balanced information. Those documents, in view of their purpose, were therefore among those covered by Article 12(2) of Regulation No 1049/2001 [151] for which wider access should be granted. Since those documents also contained environmental information within the meaning of Regulation No 1367/2006, [152] the Court pointed out that the exception relating to the protection of the decision-making process laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001 had to be interpreted and applied all the more strictly.

150| Judgment of the General Court of 13 November 2015, ***ClientEarth*** v ***Commission*** (T-424/14 and T-425/14, EU:T:2015:848).

151| Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

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

Secondly, the Court questioned the general presumption recognised by the General Court in its judgment. Thus, the Court found that although the Commission has to be able to enjoy a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted, the General Court was wrong to consider, in essence, that the protection of the Commission's power of initiative, under Article 17(1) to (3) TEU, and the preservation of that institution's ability to exercise that power in a fully independent manner and exclusively in the general interest required, in principle, that documents drawn up in the context of an impact assessment may, generally, remain confidential until that institution has made such a decision.

XIX. International agreements

1. Interpretation of an international agreement

In the judgment in ***Western Sahara Campaign UK*** (C-266/16, EU:C:2018:118), delivered on 27 February 2018, the Court, sitting as the Grand Chamber, was required to give a preliminary ruling on a request concerning the validity of *two regulations* [153] *approving and implementing the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco* [154] *and the Protocol setting out the fishing opportunities provided for by that agreement.* [155] The validity of those acts had been challenged by an organisation whose aim is to support the recognition of the right of the Saharawi people to self-determination, on the ground that the partnership agreement and the protocol permitted the exploitation of natural resources in the waters adjacent to the territory of Western Sahara.

In the first place, the Court recalled that it has jurisdiction to rule on the interpretation of EU law and the validity of acts adopted by the EU institutions, without exception. It explained that international agreements concluded by the European Union constitute acts of the institutions of the European Union, that those agreements — inasmuch as they must be entirely compatible with the Treaties — are an integral part of the EU legal order, and that the European Union is required, when exercising its powers, to observe international law in its entirety. Consequently, the Court has jurisdiction, both in the context of an action for annulment and in that of a request for a preliminary ruling, to assess whether an international agreement concluded by the European Union is compatible with the Treaties and with the rules of international law which are binding on the European Union. That said, since international agreements concluded by the European Union are binding not only on the EU institutions, in accordance with Article 216(2) TFEU, but also on the non-member States that are parties to those agreements, a request for a preliminary ruling concerning the validity

153| Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (OJ 2006 L 141, p. 1); Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2013 L 349, p. 1); and Council Regulation (EU) No 1270/2013 of 15 November 2013 on the allocation of fishing opportunities under the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2013 L 328, p. 40).

154| OJ 2006 L 141, p. 4.

155| Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial compensation provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (OJ 2013 L 328, p. 2).

of an international agreement must be understood as relating not to the international agreement itself, but to the EU act approving the conclusion of that agreement, an act the validity of which is nonetheless capable of being reviewed in the light of the actual content of the international agreement at issue.

In the second place, regarding the ground of invalidity put forward by the applicant in the main proceedings, the Court stated that Article 11 of the partnership agreement provides that it is applicable to 'the territory of Morocco and to the waters under Moroccan jurisdiction'. Furthermore, Article 2(a), which refers to the concept of 'Moroccan fishing zone', refers to 'waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco'. Therefore, in defining what is meant by the territory of Morocco, the agreement refers to the geographical area over which Morocco exercises the fullness of the powers granted to sovereign entities by international law, to the exclusion of any other territory, such as that of Western Sahara. That being the case, Western Sahara is not covered by the concept of territory of Morocco, since such inclusion would be contrary to a number of rules of general international law that are applicable in relations between the European Union and the Kingdom of Morocco, as identified by the Court in its judgment of 21 December 2016, ***Council*** v ***Front Polisario*** (C-104/16 P, EU:C:2016:973).

Similarly, as regards waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco, the Court observed that the waters over which a coastal State is entitled to exercise sovereignty or jurisdiction, under the Convention on the Law of the Sea, are limited exclusively to the waters adjacent to its territory and forming part of its territorial sea or of its exclusive economic zone. Consequently, and taking account of the fact that the territory of Western Sahara does not form part of the territory of the Kingdom of Morocco, the waters adjacent to the territory of Western Sahara are not part of the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco, with the result that they do not fall within the scope of the partnership agreement.

Finally, as for the protocol, the Court found that although that protocol does not contain any specific provision that determines its territorial scope, various provisions therein use the expression 'Moroccan fishing zone', which also appears in the partnership agreement. That expression must be understood as referring to waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco within the meaning of the partnership agreement, so that the protocol does not cover the waters adjacent to the territory of Western Sahara, either.

Accordingly, since neither the partnership agreement nor the protocol thereto is applicable to the waters adjacent to the territory of Western Sahara, the Court concluded that there is nothing capable of calling in question the validity of the EU acts by which they were concluded.

2. Establishment of an arbitral tribunal by international agreement

In its judgment in ***Achmea*** (C-284/16, EU:C:2018:158), delivered on 6 March 2018, the Court was called upon to rule on *whether an arbitration clause in a bilateral investment treaty concluded in 1991 between the former Czechoslovakia and the Kingdom of the Netherlands was compatible with Articles 18, 267 and 344 TFEU.* In the main proceedings, the Slovak Republic, which succeeded to the rights and obligations of Czechoslovakia under the treaty following its dissolution, had brought an action before the German courts to set aside an award of an arbitral tribunal delivered on the basis of that arbitration clause.

The Court first recalled that according to settled case-law, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. As is apparent from Article 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties.

Furthermore, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other. In order to ensure the preservation of those characteristics, the Treaties established a judicial system intended to ensure coherence and unity in the interpretation of EU law by providing, in Article 19 TEU, that it is for the national courts and the Court of Justice to ensure the full application of EU law in all Member States and the judicial protection of the rights which individuals derive from EU law. Given the nature and characteristics of EU law, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States. Consequently, the arbitral tribunal established by that clause may, on that twofold basis, interpret or apply EU law, where appropriate.

However, the Court held that the arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia, due to the exceptional nature of its jurisdiction compared with that of the courts of those two Member States. Accordingly, that tribunal could not be classified as a court or tribunal of a Member State within the meaning of Article 267 TFEU, or a court common to a number of Member States, such as the Benelux Court of Justice, with the result that it was not entitled to make a reference to the Court for a preliminary ruling. In addition, since the awards delivered by that tribunal were final and not open to challenge before a national court, the bilateral investment treaty established a mechanism for settling disputes which could (i) prevent those disputes from being resolved by a national court in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of EU law, and (ii) preclude the Court from giving a ruling, if necessary, in the context of a reference for a preliminary ruling. In those circumstances, the Court held that the arbitration clause in that treaty had an adverse effect on the autonomy of EU law and was contrary to Articles 267 and 344 TFEU.

3. External competence of the European Union

On 4 September 2018, by its judgment in ***Commission*** v ***Council (Agreement with Kazakhstan)*** (C-244/17, EU:C:2018:662), the Court, sitting as the Grand Chamber, *annulled Decision 2017/477* [156] *on the position to be adopted on behalf of the European Union within the Cooperation Council established under the Partnership and Cooperation Agreement with Kazakhstan.* [157] Although the Commission, jointly with the High Representative of the European Union for Foreign Affairs and Security Policy, had adopted a proposal for a Council decision which had Article 218(9) TFEU in conjunction with Article 37 TEU as its procedural legal basis and Articles 207 and 209 TFEU as its substantive legal basis, the Council ultimately adopted the decision unanimously by

156| Council Decision (EU) 2017/477 of 3 March 2017 on the position to be adopted on behalf of the European Union within the Cooperation Council established under the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part as regards the working arrangements of the Cooperation Council, the Cooperation Committee, specialised subcommittees or any other bodies (OJ 2017 L 73, p. 15). This decision was annulled.

157| Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part (OJ 2016 L 29, p. 3).

adding, in particular, Article 31(1) TEU to the proposed legal bases. That article provides that decisions under Chapter 2 of Title V of the EU Treaty that contain specific provisions on the common foreign and security policy (CFSP) are to be taken unanimously, except where that chapter provides otherwise. The Commission challenged the use of that legal basis before the Court.

According to the Court, a decision by which the Council establishes the position to be adopted on behalf of the European Union in a body set up by an agreement, pursuant to Article 218(9) TFEU, and which concerns exclusively the CFSP must, in principle, be adopted unanimously, in accordance with the second subparagraph of Article 218(8) TFEU. On the other hand, if such a decision comprises several components or pursues a number of objectives, some of which fall within the CFSP, the voting rule applicable for its adoption must be determined in the light of its main or predominant purpose or component.

In this instance, although the partnership agreement at issue displays a number of links with the CFSP, the Court found that those links are not sufficient for it to be held that the legal basis of the decision on the signing of that agreement, on behalf of the European Union, and its provisional application had to include Article 37 TEU. First, most of the provisions of the partnership agreement fall within the common commercial policy of the European Union or its development cooperation policy. Secondly, the provisions of the partnership agreement displaying a link with the CFSP are limited to declarations of the contract-ing parties on the aims that their cooperation must pursue and the subjects to which that cooperation will have to relate, and do not determine in concrete terms the manner in which the cooperation will be implemented. Therefore, the Court concluded that the Council was wrong to include Article 31(1) TEU in the legal basis of Decision 2017/477 and that that decision was wrongly adopted under the voting rule requiring unanimity.

In the joined cases giving rise to the judgment in ***Commission*** v ***Council (Antarctic MPAs)*** (C-626/15 and C-659/16, EU:C:2018:925), delivered on 20 November 2018, the Court, sitting as the Grand Chamber, was required to adjudicate on *the division of powers between the European Union and the Member States for the purposes of decision-making within an international body, regarding the delineation between the common fisheries policy (CFP) and environmental policy.* In this case, the Court dismissed in its entirety the Commission's action for annulment (i) of a decision of the Council contained in a conclusion of the Chairman of the Permanent Representatives Committee (Coreper) of 11 September 2015, in so far as that conclusion had approved the submission, on behalf of the European Union and its Member States, to the Commission for the Conservation of Antarctic Marine Living Resources ('the CCAMLR') of a reflection paper relating to a future proposal to create a marine protected area in the Weddell Sea, and (ii) of the decision of the Council of 10 October 2016 in so far as it had approved the submission to the CCAMLR, on behalf of the European Union and its Member States, of three proposals for the creation of marine protected areas and a proposal for the creation of special areas. Unlike the Council and the Member States, the Commission considered that the creation of marine protected areas did not constitute marine protection measures falling under environmental policy and, therefore, under the area of shared competences, but measures for the conservation of marine biological resources under the common fisheries policy which come under the Union's exclusive competences and do not permit any action by the Member States alongside the EU institutions.

As regards the admissibility of the action in Case C-626/15, the Court held that whilst the function of preparing the work of the Council and of carrying out the tasks assigned by it does not give Coreper the power to take decisions, a power which belongs, under the Treaties, to the Council, the fact remains that, as the European Union is a union based on the rule of law, a measure adopted by Coreper must be amenable to judicial review where it is intended, as such, to produce legal effects and therefore falls outside the framework of that preparation and implementation function.

Next, the Court recalled, as regards the question of the legal basis, that it is necessary to have regard to objective factors such as the context, aims and content of the decisions at issue and that if an examination of an EU act reveals that it pursues several purposes or that it comprises several components and if one of

these is identifiable as the main or predominant purpose or component, whereas the others are merely incidental, that act must be based on a single legal basis, namely that corresponding to the main purpose or component. Concerning the scope of the exclusive competence of the European Union in respect of the conservation of marine biological resources under Article 3(1)(d) TFEU, the Court took the view that only the conservation of marine biological resources which is undertaken under the CFP, and which is therefore inseparable from the CFP, is referred to in that article. It is therefore only in so far as the conservation of marine biological resources is pursued under the CFP that it falls within the exclusive competence of the European Union and is, consequently, excluded from the competence that the European Union and its Member States share in the area of agriculture and fisheries. In this instance, the Court found that fisheries constituted only an incidental purpose of the reflection paper and the envisaged measures. As protection of the environment was the main purpose and component of that paper and those measures, the contested decisions were held not to fall within the exclusive competence of the European Union laid down in Article 3(1)(d) TFEU, but within the competence under Article 4(2)(e) TFEU regarding protection of the environment that it shares, in principle, with the Member States.

As for the alternative argument by which the Commission alleged that the Council had failed to have regard to the European Union's exclusive external competence on the ground that the contested decisions resulted in common rules being affected and their scope being altered, for the purposes of Article 3(2) TFEU, the Court considered that that provision had to be interpreted, in order to preserve its practical effect, as meaning that although its wording refers solely to the conclusion of an international agreement, it also applies, at an earlier stage, when such an agreement is being negotiated and, at a later stage, when a body established by the agreement is called upon to adopt measures implementing it. The Court also pointed out that there is a risk that the scope of common rules may be affected or altered such as to justify an exclusive external competence of the European Union, particularly where international commitments fall within an area which is already covered to a large extent by such rules, or where the international commitments at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness. Recalling, however, that it is for the party concerned to put forward evidence or arguments to establish that the exclusive nature of the external competence of the European Union on which it seeks to rely has been disregarded, the Court considered that, in the present case, the Commission had not brought such evidence to its attention. In particular, the Court found that the sphere of application of the international commitments concerned cannot be regarded as falling 'to a large extent' within that already covered by EU acts. [158] The Court also stated, as regards the risk of common EU rules being affected as claimed by the Commission, that the Commission had not provided sufficient evidence relating to the nature of that risk, in so far as the exercise by the European Union of its external competence in the specific context of the system of Antarctic agreements, which would have excluded the Member States, would have been incompatible with international law.

Lastly, as for whether the European Union could exercise, alone, an external competence it shares with the Member States, as hinted at in recent case-law, the Court ruled out that possibility here. It made clear that any such exercise must, in accordance with settled case-law, be done in observance of international law. To permit the European Union to have recourse, within the CCAMLR, to the power which it has to act without the participation of its Member States in an area of shared competence, when, unlike it, some of them have

158| In this case, Council Decision 13908/1/09 REV 1 of 19 October 2009 on the position to be adopted, on behalf of the European Union, in the CCAMLR for the period 2009-2014, which was replaced, for the period 2014-2019, by Council Decision 10840/14 of 11 June 2014, as well as Council Regulation (EC) No 600/2004 of 22 March 2004 laying down certain technical measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources (OJ 2004 L 97, p. 1) and Council Regulation (EC) No 601/2004 of 22 March 2004 laying down certain control measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources and repealing Regulations (EEC) No 3943/90, (EC) No 66/98 and (EC) No 1721/1999 (OJ 2004 L 97, p. 16).

the status of Antarctic Treaty consultative parties, might well, given the particular position held by the Canberra Convention within the system of Antarctic agreements, undermine the responsibilities and rights of those consultative parties — which could weaken the coherence of that system of agreements and run counter to the relevant provisions of the Canberra Convention.

C | ACTIVITY OF THE REGISTRY OF THE COURT OF JUSTICE IN 2018

By Mr **Marc-André Gaudissart**, Deputy Registrar

While the tasks entrusted to it are many and varied, in particular because of its special place in the structure of a multilingual judicial institution such as the Court of Justice of the European Union and the interface it provides between the courts of the Member States and the representatives of the parties, on the one hand, and the Members' cabinets and the institution's departments, on the other hand, the primary task of the Registry of the Court of Justice is, of course, to ensure, first and foremost, that the proceedings are properly conducted and that the cases brought before the Court of Justice are rigorously maintained, from the entry of the document instituting the proceedings in the Registry's register to the service on the parties or the court which referred it of the decision bringing the proceedings to an end.

The number of cases brought and closed by the Court of Justice therefore has a direct impact on the Registry's workload and its ability to meet the many challenges it faces, both in terms of optimal case management and computerisation of procedures in a context marked by increased attention to the protection of personal data and in terms of the broader, ongoing discussions on the changes that should be made to the texts governing the judicial architecture of the European Union with a view to ensuring, in the interests of litigants, an optimal division of jurisdiction between the Court of Justice and the General Court.

As the past year has once again been marked by a very steady pace, both in terms of cases brought and cases closed, the following lines will mainly be devoted to judicial activity, and not to the other tasks carried out by the Registry, even if they have mobilised a significant proportion of its resources.

Cases lodged

In 2018, **849 cases were lodged before the Court of Justice.** This is a new record in the institution's history, the previous record having been reached just one year earlier, with no fewer than 739 cases introduced in 2017. This very significant increase (of the order of 15%) in the number of cases brought during a year can be explained, first, by the continuous increase in the number of requests for a preliminary ruling submitted to the Court — with 568 new cases, these requests represented in fact, in 2018, some 100 more cases than in 2016 (470 cases) and almost twice as many as 10 years earlier (288 new preliminary rulings in 2008) — but also by a significant increase in the number of direct actions and appeals.

In 2018, 6 actions for annulment and 57 actions for failure to fulfil obligations (all categories combined) were brought before the Court, while the total number of new appeals, appeals against interim measures or appeals on intervention amounted to 199 in 2018 (compared with 147 in 2017). This significant increase is partly due to the increase in the number of cases brought before the General Court in previous years (2016 and 2017 in particular), but also to the increase in the number of cases closed by the General Court, largely due to the increase in the number of its judges following the reform of the European Union's judicial architecture.

If we look for a moment at the origin of the requests for a preliminary ruling — which now represent more than 70% of all cases pending before the Court of Justice — it is apparent that, with one exception, courts of all the Member States have applied to the Court of Justice over the past year, which testifies to the vitality of the preliminary ruling procedure and the confidence that national courts place in the Court of Justice to answer questions they may have about the interpretation or validity of EU law. As can be seen from the following tables, Germany and Italy still top the 'geographical' ranking of requests for a preliminary ruling — with 78 and 68 requests for a preliminary ruling made in the past year respectively — but the courts of the

other Member States were not left behind, since the number of requests they sent to the Court in 2018 in some cases doubled (Belgium and France) or even tripled (Spain and the Czech Republic) compared to the previous year. It should also be noted that there are more requests from Austria and the Netherlands (with 35 requests from each of these two States), as well as a continued upward trend in referrals from the courts of the States that joined the Union in 2004 and 2007, in particular from Poland (31 requests), Hungary (29 requests), Romania (23 requests) and Bulgaria (20 requests).

Of course, the number and increasing complexity of acts adopted by the Union's institutions are no strangers to this phenomenon. In addition to the traditional areas of referral, namely the free movement of persons, services and capital, competition, public procurement, taxation, social policy, environmental and consumer protection and transport policy, the Court of Justice has continued to deal with a large number of cases in the area of freedom, security and justice and, in particular, questions relating to asylum and immigration. For the first time, in 2018, the Court was also called upon to rule on such fundamental issues as the independence of the judiciary in the Member States and the measures to be taken, in this context, to ensure effective judicial protection for Union citizens or the possibility for a Member State unilaterally to revoke the notification of its intention to withdraw from the European Union. As a direct consequence of the United Kingdom's decision in June 2016 to leave the European Union, this case has generated unprecedented interest in the Court's history and is without doubt the first in a long series of Brexit-related cases, with so many and sensitive questions still open at the time of writing.

Finally, it should be noted that there has been a particularly high number of requests over the past year to have procedures speeded up. In 2018, the accelerated procedure was requested in 36 cases (31 in 2017), while the urgent preliminary ruling procedure was requested (or proposed) in no fewer than 19 cases (15 in 2017). This is also the highest number ever recorded by the Court in a single year. While not all these requests were followed up, they nevertheless led the Court to speed up the processing of 6 preliminary rulings and 3 fairly sensitive direct actions and the decision to apply the urgent preliminary ruling procedure was taken in no fewer than 12 cases, which resulted in a considerable increase in the workload of the members of the chamber responsible for them.

Cases closed

While the number of cases filed has been particularly high over the past year, this increase has, fortunately, been tempered by a very high number of cases closed. With **760 cases settled in 2018**, the Court closed almost 10% more cases than in 2017 (699 cases) and thus closed the highest number of cases in its history, the previous record having been set in 2014 (with 719 cases closed).

Without going into detail here on the cases closed in 2018 and their scope — in this respect, reference will be made to the developments in case-law referred to in the second part of this report — three elements will be of particular interest to the reader when reading the figures and statistics set out below.

The first element is the relative stability of the number of judgments and orders delivered by the Court over the past year. While the number of cases closed in 2018 is significantly higher than in 2017, the number of decisions delivered by the Court over the past year (684) is, for its part, fairly close to the number of decisions delivered in 2017 (654). This factor is mainly due to the similarity between several cases brought before the Court. Having received a large number of requests for a preliminary ruling in 2017, including on the interpretation of Regulation (EC) No 261/2004 on compensation to air passengers in the event of denied boarding and of

cancellation or long delay of flights, [1] the Court, in the interests of procedural economy and efficiency, joined most of these cases for the purposes of the written and oral phase of the procedure and the judgment, thereby reducing the overall number of decisions delivered.

A second key feature of the past year is undoubtedly the high number of cases settled by the Grand Chamber of the Court. While this court formation had 'only' settled 46 cases in 2017 — which is already a significant number of cases in terms of the investment involved in handling a case by a panel of 15 Members (instead of three or five) — this number has risen to no less than 80 over the past year! This figure alone is a measure of the importance and sensitivity of the issues on which the Court has been called upon to rule over the past year.

Finally, it should be noted that, despite the increasing number and complexity of the cases it has had to deal with, the Court has managed to keep the length of proceedings within extremely reasonable time limits. The average processing time for preliminary rulings in 2018 was 16 months (compared with 15.7 months in 2017), while the average processing time for direct actions and appeals was lower, with an average processing time of 18.8 months (compared with 20.3 months in 2017) and 13.4 months (compared with 17.1 months in 2017) respectively. The latter decline is largely due to increased use of orders, particularly in the field of intellectual and industrial property, where a large number of appeals against decisions delivered by the General Court were dismissed, on the basis of Article 181 of the Rules of Procedure, as manifestly inadmissible and/or manifestly unfounded. In 2018, almost half of the appeals brought before the Court of Justice were settled by order, compared with 24% of preliminary rulings settled by order (but only 7.5% on the basis of Article 99 of the Rules of Procedure, most of the orders issued last year in preliminary rulings being orders removing cases from the register or orders declaring that there is no need to adjudicate).

Cases pending

As a logical consequence of the significant increase in the number of cases filed in 2018, the number of cases pending before the Court was also on the rise since, for the first time, it exceeded 1 000 cases. As at 31 December 2018, the number of cases pending before the Court stood at 1 001 cases (916, after joinder).

It is in this context, in particular, that the request submitted by the Court of Justice in March 2018 to amend Protocol (No 3) on the Statute of the Court of Justice of the European Union must be considered. Driven by a desire to control its workload and, therefore, to preserve its ability to rule on cases brought before it within a reasonable time limit, the Court proposed to the Union legislature that part of the infringement proceedings, which it currently deals with exclusively, should be transferred to the General Court and that a mechanism should be set up at the Court of Justice for the prior admission of certain categories of appeals. In cases which have already benefited from a double examination — first by an independent Board of Appeal and then by the General Court — only appeals raising an issue of importance for the unity, coherence or development of EU law would be dealt with by the Court of Justice.

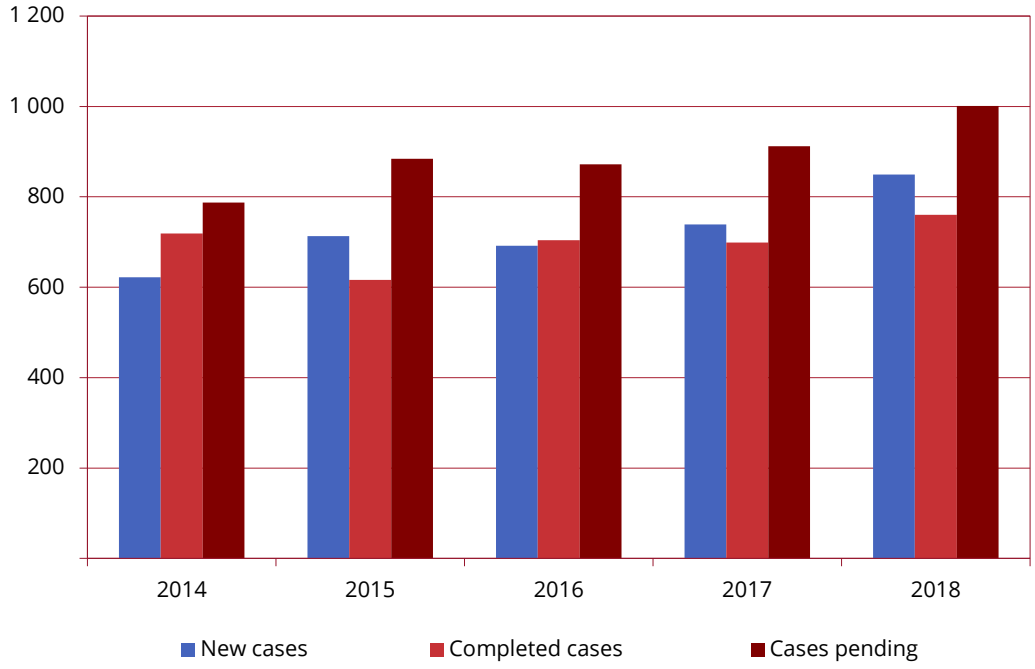
Whereas the examination of the first part of this legislative request, linked to infringements, has been postponed to a later stage by the legislator due, in particular, to the willingness of the Member States to wait for the full implementation of the reform of the Union's judicial architecture and the report to be presented by the Court of Justice, in December 2020, on the functioning of the General Court, discussions on the second part of this request were progressing well, however, at the time of writing and the prospects for the entry into force of the prior approval mechanism for appeals in 2019 were very real. This development should

1| Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

make it possible to contain, to a certain extent, the increase in the number of cases brought before the Court of Justice, without prejudice to other measures that may be proposed by the Court, when the time comes, in order to ensure that it is always in a position to fulfil its treaty mandate under the best possible conditions.

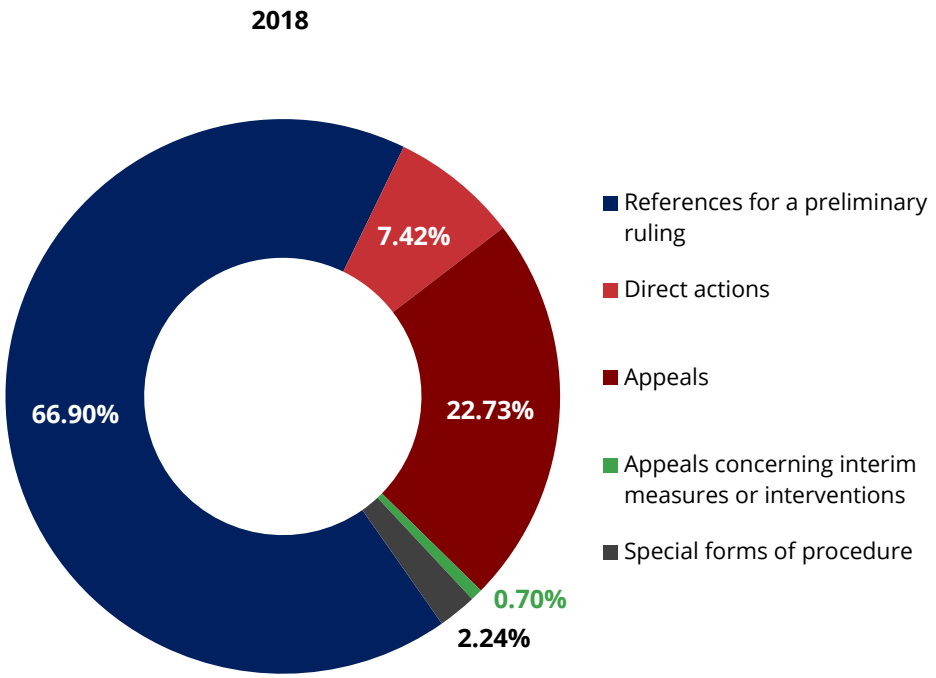
D STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE COURT OF JUSTICE

I. General activity of the Court of Justice — New cases, completed cases, cases pending (2014-2018)



	2014	2015	2016	2017	2018
New cases	622	713	692	739	849
Completed cases	719	616	704	699	760
Cases pending	787	884	872	912	1 001

II. New cases — Nature of proceedings (2014-2018)



	2014	2015	2016	2017	2018
References for a preliminary ruling	428	436	470	533	568
Direct actions	74	48	35	46	63
Appeals	111	206	168	141	193
Appeals concerning interim measures or interventions		9	7	6	6
Requests for an opinion	1	3		1	
Special forms of procedure [1]	8	11	12	12	19
Total	**622**	**713**	**692**	**739**	**849**
Applications for interim measures	3	2	3	3	6

1| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

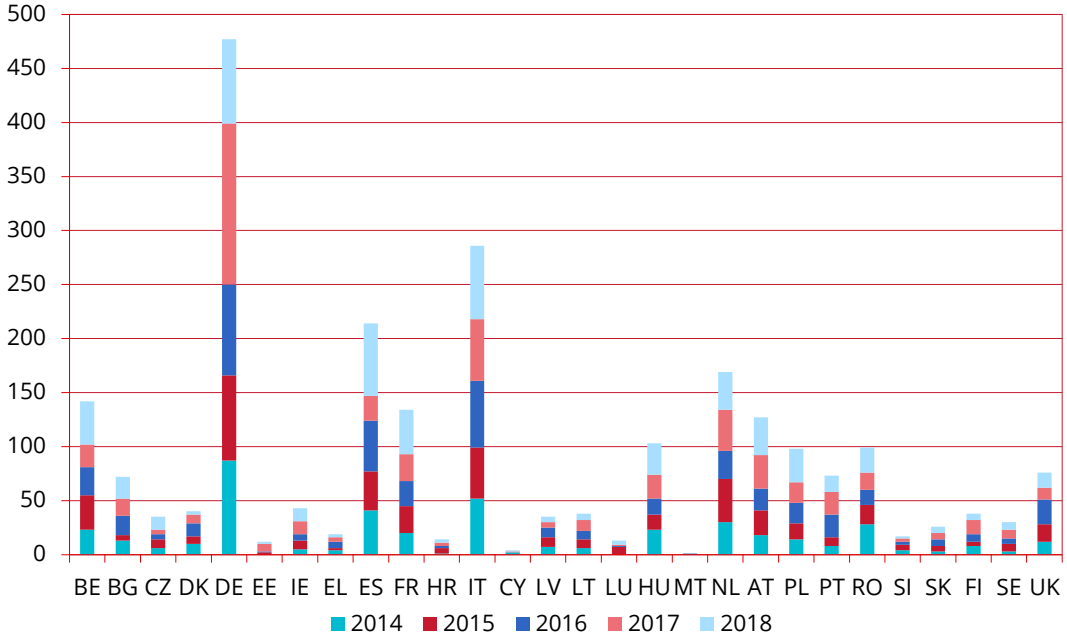
III. New cases — Subject matter of the action (2014-2018)

	2014	2015	2016	2017	2018
Access to documents	1	7	6	1	10
Accession of new States				1	
Agriculture	12	17	27	14	26
Approximation of laws	21	22	34	42	53
Arbitration clause				5	2
Area of freedom, security and justice	53	53	76	98	82
Association of the Overseas Countries and Territories		1			
Citizenship of the Union	9	6	7	8	6
Commercial policy	11	15	20	8	5
Common fisheries policy	2	1	3	1	1
Common foreign and security policy	7	12	7	6	7
Company law		1	7	1	2
Competition	23	40	35	7	25
Consumer protection	34	40	23	36	41
Customs union and Common Customs Tariff	24	29	13	14	13
Economic and monetary policy	3	11	1	7	3
Economic, social and territorial cohesion	1	3		2	1
Education, vocational training, youth and sport	1			2	
Employment	1				
Energy	4	1	3	2	12
Environment	41	47	30	40	50
External action by the European Union	2	3	4	3	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	4	6	3	6	6
Free movement of capital	7	6	4	12	9
Free movement of goods	11	8	3	6	4
Freedom of establishment	26	12	16	8	7
Freedom of movement for persons	11	15	28	16	19
Freedom to provide services	19	24	15	18	38
Industrial policy	9	11	3	6	3
Intellectual and industrial property	47	88	66	73	92
Law governing the institutions	28	24	22	26	34
Principles of EU law	23	13	11	12	29
Public health	2	10	1	1	4
Public procurement	21	26	19	23	28
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	5	2	2	1
Research and technological development and space	2	1	3	3	1
Social policy	25	32	33	43	46
Social security for migrant workers	6	7	10	7	14
State aid	32	29	39	21	26
Taxation	57	49	70	55	71
Trans-European networks	1				
Transport	29	27	32	83	39
TFEU	**612**	**702**	**676**	**719**	**814**
Protection of the general public	1				1
Safety control					1
Euratom Treaty	**1**				**2**
Principles of EU law					1
EU Treaty					**1**
Law governing the institutions					4
Privileges and immunities	2	2	2		
Procedure	6	9	13	12	12
Staff Regulations	1		1	8	16
Others	**9**	**11**	**16**	**20**	**32**
OVERALL TOTAL	**622**	**713**	**692**	**739**	**849**

IV. New cases — Subject matter of the action (2018)

	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Total	Special forms of procedure
Access to documents	1		9		10	
Agriculture	19		7		26	
Approximation of laws	49	3	1		53	
Arbitration clause			2		2	
Area of freedom, security and justice	80	2			82	
Citizenship of the Union	6				6	
Commercial policy	1		4		5	
Common fisheries policy	1				1	
Common foreign and security policy			7		7	
Company law	2				2	
Competition	4		20	1	25	
Consumer protection	41				41	
Customs union and Common Customs Tariff	12		1		13	
Economic and monetary policy	1		2		3	
Economic, social and territorial cohesion	1				1	
Energy	7	1	4		12	
Environment	32	15	3		50	
External action by the European Union	4				4	
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	1	4	1		6	
Free movement of capital	8	1			9	
Free movement of goods	4				4	
Freedom of establishment	6	1			7	
Freedom of movement for persons	16	2	1		19	
Freedom to provide services	31	7			38	
Industrial policy	3				3	
Intellectual and industrial property	20	5	67		92	
Law governing the institutions	2	4	22		34	6
Principles of EU law	23	3	3		29	
Public health	2	1	1		4	
Public procurement	20	6	1	1	28	
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			1		1	
Research and technological development and space			1		1	
Social policy	45		1		46	
Social security for migrant workers	14				14	
State aid	4	1	18	3	26	
Taxation	69	2			71	
Transport	39				39	
TFEU	**568**	**58**	**177**	**5**	**814**	**6**
Safety control		1			1	
Protection of the general public		1			1	
Euratom Treaty		**2**			**2**	
Principles of EU law		1			1	
EU Treaty		**1**			**1**	
Law governing the institutions		2	2		4	
Procedure					12	12
Staff Regulations			14	1	16	1
Others		**2**	**16**	**1**	**32**	**13**
OVERALL TOTAL	**568**	**63**	**193**	**6**	**849**	**19**

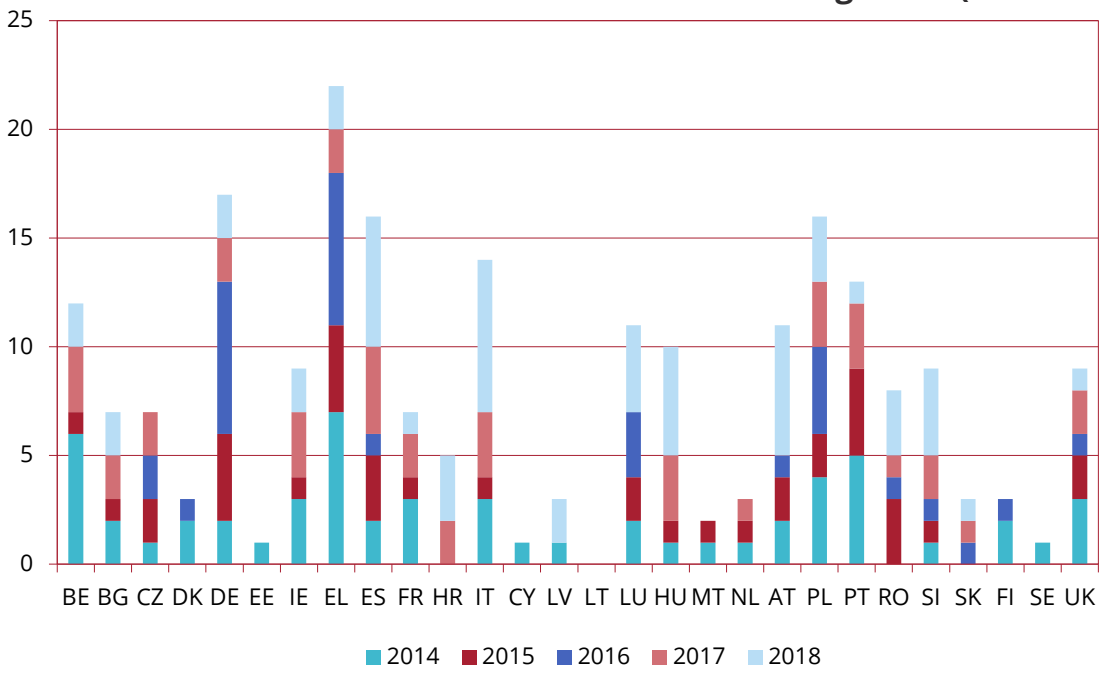
V. New cases —
References for a preliminary ruling by Member State (2014-2018)



	2014	2015	2016	2017	2018	Total
Belgium	23	32	26	21	40	**142**
Bulgaria	13	5	18	16	20	**72**
Czech Republic	6	8	5	4	12	**35**
Denmark	10	7	12	8	3	**40**
Germany	87	79	84	149	78	**477**
Estonia		2	1	7	2	**12**
Ireland	5	8	6	12	12	**43**
Greece	4	2	6	4	3	**19**
Spain	41	36	47	23	67	**214**
France	20	25	23	25	41	**134**
Croatia	1	5	2	3	3	**14**
Italy	52	47	62	57	68	**286**
Cyprus	2				1	**3**
Latvia	7	9	9	5	5	**35**
Lithuania	6	8	8	10	6	**38**
Luxembourg		7	1	1	4	**13**
Hungary	23	14	15	22	29	**103**
Malta			1			**1**
Netherlands	30	40	26	38	35	**169**
Austria	18	23	20	31	35	**127**
Poland	14	15	19	19	31	**98**
Portugal	8	8	21	21	15	**73**
Romania	28	18	14	16	23	**99**
Slovenia	4	5	3	3	2	**17**
Slovakia	3	5	6	6	6	**26**
Finland	8	4	7	13	6	**38**
Sweden	3	7	5	8	7	**30**
United Kingdom	12	16	23	11	14	**76**
Others [1]		1				**1**
Total	**428**	**436**	**470**	**533**	**568**	**2 435**

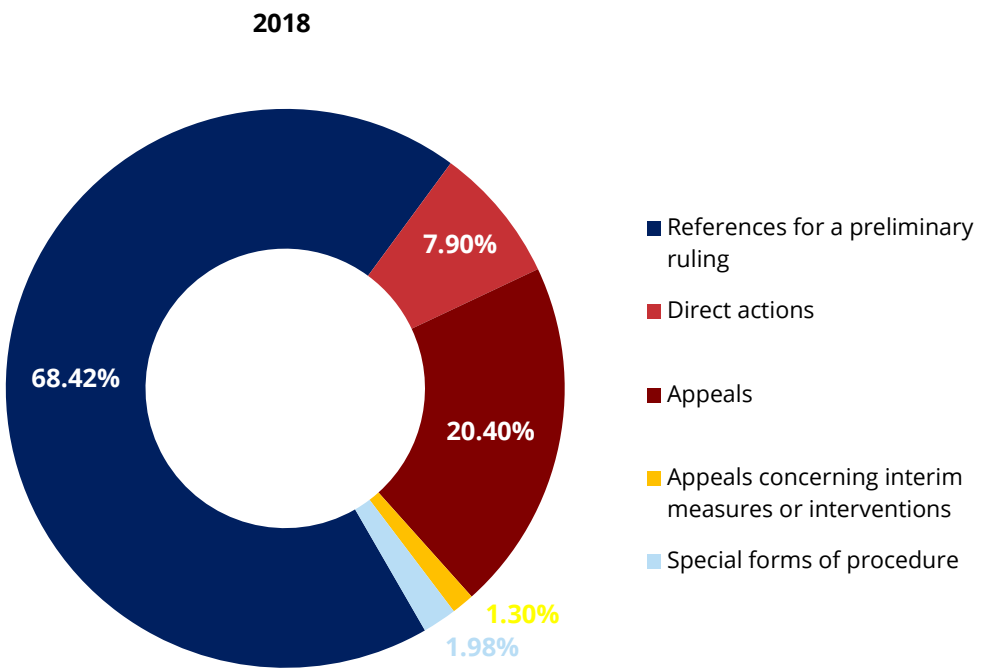
1| Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

VI. New cases — Actions for failure of a Member State to fulfil its obligations (2014-2018)



	2014	2015	2016	2017	2018	Total
Belgium	6	1		3	2	**12**
Bulgaria	2	1		2	2	**7**
Czech Republic	1	2	2	2		**7**
Denmark	2		1			**3**
Germany	2	4	7	2	2	**17**
Estonia	1					**1**
Ireland	3	1		3	2	**9**
Greece	7	4	7	2	2	**22**
Spain	2	3	1	4	6	**16**
France	3	1		2	1	**7**
Croatia				2	3	**5**
Italy	3	1		3	7	**14**
Cyprus	1					**1**
Latvia	1				2	**3**
Lithuania						
Luxembourg	2	2	3		4	**11**
Hungary	1	1		3	5	**10**
Malta	1	1				**2**
Netherlands	1	1		1		**3**
Austria	2	2	1		6	**11**
Poland	4	2	4	3	3	**16**
Portugal	5	4		3	1	**13**
Romania		3	1	1	3	**8**
Slovenia	1	1	1	2	4	**9**
Slovakia			1	1	1	**3**
Finland	2		1			**3**
Sweden	1					**1**
United Kingdom	3	2	1	2	1	**9**
Total	**57**	**37**	**31**	**41**	**57**	**223**

VII. Completed cases — Nature of proceedings (2014-2018) [1]

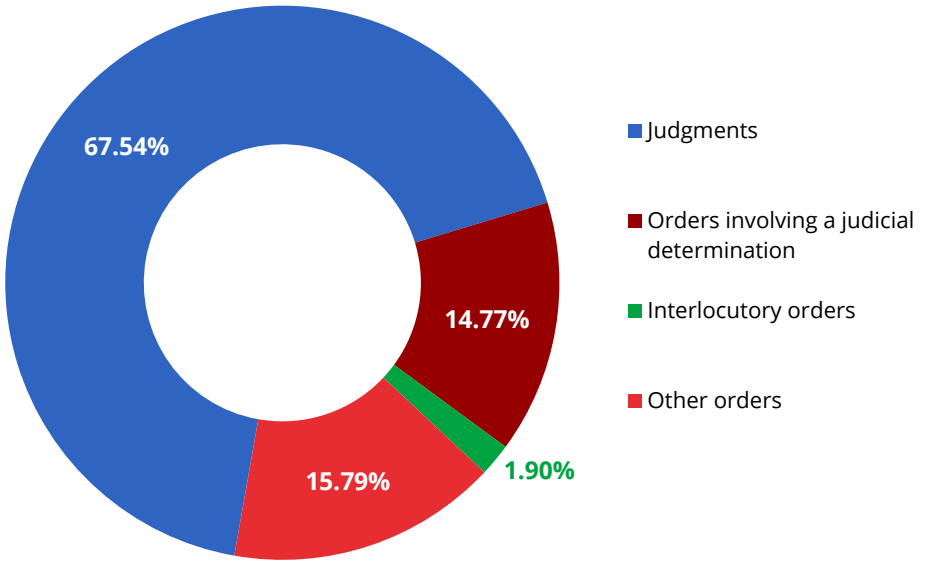


	2014	2015	2016	2017	2018
References for a preliminary ruling	476	404	453	447	520
Direct actions	76	70	49	37	60
Appeals	157	127	182	194	155
Appeals concerning interim measures or interventions	1	7	7	4	10
Requests for an opinion	2	1		3	
Special forms of procedure [2]	7	7	13	14	15
Total	**719**	**616**	**704**	**699**	**760**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

VIII. Completed cases — Judgments, opinions, orders (2018) [1]



	Judgments	Orders involving a judicial determination [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary ruling	354	35		74		463
Direct actions	37		4	22		63
Appeals	71	55		11		137
Appeals concerning interim measures or interventions			9	1		10
Special forms of procedure		11				11
Total	**462**	**101**	**13**	**108**		**684**

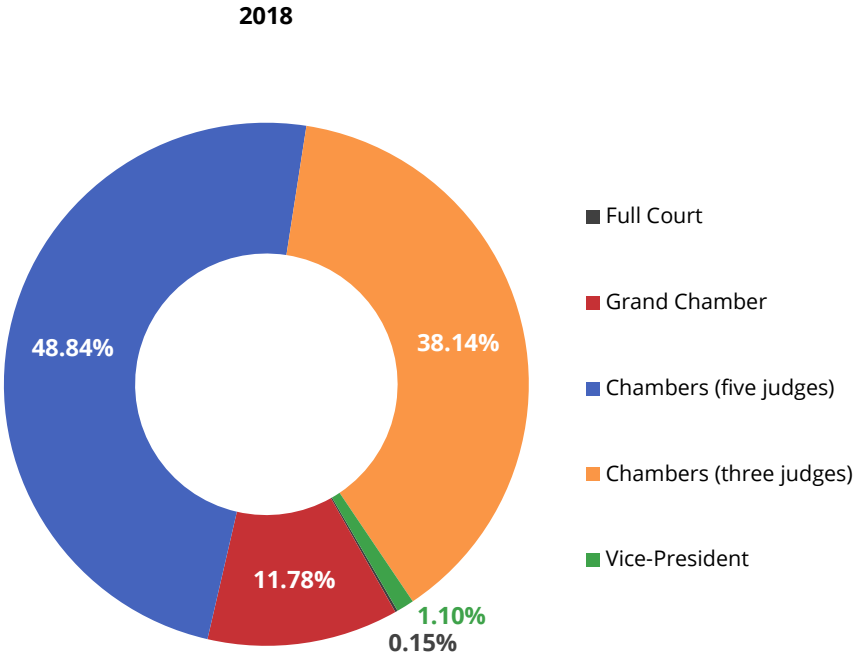
1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

3| Orders made following an application on the basis of Article 278 TFEU, 279 TFEU or 280 TFEU or the corresponding provisions of the EAEC Treaty, or following an appeal against an order concerning interim measures or intervention.

4| Orders terminating the case by removal from the register, declaration that there is no need to give a decision or referral to the General Court.

IX. Cases completed by judgments, by opinions or by orders involving a judicial determination — Bench hearing action (2014-2018) [1]



	2014			2015			2016			2017			2018		
	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total
Full Court	1		1							1		1	1		1
Grand Chamber	51	3	54	47		47	54		54	46		46	76		76
Chambers (five judges)	320	20	340	298	20	318	280	20	300	312	10	322	300	15	315
Chambers (three judges)	110	118	228	93	89	182	120	162	282	151	105	256	153	93	246
Vice-President		1	1		7	7		5	5		3	3		7	7
Total	**482**	**142**	**624**	**438**	**116**	**554**	**454**	**187**	**641**	**510**	**118**	**628**	**530**	**115**	**645**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

X. Cases completed by judgments, by opinions or by orders involving a judicial determination — Subject matter of the action (2014-2018) [1]

	2014	2015	2016	2017	2018
Access to documents	4	3	4	9	2
Accession of new States			1		1
Agriculture	29	20	13	22	15
Approximation of laws	25	24	16	29	28
Arbitration clause					3
Area of freedom, security and justice	51	49	52	61	74
Citizenship of the Union	9	4	8	5	10
Commercial policy	7	4	14	14	6
Common fisheries policy	5	3	1	2	2
Common foreign and security policy	3	6	11	10	5
Company law	3	1	1	4	1
Competition	28	23	30	53	12
Consumer protection	20	29	33	20	19
Customs union and Common Customs Tariff	21	20	27	19	12
Economic and monetary policy	1	3	10	2	3
Economic, social and territorial cohesion	8	4	2		1
Education, vocational training, youth and sport	1	1		2	
Employment		1			
Energy	3	2		2	1
Environment	30	27	53	27	33
External action by the European Union	6	1	5	1	3
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	5	1	2	7	2
Free movement of capital	6	8	7	1	13
Free movement of goods	10	9	5	2	6
Freedom of establishment	9	17	27	10	13
Freedom of movement for persons	20	13	12	17	24
Freedom to provide services	11	17	14	13	21
Industrial policy	3	9	10	8	2
Intellectual and industrial property	69	51	80	60	74
Law governing the institutions	18	27	20	27	28
Principles of EU law	23	12	13	14	10
Public health	3	5	4	5	
Public procurement	13	14	31	15	22
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	1	1	7	1
Research and technological development and space		1	3	2	3
Social policy	51	30	23	26	42
Social security for migrant workers	6	14	5	6	10
State aid	41	26	26	33	29
Taxation	52	55	41	62	58
Trans-European networks			1		
Transport	18	9	20	17	38
TFEU	**617**	**544**	**626**	**614**	**627**
Protection of the general public		1			
Euratom Treaty		**1**			
Privileges and immunities		2	1		1
Procedure	6	4	14	13	10
Staff Regulations	1	3		1	7
Others	**7**	**9**	**15**	**14**	**18**
OVERALL TOTAL	**624**	**554**	**641**	**628**	**645**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

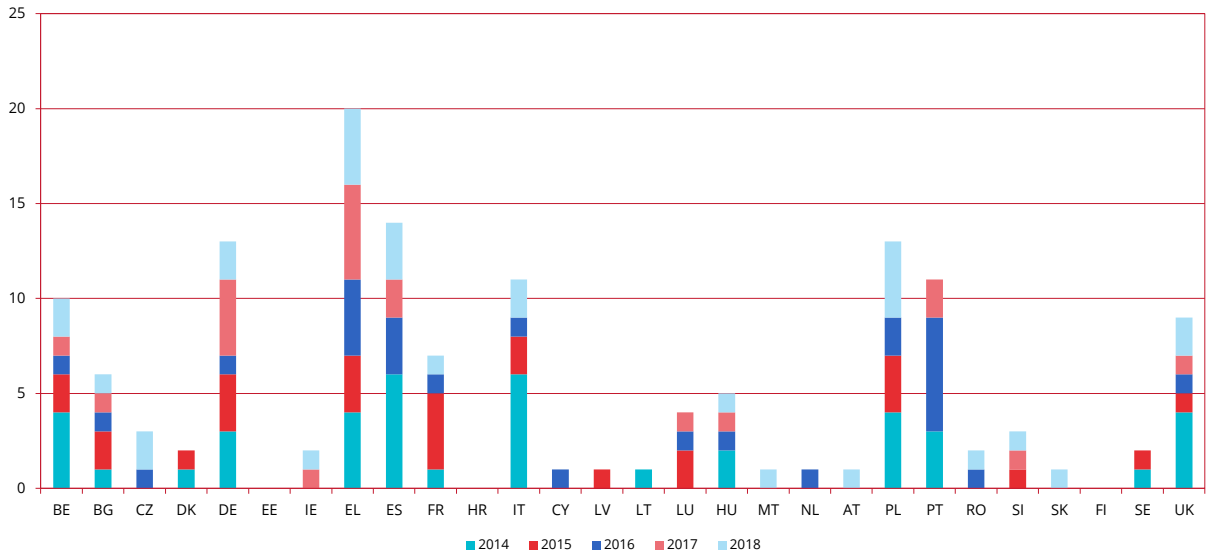
XI. Cases completed by judgments, by opinions or by orders involving a judicial determination — Subject matter of the action (2018) [1]

	Judgments/opinions	Orders [2]	Total
Access to documents	1	1	2
Accession of new States	1		1
Agriculture	15		15
Approximation of laws	26	2	28
Arbitration clause	2	1	3
Area of freedom, security and justice	67	7	74
Citizenship of the Union	10		10
Commercial policy	6		6
Common fisheries policy	2		2
Common foreign and security policy	5		5
Company law	1		1
Competition	11	1	12
Consumer protection	13	6	19
Customs union and Common Customs Tariff	12		12
Economic and monetary policy	2	1	3
Economic, social and territorial cohesion		1	1
Energy	1		1
Environment	33		33
External action by the European Union	3		3
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	2		2
Free movement of capital	9	4	13
Free movement of goods	6		6
Freedom of establishment	12	1	13
Freedom of movement for persons	20	4	24
Freedom to provide services	19	2	21
Industrial policy	2		2
Intellectual and industrial property	39	35	74
Law governing the institutions	16	12	28
Principles of EU law	9	1	10
Public procurement	19	3	22
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)		1	1
Research and technological development and space	2	1	3
Social policy	37	5	42
Social security for migrant workers	10		10
State aid	22	7	29
Taxation	56	2	58
Transport	36	2	38
TFEU	**527**	**100**	**627**
Privileges and immunities	1		1
Procedure		10	10
Staff Regulations	2	5	7
Others	**3**	**15**	**18**
OVERALL TOTAL	**530**	**115**	**645**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

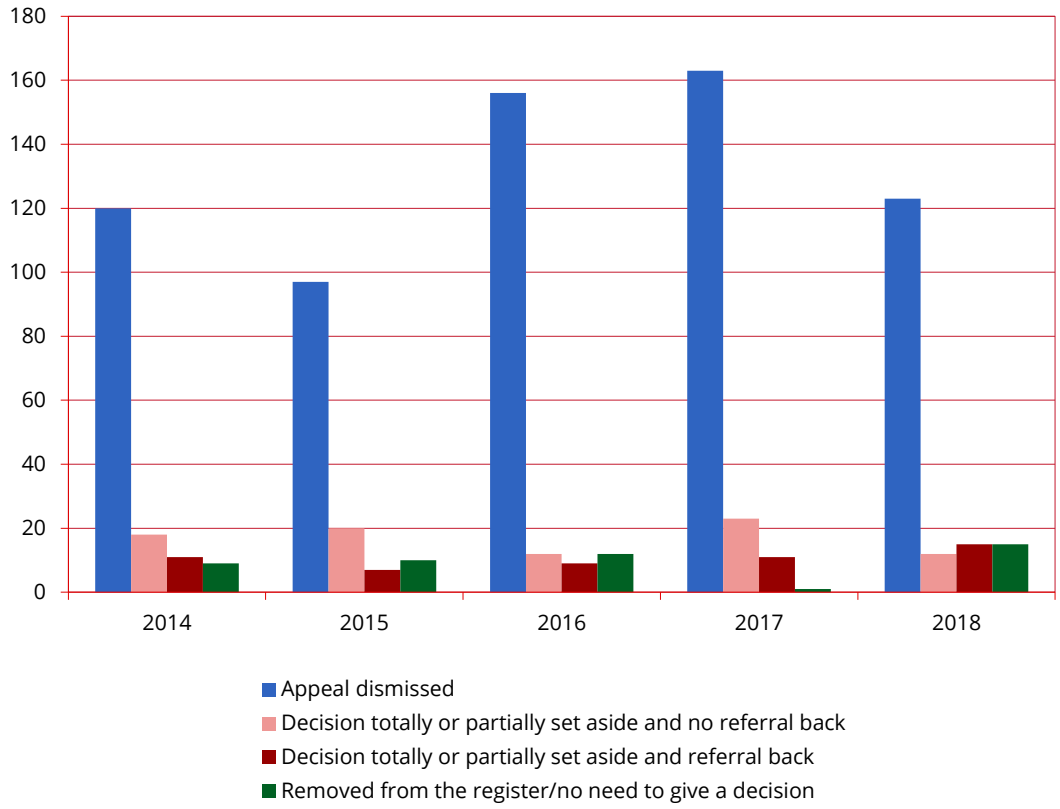
XII. Completed cases — Judgments concerning failure of a Member State to fulfil its obligations: outcome (2014-2018) [1]



	2014		2015		2016		2017		2018	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	4		2		1		1		2	
Bulgaria	1	1	2		1		1		1	
Czech Republic					1				2	
Denmark	1		1							1
Germany	3	1	3		1		4		2	1
Estonia										
Ireland				1			1		1	
Greece	4		3		4		5		4	
Spain	6				3		2		3	
France	1		4		1				1	
Croatia										
Italy	6		2		1				2	
Cyprus					1					
Latvia			1							
Lithuania	1									
Luxembourg			2		1		1			
Hungary	2				1		1		1	
Malta						1			1	
Netherlands		1			1	1				
Austria						1			1	1
Poland	4		3	1	2				4	
Portugal	3				6		2			
Romania					1				1	
Slovenia			1				1		1	
Slovakia				2					1	
Finland										
Sweden	1		1							
United Kingdom	4		1	1	1	1	1		2	
Total	**41**	**3**	**26**	**5**	**27**	**4**	**20**		**30**	**3**

1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

XIII. Completed cases — Appeals: outcome (2014-2018) [1] [2] (judgments and orders involving a judicial determination)

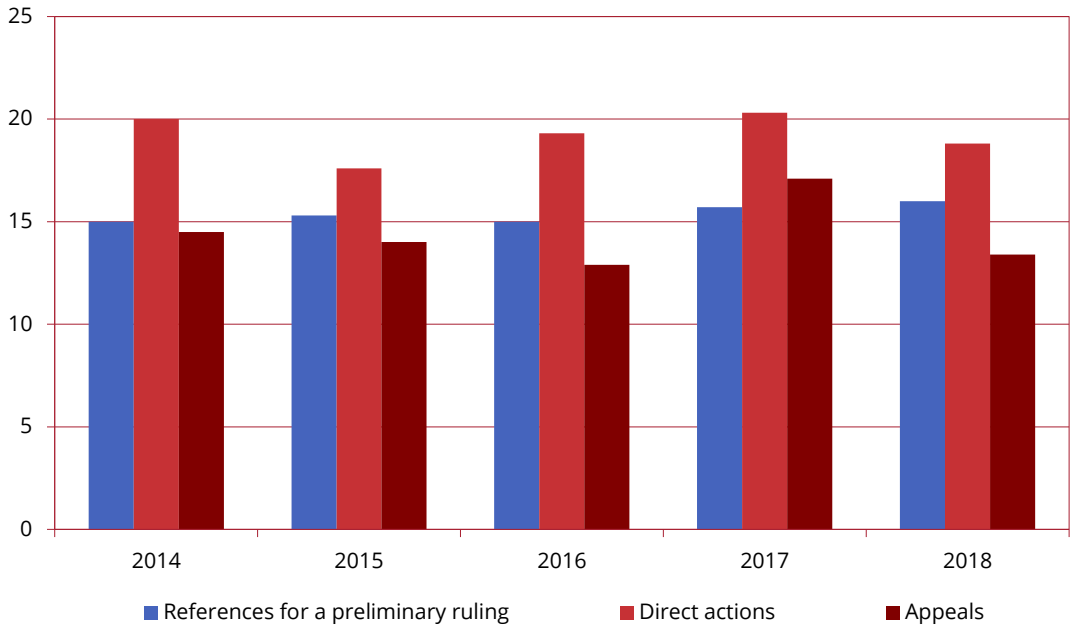


	2014			2015			2016			2017			2018		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal dismissed	46	74	120	37	60	97	63	93	156	103	60	163	59	64	123
Decision totally or partially set aside and no referral back	18		18	19	1	20	12		12	23		23	11	1	12
Decision totally or partially set aside and referral back	11		11	6	1	7	9		9	11		11	14	1	15
Removed from the register/no need to give a decision		9	9		10	10		12	12		1	1		15	15
Total	**75**	**83**	**158**	**62**	**72**	**134**	**84**	**105**	**189**	**137**	**61**	**198**	**84**	**81**	**165**

1| More detailed information on appeals brought against the decisions of the General Court is included in the Statistics concerning the Judicial Activity of the General Court.

2| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

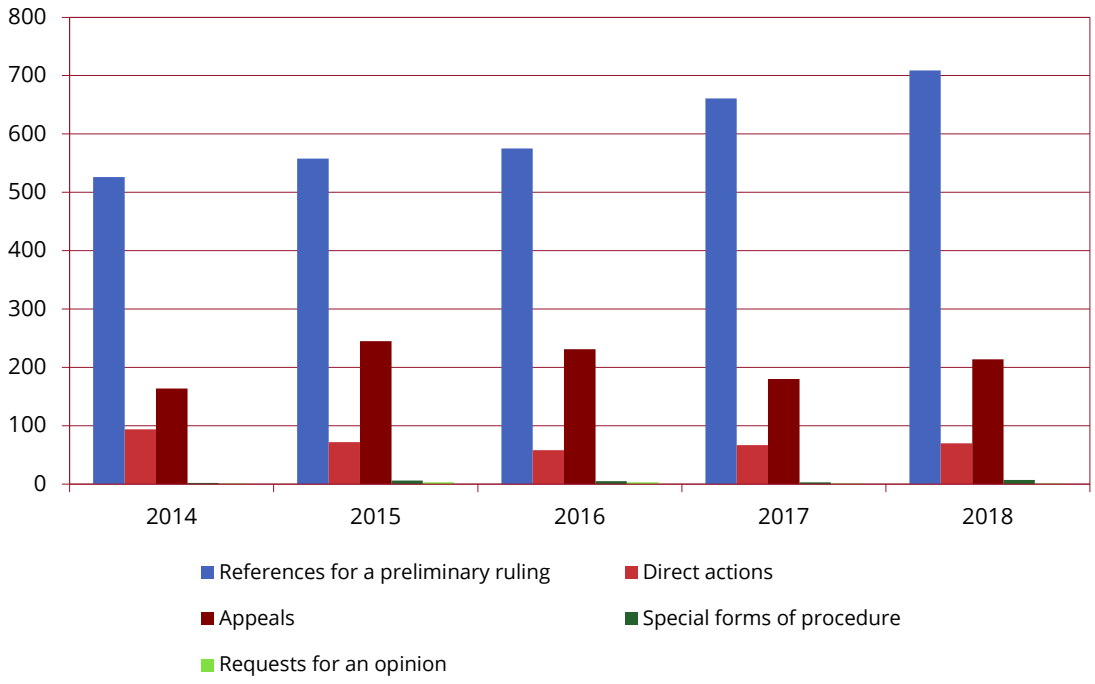
XIV. Completed cases — Duration of proceedings in months (2014-2018) [1] (judgments and orders involving a judicial determination)



	2014	2015	2016	2017	2018
References for a preliminary ruling	15	15.3	15	15.7	16
Urgent preliminary ruling procedure	2.2	1.9	2.7	2.9	3.1
Expedited procedures	3.5	5.3	4	8.1	2.2
Direct actions	20	17.6	19.3	20.3	18.8
Expedited procedures					9
Appeals	14.5	14	12.9	17.1	13.4
Expedited procedures			10.2		

1| The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions; special forms of procedure (namely legal aid, taxation of costs, rectification, application to set aside a judgment delivered by default, third-party proceedings, interpretation, revision, examination of a proposal by the First Advocate General to review a decision of the General Court, attachment procedure and cases concerning immunity); cases terminated by an order removing the case from the register, declaring that there is no need to give a decision or referring the case to the General Court; proceedings for interim measures and appeals concerning interim measures and interventions.

XV. Cases pending as at 31 December — Nature of proceedings (2014-2018) [1]

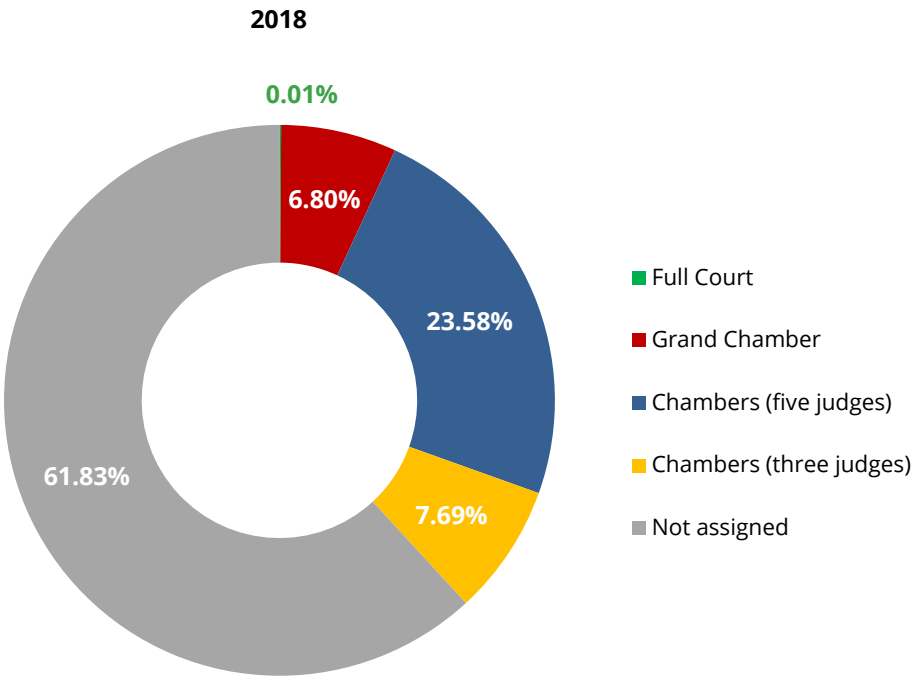


	2014	2015	2016	2017	2018
References for a preliminary ruling	526	558	575	661	709
Direct actions	94	72	58	67	70
Appeals	164	245	231	180	214
Special forms of procedure [2]	2	6	5	3	7
Requests for an opinion	1	3	3	1	1
Total	**787**	**884**	**872**	**912**	**1 001**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

XVI. Cases pending as at 31 December — Bench hearing action (2014-2018) [1]



	2014	2015	2016	2017	2018
Full Court			1		1
Grand Chamber	33	38	40	76	68
Chambers (five judges)	176	203	215	194	236
Chambers (three judges)	44	54	75	76	77
Vice-President		2	2	4	
Not assigned	534	587	539	562	619
Total	**787**	**884**	**872**	**912**	**1 001**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

XVII. Expedited procedures (2014-2018)

Requests for an expedited procedure [1]

	2014	2015	2016	2017	2018	Total
References for a preliminary ruling	17	18	20	30	32	**117**
Direct actions				1	3	**4**
Appeals	3		1		1	**5**
Total	**20**	**18**	**21**	**31**	**36**	**126**

Requests for an expedited procedure — outcome [2]

	2014	2015	2016	2017	2018	Total
Granted	2	1	4	4	9	**20**
Not granted	12	23	12	29	17	**93**
Not acted upon [3]	3		4	1	1	**9**
Decision pending				1	6	**7**
Total	**17**	**24**	**20**	**35**	**33**	**129**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concening a request for the expedited procedure, irrespective of the year in which such a request was made.

3| There was no need to give a formal ruling on the request because the case was removed from the register or completed by judgment or order.

XVIII. Urgent preliminary ruling procedure (2014-2018)

Requests for the urgent preliminary ruling procedure to be applied [1]

	2014	2015	2016	2017	2018	Total
Judicial cooperation in civil matters	3	4		5	5	**17**
Judicial cooperation in criminal matters	1	5	7	6	8	**27**
Borders, asylum and immigration	1	2	5	4	5	**17**
Others	1				1	**2**
Total	**6**	**11**	**12**	**15**	**19**	**63**

Requests for the urgent preliminary ruling procedure to be applied — outcome [2]

	2014	2015	2016	2017	2018	Total
Granted	4	5	9	4	12	**34**
Not granted	2	5	4	11	7	**29**
Total	**6**	**10**	**13**	**15**	**19**	**63**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning a request for the urgent procedure to be applied, irrespective of the year in which such a request was made.

XIX. Proceedings for interim measures (2014-2018)

Applications for interim measures [1]

	2014	2015	2016	2017	2018	Total
Agriculture			1			**1**
Commercial policy	1					**1**
Competition		2			1	**3**
Environment			1	1		**2**
Industrial policy				1		**1**
Law governing the institutions	1				2	**3**
Principles of EU law					1	**1**
Public procurement				1		**1**
Research and technological development and space			1			**1**
State aid	1				2	**3**
Total	**3**	**2**	**3**	**3**	**6**	**17**

Applications for interim measures — outcome [2]

	2014	2015	2016	2017	2018	Total
Granted	1		2	1	6	**10**
Not granted	2		3		2	**7**
Total	**3**		**5**	**1**	**8**	**17**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning an application for interim measures, irrespective of the year in which such an application was made.

XX. General trend in the work of the Court (1952–2018) — New cases and judgments or opinions

Year	New cases [1]							Judgments/opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1953		4				4		
1954		10				10		2
1955		9				9	2	4
1956		11				11	2	6
1957		19				19	2	4
1958		43				43		10
1959		46			1	47	5	13
1960		22			1	23	2	18
1961	1	24			1	26	1	11
1962	5	30				35	2	20
1963	6	99				105	7	17
1964	6	49				55	4	31
1965	7	55				62	4	52
1966	1	30				31	2	24
1967	23	14				37		24
1968	9	24				33	1	27
1969	17	60				77	2	30
1970	32	47				79		64
1971	37	59				96	1	60
1972	40	42				82	2	61
1973	61	131				192	6	80
1974	39	63				102	8	63
1975	69	61			1	131	5	78
1976	75	51			1	127	6	88
1977	84	74				158	6	100
1978	123	146			1	270	7	97
1979	106	1 218				1 324	6	138
1980	99	180				279	14	132
1981	108	214				322	17	128
1982	129	217				346	16	185
1983	98	199				297	11	151
1984	129	183				312	17	165
1985	139	294				433	23	211
1986	91	238				329	23	174

>>>

1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

Year	New cases [1]							Judgments/opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1987	144	251				395	21	208
1988	179	193				372	17	238
1989	139	244				383	19	188
1990	141	221	15	1		378	12	193
1991	186	140	13	1	2	342	9	204
1992	162	251	24	1	2	440	5	210
1993	204	265	17			486	13	203
1994	203	125	12	1	3	344	4	188
1995	251	109	46	2		408	3	172
1996	256	132	25	3		416	4	193
1997	239	169	30	5		443	1	242
1998	264	147	66	4		481	2	254
1999	255	214	68	4		541	4	235
2000	224	197	66	13	2	502	4	273
2001	237	187	72	7		503	6	244
2002	216	204	46	4		470	1	269
2003	210	277	63	5	1	556	7	308
2004	249	219	52	6	1	527	3	375
2005	221	179	66	1		467	2	362
2006	251	201	80	3		535	1	351
2007	265	221	79	8		573	3	379
2008	288	210	77	8	1	584	3	333
2009	302	143	105	2	1	553	1	376
2010	385	136	97	6		624	3	370
2011	423	81	162	13		679	3	370
2012	404	73	136	3	1	617		357
2013	450	72	161	5	2	690	1	434
2014	428	74	111		1	614	3	416
2015	436	48	206	9	3	702	2	399
2016	470	35	168	7		680	3	412
2017	533	46	141	6	1	727	3	466
2018	568	63	193	6		830	6	462
Total	**10 717**	**9 093**	**2 397**	**134**	**27**	**22 368**	**373**	**11 952**

1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

XXI. General trend in the work of the Court (1952–2018) — New references for a preliminary ruling by Member State per year

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1961																			1											**1**
1962																			5											**5**
1963																1			5											**6**
1964												2							4											**6**
1965					4					2									1											**7**
1966																			1											**1**
1967	5				11					3						1			3											**23**
1968	1				4					1		1							2											**9**
1969	4				11					1						1														**17**
1970	4				21					2		2							3											**32**
1971	1				18					6		5				1			6											**37**
1972	5				20					1		4							10											**40**
1973	8				37					4		5				1			6											**61**
1974	5				15					6		5							7									1		**39**
1975	7			1	26					15		14				1			4									1		**69**
1976	11				28		1			8		12							14									1		**75**
1977	16			1	30		2			14		7							9									5		**84**
1978	7			3	46		1			12		11							38									5		**123**
1979	13			1	33		2			18		19				1			11									8		**106**
1980	14			2	24		3			14		19							17									6		**99**
1981	12			1	41					17		11				4			17									5		**108**
1982	10			1	36					39		18							21									4		**129**
1983	9			4	36		2			15		7							19									6		**98**
1984	13			2	38		1			34		10							22									9		**129**
1985	13				40		2			45		11				6			14									8		**139**
1986	13			4	18		4	2	1	19		5				1			16									8		**91**
1987	15			5	32		2	17	1	36		5				3			19									9		**144**
1988	30			4	34				1	38		28				2			26									16		**179**
1989	13			2	47		1	2	2	28		10				1			18			1						14		**139**
1990	17			5	34		4	2	6	21		25				4			9			2						12		**141**
1991	19			2	54		2	3	5	29		36				2			17			3						14		**186**
1992	16			3	62			1	5	15		22				1			18			1						18		**162**

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1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1993	22			7	57		1	5	7	22		24				1			43			3						12		**204**
1994	19			4	44		2		13	36		46				1			13			1						24		**203**
1995	14			8	51		3	10	10	43		58				2			19	2		5					6	20		**251**
1996	30			4	66			4	6	24		70				2			10	6		6				3	4	21		**256**
1997	19			7	46		1	2	9	10		50				3			24	35		2				6	7	18		**239**
1998	12			7	49		3	5	55	16		39				2			21	16		7				2	6	24		**264**
1999	13			3	49		2	3	4	17		43				4			23	56		7				4	5	22		**255**
2000	15			3	47		2	3	5	12		50							12	31		8				5	4	26	1	**224**
2001	10			5	53		1	4	4	15		40				2			14	57		4				3	4	21		**237**
2002	18			8	59			7	3	8		37				4			12	31		3				7	5	14		**216**
2003	18			3	43		2	4	8	9		45				4			28	15		1				4	4	22		**210**
2004	24			4	50		1	18	8	21		48				1	2		28	12		1				4	5	22		**249**
2005	21		1	4	51		2	11	10	17		18				2	3		36	15	1	2				4	11	12		**221**
2006	17		3	3	77		1	14	17	24		34			1	1	4		20	12	2	3			1	5	2	10		**251**
2007	22	1	2	5	59	2	2	8	14	26		43			1		2		19	20	7	3	1		1	5	6	16		**265**
2008	24		1	6	71	2	1	9	17	12		39	1	3	3	4	6		34	25	4	1				4	7	14		**288**
2009	35	8	5	3	59	2		11	11	28		29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	**302**
2010	37	9	3	10	71		4	6	22	33		49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		**385**
2011	34	22	5	6	83	1	7	9	27	31		44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		**423**
2012	28	15	7	8	68	5	6	1	16	15		65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		**404**
2013	26	10	7	6	97	3	4	5	26	24		62	3	5	10		20		46	19	11	14	17	1	4	4	12	14		**450**
2014	23	13	6	10	87		5	4	41	20	1	52	2	7	6		23		30	18	14	8	28	4	3	8	3	12		**428**
2015	32	5	8	7	79	2	8	2	36	25	5	47		9	8	7	14		40	23	15	8	18	5	5	4	7	16	1	**436**
2016	26	18	5	12	84	1	6	6	47	23	2	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		**470**
2017	21	16	4	8	149	7	12	4	23	25	3	57		5	10	1	22		38	31	19	21	16	3	6	13	8	11		**533**
2018	40	20	12	3	78	2	12	3	67	41	3	68	1	5	6	4	29		35	35	31	15	23	2	6	6	7	14		**568**
Total	**881**	**137**	**69**	**195**	**2 527**	**27**	**115**	**185**	**527**	**1 020**	**14**	**1 513**	**8**	**65**	**61**	**96**	**187**	**3**	**1 048**	**556**	**158**	**189**	**162**	**22**	**50**	**121**	**141**	**637**	**3**	**10 717**

1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

XXII. General trend in the work of the Court (1952–2018) — New references for a preliminary ruling by Member State and by court or tribunal

			Total
Belgium	Cour constitutionnelle	38	
	Cour de cassation	98	
	Conseil d'État	85	
	Other courts or tribunals	660	**881**
Bulgaria	Върховен касационен съд	5	
	Върховен административен съд	20	
	Other courts or tribunals	112	**137**
Czech Republic	Ústavní soud		
	Nejvyšší soud	10	
	Nejvyšší správní soud	32	
	Other courts or tribunals	27	**69**
Denmark	Højesteret	36	
	Other courts or tribunals	159	**195**
Germany	Bundesverfassungsgericht	2	
	Bundesgerichtshof	240	
	Bundesverwaltungsgericht	135	
	Bundesfinanzhof	327	
	Bundesarbeitsgericht	43	
	Bundessozialgericht	76	
	Other courts or tribunals	1 704	**2 527**
Estonia	Riigikohus	11	
	Other courts or tribunals	16	**27**
Ireland	Supreme Court	38	
	High Court	38	
	Other courts or tribunals	39	**115**
Greece	Άρειος Πάγος	12	
	Συμβούλιο της Επικρατείας	60	
	Other courts or tribunals	113	**185**
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	98	
	Other courts or tribunals	428	**527**
France	Conseil constitutionnel	1	
	Cour de cassation	136	
	Conseil d'État	138	
	Other courts or tribunals	745	**1 020**
Croatia	Ustavni sud		
	Vrhovni sud		
	Visoki upravni sud	1	
	Visoki prekršajni sud		
	Other courts or tribunals	13	**14**

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Italy	Corte Costituzionale	3	
	Corte suprema di Cassazione	153	
	Consiglio di Stato	176	
	Other courts or tribunals	1 181	**1 513**
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	4	**8**
Latvia	Augstākā tiesa	21	
	Satversmes tiesa	1	
	Other courts or tribunals	43	**65**
Lithuania	Konstitucinis Teismas	2	
	Aukščiausiasis Teismas	20	
	Vyriausiasis administracinis teismas	22	
	Other courts or tribunals	17	**61**
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	28	
	Cour administrative	29	
	Other courts or tribunals	38	**96**
Hungary	Kúria	28	
	Fővárosi Ítélőtábla	8	
	Szegedi Ítélötáblá	3	
	Other courts or tribunals	148	**187**
Malta	Qorti Kostituzzjonali		
	Qorti tal-Appell		
	Other courts or tribunals	3	**3**
Netherlands	Hoge Raad	294	
	Raad van State	128	
	Centrale Raad van Beroep	68	
	College van Beroep voor het Bedrijfsleven	164	
	Tariefcommissie	35	
	Other courts or tribunals	359	**1 048**
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	130	
	Verwaltungsgerichtshof	108	
	Other courts or tribunals	313	**556**
Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	25	
	Naczelny Sąd Administracyjny	49	
	Other courts or tribunals	83	**158**
Portugal	Supremo Tribunal de Justiça	15	
	Supremo Tribunal Administrativo	64	
	Other courts or tribunals	110	**189**
Romania	Înalta Curte de Casație și Justiție	12	
	Curtea de Apel	83	
	Other courts or tribunals	67	**162**

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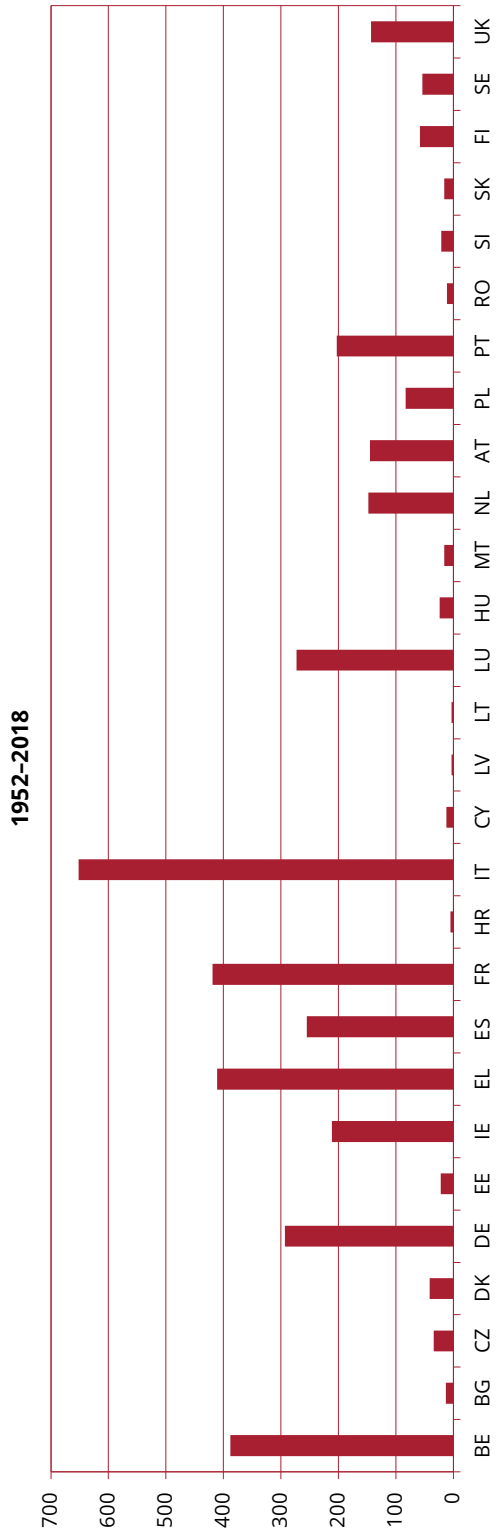
Slovenia	Ustavno sodišče	1	
	Vrhovno sodišče	15	
	Other courts or tribunals	6	**22**
Slovakia	Ústavný súd		
	Najvyšší súd	19	
	Other courts or tribunals	31	**50**
Finland	Korkein oikeus	25	
	Korkein hallinto-oikeus	58	
	Työtuomioistuin	5	
	Other courts or tribunals	33	**121**
Sweden	Högsta Domstolen	24	
	Högsta förvaltningsdomstolen	13	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	95	**141**
United Kingdom	House of Lords	40	
	Supreme Court	15	
	Court of Appeal	90	
	Other courts or tribunals	492	**637**
Others	Cour de justice Benelux/Benelux Gerechtshof [1]	2	
	Complaints Board of the European Schools [2]	1	**3**
Total			**10 717**

1| Case C-265/00, ***Campina Melkunie***.
Case C-169/15, ***Montis Design***.

2| Case C-196/09, ***Miles and Others.***

XXIII. General trend in the work of the Court (1952–2018) — Actions for failure to fulfil obligations brought against the Member States



BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Total
388	13	34	41	293	22	211	411	255	419	5	652	12	3	3	273	24	16	148	145	83	203	11	21	16	58	54	143	**3 957**

XXIV. Activity of the Registry of the Court of Justice (2015-2018)

Type of intervention	2015	2016	2017	2018
Documents entered in the register of the Registry	89 328	93 215	99 266	108 247
Procedural documents lodged by e-Curia (percentage)	69%	75%	73%	75%
Hearings convened and organised	256	270	263	295
Sittings for the delivery of Opinions convened and organised	239	319	301	305
Judgments, opinions and orders terminating the proceedings served on the parties	570	645	654	684
Minutes of hearings drawn up (oral submissions, Opinions and judgments)	894	1 001	1 033	1 062
Notices in the OJ concerning new cases	639	660	679	695
Notices in the OJ concerning completed cases	546	522	637	661

E COMPOSITION OF THE COURT OF JUSTICE

(Order of precedence as at 31 December 2018)

First row, from left to right:

M. Szpunar, First Advocate General; M. Vilaras, President of Chamber; A. Arabadjiev, President of Chamber; R. Silva de Lapuerta, Vice-President of the Court; K. Lenaerts, President of the Court; J.-C. Bonichot, President of Chamber; A. Prechal, President of Chamber; E. Regan, President of Chamber; T. von Danwitz, President of Chamber

Second row, from left to right:

M. Ilešič, Judge; J. Kokott, Advocate General; C. Lycourgos, President of Chamber; F. Biltgen, President of Chamber; C. Toader, President of Chamber; K. Jürimäe, President of Chamber; A. Rosas, Judge; E. Juhász, Judge

Third row, from left to right:

M. Berger, Judge; M. Safjan, Judge; E. Sharpston, Advocate General; E. Levits, Judge; J. Malenovský, Judge; L. Bay Larsen, Judge; Y. Bot, Advocate General; D. Šváby, Judge

Fourth row, from left to right:

E. Tanchev, Advocate General; H. Saugmandsgaard Øe, Advocate General; S. Rodin, Judge; C. Vajda, Judge; C.G. Fernlund, Judge; N. Wahl, Advocate General; M. Campos Sánchez-Bordona, Advocate General; M. Bobek, Advocate General

Fifth row, from left to right:

I. Jarukaitis, Judge; G. Hogan, Advocate General; N.J. Piçarra, Judge; P.G. Xuereb, Judge; L.S. Rossi, Judge; G. Pitruzzella, Advocate General; A. Calot Escobar, Registrar

1. CHANGES IN THE COMPOSITION OF THE COURT OF JUSTICE IN 2018

Formal sitting on 8 October 2018

A formal sitting took place at the Court of Justice on 8 October 2018 on the occasion of, first, the renewal of term of office and, secondly, the taking of the oath and entry into office of the new members of the institution.

By decisions of 28 February 2018, 13 June 2018, 25 July 2018 and 5 September 2018, the representatives of the governments of the Member States of the European Union renewed, for the period from 7 October 2018 to 6 October 2024, the term of office of eight judges of the Court of Justice, namely Alexander Arabadjiev, JeanClaude Bonichot, Thomas von Danwitz, Carl Gustav Fernlund, Egils Levits, Constantinos Lycourgos, Jiří Malenovský, and Alexandra Prechal, and the term of office of two Advocates General, namely Yves Bot and Maciej Szpunar.

For the period from 7 October 2018 to 6 October 2024, Lucia Serena Rossi, Irmantas Jarukaitis, Peter George Xuereb and Nuno José Cardoso da Silva Piçarra were appointed as judges at the Court of Justice following the end of the term of office of Antonio Tizzano, Egidijus Jarašiūnas, Anthony Borg Barthet and José Luís da Cruz Vilaça.

For the period from 7 October 2018 to 6 October 2024, Giovanni Pitruzzella, replacing Paolo Mengozzi, and Gerard Hogan [1] were appointed as Advocates General of the Court of Justice.

Following the partial renewal of the members of the Court of Justice, Koen Lenaerts was re-elected, by his peers, as President of the Court of Justice of the European Union for the period from 9 October 2018 to 6 October 2021.

Rosario Silva de Lapuerta was elected Vice-President of the Court for the period from 9 October 2018 to 6 October 2021, as successor to Antonio Tizzano.

Maciej Szpunar was appointed First Advocate General of the Court of Justice, as successor to Melchior Wathelet.

Moreover, the judges of the Court of Justice elected from among their number the presidents of the chambers of five judges, namely Jean-Claude Bonichot, Alexander Arabadjiev, Alexandra (Sacha) Prechal, Michail Vilaras and Eugene Regan, for a three-year period.

The judges of the Court of Justice also elected from among their number the presidents of the chambers of three judges, namely Thomas von Danwitz, Camelia Toader, François Biltgen, Küllike Jürimäe and Constantinos Lycourgos, for a one-year period.

1| In accordance with the principle of rotation, G. Hogan, an Irish national, succeeded M. Wathelet, a Belgian national, whose term of office ended on 8 October 2018.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2018 TO 8 OCTOBER 2018

K. LENAERTS, President
A. TIZZANO, Vice-President
R. SILVA de LAPUERTA, President of the First Chamber
M. ILEŠIČ, President of the Second Chamber
L. BAY LARSEN, President of the Third Chamber
T. von DANWITZ, President of the Fourth Chamber
J.L. da CRUZ VILAÇA, President of the Fifth Chamber
M. WATHELET, First Advocate General
A. ROSAS, President of the Seventh Chamber
J. MALENOVSKÝ, President of the Eighth Chamber
E. LEVITS, President of the Tenth Chamber
C.G. FERNLUND, President of the Sixth Chamber
C. VAJDA, President of the Ninth Chamber
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
A. BORG BARTHET, Judge
E. SHARPSTON, Advocate General
P. MENGOZZI, Advocate General
Y. BOT, Advocate General
J.-C. BONICHOT, Judge
A. ARABADJIEV, Judge
C. TOADER, Judge
M. SAFJAN, Judge
D. ŠVÁBY, Judge
M. BERGER, Judge
A. PRECHAL, Judge
E. JARAŠIŪNAS, Judge
N. WAHL, Advocate General
S. RODIN, Judge
F. BILTGEN, Judge
K. JÜRIMÄE, Judge
M. SZPUNAR, Advocate General
C. LYCOURGOS, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
M. VILARAS, Judge
E. REGAN, Judge
H. Saugmandsgaard ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General

A. CALOT ESCOBAR, Registrar

9 OCTOBER 2018

K. LENAERTS, President
R. SILVA DE LAPUERTA, Vice-President
J.-C. BONICHOT, President of the First Chamber
A. ARABADJIEV, President of the Second Chamber
A. PRECHAL, President of the Third Chamber
M. VILARAS, President of the Fourth Chamber
E. REGAN, President of the Fifth Chamber
A. ROSAS, Judge
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
M. ILEŠIČ, Judge
J. MALENOVSKÝ, Judge
E. LEVITS, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
Y. BOT, Advocate General
T. von DANWITZ, Judge
C. TOADER, Judge
M. SAFJAN, Judge
D. ŠVÁBY, Judge
M. BERGER, Judge
C.G. FERNLUND, Judge
C. VAJDA, Judge
N. WAHL, Advocate General
S. RODIN, Judge
F. BILTGEN, Judge
K. JÜRIMÄE, Judge
M. SZPUNAR, Advocate General
C. LYCOURGOS, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
H. Saugmandsgaard ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General
P.G. XUEREB, Judge
N. PIÇARRA, Judge
L.S. ROSSI, Judge
G. HOGAN, Advocate General
G. PITRUZZELLA, Advocate General
I. JARUKAITIS, Judge

A. CALOT ESCOBAR, Registrar

FROM 10 OCTOBER 2018 TO 31 DECEMBER 2018

K. LENAERTS, President
R. SILVA de LAPUERTA, Vice-President
J.-C. BONICHOT, President of the First Chamber
A. ARABADJIEV, President of the Second Chamber
A. PRECHAL, President of the Third Chamber
M. VILARAS, President of the Fourth Chamber
E. REGAN, President of the Fifth Chamber
M. SZPUNAR, First Advocate General
T. von DANWITZ, President of the Seventh Chamber
C. TOADER, President of the Sixth Chamber
F. BILTGEN, President of the Eighth Chamber
K. JÜRIMÄE, President of the Ninth Chamber
C. LYCOURGOS, President of the Tenth Chamber
A. ROSAS, Judge
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
M. ILEŠIČ, Judge
J. MALENOVSKÝ, Judge
E. LEVITS, Judge
L. BAY LARSEN, Judge
E. SHARPSTON, Advocate General
Y. BOT, Advocate General
M. SAFJAN, Judge
D. ŠVÁBY, Judge
M. BERGER, Judge
C.G. FERNLUND, Judge
C. VAJDA, Judge
N. WAHL, Advocate General
S. RODIN, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
H. Saugmandsgaard ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General
P.G. XUEREB, Judge
N. PIÇARRA, Judge
L.S. ROSSI, Judge
G. HOGAN, Advocate General
G. PITRUZZELLA, Advocate General
I. JARUKAITIS, Judge

A. CALOT ESCOBAR, Registrar

3. FORMER MEMBERS OF THE COURT OF JUSTICE

(in order of their entry into office)

JUDGES

Massimo PILOTTI, Judge (1952–1958), President from 1952 to 1958 (†)
Petrus SERRARENS, Judge (1952–1958) (†)
Otto RIESE, Judge (1952–1963) (†)
Louis DELVAUX, Judge (1952–1967) (†)
Jacques RUEFF, Judge (1952–1959 and 1960–1962) (†)
Charles Léon HAMMES, Judge (1952–1967), President from 1964 to 1967 (†)
Adrianus VAN KLEFFENS, Judge (1952–1958) (†)
Maurice LAGRANGE, Advocate General (1952–1964) (†)
Karl ROEMER, Advocate General (1953–1973) (†)
Rino ROSSI, Judge (1958–1964) (†)
Nicola CATALANO, Judge (1958–1961) (†)
Andreas Matthias DONNER, Judge (1958–1979), President from 1958 to 1964 (†)
Alberto TRABUCCHI, Judge (1962–1972), then Advocate General (1973–1976) (†)
Robert LECOURT, Judge (1962–1976), President from 1967 to 1976 (†)
Walter STRAUSS, Judge (1963–1970) (†)
Riccardo MONACO, Judge (1964–1976) (†)
Joseph GAND, Advocate General (1964–1970) (†)
Josse J. MERTENS de WILMARS, Judge (1967–1984), President from 1980 to 1984 (†)
Pierre PESCATORE, Judge (1967–1985) (†)
Hans KUTSCHER, Judge (1970–1980), President from 1976 to 1980 (†)
Alain Louis DUTHEILLET DE LAMOTHE, Advocate General (1970–1972) (†)
Henri MAYRAS, Advocate General (1972–1981) (†)
Cearbhall O'DALAIGH, Judge (1973–1974) (†)
Max SØRENSEN, Judge (1973–1979) (†)
Jean-Pierre WARNER, Advocate General (1973–1981) (†)
Alexander J. MACKENZIE STUART, Judge (1973–1988), President from 1984 to 1988 (†)
Gerhard REISCHL, Advocate General (1973–1981) (†)
Aindrias O'KEEFFE, Judge (1974–1985) (†)
Francesco CAPOTORTI, Judge (1976), then Advocate General (1976–1982) (†)
Giacinto BOSCO, Judge (1976–1988) (†)
Adolphe TOUFFAIT, Judge (1976–1982) (†)
Thijmen KOOPMANS, Judge (1979–1990) (†)
Ole DUE, Judge (1979–1994), President from 1988 to 1994 (†)
Ulrich EVERLING, Judge (1980–1988) (†)
Alexandros CHLOROS, Judge (1981–1982) (†)
Sir Gordon SLYNN, Advocate General (1981–1988), then Judge (1988–1992) (†)
Simone ROZÈS, Advocate General (1981–1984)
Pieter VERLOREN van THEMAAT, Advocate General (1981–1986) (†)
Fernand GRÉVISSE, Judge (1981–1982 and 1988–1994) (†)
Kai BAHLMANN, Judge (1982–1988) (†)
G. Federico MANCINI, Advocate General (1982–1988), then Judge (1988–1999) (†)
Yves GALMOT, Judge (1982–1988) (†)

Constantinos KAKOURIS, Judge (1983–1997) (†)
Carl Otto LENZ, Advocate General (1984–1997)
Marco DARMON, Advocate General (1984–1994) (†)
René JOLIET, Judge (1984–1995) (†)
Thomas Francis O'HIGGINS, Judge (1985–1991) (†)
Fernand SCHOCKWEILER, Judge (1985–1996) (†)
Jean MISCHO, Advocate General (1986–1991 and 1997–2003) (†)
José Carlos de CARVALHO MOITINHO de ALMEIDA, Judge (1986–2000)
José Luís da CRUZ VILAÇA, Advocate General (1986–1988), Judge (2012–2018)
Gil Carlos RODRÍGUEZ IGLÉSIAS, Judge (1986–2003), President from 1994 to 2003 (†)
Manuel DIEZ de VELASCO, Judge (1988–1994) (†)
Manfred ZULEEG, Judge (1988–1994) (†)
Walter VAN GERVEN, Advocate General (1988–1994) (†)
Francis Geoffrey JACOBS, Advocate General (1988–2006)
Giuseppe TESAURO, Advocate General (1988–1998)
Paul Joan George KAPTEYN, Judge (1990–2000)
Claus Christian GULMANN, Advocate General (1991–1994), then Judge (1994–2006)
John L. MURRAY, Judge (1991–1999)
David Alexander Ogilvy EDWARD, Judge (1992–2004)
Antonio Mario LA PERGOLA, Judge (1994 and 1999–2006), Advocate General (1995–1999) (†)
Georges COSMAS, Advocate General (1994–2000)
Jean-Pierre PUISSOCHET, Judge (1994–2006)
Philippe LÉGER, Advocate General (1994–2006)
Günter HIRSCH, Judge (1994–2000)
Michael Bendik ELMER, Advocate General (1994–1997)
Peter JANN, Judge (1995–2009)
Hans RAGNEMALM, Judge (1995–2000) (†)
Leif SEVÓN, Judge (1995–2002)
Nial FENNELLY, Advocate General (1995–2000)
Melchior WATHELET, Judge (1995–2003), Advocate General (2012–2018)
Dámaso RUIZ-JARABO COLOMER, Advocate General (1995–2009) (†)
Romain SCHINTGEN, Judge (1996–2008)
Krateros IOANNOU, Judge (1997–1999) (†)
Siegbert ALBER, Advocate General (1997–2003)
Antonio SAGGIO, Advocate General (1998–2000) (†)
Vassilios SKOURIS, Judge (1999–2015), President from 2003 to 2015
Fidelma O'KELLY MACKEN, Judge (1999–2004)
Ninon COLNERIC, Judge (2000–2006)
Stig von BAHR, Judge (2000–2006)
Antonio TIZZANO, Advocate General (2000–2006), then Judge (2006–2018), Vice-President from 2015 to 2018
José Narciso da CUNHA RODRIGUES, Judge (2000–2012)
Christiaan Willem Anton TIMMERMANS, Judge (2000–2010)
Leendert A. GEELHOED, Advocate General (2000–2006) (†)
Christine STIX-HACKL, Advocate General (2000–2006) (†)
Luís Miguel POIARES PESSOA MADURO, Advocate General (2003–2009)
Konrad Hermann Theodor SCHIEMANN, Judge (2004–2012)
Jerzy MAKARCZYK, Judge (2004–2009)
Pranas KŪRIS, Judge (2004–2010)
Georges ARESTIS, Judge (2004–2014)
Anthony BORG BARTHET, Judge (2004–2018)

Ján KLUČKA, Judge (2004–2009)
Uno LÕHMUS, Judge (2004–2013)
Aindrias Ó CAOIMH, Judge (2004–2015)
Paolo MENGOZZI, Advocate General (2006–2018)
Pernilla LINDH, Judge (2006–2011)
Ján MAZÁK, Advocate General (2006–2012)
Verica TRSTENJAK, Advocate General (2006–2012)
Jean-Jacques KASEL, Judge (2008–2013)
Niilo JÄÄSKINEN, Advocate General (2009–2015)
Pedro CRUZ VILLALÓN, Advocate General (2009–2015)
Egidijus JARAŠIŪNAS, Judge (2010–2018)

PRESIDENTS

Massimo PILOTTI (1952–1958) (†)
Andreas Matthias DONNER (1958–1964) (†)
Charles Léon HAMMES (1964–1967) (†)
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Hans KUTSCHER (1976–1980) (†)
Josse J. MERTENS de WILMARS (1980–1984) (†)
Alexander John MACKENZIE STUART (1984–1988) (†)
Ole DUE (1988–1994) (†)
Gil Carlos RODRÍGUEZ IGLÉSIAS (1994–2003) (†)
Vassilios SKOURIS (2003–2015)

REGISTRARS

Albert VAN HOUTTE (1953–1982) (†)
Paul HEIM (1982–1988)
Jean-Guy GIRAUD (1988–1994)
Roger GRASS (1994–2010)

CHAPTER II
GENERAL COURT

A| ACTIVITY OF THE GENERAL COURT IN 2018

By **Marc Jaeger**, President of the General Court

2018, the second full year since the reform of the judicial architecture of the European Union began, has provided an insight into the new paradigm of activity and functioning of the General Court in the context of the strategic objectives of that reform, under which the number of judges will gradually be doubled, with the third and final phase to be implemented in September 2019.

The General Court's composition has remained stable apart from the departure from office of Judge Xuereb, who was appointed as Judge to the Court of Justice on 8 October 2018. Since then, pending the appointment of a judge replacing Judge Xuereb and a judge due under the first phase of the reform (in which 12 new judges were to be appointed from 25 December 2015 onwards), the General Court has 45 members. [1]

Following 2017, the first year in which its new structure was implemented, and strengthened by its new resources, it was incumbent on the General Court to increase its productivity. An aim it has achieved, having decided [2] 1 009 cases in 2018. This represents a new record and an increase of almost 13% as compared to the previous year. Concurrently, there was a slight decrease in the number of cases brought before the Court (834 cases lodged). The combination of these factors has led to a substantial reduction in the number of pending cases (175 cases fewer, a decrease of almost 12%), which returned to the same level as in 2010. Nevertheless, the current situation is different from that in 2010, since the Court's capacity to decide cases is much stronger and, accordingly, the disposition time is much lower (482 days in 2018 compared to 900 days in 2010). The functioning of the General Court thus demonstrates that it is prepared to accommodate a potential transfer of competences from the Court of Justice.

The overall duration of proceedings (20.0 months for cases decided by judgment or order) has slightly increased compared to 2017. This was due to the disposal, in 2018, of a significant number of competition cases of such scope and complexity that the duration of the respective proceedings was naturally far higher than average. [3] Despite this short-term factor, it is pertinent to note that these values remain at levels markedly below those observed before the implementation of the reform of the judicial architecture of the European Union.

Amid the year's statistical results, it is also worth noting the increase in the number of cases decided by an extended chamber consisting of five judges, in the interests of the authority, consistency, clarity and, ultimately, the quality of the Court's case-law. In 2018, 87 cases were decided by extended chambers, that is to say 8.6% of all cases closed, a proportion that is four times higher than the average since 2009. In the years preceding the reform, it became necessary, on account of the increasing backlog of pending cases and lack of resources, to forgo extended chambers to a certain extent, even though these had been common between 1995 and 2005. The new structure of the General Court has thus enabled the Court to increase the number of cases

1| As at 31 December 2018.

2| Excluding applications for interim measures, which totalled 44 in 2018.

3| Excluding those 23 cases (relating to two groups of cases known as 'electrical cables' and 'perindopril'), the average duration of proceedings for the other 986 cases decided by judgment or order was 19.2 months. The impact of those 23 cases on the overall duration of proceedings can therefore be estimated at + 0.8 months, that is to say + 4%.

heard by extended chambers, where justified by the legal difficulty, importance or other special circumstances of a case, which has been particularly relevant to certain cases adjudicated on in 2018 or still pending that presented unquestionably high legal, economic, financial and institutional stakes.

Lastly, it is important to mention two procedural changes that entered into force on 1 December 2018. In the first place, amendments to Articles 3(3) and 28(2) of the Rules of Procedure of the General Court have granted the Vice-President of the General Court the competence, respectively, to perform the duties of an Advocate General and to propose to the plenum, as may the President of the General Court and the chamber initially seised of a case, that a case be referred to an extended chamber sitting with five judges or to the Grand Chamber. These provisions are intended to strengthen the means available to the Vice-President of the General Court in his objective of coordinating pending cases and fostering consistency in the case-law. In the second place, e-Curia, a computer application that makes it possible for procedural documents to be lodged and served electronically, is now the exclusive method for the communication of judicial documents between the representatives of parties and the General Court. This transition towards e-Curia becoming mandatory [4] follows positive feedback from users and aims to reap the full benefits of the immediacy of electronic exchanges and the efficiency gains resulting from no longer having to manage a number of different formats.

2018 has thus provided striking insight into the General Court's new mode of operation as a result of the reform of the judicial architecture of the European Union. It has given an early indication of the General Court's renewed capacity to dispose of cases, ensuing from its objective to increase referrals to extended chambers, in cases that so warrant, and its aim of meeting high quality and expediency requirements, backed by the continuous modernisation of its working methods and quest for efficacy.

The following pages, written by Vice-President van der Woude, highlight the broad range and importance of the cases adjudicated by the General Court, which is the very foundation of the legitimacy of the institutional system provided for by the Treaties, in performing its task of reviewing the legality of acts adopted by EU institutions, bodies, offices and agencies. Lastly, the essential support provided by the Registry of the General Court is summarised by the Registrar, Mr Coulon, followed by a range of statistics providing further details regarding 2018.

4| The need to provide a legal framework for this development led the General Court to adopt, on 11 July 2018, amendments to its Rules of Procedure and a new decision on the lodging and service of procedural documents by means of e-Curia. This change applies to all parties (applicants, defendants and interveners) and all types of proceedings, including urgent procedures, although it provides for certain exceptions in accordance with the general principle of access to justice (inter alia where the use of e-Curia is technically impossible or where legal aid is requested by an applicant that is not represented by a lawyer).

B | CASE-LAW OF THE GENERAL COURT IN 2018

Trends in the case-law

By Vice-President **Marc van der Woude**

The year 2018 was a particularly productive year in view of the record number of final decisions delivered. It was no less significant from the aspect of the nature of the judicial review carried out by the Court. In fact, during the past year the General Court was again able to take advantage of the reform of the judicial structure put in place by Regulation 2015/2422 [1] by referring a significant number of cases to formations of five judges, and also one case to the Grand Chamber. The involvement of a greater number of judges in important cases, special cases or cases presenting legal difficulties makes it possible to combine more points of view and more expertise, to provide litigants with a larger audience and, consequently, to enhance the authority of the judgments of the General Court. Referring cases to extended formations also allows the Court to structure its case-law by ascribing particular significance to certain judgments.

The wealth of judicial activity was attributable also to the great variety of areas of law in which the Court is involved. The extension of the spheres of activity of the European Union is gradually being reflected in the case-law. Thus, the Court has had the opportunity to develop its case-law in new matters such as supervision of the financial sector (see, for example, judgment of 24 April 2018, ***Caisse régionale de crédit agricole mutuel Alpes Provence and Others*** v ***ECB***, T-133/16 to T-136/16, EU:T:2018:219), or again in matters of great societal importance, such as environmental and health protection (see, for example, judgment of 17 May 2018, ***Bayer CropScience and Others*** v ***Commission***, T-429/13 and T-451/13, EU:T:2018:280, and judgment of 13 December 2018, ***Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid*** v ***Commission***, T-339/16, T-352/16 and T-391/16, EU:T:2018:927). The judicial protection provided by the Court does not extend to all the activities of the Union, however. It follows, in particular, from Article 275 TFEU that the Court of Justice of the European Union is not to have jurisdiction with respect to the provisions relating to the common foreign and security policy (CFSP) nor with respect to acts adopted on the basis of those provisions. Applying the principle outlined by the Court of Justice in its judgment in ***Rosneft,*** [2] the General Court considered, however, that that derogation from the principle of effective judicial protection within the meaning of Article 47 of the Charter, and from the rule of general jurisdiction which Article 19 TEU confers on the Court of Justice of the European Union to ensure that in the interpretation of the Treaties the law is observed, must be interpreted strictly. The General Court therefore considers that it has jurisdiction to adjudicate in disputes between a body coming under the CFSP and the members of its staff (judgment of 25 October 2018, ***KF*** v ***SatCen***, T-286/15, EU:T:2018:718).

In most cases the judicial protection afforded by the Court is provided in the context of the review of legality provided for in Article 263 TFEU. This review means that the Court is to verify, upon application by the applicant, whether the administrative or regulatory authorities complied with EU law when adopting the contested measure. The intensity of this review is not uniform, but may vary from one case to another, in particular according to the extent of the margin of discretion which EU law leaves to the authorities concerned. However, the review of legality never allows the General Court to substitute its own decision for that of the administration. It reviews and annuls contested measures when there has been a breach of the legal norm,

1| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

2| Judgment of 28 March 2017, ***Rosneft***, C-72/15, EU:C:2017:236, paragraph 74.

but it cannot adopt a decision in place of the administration. Although this review is always carried out in specific cases and although it is difficult to derive general tendencies from a body of individual cases, two trends seem to emerge from the Court's 2018 case-law.

A first characteristic relates to the relatively large number of cases in which a contested measure was annulled on the ground that the administration did not have all the relevant material before it at the time when it adopted that measure. The first decision in that series concerned merger law and more specifically the Commission's obligation to gather all the relevant evidence when it rules on a request to alter commitments, in this instance those given by Deutsche Lufthansa in order to obtain conditional authorisation for its acquisition of Swiss International Air Lines (judgment of 16 May 2018, ***Deutsche Lufthansa*** v ***Commission***, T-712/16, EU:T:2018:269). Second, in the field of State aid, the Court recalled that the insufficient or incomplete nature of the preliminary examination carried out in the context of the procedure provided for in Article 108(3) TFEU constitutes an indication of the existence of serious difficulties which the Commission encountered in that examination and which ought to have led it to initiate the formal investigation procedure under Article 108(2) TFEU (judgment of 19 September 2018, ***HH Ferries and Others*** v ***Commission***, T-68/15, EU:T:2018:563). In the judgment of 15 November 2018, ***Tempus Energy and Tempus Energy Technology*** v ***Commission*** (T-793/14, EU:T:2018:790), the Court further explained in that regard that the Commission must assemble all the relevant evidence diligently and impartially, in such a way as to eliminate all doubt as to the compatibility of the notified measure with the internal market. Third, the Court also had the opportunity to clarify the obligation placed on the administration to investigate cases correctly in the area of trade mark law. Although the applicant had failed to adduce within the prescribed period evidence to substantiate the reputation of the earlier trade mark on which it had based its opposition, the Board of Appeal ought, in the light of its previous practice in taking decisions relating to that reputation, to have assembled all the evidence necessary for the exercise of its discretion. Fourth, where the Council adopts or extends the listing of natural or legal persons on the lists of persons and entities covered by restrictive measures, it must ensure that it has reliable evidence and, if necessary, undertake additional checks. It must also state to the requisite legal standard the reasons why the evidence received justifies the adoption of restrictive measures against the person concerned.

A second trend which seems to be taking shape in recent case-law concerns the admissibility of actions brought under Article 263 TFEU and in particular those challenging regulatory acts which are of direct concern to the applicant and do not entail implementing measures. In that regard, it should be observed, first of all, that the Court of Justice, in its judgment of 6 November 2018, ***Scuola Elementare Maria Montessori*** v ***Commission***, ***Commission*** v ***Scuola Elementare Maria Montessori and Commission*** v ***Ferracci*** (C-622/16 P to C-624/16 P, EU:C:2018:873), upheld for the most part, as regards admissibility, the judgments of the General Court of 15 September 2016, ***Ferracci*** v ***Commission*** (T-219/13, EU:T:2016:485) and ***Scuola Elementare Maria Montessori*** (T-220/13, not published, EU:T:2016:484), in which the General Court had declared admissible the actions for annulment brought by two competitors of the beneficiaries of three national schemes against the Commission decision on State aid relating to those schemes. The Court of Justice approved the General Court's analysis, according to which the contested decision constituted, by reference to the three schemes, a regulatory act within the meaning of the final limb of the fourth paragraph of Article 263 TFEU, which did not require any implementing measure within the meaning of that provision and which was of direct concern to the applicants owing to their competitive relationships with the beneficiaries of the schemes at issue.

It was also on the basis of the final limb of the fourth paragraph of Article 263 TFEU that the Court considered, in its judgment of 13 September 2018, ***Gazprom Neft*** v ***Council*** (T-735/14 and T-799/14, EU:T:2018:548), that an action for annulment brought by the Russian undertaking Gazprom Neft against a number of provisions of general application, namely those governing a system of prior authorisation for exports relating to oil exploration and production to Russia, was admissible. The Court considered in that regard that those provisions did not require implementing measures, since the national authorities had no margin of discretion

when applying those provisions and since Gazprom Neft could not itself seek export authorisations. Since Gazprom Neft had shown that it was active in the field of exploration and production covered by the export bans at issue, its action was admissible.

The admissibility of an action against a regulatory act was also at the centre of the actions for annulment brought by three European capital cities against a Commission regulation on emissions standards for passenger and light goods vehicles; according to those cities, those standards were too flexible by comparison with the standards laid down in the basic regulation (Cases T-339/16, T-352/16 and T-391/16, cited above). The Commission disputed the admissibility of those actions on the ground that the regulation at issue did not directly affect the legal situation of the three applicants. The Court rejected that argument, being of the view that the contested measure restricted the ability of the public authorities of a Member State to combat air pollution by limiting vehicular traffic for technical reasons governed by the contested regulation. Consequently, the contested measure directly affected their regulatory capacity.

Last, in 2018 the Court had the opportunity to rule on a number of occasions on unlimited jurisdiction within the meaning of Article 261 TFEU, as it exists in particular in the field of competition law under Article 31 of Regulation No 1/2003, [3] and the power to alter a contested decision provided for in Article 72(3) of Regulation 2017/1001 on the European Union trade mark. [4] Both types of power supplement the review of legality in that they allow the Courts of the European Union to substitute their point of view for that of the administration. They diverge, nonetheless, as is apparent, for example, from the order of 1 February 2018, ***ExpressVPN*** v ***EUIPO (EXPRESSVPN)*** (T-265/17, EU:T:2018:79). In that case, the Court recalled that the annulment, in whole or in part, of the contested measure is a precondition of the exercise of the power of alteration. The power of unlimited jurisdiction, on the other hand, which is limited to the area of fines, may be exercised in the absence of such annulment (judgment of 15 October 2002, ***Limburgse Vinyl Maatschappij and Others*** v ***Commission***, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692). The Court also had the opportunity to rule for the first time on the exercise of unlimited jurisdiction in connection with the penalties provided for by Regulation No 966/2012 on the financial rules applicable to the general budget of the Union, [5] recalling the principle, already developed in competition matters, that it cannot exercise its unlimited jurisdiction of its own motion, but only where it is asked to do so when the action is brought (judgment of 8 November 2018, ***'Pro NGO!'*** v ***Commission***, T-454/17, EU:T:2018:755).

3| Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

4| 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). This power of alteration was conferred on the Court in accordance with the fifth paragraph of Article 263 TFEU.

5| Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation (EU, Euratom) No 966/2012 on the financial rules applicable to the general budget of the Union (OJ 2015 L 286, p. 1).

I. Institutional law

In the case that gave rise to the judgment of 23 April 2018, ***One of Us and Others*** v ***Commission*** (T-561/14, under appeal, [6] EU:T:2018:210), the Court was required to rule on the legality of Communication COM(2014) 355 final, [7] adopted on the basis of Article 10(1)(c) of Regulation (EU) No 211/2011. [8] In that communication, the European Commission's position was that it would not take the actions requested by the European Citizens' Initiative (ECI) at issue, the objective of which was to secure a ban and the end of the financing by the European Union of activities involving the destruction of human embryos.

The Court began by examining the question whether the entity known as 'European Citizens' Initiative One of Us' might bring proceedings before the Courts of the European Union in order to seek, pursuant to the fourth paragraph of Article 263 TFEU, annulment of the contested communication. In that regard, the Court observed that it was not apparent from the case file that that entity had legal personality under the law of a Member State or of a third State, just as it was not apparent from Regulation No 211/2011 that that regulation conferred legal personality on an ECI by treating it as a distinct person. In the light of those considerations, and since, moreover, it was not apparent from any act or conduct on the part of the Commission that it had treated the entity known as 'European Citizens' Initiative One of Us' as being a distinct person, the Court concluded that it did not have capacity to bring legal proceedings before the Courts of the European Union. According to the Court, the action therefore had to be declared inadmissible in so far as it had been brought by the entity known as 'European Citizens' Initiative One of Us', without prejudice to the admissibility of the action in so far as it had also been brought by the seven natural persons comprising the citizens' committee of the ECI at issue.

As regards the substance, although the applicants claimed that the Commission, in connection with the obligation to state reasons incumbent on it, was required to demonstrate that the existence of sufficient ethical and legal guarantees made the ECI at issue devoid of purpose, which it had not done, the Court observed that the obligation to state reasons must apply to all acts that might be the subject of an action for annulment and that it followed that the contested communication, which contained the Commission's decision not to submit to the EU legislature a proposal for a legal act following the ECI at issue, was covered by such an obligation to state reasons. In addition, the obligation for the Commission to set out, in the communication adopted pursuant to Article 10(1)(c) of Regulation No 211/2011, the reasons for taking or not taking an action following an ECI gave specific expression to the obligation to state reasons laid down in the context of that provision. In this instance, while rejecting the Commission's proposition that the sole objective of the reasons for the communication provided for in Article 10(1)(c) of Regulation No 211/2011 was to allow a possible political debate, the Court considered that the explanations set out in the contested communication enabled the applicants to determine whether the Commission's refusal to submit a proposal for amendment of certain EU acts, as the ECI at issue had called on it to do, was well founded or whether it was vitiated by defects. Furthermore, those explanations allowed the Courts of the European Union to exercise their jurisdiction to review the legality of the contested communication. The Court therefore concluded that that communication was sufficiently reasoned.

6| Case C-418/18 P, ***One of Us*** v ***Commission***.

7| Commission Communication COM(2014) 355 final of 28 May 2014 on the European Citizens' Initiative (ECI) 'One of us'.

8| Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative (OJ 2011 L 65, p. 1).

In the cases that gave rise to the judgments of 31 May 2018, ***Korwin-Mikke*** v ***Parliament*** (T-352/17, EU:T:2018:319), and of 31 May 2018, ***Korwin-Mikke*** v ***Parliament*** (T-770/16, EU:T:2018:320), the Court was required to rule on the actions brought by the applicant, a Member of the European Parliament (MEP), against the decisions of the European Parliament imposing disciplinary penalties on him for comments which he had made about migrants and women during two plenary sessions of the Parliament on, respectively, immigration in Europe and the problem of the pay gap between men and women. The applicant took issue with the Parliament, in particular, for having breached his right to freedom of expression as guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and for having disregarded the scope of Rule 166 of its Rules of Procedure.

The Court recalled first of all that, while freedom of expression occupied an essential role in democratic societies, it did not constitute an unfettered prerogative and its exercise might, under certain conditions, be subject to restrictions, which must be interpreted strictly. Interferences with freedom of expression were permitted only if they satisfied three conditions. First, the limitation in question must be 'provided for by law'. Second, the limitation in question must be intended to achieve an objective of general interest, recognised as such by the European Union. Third, the limitation in question must not be excessive, which means, on the one hand, that it must be necessary and proportionate to the aim sought and, on the other hand, that the essence of the freedom in question must not be impaired. In addition, the Court noted, an interference with or restriction on freedom of expression could be regarded as being 'provided for by law' only if the provision was formulated with sufficient precision. Notwithstanding that the freedom of expression of members of parliament must be afforded greater protection in the light of the fundamental importance of the role which the Parliament plays in a democratic society, the exercise of freedom of expression within the Parliament must yield on occasions to the legitimate interests of protecting the orderly conduct of parliamentary business and the protection of the rights of other members of parliament. In that regard, the Court observed that the European Court of Human Rights had, on the one hand, linked the possibility of a parliament's penalising one of its members for his conduct to the need to ensure that parliamentary business was conducted in an orderly fashion and, on the other hand, recognised that parliaments had considerable autonomy to regulate the time, place and manner of speeches by members of parliament, but very limited latitude in regulating the content of parliamentary speech. It followed, according to the Court, that a parliament's rules of procedure could provide for the possibility of penalising members for their comments only in the event that those comments undermined the proper functioning of the parliament or posed a serious threat to society, such as incitement to violence or racial hatred. It also followed that the power granted to parliaments to impose disciplinary sanctions in order to ensure the proper conduct of their business or the protection of certain fundamental rights, freedoms or principles should be reconciled with the need to ensure respect for the freedom of expression of members of parliament.

Examining, next, whether, in imposing the disciplinary penalty at issue, the Parliament had observed the conditions laid down in Rule 166(1) of its Rules of Procedure, the Court stated that that provision covered cases where there was disruption of the proper functioning of the Parliament or of the orderly conduct of parliamentary business and therefore sought to penalise an MEP for behaviour that might seriously disrupt the conduct of a parliamentary session or parliamentary business, namely in serious cases of 'disorder' or 'disruption' of the Parliament in violation of the principles laid down in Rule 11 of those Rules of Procedure, establishing Members' standards of conduct. The Court made clear that a breach of those principles could not be penalised as such, but only where it was accompanied by disorder or disruption of the Parliament within the meaning of Rule 166(1) of its Rules of Procedure. In this case, it was not apparent from the file that the comments made by the MEP during the plenary sessions had in any way caused disorder or disruption of the Parliament. In addition, the disruption of the Parliament referred to in the first subparagraph of Rule 166(1) of its Rules of Procedure that had occurred outside the Hemicycle, as a result of the repercussions which the applicant's comments had had beyond the Parliament, could not be understood as constituting

harm to the reputation or the dignity of the Parliament as an institution. In those circumstances, and in spite of the particularly shocking nature of the words used by the applicant in his speeches during the two plenary sessions, the Parliament had not been entitled, in the circumstances of the present case, to impose on him disciplinary penalties on the basis of Rule 166(1) of its Rules of Procedure.

In the case that gave rise to the judgment of 25 October 2018, ***KF*** v ***SatCen*** (T-286/15, EU:T:2018:718), delivered by the Court sitting in an extended composition, an action had been brought before the Court seeking annulment of a number of decisions taken against the applicant, including the decision whereby the Director of the European Union Satellite Centre (SatCen) had removed the applicant because of behaviour liable to constitute psychological harassment, and compensation for the harm which the applicant claimed to have suffered.

Although SatCen claimed that the dispute came under the common foreign and security policy (CFSP) and that the Court therefore lacked jurisdiction to hear it, the Court observed that the fact that the contested decisions fell within the framework of the functioning of a body operating in the field of the CFSP could not, in itself, mean that the Courts of the European Union lacked jurisdiction to adjudicate. In essence, according to the Court, the contested decisions constituted purely acts of staff management which, in the light of their grounds and objectives, and of the context in which they had been adopted, had not been intended to support the conduct, definition or implementation of the CFSP within the meaning of Article 24(2) TEU, or, more specifically, to fulfil the missions of SatCen falling within the CFSP. The Court inferred that the dispute before it was comparable to disputes between an institution, body, office or agency of the European Union not covered by the CFSP and one of its officials or other servants, which might be brought before the Courts of the European Union under Article 270 TFEU, which provided that the Court of Justice of the European Union was to have jurisdiction in any dispute between the European Union and its servants. The Court considered, therefore, that it had jurisdiction to rule on this dispute, such jurisdiction stemming, respectively, as regards the review of the legality of the contested decisions, from Article 263 TFEU and, as regards claims based on the non-contractual liability of the European Union, from Article 268 TFEU, read with the second paragraph of Article 340 TFEU.

As regards the substance, the Court, examining the plea of illegality in respect of Article 28(6) of the Staff Regulations of SatCen, [9] raised by the applicant on the ground that that provision made the Appeals Board of SatCen the only body with jurisdiction to review the legality of the decisions of the Director of SatCen, decided that that plea must be upheld. It held that the Council of the European Union could not, without infringing the provisions of Article 19 TEU and of Article 256 TFEU, confer on the Appeals Board of SatCen mandatory and exclusive jurisdiction to review the legality of the decisions of the Director of SatCen, and to rule on claims by staff members for compensation, in a situation where, as in the present case, it was the General Court that had jurisdiction to hear and determine, at first instance, that type of dispute. Consequently, the Appeals Board's decision had no legal basis and therefore had to be annulled. The same applied to the decisions to suspend and remove the applicant, as SatCen had infringed the principle of sound administration, the duty of care and the requirement of impartiality in the conduct of the administration by sending a number of staff members a 'Bullying Questionnaire' containing multiple choice entries corresponding, in essence, to general categories of conduct liable to constitute 'psychological harassment'. As regards the claims for compensation, the Court considered, with respect to compensation for the material harm which the contested decisions were alleged to have caused to the applicant, corresponding to the amount of the remuneration to which she would have been entitled had she remained in her position at SatCen between the date of her dismissal and the date on which her employment contract ended, that such claims must be rejected as

9| Council Decision 2009/747/CFSP of 14 September 2009 concerning the Staff Regulations of the European Union Satellite Centre (OJ 2009 L 276, p. 1).

premature. On the other hand, it held that the applicant had sustained non-material harm arising from a state of uncertainty with regard to the facts alleged against her and from an attack on her good repute and her professional reputation, and that compensation of EUR 10 000 constituted appropriate redress for that harm.

II. Competition rules applicable to undertakings

1. Developments in the area of Article 101 TFEU

In the judgments of 12 July 2018, ***The Goldman Sachs Group*** v ***Commission*** (T-419/14, under appeal, [10] EU:T:2018:445), ***Prysmian and Prysmian Cavi e Sistemi*** v ***Commission*** (T-475/14, under appeal, [11] EU:T:2018:448), ***Brugg Kabel and Kabelwerke Brugg*** v ***Commission*** (T-441/14, under appeal, [12] EU:T:2018:453), and ***Nexans France and Nexans*** v ***Commission*** (T-449/14, under appeal, [13] EU:T:2018:456), the Court ruled on the legality of the Commission decision finding that the applicants had participated in a cartel on the European market for power cables. [14] Those cases gave the Court the opportunity to provide helpful clarification with regard to the Commission's powers of inspection, the extraterritorial effects of competition law and the relationship between parent companies and their subsidiaries.

As regards, first of all, the Commission's powers of inspection, in the cases that gave rise to the judgments ***Prysmian and Prysmian Cavi e Sistemi*** v ***Commission*** (T-475/14, under appeal, EU:T:2018:448), and ***Nexans France and Nexans*** v ***Commission*** (T-449/14, under appeal, EU:T:2018:456), the applicants took issue with the Commission for having made a copy-image of the hard drives of the computers of certain of their employees in order to use them subsequently for the purposes of the investigation in its offices, without having first ascertained that the documents on those drives were relevant to the subject matter of the investigation. In their submission, that practice went beyond the powers conferred on the Commission by Article 20(1) and (2) of Regulation (EC) No 1/2003. [15] According to the Court, given that making the copy-image of the hard drive of the computers in question was part of the process by which the Commission operated the forensic information technology (FIT), the purpose of which was to search for information relevant to the investigation, the making of those copies fell within the scope of the powers provided for in Article 20(2)(b) and (c) of Regulation No 1/2003. As regards the fact that those copy-images had been taken to the Commission's premises in Brussels (Belgium) so that a search for material relevant to the investigation could subsequently be conducted, the Court noted that Article 20(2)(b) of Regulation No 1/2003 did not provide that the examination of the books or records related to the business of undertakings under inspection must

10| Case C-595/18 P, ***The Goldman Sachs Group*** v ***Commission***.

11| Case C-601/18 P, ***Prysmian and Prysmian Cavi e Sistemi*** v ***Commission***.

12| Case C-591/18 P, ***Brugg Kabel and Kabelwerke Brugg*** v ***Commission***.

13| Case C-606/18 P, ***Nexans France and Nexans*** v ***Commission***.

14| Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 — Power cables).

15| Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

be carried out exclusively at their premises if, as in the present case, that inspection could not be completed within the time frame initially envisaged. It merely required the Commission to offer, when examining those documents at its premises, the same guarantees to undertakings under inspection as those required of the Commission when it conducted an on-the-spot examination. As those guarantees had been observed in the present case, the Court held that, during the inspection, the Commission had not gone beyond the powers conferred on it under Article 20(2) of Regulation No 1/2003.

Next, having regard to the extraterritorial effects of competition law, it was maintained by the applicants in the case that gave rise to the judgment of 12 July 2018, ***Brugg Kabel and Kabelwerke Brugg*** v ***Commission*** (T-441/14, under appeal, EU:T:2018:453), that the Commission did not have jurisdiction to apply Article 101 TFEU to practices that had taken place outside the European Economic Area (EEA) and to projects to be carried out outside the EEA when they had had no impact in the EEA. In the absence of proof that the practices relating to each of those projects had immediate, substantial and foreseeable effects in the EEA, the Commission could not simply link them with the single and continuous infringement found in the contested decision in order to provide a basis for its extraterritorial jurisdiction, unless it were allowed to confer an unlimited nature on that jurisdiction. In that regard, the Court observed that Article 101 TFEU might be applied to practices and agreements that served the same anti-competitive objective, provided that it was foreseeable that, taken together, those practices and agreements would have immediate and substantial effects in the internal market. It followed that, contrary to the applicants' assertions, it was by reference to the effects, taken together, of the various practices described in the contested decision, including those relating to projects to be carried out outside the EEA, that the Court had to assess whether Article 101 TFEU had been applicable in this case. According to the Court, the Commission had not erred in stating in the contested decision that the effects on competition in the EEA, including the internal market, of the practices and agreements in which the members of the cartel had participated had been foreseeable, substantial and immediate. In that context, the Court explained, it was sufficient to take account of the likely effects of conduct on competition for the condition relating to the requirement of foreseeability to be fulfilled. As regards the immediate nature of the effects of the practices at issue on the territory of the European Union, those practices had necessarily had a direct impact on the supply of high and extra high voltage power cables in that territory, since that had been the object of the different meetings and contacts between the participants in the cartel. As for the substantial nature of the effects in the European Union, the Court drew attention to the number and size of the producers who had participated in the cartel, who represented virtually the entire market, and also to the wide range of products affected by the different agreements and the gravity of the practices in question, and likewise to the significant duration of the single and continuous infringement, which had lasted for 10 years. According to the Court, all of those factors, when assessed together, served to demonstrate the substantial nature of the practices in question on the territory of the European Union. Accordingly, the Court concluded that the single and continuous infringement as defined in the contested decision came within the scope of Article 101 TFEU and that the Commission had had jurisdiction to penalise it.

Last, as regards the relationship between parent companies and their subsidiaries, the applicant in the case that gave rise to the judgment of 12 July 2018, ***The Goldman Sachs Group*** v ***Commission*** (T-419/14, under appeal, EU:T:2018:445), submitted, inter alia, that the Commission had been wrong to apply the presumption of actual exercise of decisive influence in order to hold it jointly and severally liable for payment of the fine imposed on its subsidiaries. On that point, the Court observed that the presumption of actual exercise of decisive influence was based on the premiss that where a parent company holds all or virtually all the share capital of its subsidiary, the Commission is entitled to conclude, without supporting evidence, that that parent company has the power to exercise decisive influence over the subsidiary without having to take the interests of other shareholders into account when adopting strategic decisions or in the day-to-day business of that subsidiary, which does not determine its own market conduct independently, but does so in accordance with the wishes of that parent company. Those considerations were fully applicable in the case where a parent company was able to exercise all the voting rights associated with the shares of its subsidiary, since that

parent company was in a position to exercise total control over the conduct of that subsidiary without any third parties, in particular other shareholders, being in principle able to object to that control. Admittedly, it could not be ruled out that, in certain cases, minority shareholders who had no voting rights associated with the shares of that subsidiary might exercise, with respect to that subsidiary, certain rights enabling them, in certain circumstances, to also have an influence over the conduct of that subsidiary. However, in those circumstances, that parent company might then rebut the presumption of actual exercise of decisive influence by adducing evidence capable of showing that it did not determine the commercial policy of the subsidiary concerned on the market. In addition, the Court considered that the Commission had been correct to take account of other objective factors that supported the finding that the applicant had exercised decisive influence over its subsidiary, namely the parent company's power to appoint members to the board of directors of the subsidiary, the power to call shareholder meetings, the power to propose the revocation of the members of the board of directors, the role played by the directors of the parent company within the strategic committee of the subsidiary, or the receipt by the parent company of regular updates and monthly reports on the subsidiary's business. Last, the Court stated that the applicant had not submitted sufficient arguments to show that its shareholding in its subsidiary had been intended solely as a pure financial investment, rather than to manage and control the subsidiary.

In the case that gave rise to the judgment of 12 December 2018, ***Servier and Others*** v ***Commission*** (T-691/14, EU:T:2018:922), an action had been brought before the Court against the decision whereby the Commission had considered that Servier SAS had participated in cartels on the market for perindopril, a medicinal product designed to combat hypertension and heart failure. At issue were patent settlements putting an end to disputes concerning certain of Servier's patents. [16] The judgment provides clarification on the reconciliation, in such a context, of patent law and competition law.

While observing that it was prima facie permissible for the parties to a patent dispute to enter into a settlement agreement rather than embark on litigation, the Court found that the identification of the relevant factors on the basis of which it might be concluded that a patent settlement was restrictive of competition by object was made particularly difficult by the fact that neither the Commission nor the Courts of the European Union were competent to define the scope of a patent or to rule on its validity. That prevented them from making an objective assessment of those issues and must lead them, on the contrary, to favour a subjective approach based on the recognition of the validity of the patent by the parties to the agreements at issue. The Court emphasised, in that context, that a settlement of a patent dispute might not have any negative impact on competition. That was the case, for example, if the parties agreed to consider that the patent at issue was not valid and thereby provided for the immediate entry of the generics company to the market. It was where the parties agreed, on the contrary, to consider that the patent at issue was valid that the distinction between settlements that complied with competition law and those that did not became more delicate to draw.

As regards the criteria on which it might be concluded that a patent settlement was restrictive of competition by object, the Court considered that the first criterion consisted in the presence in the agreement in question of clauses covering the non-challenge of patents and the non-marketing of goods, which were in themselves restrictive of competition. However, the inclusion of such clauses might be lawful, but only in so far as it was based on the recognition by the parties of the validity of the patent at issue. The second criterion consisted in the existence of a 'reverse payment' — that is to say, a payment from the originator company to the generic company — by way of inducement. In fact, where an inducement was found to exist, it was then the inducement, and not recognition by the parties to the settlement of the validity of the patent, that must be considered to be the real cause of the restrictions of competition introduced by the non-marketing and non-challenge

16| 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)).

clauses, which, being then deprived of any legitimacy, therefore displayed a sufficient degree of harmfulness for the proper function of normal competition to be classified as a restriction by object. The Court thus found it necessary to clarify the concept of inducement. Without reversing the burden of proof, which would have been contrary to the case-law according to which it is in principle for the Commission to establish the infringement, the Court introduced a variation of the burden of proof based on a classification of the forms of inducement in order to ensure that undertakings wishing to settle their disputes had a greater foreseeability in the application of competition law, which was insufficiently ensured by a mere examination of the present situations on a case-by-case basis. In that regard, the Court distinguished, on the one hand, the situation of a payment by the originator company to the generic company without consideration (other than submission to the restrictive clauses) and, on the other hand, the situation of a transfer of value in the context of a commercial agreement associated with the settlement (that is to say, an 'auxiliary agreement').

This judgment also gave the Court the opportunity to review the principles applicable to the aggregation of fines. Servier maintained that the aggregated amount of the fines imposed on it under Article 101 TFEU was disproportionate and also that the settlements at issue had been penalised twice, as fines had been imposed on it for those agreements on the basis of both Article 101 TFEU and Article 102 TFEU.

On the first point, the Court noted that the Commission had taken into account in the contested decision the fact that Servier had committed a number of infringements which were admittedly separate infringements but related to the same product, perindopril, and to a large extent to the same geographic areas and the same periods. In that particular context, in order to avoid a potentially disproportionate outcome, the Commission had decided to limit, for each infringement, the proportion of the value of sales made by Servier taken into account for the purpose of determining the basic amount of the fine. Thus, the Court essentially approved that approach and found that the aggregate amount of the fines imposed on Servier on the basis of Article 101 TFEU was not disproportionate. On the other hand, it did not rule on the second point, because the fine imposed on Servier on the basis of Article 102 TFEU was annulled.

2. Developments in the area of Article 102 TFEU

In the case that gave rise to the judgment of 12 December 2018, ***Servier and Others*** v ***Commission*** (T-691/14, EU:T:2018:922), the Court was also required to adjudicate on the alleged infringement by Servier consisting in an abuse of a dominant position. The applicants maintained, in particular, that the Commission had made an error of assessment and an error of law in restricting the market for the relevant finished goods solely to the perindopril molecule and excluding the 15 other conversion enzyme inhibitors (CEIs) from the market with the sole aim of being able to find that Servier held a dominant position on that market.

In that regard, the Court emphasised that the pharmaceutical sector was 'atypical' in that the demand for medicinal products issued on prescription was guided by the prescriber and not by the end consumer, namely the patient. Likewise, doctors were mainly guided, in their prescription choices, by the therapeutic effect of the medicinal products. According to the Court, the free choice of doctors between the originator medicinal products available on the market, or between originator medicinal products and the generic versions of other molecules, and the attention that prescribers gave in priority to the therapeutic aspects allowed, where appropriate, significant competitive constraints, of a qualitative and non-tariff nature, to be exercised outside the normal mechanisms of pressure by price. Thus, where medicinal products existed which were recognised or perceived as equivalent or substitutable, the market analysis had to pay particular attention to the factors that permitted the identification of the existence of competitive pressure of that type.

In the present case, the Court held that the Commission had made a number of errors in its analysis of the definition of the relevant market, which were of such a kind as to vitiate the result of its analysis. In fact, the Commission had been wrong to consider, as regards therapeutic use, that the CEIs were a class of heterogeneous medicinal products and that perindopril had particular characteristics within that class of medicinal products. In addition, the Commission had underestimated the propensity of patients treated with perindopril to change treatment and had misunderstood the specific characteristics of competition in the pharmaceutical sector, by wrongly inferring from an analysis of natural events based essentially on price variations that perindopril was not subject to significant competitive pressure from the other CEIs. The Court concluded that the Commission had not established that the relevant product market had been limited solely to originator and generic perindopril.

In the cases that gave rise to the judgments of 13 December 2018,

(T-851/14, EU:T:2018:929), and of 13 December 2018, ***Deutsche Telekom*** v ***Commission*** (T-827/14, EU:T:2018:930), the Court was required to examine the legality of the decision whereby the Commission had considered that the undertaking composed of Slovak Telekom, a.s. and Deutsche Telekom AG had abused its dominant position on the Slovakian telecommunications market. [17] The applicants claimed, in particular, that the Commission had wrongly failed to examine whether access to Slovak Telekom's network was indispensable in order to be able to operate on the retail market for broadband services in Slovakia.

On that point, the Court observed that the relevant regulatory framework clearly acknowledged the need for access to Slovak Telekom's local loop, in order to allow the emergence and development of effective competition in the Slovakian market for high-speed internet services. Thus, the Commission had not been required to demonstrate that such access was indeed indispensable.

The Court also considered whether Article 1(2)(d) of the contested decision could be annulled in part in that it found that, during the period between 12 August and 31 December 2005, Slovak Telekom had employed a practice resulting in a margin squeeze. In that regard, the Court found that the analysis carried out by the Commission had resulted, in all the scenarios envisaged, in a positive margin for that period. The Court recalled that, in such circumstances, to the extent that an undertaking in a dominant position set its prices at a level covering the bulk of the costs attributable to the supply of the goods or services in question, it was, as a general rule, possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that were unsustainable in the long term. It followed that, during the period between 12 August and 31 December 2005, it had, in principle, been possible for a competitor as efficient as Slovak Telekom to compete with that operator on the retail market for broadband services in so far as unbundled access to the local loop was granted to it, and without suffering losses that were unsustainable in the long term. While it was indeed true that, if a margin was positive, it could not be precluded that the Commission could, in the context of the examination of the exclusionary effect of a pricing practice, demonstrate that the application of that practice had, by reason, for example, of reduced profitability, been likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned, in this case it had to be noted, however, that the Commission had not demonstrated in the contested decision that Slovak Telekom's pricing practice, during the period between 12 August and 31 December 2005, had resulted in such exclusionary effects, as it had been particularly required to demonstrate given the presence of positive margins.

17| Commission Decision C(2014) 7465 final of 15 October 2014 relating to proceedings under Article 102 [TFEU] and Article 54 of the EEA Agreement (Case AT.39523 — Slovak Telekom), as rectified by Commission Decision C(2014) 10119 final of 16 December 2014 and by Commission Decision C(2015) 2484 final of 17 April 2015.

In the case that gave rise to the judgment of 13 December 2018, ***Deutsche Telekom*** v ***Commission*** (T-827/14, EU:T:2018:930), moreover, the Court, when examining the applicant's argument that the Commission had misunderstood the concept of 'undertaking' in EU law and the principle that penalties and sanctions must be appropriate to the offender when it had imposed a separate fine on the applicant, in addition to the fine that had been imposed on it jointly and severally with Slovak Telekom, the Court stated that the aggravating circumstance of repeated infringement might constitute a factor that individually characterised the conduct of a parent company and caused the extent of its liability to exceed that of its subsidiary. It noted, however, that where, as in this case, the Commission, in order to assess the gravity of the infringement committed by the undertaking and to calculate the fine to be imposed on it, relied on the subsidiary's turnover, the parent company's turnover, even if it was considerably larger than its subsidiary's, was not a factor of such a kind as to characterise the parent company's individual conduct in committing the infringement attributed to the undertaking, as the parent company's liability in that respect was derived purely from that of its subsidiary. Consequently, the Commission had misunderstood the concept of 'undertaking' in EU law when, in the contested decision, it had applied a multiplier of 1.2 to the applicant for deterrent purposes. In the exercise of its unlimited jurisdiction, the Court recalculated the amount of the fine imposed jointly and severally on Deutsche Telekom and Slovak Telekom, owing to the error made by the Commission when it had found that the practice resulting in a margin squeeze committed by Slovak Telekom might have commenced before 1 January 2006. It also recalculated the amount of the separate fine imposed on the applicant to ensure that it would bear the consequences of repeated infringement, namely 50% of the amount imposed jointly and severally, without applying the coefficient of 1.2 for deterrence. Last, as regards the Commission's request, in the case that gave rise to the judgment of 13 December 2018, ***Slovak Telekom*** v ***Commission*** (T-851/14, EU:T:2018:929), that the amount of the fine imposed jointly and severally be increased, the Court considered that, in the light of the circumstances of the case, there was no need to amend that amount.

3. Developments in the area of mergers

In the case that gave rise to the judgment of 16 May 2018, ***Deutsche Lufthansa*** v ***Commission*** (T-712/16, EU:T:2018:269), an action had been brought before the Court for annulment of the decision whereby the Commission had rejected the applicant's request for a waiver of certain commitments rendered binding by the Commission decision of 4 July 2005 approving the acquisition of control of Swiss International Air Lines Ltd by Deutsche Lufthansa AG. [18] By its request, the applicant had sought a waiver of the fare commitments and, if possible, a waiver of the slot commitments and other ancillary access remedies applicable to the Zurich-Stockholm route ('the ZRH-STO route') and the Zurich-Warsaw route ('the ZRH-WAW route'). Following the rejection of that request by the Commission, the applicant had brought an action before the Court directed more particularly against that rejection in so far as it related to the request for a waiver of the fare commitments applicable to the ZRH-STO and ZRH-WAW routes.

In that regard, the Court began by pointing out that the commitments entered into by the parties in order to dispel the serious doubts raised by a concentration and to render it compatible with the internal market generally contained a review clause stipulating the conditions under which the Commission, upon request, would be able to waive, modify or replace those commitments. The waiver or amendment of such commitments was of particular relevance in the case of behavioural commitments, for which not all contingencies could be predicted at the time of the adoption of the merger decision. The purpose of commitments was in fact to remedy the competition problems identified; accordingly, the commitments might have to be amended,

18| Commission Decision C(2016) 4964 final of 25 July 2016 rejecting Deutsche Lufthansa AG's request for a waiver of certain commitments rendered binding by the Commission Decision of 4 July 2005 approving the merger in Case COMP/M.3770 — Lufthansa/Swiss.

depending on how the market situation developed. In that context, the Commission had a certain discretion to assess, in particular, the need to obtain commitments in order to dispel the serious doubts raised by a concentration. As regards, more particularly, a request for waiver of commitments, the Court observed that such a request did not necessarily give rise to the same difficulties of prospective analysis as the examination of a concentration. The examination of such a request would require an assessment of whether the conditions laid down in the review clause were fulfilled or an evaluation of whether the assumptions made at the time when the concentration had been approved had proved to be correct or whether the serious doubts raised by the concentration still persisted. Nonetheless, the appraisal of a waiver request entailed what were sometimes complex economic assessments in order to ascertain whether market circumstances had changed significantly and on a permanent basis, with the consequence that the commitments were no longer necessary. It therefore had to be held that the Commission also had a certain discretion when evaluating a waiver request that involved complex economic assessments. It was nonetheless obliged to carry out a careful examination of that request and to base its conclusions on all the relevant information. Furthermore, the Court observed, the decision concerning a request for the waiver of commitments did not presuppose withdrawal of the decision authorising the merger, which had made those commitments binding, and did not comprise such a withdrawal. Its purpose was to ascertain whether the conditions laid down in the review clause forming part of the commitments were met or, as the case might be, whether the competition concerns identified in the decision authorising the merger subject to the commitments had ceased to exist. In addition, it was the parties bound by the commitments that must adduce sufficient evidence to demonstrate that the conditions for waiving the commitments were fulfilled. However, where those parties did provide evidence that was such as to establish that the conditions laid down in the review clauses of the commitments were fulfilled, it was for the Commission to show how the evidence was insufficient or unreliable and, if necessary, to carry out an investigation to verify, supplement or refute the evidence adduced by those parties.

In the light of those considerations, the Court considered that, in the present case, the Commission had not fulfilled its obligations. As regards the ZRH-STO route, the Court observed, in particular, that the Commission had not examined the impact on competition of the termination of the joint venture agreement concluded between Deutsche Lufthansa and Scandinavian Airlines System, either on its own or in conjunction with Deutsche Lufthansa's offer to terminate its existing bilateral alliance agreement with Scandinavian Airlines System as well. Nor, according to the Court, had the Commission adequately answered Deutsche Lufthansa's argument that the Commission had changed its policy by no longer taking alliance partners into account when defining affected markets, or undertaken a sufficient analysis of the impact of the codeshare agreement on competition between Swiss International Air Lines and Scandinavian Airlines System. The Court therefore concluded that the Commission had made a manifest error of assessment inasmuch as it had failed to take all the relevant information into account and that the matters relied on in the contested decision were not capable of justifying the rejection of the waiver request relating to the ZRH-STO route. As regards the ZRH-WAW route, on the other hand, the Court held that, in the absence of any change in the contractual relationships between Swiss International Air Lines and Polskie Linie Lotnicze LOT S.A., in the light of which the fare commitments had been made binding, the failures established had not been sufficient to cause the contested decision to be annulled so far as that route was concerned.

In the case that gave rise to the judgment of 9 October 2018, ***1&1 Telecom*** v ***Commission*** (T-43/16, EU:T:2018:660), the Court was required to rule on an action brought against the Commission's alleged decision relating to the implementation of the final commitments made binding by its decision declaring the acquisition of E-Plus Mobilfunk GmbH & Co. KG by Telefónica Deutschland Holding AG to be compatible with the internal market. The case raised, primarily, a question of admissibility, namely whether a letter whereby the Commission, following a complaint, such as that lodged by the applicant, interpreted the scope of final commitments and considered that the undertaking required to comply with them was not in breach of those commitments, and thus refused to take measures against that undertaking, constituted an act against which an action within the meaning of Article 263 TFEU might be brought.

In the first place, the Court observed that, in the present case, the letter at issue merely confirmed the final commitments without modifying the applicant's legal situation. It followed that, in so far as it interpreted the scope of the final commitments, that letter did not constitute a decision, but merely a legally non-binding statement that the Commission was authorised to make in the context of ex post supervision of the correct implementation of its decisions relating to the control of concentrations. In the second place, the Court emphasised that the applicant had no individual right to oblige the Commission to adopt a decision finding that Telefónica Deutschland Holding had infringed the final commitments and taking measures to restore fair conditions of effective competition for the purposes of Article 8(4) or (5) of Regulation (EC) No 139/2004, [19] even if the conditions justifying such a decision were satisfied. Even if that amounted to a loophole in the control of concentrations, it was, where appropriate, for the legislature and not for the Courts of the European Union to close that loophole. Last, in the third place, the Court considered that the conclusion that the letter at issue did not constitute an act against which an action within the meaning of Article 263 TFEU might be brought could not be called into question by the applicant's claim that such a conclusion infringed its right to effective judicial protection. The Court noted, in that regard, that, without prejudice to the possibility of the Commission finding an infringement of the final commitments and taking measures which it deemed appropriate by means of a decision adopted under Article 8(4) and (5) of Regulation No 139/2004, it was entirely permissible for the third parties referred to in the final commitments, which could include the applicant, to rely on them before the competent national courts. In that context, any opinion expressed by the Commission regarding the interpretation to be given to the final commitments constituted only a possible interpretation which, unlike decisions taken under Article 288 TFEU, had only persuasive value and did not bind the competent national courts. Consequently, the Court concluded, the letter at issue did not constitute a decision-making act against which an action for annulment might be brought under Article 263 TFEU.

4. Powers of inspection

In the case that gave rise to the judgment of 20 June 2018, ***České dráhy*** v ***Commission*** (T-325/16, under appeal, [20] EU:T:2018:368), the Court was required to rule on the action brought by the Czech national rail carrier against the decision which the Commission had addressed to it and all companies directly or indirectly controlled by it, ordering them to submit to an inspection under Article 20(4) of Regulation No 1/2003. [21] The applicant challenged that decision on the ground that, at the time of its adoption, the Commission could not have had serious evidence — even indirect — to suspect infringement of the competition rules. In addition, the applicant claimed that insufficient reasons had been given in the decision, which defined the subject matter and purpose of the inspection too broadly, thus referring to practically all of the applicant's behaviour in the rail passenger transport sector in the Czech Republic.

The Court recalled that the need for protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, was recognised as a general principle of EU law. Consequently, with a view to observing that general principle, an inspection decision had to be directed at gathering the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possessed certain

19| Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

20| Case C-538/18 P, ***České dráhy*** v ***Commission***.

21| Commission Decision C(2016) 2417 final of 18 April 2016, relating to a proceeding under Article 20(4) of Regulation No 1/2003, addressed to České dráhy and all companies directly or indirectly controlled by it, ordering them to submit to an inspection (Case AT.40156 — Falcon).

information, constituting reasonable grounds for suspecting an infringement of the competition rules. It followed that, in so far as the statement of reasons for an inspection decision circumscribed the powers conferred on the Commission's agents, that general principle precluded wording, in inspection decisions, that would extend the scope of those powers beyond those arising from the reasonable grounds which the Commission had at its disposal on the date of adoption of such a decision.

In this case, since the reasons stated in the contested decision did not on their own make it possible to presume that, on the date of adoption of that decision, the Commission had indeed had reasonable grounds to suspect an infringement of Article 102 TFEU, the Court considered that it was necessary to determine, in the light of other relevant evidence, whether, on the date of adoption of the contested decision, the Commission had had reasonable grounds to suspect an infringement of Article 102 TFEU. It thus held, on the basis of the evidence already contained in the file, in particular an expert report drawn up by a Czech university in the context of the national procedure, that the Commission had had reasonable grounds to suspect an infringement of Article 102 TFEU by the applicant, consisting in predatory pricing practices on the Prague-Ostrava route since 2011. On the other hand, it considered, in particular on the basis of the documents produced by the Commission, that the latter had not had reasonable grounds with respect to an infringement of Article 102 TFEU by the applicant taking forms other than the alleged predatory pricing practice or relating to routes other than the Prague-Ostrava route, and annulled the contested decision to that extent.

III. State aid

1. Concept of State aid

(a) Determination of the amount of the aid — Concept of economic activity

In the case that gave rise to the judgment of 25 January 2018, ***BSCA*** v ***Commission*** (T-818/14, EU:T:2018:33), an action had been brought before the Court for annulment of certain provisions of the Commission Decision of 1 October 2014 concerning State aid measures implemented by the Belgian State in favour of the company Brussels South Charleroi Airport (BSCA) and the airline Ryanair Ltd. [22] That decision had been adopted as a consequence of the judgment in ***Ryanair*** v ***Commission***, [23] whereby the Court had annulled the Commission decision of 12 February 2004 concerning advantages granted by the Walloon Region and BSCA to the airline Ryanair in connection with its establishment at Charleroi. [24] The decision had provided clarification concerning the aid granted by certain regions in favour of airports hosting low-cost airlines. On this occasion the Court dismissed the action.

22| Commission Decision C(2014) 6849 final of 1 October 2014 concerning measures SA.14093 (C76/2002) implemented by Belgium in favour of BSCA and Ryanair.

23| Judgment of 17 December 2008, ***Ryanair*** v ***Commission*** (T-196/04, EU:T:2008:585).

24| Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair with its establishment at Charleroi (OJ 2004 L 137, p. 1).

Recalling that the criterion for determining the time of granting aid was that of the legally binding act by which the competent authority undertook to grant the aid to its recipient, the Court stated, first of all, that the decisions of 20 July and 8 November 2000 on which the applicant relied contained no binding and precise legal undertakings to the applicant on the part of the Walloon Government.

On the question whether, as the applicant claimed, a system enabling aircraft to approach the landing runway in poor visibility must be classified as non-economic investment, the Court noted that any activity consisting in offering goods or services on a given market was an economic activity, which precluded activities falling within the scope of the exercise of the powers of a public authority. As regards a ground approach instrument that used a radio signal to increase the landing accuracy of an aircraft approaching a landing runway, that instrument, even if it was mandatory and contributed to the safety of landings, played no part either in the control and supervision of airspace or in the performance of any other public policy remit that might be exercised at an airport. It contributed to the delivery of the services offered by a civil airport in a competitive context to airlines within the framework of its general activity, which was an economic activity. The absence of such equipment meant only that, in certain meteorological conditions, the airlines using an airport would cancel their flights or redirect them to other airports possessing such equipment. Thus, an airport without that equipment was in a less favourable competitive position than an airport with such equipment, but that finding did not allow the equipment in question to escape being classified as an activity of an economic nature.

(b) Selectivity in fiscal matters

The case that gave rise to the judgment of 15 November 2018, ***Banco Santander and Santusa*** v ***Commission*** (T-399/11 RENV, EU:T:2018:787), concerned the arrangements that allowed undertakings resident for tax purposes in Spain to write off the goodwill resulting from shareholdings in undertakings resident abroad for tax purposes. By this judgment, and five other judgments delivered on the same date (judgments of 15 November 2018, ***Axa Mediterranean*** v ***Commission***, T-405/11, not published, EU:T:2018:780, of 15 November 2018, ***Sigma Alimentos Exterior*** v ***Commission***, T-239/11, not published, EU:T:2018:781, of 15 November 2018, ***World Duty Free Group*** v ***Commission***, T-219/10 RENV, EU:T:2018:784, of 15 November 2018, ***Banco Santander*** v ***Commission***, T-227/10, not published, EU:T:2018:785, and of 15 November 2018, ***Prosegur Compañía de Seguridad*** v ***Commission***, T-406/11, not published, EU:T:2018:793), seeking annulment of certain provisions of Decision 2011/282/EU, [25] the Court re-examined whether or not the tax measure at issue was selective, after the Court of Justice, on appeal, [26] had set aside the judgments whereby the General Court had considered that the Commission had not established that the tax measure was selective. [27]

25| Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1).

26| Judgment of 21 December 2016, ***Commission*** v ***World Duty Free Group and Others*** (C-20/15 P and C-21/15 P, EU:C:2016:981).

27| Judgments of 7 November 2014, ***Banco Santander and Santusa*** v ***Commission*** (T-399/11, EU:T:2014:938), and of 7 November 2014, ***Autogrill España*** v ***Commission*** (T-219/10, EU:T:2014:939).

Applying the three-step method to establish the selectivity of a national tax measure which the Court of Justice, in its judgment on appeal, had invited it to apply, [28] the Court observed that the case-law had placed the emphasis on a concept of selectivity based on the distinction between undertakings which chose to perform certain transactions and other undertakings which chose not to perform them, and not on the distinction between the undertakings from the perspective of their specific characteristics. On that basis, the Court held that a national tax measure such as the measure at issue, which granted an advantage upon satisfaction of the condition that an economic transaction was performed, might be selective including where, having regard to the characteristics of the transaction concerned, any undertaking might freely choose whether to perform that transaction. In this case, the Court considered that the Commission had been correct, in the context of the first step in the abovementioned method, not to limit the examination of the selectivity criterion solely to acquisitions of shareholdings in non-resident companies and had therefore used, under the ordinary system, the tax treatment of goodwill and not the tax treatment of financial goodwill introduced by the measure at issue. According to the Court, the Commission had also been correct to consider that the measure at issue, in allowing the writing-off of goodwill for acquisitions of shareholdings in non-resident companies, had applied to those transactions different treatment from that afforded to the acquisition of shareholdings in resident companies, even though both types of transactions were, in the light of the objective pursued by the ordinary system, in comparable legal and factual situations. As the application of the measure at issue thus had the consequence that undertakings which were nevertheless in comparable situations were treated differently, its effects, in any event, meant that it could not be regarded as justified in the light of the principle of fiscal neutrality.

(c) Imputability — Principle of the prudent private investor

In the case that gave rise to the judgment of 13 December 2018, ***Comune di Milano*** v ***Commission*** (T-167/13, EU:T:2018:940), an action had been brought before the Court for annulment of the decision whereby the Commission had declared that the aid put in place by the company that managed the airports of Milan-Linate and Milan-Malpensa (Italy), SEA SpA, in the form of capital injections made by that body in favour of a new company wholly controlled by it, called SEA Handling SpA, was incompatible with the internal market. [29] In support of its action, the applicant claimed, in particular, that there had been an infringement of Article 107(1) TFEU in so far as the Commission had, first, erred in finding that there had been a transfer of State resources and that the measures at issue could be imputed to the Italian State and, second, disregarded the private investor test. The judgment provides clarification of the criteria of the imputability of aid measures to the State and also of the burden of proof concerning the prudent private investor principle.

As regards the imputability of the measures at issue to the State, the Court was required to determine whether the imputability to the State of the aid measures at issue, adopted each year during the period 2002 to 2010, ought to have been demonstrated separately by the Commission for each year. In that regard, the Court noted that, as the State interventions had taken various forms and had to be analysed by reference

28| In accordance with that method, it is necessary to begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned (first step), and then to demonstrate that the tax measure at issue constitutes a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary system, are in a comparable factual and legal situation (second step). However, the concept of State aid does not cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (third step).

29| Commission Decision (EU) 2015/1225 of 19 December 2012 regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10) (ex CP 175/06)) (OJ 2015 L 201, p. 1).

to their effects, it could not be precluded that a number of consecutive State interventions must, for the purposes of the application of Article 107(1) TFEU, be regarded as a single intervention. That was the case, in particular, where, in the light of their chronology, their purpose and the situation of the undertaking at the time of those interventions, consecutive interventions were so closely linked that it was impossible to separate them, which, according to the Court, was the position here.

As regards the burden of proof concerning the private investor principle, the Court began by recalling that, in accordance with the principles relating to the burden of proof in State aid matters, it was for the Commission to adduce proof of the existence of aid. In that regard, the Commission was required to conduct a diligent and impartial examination of the measures at issue, so that it had at its disposal, when adopting the final decision establishing the existence and, as the case might be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible. More particularly — the Court observed — the Commission was required to make a complex economic assessment when it examined whether particular measures could be described as State aid because the public authorities had not acted in the same way as a private investor. In the context of the review conducted by the Courts of the European Union in that context, the Court in question must not substitute its own economic assessment for that of the Commission, but must confine itself to verifying whether the Commission had complied with the rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based had been accurately stated and whether there had been any manifest error in the assessment of those facts or any misuse of powers. In order to establish that the Commission had made a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicants must be sufficient to make the factual assessments used in the decision implausible. The Court also recalled that, when applying the private creditor test, the Commission was required to carry out an overall assessment, taking into account all relevant evidence. In that context, any information liable to have a significant influence on the decision-making process of a normally prudent and diligent private creditor, who was in a situation as close as possible to that of the public creditor and was seeking to recover sums due to it by a debtor experiencing difficulties in making the payments, had to be regarded as relevant. Moreover, for the purposes of applying the private creditor test, the only relevant information was the information that had been available, and the developments that had been foreseeable, at the time when that decision had been taken. The Commission was under no obligation to examine information if the evidence adduced had been established after the decision to make the investment in question had been taken and that evidence did not relieve the Member State concerned of its obligation to make an appropriate prior assessment of the profitability of its investment before making that investment. As it considered that in this case such a prior assessment of the profitability of the investment had not been made, the Court concluded that the applicant had failed to show that the Commission had made a manifest error of assessment in rejecting the argument that the private investor test had been complied with.

2. Compatibility

In the case that gave rise to the judgment of 12 July 2018, ***Austria*** v ***Commission*** (T-356/15, under appeal, [30] EU:T:2018:439), the Court was required to examine the legality of the decision whereby the Commission had found that the aid measure which the United Kingdom was planning to implement for support to the Hinkley Point nuclear power station was compatible with the internal market and had authorised the implementation

30| Case C-594/18 P, ***Austria*** v ***Commission***.

of that measure. [31] The case provided the Court with the opportunity, in particular, to clarify the interrelationship between Article 107 TFEU and the Euratom Treaty in the case of measures relating to the field of nuclear energy.

In that regard, the Court observed that, since the Euratom Treaty did not contain exhaustive rules on State aid, Article 107 TFEU must be applied to the measures at issue, even though they pursued an objective covered by the Euratom Treaty. However, in the context of the application of that provision to measures concerning the field of nuclear energy, it was necessary to take the provisions and objectives of the Euratom Treaty into account.

Examining, moreover, the conditions determining the application of Article 107(3)(c) TFEU to such measures, in the first place, the Court observed that, under that provision, the public interest objective pursued by the measure in question did not necessarily have to be an objective shared by all or by the majority of the Member States. Having regard to the provisions of the Euratom Treaty and to the right of each Member State to choose between different energy sources, a Member State was entitled to decide upon the promotion of nuclear energy and, more specifically, incentives for the creation of new nuclear energy generating capacity, as a public interest objective for the purposes of Article 107(3)(c) TFEU. In the second place, as to whether the aid might be considered appropriate, necessary and not disproportionate, the Court stated that the question that was relevant for the purpose of determining whether State intervention was necessary was whether the public interest objective pursued by the Member State would be attained without that Member State's intervention. State intervention might be considered to be necessary where market forces were not capable by themselves of ensuring that the public interest objective of the Member State would be achieved in sufficient time, even if, as such, that market could not be considered to be failing. The Court observed, moreover, that Article 107(3)(c) TFEU did not expressly require the Commission to quantify the precise amount of the grant equivalent arising from an aid measure. Accordingly, if the Commission was in a position to conclude that an aid measure was appropriate, necessary and not disproportionate without that amount being made explicit, it could not be criticised for having failed to quantify it. Last, the Court noted that operating aid intended to maintain the status quo or to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities could not be considered compatible with the internal market, as such aid could not satisfy the requirements of Article 107(3)(c) TFEU. On the other hand, there was nothing to preclude an aid measure which pursued a public interest objective, which was appropriate to and necessary for the attainment of that objective, which did not adversely affect trading conditions to an extent contrary to the common interest and which therefore satisfied the requirements of Article 107(3)(c) TFEU from being declared compatible with the internal market under that provision, irrespective of whether it must be characterised as investment aid or operating aid.

3. Preliminary examination phase — Duty to investigate

In the case that gave rise to the judgment of 19 September 2018, ***HH Ferries and Others*** v ***Commission*** (T-68/15, EU:T:2018:563), the Court was required to rule on an action brought against the Commission's decision not to classify certain measures as aid and not to raise any objection against State guarantees and fiscal aid granted to the consortium responsible for the construction and operation of the road-rail fixed link across the Øresund strait between Kastrup (Denmark) and Limhamn (Sweden), following the preliminary

31| Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (OJ 2015 L 109, p. 44).

investigation procedure provided for in Article 108(3) TFEU. [32] The applicants relied, in particular, on a breach by the Commission of the obligation to initiate the formal investigation procedure provided for in Article 108(2) TFEU. In their submission, during the preliminary examination the Commission had experienced serious difficulties that ought to have compelled it to initiate the formal investigation procedure.

The Court recalled that, where the Commission was unable to reach a firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either was not State aid within the meaning of Article 107(1) TFEU or, if it was classified as aid, was compatible with the FEU Treaty, or where that procedure had not enabled the Commission to overcome all the difficulties involved in assessing the compatibility of the measure under consideration, the Commission was under a duty to initiate the procedure provided for in Article 108(2) TFEU and had no discretion in that regard. Although the fact that the examination carried out by the Commission during the preliminary examination phase was insufficient or incomplete constituted evidence of the existence of serious difficulties, the onus was on the applicant to prove the existence of serious difficulties, and such proof could take the form of a consistent body of evidence.

On that point, the Court found that the contested decision provided no explanation of why the State guarantees granted in the present case were to be considered to be aid schemes, which was a factor that indicated the existence of an insufficient and incomplete examination. In particular, the contested decision wholly failed to explain how the aid contained in the State guarantees satisfied the condition that the aid must not be linked to a specific project, as laid down in Article 1(d) of Regulation (EC) No 659/1999. [33]

The Court further observed that the examination of the compatibility of the State aid at issue was insufficient and incomplete in that the Commission (i) had not verified the existence of conditions governing the mobilisation of the State guarantees; (ii) had been incapable, following its preliminary review, of determining the aid element contained in the State guarantees; (iii) had failed to verify the possibility that operating aid had covered operating costs; (iv) had been unaware of any limit on the amount or any limit on the precise duration of the aid at issue; (v) had not been in possession of sufficient evidence that the aid linked to the State guarantees and the aid linked to the Danish tax aid had been limited to the minimum necessary for the realisation of the project at issue; and (vi) had failed to examine the effects of the aid at issue on competition and trade between the Member States, and to weigh its negative effects against its positive effects. The Court concluded that the Commission had experienced serious difficulties in relation to determining the compatibility of the State aid at issue, which ought to have compelled it to initiate the formal investigation procedure, and on that basis annulled the contested decision.

In the case that gave rise to the judgment of 15 November 2018, ***Energy and Tempus Energy Technology*** v ***Commission*** (T-793/14, EU:T:2018:790), the Court was required to rule on the legality of the Commission's decision not to raise objections to the aid scheme for the capacity market in the United Kingdom, on the ground that that scheme was compatible with the internal market pursuant to Article 107(3)(c) TFEU. [34] The

32| Commission Decision C(2014) 7358 final of 15 October 2014 not to classify certain measures as aid and not to raise any objection following the preliminary investigation procedure provided for in Article 108(3) TFEU to State aid SA.36558 (2014/NN) and SA.38371 (2014/NN) — Denmark, and SA.36662 (2014/NN) — Sweden, concerning the public financing of the Øresund Fixed Link road/rail infrastructure project (OJ 2014 C 418, p. 1, and OJ 2014 C 437, p. 1).

33| Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

34| Commission Decision C(2014) 5083 final of 23 July 2014 not to raise objections to the aid scheme for the capacity market in the United Kingdom, on the ground that that scheme is compatible with the internal market pursuant to Article 107(3)(c) TFEU (State aid 2014/N-2) (OJ 2014 C 348, p. 5).

applicants claimed that the Commission had not been entitled to conclude, following a preliminary examination and in the light of the information available at the time when the contested decision was adopted, that the capacity market envisaged did not raise doubts as to its compatibility with the internal market.

Examining that question in the light, in particular, of the Guidelines on State aid for environmental protection and energy 2014-2020, [35] the Court emphasised that the concept of doubts referred to in Article 4(3) and (4) of Regulation No 659/1999 was an objective one. Whether or not such doubts existed required investigation of both the circumstances in which the contested measure had been adopted and its content, and such investigation had to be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it had taken a decision on the compatibility of the aid at issue with the internal market. The Court also noted that, in order to be in a position to carry out a sufficient examination for the purposes of the rules applicable to State aid, the Commission was not required to limit its analysis to the information contained in the notification of the measure at issue. It could and, where necessary, must seek relevant information so that, when it adopted the contested decision, it had at its disposal assessment factors that could reasonably be considered to be sufficient and clear for the purposes of its assessment. Therefore, in the present case, in order to establish the existence of doubts within the meaning of Article 4(4) of Regulation No 659/1999, the applicants had to show that the Commission had not researched and examined, thoroughly and impartially, all the relevant information for the purposes of that analysis or that it had failed duly to take that information into account in such a way as to eliminate all doubt as to the compatibility of the notified measure with the internal market.

According to the Court, the fact that the preliminary examination had lasted only a month was not, however, a reliable indication allowing it to be established that doubts had not arisen by the end of the first examination of the measure at issue. In fact, during the pre-notification phase, the Commission had sent the United Kingdom a number of sets of questions, which attested to the difficulties which it had encountered in making a full assessment of the measure to be notified. Thus, one week before the measure was notified, the Commission had sent the United Kingdom a set of questions relating, in particular, to the incentive effect of the planned measure, its proportionality and potential discrimination between capacity providers, three questions that were central to the assessment that the Commission had to carry out under the Guidelines. At the same time, the Commission had also been contacted by three different types of operator who wished to inform it of their concerns about certain planned aspects of the capacity market. In addition, it was not apparent that, during the preliminary examination, the Commission had carried out a specific investigation or independently assessed the information submitted by the United Kingdom with regard to the role of demand-side response within the capacity market. The Court considered, moreover, that the Commission had failed to make a proper assessment of that role. The Court found, in addition, that the Commission had been aware of the difficulties referred to by a group of technical experts regarding the appreciation of the potential of demand-side response in the capacity market, yet it was apparent from the contested decision that the Commission had considered that, for the purposes of assessing the actual appreciation of demand-side response — and in order no longer to be in a situation in which it could have doubts in that respect as to the compatibility of the aid scheme with the internal market — it was sufficient to accept the modalities envisaged by the United Kingdom in that regard. Following its analysis, the Court concluded that the assessment of the compatibility of the measure notified with the internal market had given rise to doubts within the meaning of Article 4 of Regulation No 659/1999, which ought to have led the Commission to initiate the procedure referred to in Article 108(2) TFEU.

35| Guidelines on State aid for environmental protection and energy 2014-2020 (OJ 2014 C 200, p. 1).

4. Recovery

The case that gave rise to the judgment of 15 November 2018, ***Banco Santander and Santusa*** v ***Commission*** (T-399/11 RENV, EU:T:2018:787), also gave the Court the opportunity to clarify the conditions in which aid declared unlawful and incompatible may not be subject to recovery, in compliance with the principle of protection of legitimate expectations. In this case, the Commission had considered that the recipients of the scheme at issue might have such an expectation until the time of publication in the *Official Journal of the European Union* of the decision to initiate the formal investigation procedure. In their action, the applicants maintained, in particular, that the Commission ought to have recognised such an expectation until the date of publication of the contested decision.

In that regard, the Court began by recalling that the right to rely on the principle of the protection of legitimate expectations required that three conditions be satisfied cumulatively. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they were addressed. Third, the assurances given must comply with the applicable rules. According to the Court, if there were a rule or a principle that the Commission was obliged to order the recovery of any aid that was unlawful and incompatible with the internal market, assurances given where such aid was not recovered, which might be the result of assurances given with regard to the measure in question not being classified as aid, would necessarily be contrary to that principle or that rule. Thus, the third of the cumulative conditions of the application of the principle of the protection of legitimate expectations could never be satisfied. The Court considered, however, that the undertakings to which the scheme at issue applied or was capable of applying were in a position, from the date of publication of the initiation decision, to adjust their behaviour immediately by not entering into a commitment relating to the acquisition of a shareholding in a foreign company if they considered that, given the risk that they might not be able to benefit in the long term from the tax advantage provided for by the system at issue, such a commitment did not provide sufficient economic interest.

In the judgment of 15 November 2018, ***Deutsche Telekom*** v ***Commission*** (T-207/10, EU:T:2018:786), the Court also ruled on the Commission decision forming the subject matter of the judgment of 15 November 2018, ***Banco Santander and Santusa*** v ***Commission*** (T-399/11 RENV, EU:T:2018:787), in an action brought this time by an undertaking in competition with one of the beneficiaries of the scheme. According to the applicant, the Commission ought to have ordered recovery of the aid granted under that scheme and not to have authorised, on the basis of the principle of the protection of legitimate expectations, the continuation of the scheme for shareholdings acquired before the publication of the decision to initiate the formal investigation procedure.

As regards that argument, the Court emphasised that, when aid was implemented without being notified in advance to the Commission, with the consequence that it was unlawful under Article 108(3) TFEU, the recipient of the aid could not at that time have a legitimate expectation in the lawfulness of the aid, save in exceptional circumstances. The recognition of that exception was justified, in particular, by the different status of the Member States and the recipients in the light of the notification obligation. The exception recognised in favour of the recipients of the aid was justified, moreover, by the fact that if it were not recognised the general principle of protection of legitimate expectations would be rendered devoid of substance so far as State aid was concerned, since the recovery obligation which that principle sought to mitigate would apply only to non-notified aid implemented without the Commission's approval.

Examining also, in particular, the scope *ratione temporis* of the recognised legitimate expectation, the Court stated that it was necessary, in that context, to draw a distinction between the date on which the legitimate expectation was acquired, which corresponded to the date on which the person concerned was made aware

of precise assurances, and the object covered by the legitimate expectation acquired, which might extend to transactions carried out before that date, depending on the terms of the precise assurances given. In fact, the legitimate expectation related most often, and in particular in this case, to the maintenance of an existing situation, which by definition came about before the act giving rise to an expectation that it would be maintained. It followed that, in this case, the Commission had not erred in considering that the legitimate expectation had extended to the aid granted under the system at issue since its entry into force.

IV. Intellectual property — European Union trade mark

1. Power to alter decisions

In the case that gave rise to the order of 1 February 2018, ***ExpressVPN*** v ***EUIPO (EXPRESSVPN)*** (T-265/17, EU:T:2018:79), the Court had the opportunity to rule on whether an action containing only a single head of claim seeking the alteration of a decision of the Board of Appeal of the European Union Intellectual Property Office (EUIPO) could be held to be admissible. In this case, in its observations on the plea of inadmissibility raised by EUIPO, the applicant stated that it was seeking only the alteration of the contested decision.

According to the Court, the single head of claim in the action before it constituted an application for alteration, within the meaning of Article 65(3) of Regulation (EC) No 207/2009 [36] (now Article 72(3) of Regulation (EU) 2017/1001), which provided that, with regard to actions brought against decisions of the Boards of Appeal, 'the General Court shall have jurisdiction to annul or to alter the contested decision'. In fact, as the applicant had emphasised in its observations on the plea of inadmissibility that it was seeking only the 'alteration' of the contested decision, it was not possible for the Court, in this case, to interpret that single head of claim as seeking both the annulment and the alteration of that decision. Accordingly, since the annulment of all or part of a decision constituted a necessary prerequisite in order to allow an application for alteration within the meaning of Article 65(3) of Regulation No 207/2009, such an application could not be granted where there was no claim for annulment of the contested decision. In any event, in so far as the applicant's application requested that 'the mark will proceed to be added to the European Union trade mark register by [EUIPO]' and since a Board of Appeal did not have the power to take cognisance of such a request, it was similarly not for the Court to take cognisance of an application for alteration requesting that it amend the decision of a Board of Appeal to that effect and such an action had to be dismissed as inadmissible.

2. Absolute grounds for refusal

The case that gave rise to the judgment of 15 March 2018, ***La Mafia Franchises*** v ***EUIPO — Italy (La Mafia SE SIENTA A LA MESA)*** (T-1/17, EU:T:2018:146) concerned the application by the Italian Republic for a declaration of invalidity, on the ground that it was contrary to public policy, of a figurative mark consisting of a composite

36| Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by 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)).

sign made up of a black square within which the word elements 'La Mafia' and 'se sienta a la mesa' were represented in white letters with the depiction of a red rose in the background. The Cancellation Division, and then the Board of Appeal, of EUIPO had considered that the contested mark was contrary to public policy and should therefore be declared invalid in its entirety, in accordance with Article 7(1)(f) of Regulation No 207/2009 (now Article 7(1)(f) of Regulation 2017/1001).

In an action brought by the applicant against the decision of the Board of Appeal, the Court observed first of all that, in order to apply the absolute ground for refusal laid down in Article 7(1)(f) of Regulation No 207/2009, it was necessary to take account both of the circumstances common to all the Member States and of the particular circumstances of individual Member States that were likely to influence the perception of the relevant public within those States. Thus, having inferred from the dominant nature of the word element 'La Mafia' that the contested mark would be perceived as a reference to the criminal organisation known by that name, the Court considered that the criminal activities in which that organisation was involved breached the very values on which the European Union was founded, in particular the values of respect for human dignity and freedom as laid down in Article 2 TEU and Articles 2, 3 and 6 of the Charter of Fundamental Rights. Emphasising that those values were indivisible and made up the spiritual and moral heritage of the European Union, the Court further stated that the Mafia was active in areas of particularly serious crime with a cross-border dimension in which the EU legislature might intervene, as provided for in Article 83 TFEU. It observed, moreover, that the word element 'La Mafia' had deeply negative connotations in Italy, on account of the serious harm done by that criminal organisation to the security of that Member State. The Court therefore held that the Board of Appeal had rightly found that the word element 'La Mafia' in the contested mark would manifestly bring to mind, for the relevant public, the name of a criminal organisation responsible for particularly serious breaches of public policy.

In the case that gave rise to the judgment of 24 October 2018, ***Pirelli Tyre*** v ***EUIPO*** — ***Yokohama Rubber (Representation of an L-shaped groove)*** (T-447/16, under appeal, [37] EU:T:2018:709), the Court was required to rule on an action brought against the decision whereby the Fifth Board of Appeal of EUIPO had confirmed the Cancellation Division's decision that the applicant's trade mark, a figurative sign representing an L-shaped groove and registered for, in particular, tyres, consisted exclusively of the shape of goods that was necessary to obtain a technical result, within the meaning of Article 7(1)(e)(ii) of Regulation (EC) No 40/94. [38] In support of its action, the applicant took issue with the Board of Appeal, in particular, for having based its decision on a version of Article 7(1)(e)(ii) that had not been applicable *ratione temporis*.

In that regard, the Court pointed out that Regulation (EU) 2015/2424 [39] had amended the wording of Article 7(1)(e)(ii) of Regulation No 207/2009 (now Article 7(1)(e)(ii) of Regulation 2017/1001), which concerned a substantive rule. According to the Court, it was not apparent from the terms of Regulation 2015/2424, its objectives or its general scheme that Article 7(1)(e)(ii) of Regulation No 207/2009, in the version resulting from Regulation 2015/2424, should apply to situations existing before the latter regulation had entered into force on 23 March 2016. It followed that Article 7(1)(e)(ii) of Regulation No 207/2009, in the version resulting from Regulation 2015/2424, was clearly not applicable in the present case, given that the contested mark had been registered

37| Case C-818/18 P, ***Yokohama Rubber*** — ***Pirelli Tyre*** v ***EUIPO*** and Case C-6/19 P, ***EUIPO*** v ***Pirelli Tyre***.

38| Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Regulation No 207/2009, as amended, itself replaced by Regulation 2017/1001).

39| Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Regulation No 207/2009 and Commission Regulation (EC) No 2868/95 implementing Regulation No 40/94, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OJ 2015 L 341, p. 21).

on 18 October 2002 following an application for registration filed on 23 July 2001. The Board of Appeal had therefore been required to assess whether the contested mark should be declared invalid under Article 7(1)(e)(ii) of Regulation No 40/94.

On the substance, the Court stated, first of all, that the contested sign, as registered, represented neither the shape of a tyre nor the shape of a tyre tread. It observed that, admittedly, for the purposes of identifying the essential characteristics of a two-dimensional sign, the Board of Appeal might take into account, in addition to the graphic representation and any descriptions filed at the time of application for registration, material that made it possible to assess what the sign at issue actually represented. However, EUIPO was not permitted, in order to qualify the shape represented by a contested sign, to add to that shape elements that did not form part of the sign and were therefore external and foreign. In fact, the general interest, which underlay Article 7(1)(e)(ii) of Regulation No 40/94, did not allow the Board of Appeal, in applying that specific provision, to go beyond the shape represented by the sign. While noting, moreover, that the scope of the absolute ground for refusal provided for in Article 7(1)(e)(ii) of Regulation No 40/94 was not limited solely to signs formed exclusively of the shape of 'goods' as such, the Court observed, however, that in the present case the contested sign was not made up exclusively of the shape of the goods in question or of a shape which, on its own, represented, quantitatively and qualitatively, a significant part of those goods. The Board of Appeal had therefore been wrong to consider that the contested sign represented a tyre tread and that that sign consisted of the 'shape of the goods' within the meaning of Article 7(1)(e)(ii) of Regulation No 40/94.

In the case that gave rise to the judgment of 25 October 2018, ***Devin*** v ***EUIPO — Haskovo (DEVIN)*** (T-122/17, under appeal, [40] EU:T:2018:719), the Court was called upon to examine the balance between the general interest in ensuring that geographical names remained available and the individual interest of the proprietor of a mark. In this instance, the Second Board of Appeal of EUIPO had upheld the Cancellation Division's decision declaring the contested mark, registered for non-alcoholic drinks, invalid on the ground that, as the town of Devin (Bulgaria) was known to the general public as a spa town, that mark was descriptive of the geographical origin of the goods covered.

Examining, first of all, the perception of the word 'devin' by average consumers of Bulgaria's neighbouring countries, namely Greece and Romania, the Court found that the mere fact that the town of Devin had a detectable presence on the internet could not suffice to establish that it would be known by a significant part of the relevant public of those countries. Likewise, the existence of a 'non-negligible tourist profile on the internet' did not in itself suffice to establish the knowledge of a small town by the relevant public abroad. In this instance, the Court observed, the Board of Appeal, by wrongly focusing on foreign tourists, in particular Greeks or Romanians, who visited Bulgaria or Devin, had not taken into consideration the entire relevant public, consisting of the average consumer of the European Union, in particular from Greece and Romania, but had wrongly limited itself to a very small or minimal fraction of the relevant public, which, in any event, was negligible and could not be considered to be sufficiently representative of the relevant public. Thus, the Board of Appeal had applied an inappropriate test, which had inevitably led it to an incorrect factual assessment of the perception of the word 'devin' by the relevant public.

Having been able to conclude that it did not appear from the file that the word 'devin' was recognised as the designation of a geographical origin by the average consumer in Member States other than Bulgaria, the Court went on to analyse the consequences of that finding for the availability of the geographical name Devin. It noted that, although Article 12(1)(b) of Regulation No 207/2009 (now, in slightly amended form, Article 14(1)(b) of Regulation 2017/1001) did not confer on third parties the right to use a geographical name as a trade mark, it nonetheless guaranteed their right to use it descriptively, that is to say, as an indication of geographical

40| Case C-800/18 P, ***Haskovo*** v ***EUIPO***.

origin, provided that it was used in accordance with honest practices in industrial or commercial matters. In particular, a descriptive use of the name 'Devin' was thus permitted in order to promote the town as a tourist destination. The Court made clear, moreover, that the name of the town of Devin remained available to third parties not only for descriptive use, such as the promotion of tourism in that town, but also as a distinctive sign in cases of 'due cause' and where there was no likelihood of confusion that would exclude the application of Articles 8 and 9 of Regulation No 207/2009. The general interest in preserving the availability of a geographical name such as that of the spa town of Devin could thus be protected by allowing descriptive uses of such names and by means of safeguards limiting the exclusive right of the proprietor of the contested mark, without requiring cancellation of that mark. It followed that the Board of Appeal had erred in its assessment and that the contested decision should therefore be annulled.

3. Relative grounds for refusal

The case that gave rise to the judgment of 1 February 2018, ***Philip Morris Brands*** v ***EUIPO — Explosal (Superior Quality Cigarettes FILTER CIGARETTES Raquel)*** (T-105/16, EU:T:2018:51), allowed the Court to examine the question whether, in invalidity proceedings, a Board of Appeal of EUIPO was entitled to refuse to take into account evidence of the reputation of an EU trade mark that had been submitted out of time. In support of its application for a declaration of invalidity before EUIPO, the applicant had relied on the reputation of the trade mark Marlboro, but without submitting any evidence to establish its reputation. The evidence subsequently produced before the Board of Appeal had been rejected as out of time and the applicant complained that the Board of Appeal had incorrectly applied Article 76(2) of Regulation No 207/2009 (now Article 95(2) of Regulation 2017/1001), read together with Rule 50(1) of Regulation No 2868/95, [41] maintaining that, in so far as the evidence in question that had been submitted out of time had been highly relevant to the outcome of the proceedings, the refusal to take it into account had run counter to the principle of sound administration. The applicant also relied on an earlier decision of the same Board of Appeal, in which it had been acknowledged that the Marlboro brand had acquired a 'substantial reputation' throughout the European Union.

The Court considered, first of all, that, in so far as evidence submitted before the Board of Appeal could not be considered to be 'additional' or 'supplementary' to evidence already submitted by the applicant, the Board of Appeal had, in principle, been required not to take it into account, in accordance with Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009. The Court emphasised, next, that it was for any party relying on the reputation of its earlier mark to establish, in the circumscribed context of each set of proceedings to which it was a party and on the basis of facts which it considered most appropriate, that that mark had acquired such reputation, and not merely to claim to adduce that evidence by virtue of the recognition of such a reputation, including for the same mark, in a separate administrative procedure. It followed that EUIPO had not been under any obligation to recognise automatically the reputation of the earlier mark on the sole basis of findings made in other proceedings giving rise to the earlier decision.

However, the Court considered that, in the light of the case-law requiring EUIPO to take into account decisions already taken and to consider with particular care whether it should decide in the same way or not, the earlier decision had clearly been an indication that the earlier mark might have a reputation within the meaning of Article 8(5) of Regulation No 207/2009. In those circumstances, the evidence adduced by the applicant before the Board of Appeal had clearly been likely to be genuinely relevant to the outcome of the proceedings. Therefore, by refusing to examine the evidence on the ground that it had been submitted out of time, the Board of Appeal had failed to examine a potentially relevant factor in the application of that provision. The

41| Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation No 40/94 (OJ 1995 L 303, p. 1).

broad discretion enjoyed by EUIPO in the performance of its duties could not exempt it from its duty to assemble all the elements of fact and of law necessary for the exercise of its discretion in cases where the refusal to take account of certain evidence submitted late would lead it to breach the principle of sound administration. Therefore, in holding that the evidence produced by the applicant for the first time before it should not be taken into consideration because it was submitted out of time, the Board of Appeal had breached the principle of sound administration.

The case that gave rise to the judgment of 15 October 2018, ***John Mills*** v ***EUIPO — Jerome Alexander Consulting (MINERAL MAGIC)*** (T-7/17, under appeal, [42] EU:T:2018:679), gave the Court the opportunity to interpret Article 8(3) of Regulation No 207/2009, which provides that, upon opposition by the proprietor of the trade mark, a trade mark is not to be registered where an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name without the proprietor's consent.

According to the Court, that provision required that there should be a direct link between the proprietor's trade mark and the trade mark which the agent or representative sought to register in his own name. Such a link could exist only if the trade marks in question matched. In that context, the travaux préparatoires of the regulation on the EU trade mark provided a useful insight into the legislature's intentions and suggested an interpretation whereby the earlier trade mark and the trade mark applied for had to be identical — not merely similar — in order for Article 8(3) of Regulation No 207/2009 to apply. The possibility originally envisaged by the EU legislature in the pre-draft of the regulation relating to the EU trade mark that the provision at issue could also be applied in a case where the signs were similar had not been included in the final version. It was also apparent from the travaux préparatoires that the provision at issue should be interpreted as applying internationally within the meaning of Article 6 septies of the Paris Convention. [43] As the European Union was a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), [44] Article 2 of which made reference to several substantive provisions of the Paris Convention, including Article 6 septies, it was required to interpret Article 8(3) of Regulation No 207/2009, as far as possible, in the light of the wording and purpose of that agreement and therefore of that provision. In so far as the wording of Article 8(3) of Regulation No 207/2009 could be interpreted only as meaning that the proprietor's trade mark and the mark filed by the agent or representative were the same, the Court held that EUIPO could not base an argument on the travaux préparatoires of the Paris Convention to support the claim that that article should also be interpreted as encompassing cases where the signs were merely similar.

42| Case C-809/18 P, ***EUIPO*** v ***John Mills***.

43| Paris Convention for the Protection of Industrial Property of 20 March 1883, as revised and amended.

44| Agreement on Trade-Related Aspects of Intellectual Property Rights of 15 April 1994 (OJ 1994 L 336, p. 214), being Annex 1 C to the Agreement establishing the World Trade Organisation (OJ 1994 L 336, p. 3).

4. Revocation proceedings

(a) Genuine use

The judgment of 7 June 2018, ***Schmid*** v ***EUIPO — Landeskammer für Land- und Forstwirtschaft in Steiermark (Steirisches Kürbiskernöl)*** (T-72/17, under appeal, [45] EU:T:2018:335), allowed the Court to rule on the question whether a name, which was protected as a protected geographical indication (PGI), under Regulation (EU) No 1151/2012, [46] might be put to genuine use within the meaning of Article 15(1) of Regulation No 207/2009. The Court found it appropriate, for the first time, to apply the case-law of the Court of Justice in W. F. Gözze Frottierweberei and Gözze. [47]

The Court recalled, first of all, that it was settled case-law that there was 'genuine use', within the meaning of that provision, of a trade mark where the mark was used in accordance with its essential function, which was to guarantee the identity of the origin of the goods or services for which it was registered. In the case of individual marks, that essential function was to guarantee the identity of origin of the market goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which had another origin. The trade mark must therefore offer a guarantee that all the goods or services bearing it had been manufactured or supplied under the control of a single undertaking which was responsible for their quality.

According to the Court, the essential function of the mark should not be confused with the other functions that the mark might also fulfil, such as that of guaranteeing the quality of the good in question or indicating its geographical origin. An individual mark fulfilled its function of indicating origin where its use guaranteed to consumers that the goods which it designated came from a single undertaking under the control of which those goods were manufactured and which was responsible for the quality of those goods. In the present case, the use of the contested mark had not been made in accordance with such a function of indicating origin. It followed that, in considering that genuine use of the contested mark had been demonstrated, the Board of Appeal of EUIPO had erred in law.

(b) Mark having become a common name in the trade

In the case that gave rise to the judgment of 18 May 2018, ***Mendes*** v ***EUIPO — Actial Farmaceutica (VSL#3)*** (T-419/17, EU:T:2018:282), an action had been brought before the Court for annulment of the decision whereby the Second Board of Appeal of EUIPO had dismissed the application for revocation brought by the applicant against a word mark in the pharmaceutical products sector. According to the Board of Appeal, the evidence submitted by the applicant had not made it possible to establish that the contested mark had become the common name in the trade for the products for which it had been registered, and the misleading use of the

45| Case C-514/18 P, ***Landeskammer für Land- und Forstwirtschaft in Steiermark*** v ***Schmid***.

46| Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

47| Judgment of 8 June 2017, ***W.F. Gözze Frottierweberei and Gözze*** (C-689/15, EU:C:2017:434).

contested mark had not been duly substantiated by the applicant. That case gave the Court the opportunity to apply, for the first time, Article 51(1)(b) of Regulation No 207/2009 (now Article 58(1)(b) and (c) of Regulation 2017/1001).

The Court began by pointing out that, while there was no case-law relating to the application of that provision, the Court of Justice had nonetheless already interpreted Article 12(2)(a) of First Council Directive 89/104/EEC [48] and Article 12(2)(a) of Directive 2008/95/EC, [49] the content of which was, in essence, identical to that of Article 51(1)(b) of Regulation No 207/2009. It followed from that case-law, applicable, by analogy, to Article 51(1)(b) of Regulation No 207/2009, that that article addressed the situation in which the use of a mark had become so widespread that the sign constituting the mark had come to designate the kind, the type or the nature of the goods or services covered by the registration rather than the specific goods or services originating from a particular undertaking. The rights conferred on the proprietor of a mark under Article 9 of Regulation No 207/2009 might then be revoked provided, first, that that mark had become, in the trade, a common name for a product or service for which it was registered and, second, that that transformation was attributable to acts or inactivity on the part of that proprietor.

In addition, the Court stated that, while the relevant circles included primarily consumers and end users, intermediaries playing a part in the assessment of the customary nature of the mark must also be taken into account. Thus, the relevant circles, whose point of view had to be taken into account for the purpose of assessing whether the contested mark had become, in the trade, the common name of the product marketed under it, had to be defined in the light of the characteristics of that product's market. In the circumstances of this case, as the product marketed under the contested mark could be obtained without a medical prescription, the relevant circles included, in the first place, the end consumers of the product. In the second place, as regards professionals, the relevant circles included, primarily, pharmacists, but also doctors, both general practitioners and specialists.

48| First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

49| Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

V. Common foreign and security policy — Restrictive measures

As in previous years, proceedings relating to restrictive measures in the field of the common foreign and security policy (CFSP) have developed further in 2018. A number of decisions merit particular attention.

1. Ukraine

In the judgment of 21 February 2018, ***Klyuyev*** v ***Council*** (T-731/15, EU:T:2018:90), the Court adjudicated on an application for annulment of the acts whereby the Council had decided to maintain the applicant's name on the list of persons to whom the restrictive measures adopted in view of the situation in Ukraine applied. [50] In support of his application for annulment, the applicant claimed, in particular, that the Council had made a manifest error of assessment in considering that the relevant criterion justifying the imposition of restrictive measures against him was satisfied.

After referring to the essential principles established in the case-law [51] as regards the obligations relating, in particular, to the need for the Council to undertake further investigations when it adopts restrictive measures, the Court observed, first of all, that the Council had not substantiated, by sufficiently specific and concrete evidence, the second reason for maintaining the applicant's name on the list, namely that he was a person 'associated' with a person subject to criminal proceedings for the misappropriation of public funds. As regards the first reason given for maintaining the applicant's name on the list, namely the fact that he was a person subject to criminal proceedings by the Ukrainian authorities for involvement in the misappropriation of public funds or assets, the Court placed particular emphasis on the fact that when the person concerned made observations on the summary of reasons, the Council was under an obligation to examine, carefully and impartially, whether the alleged reasons were well founded, in the light of those observations and any exculpatory evidence provided with them, and that that obligation flowed from the principle of good administration enshrined in Article 41 of the Charter of Fundamental Rights. In that context, the Council was required to verify, first, the extent to which the evidence on which it had relied could establish that the applicant's situation was covered by the reason for maintaining his name on the list and, second, whether it could be concluded from that evidence that the applicant's actions fell within the scope of the relevant criterion. Only if those matters could not be verified was the Council required to investigate further. The issue was not whether, in the light of the information provided to it, the Council had been required to remove the applicant's name from the list, but only whether it had been required to take that evidence into account and, where appropriate, to carry out additional checks or seek clarification from the Ukrainian authorities. In that regard, it was sufficient that the evidence was capable of giving rise to legitimate doubts, first, as to the outcome of the investigation and, second, as to how reliable and up-to-date the information submitted was.

50| See, in particular, Council Decision (CFSP) 2015/1781 of 5 October 2015 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2015 L 259, p. 23); Council Decision (CFSP) 2016/318 of 4 March 2016 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2016 L 60, p. 76); and Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 34).

51| Judgment of 30 June 2016, ***Al Matri*** v ***Council*** (T-545/13, not published, EU:T:2016:376).

The Court observed that in this instance, as the Council had been aware that the prosecutor's office of a Member State had raised serious doubts with regard to whether the evidence in support of the investigation by the Ukrainian authorities that had served as the basis for the Council's decision to maintain the applicant's name on the list was sufficiently substantiated, it was required to make further enquiries of those authorities or, at the very least, to seek clarification from them. It followed that, in considering that it had not been required to take into account the evidence produced by the applicant and the arguments developed by him or to make further enquiries of the Ukrainian authorities, in spite of the fact that that evidence and those arguments had been such as to give rise to legitimate doubts regarding the reliability of the information provided, the Council had made a manifest error of assessment.

A similar problem was central to the case that gave rise to the judgment of 6 June 2018, ***Arbuzov*** v ***Council*** (T-258/17, EU:T:2018:331). Once again, an action had been brought before the Court for annulment of the Council decision maintaining the applicant's name on the list of persons, entities and bodies affected by the restrictive measures adopted in the light of the situation in Ukraine, on the ground that he was subject to criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets. [52] The applicant claimed, in particular, that the Council had made a manifest error of assessment in that, when adopting the contested decision, it had relied solely on a brief summary of the situation prepared by the Prosecutor General's Office of Ukraine, without asking for additional information and without examining with due diligence the exculpatory evidence which the applicant had submitted to it.

Having, again, reviewed the principles established in the case-law [53] concerning the criteria to be taken into consideration by the Council when it adopts restrictive measures, the Court proceeded to examine the applicant's specific arguments concerning the subject matter of the proceedings against him and the progress of those proceedings in the light of those considerations. As regards, first, the subject matter of the proceedings, the Court considered that the Council had not made a manifest error of assessment with regard to the subject matter of the criminal proceedings initiated by the Ukrainian judicial authorities against the applicant in relation to an offence of misappropriation of public funds, or the relevance of that offence in the light of the relevant criterion, when it adopted the contested decision, in so far as it concerned the applicant. As regards, second, the progress of the proceedings, the Court observed, in particular, that it was common ground that, by decision of 15 February 2016, a Ukrainian court had authorised the Ukrainian prosecution to proceed *in absentia* in the criminal proceedings, the existence of which, according to the Council, justified the restrictive measures against the applicant. The Court therefore concluded that the Council ought to have sought clarification from the Ukrainian authorities as to the possible reasons for the lack of progress in the proceedings, in spite of the adoption of the decision of 15 February 2016. The Council had therefore made a manifest error that was sufficient for the contested decision to be annulled in so far as it concerned the applicant.

In the case that gave rise to the judgment of 13 September 2018, ***DenizBank*** v ***Council*** (T-798/14, EU:T:2018:546), the Court was required to rule on the action brought by the applicant against the acts whereby its name had been included in Annex III to Regulation (EU) No 833/2014. [54] In support of its action, the applicant had

52| Council Decision (CFSP) 2017/381 of 3 March 2017 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2017 L 58, p. 34).

53| Judgment of 7 July 2017, ***Arbuzov*** v ***Council*** (T-221/15, not published, EU:T:2017:478).

54| Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13), as amended by Council Decision 2014/659/CFSP of 8 September 2014 (OJ 2014 L 271, p. 54), by Council Decision 2014/872/CFSP of 4 December 2014 (OJ 2014 L 349, p. 58), by Council Decision (CFSP) 2015/2431 of 21 December 2015 (OJ 2015 L 334, p. 22), by Council Decision (CFSP) 2016/1071 of 1 July 2016 (OJ 2016 L 178, p. 21) and by Council Decision (CFSP) 2016/2315 of 19 December 2016 (OJ 2016 L 345, p. 65), and Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1), as amended by Council Regulation (EU) No 960/2014 of 8 September 2014 (OJ 2014 L 271, p. 3) and by Council Regulation (EU) No 1290/2014 of 4 December 2014 (OJ 2014 L 349, p. 20).

claimed, in particular, that there had been an infringement of Article 19 of the Ankara agreement, [55] of Article 41(1), Article 50(3) and Article 58 of the Additional Protocol and of Article 6 of the Financial Protocol to that agreement. The applicant maintained that those provisions had direct effect in so far as the obligations arising under them were sufficiently clear and precise and were not conditional, in terms of their implementation or their effects, on any further measure.

The Court observed that it was clear from Article 216(2) TFEU that the agreements concluded by the European Union, such as the Ankara agreement and the additional protocols thereto, were binding on the EU institutions and the Member States. Consequently, those agreements had primacy over secondary EU legislation. Therefore, the validity of the contested acts in the present case might be assessed in the light of the Ankara agreement and the additional protocols thereto, provided, however, that, first, the nature and the broad logic of the agreement in question did not preclude this and, second, the provisions relied upon appeared, as regards their content, to be unconditional and sufficiently precise. The Court observed, however, that international agreements concluded by the European Union pursuant to the provisions of the Treaties constituted, as far as the European Union was concerned, acts of the EU institutions. In that respect, such agreements formed, from the time when they entered into force, an integral part of EU law. Accordingly, their provisions must be entirely compatible with the provisions of the Treaties and with the constitutional principles stemming therefrom. Thus, the primacy of the international agreements concluded by the European Union over EU secondary legislation did not extend to EU primary law. Consequently, even in the absence of an express provision in the Ankara agreements enabling a party to take such measures as it considered necessary for the protection of the essential interests of its security, it was possible for the Council to restrict the rights stemming from the Ankara agreements as a result of its powers under Article 29 TEU and Article 215 TFEU, provided that such restrictions were non-discriminatory and proportionate.

In that regard, the argument that the measures at issue were discriminatory could not succeed. The applicant's situation was not comparable, by reference to the objectives pursued by the measures at issue, to that of other banks operating in Turkey that were not owned by a Russian entity caught by the restrictive measures at issue. Nor could the applicant's situation be compared to that of other financial institutions established in the European Union. The same applied to the applicant's arguments relating to restrictions on the freedom of establishment, the freedom to provide services and the free movement of capital, since those restrictions, even if they were established, were justified by the objectives pursued by the contested acts, adopted on the basis of Article 29 TEU and Article 215 TFEU, namely increasing the costs of the actions of the Russian Federation designed to undermine Ukraine's territorial integrity, sovereignty and independence and promoting a peaceful settlement of the crisis. That objective was consistent with the objective of maintaining peace and international security, in accordance with the objectives of the Union's external action set out in Article 21 TEU. Since such measures were targeted and time limited, the applicant could not claim that the negative effects to which they gave rise should be considered disproportionate. Therefore, according to the Court, the infringements by the European Union of the relevant provisions of the Ankara agreements advanced in the present case, even if they were established, were justified in the light of the objectives pursued by the measures at issue and proportionate to those objectives.

The restrictive measures adopted in view of the Russian Federation's actions destabilising the situation in Ukraine were also at the centre of the case that gave rise to the judgment of 13 September 2018, ***Gazprom Neft*** v ***Council*** (T-735/14 and T-799/14, EU:T:2018:548). That judgment is particularly interesting in the light

55| Agreement establishing an Association between the European Economic Community and Turkey, signed on 12 September 1963.

of the Court's examination of the applicant's standing to bring proceedings against the provisions of the contested regulation concerning export restrictions having regard to the provisions of the fourth paragraph of Article 263 TFEU. [56]

According to the Court, even though those provisions constituted provisions of general application, they affected the applicant directly. While it was true that those provisions established a system of prior authorisation under which the national authorities were required to implement the prohibitions laid down, they did not in fact have any margin of discretion in that regard. As to whether or not the provisions at issue provided for implementing measures, the Court observed that it was not clear that the applicant could itself ask the national authorities to issue an authorisation to it and that it could challenge the act granting or refusing such authorisation before the national courts. It could not therefore be concluded that those provisions entailed implementing measures in relation to the applicant merely because the applicant could potentially ask its counterparties established in the European Union to submit requests for authorisation to the competent national authorities, in order to challenge the decisions taken by those authorities in the national courts. In addition, it would be artificial or excessive to demand that an operator request an implementing measure merely in order to be able to challenge that measure in the national courts, when it was clear that such a request would necessarily be refused and would not therefore have been made in the normal course of business. The Court concluded that the provisions of the contested regulation concerning export restrictions were regulatory provisions that did not entail implementing measures, within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. The applicant, therefore, merely had to establish that it had been directly affected by those provisions, which it had done in the present case. Accordingly, its action had to be declared admissible, including in so far as it related to the provisions of the contested regulation concerning export restrictions.

2. Egypt

In the judgment of 27 September 2018, ***Ezz and Others*** v ***Council*** (T-288/15, EU:T:2018:619), the Court ruled on an application for annulment of the decisions maintaining the applicants, an Egyptian industrialist and politician and his wives, on the list annexed to Decision 2011/172/CFSP, [57] for 2015, 2016 and 2017. The applicants relied, in particular, on a plea of illegality in respect of Article 1(1) of Decision 2011/172, as amended by Decisions (CFSP) 2015/486, (CFSP) 2016/411 and (CFSP) 2017/496, [58] and of Article 2(1) of Regulation (EU) No 270/2011, [59] alleging, in essence, a lack of legal basis and an infringement of the principle of proportionality,

56| Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1), as amended by Council Regulation (EU) No 960/2014 of 8 September 2014 (OJ 2014 L 271, p. 3) and by Council Regulation (EU) No 1290/2014 of 4 December 2014 (OJ 2014 L 349, p. 20).

57| Council Decision 2011/172/CFSP of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt (OJ 2011 L 76, p. 63); as regards the maintenance of their names on the lists, Council Decision (CFSP) 2015/486 of 20 March 2015 amending Decision 2011/172 (OJ 2015 L 77, p. 16); Council Decision (CFSP) 2016/411 of 18 March 2016 amending Decision 2011/172 (OJ 2016 L 74, p. 40); and Council Decision (CFSP) 2017/496 of 21 March 2017 amending Decision 2011/172 (OJ 2017 L 76, p. 22).

58| Council Decision (CFSP) 2015/486 of 20 March 2015 amending Decision 2011/172 (OJ 2015 L 77, p. 16); Council Decision (CFSP) 2016/411 of 18 March 2016 amending Decision 2011/172 (OJ 2016 L 74, p. 40); and Council Decision (CFSP) 2017/496 of 21 March 2017 amending Decision 2011/172 (OJ 2017 L 76, p. 22).

59| Council Regulation (EU) No 270/2011 of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt (OJ 2011 L 76, p. 4).

and also infringement by the Council of Article 6 TEU, considered together with Article 2 TEU and Article 3(5) TEU, and of Articles 47 and 48 of the Charter of Fundamental Rights, in that the Council had failed to ensure that the legal proceedings in Egypt concerning the applicants had respected fundamental rights.

The Court recalled that Article 2 TEU and Article 3(5) TEU required the institutions of the European Union to promote, in particular in international relations, the values and principles on which the European Union was founded, namely, in particular, respect for human dignity, the rule of law and fundamental rights. Respect for those values and for the principles on which the European Union was founded was required of all actions of the European Union, including in the area of the CFSP. In that context, the right to a fair trial held a prominent place in a democratic society. In the present case, the characteristics of the scheme set out in Decision 2011/172 did not justify an exception to the Council's general obligation, when adopting restrictive measures, to respect the fundamental rights that formed an integral part of the EU legal order, which would have had the effect of exempting it from any verification of the protection of fundamental rights in Egypt. On the one hand, the hypothesis that that decision was manifestly inappropriate in the light of that objective owing to the existence of serious and systematic fundamental rights infringements could not be completely ruled out. Moreover, the purpose of that decision, which was to assist the Egyptian authorities in establishing any misappropriation of state funds that had taken place and to ensure that it remained possible for those authorities to recover the proceeds of misappropriation, would be irrelevant if the Egyptian authorities' finding that state funds had been misappropriated were vitiated by a denial of justice or by arbitrariness. On the other hand, whereas the existence of ongoing legal proceedings in Egypt constituted, in principle, a sufficiently solid factual basis for the designation of the persons on the list annexed to Decision 2011/172 and its renewal, that was not the case when the Council had to form a reasonable presumption that the decision taken at the end of those proceedings would not be reliable. The Council's argument that it was not for it to verify whether guarantees equivalent to those offered by EU law in the field of fundamental rights were provided in Egyptian judicial proceedings related to the scope of the obligation to assess respect for fundamental rights in the Egyptian political and judicial context, but did not call into question the existence of that obligation.

With particular regard to the plea of illegality raised against Decisions 2015/486, 2016/411 and 2017/496, in so far as they renewed the scheme of restrictive measures established in Article 1(1) of Decision 2011/172, the Court observed that, even supposing that the situation in Egypt in respect of which the Council had adopted Decision 2011/172 had evolved, and had done so in a manner contrary to the democratisation process which the policy underpinning that decision was intended to support, that circumstance could not, in any event, have the result of affecting the competence of that institution to renew that decision. Notwithstanding that circumstance, the purposes pursued by Decisions 2015/486, 2016/411 and 2017/496 and the rules whose validity they renewed nevertheless fell within the scope of the CFSP, which in the present case was sufficient to dismiss the applicants' complaint. The same applied to the complaint alleging infringement of the principle of proportionality, since the evidence provided by the applicants did not alone make it possible to conclude that the capacity of the Egyptian judicial authorities to guarantee respect for the rule of law and fundamental rights in the judicial proceedings on which Decision 2011/172 was based would be definitively compromised and since the Council had not made a manifest error of assessment in considering that providing assistance to the Egyptian authorities in the fight against the misappropriation of state funds remained appropriate, including in the light of the political and judicial developments relied on. Last, the Court considered that, in the light of the information provided by the Egyptian authorities concerning the status of the criminal proceedings against the first applicant, the Council had not acted unreasonably when it had considered that the competent Egyptian court would be in a position to rule again on the merits under conditions free from infringements of the right to a fair trial, in such a way as to preclude the risk that its decisions would not be reliable. Taking the view that the judgments of the Egyptian Court of Cassation in the criminal proceedings

at issue and the subsequent possibility, for the first applicant, of bringing a second appeal before that court attested to the existence of effective judicial protection, the Court concluded that the Council was not required to discontinue the designation of the applicants or to carry out further verification.

3. Fight against terrorism

In the case that gave rise to the judgment of 15 November 2018, ***PKK*** v ***Council*** (T-316/14, EU:T:2018:788), an action had been brought before the Court for annulment of the acts maintaining the Kurdistan Workers' Party (PKK) on the list of groups and entities involved in terrorist acts within the meaning of Common Position 2001/931/CFSP. [60] The action was directed against two implementing regulations adopted in 2014 and a number of consequential acts. The applicant maintained, in particular, that the Council had breached its obligation to state reasons by not providing the actual and specific reasons why it had decided, after review, to maintain the PKK's name on the lists at issue.

The Court observed that, although the Council's decision to maintain the PKK on that list had been based, in particular, on the designation of the PKK as a 'foreign terrorist organisation' (FTO) and a 'specially designated global terrorist' (SDGT) by the Government of the United States of America, the contested acts did not provide the slightest indication that the Council had actually verified that the FTO and SDGT designations had been adopted with due regard for the rights of the defence and the right to effective judicial protection. It observed, moreover, that a period of more than 10 years had elapsed between the adoption of the decisions that had served as the basis for the initial inclusion of the applicant's name on the lists at issue and the adoption of the contested acts and also between the initial inclusion of the applicant's name on the lists at issue and the adoption of those acts. The fact that such a period had elapsed was in itself a factor that justified the conclusion that the findings made in the order of the United Kingdom Home Secretary and the FTO and SDGT designations were no longer sufficient for the purposes of determining whether the risk of the applicant's involvement in terrorist activities had persisted at the time when those acts had been adopted.

While it was true that there had been nothing to prevent the Council from relying on information that was not derived from decisions of a competent authority, within the meaning of Article 1(4) of Common Position 2001/931, in order to attribute to the applicant responsibility for incidents and to categorise them as terrorist acts in order to justify the retention of its name on the lists at issue, the Court nonetheless considered, with regard to the two implementing regulations of 2014, that the brevity of the information contained in the statement of reasons did not allow it to exercise its power of judicial review with respect to the incidents that were disputed by the applicant. It concluded that the Council had failed to state sufficient reasons, in the statement of reasons accompanying those acts, for its finding that there existed one or more decisions of competent authorities within the meaning of Article 1(4) of Common Position 2001/931 and had also failed to indicate sufficiently the actual and specific reasons for retaining the applicant's name on the lists at issue. As regards the consequential acts, the Court emphasised that the Council could not, as in this case, do no more than repeat the grounds for the decision of a competent authority while not itself considering whether those grounds were well founded. Admittedly, the statement of reasons for those acts contained an assertion that the Council had examined whether there was anything in its possession to support the removal of the PKK's name from the lists at issue and had found nothing. While such a generic formulation might perhaps suffice in the absence of any comments being made by the persons, groups or entities affected by the fund-freezing measures, that did not apply when, as in this case, the applicant submitted information which in its

60| Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

opinion was such as to justify the removal of its name from the lists at issue, irrespective of whether or not that information was well founded. The Court therefore concluded that those acts were also vitiated by a failure to state sufficient reasons.

VI. Economic, social and territorial cohesion

In the case that gave rise to the judgment of 1 February 2018, ***France*** v ***Commission*** (T-518/15, EU:T:2018:54), an action had been brought before the Court for the partial annulment of Implementing Decision (EU) 2015/1119 of 22 June 2015 excluding from European Union financing certain expenditure incurred by the French Republic under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) [61] for the years 2011 to 2013. That expenditure had corresponded to 'compensatory allowances for natural handicaps ("CANH")' and the agri-environmental grassland premium (PHAE). The French Republic claimed that the Commission had infringed the rules laid down in two documents setting out the guidelines to be followed for the clearance of the accounts of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), namely Documents VI/5330/97 [62] and AGRI/60637/2006, [63] by applying an increased flat-rate correction of 10% on the basis that the failure to count the animals alleged against the French authorities was recurrent, because it concerned a key control which had already been corrected in two previous investigations and had not been subject to improvements.

According to the Court, it was clear from the wording of Document VI/5330/97 that the failure to make improvements, which might be an aggravating factor, could not be deemed to have occurred until after notification of the necessary improvements, namely, as stated in Document AGRI/60637/2006, after the financial correction decision adopted in the context of the accounts clearance procedure. Moreover, to regard, as the Commission did, the alleged irregularities as being recurrent without examining whether the Member State had had the opportunity to remedy them following the initial complaint led, ultimately, to a notion that recurrence was based solely on the mere repetition of the disputed irregularities, regardless of whether a decision had been adopted as required by Document AGRI/60637/2006. The contested decision therefore had to be annulled in so far as it applied an increased flat-rate correction of 10% on the basis that the failure to count the animals alleged against the French authorities had been recurrent and had not been subject to improvements carried out by the French authorities.

In the judgment of 1 March 2018, ***Poland*** v ***Commission*** (T-402/15, EU:T:2018:107), the Court ruled on the consequences of the Commission's having exceeded the three-month time limit laid down in Article 41(2) of Regulation (EC) No 1083/2006 [64] for refusing a Member State a financial contribution from the European Regional Development Fund (ERDF) to a major project.

61| Commission Implementing Decision (EU) 2015/1119 of 22 June 2015 excluding from European Union financing certain expenditure incurred by the Member States under the EAGF and under the EAFRD (OJ 2015 L 182, p. 39).

62| Commission Document No VI/5330/97 of 23 December 1997, entitled 'Guidelines for the calculation of financial consequences when preparing the decision regarding the clearance of the accounts of EAGGF Guarantee'.

63| Commission Communication — How the Commission intends to handle recurrent shortcomings in control systems under the EAGGF Guarantee Section accounts clearance procedure.

64| Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25).

The Court observed first of all that, as was clear from both the wording and the scheme of that provision, the time limit in question was a mandatory time limit, and that in the present case it had been exceeded by the Commission. However, since Article 41 of Regulation No 1083/2006 gave no indication of the consequences of the Commission exceeding the three-month time limit which it laid down, then, in accordance with the case-law of the Court of Justice, it was necessary to examine the purpose and structure of that regulation in order to determine the consequences of that time limit being exceeded. In that regard, in the first place, the Court recalled that the time limit laid down in Article 41(2) of Regulation No 1083/2006 was a time limit placed on the Commission within which to respond to a request made to it by a third party, in this case a Member State. It was only if the absence of response within that time limit entailed acceptance of the request or the loss of the Commission's power to rule thereon that a negative response adopted outside the time limit could automatically be annulled solely because of the fact that the time limit had been exceeded. In so far as the absence of response to an application for confirmation within the time limit laid down in Article 41(2) of that regulation did not entail approval of the application for confirmation or the loss of the Commission's power to rule on that application, Regulation No 1083/2006 could not be interpreted as meaning that exceeding the time limit laid down in Article 41(2) of that regulation automatically and for that reason alone entailed the annulment of a rejection decision adopted out of time.

In the second place, examining whether the fact that the three-month time limit had been exceeded in the present case must entail the annulment of the contested decision, the Court stated that the Republic of Poland had not demonstrated by concrete proof, nor even claimed, that it could not be ruled out that the administrative procedure could have resulted in a different outcome if it had been concluded within the three-month time limit laid down in Article 41(2) of Regulation No 1083/2006. Accordingly, in this case, the fact that that time limit had been exceeded could not entail the annulment of the contested decision. However, the Court observed, since the Commission had infringed Article 41(2) of Regulation No 1083/2006 by ruling outside the three-month time limit, a remedy for any harm caused by the failure to observe the time limit laid down in Article 41(2) of Regulation No 1083/2006 to rule on an application for confirmation could be sought before the General Court, in an action for compensation, provided that the conditions on which the non-contractual liability of the European Union and the exercise of the right to compensation for damage suffered depended, by virtue of the second paragraph of Article 340 TFEU, were satisfied.

VII. Health protection

In the case that gave rise to the judgment of 14 March 2018, ***TestBioTech*** v ***Commission*** (T-33/16, EU:T:2018:135), an action had been brought before the Court by a non-governmental organisation for annulment of the letter from the Commissioner for Health and Food Safety rejecting an application for internal review, based on Article 10 of Regulation (EC) No 1367/2006, [65] of the Commission implementing decisions authorising the placing on the market of genetically modified soybeans. The rejection had been based on the argument that the complaints raised in the application did not fall within the scope of Article 10 of Regulation No 1367/2006, on the ground that the aspects relating to the health assessment of genetically modified food and feed were not concerned with environmental risk assessment.

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

According to the Court, the concept of 'environmental law', within the meaning of Regulation No 1367/2006, must be interpreted, in principle, very broadly. It followed that the extent of the obligation to carry out an internal review pursuant to Article 10 of Regulation No 1367/2006 had to be interpreted in such a way that the Commission was required to examine a request for internal review only in so far as the applicant for review had claimed that the administrative action in question contravened environmental law within the meaning of Regulation No 1367/2006. With specific regard to the review of a market authorisation (MA) under Regulation (EC) No 1829/2003, [66] the Court observed that environmental law, within the meaning of Regulation No 1367/2006, covered any EU legislation, concerning the regulation of genetically modified organisms, that had the objective of dealing with risk, to human or animal health, that originated in those genetically modified organisms or in environmental factors that might have effects on those organisms when they were cultivated or bred in the natural environment. That finding was no less applicable in situations where the genetically modified organisms had not been cultivated within the European Union. The Commission had therefore been wrong to conclude, in the contested decision, that the complaints raised by the applicant could not be examined within the framework of Article 10 of Regulation No 1367/2006.

In the case that gave rise to the judgment of 17 May 2018, ***Bayer CropScience and Others*** v ***Commission*** (T-429/13 and T-451/13, under appeal, [67] EU:T:2018:280), the Court was required to rule on the legality of Implementing Regulation (EU) No 485/2013, [68] in so far as it amended the conditions of approval of a number of active substances, following a review of the risks which they represented for pollinating insects.

Emphasising that it was evident from the wording and the organisation of the relevant provisions of Regulation (EC) No 1107/2009 [69] that the burden of proving that the conditions for approval under Article 4 of that regulation were met lay, in principle, with the person requesting approval, the Court began by observing that, in the context of a review taking place before the end of the approval period, it was for the Commission to demonstrate that the conditions of approval were no longer met. According to the Court, in order for the Commission to be able to carry out a review of the approval of an active substance under Article 21(1) of Regulation No 1107/2009, it was sufficient that there were new studies the results of which, by comparison with the knowledge available at the time of the earlier assessment, raised concerns as to whether the conditions of approval in Article 4 of that regulation were still satisfied. In that context, it was also necessary to take into account the fact that the regulatory framework had evolved since the original approval of the substances covered, particularly through the adoption of Regulation No 1107/2009 and associated implementing regulations, which now provided that special attention had to be paid to the risks that active substances and notably pesticides posed to bees.

The Court held, moreover, that the adoption, in the absence of scientific certainty, of preventive measures which, once that certainty had been acquired, might prove to be overly conservative could not be regarded in itself as a breach of the precautionary principle and was, on the contrary, inherent in that principle. Thus, the Commission had not made a manifest error of assessment in finding that the additional period during which the risk assessment had been postponed to allow later scientific knowledge to be taken into account had not in any event been compatible with the goal of maintaining a high level of protection of the environment,

66| Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ 2003 L 268, p. 1).

67| Case C-499/18 P, ***Bayer CropScience and Bayer*** v ***Commission***.

68| Commission Implementing Regulation (EU) No 485/2013 of 24 May 2013 amending Implementing Regulation (EU) No 540/2011, as regards the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid, and prohibiting the use and sale of seeds treated with plant protection products containing those active substances (OJ 2013 L 139, p. 12).

69| Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

and that it had been for the Commission, pursuant to the precautionary principle, to adopt protective measures without waiting further. Last, the Court noted that point 6.3.4 of the Communication on the precautionary principle [70] provided for an examination to be carried out of the benefits and costs of action and lack of action. That requirement was met where the authority concerned — in the present case, the Commission — had in fact acquainted itself with the effects, positive and negative, economic and otherwise, to which the proposed action, as well as the failure to act, might lead, and had taken that into account in adopting its decision.

According to the Court, the Commission had been fully entitled to find that, in the light of the hazard quotient values identified in respect of the substances covered in the conclusions of the European Food Safety Authority (EFSA), a risk to the colonies could not be ruled out, and that it had therefore been for the Commission, on the basis of the precautionary principle, to adopt protective measures without having to wait for the conditions under which, and the mortality rate threshold above which, the loss of individual bees would be likely to endanger colony survival or development to be established.

That problem was also at the centre of the case that gave rise to the judgment of 17 May 2018, ***BASF Agro and Others*** v ***Commission*** (T-584/13, EU:T:2018:279). In an action for annulment of Implementing Regulation (EU) No 781/2013, [71] the Court, having concluded that the Commission had not submitted any evidence to show that an impact analysis had in fact been carried out when the precautionary principle was applied, annulled the contested act.

According to the Court, it was indeed true that, in the context of the application of Regulation No 1107/2009, the protection of the environment took precedence over economic considerations, with the result that it might justify adverse economic consequences, even those which were substantial, for certain traders. However, the general assertion of such a principle could not be seen as the pre-emptive exercise of the legislature's discretion, relieving the Commission of the need to analyse the costs and benefits of a specific measure.

The Court observed, moreover, that the obligation, set out in point 6.3.4 of the Communication on the precautionary principle, to carry out an impact assessment was ultimately no more than a specific expression of the principle of proportionality. To assert, in relation to an area in which the Commission had a broad discretion, that it was entitled to adopt measures without being required to assess their advantages and disadvantages was not compatible with the principle of proportionality. The necessary and indispensable corollary of a discretion being conferred on the administration was an obligation to exercise that discretion and to take all relevant information into account for that purpose. That applied a fortiori in the context of the application of the precautionary principle, where the administration adopted measures restricting the rights of individuals, not on the basis of scientific certainty, but on the basis of uncertainty.

In the case that gave rise to the judgment of 27 September 2018, ***Mellifera*** v ***Commission*** (T-12/17, under appeal, [72] EU:T:2018:616), an action had been brought before the Court for annulment of the Commission decision rejecting the request for internal review of Implementing Regulation (EU) 2016/1056, [73] whereby

70| Commission Communication COM(2000) 1 final of 2 February 2000 on the precautionary principle.

71| Commission Implementing Regulation (EU) No 781/2013 of 14 August 2013 amending Implementing Regulation (EU) No 540/2011, as regards the conditions of approval of the active substance fipronil, and prohibiting the use and sale of seeds treated with plant protection products containing this active substance (OJ 2013 L 219, p. 22).

72| Case C-784/18 P, ***Mellifera*** v ***Commission***.

73| Commission Implementing Regulation (EU) 2016/1056 of 29 June 2016 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval period of the active substance glyphosate (OJ 2016 L 173, p. 52).

the Commission had extended for the second time the approval period for glyphosate, in application of Article 10 of Regulation (EC) No 1367/2006. The Commission had rejected that request for internal review as inadmissible on the ground that the act referred to by that request was not an administrative act within the meaning of Article 2(1)(g) of Regulation No 1367/2006, namely a measure of individual scope.

Since by its Implementing Regulation (EU) 2017/2324 of 12 December 2017, [74] which had been adopted after the end of the written procedure in this case, the Commission had renewed the approval of glyphosate for a period of five years, the Court first of all examined the applicant's interest in bringing proceedings. The Court recalled that an applicant retained an interest in seeking annulment of an act of an EU institution in order to prevent its alleged unlawfulness from recurring in the future. That was the position in the present case, since the unlawfulness alleged by the applicant was based on an interpretation of Article 10(1) of Regulation No 1367/2006, read in conjunction with Article 2(1)(g) of that regulation, that the Commission was highly likely to reiterate if there was a further request for internal review of an administrative act under environmental law.

As to the substance, the Court observed that an implementing regulation adopted on the basis of the first paragraph of Article 17 of Regulation No 1107/2009 extended the approval of the active substance in question for a certain period. That measure therefore had the same consequences as an implementing regulation approving such a substance for the first time under Article 13(2) of that regulation or a regulation renewing approval under Article 20 of that regulation. According to the Court, it followed from Article 28(1) of Regulation No 1107/2009 that, in principle, a plant protection product was not to be placed on the market or used unless it had been authorised in the Member State concerned in accordance with that regulation. It followed from Article 29(1)(a) of that regulation, moreover, that a plant protection product could be authorised only where the active substance which it contained had been approved. Consequently, approval of an active substance on the basis of Regulation No 1107/2009 entailed legal effects not only for the person who had applied for such approval, but also for any operator whose activities required such approval, in particular for the production of plant protection products containing that substance, and for any competent public authority, in particular the public authorities of the Member States responsible for authorising those products. The inevitable conclusion was therefore that Implementing Regulation 2016/1056 was of general application in that it applied to objectively determined situations and produced legal effects with respect to a category of persons envisaged in general and in the abstract.

The Court made clear that, while Article 9(3) of the Aarhus Convention [75] did not specify that the opportunity it provided for access to administrative procedures related only to cases where the acts at issue were of individual scope, that provision was not directly applicable within the EU legal order, nor could it be relied upon as a criterion for assessing the legality of EU acts. Since, under Article 10(1) of Regulation No 1367/2006, only 'administrative act[s]', which were defined in Article 2(1)(g) of that regulation as being 'measure[s] of individual scope', might form the subject of a request for internal review, it was not possible to interpret those provisions as meaning that the administrative acts referred to in them encompassed measures of general application, since such an interpretation would be *contra legem*.

74| Commission Implementing Regulation (EU) 2017/2324 of 12 December 2017 renewing the approval of the active substance glyphosate in accordance with Regulation No 1107/2009, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2017 L 333, p. 10).

75| Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998.

In the judgment of 13 December 2018, ***Ville de Paris, Ville de Bruxelles and Ayuntamiento de Madrid*** v ***Commission*** (T-339/16, T-352/16, and T-391/16, EU:T:2018:927), the Court adjudicated on actions for annulment of Regulation (EU) 2016/646 [76] brought by the cities of Paris, Brussels and Madrid and also on an action for compensation for the harm which the city of Paris claimed to have sustained as a result of the adoption of that regulation. In the context of the actions for annulment, the applicants claimed that the Commission had not been entitled to adopt not-to-exceed (NTE) values of emissions of oxides of nitrogen, in real driving tests, higher than the limits of those emissions set for the Euro 6 standard in Annex I to Regulation (EC) No 715/2007. [77]

Whereas the Commission disputed the admissibility of the actions, maintaining in particular that the applicants' powers to regulate vehicle traffic in order to reduce air pollution were not in any way affected by the contested regulation, which therefore did not affect their legal position, the Court did not take that view. After recalling that, if the contested act directly affected the applicant's legal position and left no discretion to its addressees, who were responsible for its implementation, the applicant was directly concerned by that act, within the meaning of the fourth paragraph of Article 263 TFEU, the Court observed that that was the case where the legislative powers of an infra-State entity were affected by the act in question. According to the Court, the literal, teleological and contextual interpretations of Directive 2007/46/EC, [78] in the framework of which the contested regulation had been adopted, were to the same effect, namely that the directive in fact prevented the public authorities which emanated from a Member State from prohibiting, restricting or curtailing road traffic for reasons linked with aspects of their construction or use covered by that directive if they satisfied the requirements of the directive. It followed that the applicants were unable, owing to the adoption of the contested regulation, to limit the movement of vehicles that did not comply with the oxides of nitrogen emissions limits set in the Euro 6 standard, but which nonetheless complied on that occasion with the NTE oxides of nitrogen emissions values defined in that regulation, which were higher than the Euro 6 limits. The Court was satisfied, moreover, that the restriction of the applicants' powers was not hypothetical and considered that they had the powers under national law to protect the environment and health, and in particular to combat air pollution, including the power to restrict vehicle traffic for that purpose, that they were in fact involved in such actions and that they were faced with situations of air pollution.

As regards the substance, the Court held that, as the amendment of the limits of emissions of oxides of nitrogen set for the Euro 6 standard that appeared in Annex I to Regulation No 715/2007 constituted the amendment of an essential element of that regulation, the Commission was not competent to make such an amendment under its implementing powers. As regards the scope of the annulment, the Court observed that the provisions of the contested regulation other than those relating to the limits of emissions of oxides of nitrogen were severable from the latter provisions. It followed that only point 2 of Annex II to the contested regulation had to be annulled, in so far as it set the value of the final conformity factor CF pollutant and the value of the temporary conformity factor CF pollutant for the mass of oxides of nitrogen. The Court made clear, nonetheless, that in order to comply with an annulment judgment and to implement it fully, the institution that had adopted the provision that was annulled had to eliminate it from subsequent acts which it had adopted, in which that provision had been included, and exclude it from its future acts, taking into account not only the operative part of the judgment but also the grounds that led to the operative part and

76| Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ 2016 L 109, p. 1).

77| Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

78| Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1).

constituted its essential basis. The Court decided, moreover, that the effects of the annulled provision would be maintained in the future for a reasonable period to allow the relevant legislation to be amended, a period that could not be more than 12 months from the date on which the judgment took effect, in order to prevent the annulment from adversely affecting legitimate economic interests in the automobile sector, which had complied with the applicable legislation, and also, where relevant, those of consumers who had acquired vehicles that complied with that legislation and with the EU policies on the environment and health.

Last, as regards the claim for compensation, the Court considered that the sole damage 'to image and to legitimacy' in respect of which the city of Paris claimed compensation of one symbolic euro had not been substantiated. In any event, that damage leant itself particularly well to being made good symbolically and sufficiently by the annulment of the provision of the contested regulation which it had challenged.

VIII. Dumping

In the case that gave rise to the judgment of 3 May 2018, ***Distillerie Bonollo and Others*** v ***Council*** (T-431/12, EU:T:2018:251, under appeal [79]), an action had been brought before the Court for annulment of Implementing Regulation (EU) No 626/2012, [80] in the context of a dispute relating to anti-dumping duties on imports of tartaric acid originating in China. By the contested regulation, the Council had denied two Chinese exporting producers of tartaric acid market economy treatment (MET) and, having constructed the normal value on the basis of information provided by a cooperating producer in the analogue country, namely Argentina, had increased the anti-dumping duty applicable to the goods produced by those two exporting producers. This case allowed the Court to examine, for the first time, the admissibility of an action brought by producers in the European Union against a regulation imposing anti-dumping duties following a partial interim review request from those producers.

On that point, the Court observed, first of all, as regards the question whether the applicants were directly concerned by the contested act, that the case-law showed that actions for annulment brought by individuals against EU acts had repeatedly been declared admissible when the effects on the applicants had not been legal but primarily factual, in particular because the applicants had been directly affected in their capacity as market participants competing with other market participants. Thus, in so far as the applicants had triggered the partial interim review procedure, and as the measures adopted at the end of that procedure had been intended to offset the dumping giving rise to the injury they had suffered as competing producers operating on the same market, they were directly concerned by the contested regulation. As to whether the applicants were also individually concerned by the contested regulation, the Court observed that the closer the competitive relationship between the applicant and the competitor in question, either because there was a reduced number of active operators on the market, or because the undertaking in question was the applicant's main competitor, and the more significant the negative consequences were for the applicant, the more appropriate it was to conclude that the applicant was individually concerned by the contested measure. In this case, the applicants had actively participated in the administrative procedure and contributed significantly to the conduct and outcome of that procedure. As their market position had also been substantially

79| Case C-461/18 P, ***Changmao Biochemical Engineering*** v ***Distillerie Bonollo and Others and Council***.

80| Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China (OJ 2012 L 182, p. 1).

affected, the Court concluded that they displayed attributes peculiar to them as competitors of the two Chinese exporting producers and found themselves in circumstances which differentiated and distinguished them individually just as in the case of the addressees of the contested regulation.

As regards the substance, whereas the applicants relied on a change in methodology prohibited by Article 11 of Regulation (EC) No 1225/2009, [81] the Court emphasised that, while it was logical that, where several exporting producers were granted MET, the normal value would be different for each, given that it was calculated on the basis of their respective data, there was no reason for the normal value to differ in the case of several exporting producers that were denied MET. In that situation, the calculations of the normal value were carried out on the basis of data from an analogue country and were thus independent of their respective data. The contested regulation therefore had to be annulled.

The Court also examined an admissibility issue in the case that gave rise to the judgment of 18 October 2018, ***ArcelorMittal Tubular Products Ostrava and Others*** v ***Commission*** (T-364/16, EU:T:2018:696). This case followed on from the judgment in *Hubei Xinyegang Steel* v *Council*, [82] whereby the Court had annulled Regulation (EC) No 926/2009, [83] to the extent that it had imposed anti-dumping duties on exports of products produced by Hubei Xinyegang Steel Co. Ltd and had collected provisional duties imposed on those exports. That judgment had been upheld by the Court of Justice on appeal. [84]

Before the judgment on appeal had been delivered, the Commission had adopted Implementing Regulation (EU) 2015/2272, concerning a review and imposing anti-dumping measures for a new period. [85] Having subsequently been informed that anti-dumping duties continued to be collected on Hubei Xinyegang Steel's imports, the Commission, in the contested decision, avoided levying duties on those imports. In particular, the Commission removed Hubei Xinyegang Steel from the list of companies listed under the TARIC (integrated tariff of the European Union) additional code A 950 and listed it under the TARIC additional code C 129, for all the combined nomenclature codes referred to in Article 1(1) of Implementing Regulation 2015/2272. A footnote to that TARIC code referred to the judgment of the Court of Justice.

As regards the admissibility of the action, the Court observed, first of all, that the Member States must, as a general rule, apply the measures represented by the TARIC codes and additional codes, in order to achieve uniform implementation of the Common Customs Tariff. Next, after pointing out that, by the contested decision, the Commission had created a TARIC additional code C 129 that had not previously existed, the Court stated that the creation of that code had ensured, at the very least, that the national customs authorities were informed that imports of the goods concerned manufactured by Hubei Xinyegang Steel ought no longer to be subject to the collection of an anti-dumping duty, notwithstanding the existence of Implementing Regulation 2015/2272, which required such collection. The Court stated, moreover, that in the two previous

81| Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51) (replaced by Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21)).

82| Judgment of 29 January 2014, ***Hubei Xinyegang Steel*** v ***Council*** (T-528/09, EU:T:2014:35).

83| Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China (OJ 2009 L 262, p. 19).

84| Judgment of 7 April 2016, ***ArcelorMittal Tubular Products Ostrava and Others*** v ***Hubei Xinyegang Steel*** (C-186/14 P and C-193/14 P, EU:C:2016:209).

85| Commission Implementing Regulation (EU) 2015/2272 of 7 December 2015 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 (OJ 2015 L 322, p. 21).

judgments the legality of Implementing Regulation 2015/2272, in so far as it concerned Hubei Xinyegang Steel, had not been at issue, and that the creation of the TARIC additional code C 129 related specifically to the non-application of the anti-dumping duties laid down by that regulation with respect to Hubei Xinyegang Steel. Recalling that the acts of the institutions were in principle presumed to be lawful, the Court further noted that the contested decision might also be considered to be a measure adopted in order to comply with those judgments, within the meaning of Article 266 TFEU. As judicial review of whether the institutions respected the obligation imposed by Article 266 TFEU was ensured by means of, inter alia, the legal remedy provided for in Article 263 TFEU, it had to be held that the contested decision was an act against which an action for annulment could be brought within the meaning of that provision. The Court also accepted that the applicants had standing to bring proceedings, given the circumstances of the case and, in particular, the fact that they were part of the association that had lodged a complaint in the anti-dumping procedures concerned and had actively participated in those procedures.

As regards the substance, the Court observed that, since Implementing Regulation 2015/2272 must, in principle, be presumed to be lawful, the Commission ought to have amended it or repealed it by means of a regulation. In accordance with the rule of equivalence of form, which corresponded to a general principle of law, the form used in order to bring a measure to the notice of a third party must also be used for all subsequent amendments of that measure. In the present case, the Court noted, in particular, that under Article 14(1) of Regulation No 1225/2009 the anti-dumping duties 'shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties'. It followed that the non-collection with respect to one company of anti-dumping duties laid down by a regulation which had not been annulled or declared invalid by the Courts of the European Union must normally be brought about by means of a regulation. Thus, by definitively prescribing that anti-dumping duties were not to be collected on the goods manufactured by Hubei Xinyegang Steel, when they were required to be collected pursuant to Implementing Regulation 2015/2272, by creating an additional TARIC code, the Commission had infringed the rule of equivalence of form. In addition, compliance with the rule of equivalence of form ought to have led not only to the matter being referred to the Commission's College of Commissioners, but also to consultation of the committee established by Article 15(1) of Regulation No 1225/2009. Referring, last, to the situation of legal uncertainty that resulted from the contested decision, and to the fact that compliance with the rule of equivalence of form would have ensured a more explicit statement of the Commission's reasons, the Court concluded that the infringement by the Commission of the rule of equivalence of form constituted an irregularity that required the annulment of the contested decision.

IX. Supervision of the financial sector

In the judgment of 24 April 2018, ***Caisse régionale de crédit agricole mutuel Alpes Provence and Others*** v ***ECB*** (T-133/16 to T-136/16, EU:T:2018:219), the Court was required to rule on the legality of the decisions whereby the European Central Bank (ECB) had refused to designate the chairmen of the applicants' boards of directors as 'effective directors' within the meaning of Article 13(1) of Directive 2013/36/EU. [86] According to the ECB, the functions that enabled a person to be classified as an effective director had to be executive functions, such as those of a chief executive officer, different from those assigned to the chairman of the

86| Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

board of directors, in such a way as to ensure a separation between the exercise of executive and non-executive functions. That interpretation was disputed by the applicants, which claimed that the concept of effective director was not limited to members of the senior management having executive functions.

In that regard, the Court observed, first of all, that, pursuant to Article 4(3) of Regulation (EU) No 1024/2013, [87] the ECB was required to apply not only Article 13(1) of Directive 2013/36 but also the provision of national law transposing that directive. That necessarily required the Court to assess the legality of the contested decisions in the light of both Article 13(1) of Directive 2013/36 and national law, in this instance French law. In the context of that assessment, the Court considered that it was apparent from the literal, historical, teleological and contextual interpretations of Article 13(1) of Directive 2013/36 that the concept of effective director referred to the members of the management board who were also part of the senior management of the credit institution. The Court emphasised, in particular, that in the general scheme of Directive 2013/36, the objective relating to good governance of credit institutions required effective oversight of the senior management by the non-executive members of the management body, which necessitated checks and balances within the management body. The effectiveness of such oversight might be jeopardised if the chairman of the management body in its supervisory function, while not formally acting as chief executive officer, was also responsible for the effective direction of the business of the credit institution.

In addition, in so far as the interpretation of a national provision was also at issue, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by the national courts. In that connection, the Court observed that, by a judgment of 30 June 2016, the Conseil d'État (French Council of State) had held that it was only in the event that the chairman of the board of directors of a credit institution had been expressly authorised to have responsibility for its general management that that individual could be appointed 'effective director' of that institution. It followed, according to the Court, that the ECB had not made an error of law in considering that the concept of 'effective director' of a credit institution must be understood as referring to directors with executive functions, such as the chief executive officer, the deputy chief executive officer, the members of the executive board or the sole managing director.

X. Public procurement by the institutions of the European Union

In the case that gave rise to the judgment of 8 November 2018, ***"Pro NGO!"*** v ***Commission*** (T-454/17, EU:T:2018:755), the Court was required to rule, for the first time, on the scope of Article 108(11) of Regulation (EU, Euratom) No 966/2012, [88] in the version introduced by Regulation (EU, Euratom) 2015/1929. [89] That provision provided that the Court of Justice of the European Union was to have unlimited jurisdiction to review a decision whereby the contracting authority excluded an economic operator or imposed on it a financial penalty, including reducing or increasing the duration of the exclusion or cancelling, reducing or

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

88| Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1).

89| Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 amending Regulation No 966/2012 (OJ 2015 L 286, p. 1).

increasing the financial penalty imposed. The case concerned the decision whereby the Commission had excluded the applicant, for gross professional misconduct, for a period of six months from public procurement procedures and the grant of subsidies funded by the general budget of the European Union. The central issue in the case was whether the Court's unlimited jurisdiction should be exercised, when the applicant had claimed that the penalty imposed by the Commission was disproportionate only at the stage of the reply.

In that regard, the Court recalled that the exercise of unlimited jurisdiction did not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union were *inter partes*. With the exception of pleas involving matters of public policy which the Courts were required to raise of their own motion, such as the failure to state reasons for a contested decision, it was for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas. The Court noted that in this case the applicant, in the application, had sought annulment of the contested decision without disputing the legality of the penalty imposed on it, let alone its proportionality. The complaint alleging breach of the principle of proportionality, raised for the first time in the reply, had therefore not amplified a plea raised previously, whether directly or implicitly, in the application and which was closely linked with the application. In addition, the complaint alleging breach of the principle of proportionality was based on matters known to the applicant on the date on which it had brought its action. Thus, since it was clear from Article 84(1) of the Rules of Procedure that no new plea in law might be introduced in the course of proceedings unless it was based on matters of law or of fact which had come to light in the course of the procedure, that complaint, submitted at the stage of the reply, was inadmissible.

XI. Access to documents of the institutions

1. Documents held by the EMA in the context of an application for marketing authorisation for a medicinal product

The case that gave rise to the judgment of 5 February 2018, ***Pari Pharma*** v ***EMA*** (T-235/15, EU:T:2018:65), provided the Court with the opportunity to rule on the application of a general presumption of confidentiality, based on the exception to the right of access associated with the protection of commercial interests provided for in Regulation (EC) No 1049/2001, [90] to all the documents submitted in the context of a procedure relating to the application for marketing authorisation (MA) for a medicinal product. The case concerned an application, submitted by the applicant, for annulment of the decision whereby the European Medicines Agency (EMA) had granted a third party access to documents containing information submitted in the context of such a procedure, in accordance with Regulations (EC) No 141/2000 91 and (EC) No 726/2004. [92] The applicant challenged that decision, which in its submission was contrary to the general presumption of confidentiality that MA dossiers should enjoy and undermined its commercial interests.

90| Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

91| Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ 2000 L 18, p. 1).

92| Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

In that regard, the Court observed that, unlike the situations in which the Court of Justice and the General Court had accepted that the general presumptions of confidentiality justifying refusal of access to documents applied, Regulations No 141/2000 and No 726/2004 did not restrict the use of documents in the file relating to an MA procedure for a medicinal product and, by contrast with Regulations No 1/2003 and (EC) No 773/2004, [93] did not provide that access to the file was to be limited to the 'parties concerned' or to 'complainants'. No provision of Regulations No 141/2000 and No 726/2004 could be interpreted as evidence of the intention of the EU legislature to set up a system of restricted access to documents by means of a general presumption of confidentiality of documents. It followed that the documents at issue could not be considered to enjoy a general presumption of confidentiality on the implicit ground that they were, as a matter of principle and in their entirety, clearly covered by the exception relating to the protection of the commercial interests of MA applicants.

As to whether disclosure of the information contained in those documents was capable of undermining the protection of the applicant's commercial interests, the Court further stated that the mere fact that published data had been compiled together in those documents could not, as such, suffice to show that all those data revealed the content of the applicant's strategic know-how and were thus confidential. In order for such know-how to be deemed to fall within the scope of commercial interest within the meaning of Article 4(2) of Regulation No 1049/2001, the applicant was required to show that the compilation of those data which were accessible to the public and its assessments on those data provided added value — consisting of, for example, new scientific conclusions or considerations relating to an inventive strategy — that had given the undertaking a commercial advantage over its competitors. In the present case, according to the Court, the applicant had been unable to show that all the information at issue was the result of an inventive strategy which had bestowed a scientific added value on the non-confidential elements taken in isolation, or, a fortiori, that that strategy and the entirety of the documents which outlined that strategy could be considered confidential for the purposes of Article 4(2) of Regulation No 1049/2001.

2. Documents from the Legal Service of an institution

In the cases that gave rise to the judgments of 7 February 2018, ***Access Info Europe*** v ***Commission*** (T-851/16, EU:T:2018:69), and of 7 February 2018, ***Access Info Europe*** v ***Commission*** (T-852/16, EU:T:2018:71), two actions had been brought before the Court for annulment of the decision whereby the Commission had refused the applicant access to documents from its Legal Service relating to the measures implementing the 'EU-Turkey' statement of 8 March 2016 regarding the migration crisis. The refusal was based, in particular, on the exceptions to the right of access based on the protection of international relations and the protection of legal advice.

After examining, first of all, the merits of the application of the exception relating to the protection of international relations, the Court recalled that the disclosure of elements connected with the objectives pursued by the European Union and its Member States in decisions, in particular when they dealt with the specific content of an agreement envisaged or the strategic objectives pursued by the European Union in negotiations, would damage the climate of confidence in the negotiations which were ongoing at the time of the decision refusing access to documents containing those elements. Thus, the Commission had not made a manifest error of assessment when it had justified the refusal of access to documents containing the European Union's position vis-à-vis the Republic of Turkey and, more generally, relating to the international

93| Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

relations of the European Union. In fact, the disclosure of such documents would give rise to a specific risk of complicating the European Union's position in the dialogue with the Republic of Turkey and, consequently, of affecting the European Union's relations. Furthermore, the Commission had been entitled to provide only a summary statement of the grounds of its refusal, since providing more comprehensive information would have entailed revealing the very content of the documents coming within the protection provided for by that provision, in disregard of the scope of the imperative protection provided for by the legislature in the wording of Article 4(1) of Regulation No 1049/2001.

As regards the exception based on the protection of the institutions' legal advice, the Court observed that the disclosure of such legal advice, which was preparatory and internal and drawn up for the purpose of political dialogue between the institution and representatives of a Member State and a third State, would have actually undermined, in a foreseeable manner, the Commission's interest in seeking and receiving frank, objective and comprehensive advice from its various departments in order to prepare its final position as an institution. The same applied, moreover, in an area of certain high political sensitivity and in a context of urgency in order to address a delicate migration situation.

3. Documents relating to the grant of a Euratom loan

In the case that gave rise to the judgment of 27 February 2018, ***CEE Bankwatch Network*** v ***Commission*** (T-307/16, EU:T:2018:97), an action had been brought before the Court for annulment of the decision whereby the Commission had refused the applicant, a non-governmental organisation active in environmental matters, access to a number of documents relating to the grant of a Euratom loan in support of the Ukraine safety upgrade programme of nuclear power units, granted on the basis of the provisions of the Treaty establishing the European Atomic Energy Community (EAEC). The applicant challenged the contested decision in that it had failed to take account of all the rules applicable to the present case. In this instance, the applicant claimed that the decision had been adopted on the basis of Regulation No 1049/2001, and that the Commission had failed to take account of Regulation No 1367/2006 on the Aarhus Convention, which was crucial, however, according to the applicant, since it restricted the opportunity for EU institutions to refuse access to documents where the requested information related to emissions into the environment.

The Court rejected that argument. In order to do so, in the first place, it stated that, according to its title, its recitals and its provisions, Regulation No 1367/2006 applied information obligations concluded within the framework of an international convention to which the European Atomic Energy Community (EAEC) was not a party, namely the Aarhus Convention. As it was not a party to that convention, the EAEC could not, in the absence of any indication to the contrary, be subject to the obligations contained in the regulation applying that convention. In the second place, the measures adopted under the EAEC Treaty were not necessarily subject to the obligations applicable within the framework of the European Union. Thus, the rules applicable within the framework of the EAEC were provided for by the EAEC Treaty. One such rule was Article 106a(1) EA, which, for the functioning of the EAEC, rendered applicable certain provisions of the EU and FEU Treaties, in particular Article 15 TFEU, formerly Article 255 EC, which formed the basis of Regulation No 1049/2001. Based on a provision applicable in the EAEC, that regulation, which established general rules for access to documents of the institutions, was intended to apply to documents held by the institutions and bodies operating in that context. That was not the case for Regulation No 1367/2006, which, as stated in its preamble, had been adopted on the basis of Article 175 EC, now Article 192 TFEU. Since the latter provision was not mentioned in Article 106a(1) EA, no measure adopted on the basis thereof, including Regulation No 1367/2006, could be applied within the framework of Euratom. In the third, and last, place, the text of Regulation No 1367/2006 referred specifically to the institutions and bodies of the European Community, without contemplating its application to other entities, for example, institutions or bodies of the EAEC.

4. Documents concerning an ongoing legislative procedure

In the case that gave rise to the judgment of 22 March 2018, ***De Capitani*** v ***Parliament*** (T-540/15, EU:T:2018:167), the Court was required to examine the conditions governing access to documents, drawn up by the Parliament or made available to it, containing information relating to the positions of the institutions on ongoing co-decision procedures. The Court, in particular, examined the legality of the Parliament's decision refusing to grant the applicant full access to two tables drawn up in the context of trilogues that were then ongoing. The tables at issue contained four columns, the first three reflecting the Commission's proposal, the Council's position and the Parliament's position, while the fourth column contained, depending on the case, the provisional compromise text or the preliminary position of the Presidency of the Council in relation to the amendments proposed by the Parliament. It was to the fourth column of the tables that the Parliament had refused to grant the applicant access, on the ground that such disclosure would actually, specifically and seriously undermine the decision-making process of the institution as well as the inter-institutional decision-making process in the context of the ongoing legislative procedure.

After finding that the applicant retained an interest in bringing proceedings, in spite of the fact that the legislative procedure to which the documents at issue related had in the meantime been closed, the Court noted that the trilogues were part of the legislative process and that it was not possible in that context to apply a general presumption that the fourth column of the tables of the ongoing trilogues should not be disclosed. Such a conclusion might be inferred, according to the Court, from the principles of openness and transparency inherent in the EU legislative process and also from the fact that the case-law of the Court of Justice had found there to be a general presumption of non-disclosure only in relation to a set of documents that were clearly defined by the fact that they all belonged to a file relating to ongoing administrative or judicial proceedings, but never in respect of the legislative process.

It remained for the Court to ascertain whether the Parliament had complied with its obligation to provide the applicant with reasoned explanations as to how full access to the documents at issue might specifically and effectively undermine the interest protected by the exception relating to the protection of the decision-making process, as the risk of its being undermined must be reasonably foreseeable and not purely hypothetical. In that respect, as regards, in the first place, the specific considerations concerning the legislative procedure at issue put forward in the contested decision, the Court observed that the fact, mentioned in the contested decision, that the documents at issue related to the area of police cooperation could not per se suffice to demonstrate the special sensitivity of the documents. To hold otherwise would have meant exempting a whole field of EU law from the transparency requirements of legislative action in that field. As regards, in the second place, the more general considerations put forward in the contested decision, the Court, while acknowledging that it had been recognised in the case-law that the risk of external pressure could constitute a legitimate ground for restricting access to documents related to the decision-making process, emphasised that the reality of such external pressure must, however, be established with certainty, and that evidence must be adduced to show that there was a reasonably foreseeable risk that the decision to be taken would be substantially affected owing to that external pressure. In this instance, there was no tangible evidence in the case file establishing, in the event of disclosure of the fourth column of the documents at issue, the reality of such external pressure. The Court stated, moreover, that the provisional nature of the information in the documents at issue did not as such justify the application of the exception relating to the protection of the decision-making process, since that provision did not draw a distinction according to the state of progress of the discussions. In that context, it was irrelevant, moreover, whether the documents at issue had been produced or received at an early, late or final stage of the decision-making process or whether they had been produced or received in a formal or informal context, a fortiori because a proposal was, by its nature, intended

to be discussed and was not liable to remain unchanged following such discussion, and since public opinion was perfectly capable of understanding that the author of a proposal was likely to amend its content subsequently.

5. Documents originating in a Member State exchanged in the context of the rules of the common fisheries policy

In the case that gave rise to the judgment of 3 May 2018, ***Malta*** v ***Commission*** (T-653/16, EU:T:2018:241), the Court ruled on an action for annulment of the Commission decision granting access to documents originating from a Member State exchanged in the context of the rules of the common fisheries policy. In support of its action, the Republic of Malta claimed that the Commission had not processed its application within the time limits prescribed in Articles 7 and 8 of Regulation No 1049/2001 and had thus breached the duty of sincere cooperation which it owed to the Maltese authorities.

The Court began by observing that although infringement of the rules for examining applications for access to documents provided for in Articles 6 to 8 of Regulation No 1049/2001 was capable, in certain circumstances, of affecting the legality of a decision refusing to grant access to certain documents, it could not affect the legality of a decision to grant access to those documents. It followed that a Member State could not, in respect of the decision of an institution to grant access to documents, legitimately rely on arguments based on infringement of those provisions. In contrast to Articles 6 to 8 of Regulation No 1049/2001, Article 4(4) and (5) of that regulation governed the relationship between the institution and third parties, in particular the Member States, as regards documents originating from the Member States, and was intended to protect the interests of such third parties and of the Member States in opposing disclosure of the documents. It followed that the infringement of Article 4(4) and (5) of Regulation No 1049/2001 and of the duty of sincere cooperation owed by the institution to a Member State was liable to affect the legality of a decision granting access to documents originating from that Member State.

This case also gave the Court the opportunity to examine the relationship between Regulation No 1049/2001 and Regulation (EC) No 1224/2009. [94] Emphasising that it was appropriate to ensure a coherent application of each of those two regulations, the Court stated that, where a request based on Regulation No 1049/2001 sought to obtain access to documents containing data within the meaning of Regulation No 1224/2009, Article 113(2) and (3) of Regulation No 1224/2009 became applicable in its entirety, subjecting any transmission or use of data not provided for by that regulation to the express consent of that Member State. In fact, Article 113(2) and (3) of Regulation No 1224/2009 did not merely lay down that, where a Member State made a specific request to that effect, a document originating from that Member State could not subsequently be disclosed without its prior agreement, as did Article 4(5) of Regulation No 1049/2001, but — similarly to Article 9(3) of Regulation No 1049/2001 — it set prior and express consent of that Member State as an unqualified condition for certain forms of transmission and use of data communicated by that Member State. Thus, it appeared that, with respect to such data, the EU legislature had intended to maintain, in a certain form, the authorship rule, which had nevertheless, in principle, been abolished in respect of public access to documents under Regulation No 1049/2001. The Court concluded that Article 113(2) and (3) of Regulation No 1224/2009 prohibited, in principle, disclosure to the public, and in particular to a non-governmental organisation, under Regulation No 1049/2001, of unredacted documents containing data communicated by

94| Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1).

a Member State to the Commission under Regulation No 1224/2009 where that Member State had not expressly given its consent and, a fortiori, where, as was the case here, that Member State had expressly opposed disclosure.

6. Documents relating to the allowances of Members of the Parliament

In the cases that gave rise to the judgment of 25 September 2018, ***Psara and Others*** v ***Parliament*** (T-639/15 to T-666/15 and T-94/16, EU:T:2018:602), an action had been brought before the Court for annulment of a series of decisions of the Parliament rejecting the applicants' applications for access to Parliament documents containing information on the allowances of its members. In the contested decisions, the Parliament had stated, in particular, that it did not have any data on the actual expenditure incurred by MEPs in respect of the general expenditure allowance and that it was therefore unable to disclose the documents requested in that connection and, moreover, that it was not in possession of records of MEPs' bank accounts earmarked specifically for the use of the general expenditure allowances. It had also relied on the exception to the right of access based on the protection of privacy provided for in Article 4(1)(b) of Regulation No 1049/2001, read in conjunction with Article 8(b) of Regulation (EC) No 45/2001. [95]

The Court recalled first of all that the right of public access enshrined in Regulation No 1049/2001 concerned only those institution documents which the institutions effectively held, in that that right could not extend to documents which were not in the institutions' possession or which did not exist. As regards documents detailing how and when the MEPs of each Member State spent, at various times, their general expenditure allowances, it was not in dispute that MEPs were to receive, on a monthly basis, a flat-rate allowance in, furthermore, an amount known to the public, following a single application submitted at the start of their mandate. It followed that, as the general expenditure allowance was paid at a flat rate, the Parliament had no document detailing, physically or in time, its members' use of those allowances. The Parliament had therefore been correct to state that it did not have any data on the actual expenditure incurred by MEPs in that context. As regards the records of MEPs' bank accounts earmarked specifically for the use of general expenditure allowances, the Court emphasised that, in accordance with the presumption of legality attaching to EU acts, the non-existence of a document to which access had been requested was presumed when a statement to that effect was made by the institution concerned. That was, however, a simple presumption which the person requesting access might rebut in any way by relevant and consistent evidence. In so far as, in the present case, the applicants had not put forward evidence capable of calling into question the non-existence of the documents at issue, the Court considered that the Parliament had been correct to reject their applications relating to those documents.

So far as the exception relating to the protection of privacy was concerned, whereas the applicants claimed that the contested decisions were vitiated by illegality in that Regulation No 45/2001 was not applicable in the present case, as the data in question did not fall within the MEPs' private sphere, but within their public sphere, since the documents requested related to the performance of their duties as elected representatives, the Court considered that that distinction was manifestly based on confusion between what was meant by personal data and what was regarded as relating to private life. In addition, the fact that data concerning the persons in question were closely linked to public data on those persons did not in any way mean that those

95| Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

data could no longer be characterised as personal data, within the meaning of Article 2(a) of Regulation No 45/2001. In other words, the classification of the data at issue as personal data could not be ruled out merely because those data were related to other data which were public. In that context, the Court observed, moreover, that it was clear from Article 8(b) of Regulation No 45/2001 that that regulation made the transfer of personal data subject to two cumulative conditions. Whoever requested such a transfer first had to establish that it was necessary. If the transfer of the data was demonstrated to be necessary, it was then for the institution concerned to determine that there was no reason to assume that that transfer might prejudice the legitimate interests of the person concerned. In the present case, as the applicants had, in their applications, stated only general objectives of enabling the public to verify the appropriateness of the expenses incurred by the MEPs in the exercise of their mandate and guaranteeing the public right to information and transparency, the Court held that the Parliament could not be criticised for not having deduced from such objectives, expressed in such broad and general terms, an implicit demonstration of the need to transfer those personal data.

XII. Civil service

1. Psychological harassment

In the case that gave rise to the judgment of 29 June 2018, ***HF*** v ***Parliament*** (T-218/17, under appeal, [96] EU:T:2018:393), an application had been made to the Court for, first, annulment of the decision rejecting the applicant's request for assistance and, second, compensation for the damage which she claimed to have suffered as a result of the unlawful conduct of the authority empowered to conclude contracts of employment ('the AECE') of the Parliament in its handling of that request.

In that regard, the Court recalled that an administrative inquiry procedure initiated following the submission, by an official or other staff member, of a request for assistance within the meaning of Article 24 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') in respect of conduct by a third party — an official or other staff member — allegedly constituting psychological harassment within the meaning of Article 12a of the Staff Regulations, although initiated at the former's request, could not be regarded as being an inquiry procedure opened against the latter official or other staff member. It followed that, in the context of the procedure followed by the appointing authority of an institution or the AECE to give a ruling on a request for assistance based on infringement of Article 12a of the Staff Regulations, the party who had made that request could not call for observance of the rights of the defence referred to in Article 48 of the Charter of Fundamental Rights as such or, in that context, in the form of an infringement of the *audi alteram partem* rule. The same held true for the alleged harasser.

Nevertheless, in order for the right to good administration to be observed, the party who had made the request for assistance had necessarily, in accordance with Article 41(2)(a) of the Charter of Fundamental Rights, to be properly heard before the decision rejecting the request for assistance was adopted by the appointing authority or the AECE. In that context, where the administration decided, as in the present case, to call for the opinion of an advisory committee to which it entrusted the conduct of an administrative inquiry and, in the decision on the request for assistance, it took into account the opinion thus issued by that advisory

96| Case C-570/18 P, ***HF*** v ***Parliament***.

committee, that opinion must, in accordance with the right to be heard of the party who had made the request for assistance, in principle be brought to the latter's attention. However, in order to ensure effective application of the prohibition of any form of psychological or sexual harassment at the workplace, it was permissible for the administration to provide for the possibility of assuring witnesses who agreed to provide their accounts of the facts at issue in an alleged case of harassment that their testimony would remain confidential vis-à-vis both the alleged harasser and the alleged victim. Accordingly, the Court stated, the AECE had not infringed the right to be heard, as referred to in Article 41 of the Charter of Fundamental Rights, when, in the present case, it had refused to send the records of the witness hearings to the applicant at the pre-litigation stage.

Furthermore, as regards the definition of psychological harassment, the Court held that the definition which it had applied before the entry into force of the Staff Regulations adopted in 2004, according to which the conduct at issue should be objectively intentional in character, should be abandoned. In other words, there could be psychological harassment without proof that the harasser had intended, by his actions, to discredit the victim or deliberately impair his working conditions. It was sufficient that those actions, provided that they were committed voluntarily, had objectively had such consequences. Thus, the definition of psychological harassment in Article 12a of the Staff Regulations was an objective concept which, although based on a contextual classification of the actions and behaviour of third parties, which was not always straightforward, did not call for complex assessments to be carried out, such as those that might have to be conducted in respect of economic, scientific or technical concepts, that would warrant a margin of discretion being afforded to the administrative body in applying the concept in question.

In the case that gave rise to the judgment of 13 July 2018, ***Curto*** v ***Parliament*** (T-275/17, EU:T:2018:479), an application of the same nature had been made to the Court, based, in particular, on the excessive duration of the procedure. Since the request for assistance in question concerned a Member of the European Parliament, the question arose as to whether the prohibition of psychological harassment, laid down in Article 12a of the Staff Regulations, was applicable.

On this point, the Court observed that, although the Members of the institutions were admittedly not directly subject to the obligations laid down in the Staff Regulations or, in particular, to the prohibition of psychological harassment laid down in Article 12a of those regulations, the fact nonetheless remained that the provisions of the Parliament's Rules of Procedure also required the Members of that institution to have due regard to the prohibition on psychological harassment laid down in Article 12a of the Staff Regulations, since the ban on such behaviour, imposed in an instrument such as the Staff Regulations, was in fact based on the values and principles laid down in the fundamental texts and was covered by Article 31 of the Charter of Fundamental Rights, which provided that 'every worker has the right to working conditions which respect his or her health, safety and dignity'. As for the classification of the conduct at issue, the Court found that the nature, in particular the singular vulgarity, of the language used by the MEP concerned with the applicant, inter alia on the telephone, constituted belittlement, both of the applicant herself and of her work. In so far as the MEP had belittled the applicant's work at her workplace or even insulted her, including in front of persons from outside the institution, that behaviour appeared to be improper and could in no way be regarded as an attitude befitting a member of an EU institution. According to the Court, the improper nature of the behaviour at issue could not be tempered by the closeness of the relationship between the MEP and the applicant on account of the fact that the applicant was a friend of the MEP's daughter or by the allegedly tense atmosphere within the MEP's team of parliamentary assistants.

Last, as regards compensation for the non-material harm allegedly suffered by the applicant as a result of the behaviour at issue, the Court stated that, in accordance with Article 24 of the Staff Regulations, the applicant must, in fact, as she had indicated, seek in the first place compensation for such damage by bringing an action for compensation before a national court, as it was clear that, pursuant to that provision of the Staff Regulations, it was only when such damage could not be made good that the AECE could be required

jointly and severally to pay compensation for the damage caused to the applicant by the conduct of a 'third party' for the purposes of that provision. Nonetheless, in accordance with its duty to provide assistance, the AECE could already have been required to assist the applicant, inter alia financially, in seeking such compensation, in the present circumstances, with a view to obtaining, by means of 'assisted' legal action, a declaration that the conduct affecting her, by reason of her position or duties, and which had justified the request for assistance, had been unlawful and entitled her to the award of compensation by a national court.

In the judgment of 13 July 2018, ***SQ*** v ***EIB*** (T-377/17, EU:T:2018:478), the Court ruled on an action for partial annulment of the decision of the President of the European Investment Bank (EIB) of 20 March 2017 informing the applicant of the termination of the investigation procedure opened following her complaint of psychological harassment, and upheld in part her claim for compensation in respect of the material and non-material damage which she claimed to have sustained as a result of psychological harassment by her superior and the EIB's conduct.

The Court observed that the reference in the case-law on Article 12a of the Staff Regulations to a 'process that occurred over time and presumes the existence of repetitive or continual conduct' could also apply by analogy for the purpose of applying the concept of 'psychological harassment' applicable to members of staff of the EIB. According to the Court, while a finding of psychological harassment was the outcome of a finding of a set of acts and could not in principle be made on the basis of a finding of a single isolated act, to require that the categorisation of 'psychological harassment' depended on the repetition over time of identical or similar acts would be at odds with the concept of a process over time. As a result of that process, psychological harassment might by definition be the outcome of a set of different acts by one member of the staff of the EIB towards another which, considered in isolation, would not necessarily have constituted per se psychological harassment but which, viewed as a whole and in context, including because of their build-up over time, could be regarded as having constituted such harassment. It followed that it could not be inferred from the mere fact that conduct alleged to constitute 'psychological harassment' had been observed only once that such conduct did not constitute psychological harassment.

Examining, moreover, the measures to be adopted by the institution against the harasser, the Court observed that the administration had merely asked that a letter of apology be addressed to the applicant and that job coaching be provided. It had not been deemed necessary to issue a written reprimand or to refer the matter to the disciplinary Joint Committee. It had merely been stated that disciplinary proceedings would be initiated should there be a further incidence within three years. The Court noted that although the administration had a broad discretion, subject to review by the Courts of the European Union, regarding the choice of measures and means of implementing Article 24 of the Staff Regulations, in the light of the objective of the EIB's Code of Conduct and its Dignity at Work Policy and, in particular, the inherent seriousness of all acts of psychological harassment as asserted in those texts adopted by the EIB, a measure adopted by the EIB that would be applicable only in the event that the person concerned should reoffend was insufficient and therefore inappropriate having regard to the seriousness of the present case.

The Court held, moreover, that the EIB could not, outside the period of the administrative investigation, require a member of staff who had been the victim of psychological harassment to maintain the confidentiality of her case and the documents relating to the investigation period both inside and outside the EIB. If a member of the staff of the EIB who had been the victim of psychological harassment were required to remain silent as to the existence of such harassment, the effect would be, besides the fact that that person would no longer necessarily be able to cite illness relating to that psychological harassment to justify possible absences, that the interested party would not be able to rely on the findings made during the investigation, particularly in any action brought before a national court against the harasser.

2. Occupational disease

The case that gave rise to the judgment of 23 October 2018, ***McCoy*** v ***Committee of the Regions*** (T-567/16, EU:T:2018:708), allowed the Court to provide clarification concerning the review by the Courts of the European Union of a decision delivered by an invalidity committee or by an appointing authority on the basis of such a decision and also of the consequences to be ascribed to errors made by the institution during the pre-litigation phase when they did not affect the legality of the contested decision. The case concerned the decision whereby the Committee of the Regions had confirmed the findings of the invalidity committee rejecting the applicant's request that the occupational origin of his disease should be recognised. The applicant relied, in particular, on a breach of the obligation to state reasons, in that the contested decision and the decision rejecting the complaint and confirming the second invalidity committee's findings did not allow him to understand why the majority of that committee had departed from the previous medical reports, or in particular on what material it had relied in order to assert that the applicant's disease did not have an occupational origin.

On that point, the Court stated that, although an invalidity committee had to meet a higher standard of reasoning in order to depart from earlier medical reports, it could not be required to provide detailed specific reasons for each report. It did, however, have a duty to set out clearly and comprehensively the reasons why it differed from those opinions. In the present case, according to the Court, the second invalidity committee had not explained to the requisite legal standard the reasons that had led it to differ from the earlier medical reports that provided clear evidence of the occupational origin of the applicant's disease, nor had it sufficiently explained the reasons why the applicant's invalidity could not have had an occupational origin. In particular, the invalidity committee had not provided a sufficient explanation of its failure to examine the possible impact of the facts that emerged from the administrative file concerning the applicant's health, although the file clearly revealed a serious conflict at work and 'harassment' towards the applicant.

Having also been required to examine the applicant's arguments alleging a manifest error of assessment and infringement of the concept of occupational disease, the Court noted that the limited judicial review which the Courts of the European Union were required to carry out in the case of medical appraisals properly so called could not prevent it from ascertaining whether the invalidity committee had taken into consideration all the material that had appeared to it to be manifestly relevant in the light of the task entrusted to it. The Court observed that it was apparent from the file that, during the period when he had performed his duties at the Committee of the Regions, the applicant had been subjected in the context of those duties to psychological harassment and pressure and that he had experienced health problems during that period and shortly afterwards. However, the second invalidity committee seemed to have omitted to examine those facts, which were nonetheless extremely significant in the present case. Thus, in so far as the objective of the second invalidity committee's task had been to establish or to rule out a connection between the applicant's occupational situation and his invalidity, the Court held that the committee had been unable, without infringing the concept of occupational disease and thus vitiating its summary medical report with a manifest error of assessment, to suggest that it had relied solely on the applicant's psychological and extra-occupational history, and also on his health in 2014. That was particularly the case in so far as it had been established in the administrative file that the applicant had been the victim of harassment and pressure in the context of his duties. In fact, the Court recalled, in complex situations in which the official's disease had several causes, occupational and extra-occupational, physical or psychological, which had each contributed to its appearance, it was for the medical committee to determine whether the performance of his duties with the EU institutions had a direct link with the official's disease, as, for example, a factor that triggered that disease. In such cases, there was no requirement, in order for the disease to be recognised as an occupational disease, for it to have been caused solely, essentially, preponderantly or predominantly by the performance of the applicant's duties.

3. Waiving of immunity from legal proceedings

In the judgment of 24 October 2018, ***RQ*** v ***Commission*** (T-29/17, EU:T:2018:717, under appeal, [97]) the Court ruled on an application for annulment of the decision whereby the Commission had waived in part the immunity from legal proceedings of the applicant, the former Director-General of the European Anti-Fraud Office (OLAF), in accordance with the second paragraph of Article 17 of Protocol No 7 on the privileges and immunities of the European Union, [98] so that he could be examined by the Belgian authorities about the allegation of unlawful recording of a telephone conversation in the context of an investigation by OLAF into the involvement of a former Member of the Commission in attempted bribery. The applicant took issue with the Commission for not having heard him before adopting the contested decision, although it was an act adversely affecting him.

After holding, adopting the approach taken by the European Union Civil Service Tribunal in the judgment in *A and G* v *Commission*, [99] that a decision waiving an official's immunity from legal proceedings constituted an act adversely affecting the official concerned, the Court observed that, in Member States where such a measure was provided for, investigative confidentiality was a principle of public policy. The Commission could not therefore be criticised, having regard to the principle of sincere cooperation enshrined in the first subparagraph of Article 4(3) TEU, for having taken that principle into account. Accordingly, the fact that the person concerned had not been heard could, as a general rule, be objectively justified by investigative confidentiality. The Commission had nonetheless been required to implement measures intended to accommodate legitimate considerations of investigative confidentiality and the need to ensure sufficient compliance with the individual's fundamental rights, such as the right to be heard. Since the Commission was required to respect the right to be heard when it adopted an act adversely affecting a person, it had to pay the utmost attention to the way in which it could accommodate the respect of that right of the person concerned and the legitimate considerations of the national authorities. In this case, the Court considered that the Commission had not weighed up those factors correctly, since it had not asked the national authorities what risks the prior hearing of the applicant entailed in respect of the preservation of investigative confidentiality and, ultimately, the proper conduct of the criminal proceedings. The Court therefore concluded that the Commission had infringed the applicant's right to be heard and, accordingly, annulled the contested decision.

4. Recruitment

In the case that gave rise to the judgment of 21 November 2018, ***HM*** v ***Commission*** (T-587/16, EU:T:2018:818), an action had been brought before the Court for annulment, first, of the decision of the European Personnel Selection Office (EPSO) not to take into account the request for a review of the selection board's decision not to allow the applicant to participate in the next stage of an open competition and, second, of the selection board's 'implied decision' not to grant that request. Central to the discussion was the question whether EPSO

97| Case C-831/18 P, ***Commission*** v ***RQ***.

98| Protocol (No 7) on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266).

99| Judgment of 13 January 2010, ***A and G*** v ***Commission*** (F-124/05 and F-96/06, EU:F:2010:2).

had been competent to reject that request for a review, which had been submitted on the basis of the general rules governing open competitions, [100] when it was directed against a decision adopted by the selection board of the open competition in question.

The Court stated first of all that the selection board had not been aware of the existence of the applicant's request for review. Accordingly, it could not be considered that the selection board had adopted an 'implied decision' to reject that request. The applicant's head of claim referring to the selection board's implied decision not to grant his request for review was thus devoid of purpose and therefore had to be rejected as inadmissible. The Court observed, next, that the body that had taken the decision to reject the application had been the selection board and not EPSO. Pursuant to Section 3.4.3 of the general rules governing open competitions, it had therefore been for the selection board and not for EPSO to adjudicate on the applicant's request for review. Accordingly, the Court concluded that there had been no legal basis for EPSO to reject the applicant's request for review, as the fact that that request had been rejected for purely formal reasons was of no consequence in that respect. Last, the Court stated that that finding was unaffected by the Commission's other arguments, in particular the argument based on the general role played by EPSO in organising open competitions. In particular, there was nothing in the responsibilities assigned to EPSO to allow it to arrogate the power to adjudicate on a request for a review of a decision of the selection board. That was particularly so since the question whether a request for review had been submitted out of time was a procedural decision that might turn out to be complex, as it might depend on an assessment of technical matters such as those needed in order to determine the exact date on which the candidate concerned had been informed of the selection board's decision.

XIII. Actions for damages

The case that gave rise to the judgment of 28 February 2018, ***Vakakis kai Synergates*** v ***Commission*** (T-292/15, EU:T:2018:103), allowed the Court to provide clarification of the relationship between actions for annulment and actions for damages. In that case, an application had been made to the Court for compensation for the harm which the applicant claimed to have sustained owing to irregularities committed by the Commission in the context of a call for tenders and, in particular, for the harm consisting in the loss of an opportunity to be awarded the contract. Those alleged irregularities related to the fact that one of the experts of the company awarded the contract had participated in the preparation of the procedure. The Commission claimed that the action was inadmissible on the ground that the applicant had not challenged the tendering procedure by means of an action for annulment.

According to the Court, having regard to the specific nature of EU public procurement disputes, an action for damages seeking compensation for the harm alleged to have been sustained by an unsuccessful tenderer as a result of irregularities which an institution acting as contracting authority had committed in the context of the call for tenders did not have the same purpose or the same legal and economic effects as an action seeking annulment of the decision rejecting that tenderer's bid and it could not therefore have the effect of cancelling the effects of that decision. The action was therefore held to be admissible.

Having also been required, as regards the substance, to rule on the obligations of the contracting authority when there was an allegation of a conflict of interests during the tendering procedure, the Court emphasised in particular that, where there was a risk of a conflict of interests in the field of public procurement, it was

100| General rules governing open competitions (OJ 2014 C 60 A, p. 1).

for the contracting authority to prepare and take its decision on the outcome of the tendering procedure in question with all necessary diligence and on the basis of all the relevant data. Such an obligation followed, in particular, from the principles of sound administration and equal treatment, since the contracting authority was required to ensure compliance at each stage of a tendering procedure with the principle of equal treatment and, consequently, equal opportunities for all tenderers. Since a conflict of interests undermined equality between tenderers, the decision not to exclude a candidate in respect of which an allegation of conflict of interests had been made could be adopted only on condition that the contracting authority had been able to be certain that that candidate was not in such a position. In the present case, in the Court's view, the evaluation committee and the contracting authority had failed to examine carefully and prudently all the relevant material that would have allowed them to dispel the doubts that existed and to clarify the position of the company awarded the contract. It followed that the applicant had thus, in particular, demonstrated the existence of a sufficiently serious breach of the obligation to exercise due diligence and, accordingly, of the principle of sound administration and of Article 41 of the Charter of Fundamental Rights.

On that basis, the Court upheld in part the applicant's claim for damages in that it sought compensation for the loss of an opportunity to be awarded the contract in question and also compensation for the costs and expenses incurred in participating in the tendering procedure, together with compensatory interest. The fact that the contracting authority was never required to award a contract could not undermine any likelihood of winning the contract and therefore the loss of an opportunity. Having regard to the fact that, in the present case, the illegalities committed by the Commission in the conduct of the tendering procedure had fundamentally vitiated that procedure and affected the opportunity of the applicant, whose tender had been placed second, to be awarded a contract, the harm relied on under the head of loss of opportunity had to be considered to be actual and certain in the present case.

In the judgments of 13 July 2018, ***K. Chrysostomides & Co. and Others*** v ***Council and Others*** (T-680/13, under appeal, [101] EU:T:2018:486), and of ***Bourdouvali and Others*** v ***Council and Others*** (T-786/14, not published, under appeal, [102] EU:T:2018:487), the Court adjudicated on two claims for compensation for the harm which the applicants claimed to have sustained as a result of a number of acts and conduct of the Commission, the Council, the European Central Bank (ECB) and the Euro Group relating to a financial assistance facility for the Republic of Cyprus. The two cases had their origins in the financial difficulties which the Republic of Cyprus and two of the main Cypriot banks, Cyprus Popular Bank Public Co Ltd and Trapeza Kyprou Dimosia Etaireia LTD, encountered in 2012-2013 and in connection with which the European Stability Mechanism (ESM) had granted a financial assistance facility to that Member State under a Memorandum of Understanding dated 26 April 2013. [103]

Although the Council, relying on the judgment in *Mallis and Others* v *Commission and ECB*, [104] claimed that the Euro Group could not be equated with a configuration of the Council or be classified as a body, office or agency of the European Union and could not therefore incur the non-contractual liability of the latter, the Court did not share that view. Noting that in that judgment the Court of Justice had taken care to point out that the Euro Group could not be classified as a body, office or agency of the EU 'within the meaning of Article 263 TFEU', the Court considered that in the light of the different and complementary purposes of actions for annulment and actions for damages, it could not be considered that the content of the concept

101| Cases C-597/18 P, ***Council*** v ***K. Chrysostomides & Co. and Others,*** and C-603/18 P, ***K. Chrysostomides & Co. and Others*** v ***Council***.

102| Cases C-598/18 P, ***Council*** v ***Bourdouvali and Others***, and C-604/18 P, ***Bourdouvali and Others*** v ***Council***.

103| Memorandum of Understanding of 26 April 2013 on Specific Economic Policy Conditionality concluded between the Republic of Cyprus and the European Stability Mechanism (ESM).

104| Judgment of 20 September 2016, ***Mallis and Others*** v ***Commission and ECB*** (C-105/15 P to C-109/15 P, EU:C:2016:702).

of 'institution' for the purposes of the second paragraph of Article 340 TFEU was necessarily restricted to the institutions, bodies, offices or agencies of the Union referred to in the first paragraph of Article 263 TFEU. On the contrary, the identification of the EU entities that could be classified as an 'institution' for the purposes of the second paragraph of Article 340 TFEU had to be undertaken according to the criteria relevant to that provision. To that end, it was necessary to determine whether the EU entity responsible for the act or conduct complained of had been established by the Treaties and was intended to contribute to the achievement of the Union's objectives. Thus, since the Euro Group was a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union, the acts and conduct of that entity in the exercise of its powers under EU law were attributable to the European Union. The Court made clear, moreover, that it could not be inferred from the judgment in *Ledra Advertising and Others* v *Commission and ECB* [105] that the Commission's unlawful conduct connected with the adoption of a Memorandum of Understanding was the only unlawful conduct of an EU institution, in the context of the Treaty Establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, that was capable of incurring non-contractual liability on the part of the Union. It followed that the unlawful conduct connected with the monitoring of the application of the harmful measures by the ECB could be used against it in the context of an action for damages.

Having also been called upon to examine the proportionality of the measures restrictive of the right to property of the applicants in question, the Court emphasised that it was necessary to take into consideration the need for the Cypriot authorities to act rapidly when adopting the harmful measures. It was a question of preventing an imminent risk of collapse of the banks concerned in order to protect the stability of the Cypriot financial system and therefore of preventing contagion to other Member States of the euro area. The Court further observed that the measures to which the grant of financial assistance by the ESM in order to resolve the financial difficulties encountered by a State facing the need to recapitalise its banking system might be subject were likely to vary significantly from case to case depending on the experience acquired and on a set of specific circumstances. Those circumstances could include in particular the economic situation of the recipient State, the size of the assistance in relation to the whole of its economy, the prospects of the banks concerned becoming economically viable again and the reasons which had led to the difficulties encountered by them, including, where relevant, the excessive size of the banking sector of the recipient State in relation to its national economy, the development of the international economic environment or an increased likelihood of future ESM interventions in support of other States in difficulty which could require a preventive limitation of amounts dedicated to each intervention.

In the cases that gave rise to the judgments of 13 December 2018, ***Iran Insurance*** v ***Council*** (T-558/15, EU:T:2018:945), and of 13 December 2018, ***Post Bank Iran*** v ***Council*** (T-559/15, EU:T:2018:948), the Court had the opportunity to adjudicate on applications under Article 268 TFEU for compensation for the damage which the applicants claimed to have suffered as a result of the acts whereby their names had been entered or maintained on the lists of persons and entities subject to restrictive measures introduced in order to apply

105| Judgment of 20 September 2016, ***Ledra Advertising and Others*** v ***Commission and ECB*** (C-8/15 P to C-10/15 P, EU:C:2016:701).

pressure on the Islamic Republic of Iran to end proliferation-sensitive nuclear activities. [106] The applicants claimed that the adoption of the disputed acts constituted a sufficiently serious breach, on the part of the Council, of a rule of law intended to confer rights on individuals and in that respect claimed compensation for the material and non-material damage which they claimed to have suffered as a result of their names being entered on the lists at issue.

The Court observed that, at the time of the adoption of the disputed acts by the Council, it had already been clearly and specifically apparent from the case-law that, in the event of challenge, the Council was required to provide the information and the evidence establishing that the conditions for applying the criterion of 'support' for nuclear proliferation were satisfied. Moreover, in so far as the Council's obligation to verify and establish that the restrictive measures taken against a person or entity were well founded before those measures were adopted arose from the requirement to observe the fundamental rights of the person or entity concerned, and in particular their right to effective judicial protection, the Council did not enjoy any discretion in that regard. Thus, in the present case, the Council had had no margin of discretion in implementing that obligation. Therefore, in not complying with its obligation to substantiate the disputed acts, the Council had committed, in the present case, a sufficiently serious breach of a rule of law that conferred rights on an individual.

As regards the non-material damage which the applicants claimed to have suffered, the Court recalled that according to the case-law based on Article 268 TFEU, read in conjunction with the second paragraph of Article 340 TFEU, non-material damage could, in principle, be compensated with regard to legal persons, and such damage could take the form of injury to the image or to the reputation of that person. The Court emphasised, moreover, that the case-law of the European Court of Human Rights did not exclude the possibility that even a commercial company might be awarded pecuniary compensation for non-pecuniary damage, with such compensation depending on the circumstances of each case. That damage might include, for such a company, elements that were to a greater or lesser extent 'objective' or 'subjective', among which account should be taken of the company's reputation, for which there was no precise method of calculating the consequences. In the present case, the only admissible evidence submitted by the applicants did not, however, support a finding that the recognition of the unlawfulness of the conduct alleged against the Council and the annulment of the disputed acts would have been insufficient, as such, to compensate for the non-material damage allegedly suffered as a result of the injury to the applicants' reputation caused by the disputed acts.

106| Council Decision 2010/644/CFSP of 25 October 2010 amending Decision 2010/413/CFSP concerning restrictive measures against Iran and repealing Common Position 2007/140/CFSP (OJ 2010 L 281, p. 81); Council Regulation (EU) No 961/2010 of 25 October 2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 (OJ 2010 L 281, p. 1); Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran (OJ 2011 L 319, p. 71); Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran (OJ 2011 L 319, p. 11); and Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010 (OJ 2012 L 88, p. 1).

XIV. Applications for interim measures

In 2018 the Court received 41 applications for interim relief, which essentially corresponds to the figures for the previous year. [107] In 2018, 42 orders were made, [108] closing 44 interlocutory cases. [109] In four cases the Court made a suspensory order under Article 157(2) of the Rules of Procedure.

The orders made cover a wide range of matters, including cases relating to public health (five cases), State aid (four cases), public procurement (seven cases), confidentiality issues (four cases) and the civil service (eight cases).

The President of the General Court allowed two applications for interim measures, by orders of 18 January 2018, ***Strabag Belgium*** v ***Parliament*** (T-784/17 R, not published, EU:T:2018:17), [110] and of 15 May 2018, ***Elche Club de Fútbol*** v ***Commission*** (T-901/16 R, not published, EU:T:2018:268).

The first case in which the President of the General Court allowed an application for interim measures was a case relating to public procurement. The President of the General Court ordered, by order of 18 January 2018, ***Strabag Belgium*** v ***Parliament*** (T-784/17 R, not published, EU:T:2018:17), suspension of operation of the decision of the Parliament rejecting the applicant's offer and awarding to five tenderers the contract relating to a framework contract for general building works for the Parliament's buildings in Brussels.

When examining the condition relating to urgency, the President of the General Court applied the case-law, now well established in public procurement matters, [111] that that condition is mitigated if the party seeking the interim measures succeeds in demonstrating the existence of a particularly serious prima facie case and if it has made application to the Court within the standstill period of 10 calendar days.

In this case, as the application for interim measures had been submitted within the standstill period, the President of the General Court went on to examine the prima facie case. In that regard, the President of the General Court considered that, at first sight, the Parliament had infringed Article 151 of Delegated Regulation (EU) No 1268/2012 [112] by not finding that the offer placed first had appeared to be abnormally low and not carrying out the verification provided for in that article. As the prima facie case was established on the basis of a legal assessment of facts on which the parties were agreed and which related to a clearly defined question, the President of the General Court concluded that there was a particularly serious prima facie case.

107| The General Court had received 47 applications for interim measures in 2017.

108| This figure corresponds to all the orders made by the judge hearing applications for interim measures; it excludes orders declaring that there is no longer any need to adjudicate or that the case must be removed from the register, but includes orders made pursuant to Article 157(2) of the Rules of Procedure.

109| It should be noted that, from a strictly statistical viewpoint, orders made on applications for interim measures are not included in the total number of cases disposed of in 2018, which appears in Part D, 'Statistics concerning the judicial activity of the General Court', of this Report, namely 1 009 cases disposed of.

110| The appeal was dismissed by order of 19 September 2018, ***Parliament*** v ***Strabag Belgium*** (C-229/18 P(R), not published, EU:C:2018:740).

111| The case-law resulting from the order of 23 April 2015, ***Commission*** v ***Vanbreda Risk & Benefits*** (C-35/15 P(R), EU:C:2015:275).

112| Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation No 966/2012 (OJ 2012 L 362, p. 1).

In addition, it should be observed that, in contentious matters relating to public procurement, most of the applications for interim measures were submitted within the standstill period and accompanied by an application based on Article 157(2) of the Rules of Procedure. In three of those cases, giving rise to the orders of 23 January 2018, ***Seco Belgium and Vinçotte*** v ***Parliament*** (T-812/17 R, not published, EU:T:2018:25), of 3 October 2018, ***Euronet Consulting*** v ***Commission*** (T-350/18 R, not published, EU:T:2018:653), and of 21 December 2018, ***Phrenos and Others*** v ***Commission*** (T-715/18 R, not published, EU:T:2018:1015), the contracting authority had, during the course of the interim measures proceedings and following the intervention of the President of the General Court, withdrawn or amended to the applicant's satisfaction the decision awarding the public contract and the proceedings had therefore become devoid of purpose.

The second case in which the President of the General Court granted an application for interim measures concerned a Commission decision ordering recovery of alleged State aid from its recipient, the Spanish football club Elche, and gave rise to the order of 15 May 2018, ***Elche Club de Fútbol*** v ***Commission*** (T-901/16 R, not published, EU:T:2018:268). That case was among a series of cases relating to alleged State aid granted to Spanish football clubs.

As regards the condition that there must be a prima facie case, the President of the General Court considered that the statement of reasons of the contested decision was not at first sight sufficient, in that it did not enable him to assess the existence of and, if appropriate, the amount of the aid. As regards the examination of urgency, the President of the General Court found that the recovery of the amount of the aid might well entail the liquidation of the football club, which was already subject to insolvency proceedings. In that regard, the President of the General Court rejected, in particular, the Commission's argument that the club could obtain the necessary liquidity by 'transferring' members of its football team. According to the President of the General Court, the team of players constituted the applicant's essential 'means of production'. In those circumstances, and having regard to the fact that the applicant could not transfer a significant part of its team without jeopardising its sporting capacity and thus its economic survival, it could not be maintained that the applicant could deal with immediate payment of the sum claimed by way of recovery of the State aid by the 'sale' of a significant part of its team without jeopardising its financial viability. In addition, the President of the General Court rejected the Commission's argument that the applicant had not yet exhausted national remedies, in that that argument amounted in the present case to requiring, in a categorical and mechanical manner, the applicant to exhaust domestic remedies, thus disproportionately limiting access to the Courts of the European Union.

As regards the balance of interests, the President of the General Court pointed out that, while it was correct that the suspension of operation of a decision ordering recovery of aid that was incompatible with the internal market might prolong the negative effects for competition produced by that aid, it was nonetheless true, conversely, that the immediate enforcement of such a decision would normally entail irreversible effects for the recipient undertaking, while it could not be precluded a priori that the maintenance of the aid would ultimately be held to be lawful owing to possible defects affecting the decision. It was thus a question of ensuring, first, that the provisional judicial protection was not excessively reduced and, second, that the broad discretion which the judge hearing an application for interim relief must have when exercising the powers conferred on him was not limited. In this case, the President of the General Court emphasised that, on the one hand, the applicant was at risk of being placed in liquidation owing to a decision that was at first sight unlawful and, on the other hand, the national authorities had taken measures to ensure the proper enforcement of the contested decision. In those circumstances, the President of the General Court concluded that he could count, in the spirit of sincere cooperation, on the intention and the ability of the national authorities to ensure, as they had thus far done, the protection of the European Union's interest by allowing effective recovery of the State aid, so that suspension of operation of the decision would not produce any obstacles to any future effective recovery of the aid.

By the orders of 22 March 2018, ***Hércules Club de Fútbol*** v ***Commission*** (T-766/16 R, not published, EU:T:2018:170), [113] and of 22 March 2018, ***Valencia Club de Fútbol*** v ***Commission*** (T-732/16 R, not published, EU:T:2018:171), [114] on the other hand, the President of the General Court dismissed the applications for interim measures, in that it was apparent that neither of the football clubs concerned had demonstrated its inability to deal with the recovery of the aid without jeopardising its financial viability.

Furthermore, in addition to the orders mentioned above, reference should be made to some other developments in the case-law concerning the protection of confidentiality, restrictive measures, institutional law and public health.

As regards the protection of confidentiality, it should be noted that the judge hearing applications for interim measures examined in detail the arguments relating to the existence of a prima facie case before dismissing the applications for suspension of operation in the cases that gave rise to the orders of 25 October 2018, ***JPMorgan Chase and Others*** v ***Commission*** (T-420/18 R, not published, under appeal, [115] EU:T:2018:724), and of 25 October 2018, ***Crédit agricole and Crédit agricole Corporate and Investment Bank*** v ***Commission*** (T-419/18 R, not published, under appeal, [116] EU:T:2018:726), relating to the publication of a Commission decision finding an infringement of Article 101 TFEU, of 12 July 2018, ***RATP*** v ***Commission*** (T-250/18 R, not published, EU:T:2018:458), relating to access to documents concerning an EU-Pilot procedure, and of 12 October 2018, ***Taminco*** v ***EFSA*** (T-621/17 R, EU:T:2018:763), relating to the assessment of a plant protection product.

In particular, in the orders of 25 October 2018, ***JPMorgan Chase and Others*** v ***Commission*** (T-420/18 R, not published, under appeal, EU:T:2018:724), and of 25 October 2018, ***Crédit agricole and Crédit agricole Corporate and Investment Bank*** v ***Commission*** (T-419/18 R, not published, under appeal, EU:T:2018:726), the President of the General Court recalled that, as regards the provisional protection of confidential information, it was not sufficient to declare that the information was confidential. It was necessary to establish that, prima facie, the information was effectively confidential.

The President of the General Court then stated that the interest of an undertaking on which the Commission had imposed a fine for infringement of competition law in the details of the unlawful conduct in which it was alleged to have engaged not being disclosed to the public did not merit any particular protection, in view of the public interest in knowing as fully as possible the reasons for any action taken by the Commission.

The President of the General Court emphasised that the applicants' argument that the principle of the presumption of innocence precluded any publication of the decision finding the infringement or required that the entire description of the unlawful conduct be deleted could not, prima facie, be upheld. He recalled that the acts of the EU institutions enjoyed a presumption of legality and had legal effects so long as they had not been withdrawn, annulled or declared void. Accordingly, the publication of the decision finding the infringement of Article 101 TFEU could not, as a matter of principle, be subject to the condition that the Court had first adjudicated on the action relating to that decision.

113| Order set aside by order of 22 November 2018, ***Hércules Club de Fútbol*** v ***Commission*** (C-334/18 P(R), EU:C:2018:952).

114| The appeal was dismissed by order of 22 November 2018, ***Valencia Club de Fútbol*** v ***Commission*** (C-315/18 P(R), EU:C:2018:951).

115| Case C-1/19 P(R), ***JPMorgan Chase and Others*** v ***Commission***.

116| Case C-4/19 P(R), ***Crédit agricole and Crédit agricole Corporate and Investment Bank*** v ***Commission***.

As regards restrictive measures, in the case that gave rise to the order of 28 November 2018, ***Klyuyev*** v ***Council*** (T-305/18 R, not published, EU:T:2018:849), the President of the General Court dismissed the application for suspension of operation of the acts of the Council renewing the restrictive measures against the applicant.

Thus, while finding that there was a prima facie case, the President of the General Court dismissed the application on the ground that there was no urgency. In that regard, the President of the General Court examined, in particular, the applicant's argument alleging a breach of his right to an effective remedy as a result of the continuous extensions of the inclusion of his name on the list in spite of the existence of judgments whereby the General Court had concluded that certain acts imposing restrictive measures against him were unlawful.

In that context, the President of the General Court stated that the condition relating to urgency might be relaxed where there was a risk that systemic reasons would impede effective judicial protection. The President of the General Court thus made clear that the specific features of restrictive measures cases must not undermine the right to effective judicial protection. In this case, however, there were no systemic reasons that rendered the judgments of the General Court annulling restrictive measures ineffective.

As regards institutional law, the case that gave rise to the order of 4 May 2018, ***Czarnecki*** v ***Parliament*** (T-230/18 R, not published, EU:T:2018:262), is deserving of mention. The President of the General Court dismissed as inadmissible the application for interim measures in connection with the decision of the Parliament to relieve the applicant of his office as Vice-President of the Parliament, on the ground of what was alleged to be serious misconduct.

As regards the application for suspension of operation of the Parliament's decision to terminate early the applicant's role as Vice-President of the Parliament, the President of the General Court stated that that decision had exhausted its own effects by its adoption and could not therefore be suspended. As regards the second head of claim, that the applicant should be 'maintained' in his office as Vice-President of the Parliament, the President of the General Court pointed out that the applicant had been removed from his office as Vice-President at the time when the contested decision was adopted. In addition, the post of Vice-President which had been vacated when the applicant's post as Vice-President was terminated had been filled on 1 March 2018. In those circumstances, the applicant could not be 'maintained' in the post of Vice-President of the Parliament by an interim measure sought almost two months after the end of his term of office and almost one month after the post of Vice-President previously occupied by him had been filled.

Last, in the matter of public health, mention should be made, in particular, of a number of cases relating to regulated markets entailing public health issues (the plant protection products, medicinal products for human use and biocidal products sectors) that gave rise to the orders of 22 June 2018, ***Arysta LifeScience Netherlands*** v ***Commission*** (T-476/17 R, EU:T:2018:407), of 22 June 2018, ***FMC*** v ***Commission*** (T-719/17 R, EU:T:2018:408), of 11 July 2018, ***GE Healthcare*** v ***Commission*** (T-783/17 R, EU:T:2018:503), of 24 August 2018, ***Laboratoire Pareva and Biotech3D*** v ***Commission*** (T-337/18 R and T-347/18 R, not published, EU:T:2018:587), of 25 October 2018, ***Laboratoire Pareva*** v ***Commission*** (T-337/18 R II, not published, EU:T:2018:729), of 25 October 2018, ***Laboratoire Pareva*** v ***Commission*** (T-347/18 R II, not published, EU:T:2018:730), and of 23 November 2018, ***GMPO*** v ***Commission*** (T-733/17 R, not published, EU:T:2018:839).

In particular, the cases that gave rise, first, to the order of 22 June 2018, ***FMC*** v ***Commission*** (T-719/17 R, EU:T:2018:408), concerning an application for suspension of operation of a Commission regulation withdrawing marketing authorisation from a substance used in herbicides and, second, to the order of 23 November 2018, ***GMPO*** v ***Commission*** (T-733/17 R, not published, EU:T:2018:839), concerning an application for suspension of operation of a Commission regulation authorising the placing on the market of a medicinal product even though it had not been designated as an orphan medicinal product, the President of the General Court emphasised that, although it had been accepted that it could not be precluded that financial harm which

was objectively significant and which allegedly resulted from the obligation to make a final commercial choice of some magnitude within a disadvantageous timescale could be considered 'serious', or even that the seriousness of such harm could be considered obvious, even in the absence of information concerning the size of the undertaking concerned, that case-law must be assessed having regard to the field in which the applicant operated. Thus, in the context of a highly regulated market in which the authorities might intervene rapidly when public health risks became apparent, for reasons which could not always be foreseen, it was for the undertakings concerned, if they were not themselves to bear the loss resulting from such intervention, to protect themselves against its consequences by adopting an appropriate policy.

In addition, in the case that gave rise to the order of 22 June 2018, ***FMC*** v ***Commission*** (T-719/17 R, EU:T:2018:408), and also in those relating to applications for suspension of operation of Commission decisions either imposing restrictions on the use of an active substance in plant protection products (order of 22 June 2018, ***Arysta LifeScience Netherlands*** v ***Commission***, T-476/17 R, EU:T:2018:407), or refusing to approve substances intended for use in certain biocidal products (order of 24 August 2018, ***Laboratoire Pareva and Biotech3D*** v ***Commission***, T-337/18 R and T-347/18 R, not published, EU:T:2018:587), the President of the General Court weighed up the relevant interests before dismissing those applications. In that context, the President of the General Court observed that scientific developments were not unusual and provided an opportunity for substances to be evaluated afresh in the light of newly acquired knowledge and new scientific discoveries, in particular in the light of the risk for public health. That was the basis of renewal procedures and the rationale for applying time limits to marketing authorisations. The President of the General Court considered that it was therefore not sufficient to assert that the product in question had been able to be used without restriction in the past in order to disregard the risks for public health identified in the dossier. The President of the General Court stated that he was required to take those risks into account and that it was not for him to conduct a new technical assessment of scientific data that would exceed the framework of his powers.

C | ACTIVITY OF THE REGISTRY OF THE GENERAL COURT IN 2018

By Mr **Emmanuel COULON**, Registrar of the General Court

It is in a context of sustained activity [1] that the Registry has fully mobilised its resources to support the General Court and contribute, within the framework of the legal and administrative assistance tasks entrusted to it, to the very good results of the Court. It has adapted to the specific requirements of the functioning of an enlarged court [2] and has endeavoured to anticipate some of the expected effects of the next and final increase in the number of judges scheduled for September 2019 in the context of the reform of the judicial architecture of the Court of Justice of the European Union. [3] It has organised itself in such a way as to comply with new standards. In any event, the value added to the services offered by that department, which can be only partially reflected in the figures, has remained a constant concern.

With 72 budgetary posts (55 assistants and 17 administrators), the Registry has been affected by staff movements and by the vacancy which arose during the year in the post of Deputy Registrar of the General Court.

Once again, the Registry provided legal assistance to the Court:

- by ensuring the proper conduct of proceedings and the proper keeping of files;
- by ensuring communication between the representatives of the parties and the judges;
- by actively assisting the judges and their staff;

The Registry also contributed to the administration of the Court under the authority of the President of the General Court and with the assistance of the institution's departments.

The tasks entrusted to the Registry, the consistency of which, at least in their wording, contrasts with the need to act in an appropriate and varied manner to achieve them, have been carried out by diligent and hard-working officials and agents who are aware of the issues at stake and wish to contribute to the public service of justice in the European Union.

1| That context, described in detail by the President of the General Court in his introductory statement to the activity of the General Court in 2018, was marked by the number of cases closed, which was without precedent in the history of the institution (1 009), and by a certain decline in the number of cases brought (834 compared to 917 in 2017), leading to a 12% reduction in the number of cases pending as at 31 December 2018 (1 333 compared to 1 508 in 2017).

2| On 1 January 2018, the General Court comprised 46 judges. With the departure of a judge to take up his duties at the Court of Justice and without his successor being appointed, the General Court has been composed of 45 judges since 8 October 2018.

3| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14), and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

I. Contribution to the judicial activity

In 2018, the Registry registered 55 395 procedural documents in 23 languages of the case [4] (of the 24 languages of the case provided for in the Rules of Procedure), handled 4 562 pleadings (other than applications) produced in pending cases, implemented the decisions taken by the chambers of the General Court, in the form of measures of organisation of procedure or measures of inquiry, and issued 1 371 notices to the *Official Journal of the European Union*.

It is, of course, not possible to state here all the information allowing the measure of the work done by the Registry; identifying some of them, in particular the statistics, does, however, enable the size of its workload to be seen:

- the 9 746 pleadings filed included 318 requests for leave to intervene and 197 requests for confidential treatment as regards the parties or the public;
- the conduct of the proceedings involving groups or series of cases has required coordination both within the Registry, having regard to the multiple languages of the cases, and with the chambers of the Court, for the processing of applications for time extensions, joinder, leave to intervene and, where appropriate, confidential treatment in each of those cases;
- 12 436 transmission forms (more than 1 000 each month) prepared by the Registry were sent (in digital form) to the judges' chambers for the requirements of the examination of cases;
- hundreds of measures of organisation of procedure and dozens of measures of inquiry have been decided upon or ordered as regards, in particular, the production of documents which the parties had claimed to be confidential.

In addition, the Registry's service was ensured by 11 administrators responsible for the management of procedural files at 381 chamber conferences and oral hearings in 387 cases, with, at the end of each chamber conference and oral hearing, in addition to preparing the files, the preparation of minutes for the judges' approval.

Two pieces of data illustrate the average volume of the files maintained by the Registry. First, the 85% of procedural documents filed with the Registry via the e-Curia application totalled 823 076 pages. Second, the volume of the files held by the Registry in the 1 333 cases under investigation at the end of 2018 represented 530 linear metres.

In addition, the procedural rules which came into force on 1 July 2015 continue to have beneficial effects. While some effects of the new Rules of Procedure were immediately beneficial, in particular in the field of intellectual property (change of language regime and withdrawal of the second exchange of pleadings), others, given the nature of the changes made, became apparent only as the rules in question were implemented. Thus, the possibility of settling cases by judgment without a hearing, in particular because the parties do not request one, has been used effectively by the General Court (up to 29%, all disputes combined, and 42% in the field of intellectual property alone). In addition to the fact that this absence of a hearing made the production of a summary hearing report unnecessary, it also made it possible to settle cases more quickly (16.6 months on average without a hearing compared with 25.7 months on average with a hearing).

4| Including an appeal in Maltese.

Furthermore, the percentage of the total number of direct actions which resulted in cases being settled by judgment without a second exchange of pleadings is tending to increase (13% compared with 10% in 2017), [5] it being specified that Civil Service litigation is the one in which that second exchange is most frequently waived (32% compared with 20% in 2017).

Finally, although it is still too high, the reduction in the rate of regularisation of applications because of failure to comply with the formal requirements for direct actions other than those introduced in the field of intellectual property (28%) is to be welcomed. However, the regularisation of one out of two applications in that area remains a problem.

Despite this generally positive assessment of the judicial activity in 2018, avenues can and must still be explored within the Registry in order to contribute to the rapid and effective investigation of files as well as to optimise the time spent in each phase of the litigation procedure and the processing of procedural documents. The increase in the number of judges composing the General Court, scheduled for September 2019, and the likely increase in litigation resulting from it, on the basis of which the reform of the institution's judicial architecture was designed, will, in that regard, constitute an unprecedented challenge for the Registry.

II. Support for consistency

The organisation and functioning of the Court largely determine how tasks are distributed within the Registry and how its resources are allocated to assist the Court in the best way possible.

At present, the General Court is organised into nine chambers composed of five judges. Those chambers comprise two sub-formations of three judges chaired by the President of the Chamber of five judges. When the Registry assists each of the chambers, it is responsible for ensuring that all procedural documents are processed in exactly the same way (in particular as regards the time taken for such processing). It is also responsible for contributing to the consistency of decisions taken by the chambers or the presidents of chambers on procedural matters, in particular by providing its expertise in various forms and by making targeted documentation (online information on procedural issues and procedural orders, establishment of a monthly report on procedural case law) available to the Court.

Those tasks are perfectly in line with the objectives pursued by the General Court, which have already been realised, in particular, by the more frequent referral of cases to the chambers of five judges and the referral of a case to the Grand Chamber, and complement, in a restricted area, the more general task entrusted to the Vice-President of the General Court, namely to develop a centre of activity for transversal legal analysis designed to enhance the consistency and quality of the case-law.

In that regard, the General Court wished the powers of its Vice-President to be extended and proposed that he should be able, on the one hand, to exercise the functions of Advocate General and, on the other, to refer proposals to the Plenary Conference for the referral of cases to chambers composed of more than three judges. Amendments to Articles 3(3) and 28(2) of the Rules of Procedure have been proposed to that effect.

5| Disputes relating to intellectual property rights are excluded from that calculation, since the Rules of Procedure do not provide for a second exchange of pleadings for that category of cases.

After obtaining the assent of the Court of Justice and the approval of the Council of the European Union in accordance with the procedure laid down in the fifth paragraph of Article 254 TFEU, those amendments were adopted by the Court. [6]

III. A major reform: e-Curia mandatory in proceedings before the General Court

The digital application e-Curia, common to the two courts making up the Court of Justice of the European Union, has enabled, since November 2011, the lodging and service of procedural documents solely by electronic means.

In 2016, an ambitious reform was launched to make the use of e-Curia mandatory before the General Court. The increase in the number of holders of access accounts to that application, the already very high percentage of lodgments of procedural documents made before the Court by e-Curia, the satisfaction expressed by users with this free and ecological system, the widespread digitisation of all stages of the judicial process finalised or in the process of being finalised in most Member States and the gains associated with the use of an exclusive method of lodging and service of procedural documents are among the factors that justified the General Court's proposal to move towards fully paperless exchanges between the Registry and the parties' representatives.

The announcement of that reform was very well received by the Member States and by the lawyers represented by the European Bar Council (CCBE).

The reform was completed on 1 December 2018, when e-Curia became the sole means of exchanging judicial documents between the representatives of the parties and the General Court. This development concerns all parties (applicants, defendants and interveners) and all types of proceedings. However, certain exceptions are provided for in accordance with the principle of access to the courts (in particular where the use of e-Curia is technically impossible or where legal aid is requested by an applicant not represented by a lawyer).

The implementation of the mandatory e-Curia reform was divided into three parts.

First, the legal aspect required the approval of the amendments to the Rules of Procedure by the Council of the European Union, [7] followed by the adoption by the General Court of a new decision on the lodging and service of procedural documents by means of the e-Curia application, [8] new conditions of use of the e-Curia application, amendments to the Practice Rules for the Implementation of the Rules of Procedure [9] and a new legal aid form. [10]

6| Amendments to the Rules of Procedure of the General Court (OJ 2018 L 240, p. 67).

7| Amendments to the Rules of Procedure of the General Court (OJ 2018 L 240, p. 68).

8| Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia (OJ 2018 L 240, p. 72).

9| Amendments to the Practice Rules for the Implementation of the Rules of Procedure of the General Court (OJ 2018 L 294, p. 23; corrigendum OJ 2018 L 296, p. 40).

10| Legal aid form (OJ 2018 L 306, p. 61).

Second, the technical and organisational aspect consisted of a series of operations to configure computer systems to meet the new needs.

Third, the communication aspect, which the General Court wished to be robust and sustained, involved many operations aimed at various target audiences (the general public, representatives of the parties, including lawyers and agents active in proceedings pending before the General Court, and the institution's staff).

From the outset, that reform, which makes it possible to rationalise document processing, was implemented by the Registry of the General Court in order to anticipate the expected effects of the increase in the number of judges planned for September 2019 under the third stage of the reform of the institution's judicial architecture. Mandatory e-Curia has put an end to the management of numerous different formats, the digitisation of documents lodged in paper format and, in the case of lodgment in paper format preceded by lodgment by fax, double entries in the database and the need to ensure that the document lodged in paper format is identical to that lodged by fax. The simplification of the rules on the submission of procedural documents (in particular the waiver of the obligation to lodge certified copies of the original) should also help further to reduce the number of regularisations.

The successful implementation of that bold project would not have been possible without the full involvement of the Registry staff, nor would it have been possible without the support of the Court, in particular its Rules of Procedure Committee, the Registry of the Court of Justice, the Directorate-General for Multilingualism, the Information Technology Directorate, the Communication Directorate and the Vocational Training Unit.

IV. Other forms of assistance to the Court

The Registry assisted the President of the General Court, the Vice-President of the General Court and all the panels of judges, as well as the staff of the chambers of judges composing them, in their daily work. As a result, they were able to count on the constant availability of the officials and other staff of the Registry and to benefit from their expertise in the field of procedural techniques. In this respect, the increase in the number of judges, as well as in their staff, resulting from the implementation of the reform of the institution's judicial architecture has once again had the effect of significantly increasing the number of internal requests to the Registry.

At the same time, demonstrating its flexibility, the Registry has continued to look for synergies and efficiency by continuing to adapt to the inherent constraints of a larger Court and to improve its working methods. In an inter-institutional context, the cooperation developed between the Registry of the Boards of Appeal of the European Union Intellectual Property Office (EUIPO) and the Registry of the General Court has made it possible, on the one hand, to deploy the technical means necessary to ensure the full transmission to the Court of the administrative file of the Boards of Appeal in exclusively digital format and, on the other, to automate the transmission of certain information to the Boards of Appeal as soon as it is made available on the Curia site. [11]

Finally, the Registry, through the Registrar of the General Court and its representatives, continues to provide assistance to various organs of the court (in particular the Plenary Conference, the Conference of Presidents of Chambers and the Rules of Procedure Committee), as well as to other committees and working groups as required or appropriate to the nature of the topics considered.

11| EUIPO was a defendant in 42.5% of the cases filed in 2018 (excluding special proceedings).

V. Administrative work

Affected by various factors, the proportion of the Registry's resources devoted to administrative work has increased.

First, the costs associated with the administration of a growing jurisdiction, including the preparation of committee and working group meetings (agenda, file review, drafting minutes) and the diversification of topics to be covered, have increased.

Second, the costs related to the administration of the service, the management of its officials and other staff, the monitoring of IT projects, the coordination, the communication and the circulation of information remained significant.

Finally, as an administrative service, the Registry has responded to the various other requests made to it. Measures have thus been taken to:

- comply with regulatory requirements intended to preserve the environment ('EMAS' — Eco-Management and Audit Scheme), by continuing its awareness-raising activities in a coordinated manner with various other administrative actors of the institution and the judges' chambers;
- give full effect to the system for the protection of highly sensitive information in cases identified by the President of the General Court;
- implement the rules arising from the new financial regulations; [12]
- ensure compliance with the Regulation on the processing of personal data by the Union's institutions, bodies, offices and agencies. [13] In order to take into account the actual situation resulting from the evolution of roles and responsibilities, the Registry has appointed a personal data protection correspondent (in addition to an IT correspondent and an 'EMAS' correspondent), a member of the institution's network of data protection correspondents.

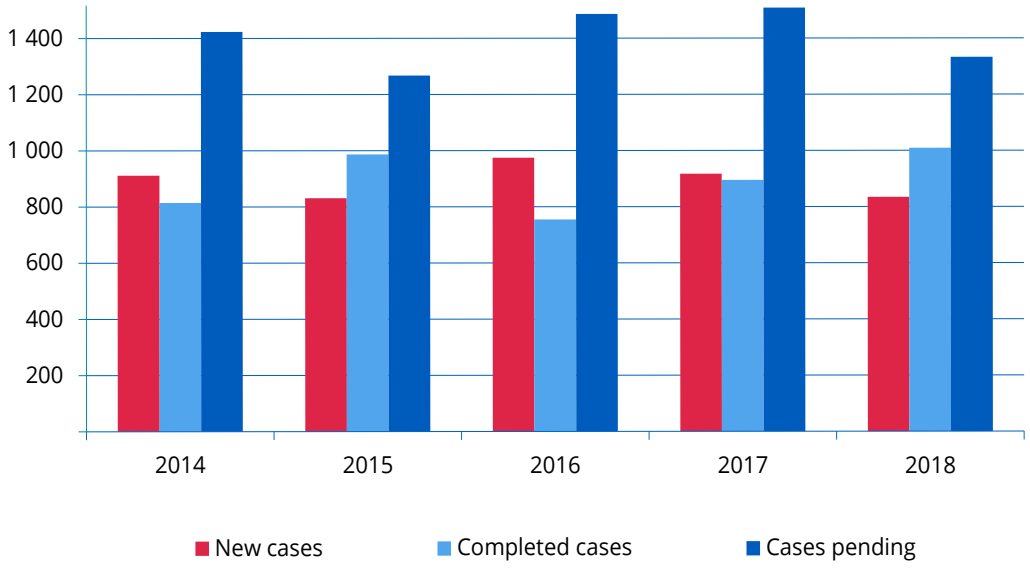
The general trend towards increased external costs, as a result of rendering documentation and procedures within the services compliant, should be highlighted, since it has to be borne from fixed resources. This is a new situation with which the Registry must deal when carrying out its tasks in the service of an extended court.

12| Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

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

D STATISTICS CONCERNING THE JUDICIAL ACTIVITY OF THE GENERAL COURT

I. General activity of the General Court — New cases, completed cases, cases pending (2014-2018) [1]



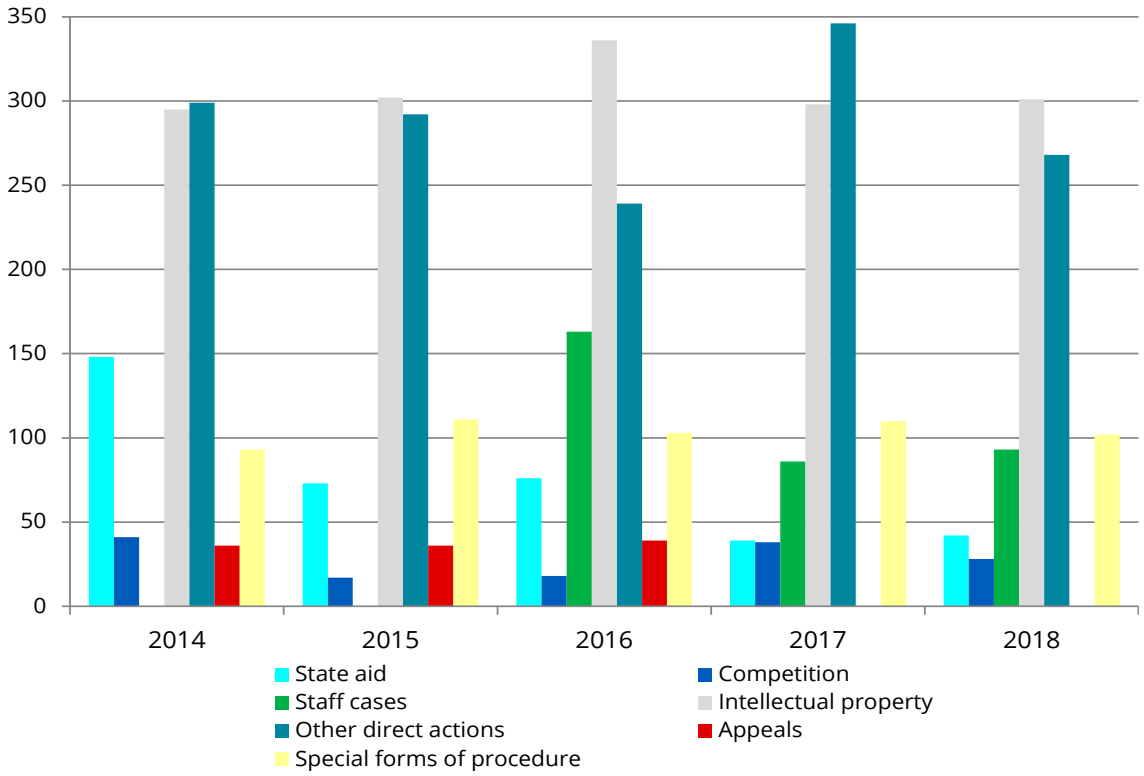
	2014	2015	2016	2017	2018
New cases	912	831	974	917	834
Completed cases	814	987	755	895	1 009
Cases pending	1 423	1 267	1 486	1 508	1 333

1| Unless otherwise indicated, this table and the following tables take account of special forms of procedure.

The following are considered to be 'special forms of procedure': application to set aside a judgment by default (Article 41 of the Statute of the Court of Justice; Article 166 of the Rules of Procedure of the General Court); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 167 of the Rules of Procedure); interpretation (Article 43 of the Statute of the Court of Justice; Article 168 of the Rules of Procedure); revision (Article 44 of the Statute of the Court of Justice; Article 169 of the Rules of Procedure); legal aid (Article 148 of the Rules of Procedure); rectification (Article 164 of the Rules of Procedure); failure to adjudicate (Article 165 of the Rules of Procedure); and dispute concerning the costs to be recovered (Article 170 of the Rules of Procedure).

2| Unless otherwise indicated, this table and the following tables do not take account of proceedings concerning interim measures.

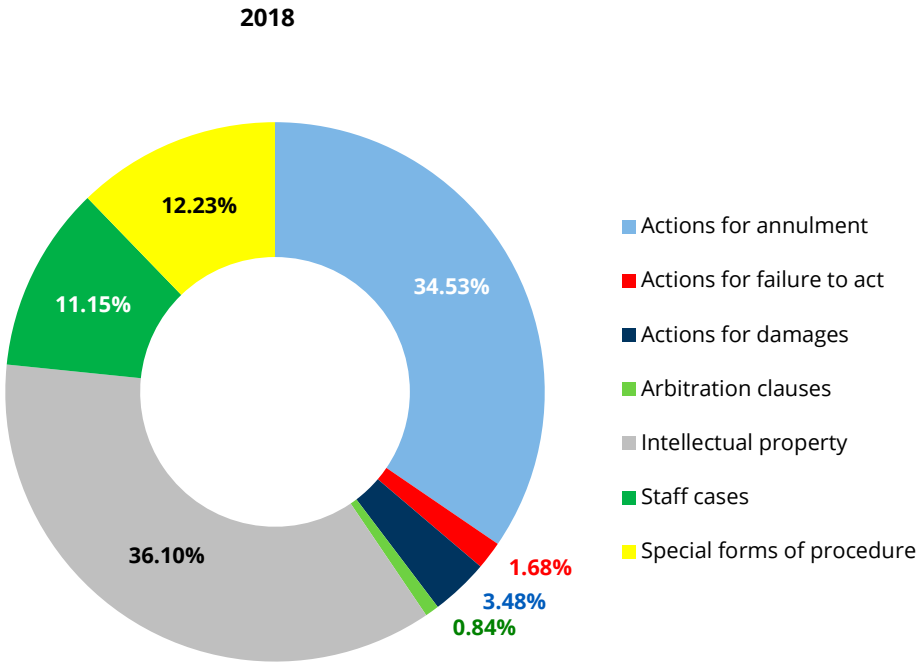
II. New cases — Nature of proceedings (2014-2018)



	2014	2015	2016 [1]	2017	2018
State aid	148	73	76	39	42
Competition	41	17	18	38	28
Staff cases			163	86	93
Intellectual property	295	302	336	298	301
Other direct actions	299	292	239	346	268
Appeals	36	36	39		
Special forms of procedure	93	111	103	110	102
Total	**912**	**831**	**974**	**917**	**834**

1| On 1 September 2016, 123 staff cases and 16 special forms of procedure in that area were transferred to the General Court.

III. New cases — Type of action (2014-2018)

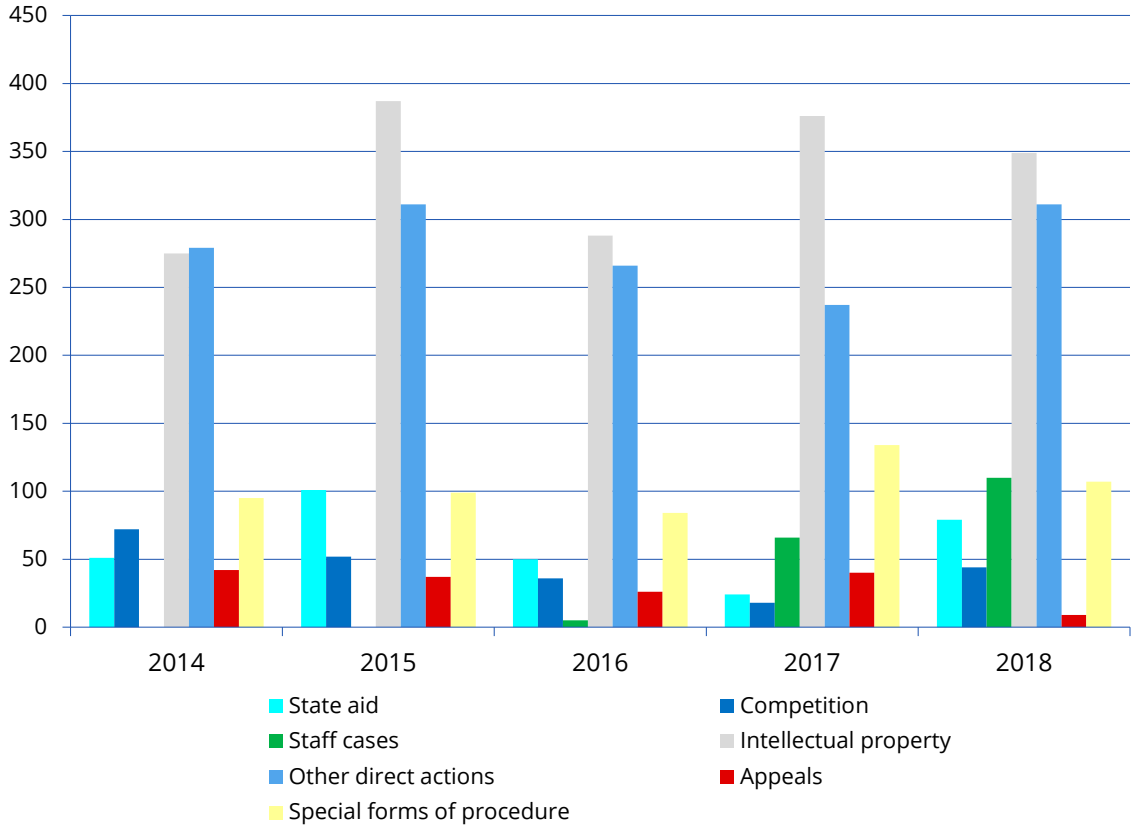


	2014	2015	2016	2017	2018
Actions for annulment	423	332	297	371	288
Actions for failure to act	12	5	7	8	14
Actions for damages	39	30	19	23	29
Arbitration clauses	14	15	10	21	7
Intellectual property	295	302	336	298	301
Staff cases			163	86	93
Appeals	36	36	39		
Special forms of procedure	93	111	103	110	102
Total	**912**	**831**	**974**	**917**	**834**

IV. New cases — Subject matter of the action (2014-2018)

	2014	2015	2016	2017	2018
Access to documents	17	48	19	25	21
Agriculture	15	37	20	22	25
Approximation of laws		1	1	5	3
Arbitration clause	14	15	10	21	7
Area of freedom, security and justice	1		7		2
Citizenship of the Union	1				
Commercial policy	31	6	17	14	15
Common fisheries policy	3		1	2	3
Common foreign and security policy			1		
Company law	1	1			
Competition	41	17	18	38	28
Consumer protection	1	2	1		1
Culture			1		
Customs union and Common Customs Tariff	8		3	1	
Economic and monetary policy	4	3	23	98	27
Economic, social and territorial cohesion	3	5	2	3	
Education, vocational training, youth and sport		3	1		1
Energy	3	3	4	8	1
Environment	10	5	6	8	7
External action by the European Union	2	1	2	2	2
Financial provisions (budget, financial framework, own resources, combating fraud)	4	7	4	5	4
Free movement of capital		2	1		1
Free movement of goods		2	1		
Freedom of establishment	1				1
Freedom of movement for persons		1	1	1	1
Freedom to provide services	1		1		
Industrial policy	2				
Intellectual and industrial property	295	303	336	298	301
Law governing the institutions	67	53	52	65	71
Public health	11	2	6	5	9
Public procurement	16	23	9	19	15
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	3	5	6	10	4
Research and technological development and space	2	10	8	2	1
Restrictive measures (external action)	69	55	28	27	40
Social policy	1		1		1
State aid	148	73	76	39	42
Taxation	1	1	2	1	2
Trans-European networks				2	1
Transport	1				1
Total EC Treaty/TFEU	**777**	**684**	**669**	**721**	**638**
Special forms of procedure	93	111	103	110	102
Staff Regulations	42	36	202	86	94
OVERALL TOTAL	**912**	**831**	**974**	**917**	**834**

V. Completed cases — Nature of proceedings (2014-2018)



	2014	2015	2016	2017	2018
State aid	51	101	50	24	79
Competition	72	52	36	18	44
Staff cases			5	66	110
Intellectual property	275	387	288	376	349
Other direct actions	279	311	266	237	311
Appeals	42	37	26	40	9
Special forms of procedure	95	99	84	134	107
Total	**814**	**987**	**755**	**895**	**1 009**

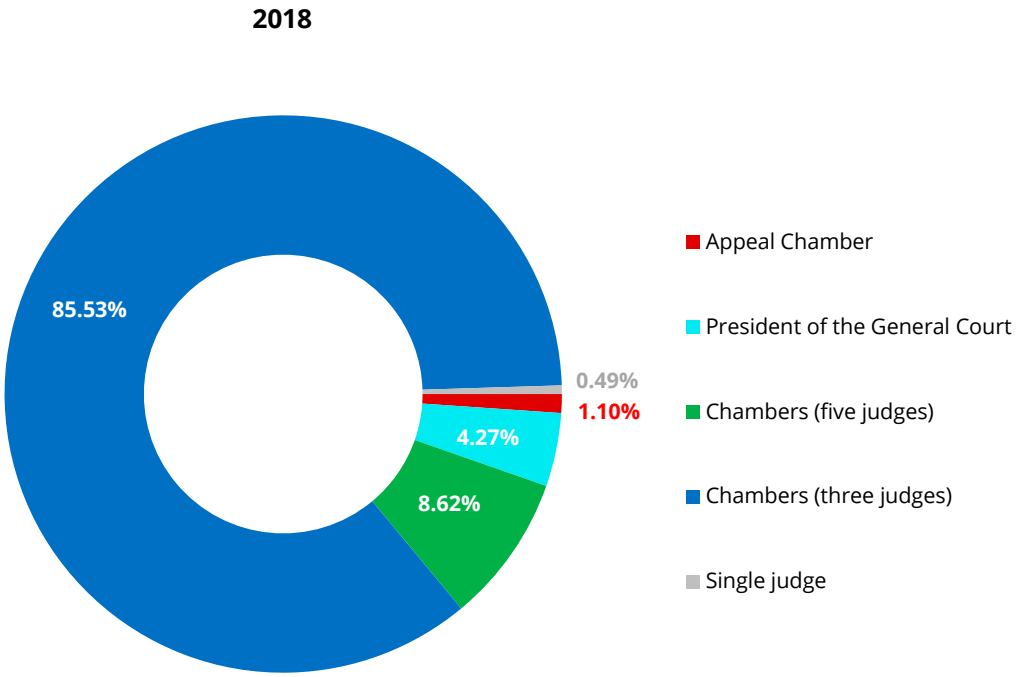
VI. Completed cases — Subject matter of the action (2018)

	Judgments	Orders	Total
Access to documents	58	9	67
Agriculture	25		25
Approximation of laws		1	1
Arbitration clause	5	2	7
Area of freedom, security and justice		3	3
Commercial policy	8	2	10
Common fisheries policy		2	2
Common foreign and security policy	1		1
Competition	39	5	44
Consumer protection	1		1
Customs union and Common Customs Tariff		1	1
Economic and monetary policy	10	6	16
Economic, social and territorial cohesion	4		4
Education, vocational training, youth and sport	3		3
Energy	4	2	6
Environment	6	5	11
External action by the European Union		2	2
Financial provisions (budget, financial framework, own resources, combating fraud)		5	5
Freedom of movement for persons		1	1
Intellectual and industrial property	267	82	349
Law governing the institutions	29	35	64
Public health	3	2	5
Public procurement	9	11	20
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	4		4
Research and technological development and space	5	2	7
Restrictive measures (external action)	30	12	42
Social policy	1		1
State aid	45	34	79
Trans-European networks		1	1
Transport		1	1
Total EC Treaty/TFEU	**557**	**226**	**783**
Special forms of procedure		107	107
Staff Regulations	87	32	119
OVERALL TOTAL	**644**	**365**	**1 009**

VII. Completed cases — Subject matter of the action (2014-2018) (Judgments and Orders)

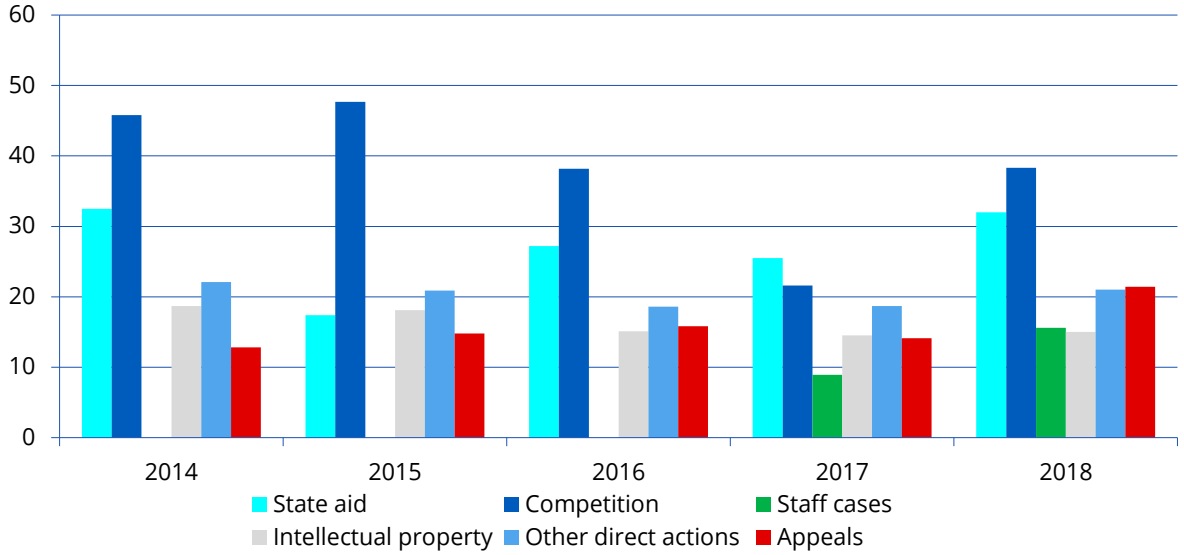
	2014	2015	2016	2017	2018
Access to documents	23	21	13	14	67
Accession of new States		1			
Agriculture	15	32	34	21	25
Approximation of laws	13		1	2	1
Arbitration clause	10	2	17	17	7
Area of freedom, security and justice	1			5	3
Association of the Overseas Countries and Territories	1				
Citizenship of the Union	1				
Commercial policy	18	24	21	15	10
Common fisheries policy	15	3	2	2	2
Common foreign and security policy	2	1			1
Company law		1			
Competition	72	52	36	18	44
Consumer protection		2	1	1	1
Culture			1	1	
Customs union and Common Customs Tariff	6	4	3	5	1
Economic and monetary policy	13	9	2	6	16
Economic, social and territorial cohesion	1	6	1	12	4
Education, vocational training, youth and sport	2		1		3
Energy	3	1	3	3	6
Environment	10	18	4	3	11
External action by the European Union		2		4	2
Financial provisions (budget, financial framework, own resources, combating fraud)		5	1	5	5
Free movement of capital		2	1		
Free movement of goods		2	1		
Freedom of establishment		1			
Freedom of movement for persons		1		2	1
Freedom to provide services	1		1		
Industrial policy		2			
Intellectual and industrial property	275	388	288	376	349
Law governing the institutions	33	58	46	54	64
Public health	10	15	3	3	5
Public procurement	18	22	20	16	20
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	3	9	8	4	4
Research and technological development and space	1	2	6	12	7
Restrictive measures (external action)	68	60	70	26	42
Social policy			1		1
State aid	51	101	50	24	79
Taxation	2	1		3	
Tourism	1				
Trans-European networks	1		2		1
Transport	3	3			1
Total EC Treaty/TFEU	**673**	**851**	**638**	**654**	**783**
Special forms of procedure	95	99	84	134	107
Staff Regulations	46	37	33	107	119
OVERALL TOTAL	**814**	**987**	**755**	**895**	**1 009**

VIII. Completed cases — Bench hearing action (2014-2018)



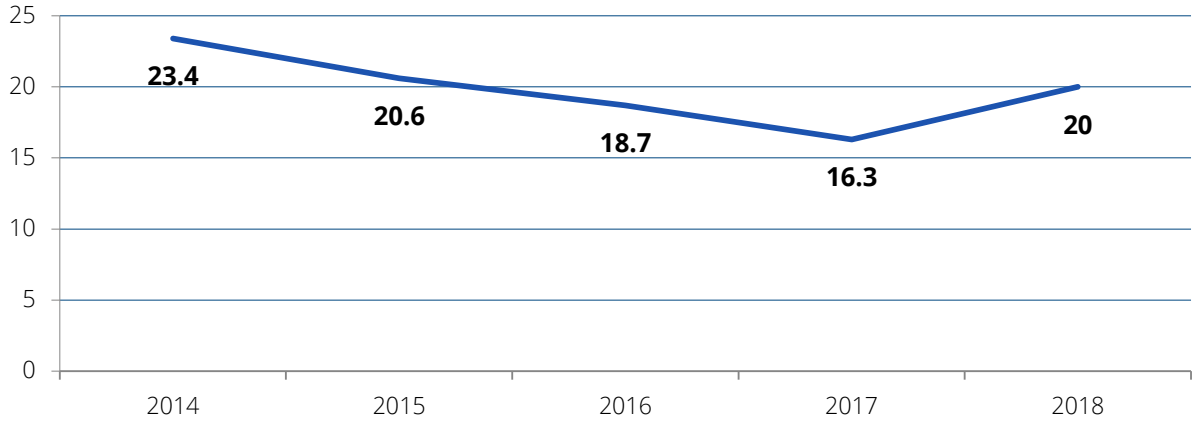
	2014			2015			2016			2017			2018		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal Chamber	21	32	53	23	14	37	25	13	38	29	17	46	9	2	11
President of the General Court		46	46		44	44		46	46		80	80		43	43
Chambers (five judges)	9	7	16	8	3	11	10	2	12	13	5	18	84	3	87
Chambers (three judges)	398	301	699	538	348	886	408	246	654	450	301	751	546	317	863
Single judge				1	8	9	5		5				5		5
Total	**428**	**386**	**814**	**570**	**417**	**987**	**448**	**307**	**755**	**492**	**403**	**895**	**644**	**365**	**1 009**

IX. Completed cases — Duration of proceedings in months (2014-2018) [1] (Judgments and Orders)



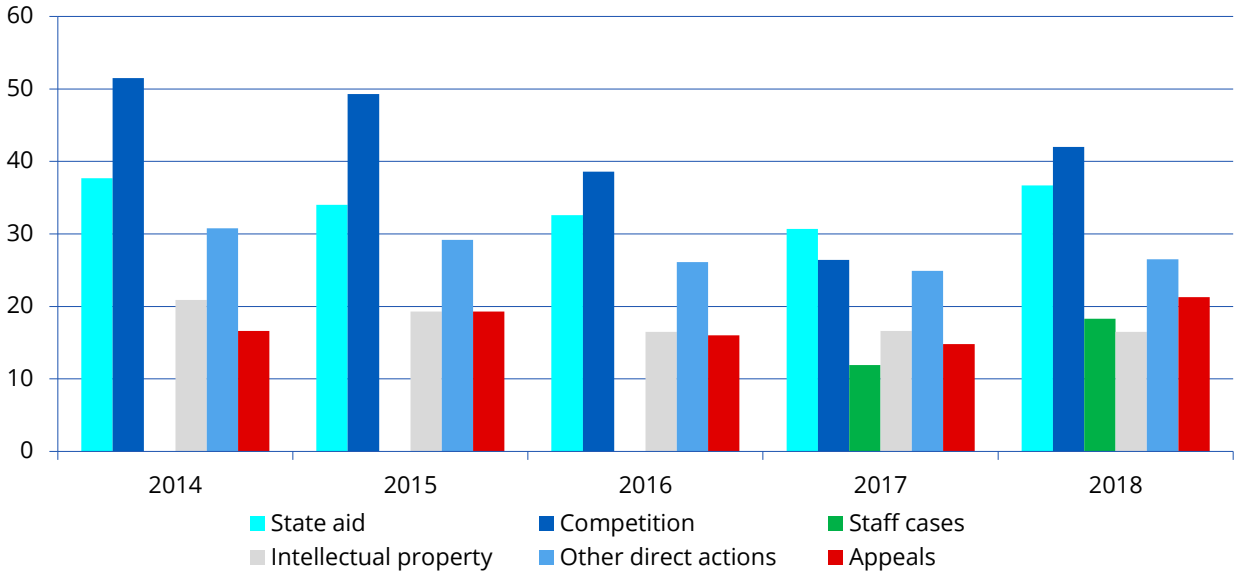
	2014	2015	2016	2017	2018
State aid	32.5	17.4	27.2	25.5	32
Competition	45.8	47.7	38.2	21.6	38.3
Staff cases				8,9	15,6
Intellectual property	18.7	18.1	15.1	14.5	15
Other direct actions	22.1	20.9	18.6	18.7	21
Appeals	12.8	14.8	15.8	14.1	21.4
All cases	**23.4**	**20.6**	**18.7**	**16.3**	**20**

Duration of proceedings (in months)
All cases disposed of by way of judgment or order



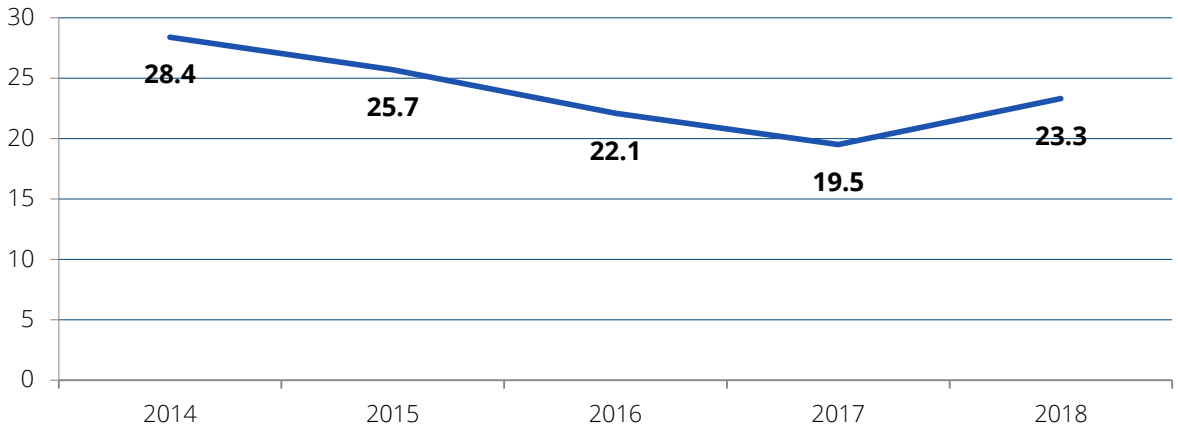
1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment or order is 20.3 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

X. Duration of proceedings in months (2014-2018) [1] (Judgments)



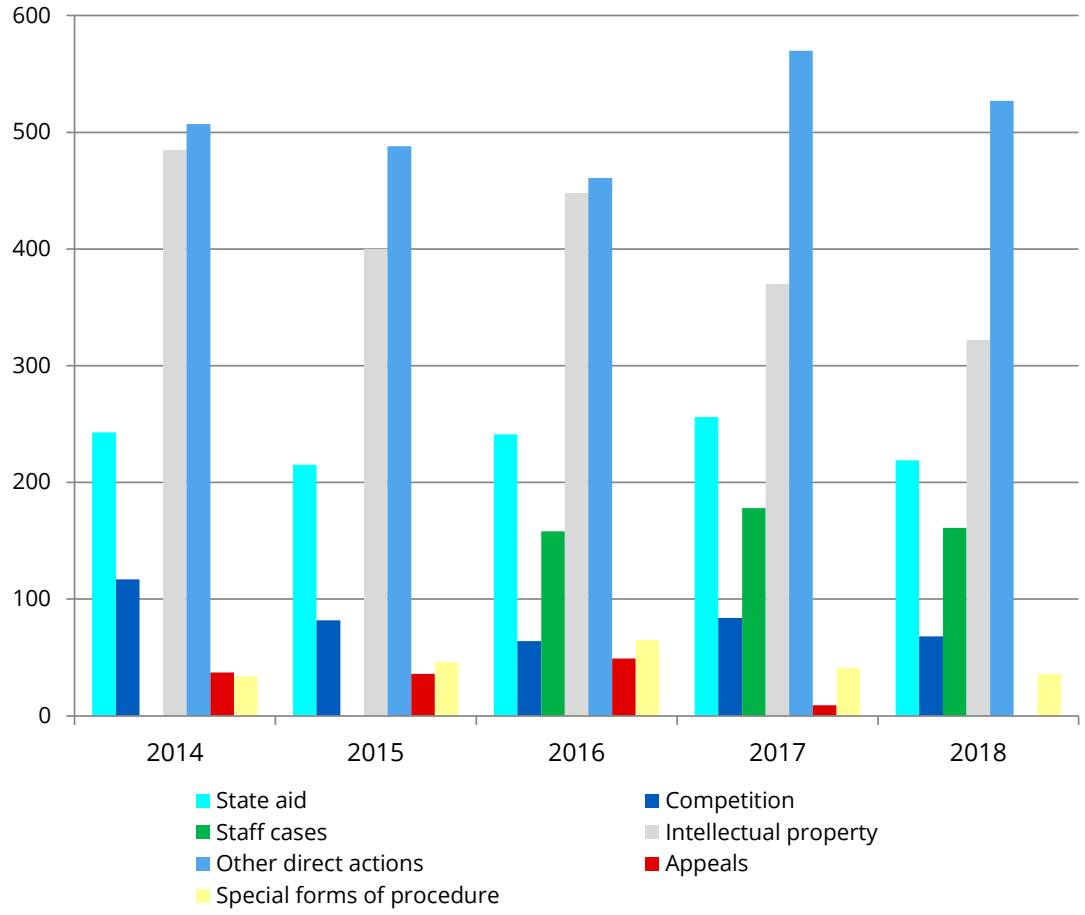
	2014	2015	2016	2017	2018
State aid	37.7	34	32.6	30.7	36.7
Competition	51.5	49.3	38.6	26.4	42
Staff cases				11.9	18.3
Intellectual property	20.9	19.3	16.5	16.6	16.5
Other direct actions	30.8	29.2	26.1	24.9	26.5
Appeals	16.6	19.3	16	14.8	21.3
All cases	**28.4**	**25.7**	**22.1**	**19.5**	**23.3**

Duration of proceedings (in months)
All cases disposed of by way of judgment



1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment is 23.2 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

XI. Cases pending as at 31 December — Nature of proceedings (2014-2018)

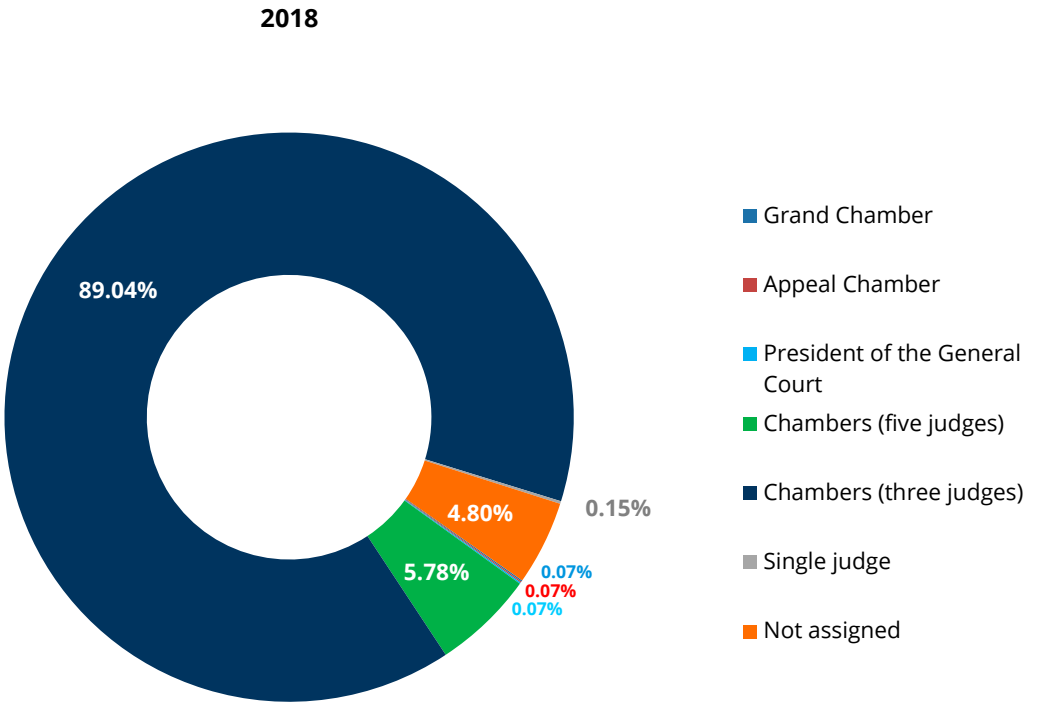


	2014	2015	2016	2017	2018
State aid	243	215	241	256	219
Competition	117	82	64	84	68
Staff cases			158	178	161
Intellectual property	485	400	448	370	322
Other direct actions	507	488	461	570	527
Appeals	37	36	49	9	
Special forms of procedure	34	46	65	41	36
Total	**1 423**	**1 267**	**1 486**	**1 508**	**1 333**

XII. Cases pending as at 31 December — Subject matter of the action (2014-2018)

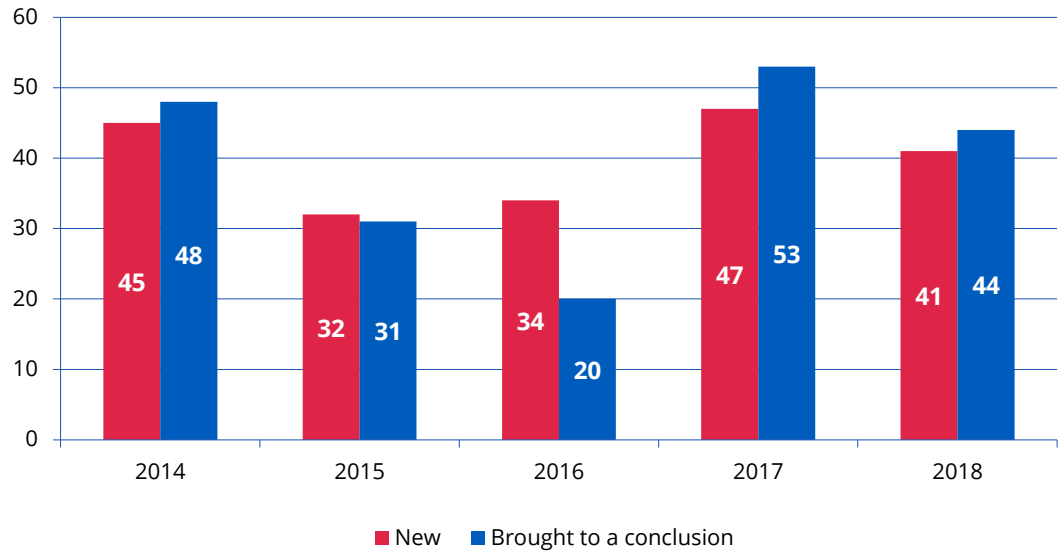
	2014	2015	2016	2017	2018
Access to documents	32	59	65	76	30
Accession of new States	1				
Agriculture	51	56	42	43	43
Approximation of laws		1	1	4	6
Arbitration clause	17	30	23	27	27
Area of freedom, security and justice			7	2	1
Commercial policy	58	40	36	35	40
Common fisheries policy	5	2	1	1	2
Common foreign and security policy	1		1	1	
Company law	1	1	1	1	1
Competition	117	82	64	84	68
Consumer protection	2	2	2	1	1
Culture	1	1	1		
Customs union and Common Customs Tariff	9	5	5	1	
Economic and monetary policy	9	3	24	116	127
Economic, social and territorial cohesion	15	14	15	6	2
Education, vocational training, youth and sport		3	3	3	1
Energy	1	3	4	9	4
Environment	18	5	7	12	8
External action by the European Union	3	2	4	2	2
Financial provisions (budget, financial framework, own resources, combating fraud)	5	7	10	10	9
Free movement of capital					1
Freedom of establishment	1				1
Freedom of movement for persons			1		
Industrial policy	2				
Intellectual and industrial property	485	400	448	370	322
Law governing the institutions	84	79	85	96	103
Public health	17	4	7	9	13
Public procurement	34	35	24	27	22
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	14	10	8	14	14
Research and technological development and space	9	17	19	9	3
Restrictive measures (external action)	108	103	61	62	60
Social policy	1	1	1	1	1
State aid	243	215	241	256	219
Taxation			2		2
Trans-European networks	2	2		2	2
Transport	3				
Total EC Treaty/TFEU	**1 349**	**1 182**	**1 213**	**1 280**	**1 135**
Special forms of procedure	34	46	65	41	36
Staff Regulations	40	39	208	187	162
OVERALL TOTAL	**1 423**	**1 267**	**1 486**	**1 508**	**1 333**

XIII. Cases pending as at 31 December — Bench hearing action (2014-2018)



	2014	2015	2016	2017	2018
Grand Chamber					1
Appeal Chamber	37	48	51	11	1
President of the General Court	1	12	12	1	1
Chambers (five judges)	15	6	23	100	77
Chambers (three judges)	1 272	1 099	1 253	1 323	1 187
Single judge		1			2
Not assigned	98	101	147	73	64
Total	**1 423**	**1 267**	**1 486**	**1 508**	**1 333**

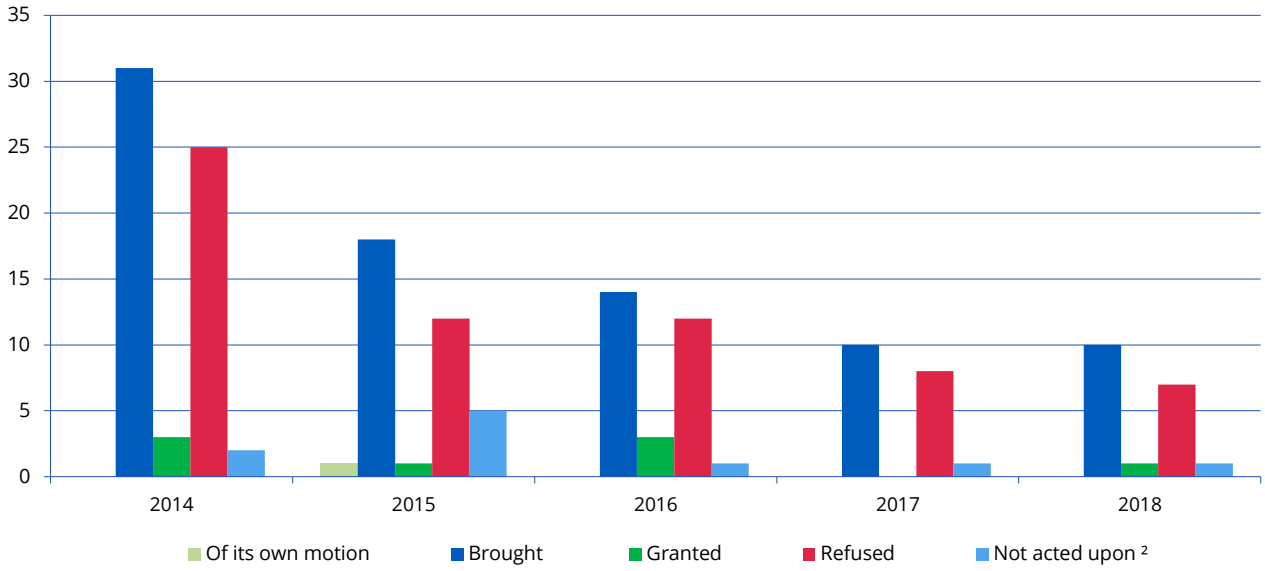
XIV. Miscellaneous — Proceedings for interim measures (2014-2018)



2018

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Granted	Removal from the register/no need to adjudicate	Dismissed
Access to documents	1	2			2
Agriculture	9	7			7
Common fisheries policy	1	1			1
Competition	2	2			2
Economic and monetary policy	2	1			1
Financial provisions (budget, financial framework, own resources, combating fraud)	2	2		1	1
Law governing the institutions	5	5		2	3
Public health	1	2			2
Public procurement	6	8	1	3	4
Research and technological development and space	1	1			1
Restrictive measures (external action)	1	1			1
Staff Regulations	8	7			7
State aid	1	4	1		3
Taxation	1	1			1
Total	**41**	**44**	**2**	**6**	**36**

XV. Miscellaneous — Expedited procedures (2014-2018) [1]

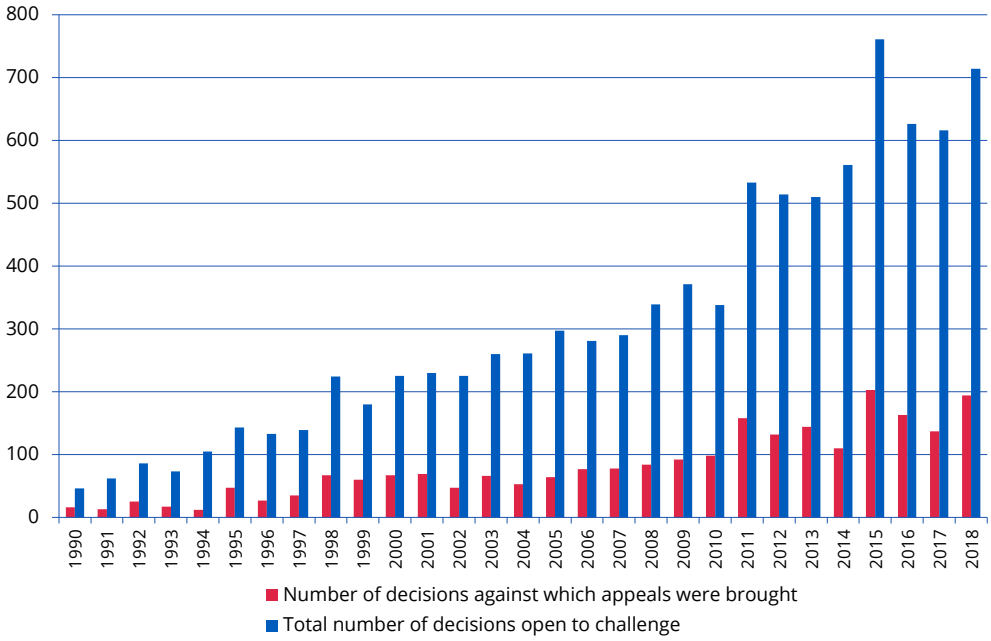


	2014					2015					2016					2017					2018				
	Of its own motion	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome		
			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]
Access to documents		2		2			2		2			2		2			2		1					1	
Agriculture							1		1													1		1	
Area of freedom, security and justice												3	3									1			1
Commercial policy												1		1											
Competition		1		1								1		1			1		1			3	1	2	
Consumer protection																						1			
Economic and monetary policy							1		1													1		1	
Environment		1						1																	
External action by the European Union							1		1																
Free movement of capital							2			2															
Free movement of goods												1			1										
Law governing the institutions		1			1		2			2		2		2			5		4	1					
Public health		3	1	1	1							1		1											
Public procurement		1		2		1	1			1		1		1			1		1						
Restrictive measures (external action)		9		9			4		4			1		1											
Staff Regulations							1		1			1		1			1		1			2		2	
State aid		13	2	10			3		2					2											
Total		**31**	**3**	**25**	**2**	**1**	**18**	**1**	**12**	**5**		**14**	**3**	**12**	**1**		**10**		**8**	**1**		**9**	**1**	**7**	**1**

1| The General Court may decide to deal with a case before it under an expedited procedure at the request of a main party or, since 1 July 2015, of its own motion.

2| The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

XVI. Miscellaneous — Appeals against decisions of the General Court to the Court of Justice (1990–2018)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge [1]	Percentage of decisions against which appeals were brought
1990	16	46	35%
1991	13	62	21%
1992	25	86	29%
1993	17	73	23%
1994	12	105	11%
1995	47	143	33%
1996	27	133	20%
1997	35	139	25%
1998	67	224	30%
1999	60	180	33%
2000	67	225	30%
2001	69	230	30%
2002	47	225	21%
2003	66	260	25%
2004	53	261	20%
2005	64	297	22%
2006	77	281	27%
2007	78	290	27%
2008	84	339	25%
2009	92	371	25%
2010	98	338	29%
2011	158	533	30%
2012	132	514	26%
2013	144	510	28%
2014	110	561	20%
2015	203	761	27%
2016	163	626	26%
2017	137	616	22%
2018	194	714	27%

1| Total number of decisions open to challenge — judgments, orders concerning interim measures or refusing leave to intervene and all orders terminating proceedings other than those removing a case from the register or transferring a case — in respect of which the period for bringing an appeal expired or against which an appeal was brought.

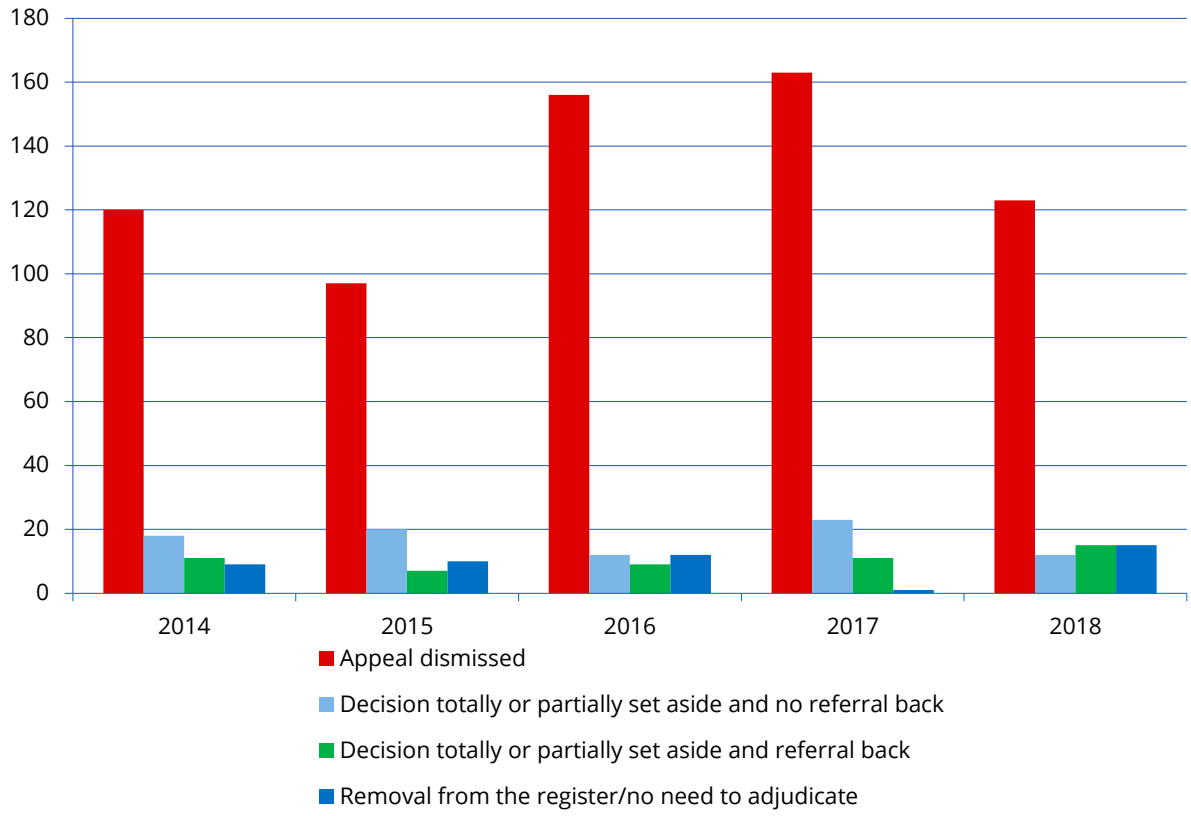
XVII. Miscellaneous — Distribution of appeals before the Court of Justice according to the nature of the proceedings (2014-2018)

	2014			2015			2016			2017			2018		
	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**
State aid	15	77	**19%**	22	75	**29%**	23	56	**41%**	8	25	**32%**	20	55	**36%**
Competition	15	44	**34%**	32	61	**52%**	17	41	**41%**	5	17	**29%**	21	35	**60%**
Staff cases										8	37	**22%**	15	79	**19%**
Intellectual property	33	209	**16%**	64	333	**19%**	48	276	**17%**	52	298	**17%**	68	295	**23%**
Other direct actions	47	231	**20%**	85	290	**29%**	75	253	**30%**	61	236	**26%**	69	249	**28%**
Appeals					2										
Special forms of procedure										3	3	**100%**	1	1	**100%**
Total	110	561	**20%**	203	761	**27%**	163	626	**26%**	137	616	**22%**	194	714	**27%**

XVIII. Miscellaneous — Results of appeals before the Court of Justice (2018) (Judgments and Orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Access to documents		1			**1**
Agriculture	4	1			**5**
Arbitration clause	3				**3**
Area of freedom, security and justice	3				**3**
Commercial policy	3		1	8	**12**
Common foreign and security policy	3	2			**5**
Competition	8		1	1	**10**
Consumer protection	1				**1**
Customs union and Common Customs Tariff	1	1			**2**
Economic and monetary policy	1				**1**
Economic, social and territorial cohesion	1				**1**
Financial provisions (budget, financial framework, own resources, combating fraud)			1		**1**
Intellectual and industrial property	54		5	5	**64**
Law governing the institutions	18	1	2		**21**
Public procurement	2			1	**3**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1				**1**
Research and technological development and space	3				**3**
Staff Regulations	6	1			**7**
State aid	11	5	5		**21**
Total	**123**	**12**	**15**	**15**	**165**

XIX. Miscellaneous — Results of appeals before the Court of Justice (2014-2018) (Judgments and Orders)



	2014	2015	2016	2017	2018
Appeal dismissed	120	97	156	163	123
Decision totally or partially set aside and no referral back	18	20	12	23	12
Decision totally or partially set aside and referral back	11	7	9	11	15
Removal from the register/no need to adjudicate	9	10	12	1	15
Total	**158**	**134**	**189**	**198**	**165**

XX. Miscellaneous — General trend (1989–2018)
New cases, completed cases, cases pending

	New cases [1]	Completed cases [2]	Cases pending on 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
2007	522	397	1 154
2008	629	605	1 178
2009	568	555	1 191
2010	636	527	1 300
2011	722	714	1 308
2012	617	688	1 237
2013	790	702	1 325
2014	912	814	1 423
2015	831	987	1 267
2016	974	755	1 486
2017	917	895	1 508
2018	834	1 009	1 333
Total	**15 208**	**13 875**	

1| 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance (now the General Court). 1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance. 1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance. 2004–05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance. 2016: on 1 September 2016, 139 staff cases were transferred to the General Court.

2| 2005–06: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

XXI. Activity of the Registry of the General Court (2015-2018)

Type of act	2015	2016	2017	2018
Procedural documents entered in the register of the Registry [1]	46 432	49 772	55 069	55 395
Applications initiating proceedings [2]	831	835	917	834
Staff cases transferred to the General Court [3]	–	139	–	–
Rate of regularisation of the applications initiating proceedings [4]	42.5%	38.2%	41.2%	35.85%
Written pleadings (other than applications)	4 484	3 879	4 449	4 562
Applications to intervene	194	160	565	318
Requests for confidential treatment (of data contained in procedural documents) [5]	144	163	212	197
Draft orders prepared by the Registry [6] (manifest inadmissibility before service, stay/resumption, joinder of cases, joinder of a plea of inadmissibility with the substance of the case, uncontested intervention, removal from the register, finding of no need to adjudicate in intellectual property cases, reopening of the oral part of the procedure and rectification)	521	241	317	285
Chamber conferences (with services of the Registry)	303	321	405	381
Minutes of hearings and records of delivery of judgment	873	637	812	924

1| This number is an indicator of the volume of work of the Registry, since each incoming or outgoing document is entered in the register. The number of procedural documents entered in the register must be assessed in the light of the nature of the proceedings within the Court's jurisdiction. As the number of parties to proceedings is limited in direct actions (applicant, defendant and, as the case may be, intervener(s)), service is effected only on those parties.

2| Any written pleadings lodged (including applications) must be entered in the register, placed on the case file, put in order where appropriate, communicated to the judges' chambers with a transmission sheet, which is sometimes detailed, then possibly translated and, lastly, served on the parties.

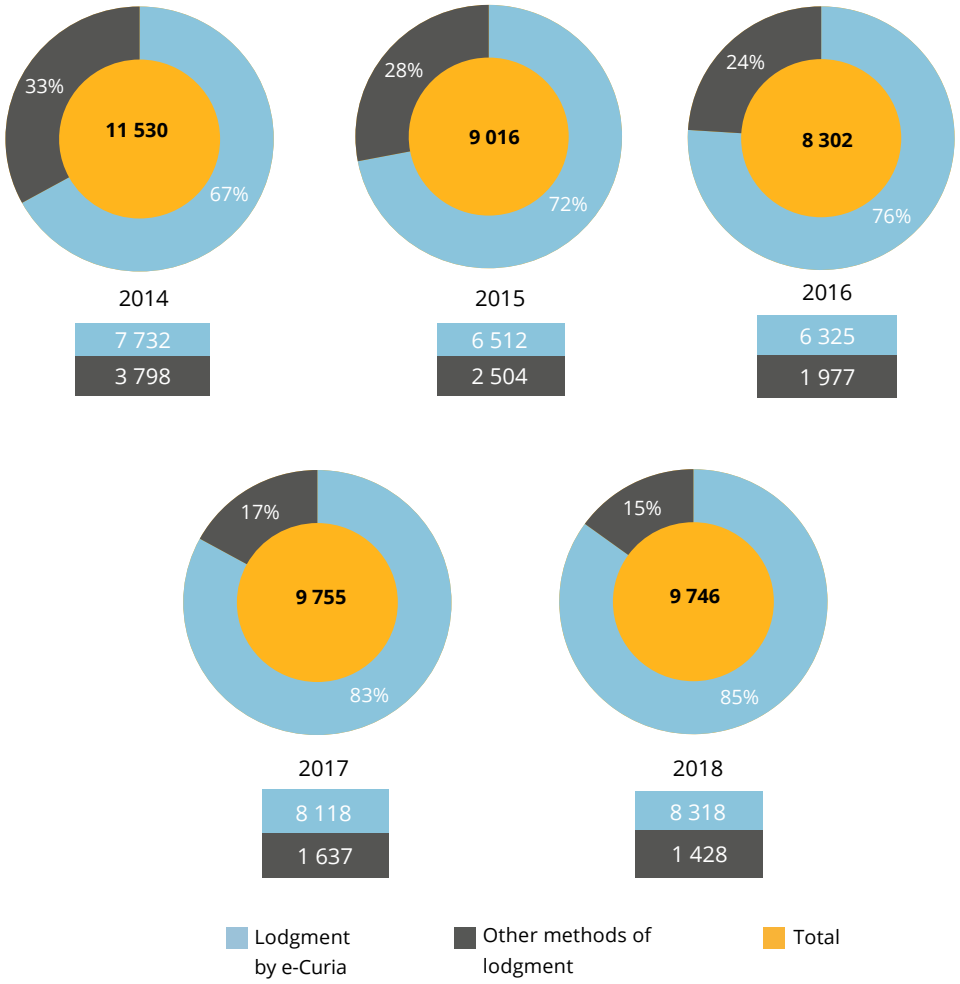
3| On 1 September 2016.

4| Where an application initiating proceedings (or any other written pleading) does not comply with certain requirements, the Registry ensures that it is put in order, as provided in the Rules of Procedure.

5| The number of requests for confidentiality is without prejudice to the amount of data contained in one or more pleadings for which confidential treatment is requested.

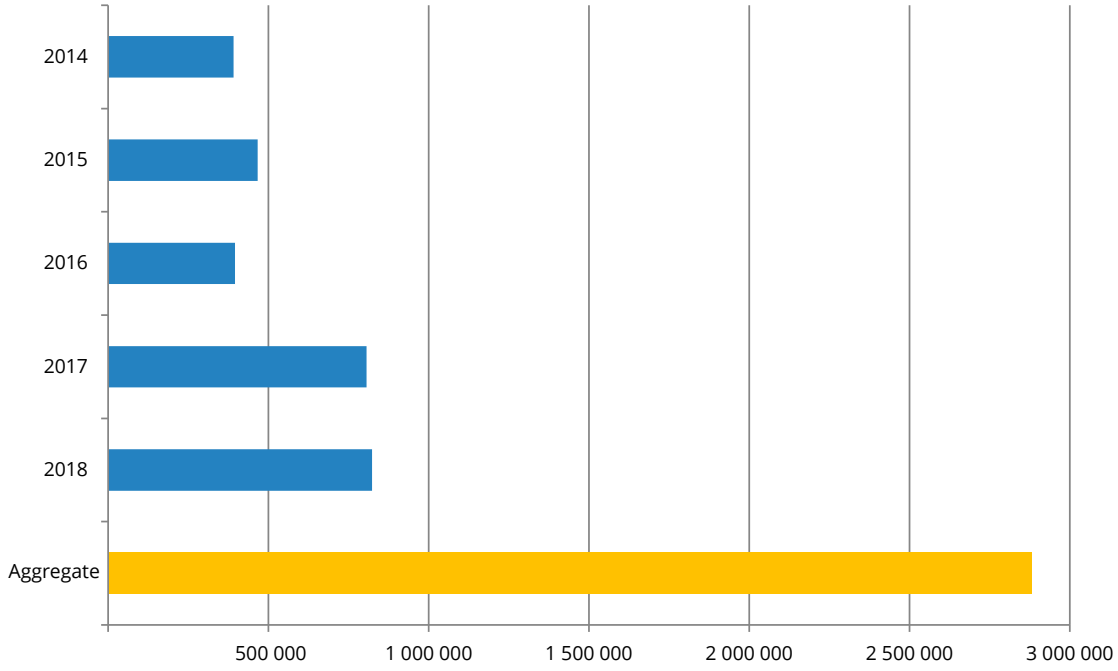
6| Since the entry into force, on 1 July 2015, of the new Rules of Procedure of the General Court, certain decisions that were previously taken in the form of orders (stay/resumption, joinder of cases, intervention by a Member State or an institution where confidentiality is not raised) have been taken in the form of a simple decision added to the case file.

XXII. Methods of lodging procedural documents before the General Court [1]



1| Since 1 December 2018, e-Curia has become the mandatory means of exchanging documents with the representatives of the parties in all proceedings before the General Court.

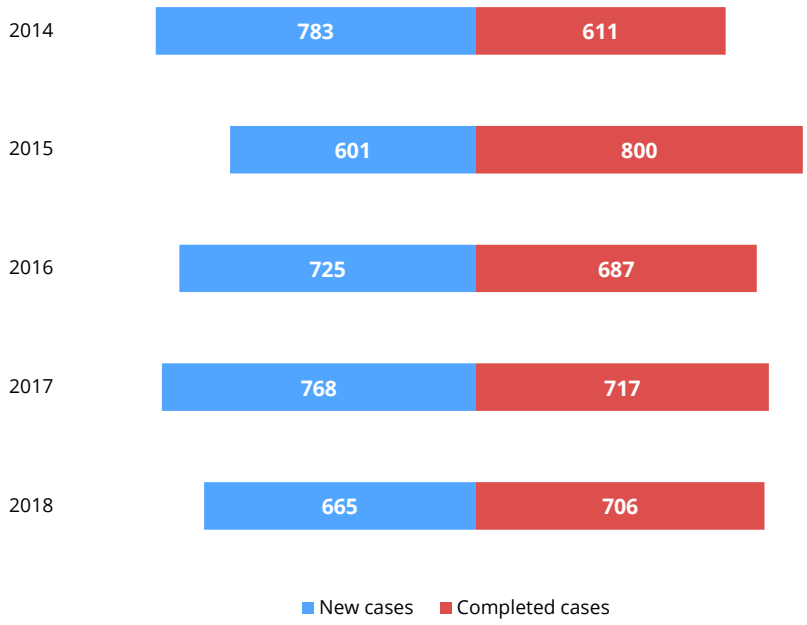
XXIII. Pages lodged by e-Curia (2014-2018) [1]



	2014	2015	2016	2017	2018	Aggregate
Pages lodged by e-Curia	390 892	466 875	396 072	805 768	823 076	2 882 683

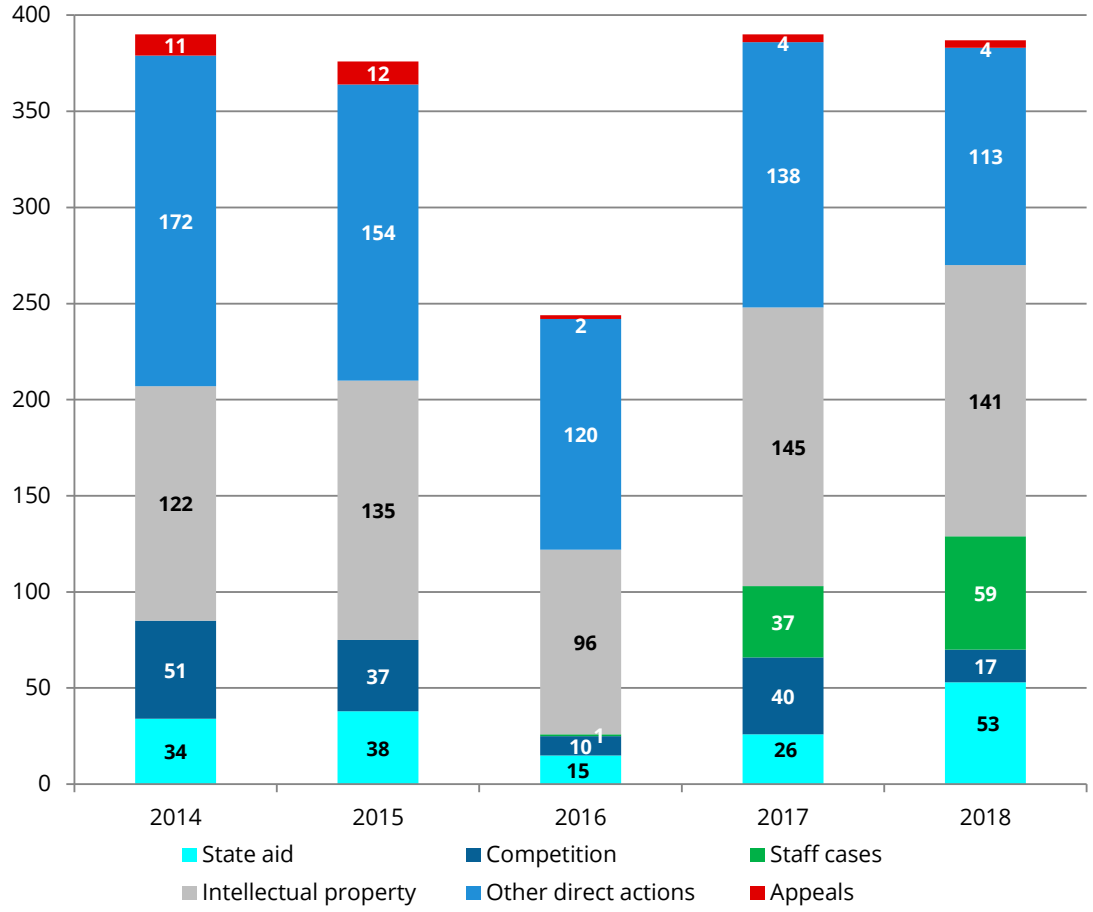
1| For the years 2014 to 2016, the data do not include the number of pages of the applications initiating proceedings.

XXIV. Notices in the *Official Journal of the European Union* (2014-2018) [1]



1| In accordance with the Rules of Procedure (Articles 79 and 122), notices concerning new applications and decisions which close the proceedings must be published in the *Official Journal of the European Union.*

XXV. Cases pleaded (2014-2018)



	2014	2015	2016	2017	2018
Total	390	376	244	390	387

E COMPOSITION OF THE GENERAL COURT

(Order of precedence as at 31 December 2018)

First row, from left to right:

I. Labucka, Judge; A.M. Collins, President of Chamber; G. Berardis, President of Chamber; H. Kanninen, President of Chamber; M. Prek, President of Chamber; M. van der Woude, Vice-President of the Court; M. Jaeger, President of the Court; I. Pelikánová, President of Chamber; S. Frimodt Nielsen, President of Chamber; D. Gratsias, President of Chamber; V. Tomljenović, President of Chamber; S. Gervasoni, President of Chamber; S. Papasavvas, Judge

Second row, from left to right:

C. Iliopoulos, Judge; L. Madise, Judge; V. Kreuschitz, Judge; E. Buttigieg, Judge; J. Schwarcz, Judge; A. Dittrich, Judge; M. Kancheva, Judge; E. Bieliūnas, Judge; I. Ulloa Rubio, Judge; I.S. Forrester, Judge

Third row, from left to right:

P. Nihoul, Judge; R. Barents, Judge; I. Reine, Judge; A. Marcoulli, Judge; Z. Csehi, Judge; D. Spielmann, Judge; L. Calvo-Sotelo Ibáñez-Martín, Judge; V. Valančius, Judge; N. Półtorak, Judge; F. Schalin, Judge; E. Perillo, Judge; R. da Silva Passos, Judge; B. Berke, Judge

Fourth row, from left to right:

E. Coulon, Registrar; C. Mac Eochaidh, Judge; K. Kowalik-Bańczyk, Judge; M.J. Costeira, Judge; U. Öberg, Judge; J. Svenningsen, Judge; O. Spineanu-Matei, Judge; J. Passer, Judge; A. Kornezov, Judge; G. De Baere, Judge

1. CHANGES IN THE COMPOSITION OF THE GENERAL COURT IN 2018

Peter George Xuereb, judge at the General Court since 8 June 2016, terminated his mandate to take up office at the Court of Justice on 8 October 2018.

2. ORDER OF PRECEDENCE

FROM 1 JANUARY 2018 TO 7 OCTOBER 2018

M. JAEGER, President
M. van der WOUDE, Vice-President
I. PELIKÁNOVÁ, President of Chamber
M. PREK, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
H. KANNINEN, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
A. DITTRICH, Judge
J. SCHWARCZ, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
I. ULLOA RUBIO, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
L. CALVO-SOTELO IBÁÑEZ-MARTÍN, Judge
D. SPIELMANN, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
A. MARCOULLI, Judge
P.G. XUEREB, Judge
F. SCHALIN, Judge
I. REINE, Judge
E. PERILLO, Judge
R. BARENTS, Judge
R. da SILVA PASSOS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
J. SVENNINGSEN, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
M.J. COSTEIRA, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
A. KORNEZOV, Judge

C. MAC EOCHAIDH, Judge
G. DE BAERE, Judge

E. COULON, Registrar

FROM 8 OCTOBER 2018 TO 31 DECEMBER 2018

M. JAEGER, President
M. van der WOUDE, Vice-President
I. PELIKÁNOVÁ, President of Chamber
M. PREK, President of Chamber
S. FRIMODT NIELSEN, President of Chamber
H. KANNINEN, President of Chamber
D. GRATSIAS, President of Chamber
G. BERARDIS, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
I. LABUCKA, Judge
S. PAPASAVVAS, Judge
A. DITTRICH, Judge
J. SCHWARCZ, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
E. BIELIŪNAS, Judge
V. KREUSCHITZ, Judge
I. ULLOA RUBIO, Judge
L. MADISE, Judge
I.S. FORRESTER, Judge
C. ILIOPOULOS, Judge
L. CALVO-SOTELO IBÁÑEZ-MARTÍN, Judge
D. SPIELMANN, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
A. MARCOULLI, Judge
F. SCHALIN, Judge
I. REINE, Judge
E. PERILLO, Judge
R. BARENTS, Judge
R. da SILVA PASSOS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
J. SVENNINGSEN, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
M.J. COSTEIRA, Judge
J. PASSER, Judge
K. KOWALIK-BAŃCZYK, Judge
A. KORNEZOV, Judge
C. MAC EOCHAIDH, Judge
G. DE BAERE, Judge

E. COULON, Registrar

3. FORMER MEMBERS OF THE GENERAL COURT

(in order of their entry into office)

JUDGES

Donal Patrick Michael BARRINGTON (1989–1996) (†)
Antonio SAGGIO (1989–1998), President (1995–1998) (†)
David Alexander Ogilvy EDWARD (1989–1992)
Heinrich KIRSCHNER (1989–1997) (†)
Christos YERARIS (1989–1992)
Romain Alphonse SCHINTGEN (1989–1996)
Cornelis Paulus BRIËT (1989–1998)
José Luis da CRUZ VILAÇA (1989–1995), President (1989–1995)
Bo VESTERDORF (1989–2007), President (1998–2007)
Rafael GARCÍA-VALDECASAS Y FERNÁNDEZ (1989–2007)
Jacques BIANCARELLI (1989–1995)
Koen LENAERTS (1989–2003)
Christopher William BELLAMY (1992–1999)
Andreas KALOGEROPOULOS (1992–1998)
Virpi TIILI (1995–2009)
Pernilla LINDH (1995–2006)
Josef AZIZI (1995–2013)
André POTOCKI (1995–2001)
Rui Manuel GENS de MOURA RAMOS (1995–2003)
John D. COOKE (1996–2008)
Jörg PIRRUNG (1997–2007)
Paolo MENGOZZI (1998–2006)
Arjen W.H. MEIJ (1998–2010)
Michail VILARAS (1998–2010)
Nicholas James FORWOOD (1999–2015)
Hubert LEGAL (2001–2007)
Maria Eugénia MARTINS de NAZARÉ RIBEIRO (2003–2016)
Franklin DEHOUSSE (2003–2016)
Ena CREMONA (2004–2012)
Ottó CZÚCZ (2004–2016)
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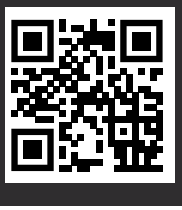

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