COURT OF JUSTICE
OF THE EUROPEAN UNION

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MONTHLY CASE-LAW DIGEST
November 2021

I. VALUES OF THE UNION

Judgment of the Court (Grand Chamber) of 16 November 2021, Prokuratura Rejonowa w Mińsku Mazowieckim, C-748/19 to C-754/19

Link to the complete text of the judgment

References for a preliminary ruling – Rule of law – Independence of the judiciary – Second subparagraph of Article 19(1) TEU – National legislation providing the possibility for the Minister for Justice to second judges to higher courts and to terminate those secondments – Adjudicating panels in criminal cases including judges seconded by the Minister for Justice – Directive (EU) 2016/343 – Presumption of innocence

In connection with seven criminal cases pending before it, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) questions whether the composition of the adjudicating panels called upon to rule on those cases is in line with EU law, having regard to the presence in those panels of a judge seconded in accordance with a decision of the Minister for Justice pursuant to the Law on the organisation of the ordinary courts. [1]

According to that court, under the Polish rules relating to the secondment of judges, the Minister for Justice may assign a judge, by way of secondment, to a higher criminal court on the basis of criteria which are not officially known, without the secondment decision being amenable to judicial review. In addition, that minister may terminate that secondment at any time without such termination being subject to criteria that are predefined by law or having to be accompanied by a statement of reasons.

In that context, the referring court decided to question the Court of Justice as to whether the rules referred to above are in line with the second subparagraph of Article 19(1) TEU [2] and as to whether those rules undermine the presumption of innocence applicable to criminal proceedings resulting from, inter alia, Directive 2016/343. [3]

By its judgment, delivered by the Grand Chamber, the Court rules that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Directive 2016/343 [4] preclude provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

Findings of the Court

As a preliminary point, the Court finds that the Polish ordinary courts, which include the Sąd Okręgowy w Warszawie (Regional Court, Warsaw), fall within the Polish judicial system in the 'fields covered by Union law', within the meaning of the second subparagraph of Article 19(1) TEU. To guarantee that such courts can ensure the effective legal protection required under that provision, maintaining their independence is essential. Compliance with the requirement of independence

1 Ustawa – Prawo o ustroju sądów powszechnych (Law on the organisation of the ordinary courts) of 27 July 2001, in the version applicable to the disputes in the main proceedings (Dz. U. of 2019, item 52).

2 Pursuant to that provision, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

3 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).

4 Article 6(1) and (2) of Directive 2016/343.

means, inter alia, that the rules relating to the secondment of judges must provide the necessary guarantees in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions.

In that regard, the Court emphasises that, although the fact that the Minister for Justice may not second judges without their consent constitutes an important procedural safeguard, there are, however, a number of factors which, in the referring court's view, empower that minister to influence those judges and may give rise to doubts concerning their independence. Analysing those various factors, the Court states, first of all, that, in order to avoid arbitrariness and the risk of manipulation, the decision relating to the secondment of a judge and the decision terminating that secondment must be taken on the basis of criteria known in advance and must contain an appropriate statement of reasons. In addition, as the termination of the secondment of a judge without that judge's consent may have effects similar to those of a disciplinary penalty, it should be possible for such a measure to be legally challenged in accordance with a procedure which fully safeguards the rights of the defence. Furthermore, noting that the Minister for Justice also occupies the position of Public Prosecutor General, the Court finds that that minister thus has, in any given criminal case, power over both the public prosecutor attached to the ordinary court and the seconded judges, which is such as to give rise to reasonable doubts in the minds of individuals as to the impartiality of those seconded judges. Lastly, the seconded judges in the adjudicating panels called upon to rule in the disputes in the main proceedings are also occupying the positions of deputies of the Disciplinary Officer for Ordinary Court Judges, who is the person responsible for investigating disciplinary proceedings brought against judges. The combination of those two roles, in a context where the deputies of the Disciplinary Officer for Ordinary Court Judges are also appointed by the Minister for Justice, is such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the other members of the adjudicating panels concerned to external factors.

Taken together, those various facts are, subject to the final assessments which are to be carried out by the referring court, such as may lead to the conclusion that the Minister for Justice has, on the basis of criteria which are not known, the power to second judges to higher courts and to terminate their secondment, without being required to give reasons for that decision, with the result that, during the period of those judges' secondment, they are not provided with the guarantees and the independence which all judges should normally enjoy in a State governed by the rule of law. Such a power cannot be considered compatible with the obligation to comply with the requirement of independence.

Furthermore, as regards the presumption of innocence applicable to criminal proceedings, respect for which is intended to be ensured by Directive 2016/343, [5] it presupposes that the judge is free of any bias and any prejudice when examining the criminal liability of the accused. The independence and impartiality of judges are therefore essential conditions for guaranteeing the presumption of innocence. However, in this instance, it appears that, in the circumstances referred to above, the independence and impartiality of judges and, accordingly, the presumption of innocence may be jeopardised.

5 See recital 22 and Article 6 of Directive 2016/343.

II. WITHDRAWAL OF A MEMBER STATE FROM THE EUROPEAN UNION

Judgment of the Court (Grand Chamber) of 16 November, Governor of Cloverhill Prison and Others, C-479/21 PPU

Link to the complete text of the judgment

Reference for a preliminary ruling – Urgent preliminary ruling procedure – Article 50 TEU – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Article 217 TFEU – Trade and Cooperation Agreement with the United Kingdom – Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Continuation under the Withdrawal Agreement, on a transitional basis, of the European arrest warrant regime in respect of the United Kingdom – Application to a European arrest warrant of provisions relating to the surrender mechanism established by the Trade and Cooperation Agreement with the United Kingdom – Regimes binding on Ireland

In September 2020, SD was arrested in Ireland pursuant to a European arrest warrant ('EAW') issued by the United Kingdom judicial authorities in March 2020, seeking his surrender to serve a prison sentence. SN was arrested in Ireland in February 2021, pursuant to an EAW issued by the same authorities in October 2020, seeking his surrender for the purposes of conducting a criminal prosecution. SD and SN have been detained in Ireland since their arrest, pending the decision on their respective surrender to those authorities. The High Court (Ireland) having found that their detention was lawful and having refused to order their release, SD and SN appealed to the Supreme Court (Ireland).

According to the Supreme Court, the Irish law transposing the Framework Decision on the EAW [6] may be applied in respect of a third country provided that there is an agreement in force between that country and the European Union for the surrender of requested persons. However, for that legislation to apply, the agreement concerned, namely, in the present case, the Agreement on the Withdrawal of the United Kingdom from the European Union [7] and the Trade and Cooperation Agreement between the European Union and the United Kingdom, [8] must be binding on Ireland. That might not be the case since those agreements contain measures – concerning respectively the EAW regime and the new surrender mechanism between the European Union and the United Kingdom – falling within the Area of Freedom, Security and Justice ('the AFSJ') and which are therefore, in principle, not binding on Ireland under Protocol (No 21). [9] Ireland has not made use of the possibility, offered by Protocol

6 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).

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

8 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ 2021 L 149, p. 10) ('the TCA').

9 Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU (OJ 2012, C 326, p. 295) ('Protocol (No 21)'). According to that protocol, Ireland is not bound by measures within the AFSJ unless it has expressed its wish to apply one of them.

(No 21), to opt in to the provisions of those agreements relating to those measures, either when the United Kingdom withdrew from the European Union or when the TCA was concluded. [10]

In its judgment, the Court rules, in particular, on the question whether the legal bases of the Withdrawal Agreement and of the TCA, that is to say, Article 50(2) TEU (which provides for the European Union's external competence to conclude a withdrawal agreement) and Article 217 TFEU (which lays down the competence to establish an association agreement), are by themselves appropriate as a basis for the inclusion of those measures in those agreements. Otherwise, a substantive legal basis relating to the AFSJ would be required, which would trigger the applicability of Protocol (No 21) and mean that those measures would not, in principle, be applicable to Ireland.

Findings of the Court

In the context of the urgent preliminary ruling procedure (PPU), the Court, sitting as the Grand Chamber, finds that the provisions of the Withdrawal Agreement which provide for the continuation of the EAW regime in respect of the United Kingdom during the transition period and the provision of the TCA which provides for the application of the surrender regime established by that agreement to EAWs issued before the end of the transition period in respect of persons not yet arrested before the end of that period are binding on Ireland.

Examining, in the first place, the choice of Article 50 TEU as the legal basis for the Withdrawal Agreement, the Court notes that paragraph 2 of that provision confers on the European Union alone the competence to conclude an agreement setting out the arrangements for the withdrawal of a Member State from the European Union in order to be able to attain the objective of enabling that withdrawal to take place in an orderly manner. That agreement is intended to regulate, in all areas covered by the Treaties, all questions relating to the withdrawal. It was therefore pursuant to that competence that the European Union was able to conclude the Withdrawal Agreement, which provides inter alia that, unless otherwise provided in that agreement, EU law, including the Framework Decision on the EAW, is to apply in the United Kingdom during the transition period.

The Court adds that, since it is not possible to add to Article 50(2) TEU legal bases laying down procedures which are incompatible with the procedure laid down in paragraphs 2 and 4 thereof, it must be inferred that only Article 50 TEU can ensure that all of the fields falling within the scope of the treaties are treated consistently in the Withdrawal Agreement, thus enabling the withdrawal to take place in an orderly manner. Accordingly, since Article 50(2) TEU constitutes the only appropriate legal basis for concluding the Withdrawal Agreement, the provisions of Protocol (No 21) could not apply.

Examining, in the second place, the choice of Article 217 TFEU as the legal basis of the TCA, the Court observes that agreements concluded on the basis of that provision may contain rules concerning all the fields falling within the competence of the European Union. Given that, under Article 4(2)(j) TFEU, the European Union has shared competence as regards the AFSJ, measures falling within that area may be included in an association agreement such as the TCA.

Since the surrender mechanism established by the TCA does indeed fall within that area of competence, the Court next examines whether the inclusion of that mechanism in an association agreement also requires the addition of a specific EU legal basis relating to the AFSJ. [11] In that respect, in view of, inter alia, the wide scope of the TCA, the inclusion in that agreement of provisions falling within the AFSJ forms part of the general objective of that agreement, which is to establish the basis for a broad relationship between the European Union and the United Kingdom. Since the surrender mechanism introduced by the TCA pursues that objective alone, it is not necessary, as the case-law on

10 Under Article 62(1)(b) of the Withdrawal Agreement, read in conjunction with the fourth paragraph of Article 185 thereof, the EAW regime provided for in the Framework Decision on the EAW is applicable to the United Kingdom during the transition period, that is to say, until 31 December 2020. Pursuant to Article 632 of the TCA, the provisions relating to the surrender regime provided for in the TCA are applicable to EAWs issued before the end of the transition period, where the person sought has not been arrested for the purpose of executing the EAW before the end of that period.

11 Point (d) of the second subparagraph of Article 82(1) TFEU is cited.

acts pursuing several objectives provides, to add another legal basis. Consequently, the rules of the TCA concerning surrender could be based solely on Article 217 TFEU, without the provisions of Protocol (No 21) being applicable.

Under Article 632 of the TCA, the provisions on surrender laid down by the TCA are to apply to EAWs issued in accordance with the Framework Decision on the EAW before the end of the transition period, where the person sought has not been arrested for the purpose of executing an EAW before the end of that period.

III. INSTITUTIONAL PROVISIONS

1. EUROPEAN CITIZENS' INITIATIVE

Judgment of the General Court (Tenth Chamber) of 10 November 2021, Romania v Commission, T-495/19

Law governing the institutions – European citizen's initiative – Cohesion policy – National minority regions – Registration decision – Action for annulment – Actionable measure – Admissibility – Article 4(2)(b) of Regulation (EU) No 211/2011 – Obligation to state reasons

On 18 June 2013, the proposed European's citizens' initiative ('ECI') entitled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures' was submitted to the European Commission. [12] According to the information provided by its organisers, the aim of the proposed ECI was to ensure that the Cohesion Policy of the European Union paid special attention to regions with ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions.

By decision of 25 July 2013, [13] the Commission refused to register the proposed ECI at issue on the ground that that ECI fell manifestly outside the framework of its powers to submit a proposal for an EU legal act for the purposes of implementing the Treaties. The action for annulment brought against that decision was dismissed by the General Court. [14] On appeal, the Court of Justice set aside the judgement of the General Court and the decision of 25 July 2013. [15]

On 30 April 2019, the Commission adopted a new decision by which it registered the proposed ECI at issue. [16] Romania filed an action for annulment against that decision.

The General Court dismisses Romania's action and addresses explicitly, for the first time, the question whether a Commission decision to register a proposed ECI is a challengeable act. It also clarifies, on the one hand, the characteristics of the review exercised by the Commission for the purpose of

12 Proposal submitted pursuant to Article 11(4) TEU and 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, 'the ECI proposal at issue').

13 Commission Decision C(2013) 4975 final of 25 July 2013 refusing to register the proposed citizens' initiative entitled 'Cohesion Policy for regional equality and the preservation of regional cultures'.

14 Judgment of 10 May 2016, Izsák and Dabis v Commission, T-529/13 (see Press Release No 50/16).

15 Judgment of 7 March 2019, Izsák and Dabis v Commission, C-420/16 P (see Press Release No 24/19).

16 Commission Decision (EU) 2019/721 of 30 April 2019 on the proposed citizens' initiative 'Cohesion Policy for Regional Equality and the Preservation of Regional Cultures' (OJ 2019 L 122, p. 55, 'the contested decision').

adopting such a decision and, on the other hand, the nature of the General Court's review of the legality of that decision.

Findings of the General Court

With regard to the admissibility of the action, the General Court considers whether the contested decision is a challengeable act. [17] It first notes the procedures and conditions for the submission of an ECI and observes that the contested decision is intended to produce binding effects with respect to the organisers, institutions and Member States concerned. As regards the organisers, the registration decision triggers the mechanism for the collection of statements of support and provides the organisers with, inter alia, first, the right to submit the ECI to the Commission and explain it in detail, [18] secondly, the right to require the Commission to issue the communication referred to in Article 10(1)(c) of Regulation 211/2011 [19] and, thirdly, the right to present the ECI at a public hearing in the European Parliament. Those rights, created in respect of the organisers, at the same time constitute obligations for the institutions concerned, in that the Commission is obliged to receive the organisers and issue its communication on the ECI and the Parliament is obliged to organise a public hearing. As regards the Member States concerned, the decision to register a proposed ECI creates an obligation on their part to authorise the collection of support statements and to verify and certify them.

In addition, the General Court states that the decision to register a proposed ECI is not a preparatory or intermediate act intended to lay the groundwork for the adoption by the Commission of its communication on the ICE. The decision to register a proposed ECI entails an initial legal assessment of the proposal and does not prejudge the assessment made by the Commission in its ECI communication, which includes, in particular its 'legal and political conclusions'. The General Court notes that, according to the case-law, [20] the particular added value of the ECI mechanism lies not in the certainty of its outcome, but in the possibilities and opportunities it creates for EU citizens to initiate debate on policy within the EU institutions without having to wait for the commencement of a legislative procedure. The policy debate, both with the citizens and with the institutions, takes place in particular during the campaign to gather statements of support, at the meeting with the Commission and at the public hearing in the Parliament. More specifically, that debate results from the decision to register a proposed ECI and the subsequent procedure and takes place before the Commission adopts its communication on the ECI. Accordingly, a decision to register a proposed ECH, such as the contested decision, is the outcome of a specific stage in the ECI process which produces binding legal effects distinct from those produced by the communication on the ECI and constitutes, like the communication on the ECI, an challengeable act for the purposes of Article 263 TFEU.

As to the substance, the General Court examines, in the first place, the conditions for registration of a proposed ECI and, in particular, the condition as to whether the proposed ECI falls within the framework of the Commission's powers. [21] In that context, it notes the characteristics of the examination that the Commission must carry out with respect to that condition for registration of a proposed ECI.

First, it observes that, in order to ensure that ECIs are easily accessible, the Commission is entitled to refuse registration of a proposed ECI only if, having regard to its subject matter and objectives, it falls manifestly outside the framework of the Commission's powers to submit a proposal for an EU legal act for the purpose of implementing the Treaties.

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17 For the purposes of Article 263 TFEU.

18 Regulation No 211/2011, Article 9, first paragraph, and Article 10(1)(b).

19 Under that provision, when the Commission receives an ECI, it is, within three months, to set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action ('the communication on the ECI').

20 Judgment of 19 December 2019, Puppinck and Others v Commission, C-418/18 P, paragraph 70 (see Press Release No 160/19).

21 Regulation No 211/2011, Article 4(2)(b).

Secondly, the General Court clarifies that there is a distinction between the examination that the Commission is required to carry out in respect of the registration condition relating to whether a proposed ECI falls within the framework of its powers and the examination that the Commission is required to carry out in the context of the communication on the ECI. Accordingly, in determining whether that registration condition is satisfied, the Commission must confine itself to examining whether, from an objective point of view, the measures proposed under the ECI in question could be adopted on the basis of the Treaties and it is not required to verify that all the facts relied on are proven or that the reasoning underlying the proposal and the proposed measures is sufficient. The decision to register a proposed ECI involves an initial legal assessment of the proposal and is without prejudice to the Commission's assessment in its communication on the ECI, which contains its final position on whether or not it will submit a proposal for an EU legal act in response to the ECI in question. Therefore, the Commission may only refuse to register a proposed ECI if, in examining whether the registration condition relating to whether a proposed ECI falls within the scope of its powers has been satisfied, it concludes that it can be completely ruled out that the Commission could submit a proposal for an EU legal act for the purpose of implementing the Treaties. On the other hand, if the Commission cannot come to such a conclusion, it is obliged to register the proposed ECI in question in order to enable the political debate within the institutions, which is triggered as a result of that registration.

In the second place, ruling on whether the Commission properly identified the content of the proposed ECI at issue, the General Court notes that that proposal is correctly presented in the contested decision and that its content was not distorted. In accordance with the case-law, [22] the Commission examined the proposed measures, considered in the abstract, from an objective point of view, confining itself, in essence, to presenting the subject matter and objectives of the proposed ECI and determining that that proposal fell within the scope of the EU Cohesion Policy.

In the third place, the General Court rejects the complaint concerning the existence of some reservations in the Commission's assessment. The General Court emphasises that, in order to ensure that the ECI is easily accessible, the Commission may, if necessary, 'frame', 'qualify' or even partially register the proposed ECI in question in order to ensure that it is easily accessible, provided that it complies with its obligation to state reasons and that the content of the proposal is not distorted. That approach allows the Commission - instead of refusing to register a proposed ECI - to register it in a qualified manner, in order to preserve the effectiveness of the objective pursued by Regulation 211/2011.

Lastly, in the fourth place, ruling on the question whether Articles 174 to 178 TFEU could constitute a legal basis for EU action as envisaged in the proposed ECI at issue, [23] the General Court notes that the Commission did not err in concluding, in the contested decision, that the proposed ECI at issue, inasmuch as it aimed proposals from the Commission for legal acts setting out the tasks, priority objectives and organisation of the Structural Funds and in so far as the actions to be financed were aimed at strengthening the economic, social and territorial cohesion of the European Union, did not manifestly fall outside the scope of its powers.

22 Judgment in Case C-420/16 P, cited above.

23 These articles fall under Title XVIII TFEU which concerns economic, social and territorial cohesion.

2. PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

Judgment of the Court (Grand Chamber) of 30 November 2021, LR Ģenerālprokuratūra, C-3/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Protocol (No 7) on the privileges and immunities of the European Union – Member of an organ of the European Central Bank – Governor of a national central bank of a Member State – Immunity from criminal proceedings – Indictment connected with activities carried out in the course of employment within the Member State

In June 2018, the Latvian Public Prosecutor charged the Governor of the Central Bank of Latvia ('AB') for various offences of corruption before the Rīgas rajona tiesa (Riga District Court, Latvia). Specifically, AB is accused of having accepted two bribes in connection with a procedure relating to prudential supervision of a Latvian bank and for having laundered the money from one of those bribes.

As Governor of the Central Bank of Latvia, AB, whose last term of office as governor ended in December 2019, was also a member of the General Council and the Governing Council of the European Central Bank (ECB).

In the light of that particular circumstance, the Riga District Court asks whether, by virtue of his status as a member of the General Council and the Governing Council of the ECB, AB may enjoy immunity under Article 11(a) of Protocol (No 7) on the privileges and immunities of the European Union, [24] which grants officials and other servants of the European Union immunity from legal proceedings in respect of all acts performed by them in their official capacity.

Thus, the Riga District Court decided to refer a question to the Court of Justice for a preliminary ruling seeking to ascertain whether and, if so, under what conditions and according to what arrangements the governor of a central bank of a Member State may enjoy immunity from legal proceeding under the Protocol on privileges and immunities in the context of criminal proceedings against him or her.

Findings of the Court

Pointing out that all the governors of the central banks of the Member States are members of the General Council of the ECB and that the governors of the central banks of the Member States whose currency is the euro are also members of the Governing Council of the ECB, the Court, sitting as the Grand Chamber, observes, first of all, that the Protocol on privileges and immunities, in accordance with Article 22 thereof, applies to the ECB, the members of its organs and its staff. Consequently, that protocol is applicable to the governors of the central banks of the Member States, as members of at least one organ of the ECB.

In that context, the governors of the central banks, more specifically, enjoy the immunity from legal proceedings provided for in Article 11(a) of the Protocol on privileges and immunities in respect of acts performed in their official capacity as a member of an organ of the ECB. In accordance with that provision, those governors continue to enjoy that immunity from legal proceedings after they have ceased to hold office.

24 Protocol (No 7) on the privileges and immunities of the European Union (OJ 2016 C 202, p. 266) ('the Protocol on privileges and immunities').

As regards the purpose and scope of the protection provided for in Article 11(a) of the Protocol on privileges and immunities, the Court points out, next, that under the first paragraph of Article 17 of that protocol, immunity from legal proceedings is accorded solely in the interests of the European Union. The second paragraph of Article 17 of that protocol implements that principle by requiring that each institution of the European Union is to be required to waive that immunity wherever that institution considers that the waiver of such immunity is not contrary to the interests of the European Union.

Thus, it is for the ECB alone, when seised of an application for waiver of immunity from legal proceedings concerning a governor of a central bank in the light of ongoing national criminal proceedings, to assess whether the waiver of immunity is contrary to the interests of the European Union.

By contrast, the ECB and the authority responsible for criminal proceedings concerning a governor of a national central bank share competence to determine whether the conduct liable to be characterised as criminal was carried out by the governor in his or her official capacity as a member of an organ of the ECB and therefore falls within the scope of the immunity from legal proceedings provided for in Article 11(a) of the Protocol on privileges and immunities.

As regards the arrangements for that division of competence, the Court states that, where the authority responsible for the criminal proceedings finds that the conduct in question was manifestly not carried out by the governor of the central bank in his or her official capacity as a member of an organ of the ECB, the proceedings against him or her may be continued since immunity from legal proceedings does not apply. That is the case in respect of acts of fraud, corruption or money laundering committed by the governor of a central bank of a Member State, which fall necessarily outside the bounds of the duties of an official or other servant of the European Union.

On the other hand, where, at any stage of the criminal proceedings, the national authority finds that the conduct in question was carried out by the governor concerned in his or her official capacity as a member of an organ of the ECB, it must request a waiver of immunity from legal proceedings. Where the national authority raises that issue, it is required to consult the ECB and, if the ECB considers that the acts were carried out in an official capacity, the authority must request from it the waiver of immunity of the governor concerned. Such requests for waiver of immunity must be granted, unless it is established that the interests of the Union preclude it.

Respect for that division of competence is, moreover, subject to review by the Court, which may be seised of an action for failure to fulfil obligations under Article 258 TFEU where the national authorities fail to fulfil their obligation to consult the EU institution concerned where all doubt as to the applicability of immunity from legal proceedings cannot reasonably be ruled out. Conversely, where the waiver of immunity is refused by the competent EU institution, the validity of that refusal may be the subject of a reference for a preliminary ruling to the Court or even of a direct action brought by the Member State concerned on the basis of Article 263 TFEU.

As regards the scope of the immunity from legal proceedings provided for in Article 11(a) of the Protocol on privileges and immunities, the Court states that such immunity does not preclude the criminal prosecution in its entirety, in particular investigative measures, the gathering of evidence and service of the indictment. Nevertheless, if, at the stage of the investigations conducted by the national authorities and before the matter is brought before a court, it is established that the official or servant of the European Union may enjoy immunity from legal proceedings in respect of the acts which are the subject of the criminal prosecution, it is for those authorities to request a waiver of immunity from the EU institution concerned. Moreover, that immunity, since it is enjoyed by the official or servant of the European Union concerned only in respect of a particular act, does not preclude evidence gathered during a police or judicial investigation into such an official or servant from being used in other proceedings concerning other acts not covered by the immunity or directed against third parties.

Lastly, the Court notes that, even if immunity from legal proceedings does not apply where the beneficiary of that immunity is implicated in criminal proceedings in respect of acts which have not been carried out in the context of the duties which he or she performs on behalf of an EU institution, abusive national prosecutions initiated in respect of acts which are not covered by that immunity in

order to exert pressure on the EU servant concerned would, in any event, be contrary to the principle of sincere cooperation enshrined in the third subparagraph of Article 4(3) TEU.

IV. LITIGATION OF THE UNION: REFERENCE FOR A PRELIMINARY RULING

Judgment of the Court (Grand Chamber) of 23 November 2021, IS (Illégalité de l'ordonnance de renvoi), C-564/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2010/64/EU – Article 5 – Quality of the interpretation and translation – Directive 2012/13/EU – Right to information in criminal proceedings – Article 4(5) and Article 6(1) – Right to information about the accusation – Right to interpretation and translation – Directive 2016/343/EU – Right to an effective remedy and to a fair trial – Article 48(2) of the Charter of Fundamental Rights of the European Union – Article 267 TFEU – Second subparagraph of Article 19(1) TEU – Admissibility – Appeal in the interests of the law against a decision ordering a reference for a preliminary ruling – Disciplinary proceedings – Power of the higher court to declare the request for a preliminary ruling unlawful

A judge of the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) ('the referring judge') is seised of criminal proceedings brought against a Swedish national. At the first interview with the investigative authority, the accused, who does not speak Hungarian and was assisted by a Swedish-language interpreter, was informed of the suspicions against him. However, there is no information as to how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and the accused understood each other. Indeed, Hungary does not have an official register of translators and interpreters and Hungarian law does not specify who may be appointed in criminal proceedings as a translator or interpreter, nor according to what criteria. Consequently, according to the referring judge, neither the lawyer nor the court is in a position to verify the quality of the interpretation. In those circumstances, he considers that the accused's right to be informed of his rights could be infringed, as well as his rights of defence.

Accordingly, the referring judge decided to ask the Court of Justice whether Hungarian law was compatible with Directive 2010/64, [25] on the right to interpretation and translation in criminal proceedings, and Directive 2012/13, [26] on the right to information in such proceedings. In the event of incompatibility, he also asks whether the criminal proceedings may be continued in the absence of the accused, as such proceedings are provided for under Hungarian law, in certain cases, where the accused is not present at the hearing.

Following that initial reference to the Court, the Kúria (Supreme Court, Hungary) ruled on an appeal in the interests of the law brought by the Hungarian Prosecutor General against the order for reference and held that order to be unlawful, without, however, altering its legal effects, on the ground, in essence, that the questions referred were not relevant and necessary for the resolution of the dispute

25 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

26 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).

concerned. On the same grounds as those underlying the decision of the Kúria (Supreme Court), disciplinary proceedings, which have in the meantime been discontinued, were brought against the referring judge. Since he was uncertain as to whether such proceedings and the decision of the Kúria (Supreme Court) are compatible with EU law and as to the impact of that decision on the action to be taken upon the criminal proceedings before him, the referring judge made a supplementary request for a preliminary ruling in that regard.

Findings of the Court

First of all, the Court, sitting as the Grand Chamber, holds that the system of cooperation between the national courts and the Court of Justice, established by Article 267 TFEU, precludes a national supreme court from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling submitted by a lower court is unlawful, without, however, altering the legal effects of the order for reference, on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings. Such a review of legality is similar to the review carried out in order to determine whether a request for a preliminary ruling is admissible. for which the Court of Justice has exclusive jurisdiction. Furthermore, such a finding of illegality is liable, first, to weaken the authority of the answers that the Court will provide and, secondly, to limit the exercise of the national courts' jurisdiction to make a reference to the Court for a preliminary ruling and, consequently, is liable to restrict the effective judicial protection of the rights which individuals derive from EU law.

In such circumstances, the principle of the primacy of EU law requires the lower court to disregard the decision of the supreme court of the Member State concerned. That conclusion is in no way undermined by the fact that, subsequently, the Court may find that the questions referred for a preliminary ruling by that lower court are inadmissible.

In the second place, the Court holds that EU law precludes disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of Justice, since the mere prospect of being the subject of such proceedings can undermine the mechanism provided for in Article 267 TFEU and judicial independence, which independence is essential to the proper working of that mechanism. Moreover, such proceedings are liable to deter all national courts from making references for a preliminary ruling, which could jeopardise the uniform application of EU law.

Lastly, in the third place, the Court examines the obligations of the Member States under Directive 2010/64 with regard to interpretation and translation in criminal proceedings. In that regard, the Member States must take specific measures ensuring, first, that the quality of the interpretation and translations is sufficient to enable the suspect or accused person to understand the accusation against him or her. The creation of a register of independent translators or interpreters is, in that regard, one of the means of pursuing that objective. Secondly, the measures adopted by the Member States must enable the national courts to ascertain that the interpretation was of sufficient quality, so that the fairness of the proceedings and the exercise of the rights of the defence are safeguarded.

Following that verification, a national court may conclude that, either because the interpretation provided was inadequate or it is impossible to ascertain its quality, a person has not been informed, in a language which he or she understands, of the accusation against him or her. In such circumstances, Directives 2010/64 and 2012/13, read in the light of the rights of the defence, within the meaning of Article 48(2) of the Charter of Fundamental Rights of the European Union, preclude the criminal proceedings from being continued *in absentia*.

V. BORDER CONTROLS, ASYLUM AND IMMIGRATION: ASYLUM POLICY

Judgment of the Court (Grand Chamber) of 9 November 2021, Bundesrepublik Deutschland (Maintien de l'unité familiale), C-91/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Common policy on asylum and subsidiary protection – Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection – Directive 2011/95/EU – Articles 3 and 23 – More favourable standards capable of being retained or introduced by the Member States for the purpose of extending the refugee or subsidiary protection status of a beneficiary of international protection to family members – Grant of a parent's refugee status to his or her minor child as a derived right – Maintaining family unity – Best interests of the child

The applicant in the main proceedings, LW, a Tunisian national, was born in Germany in 2017 to a Tunisian mother, whose application for asylum was unsuccessful, and a Syrian father, who was granted refugee status in 2015. The asylum application submitted on behalf of LW was rejected by decision of the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany).

Having been unsuccessful before the court hearing an appeal against that decision, LW brought an appeal on a point of law against the judgment of that court before the referring court, the Bundesverwaltungsgericht (Federal Administrative Court, Germany).

The referring court states that LW cannot claim refugee status in her own right. She could enjoy effective protection in Tunisia, a country of which she is a national. However, LW fulfils the conditions laid down by national law [27] for recognition, as a derived right and for the purposes of maintaining family unity in the context of asylum, of refugee status as a minor child of a parent who has been granted refugee status. Under that legislation, refugee status should also be granted to a child who was born in Germany and has, by his or her other parent, the nationality of a third country in whose territory he or she is not persecuted.

Uncertain whether such an interpretation of German law is compatible with Directive 2011/95, [28] the referring court stayed proceedings in order to seek a ruling from the Court on the interpretation of Article 3 [29] and Article 23(2) [30] of that directive. By its judgment, the Court, sitting as the Grand Chamber, replies that those provisions do not preclude a Member State from granting, under more favourable national provisions, as a derived right and for the purpose of maintaining family unity, refugee status to the minor unmarried child of a third-country national who has been recognised as having that status, including in the case where that child was born in the territory of that Member State and, through that child's other parent, has the nationality of another third country in which he

27 In the present case, Paragraph 26(2) and (5) of the Asylgesetz (Law on asylum), in the version applicable to the dispute in the main proceedings. Those combined provisions provide for the recognition, on request, of the minor unmarried child of a refugee as being entitled to international protection where the status acquired by his or her parent is final.

28 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).

29 The provision makes it possible for Member States to introduce more favourable standards for determining who qualifies as a refugee and for determining the content of international protection, in so far as those standards are compatible with the directive.

30 That provision, the purpose of which is to ensure that the family unity of the beneficiary of international protection is maintained where the members of his or her family do not individually fulfil the conditions necessary to qualify for such protection, provides for the extension to those family members of some of the benefits granted to the beneficiary.

or she would not be at risk of persecution. The compatibility of such national provisions with Directive 2011/95 presupposes, however, that the child is not caught by a ground for exclusion referred to in that directive and that the child is not, through his or her nationality or any other element characterising his or her personal legal status, entitled to better treatment in that Member State than that resulting from the grant of refugee status.

Findings of the Court

In the first place, the Court finds that a child in a situation such as the one in the main proceedings does not satisfy the conditions for being granted refugee status on an individual basis under the system established by Directive 2011/95.

It follows from that directive that, the status of refugee requires the fulfilment of two conditions which relate, on the one hand, to the fear of persecution and, on the other, to the lack of protection from acts of persecution by third countries of which the person concerned is a national. LW could enjoy effective protection in Tunisia. The Court points out, in that context, that, under the system established by Directive 2011/95, an application for international protection cannot be granted, on an individual basis, solely on the ground that a member of the applicant's family has a well-founded fear of persecution or faces a real risk of serious harm, where it is established that, despite his or her relation to that family member and the particular vulnerability which ensues, the applicant is not personally exposed to the threat of persecution or serious harm. [31]

In the second place, the Court notes that Directive 2011/95 does not provide for the extension, as a derived right, of refugee status to the family members of a refugee who do not individually satisfy the conditions for granting that status. Article 23 of that directive merely requires the Member States to amend their national law so that those family members are entitled, in so far as that is compatible with their personal legal status, to certain advantages which include a residence permit or access to employment, which are intended to maintain family unity. Moreover, the obligation on the Member States to provide access to those advantages does not extend to the children of a beneficiary of international protection who were born in the host Member State to a family based in that State.

In the third place, in order to determine whether a Member State may nevertheless grant, as a derived right and for the purpose of maintaining family unity, refugee status to a child in a situation such as LW's, the Court points out that Article 3 of Directive 2011/95 allows Member States to introduce more favourable standards for determining who qualifies as a refugee, in so far as those standards are compatible with that directive.

In particular, such standards are incompatible with the directive if they are intended to grant refugee status to third country nationals in situations which have no connection with the rationale of international protection. [32] However, the automatic extension, as a derived right, of refugee status to the minor child of a person to whom that status was granted, irrespective of whether or not that child individually satisfies the conditions for granting refugee status and including where that child was born in the host Member State, provided for by the national provision at issue in the main proceedings in order to maintain the family unity of refugees, is consistent with the rationale of international protection.

The Court notes, however, that there may be situations in which the automatic extension, as a derived right and for the purpose of maintaining family unity, of refugee status to a refugee's minor child would, despite the existence of that connection, be incompatible with Directive 2011/95.

Thus, first, the reservation in Article 3 of that directive precludes a Member State from introducing provisions granting refugee status to a person who is excluded from it pursuant to Article 12(2) of that

31 See judgment of 4 October 2018, Ahmedbekova (C-652/16, EU:C:2018:801, paragraph 50).

32 See judgment of 4 October 2018, Ahmedbekova (C-652/16, EU:C:2018:801, paragraph 71).

directive. The national legislation at issue in the main proceedings excludes such persons from benefiting from the extension of refugee status.

Secondly, the reservation set out in Article 23(2) of Directive 2011/95 excludes advantages granted to a beneficiary of international protection from being extended to a family member of that beneficiary where that would be incompatible with the personal legal status of the family member concerned. The Court clarifies the scope of that reservation, which must also be respected where a Member State applies more favourable rules adopted pursuant to Article 3 of that directive, under which the status granted to a beneficiary of international protection is automatically extended to members of his or her family, irrespective of whether the conditions for granting that status are satisfied.

In that regard, it would be incompatible with the personal legal status of the child of a beneficiary of international protection who does not individually satisfy the conditions for obtaining that protection to extend to that child the advantages referred to in Article 23(2) of Directive 2011/95 or the status granted to that beneficiary, where that child has the nationality of the host Member State or another nationality which gives him or her, having regard to all the elements of his or her personal legal status, the right to better treatment in that Member State than that resulting from such an extension. That interpretation of the reservation in Article 23(2) of Directive 2011/95 takes account of the best interests of the child, in the light of which that provision must be interpreted and applied.

In the present case, it does not appear that LW, through her Tunisian nationality or any other element characterising her personal legal status, is entitled to better treatment in Germany than that resulting from the extension, as a derived right, of the refugee status granted to her father.

Finally, the Court states that the compatibility with Directive 2011/95 of the application of more favourable national provisions, such as those at issue, to a situation such as LW's, does not depend on whether it is possible for LW and her parents to settle in Tunisia. Since Article 23 of that directive is intended to enable a refugee to enjoy the rights which that status confers while maintaining the unity of his or her family in the host Member State, the fact that it is possible for LW's family to move to Tunisia cannot justify the reservation in paragraph 2 of that provision being understood as precluding her from being granted refugee status, since such an interpretation would involve her father waiving the right to asylum conferred on him in Germany.

Judgment of the Court (Grand Chamber) of 16 November 2021, Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile), C-821/19

Link to the complete text of the judgment

Actions for failure to fulfil obligations – Area of freedom, security and justice – Asylum policy – Directives 2013/32/EU and 2013/33/EU – Procedure for granting international protection – Grounds of inadmissibility – Concepts of 'safe third country' and 'first country of asylum' – Assistance given to asylum seekers – Criminalisation – Prohibition on entry to the border transit zone of the relevant Member State

In 2018, Hungary amended certain laws concerning measures against illegal immigration and enacted, in particular, provisions which, first, added a further ground of inadmissibility of an application for international protection and, second, criminalised organising activities facilitating the lodging of asylum applications by persons who are not entitled to asylum under Hungarian law, and which provided for restrictions on freedom of movement on persons suspected of having committed such an offence.

Taking the view that, by enacting those provisions, Hungary had failed to fulfil its obligations under the Procedures [33] and Reception [34] Directives, the European Commission brought an action for failure to fulfil obligations before the Court of Justice.

The Court, sitting as the Grand Chamber, has upheld for the most part the Commission's action.

Findings of the Court

First, the Court of Justice finds that Hungary has failed to fulfil its obligations under the Procedures Directive [35] by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. The Procedures Directive [36] sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible. The ground for inadmissibility introduced by the Hungarian legislation corresponds to none of those situations. [37]

Second, the Court finds that Hungary has failed to fulfil its obligations under the Procedures [38] and Reception [39] Directives by criminalising, in its national law, the actions of any person who, in connection with an organising activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person knew that that application would not be accepted under that law.

In reaching that conclusion, the Court examines (i) whether the Hungarian legislation which created that offence amounts to a restriction of the rights provided for in the Procedures and Reception Directives and (ii) whether such a restriction can be justified under EU law.

Thus, in the first place, having ascertained that certain activities of assistance for applicants for international protection referred to in the Procedures and Reception Directives fall within the scope of the Hungarian legislation, the Court holds that that legislation amounts to a restriction on the rights enshrined in those directives. More specifically, that legislation restricts, first, the right of access to applicants for international protection and the right to communicate with those persons [40] and, second, the effectiveness of the right afforded to asylum seekers to be able to consult, at their own expense, a legal adviser or other counsellor. [41]

In the second place, the Court considers that such a restriction cannot be justified by the objectives relied on by the Hungarian legislature, namely the prevention of the assistance of misuse of the asylum procedure and of illegal immigration based on deception.

As regards the first objective, the Court notes that the Hungarian legislation also suppresses actions which cannot be regarded as a fraudulent or abusive practice. Once it has been proved that the accused was aware of the fact that the individual who he or she was assisting could not obtain

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

34 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96) ('the Reception Directive').

35 Article 33(2) of the Procedures Directive lists the situations in which Member States may consider an application for international protection to be inadmissible.

36 Article 33(2) of the Procedures Directive.

37 See judgment of 14 May 2020, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraphs 149, 151 and 161 to 164) (PR No 60/20).

38 Article 8(2) of the Procedures Directive, on the access of applicants for international protection to organisations and persons providing advice and counselling to them, and Article 22(1) of that directive, on the right to legal assistance and representation at all stages of the procedure.

39 Article 10(4) of the Reception Directive, on the access, inter alia, of legal advisers or counsellors and persons representing relevant non-governmental organisations to detention facilities.

40 Those rights are granted to persons or organisations providing assistance to applicants for international protection in Article 8(2) of the Procedures Directive and in Article 10(4) of the Reception Directive.

41 That right is provided for in Article 22(1) of the Procedures Directive.

refugee status under Hungarian law, the accused may be convicted of a criminal offence for any assistance provided in connection with an organising activity in order to facilitate the making or lodging of an asylum application, even if that assistance is provided in strict compliance with the procedural rules laid down in that regard and without any intention to mislead the determining authority.

Thus, first of all, it should be noted that any person could be prosecuted who assists in the making or lodging of an application for asylum, despite knowing that that application cannot succeed under the rules of Hungarian law, but considers that those rules are contrary, in particular, to EU law. Therefore, asylum seekers could be deprived of assistance enabling them to challenge, at a later stage of the procedure for granting asylum, the lawfulness of the national legislation applicable to their situation in the light, in particular, of EU law.

Next, that legislation criminalises assistance provided to a person for the purposes of making or lodging an application for asylum when that person has not suffered persecution and is not exposed to a risk of persecution in at least one State through which he or she has transited before arriving in Hungary. The Procedures Directive precludes an application for asylum from being rejected as inadmissible on that ground. Therefore, such assistance cannot, in any circumstances, be regarded as a fraudulent or abusive practice.

Lastly, in so far as it does not preclude a person from being convicted of a criminal offence on the ground that it can actually be proved that he or she could not have been unaware that the applicant he or she assisted did not satisfy the conditions for obtaining asylum, the Court finds that that legislation requires persons wishing to provide such assistance to examine, as of the making or lodging of an application, whether the application may be successful under Hungarian law. First, such an examination cannot be expected of those persons, particularly since asylum seekers may have difficulty in relying, as of that stage, on the relevant evidence on the basis of which they could obtain refugee status. Second, the risk that those persons concerned might be subject to a particularly severe criminal sentence, namely deprivation of liberty, on the sole ground that they could not be unaware that the application for asylum would be unsuccessful, renders uncertain the lawfulness of any assistance intended to enable the completion of those two essential stages of the procedure for the grant of asylum. That legislation is thus capable of strongly discouraging any person wishing to provide assistance at those stages of the procedure despite the fact that that assistance is intended solely to enable a third-country national to exercise the fundamental right to apply for asylum in a Member State, and goes beyond what is necessary to attain the objective of preventing fraudulent or abusive practices.

As regards the second objective sought by the Hungarian legislation, the Court finds that the provision of assistance with a view to making or lodging an application for asylum in a Member State cannot be regarded as an activity which encourages the unlawful entry or residence of a third-country national in that Member State, so that the offence introduced by the Hungarian legislation is not a measure capable of pursuing such an objective.

Lastly, the Court finds that Hungary has failed to fulfil its obligations under the Procedures [42] and Reception [43] Directives by preventing any person from the right to approach its external borders who, in connection with an organising activity, is suspected of having provided assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be successful. That legislation restricts the rights enshrined in those directives since a person is suspected of having committed an offence by providing assistance in the abovementioned circumstances, despite the

42 Article 8(2), Article 12(1)(c) and Article 22(1) of the Procedures Directive.

43 Article 10(4) of the Reception Directive.

criminalisation of such action being contrary to EU law. It follows that such a restriction cannot reasonably be justified under EU law.

VI. JUDICIAL COOPERATION IN CIVIL MATTERS: COUNCIL REGULATION (EC) NO 2201/2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY

Judgment of the Court (Third Chamber) of 25 November 2021, IB (Résidence habituelle d'un époux - Divorce), C-289/20

Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EC) No 2201/2003 – Jurisdiction to hear divorce applications – Article 3(1)(a) – 'Habitual residence' of an applicant

IB, a French national, and FA, an Irish national, were married in Ireland in 1994. They had three children, who are now adults. In 2018, IB filed an application for divorce before the tribunal de grande instance de Paris (Regional Court, Paris, France). That court declared that it lacked territorial jurisdiction to rule on the divorce and IB subsequently lodged an appeal before the cour d'appel de Paris (Court of Appeal, Paris, France). The latter is asked to assess the jurisdiction of the tribunal de grande instance de Paris (Regional Court, Paris) with regard to IB's habitual residence, in accordance with the Brussels IIa Regulation. [44] In that respect, it notes, inter alia, that there are numerous circumstances indicating IB's personal and family ties with Ireland, where he lived since 1999 with his wife and children. However, it also points out that, for several years, IB returned every week to France, where he established the centre of his professional interests. Accordingly, the referring court considered that IB had in fact two residences, one for the weeks when he was in Paris for professional reasons and the other, with his wife and children in Ireland, for the rest of the time.

In those circumstances, the cour d'appel de Paris (Court of Appeal, Paris) decided to refer the matter to the Court of Justice in order to determine which courts have jurisdiction to rule on the divorce of IB and FA, pursuant to Article 3(1)(a) of the Brussels IIa Regulation. In particular, it asks the Court whether a spouse who divides his or her time between two Member States may have his or her habitual residence in both Member States, with the result that the courts of both Member States have jurisdiction to rule on the divorce.

In its judgment, the Court clarifies the concept of the 'habitual residence' of a spouse and holds that, even if a spouse divides his or her time between two Member States, he or she may have only one habitual residence within the meaning of Article 3(1)(a) of the Brussels IIa Regulation.

Findings of the Court

Since the Brussels IIa Regulation does not provide any definition of that concept and makes no reference to the law of the Member States in that regard, the Court states that that concept must be given an autonomous and uniform interpretation. It observes, inter alia, that neither Article 3(1)(a) of the Brussels IIa Regulation nor any other provisions of that regulation provide that a person may, at

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44 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 Brussels IIa Regulation').

the same time, have several habitual residences or be habitually resident in several places. Such a situation would, in particular, be liable to undermine legal certainty, by making it more difficult to determine in advance which courts have jurisdiction to rule on the divorce and by making it more difficult for the court seised to determine whether it has jurisdiction.

Next, relying on its case-law on the habitual residence of a child, the Court considers that the concept of 'habitual residence', [45] for the purposes of determining jurisdiction in matters relating to the dissolution of matrimonial ties, is characterised, in principle, by two factors, namely, first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, secondly, a presence which is sufficiently stable in the Member State concerned.

Thus, a spouse relying, as an applicant, on the jurisdiction of the courts of the Member State of his or her habitual residence, pursuant to Article 3(1)(a) of the Brussels IIa Regulation, must necessarily have transferred his or her habitual residence to a Member State other than that of the former matrimonial residence. He or she must therefore have manifested an intention to establish the habitual centre of his or her interests in that other Member State and have demonstrated that his or her presence in the territory of that Member State shows a sufficient degree of stability.

In that context, the Court emphasises the particular circumstances surrounding the determination of the habitual residence of a spouse. Thus, where a spouse decides to settle in another Member State because of a marital crisis, he or she remains free to retain social and family ties in the Member State of the former matrimonial residence. Moreover, the environment of an adult is more varied than that of a child, consisting of a wider range of activities and diverse interests, and it cannot be required that they should be focused on the territory of a single Member State.

In the light of those considerations, the Court concludes that, although a spouse may have several residences at the same time, he or she may have, at a given time, only one habitual residence within the meaning of Article 3(1)(a) of the Brussels IIa Regulation. Consequently, where a spouse divides his or her time between two Member States, only the courts of the Member State in which that habitual residence is situated have jurisdiction to rule on the application for dissolution of the matrimonial ties. It is for the referring court to ascertain, on the basis of all the factual circumstances of the case, whether IB has transferred his habitual residence, for the purposes of Article 3(1)(a) of the Brussels IIa Regulation, to the Member State of that court.

45 See, inter alia, judgment of 28 June 2018, *HR*, C-512/17, EU:C:2018:513.

VII. COMPETITION: STATE AID

Judgment of the General Court (Eighth Chamber) of 10 November 2021, Solar Electric and Others v Commission, T-678/20

Link to the complete text of the judgment

State aid – Market for electricity produced from renewable energy sources, including photovoltaic energy – Obligation under French law to purchase electricity at a price higher than the market price – Rejection of a complaint – Article 12(1) and Article 24(2) of Regulation (EU) 2015/1589 – Scope

In order to encourage the development of renewable energy in its territory, France, in 2000, introduced a legal obligation on Électricité de France (EDF) and certain other electricity suppliers to enter into, at the request of the producers concerned, contracts for the purchase of electricity produced from renewable energy sources ('green electricity'). Those contracts were for a period of 20 years and provided for the purchase of green electricity at the price set by the ministerial pricing orders in force on the day of submission of the complete application by the producer for connection to the public network.

In that context, the Solar Electric Group, involved in the development, construction and operation of photovoltaic plants in French Guiana and Martinique, entered into contracts for the purchase of green electricity by EDF at the prices set by the pricing orders of 10 July 2006, 12 January 2010 and 31 August 2010.

Until the end of 2015, the costs borne by electricity distributors as a result of the obligation to purchase green electricity were the subject of a full offset mechanism financed by a contribution to the public electricity service levied on electricity consumers. Since 2016, those costs have been compensated by a special account financed by taxes on the consumption of energy products.

In 2019, the Cour de cassation (Court of Cassation, France) held that the measures based on the pricing orders of 10 July 2006 and 12 January 2010, implementing a purchase obligation mechanism in respect of green electricity at a price higher than the market price, constituted unlawful State aid in that they had not been notified to the European Commission.

Solar Electric, having received confirmation from the Commission that the measure based on the pricing orders at issue had not been notified to it, made a complaint relating to the aid schemes resulting from those pricing orders and requested the Commission to make an express finding as to their compatibility with the internal market.

That complaint was submitted pursuant to Article 24(2) of the regulation laying down detailed rules for the application of Article 108 TFEU, [46] under which any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid.

By letter of 3 September, the Commission rejected the complaint on the ground that the subject matter did not fall within the scope of Article 24(2) of the regulation laying down detailed rules for the application of Article 108 TFEU.

Confirming that finding, the General Court dismisses the action for annulment brought by Solar Electric against that decision.

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46 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9) ('the regulation laying down detailed rules for the application of Article 108 TFEU').

Findings of the Court

The Court notes, first of all, that the complaint lodged by Solar Electric sought to obtain from the Commission a decision not to raise objections to the compatibility with the internal market of the measures implemented by the French authorities and based on the pricing orders of 10 July 2006, 12 January 2010 and 31 August 2010.

Thus, the action brought by Solar Electric raises the question of whether Article 24(2) of the regulation laying down detailed rules for the application of Article 108 TFEU confers on the beneficiary of new, unlawfully granted aid an individual right to submit a complaint to the Commission in order to obtain from it a decision declaring aid which has not been notified by the Member State concerned to be compatible with the internal market.

Although a literal interpretation of the wording of the provisions of the regulation laying down detailed rules for the application of Article 108 TFEU tends to establish that the beneficiaries of unlawfully granted aid may submit a complaint to the Commission under Article 24(2) of that regulation, such a conclusion must nevertheless be rejected on grounds relating to the structure of State aid control and the scheme of the complaints mechanism.

As regards, first of all, the structure of State aid control, the Court recalls that the notification requirement is one of the fundamental features of the system of State aid control put in place by the FEU Treaty, which establishes a prior control of plans to grant new aid established by Article 108(3) TFEU. In that context, it is apparent from the actual structure of Article 108(3) TFEU that only the Member States are under the obligation to notify. To accept that the recipient of unlawfully granted aid may submit a complaint to the Commission in order for it to establish that the aid is compatible with the internal market would have no effect other than to allow that recipient to take the place of the Member State concerned, which alone is competent to notify an aid measure to the Commission.

Moreover, such an option for the beneficiary of unlawfully granted aid to submit a complaint to the Commission would call into question the fundamental and imperative nature of the obligation to notify aid measures and the prohibition on their implementation under Article 108(3) TFEU, as well as the penalty in principle associated with the failure of the Member State to fulfil, inter alia, that obligation to give prior notification, namely the repayment of that aid.

Furthermore, the recipients of unlawful aid may bring proceedings before their national courts in order to have a penalty imposed on the State providing that aid on account of an express or implied refusal to comply with its obligation to notify. Accordingly, it is not appropriate to recognise that those recipients have the right to initiate, by means of a complaint addressed to the Commission, the examination of the compatibility of the aid with the aim of having it authorised.

As regards, secondly, the scheme of the complaint mechanism established by the regulation laying down detailed rules for the application of Article 108 TFEU, the Court notes that that mechanism was designed to identify aid that is incompatible with the internal market. It follows that the scope of Article 24(2) of that regulation is limited to complaints made against unlawful aid which complainants consider to be incompatible with the internal market. By contrast, the scope of Article 24(2) of that regulation does not cover complaints by which complainants maintain that aid is compatible with the internal market and should, for that reason, be authorised by the Commission.

Consequently, the recipients of unlawful aid cannot rely on Article 24(2) of the regulation laying down detailed rules for the application of Article 108 TFEU in order to lodge a complaint concerning unlawful aid which they directly or indirectly receive, with the aim of having the Commission adopt a decision declaring that aid to be compatible with the internal market.

Lastly, the Court also rejects Solar Electric's argument that the Commission's failure to adopt a position on its complaint creates a legal vacuum which Articles 107 to 109 TFEU, as well as the regulation laying down detailed rules for the application of Article 108 TFEU, seek to avoid, recalling that EU law does not impose an obligation upon the Commission to carry out an assessment of the compatibility of aid which has not been notified as soon as it is informed of that aid by a complaint submitted by a recipient such as Solar Electric.

VIII. APPROXIMATION OF LAWS: INTELLECTUAL AND INDUSTRIAL PROPERTY

Judgment of the General Court (Tenth Chamber) of 10 November 2021, Eternit v EUIPO - Eternit Österreich (Panneau de construction), T-193/20

Link to the complete text of the judgment

Community design – Invalidity proceedings – Registered Community design representing a building panel – Earlier design representing a panel for a noise-reduction wall – Ground for invalidity – No individual character – Sector concerned – Informed user – Degree of freedom of the designer – No different overall impression – Relevance of goods actually marketed – Article 6 and Article 25(1)(b) of Regulation (EC) No 6/2002

Following an application filed with the European Union Intellectual Property Office (EUIPO), Eternit (Belgium) obtained the registration of a Community design representing a building panel. Eternit Österreich GmbH brought an application for a declaration of invalidity of that design, inter alia, on the ground that it did not have individual character [47] in relation to the earlier design representing a panel for a noise-reduction wall.

EUIPO declared the design at issue invalid, taking the view that it lacked individual character because, to the informed user, it was similar overall to the earlier design.

The Court dismisses Eternit's action against the decision of EUIPO. First, it clarifies, in relation to the designs at issue, that it is appropriate to define the sector concerned, the informed user and the degree of freedom of the designer. Second, it specifies whether the goods actually marketed in which the designs at issue are incorporated or to which they are applied are relevant to the assessment of the individual character of the contested design.

Assessment of the General Court

In the first place, the Court recalls that the assessment of the individual character of a design at issue is the result, in essence, of a four-stage examination. In that regard, it states that the first three stages of the analysis, namely the determination of the sector concerned, the informed user and the designer's degree of freedom, must be carried out only in relation to the design at issue. Given that the earlier design may fall within a completely different sector, characterised by a separate informed user and a separate freedom of the designer, it is not relevant for the purposes of those first three stages of the analysis. By contrast, the fourth stage, consisting of the comparison of the overall impressions produced by the designs at issue, requires both the contested design and the earlier design to be taken into account.

In the second place, the Court notes that, in the context of the assessment of individual character, account may be taken, in certain circumstances, of the goods actually marketed in which the designs at issue are incorporated or to which they are applied. It states that the goods actually marketed or the way in which they are used are relevant if the graphic or photographic representation of the design at issue does not, on its own, make it possible to determine which aspects of it are visible or the way in which the design will be perceived visually. The goods actually marketed may be taken into

47 For the purposes of Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), read in conjunction with Article 6 of that regulation, a Community design may be declared invalid if it does not have individual character, such that the overall impression it produces on the informed user does not differ from that produced on such a user by any design which has been made available to the public.

consideration only for illustrative purposes in order to determine the visual aspects of the designs. Thus, a product which is actually marketed may not be taken into account if the design applied to it or in which it is incorporated differs from the design as registered or if it displays features which are not clearly apparent from the graphic representation of that design.

Judgment of the General Court (Fifth Chamber) of 10 November 2021, Sanford v EUIPO - Avery Zweckform (Étiquettes), T-443/20

Link to the complete text of the judgment

Community design – Invalidity proceedings – Registered Community design representing a label – Earlier design – Proof of disclosure – Article 7(1) of Regulation (EC) No 6/2002 – Evidence submitted after the expiry of the prescribed time limit – Board of Appeal's discretion – Article 63(2) of Regulation No 6/2002 – Ground for invalidity – No individual character – Article 6 and Article 25(1)(b) of Regulation No 6/2002

Sanford LP was the proprietor of a Community design registered under the description 'labels' and representing printer label rolls. Avery Zweckform GmbH filed an application for a declaration of invalidity of that design with the European Union Intellectual Property Office (EUIPO) on the ground, inter alia, that it lacked individual character. [48]

The Cancellation Division of EUIPO rejected the application for a declaration of invalidity because the evidence submitted to demonstrate disclosure of an earlier design was insufficient. The Board of Appeal of EUIPO annulled that decision and found that some of the additional evidence submitted to it had to be taken into account, that the disclosure of an earlier design had been proved and that the contested design lacked individual character.

The General Court dismisses the action brought by Sanford and, in addition to applying, in relation to designs, the principles relating to the admissibility of evidence submitted out of time, it points out, inter alia, that, in the comparison of the overall impressions during the assessment of individual character, the marks and distinctive signs on the designs are irrelevant.

Findings of the Court

As regards, first, the admissibility of evidence submitted out of time, the Court states that, in that respect, EUIPO has a broad discretion because it may disregard evidence which the parties have not submitted in due time. [49] The Court points out that, where EUIPO is called upon to adjudicate in invalidity proceedings, the taking into account of evidence submitted out of time may be justified where that evidence is relevant to the outcome of the application for a declaration of invalidity, the circumstances do not preclude this and the evidence is submitted by way of complement to the evidence submitted within that time limit.

In the present case, the Court finds that the Board of Appeal made appropriate use of its discretion. The evidence submitted for the first time to the Board of Appeal was intended to demonstrate that the earlier design had been disclosed. Furthermore, that evidence is in addition to the evidence which had already been submitted to the Cancellation Division and considered insufficient to establish disclosure. That evidence was therefore relevant to the outcome of the dispute and could validly complement the evidence already submitted.

Furthermore, the admissibility of the evidence at issue did not infringe the applicant's right to be heard, since it was able to submit observations in that regard before the Board of Appeal.

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48 Within the meaning of Article 6 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

49 Under Article 63(2) of Regulation No 6/2002.

Secondly, the Court holds that the earlier design was made available to the public within the meaning of Article 7(1) of Regulation No 6/2002.

Thirdly, as regards the assessment of individual character, the Court finds that the differences between the designs at issue, which are limited to the size of the label, the height of the roll, and the number, position and size of the black prints marks, are insufficient to produce a different overall impression in the mind of the informed user.

In addition, it points out that the word and figurative elements on the designs at issue are marks or distinctive signs affixed to the product to indicate its origin. Those elements do not constitute features of the product giving the goods concerned their appearance and are therefore irrelevant in the comparison of the overall impressions. The Court adds that, even though those elements could be regarded as relevant, it will be clear to the informed user that their purpose is to indicate the origin of the goods, with the result that, in the overall impression, that user will not attach importance to them.

Accordingly, the Court holds that the designs at issue produce the same overall impression on the informed user and that the contested design therefore lacks individual character.

IX. SOCIAL POLICY: ORGANISATION OF WORKING TIME

Judgment of the Court (Fifth Chamber) of 11 November 2021, Dublin City Council, C-214/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Directive 2003/88/EC – Article 2 – Concept of 'working time' – Retained firefighter – Stand-by time according to a stand-by system – Pursuit, during the period of stand-by time, of a self-employed professional activity – Constraints arising from the stand-by system

MG, a retained firefighter employed on a part-time basis by Dublin City Council (Ireland), is, by virtue of a system of stand-by time according to a stand-by system, retained by the brigade of the fire station by which he was trained. He is required to participate in 75% of that brigade's interventions and has the option of refraining from the remaining interventions. Without being obliged, during his periods of stand-by time, to be present at a specific place, MG must, when he receives an emergency call to participate in an intervention, arrive at the fire station within a maximum period of 10 minutes. The period of stand-by time according to a stand-by system is, in principle, 7 days per week and 24 hours per day and is interrupted only by leave periods and periods of unavailability notified in advance.

MG is however permitted to carry out a professional activity, provided that that activity does not exceed 48 hours per week on average. Thus, he works as a taxi driver on his own account.

Taking the view that the hours for which he is on stand-by for his employer must be classified as 'working time' within the meaning of the Irish legislation on the organisation of working time and

Directive 2003/88, [50] MG filed a claim to that effect before the Workplace Relations Commission (Ireland). That claim having been rejected, he lodged an appeal before the Labour Court (Ireland).

MG maintains that he must at all times be in a position to respond rapidly to an emergency call, which prevents him from freely devoting himself to his family and social activities as well as to his employment as a taxi driver. By imposing stand-by 7 days per week and 24 hours per day, and by refusing to acknowledge that stand-by hours constitute working time, the Dublin City Council is in breach of the rules on daily and weekly rest and maximum weekly working time.

Ruling on a request for a preliminary ruling from the Labour Court, the Court of Justice clarifies in particular the extent to which periods of stand-by time according to a stand-by system may be classified as 'working time' with regard to Directive 2003/88. [51]

Findings of the Court

The Court recalls, first of all, that the concept of 'working time' set out in Article 2(1) of Directive 2003/88 covers the entirety of periods of stand-by time, including those according to a stand-by system, during which the constraints imposed on the worker are such as to affect, objectively and very significantly, the possibility for the latter freely to manage the time during which his or her professional services are not required and to pursue his or her own interests. [52]

Next, the Court provides guidance to the referring court to enable it to assess whether MG is subject to such major constraints.

In that regard, the Court observes that the possibility offered to MG to carry out another professional activity during his periods of stand-by time is an important indication that the terms of the stand-by system do not place that worker under major constraints having a very significant impact on the management of his time, provided that it is established that his rights and obligations arising from his employment contract, from collective agreements and from the Irish legislation are structured in such a way as to permit the effective pursuit of such an activity for a significant portion of those periods.

The fact that MG at no time has to be in a specific place during his periods of stand-by time, that he is not obliged to participate in the entirety of the interventions effected from his assigned fire station, since a quarter of them may in this case take place in his absence, and that he is permitted to carry out another professional activity, could constitute objective factors from which it may be concluded that he is in a position to develop, according to his own interests, that other professional activity during those periods and to devote a considerable part of the time of those periods to them, unless the average frequency of the emergency calls and the average duration of the interventions prevent the effective pursuit of a professional activity capable of being combined with the post of retained firefighter.

Organisational difficulties that may result from the choices made by the worker concerned, such as the choice of residence or places for the pursuit of another professional activity which are more or less distant from the place that he must be able to reach within the time limit set in the context of his post as a retained firefighter, may not be taken into account.

Thus, the Court concludes that Article 2(1) of Directive 2003/88 must be interpreted as meaning that a period of stand-by time according to a stand-by system served by a retained firefighter, during which that worker, with the permission of his or her employer, carries out a professional activity on his or her own account but must, in the event of an emergency call, reach his or her assigned fire station within 10 minutes, does not constitute 'working time' within the meaning of that provision if it follows

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50 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).

51 Article 2(1) of Directive 2003/88.

52 Judgment of 9 March 2021, *Stadt Offenbach am Main (A firefighter's period of stand-by time)* (C-580/19, EU:C:2021:183).

from an overall assessment of all the facts of the case that the constraints imposed on the said worker during that period are not of such a nature as to constrain objectively and very significantly the ability that he or she has freely to manage, during the said period, the time during which his or her services as a retained firefighter are not required.

X. ENVIRONMENT: EMISSION ALLOWANCE TRADING

Judgment of the Court (Fifth Chamber) of 11 November 2021, Energieversorgungscenter Dresden-Wilschdorf, C-938/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Environment – Directive 2003/87/EC – Greenhouse gas emission allowance trading scheme – Article 2(1) – Scope – Article 3(e) – Concept of 'installation' – Effect on emissions and pollution – Ancillary units not generating as such greenhouse gas emissions – Article 10a – Transitional rules for free allocation of allowances – Data Collection Template – Corrected eligibility ratio – Method of calculation – Decision 2011/278/EU – Third subparagraph of Article 6(1) – Export of cooling to an entity that belongs to a sector exposed to a significant risk of carbon leakage

Energieversorgungscenter Dresden-Wilschdorf GmbH & Co. KG ('EDW') is a German company which operates an industrial, gas engine combined heat and power plant that is subject to the greenhouse gas emission allowance trading scheme at EU level ('the ETS'). That cogeneration plant includes, as ancillary units, absorption chillers, which convert heat into cooling without emitting greenhouse gases themselves.

EDW's cogeneration plant supplies hot water, cold water and warm water exclusively to Global Foundries' semiconductors manufacturing factory, which is not subject to the ETS and whose activity, pursuant to EU rules, belongs to a sector exposed to a significant risk of carbon leakage. [53] The warm water supplied by EDW is in particular produced from the heat released by the absorption chillers as well as by using the heat which returns from Global Foundries' cooling circuit to those chillers.

In 2014, the German Emissions Trading Authority (the DEHSt') granted EDW only a portion of the free emission allowances requested by the latter. In that context, the DEHSt took the view, inter alia, that the absorption chillers formed part of EDW's installation subject to the ETS, which had an impact on the number of free emission allowances to be granted to EDW. Furthermore, it refused to find that the cooling supplied by the absorption chillers to Global Foundries is covered by the rules applicable to sectors or sub-sectors exposed to a significant risk of carbon leakage. In addition, the DEHSt refused to recognise any allowance entitlement as regards the heat flow from the warm water, in so far as the heat results from energy released by the operation of the absorption chillers. The DEHSt also deducted from the amounts of heat claimed by EDW the heat imported from Global Foundries' cooling circuit.

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53 Commission Decision 2010/2/EU of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and sub-sectors which are deemed to be exposed to a significant risk of carbon leakage (OJ 2010 L 1, p. 10); Commission Decision 2014/746/EU of 27 October 2014 determining, pursuant to Directive 2003/87/EC, a list of sectors and sub-sectors which are deemed to be exposed to a significant risk of carbon leakage, for the period 2015 to 2019 (OJ 2014 L 308, p. 114).

EDW brought an action before the Verwaltungsgericht Berlin (Administrative Court, Berlin, Germany) against DEHSt's decisions. Called upon to rule on the number of free emission allowances to be allocated to EDW, that court decided to request a preliminary ruling from the Court of Justice on the interpretation of various provisions of EU law applicable in that area.

In answer to those questions referred for a preliminary ruling, the Court provides clarification on, inter alia, the scope of the directive on the scheme for greenhouse gas emission allowance trading, [54] by interpreting the concept of 'installation' within the meaning of that directive.

Findings of the Court

In the first place, the Court confirms that the directive on the scheme for greenhouse gas emission allowance trading does not preclude national legislation which permits the inclusion, within the boundaries of an installation subject to the ETS, of ancillary units which do not emit greenhouse gases, provided that they meet the definition of 'installation' within the meaning of that directive.

Consequently, having regard to the definition of the term 'installation' in Article 3(e) of that directive, ancillary units, such as the absorption chillers which are ancillary to EDW's cogeneration plant, can be included in an installation covered by the ETS only if their activity has a technical connection with an activity listed in Annex I to the directive which is carried out in the installation and that activity could have an effect on emissions and pollution as regards the greenhouse gases listed in Annex II to the directive.

With regard to the criterion concerning the 'effect on emissions and pollution', the Court notes, next, that, if an activity does not satisfy that criterion on account of emissions and pollution which do not relate to greenhouse gases, Article 3(e) of the directive does not require that activities should emit greenhouse gases themselves, but only that there be a potential effect on emissions and pollution in respect of such gases. An activity which could influence the level of greenhouse gas emissions of an activity coming within Annex I to the directive may, consequently, be included within the boundaries of the same installation as that latter activity.

It follows that, in the present case, the absorption chillers that are ancillary to EDW's cogeneration plant and that thermal power plant could be regarded as forming one and the same installation covered by the ETS, provided that those absorption chillers could have an effect on the level of emissions and pollution generated by that plant and that the other criteria laid down in Article 3(e) of the directive on the scheme for greenhouse gas emission allowance trading are met.

In the second place, the Court gives a ruling on the method of calculating the corrected eligibility ratio referred to in the Data Collection Template drawn up by the European Commission, [55] which is used to determine the number of emission allowances to be allocated free of charge.

In accordance with the applicable legislation, [56] Member States are required to collect from operators of installations which are eligible for the free allocation of emission allowances the relevant information regarding the activities of those installations and their sub-installations. In the present case, the Data Collection Template drawn up by the Commission provided, as regards heat benchmark sub-installations, for the calculation of the total amount of measurable heat available at the installation.

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54 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003 L 275, p. 32), as amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 (OJ 2009 L 140, p. 63) ('the directive on the scheme for greenhouse gas emission allowance trading').

55 This template was drawn up by the Commission pursuant to Article 7(5) of Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council (OJ 2011 L 130, p. 1) ('Decision 2011/278').

56 Article 7 of Decision 2011/278.

In that regard, the Court notes that the corrected eligibility ratio is a single ratio calculated and applied on the basis of a comprehensive approach to the heat flows for the heat benchmark sub-installation. It follows that, for the purpose of calculating the number of emission allowances allocated free of charge to a heat benchmark sub-installation, that corrected eligibility ratio must be calculated and applied on the basis of a comprehensive approach to the heat flows for that sub-installation, even where the measurable heat imported from an installation not subject to the ETS can be attributed to a particular heat flow in the sub-installation concerned.

In the third place, the Court answers in the negative the question whether, in accordance with the applicable legislation, [57] an installation such as that of EDW may be covered, for the purposes of the free allocation of emission allowances, by the rules applicable to sectors exposed to a significant risk of carbon leakage [58] for the part of the heat which it does not export directly to an installation belonging to a sector deemed to be exposed to such a risk, such as Global Foundries, but which is consumed within the absorption chillers in order to produce cold water that is routed to that installation.

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57 Third subparagraph of Article 6(1) of Decision 2011/278.

58 Article 10a(12) of the directive on the greenhouse gas emission allowance trading scheme introduced an exception to the general rule that the number of allowances allocated free of charge to the installations concerned was to decrease progressively each year. Pursuant to that exception, installations in sectors or sub-sectors which were exposed to a significant risk of carbon leakage were to be allocated allowances free of charge at 100% of the quantity determined.

XI. COMMON FOREIGN AND SECURITY POLICY

Judgment of the Court (Grand Chamber) of 23 November 2021, Council v Hamas, C-833/19 P

Link to the complete text of the judgment

Appeal – Common foreign and security policy – Fight against terrorism – Restrictive measures against certain persons and entities – Freezing of funds – Common Position 2001/931/CFSP – Regulation (EC) No 2580/2001 – Continued inclusion of an organisation on the list of persons, groups and entities involved in terrorist acts – Statement of individual reasons notified to the organisation set out in a separate document from that containing a general statement of reasons – Authentication of the statement of individual reasons – Article 297(2) TFEU

By a judgment of 4 September 2019, *Hamas* v *Council*, [59] the General Court annulled, in an action for annulment under Article 263 TFEU, four acts of the Council of the European Union adopted in 2018 [60] by which Hamas was maintained on the list annexed to Common Position 2001/931/CFSP. Hamas had been listed as an organisation involved in terrorist acts and was, on that basis, subject to measures freezing its funds and economic resources. Although it rejected seven of the eight pleas in law relied on by Hamas to challenge its listing, the General Court annulled the acts at issue in so far as they concerned that organisation because of the Council's failure to authenticate, by means of a signature, the statements of reasons relating to those acts, those statements of reasons having been set out in separate documents. The General Court referred in that regard to the signature requirement imposed in the first subparagraph of Article 297(2) TFEU and in Article 15 of the Council's Rules of Procedure. [61]

The Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court of 4 September 2019. It finds that the General Court erred in law in ruling that the statements of reasons relating to the retention of Hamas on the lists annexed to the acts at issue should – in the same way as the acts themselves, which contain a general statement of reasons – have been signed by the President and the Secretary-General of the Council. In addition, those statements of reasons were adopted by the Council simultaneously with those acts, to which they were inseparably attached, and their authenticity has not been validly challenged.

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59 Judgment of 4 September 2019, *Hamas* v *Council* (T-308/18).

60 Council Decision (CFSP) 2018/475 of 21 March 2018 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2017/1426 (OJ 2018 L 79, p. 26); Council Implementing Regulation (EU) 2018/468 of 21 March 2018 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) 2017/1420 (OJ 2018 L 79, p. 7); Council Decision (CFSP) 2018/1084 of 30 July 2018 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/475 (OJ 2018 L 194, p. 144); Council Implementing Regulation (EU) 2018/1071 of 30 July 2018 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) 2018/468 (OJ 2018 L 194, p. 23).

61 According to Article 15 of the Council's Rules of Procedure, headed 'Signing of acts': 'The text of the acts adopted by the Council and that of the acts adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure shall be signed by the President in office at the time of their adoption and by the Secretary-General. The Secretary-General may delegate his or her power to sign to Directors-General of the General Secretariat.' (Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure (OJ 2009 L 325, p. 35)).

Findings of the Court

The Court recalls, in the first place, that it is apparent from the judgment in *Commission* v *BASF*, [62] on which the General Court relied in the judgment under appeal, that a handwritten signature on an act, in particular of the President of the institution which adopted it, constitutes a means of authenticating the act, which is intended to guarantee legal certainty by ensuring that the text adopted by that institution becomes fixed in the languages which are binding. Such authentication thus ensures, in the event of a dispute, that it is possible to verify that the texts notified or published correspond precisely to the texts as adopted, and with the intention of the author. While the Court of Justice also recalled in the judgment in *Commission* v *BASF* that the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, it observes that, unlike the decision at issue in that judgment, the acts at issue bear the signature of the President of the institution that adopted them, namely the Council, and of its Secretary-General. In addition, those acts, as published, include a general statement of reasons. The Court also notes that, in the judgment in *Commission* v *BASF*, the issue raised was not whether the entire statement of reasons for an act must be authenticated by means of a signature where part of that statement of reasons appears in a separate document, but, in particular, the lack of correspondence between the text of a decision as adopted by its author and the text of the same decision as published and notified. In the light of those various points, the Court concludes that its considerations in the judgment in *Commission* v *BASF* cannot be applied to the present case.

The Court recalls, in the second place, its case-law according to which acts that provide for restrictive measures, such as the acts at issue, have a particular nature, resembling as they do, at the same time, both measures of general application, in so far as they are addressed to a category of addressees determined in a general and abstract manner, and a bundle of individual decisions affecting the persons and entities whose names appear in the lists contained in their annexes. It follows from the rule set out in the first subparagraph of Article 297(2) TFEU that the acts at issue, which are non-legislative acts adopted in the form either of regulations or of decisions which do not specify to whom they are addressed, must be signed by the President of the Council, in so far as they resemble measures of general application within the meaning of that case-law. However, to the extent that the acts at issue resemble a bundle of individual decisions, they are not subject to a requirement that they be signed, but only to the notification obligation under the third subparagraph of Article 297(2) TFEU. The same applies to the statements of reasons that accompanied the acts at issue, as notified to Hamas, which do not fall within the scope of the general character of those acts but rather within that of the facet of those acts that renders them akin to a bundle of individual decisions. Accordingly, the President of the Council is not required to sign, in addition to the act containing a general statement of reasons for the restrictive measures, the statement of individual reasons relating to such an act. It is sufficient that that statement of reasons be duly authenticated by other means.

According to the Court, the interpretation of Article 15 of the Council's Rules of Procedure leads to the same conclusion. Since that article must be read in the light of the relevant Treaty provisions, it cannot be interpreted as imposing on the President and the Secretary-General of the Council a stricter signature requirement than that which arises under the first subparagraph of Article 297(2) TFEU. The Court states that such a formal obligation to sign statements of individual reasons cannot be inferred from the obligation to state reasons provided for in Article 296 TFEU either. The requirements that stem from that obligation must not be confused with those relating to the authentication of an EU act, checking compliance with the latter requirement being a preliminary to any other review of that act. The Court thus rules that the first ground of appeal is well founded and sets aside the judgment of the General Court.

Since the state of the proceedings is, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, such that the Court can give final judgment in the matter, the Court notes, in

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62 Judgment of 15 June 1994, *Commission* v *BASF and Others* (C-137/92 P).

the third place, that the Council produced documents demonstrating that the statements of reasons were adopted simultaneously with the acts at issue signed by the President and the Secretary-General of the Council, to which they were inseparably attached, and that Hamas has not put forward any evidence that could call into question the fact that the text of the statements of reasons that were notified to it and the text adopted by the Council correspond perfectly. Since the authenticity of those statements of reasons has not been validly challenged by Hamas, the Court concludes that the action brought by Hamas must be dismissed in its entirety.

Judgment of the General Court (Fourth Chamber) of 24 November 2021, Assi v Council, T-256/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Errors of assessment – Proportionality – Right to property – Right to pursue an economic activity – Misuse of powers – Obligation to state reasons – Rights of the defence – Right to a fair trial

Mr Bashar Assi is a businessperson of Syrian nationality with interests and activities in multiple sectors of Syria's economy. His name was included, in January 2019, then maintained in May 2019 and May 2020, on the lists of persons and entities subject to the restrictive measures against the Syrian Arab Republic adopted by the Council of the European Union [63] as, first, founding partner of an airline; secondly, chairman of the board of directors of Aman Dimashq, an undertaking involved in the development of a luxury residential and commercial project backed by the Syrian regime; and, thirdly, from 2020, on account of the creation of Aman Facilities with Mr Samer Foz, also included on those lists, and on his behalf. The Council considered that those activities allowed Mr Bashar Assi to benefit from and support the Syrian regime.

Those reasons were based, first, on the criterion of a leading businessperson operating in Syria defined in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, [64] as amended by Decision 2015/1836, and in Article 15(1a)(a) of Regulation No 36/2012, [65] as amended by Regulation 2015/1828, and, secondly, on the criterion of association with the regime defined in Article 27(1) and Article 28(1) of that decision and in Article 15(1)(a) of that regulation.

The Court upholds the applicant's action for annulment of Decision (CFSP) 2020/719 and of Implementing Regulation (EU) 2020/716 ('the 2020 maintaining acts'), since the Council, which had relied, inter alia, on past activities of the applicant, had failed to gather a set of indicia sufficiently specific, precise and consistent to establish that those reasons for listing are well founded, in particular in view of the evidence to the contrary adduced by the applicant.

63 Council Implementing Decision (CFSP) 2019/87 of 21 January 2019 implementing Decision 2013/255/CFSP concerning the restrictive measures against Syria (OJ 2019 L 18 I, p. 13) and Council Implementing Regulation (EU) 2019/85 of 21 January 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2019 L 18 I, p. 4); Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1).

64 Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

65 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

Findings of the Court

As regards, in the first place, the alleged status as a leading businessperson operating in Syria, the Court examines the evidence submitted by both the Council and the applicant concerning the applicant's economic activities.

As regards the status as chairman of the board of directors of Aman Dimashq, the Court considers that if the Council intended to rely on past activities of the applicant, in the 2020 maintaining acts, it had to put forward sound and consistent evidence from which it could reasonably be concluded that the applicant, after resigning from that structure in May 2019, maintained links with it, which the Council did not do. Since Aman Dimashq was actively involved in the Marota City development project supported by the Syrian regime, the Court also finds that the Council could not rely on the applicant's participation, as director of Aman Dimashq, in that development project when he no longer had any links with that company.

Finally, as regards the status as founding member of Aman Facilities with and on behalf of Mr Foz, the Court finds that, although the applicant admitted having set up that company, it is not possible to assert, given the documents in the file, that he acted on behalf of Mr Foz.

In the light of the foregoing, the Court concludes that the Council has not demonstrated, to the requisite standard, the applicant's status as a leading businessperson operating in Syria at the date of adoption of the 2020 maintaining acts.

As regards, in the second place, the support to the Syrian regime and the benefit which the applicant allegedly derived from it by reason of his commercial activities, the Court notes, first of all, that, for a specific person, the reasons for listing might overlap and that a person may therefore be considered to be a leading businessperson operating in Syria and be regarded, at the same time and through those same activities, as benefiting from or supporting the Syrian regime.

In the present case, since he was no longer chairman of the board of directors of Aman Dimashq at the date of adoption of the 2020 maintaining acts, the applicant could not be regarded, on account of that company's involvement in the Marota City development project, as benefiting from or as supporting the Syrian regime. Similarly, since Fly Aman was not yet operational, there is no evidence to show that, in his capacity as founding partner, the applicant benefited from or supported the Syrian regime. Finally, as regards Aman Facilities, the mere fact of forming a company and registering it for its formation cannot, moreover, be sufficient for the applicant to be regarded as benefiting from or supporting the Syrian regime.

The Court therefore concludes that the second reason for listing the applicant's name on account of his association with the Syrian regime is not sufficiently substantiated by the Council and that the maintenance of the applicant's name in the 2020 acts is unfounded.

The Court annuls accordingly Council Decision (CFSP) 2020/719 and Council Implementing Regulation (EU) 2020/716 in so far as they concern the applicant.

Judgment of the General Court (Fourth Chamber) of 24 November 2021, Al Zoubi v Council, T-257/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures against Syria – Freezing of funds – Errors of assessment

Mr Khaldoun Al Zoubi is a businessperson of Syrian nationality with interests and activities in multiple sectors of Syria's economy. His name was included, in January 2019, [66] on the lists of persons and entities subject to the restrictive measures against the Syrian Arab Republic adopted by the Council and then maintained on those lists in May 2019 and May 2020 [67] as a leading businessperson operating in Syria, Vice President of Aman Holding and majority shareholder of an airline, activities in respect of which he had links to Mr Samer Foz, who was also included on the lists. The Council of the European Union also stated that Aman Holding held a majority stake in Aman Dimashq, an undertaking involved in the development of a luxury residential and commercial project backed by the Syrian regime and that Mr Khaldoun Al Zoubi benefited from and supported the Syrian regime.

Those reasons were based, first, on the criterion of a leading businessperson operating in Syria defined in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, [68] as amended by Decision 2015/1836, and in Article 15(1a)(a) of Regulation No 36/2012, [69] as amended by Regulation 2015/1828, and, secondly, on the criterion of association with the Syrian regime defined in Article 27(1) and Article 28(1) of that decision and in Article 15(1)(a) of that regulation.

The Court upholds the applicant's action for annulment of the contested measures ('the initial acts', 'the 2019 maintaining acts' and 'the 2020 maintaining acts'), since the fact that interests are held in a single entity does not, in itself, demonstrate the existence of interests and activities in multiple sectors of the economy justifying classification as a leading businessperson operating in Syria.

Findings of the Court

As regards, in the first place, the alleged status as a leading businessperson operating in Syria, the Court examines the evidence submitted by both the Council and the applicant concerning the applicant's economic activities.

Concerning the status as majority shareholder of the airline Fly Aman, the Court finds, first, that that reason is ultimately founded only in respect of the initial measures, since the applicant has not demonstrated that he was no longer the majority shareholder at the date of adoption of the 2019 and

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66 Council Implementing Decision (CFSP) 2019/87 of 21 January 2019 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2019 L 18 I, p. 13) and Council Implementing Regulation (EU) 2019/85 of 21 January 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2019 L 18 I, p. 4).

67 Council Decision (CFSP) 2019/806 of 17 May 2019 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2019 L 132, p. 36) and Council Implementing Regulation (EU) 2019/798 of 17 May 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2019 L 132, p. 1); Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1).

68 Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

69 Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

2020 maintaining acts. As regards the status as Vice President of Aman Holding, the Court also finds that the applicant has not properly demonstrated that he did not hold such a position. Therefore, as regards that company's stake on the board of Aman Dimashq, an undertaking involved in the Marota City development project backed by the Syrian regime, the Council was not entitled to take into account, in order to demonstrate the applicant's status as a leading businessperson, Aman Holding's participation in that development project and the applicant's alleged position as Vice President of Aman Holding, when he was merely an employee of Aman Holding and did not sit on the board of Aman Dimashq. Concerning the applicant's links to Mr Samer Foz, the Court finds, moreover, that the Council has not adduced a sufficiently specific, precise and consistent set of indicia capable of substantiating to the requisite standard the links between the applicant and Mr Foz. Concerning, lastly, the constitution of Asas Iron Company, the Court finds that the applicant has properly demonstrated that he did not own any shares in that company at the date of adoption of the 2020 maintaining acts and that he was not a founding member of that company.

In the light of the foregoing, the Court concludes that the Council – in being able properly to rely, as regards the initial measures alone, only on the applicant's capacity as majority shareholder of Fly Aman – has not succeeded in demonstrating that the applicant was a leading businessperson operating in Syria. As regards the 2019 and 2020 maintaining acts, the Court states that the Council has also failed to demonstrate that the applicant was a leading businessperson operating in Syria at the date of adoption of those acts. Accordingly, the Court concludes that the first reason for listing is not sufficiently substantiated.

As regards, in the second place, the support to the Syrian regime and the benefit which the applicant allegedly derived from it, the Court points out, first, that, for a specific person, the reasons for listing might overlap and that a person may therefore be considered to be a leading businessperson operating in Syria and at the same time regarded as benefiting from the Syrian regime or supporting it through those same activities.

In the present case, since he was not Vice President of Aman Holding at the date of adoption of the contested measures, the applicant could not be regarded as benefiting from the Syrian regime on that basis nor as supporting it on account of his participation in the Marota City project. Similarly, since the applicant was no longer the majority shareholder of Fly Aman, the Court finds that there is no evidence to show that the applicant benefited, in that capacity, from the Syrian regime or that he supported it. Since the Council has not adduced a specific, precise and consistent set of indicia capable of demonstrating that the applicant supported and benefited from the Syrian regime, the Court concludes that the listing of the applicant's name for that reason is also unfounded.

It therefore annuls the contested measures in so far as they concern the applicant.

Judgment of the General Court (Fourth Chamber) of 24 November 2021, Aman Dimashq v Council, T-259/19

Link to the complete text of the judgment

Common foreign and security policy – Restrictive measures against Syria – Freezing of funds – Error of assessment – Proportionality – Right to property – Right to pursue an economic activity – Misuse of powers – Obligation to state reasons – Rights of the defence – Right to a fair trial – Right to effective judicial protection

Aman Dimashq JSC is a legal person governed by Syrian law, established in Damascus, active in the development of residential, commercial and leisure buildings. Its name was included, in January

2019, [70] on the lists of persons and entities subject to the restrictive measures against the Syrian Arab Republic adopted by the Council of the European Union and then maintained on those lists in May 2019 and May 2020 [71] as a joint venture formed between Damascus Cham Holding and Aman Holding supporting and benefiting from the Syrian regime by reason of its participation in the construction of Marota City, a regime-backed luxury development project.

In support of its action for annulment of the measures at issue ('the initial measures', 'the 2019 maintaining acts' and 'the 2020 maintaining acts'), the applicant disputed the evidence adduced by the Council, which, in its view, was not capable of demonstrating that it benefited from the Syrian regime and that it was associated with it. It also claimed that the contested measures infringed its rights of defence, its right to a fair trial and its right to effective judicial protection.

The Court dismisses the applicant's action while clarifying, as regards the rights of the defence and to an effective judicial remedy, the concept of access to documentary evidence, in the case of a re-listing, and the need for the applicant to be able effectively to submit its observations within a reasonable period before the adoption of the decision at issue and, in the case of an initial listing, the need for the existence, at the date of adoption of the decision at issue, of documentary evidence supporting that listing.

Findings of the Court

The Court notes, as a preliminary point, that the right to be heard and the right to access the file are enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union ('the Charter') and that the right to effective judicial protection, as enshrined in Article 47 of the Charter, requires that the person concerned be able to ascertain the reasons on which the decision taken against him or her is based, in order to enable him or her, inter alia to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action and, at the same time, to enable the court having jurisdiction to exercise its power of review. It points out that, in the case of a re-listing decision, unlike an initial listing decision, a surprise effect is no longer necessary in order to ensure that those measures are effective, with the result that the adoption of the acts in question must, in principle, be preceded by notification of the incriminating evidence and by affording the person or entity concerned an opportunity to be heard.

In the light of the foregoing, the Court finds, first, that the adoption of the 2019 maintaining acts should have been preceded, in principle, by notification of the incriminating evidence to the applicant within a reasonable period. Since that notification occurred only four days before the adoption of those acts, the Court considers that the disclosure to the applicant of the document in question was too late and that its rights of the defence were therefore infringed. However, since the applicant has not explained which arguments or information it could have put forward if it had received the documents in question earlier nor has it demonstrated how those arguments or that information could have led to a different outcome in its case, the Court holds that the infringement in question of the rights of the defence does not entail, in the circumstances of the present case, the annulment of the 2019 maintaining acts so far as concerns the applicant.

Next, the Court finds that, as regards the right to effective judicial protection, the Council has demonstrated that it was in possession of a body of evidence before the adoption of the initial

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70 Council Implementing Decision (CFSP) 2019/87 of 21 January 2019 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2019 L 18 I, p. 13) and Council Implementing Regulation (EU) 2019/85 of 21 January 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2019 L 18 I, p. 4).

71 Council Decision (CFSP) 2019/806 of 17 May 2019 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2019 L 132, p. 36) and Council Implementing Regulation (EU) 2019/798 of 17 May 2019 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2019 L 132, p. 1); Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1).

measures which supported the reasons for listing set out in those measures. The Court observes, moreover, that although the Council is required, at the request of the party concerned, to provide access to all non-confidential official documents within a reasonable period, and that the period which elapsed between the date of adoption of the initial measures and the date of the applicant's request for access cannot justify the Council's failure to reply within a reasonable period, there are also internal deadlines within the Council for obtaining approval from various bodies in order to send this type of document. The Court points out in that regard that the applicant itself waited more than 21 days before the expiry of the time limit for bringing its action before it sent the Council its first request for access to the file: the fact that the Council was not in a position to disclose the document in question to the applicant before its action was brought was therefore not attributable entirely to the Council. Since the applicant was also able to state its views on the evidence contained in that document both in its reply and at the hearing, the Court concludes in that regard that the disclosure of that document within the period in question was sufficient to enable the applicant to exercise its right to an effective judicial remedy.

XII. JUDGMENTS PREVIOUSLY DELIVERED

1. FREEDOM OF MOVEMENT: FREEDOM TO PROVIDE SERVICES

Judgment of the Court (Second Chamber) of 14 October 2021, Landespolizeidirektion Steiermark and Others (Machines à sous), C-231/20

Link to the complete text of the judgment

Reference for a preliminary ruling – Freedom to provide services – Article 56 TFEU – Games of chance – Making prohibited lotteries available – Penalties – Proportionality – Minimum-level fines – Accumulation – No limit – Custodial sentence in the event of non-payment – Proportional contribution to the costs of proceedings – Article 49(3) of the Charter of Fundamental Rights of the European Union

In 2016, in an establishment located in Austria, a company made 10 gaming machines available for commercial purposes, thereby infringing the monopoly on games of chance. Under the Austrian Federal Law on games of chance, lotteries for which no licence or authorisation has been granted, and which are not excluded from the Federal State's monopoly on games of chance, are prohibited. The organisation of automated games of chance without the necessary licence is an offence and is punishable by a fine, combined with a custodial sentence in lieu of a fine and a contribution to the costs of the penalty proceedings, set at 10% of that penalty. As regards the compliance by legal persons with the provisions at issue, it is in principle the person who is required to represent the company in relation to third parties who is regarded as being liable.

Thus, the representative of that company, after being found guilty of those offences, was first fined EUR 100 000 (EUR 10 000 for each offence) and given a custodial sentence in lieu of a fine of 30 days (three days for each offence), and in addition was ordered to pay EUR 10 000 as a contribution to the costs of the proceedings. In the course of the legal proceedings brought against that decision, those penalties were reduced to EUR 40 000, 10 days and EUR 4 000 respectively.

Called upon to assess the lawfulness of that new penalty, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) decided to refer several questions to the Court of Justice for a preliminary ruling concerning the compatibility of the national legislation concerned with the freedom to provide services laid down by Article 56 TFEU.

In its judgment, the Court, inter alia, explains the scope of the duty of national courts to examine, in the light of the freedom to provide services, the system of penalties laid down in relation to games of chance.

The Court's findings

As a preliminary point, the Court states that the restrictive measures imposed by the national legislation on games of chance should be examined in turn, including the penalties laid down by that legislation, in order to determine in each case whether the measure is suitable for achieving the objective or objectives invoked by the Member State concerned and whether it does not go beyond what is necessary in order to achieve those objectives.

Consequently, a national court having to rule on the lawfulness of a penalty in that area must specifically assess, having regard to the actual rules for determining that penalty, whether it complies with the freedom to provide services, within the meaning of Article 56 TFEU. That assessment must be carried out even if the other restrictions surrounding the establishment of the monopoly on games of chance have already been held to be compatible with that provision.

Next, the Court finds, inter alia, that where the restrictions imposed by the Member States on games of chance serve overriding reasons in the public interest, ensure the attainment of the objective

pursued and do not go beyond what is necessary in order to attain that objective, the imposition of penalties serves the same overriding reasons in the public interest as those restrictions. Nevertheless, the severity of the penalties must be commensurate with the seriousness of the infringements penalised and comply with the principle of the proportionality of penalties, enshrined in Article 49(3) of the Charter of Fundamental Rights of the European Union.

Accordingly, as regards, in the first place, the imposition of a minimum fine per unauthorised gaming machine, without any limit on the total amount of the fines, the Court finds that such a measure does not appear, in itself, to be disproportionate given the seriousness of the infringements at issue. It is true that that measure may lead to sizeable penalties, but it makes it possible to counter the economic benefit which the infringements thus penalised might provide. However, it is for the referring court to ensure that the minimum amount and the total amount of the fines imposed are not disproportionate in relation to that benefit.

In the second place, as regards the custodial sentence in lieu of a fine, the Court observes that that penalty seeks to ensure that infringements are actually punished if it is not possible to recover the fine and likewise does not appear, in itself, to be disproportionate in the light of the nature and gravity of the infringements at issue. However, in the present case, each gaming machine is capable of providing grounds for the imposition of such a penalty and no limit on the total duration of the penalties is provided for. Accordingly, since the accumulation of those penalties may lead to a custodial sentence of considerable length, it is for the referring court to verify that the length of the sentence imposed is not excessive in the light of the seriousness of the infringements found.

Lastly, as regards, in the third place, the imposition of a contribution to the costs of proceedings amounting to 10% of the fines imposed, the Court notes that the levying of court costs contributes to the proper functioning of the judicial system as a source of funding for the judicial activities of the Member States. The referring court must, however, satisfy itself that that contribution is not excessive in the light of the actual cost of the proceedings and does not infringe the right of access to a tribunal enshrined in Article 47 of the Charter of Fundamental Rights of the European Union.

2. COMPETITION

2.1 Article 101 TFEU

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, NEC Corporation v Commission, T-341/18

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Attribution to the parent company of the infringement committed by its subsidiary – 2006 Guidelines on the method of setting fines – Gravity of the infringement – Increase in the amount of the fine for repeated infringement – Proportionality – Unlimited jurisdiction

Nec Corp. is a company established in Japan which manufactures and sells tantalum electrolytic capacitors. From 1 August 2009 to 31 January 2013, Nec Corp. held 100% of the capital of Tokin Corp. ('Tokin').

By decision of 21 March 2018 [72] ('the contested decision'), the Commission found that Nec Corp. and Tokin had infringed Article 101 TFEU by participating in agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. In that regard, the Commission held Tokin liable on account of its direct participation in that cartel from 29 January 2003 to 23 April 2012, and Nec Corp. liable in its capacity as a parent company for the period from 1 August 2009 to 23 April 2012. The contested decision imposed, first, a fine on Tokin jointly and severally with Nec Corp. and, second, individual fines on Tokin and Nec Corp. respectively.

In order to calculate the amount of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines [73] ('the 2006 Guidelines').

In the first place, the Commission determined the basic amount by reference to the value of sales of the electrolytic capacitors during the last full business year of participation in the infringement and by applying multipliers on the basis of the duration of the infringement. Considering that horizontal price coordination arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, the Commission then set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. To ensure that the fines imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

In the second place, as regards the adjustments to the basic amount of the fines, first, the Commission granted Tokin and Nec Corp. a 3% reduction in the basic amount of the fine, on the ground that their participation in certain meetings was not established, and, second, increased the basic amount of the fine to be imposed on Nec Corp. by 50% on account of the aggravating circumstance of repeated infringement, pursuant to point 28 of the 2006 Guidelines.

In accordance with point 28, the basic amount of the fine may be increased by up to 100% for each infringement where the Commission finds that an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has already made a finding that the undertaking infringed Article 101 TFEU or Article 102 TFEU.

In that regard, the Commission noted, more specifically, that Nec Corp. had already been held liable for anticompetitive conduct amounting to price coordination in respect of 'major PC/server [original equipment manufacturers (OEMs)]', which gave rise to Commission Decision C(2011) 180/09 final of 19 May 2010 ('the DRAMs decision'). [74]

In the third place, the Commission granted Tokin and Nec Corp., for their cooperation under the 2006 Leniency Notice, [75] a 15% reduction in the amount of any fine which would otherwise have been imposed on them for the infringement.

Nec Corp. brought an action for annulment of the contested decision, which is, however, dismissed by the Ninth Chamber (Extended Composition) of the General Court. In its judgment, the General Court clarifies the circumstances in which a fine may be increased for repeated infringement.

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72 Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors).

73 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

74 Commission Decision of 19 May 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/38.511 – DRAMs).

75 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

Findings of the General Court

In its action, Nec Corp. contests, inter alia, the increase in the fine for repeated infringement that was applied to it.

Recalling that its liability was purely derivative of Tokin's liability, Nec Corp. submits, first, that the Commission's decision to increase the amount of its fine for repeated infringement had the consequence of imputing to it liability exceeding that of its subsidiary, which was not a repeat offender.

In that regard, the General Court recalls that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary. However, factors specific to the parent company may justify its liability being assessed differently to that of the subsidiary, even if the liability of the former is based exclusively on the unlawful conduct of the latter. A factor specific to the situation of the parent company which may lead to its liability being assessed differently to that of its subsidiary is precisely that of repeated infringement.

In the light of those observations, the General Court finds that, in the present case, the increase in the amount of the fine imposed on Nec Corp. corresponds to a circumstance specific to its situation and which does not apply to its subsidiary, namely repeated infringement. It was therefore open to the Commission to assess Nec Corp.'s liability and that of its subsidiary differently.

Second, Nec Corp. submits that the increase in its fine for repeated infringement is vitiated by an error of law in so far as that increase covered the entirety of the infringement period from 1 August 2009 to 23 April 2012 and, consequently, a period prior to the DRAMs decision, which had been notified on 19 May 2010.

In that regard, the General Court notes that the finding and the appraisal of the specific characteristics of a repeated infringement come within the Commission's discretion as regards the choice of factors to be taken into account for the purpose of determining the amount of fines. The Commission may therefore, in each individual case, take into consideration the indicia which have demonstrated a tendency on the part of an undertaking towards infringing the competition rules, including, for example, the time that has elapsed between the infringements in question.

Even though Nec Corp.'s first infringement was penalised after the beginning of the new cartel, its continued participation, for almost two years, in the new cartel after it had been notified of the DRAMs decision, shows a tendency on its part not to draw the appropriate conclusions therefrom. In those circumstances, the Commission's decision to apply the increase for repeated infringement to the basic amount of the fine which, in turn, was calculated taking into account the entirety of the infringement period, was not vitiated by an error of law.

Third, Nec Corp. alleges infringement of the principle of proportionality, in so far as the increase in the amount of the fine for repeated infringement covered a period prior to the DRAMs decision and in view of the fact that its own liability resulted from its subsidiary's participation in the infringement.

As regards the proportionality of the increase in the fine, the General Court recalls that, when fixing the amount of each fine, the Commission has a discretion and cannot be considered obliged to apply a precise mathematical formula for that purpose. In addition, repeated infringement justifies a significant increase in the basic amount of the fine, which may be up to 100% of the amount. Moreover, the principle of proportionality requires that the time elapsed between the infringement in question and a previous breach of the competition rules be taken into account in assessing the undertaking's tendency to infringe those rules.

In the light of those observations, the General Court confirms that Nec Corp.'s continuation of the unlawful conduct at issue for almost two years after it had been notified of the DRAMs decision clearly shows a tendency on its part not to draw the appropriate conclusions from a finding that it had infringed the competition rules. In so far as the increase for repeated infringement may result in an increase of up to 100% of the basic amount of the fine, the Commission did not infringe the principle of proportionality by setting the increase in the basic amount of the fine to be imposed on Nec Corp at 50%.

As regards the applicant's argument based on the fact that its own liability resulted from its subsidiary's participation in the infringement and based on the short period of time that elapsed between the time when that subsidiary was acquired and the adoption of the DRAMs decision, the General Court finds, first, that the applicant is presumed to exercise decisive influence over that subsidiary. Second, the General Court recalls that the objective of suppressing conduct that infringes the competition rules would be jeopardised if an undertaking concerned by a first infringement were able, by altering its legal structure (through the acquisition of a subsidiary against which proceedings cannot be brought on the basis of that first infringement, but which is involved in the commission of the new infringement), to make the imposition of a penalty impossible or particularly difficult, and therefore avoid a penalty for repeated infringement.

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Nichicon Corporation v Commission, T-342/18

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Concerted practice – Exchanges of sensitive business information – Territorial jurisdiction of the Commission – Restriction of competition by object – Statement of objections – Point 13 of the 2006 Guidelines on the method of setting fines – Value of sales – Obligation to state reasons – Proportionality – Equal treatment – Single and continuous infringement – Gravity of the infringement – Public distancing – Mitigating circumstances – Unlimited jurisdiction

Nichicon Corporation ('Nichicon') is a company established in Japan which manufactures and sells aluminium electrolytic capacitors and tantalum electrolytic capacitors.

By decision of 21 March 2018 [76] ('the contested decision'), the Commission found that Nichicon had participated, together with eight other undertakings or groups of undertakings, in an infringement of Article 101 TFEU, consisting of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. After stating that the infringement, covering the whole European Economic Area ('EEA'), had taken place between 26 June 1998 and 23 April 2012, the Commission held Nichicon liable for its participation in the cartel from 26 June 1998 to 31 May 2010 and imposed on it a fine of EUR 72 901 000.

In order to calculate the amount of that fine, the Commission used the methodology set out in the Guidelines on the method of setting fines [77] ('the 2006 Guidelines').

In the first place, the Commission determined the basic amount by reference to the value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced by Nichicon to customers established in the EEA during the last full business year of its participation in the infringement and by applying multipliers on the basis of the duration of its participation in the infringement. Considering that horizontal price coordination arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, and recalling that the cartel covered the whole EEA, the Commission then set the proportion of the value of sales to be taken into account in

76 Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors).

77 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

order to reflect the gravity of the infringement at 16%. In order to ensure that the fine imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

In the second place, as regards the adjustment of the basic amount of the fine, the Commission granted a reduction of 3%, given that Nichicon's participation in certain meetings had not been established.

Nichicon brought an action for annulment of the contested decision, which has, however, been dismissed by the Ninth Chamber (Extended Composition) of the General Court.

Findings of the Court

In the first place, the Court rejects Nichicon's argument that, given the heterogeneous nature of capacitors and the specific nature of demand on the various geographic markets, the infringement, apart from the fact that it was not established by the Commission, could not cover all sales of electrolytic capacitors to the EEA.

The Court recalls, as a preliminary point, that, in order to determine the products covered by a cartel, the Commission is not required to define the relevant market on the basis of economic criteria. Indeed, it is the members of the cartel themselves who determine the products which are the subject of their discussions and concerted practices. Moreover, the products covered by a cartel are determined by reference to the documentary evidence of actual anticompetitive conduct in respect of specific products.

In the light of those observations, the Court finds that the Commission was right to take the view that the single and continuous infringement covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors sold in the EEA. The Commission had, in fact, substantiated that conclusion by providing evidence that all the anticompetitive exchanges between the cartel participants covered those two products, that the discussions held at several meetings were of a general nature and were not limited to certain subtypes of aluminium electrolytic capacitor or tantalum electrolytic capacitor, that the cartel participants had not introduced any limitation in their corporate statements as to the definition of the capacitors covered by the cartel, and that the majority of the representatives of the cartel participants were responsible for the manufacture of those two products, and not a specific product line.

In the second place, the Court rejects Nichicon's complaint that the Commission infringed the principle of proportionality by taking as a benchmark for the calculation of the basic amount the total value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced in the EEA during the last business year of its participation in the cartel, instead of the – smaller – value of sales consigned to the EEA.

In that regard, the Court notes that point 13 of the 2006 Guidelines, according to which the Commission will take the value of the undertaking's sales of goods or services in determining the basic amount of the fine, does not preclude the Commission from using the sales invoiced in the EEA for the purpose of calculating that value. That approach is, moreover, such as to give a proper indication of the scale of the infringement on the relevant market and its economic significance for the activities of the participants in the cartel in question. Furthermore, Nichicon had not provided any evidence to support its argument that the taking into account of those sales did not reflect the impact of the infringement on competition in the EEA.

In the third place, the Court rejects Nichicon's complaint that, by adding an additional amount to the basic amount for the purposes of deterrence, the Commission had infringed the principle *ne bis in idem* and the principle of proportionality in so far as Nichicon had already been given fines in non-member countries.

The Court recalls that the application of the principle *ne bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. In view of the fact that penalties imposed by the Commission and those imposed by the authorities of non-member States clearly do not pursue the same objectives, the condition of unity of the legal interest protected is lacking in the present case; whereas the former are intended to preserve undistorted competition in the EEA, the latter seek to protect the market of the non-member country.

As regards the alleged infringement of the principle of proportionality, the Court observes that the objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine is to ensure compliance with the competition rules laid down by the Treaty within the internal market. Consequently, the Commission is not required to take into account any penalties imposed for infringement of the competition rules of non-member States.

In the fourth place, the Court rejects Nichicon's complaint that the 3% reduction in the basic amount on account of its non-participation in certain meetings is not consistent with the principles of proportionality and equal treatment. As regards, first, compliance with the principle of proportionality, the Court observes that, notwithstanding the fact that Nichicon had not participated in certain meetings, it was not justified in claiming that its participation in the cartel revealed a lesser degree of harm which would have justified a greater reduction in the amount of the fine. As regards, second, compliance with the principle of equal treatment, the Court notes that all the undertakings which had not participated in certain meetings throughout the infringement period, and which were therefore in a situation comparable to that of Nichicon, had obtained the same reduction in the amount of the fine.

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Tokin Corporation v Commission, T-343/18

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Statement of objections – 2006 Guidelines on the method of setting fines – Value of sales – Proportionality – Equal treatment – Gravity of the infringement – Mitigating circumstances

Tokin Corp. ('Tokin') is a company established in Japan which manufactures and sells tantalum electrolytic capacitors. From 1 August 2009 until 31 January 2013, Tokin was fully owned by Nec Corp.

By decision of 21 March 2018 [78] ('the contested decision'), the European Commission found that Tokin and Nec Corp. had infringed Article 101 TFEU by participating in agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. In that regard, the Commission held Tokin liable on account of its direct participation in that cartel from 29 January 2003 to 23 April 2012, and Nec Corp., in its capacity as a parent company, for the period from 1 August 2009 to 23 April 2012. The contested decision imposed, first, a fine on Tokin jointly and severally with Nec Corp. and, second, individual fines on Tokin and Nec Corp. respectively.

In order to calculate the amount of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines. [79]

In calculating the fines imposed on Tokin, the Commission determined the basic amount by referring, first, to the value of sales of the electrolytic capacitors concerned during the last full business year of participation in the infringement and then by applying a duration multiplier corresponding to the period from 29 January 2003 to 23 April 2012. Taking the view that horizontal price coordination

78 Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (Case AT.40136 – Capacitors).

79 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, the Commission set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. In order to ensure that the fines imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

As regards the adjustments to the basic amount of the fines, the Commission granted Tokin and Nec Corp. a 3% reduction in the basic amount of the fine, on the ground that their participation in certain meetings had not been established. In addition, for their cooperation under the 2006 Leniency Notice, [80] Tokin and Nec Corp. obtained a 15% reduction in the amount of any fine which would otherwise have been imposed on them for the infringement.

Tokin brought an action for annulment of the contested decision, which is, however, dismissed by the Ninth Chamber (Extended Composition) of the General Court.

Findings of the Court

In the first place, the Court rejects Tokin's plea alleging, first, a failure to have regard to the limits imposed on the Commission's discretion and, second, an infringement of the principle of proportionality, inasmuch as the Commission changed the end date of Tokin's participation in the infringement, while knowing that that change would have the effect of multiplying the value of the relevant sales and, consequently, the amount of the fine.

In that regard, the Court observes that the statement of objections indicated that Tokin had participated in the infringement until 11 December 2013, whereas, in the contested decision, the Commission finds that the duration of the infringement at issue is established until 23 April 2012 and that Tokin participated in it until that date.

However, although the statement of objections must set forth all the essential facts upon which the Commission is relying in connection with its investigative procedure, that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature. Consequently, a final decision of the Commission cannot be annulled solely on the ground that the definitive conclusions drawn from the facts set out in the statement of objections do not correspond precisely to the provisional assessment of those facts contained in that statement. Moreover, since the Commission is not required to maintain the factual or legal assessments made in the statement of objections, the Commission cannot be criticised for having taken account, in the contested decision, of an end date of the infringement which was different from the end date it had mentioned in the statement of objections.

Furthermore, Tokin did not dispute either the end date of the infringement indicated in the contested decision or the fact that the last full business year of its participation in the infringement corresponded to the period from 1 April 2011 to 31 March 2012.

As regards the alleged infringement of the principle of proportionality, the Court finds that Tokin had not put forward any detailed argument in support of the alleged infringement.

In the second place, the Court rejects Tokin's complaint alleging an infringement of the principles of non-discrimination and equal treatment inasmuch as the Commission used different reference years depending on the addressees of the contested decision for the purpose of calculating the fine.

In that regard, the Court finds, first of all, that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way. Next, the Court observes that, in order to determine the basic amount of the fines to be imposed, the Commission had applied to all the undertakings, with the exception of two of those undertakings, the criterion set out in point 13 of the 2006 Guidelines, according to which that amount must be determined using as a point of reference the value of sales achieved by the undertaking in question

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80 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17;).

during the last full business year of its participation in the infringement. According to the Court, the derogation from that criterion for two of the undertakings concerned was objectively justified, since those undertakings had ceased to sell the products in respect of which the infringement was committed before the end of the infringement and were therefore in a different situation from that of the other participants in the infringement. Lastly, the Court notes that the Commission had indeed calculated separately, for all the cartel participants, the relevant value of sales of the two categories of products concerned, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors.

In the light of those findings, the Court confirms that the method used by the Commission to calculate the value of sales was not arbitrary and did not, in itself, lead to an infringement of the principles of non-discrimination and equal treatment.

In the third place, the Court also rejects Tokin's plea alleging that, when calculating the basic amount of the fine, the Commission should have taken into account its non-participation in certain anticompetitive meetings in the gravity percentage of the infringement and not as a mitigating circumstance.

In that regard, the Court recalls that, according to settled case-law, the Commission may take into account the relative gravity of the participation of an undertaking in an infringement and the particular circumstances of the case either when calculating the basic amount of the fine or when adjusting the basic amount of the fine in the light of mitigating and aggravating circumstances. Accordingly, in view of all the characteristics of the infringement at issue, the Commission's decision to apply a gravity percentage of 16% for the purpose of determining the basic amount of the fine and to grant a 3% reduction in the basic amount of the fine on account of mitigating circumstances did not infringe either Regulation No 1/2003 or the principle of personal liability.

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Rubycon and Rubycon Holdings v Commission, T-344/18

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Fines – Partial immunity from fines – Point 26 of the 2006 Leniency Notice – Reduction in the amount of the fine – Point 37 of the 2006 Guidelines on the method of setting fines – Ceiling of 10% of turnover – Unlimited jurisdiction

Rubycon Corp. is a company established in Japan which manufactures and sells aluminium electrolytic capacitors. Since 1 February 2007, Rubycon Holdings Co. Ltd ('Rubycon Holdings') has held 100% of the capital of Rubycon Corp.

By decision of 21 March 2018 ('the contested decision'), the Commission found that Rubycon Corp. and Rubycon Holdings had infringed Article 101 TFEU by participating in agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. [81] The Commission held Rubycon Corp. liable on account of its direct participation in the cartel from 26 June 1998 to 23 April 2012, and Rubycon Holdings liable in its capacity as a parent company for the period from 1 February 2007 to 23 April 2012.

81 Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors).

The contested decision imposed, first, a fine on Rubycon Corp., jointly and severally with Rubycon Holdings, and, second, an individual fine on Rubycon Corp.

In order to calculate the amount of those fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines [82] ('the 2006 Guidelines').

Thus, the Commission determined the basic amount by reference to the value of sales of the electrolytic capacitors concerned during the last full business year of participation in the infringement and by applying multipliers on the basis of the duration of the infringement. Considering that horizontal price coordination arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, the Commission then set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. To ensure that the fines imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

As regards the multiplier relating to the duration of the infringement, the Commission granted Rubycon Corp. partial immunity from fines in respect of the duration of the infringement, under the third paragraph of point 26 of the 2006 Leniency Notice, [83] for having submitted compelling evidence which established additional facts increasing the duration of the infringement for the period from 26 June 1998 to 28 August 2003.

On the other hand, the Commission refused to grant Rubycon Corp. and Rubycon Holdings partial immunity from fines in respect of the gravity of the infringement, under the third paragraph of point 26 of that notice, on the ground that the evidence submitted by them had not enabled it to establish additional facts increasing the gravity of the infringement.

Lastly, following the application of the 10% ceiling, the Commission granted Rubycon Corp. and Rubycon Holdings an additional 30% reduction in the amount of the fine, [84] on the ground that they had been the second undertaking to submit evidence representing significant added value as regards proof of the existence of the cartel.

Rubycon Corp. and Rubycon Holdings brought an action for annulment of the contested decision and for a reduction of the fines imposed, which is, however, dismissed by the Ninth Chamber (Extended Composition) of the General Court.

Findings of the Court

By their action, Rubycon Corp. and Rubycon Holdings contest, inter alia, the Commission's refusal to grant them partial immunity from fines in respect of the gravity of the infringement, under the third paragraph of point 26 of the 2006 Leniency Notice.

In that regard, the Court rejects, in the first place, the complaint that the Commission should have excluded Rubycon Corp. and Rubycon Holdings from liability for their participation in the meetings the existence of which had been established on the basis the evidence that they had submitted. In so far as the benefit of partial immunity from fines concerns only the amount of the fine, it cannot have an impact on the extent of liability for the infringement found in respect of the undertaking which has benefited from such immunity.

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82 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

83 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'). The third paragraph of point 26 of that notice provides that, 'if the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point 25 which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence'.

84 That additional reduction was granted pursuant to the second indent of the first paragraph of point 26 of the 2006 Leniency Notice.

In the second place, the Court rejects the complaint that the Commission erred in concluding that the evidence submitted had no impact on the gravity of the infringement. In that regard, Rubycon Corp. and Rubycon Holdings had, more specifically, argued that the evidence submitted concerning several meetings in which the undertakings had concluded price agreements and established a mechanism to monitor their implementation had enabled the Commission to increase the gravity of the cartel at issue.

The Court recalls, first of all, that only undertakings which have submitted compelling evidence making it possible to establish additional facts capable of increasing the gravity or duration of the infringement may benefit from partial immunity from fines under the third paragraph of point 26 of the 2006 Leniency Notice.

Next, the Court upholds the Commission's conclusion that the evidence submitted by Rubycon Corp. and Rubycon Holdings had no impact on its ability to establish the gravity of the infringement. While that evidence showed that, at some of the meetings, the undertakings had concluded price agreements, together with a monitoring mechanism in order to ensure that those agreements were implemented, the fact remained that those aspects were not independent components of the infringement liable to have an impact on its gravity.

In the third place, the Court rejects the complaint that the principle of equal treatment was infringed.

Rubycon Corp. and Rubycon Holdings referred, more specifically, to the grant of a 3% reduction in the basic amount of the fine to other undertakings in the light of the fact that their participation in certain multilateral meetings had not been established. They submitted that, by granting that reduction, the Commission treated undertakings which had decided not to submit evidence concerning the infringement more favourably than those which had decided to submit such evidence.

In that regard, the Court notes that the factual situation of Rubycon Corp. and Rubycon Holdings and that of the other undertakings to which they refer were substantially different, in so far as the participation of those other undertakings in certain meetings in which Rubycon Corp. had participated had not been established and, unlike the other undertakings to which they refer, Rubycon Corp. and Rubycon Holdings had cooperated in the investigation.

In addition, the Court finds that the two situations were not comparable from a legal point of view either. As regards the other undertakings to which they refer, it was necessary for the Commission to assess whether their non-participation in some of the anticompetitive exchanges had to be taken into account as mitigating circumstances. As regards Rubycon Corp. and Rubycon Holdings, it was, on the other hand, necessary for the Commission to assess whether their cooperation in the investigation should lead to their being granted partial immunity from fines.

In that regard, the Court further states that an undertaking that has decided to cooperate with the Commission under the 2006 Leniency Notice cannot validly complain that the Commission failed to take into account the degree of its cooperation as a mitigating circumstance, outside the legal framework of that notice.

In the fourth place, the Court confirms that, by applying, in the present case, the general method for calculating fines laid down by the 2006 Guidelines, the Commission had not infringed the principles of proportionality and equal treatment, or the principle that the penalty must be specific to the offender and the offence.

Judgment of the General Court (Ninth Chamber, Extended Composition) of 29 September 2021, Nippon Chemi-Con Corporation v Commission, T-363/18

Link to the complete text of the judgment

Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Concerted practice – Exchanges of sensitive business information – Territorial jurisdiction of the Commission – Rights of the defence and right to be heard – Inalterability of the measure – Single and continuous infringement – Restriction of competition by object – 2006 Guidelines on the method of setting fines – Value of sales – Obligation to state reasons – Proportionality – Equal treatment – Gravity of the infringement – Mitigating circumstances – Point 37 of the 2006 Guidelines on the method of setting fines – Unlimited jurisdiction

Nippon Chemi-Con Corporation ('Nippon Chemi-Con') is a company established in Japan which manufactures and sells aluminium electrolytic capacitors. It owns 100% of the shares in Europe Chemi-Con (Deutschland) GmbH, a company incorporated under German law, and 100% of the shares in United Chemi-Con, a company incorporated under United States law.

By decision of 21 March 2018 [85] ('the contested decision'), the European Commission found that Nippon Chemi-Con had infringed Article 101 TFEU by participating in agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors. Nippon Chemi-Con was held liable for its direct participation in the cartel from 26 June 1998 to 23 April 2012, and a fine was imposed on it.

In order to calculate the amount of the fine, the Commission applied the methodology set out in the Guidelines on the method of setting fines. [86]

In the first place, the Commission determined the basic amount by reference to the value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors during the last full business year of participation in the infringement, including sales in the European Economic Area (EEA) by the applicant's wholly owned subsidiaries. A multiplier was applied on the basis of the duration of the infringement. Considering that horizontal price coordination arrangements are, by their very nature, among the most serious infringements of Article 101 TFEU, the Commission, in the second place, set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. To ensure that the fine imposed would have a sufficiently deterrent effect, the Commission also applied an additional amount of 16%.

Nippon Chemi-Con brought an action for annulment of the contested decision, which is, however, dismissed by the Ninth Chamber (Extended Composition) of the General Court.

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85 Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors).

86 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

Findings of the Court

The Court rejects, first, Nippon Chemi-Con's plea alleging that the Commission lacked territorial jurisdiction to apply Article 101 TFEU, in so far as the anticompetitive conduct was Asia-oriented and was not implemented in the EEA.

In that regard, the Court recalls that the application of Article 101 TFEU is justified where the practices it covers are implemented in the territory of the internal market, irrespective of the place where they were formed. That criterion of the implementation of a cartel as a factor linking the latter to EU territory is satisfied by mere sale within the European Union of the product that is the subject of the cartel, irrespective of the location of the sources of supply and the production plants.

Emphasising the fact that, during the infringement period, the participants in the cartel, which was global in scale, had sold electrolytic capacitors in the EEA, exchanged information concerning European customers and coordinated their commercial policy on the basis of fluctuations in euro exchange rates, the Commission put forward arguments in support of the conclusion that the cartel had indeed been implemented in the EEA.

Second, the Court analyses Nippon Chemi-Con's plea alleging that the Commission failed to establish that there was a single and continuous infringement covering all electrolytic capacitors for the entire duration of the alleged infringement. In that regard, Nippon Chemi-Con claimed in particular that the Commission failed to demonstrate an overall plan and failed to take account of the heterogeneous nature of the capacitor industry.

As regards demonstrating an overall plan, the Court recalls that the concept of a 'single infringement' covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition in the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.

In that regard, the Court finds that the Commission identified a body of evidence to substantiate its conclusion that the anticompetitive contacts which took place over a number of years between the parties formed part of an overall plan with a single aim. The Commission demonstrated that those contacts concerned the fixing of future pricing of capacitors, the supply and demand of those products and, in certain cases, the conclusion, implementation and monitoring of price agreements. In addition, the Commission ascertained that those contacts had common characteristics as regards the participants and the nature and material scope of the discussions, which overlapped.

The Court also rejects Nippon Chemi-Con's complaint alleging that, owing to the heterogeneous nature of capacitors and the specific demand in the various geographic markets, the infringement, apart from the fact that it had not been established by the Commission, could not cover all sales of electrolytic capacitors to the EEA.

The Court recalls, as a preliminary point, that in determining the products covered by a cartel, the Commission is not required to define the relevant market on the basis of economic criteria. It is the members of the cartel themselves who determine the products which are the subject of their discussions and concerted practices. In addition, the products covered by a cartel are determined by reference to the documentary evidence of actual anticompetitive conduct in respect of specific products.

In the light of that evidence, the Court holds that the Commission was fully entitled to find that the single and continuous infringement covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors, which the Commission corroborated by providing evidence that all the anticompetitive exchanges between the cartel participants covered aluminium electrolytic capacitors or tantalum electrolytic capacitors, or even both, that the discussions at several meetings were general and were not limited to certain subtypes of aluminium electrolytic capacitors and tantalum electrolytic capacitors, that the cartel participants had not introduced any limitation in their corporate statements as to the definition of the capacitors covered by the cartel, and that most of the representatives of the cartel participants were responsible for the manufacture of both products and not for a specific range of products.

Third, the Court rejects Nippon Chemi-Con's complaint alleging that the Commission erred in including in the value of sales relevant to the calculation of the basic amount of the fine the sales made by its two wholly owned subsidiaries.

In that regard, the Court notes, first of all, that the presumption that subsidiaries are not autonomous, developed by the case-law in order to allow the conduct of one legal entity (the subsidiary) to be imputed to another (the parent company), also applies where, as in the present case, it is a matter of determining the relevant value of sales for the purpose of calculating the basic amount of the fine to be imposed on a parent company which participated directly in the infringement and which, during the infringement period, sold the products covered by that infringement in the EEA through its subsidiaries.

In so far as Nippon Chemi-Con owned 100% of the shares in its two subsidiaries and those three companies therefore formed a single economic unit for the purposes Article 101 TFEU, the Commission was fully entitled to take into account the amount of sales of capacitors which that economic unit had made in the EEA in order to determine the relevant value of sales for the purpose of calculating the basic amount of the fine imposed on Nippon Chemi-Con.

2.2 State aid

Judgment of the General Court (Third Chamber) of 6 October 2021, Covestro Deutschland v Commission, T-745/18

State aid – State aid scheme implemented by Germany in favour of certain large electricity consumers – Exemption from network charges in 2012 and 2013 – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering the recovery of the aid granted – Action for annulment – Time limit for bringing proceedings – Admissibility – Concept of aid – State resources – Equal treatment – Legitimate expectations

With effect from 2011, the Federal Republic of Germany granted certain large energy consumers full exemption from network charges ('the exemption at issue'). The costs involved in that exemption were borne by the transmission system operators.

In order to offset the losses in revenue resulting from the exemption at issue, the Bundesnetzagentur (BNetzA, the Federal Agency for Networks, Germany), by decision of 14 December 2011 ('the 2011 BNetzA decision'), introduced a financing mechanism, which entered into force in 2012. Under that mechanism, distribution system operators collected from end users or electricity suppliers a surcharge ('the surcharge at issue'), the amount of which was transferred to the transmission system operators.

The amount of the surcharge was calculated each year on the basis of a methodology set out by the BNetzA. The amount for 2012, the first year the system was in operation, was determined directly by the BNetzA on a flat-rate basis. Moreover, since the mechanism did not apply to the costs of the exemption at issue for 2011, each transmission system operator and distribution system operator, depending on the network level to which the beneficiaries were connected, had to bear the losses in respect of the exemption for that year.

Since the exemption at issue was subsequently declared null and void by decisions of the German courts, it was abolished as of 1 January 2014.

By decision of 28 May 2018 [87] ('the contested decision'), the Commission, having received several complaints, concluded that the Federal Republic of Germany had unlawfully granted, during the period from 1 January 2012 to 31 December 2013, State aid in the form of the exemption at issue, thus enabling large energy consumers to avoid paying network charges.

Covestro Deutschland AG ('the applicant') brought an action for annulment of the contested decision. The Court, although it declares the action admissible, dismisses it, confirming, inter alia, that the resources generated by the surcharge at issue were State resources and, hence, the existence of aid granted through State resources.

Findings of the Court

In the first place, the Court rejects the plea of inadmissibility put forward by the Commission, in which the latter alleges that the action for annulment was lodged out of time since the contested decision had come to the knowledge of the applicant well before it was published in the *Official Journal of the European Union*.

In that regard, the Court states that it follows from the wording of the sixth paragraph of Article 263 TFEU that the criterion of the date on which the measure came to the knowledge of the applicant as the starting point of the period for bringing an action is subsidiary to the criteria of publication or notification of the measure. Even though publication of the contested decision is not a precondition for it to come into effect, since Commission decisions closing a State aid investigation procedure under Article 108(2) TFEU are published in the Official Journal, the applicant could legitimately expect the contested decision to be published and was entitled to take the date on which the contested decision was published as the starting point of the period for bringing an action.

As regards, in the second place, classification of the surcharge at issue as aid granted through State resources, the General Court notes that, in order to determine whether such a measure of support constitutes State aid, the case-law of the Court of Justice [88] relies on two main factors: first, the existence of a compulsory charge imposed on end consumers or customers, normally classified as a 'charge', and more specifically as a 'parafiscal charge', and, secondly, State control over the administration of the system, in particular through State control over the funds or the (third party) administrators of those funds.

In that regard, the Court explains that, in essence, these are two factors which together form an alternative. The cases in which the existence of State resources has been recognised are characterised by the fact that, in one way or another, the State exercised control over the resources in question.

In the light of that explanation, the Court examines first whether the surcharge at issue was in fact a compulsory charge and, hence, could be assimilated to a parafiscal charge, and secondly whether the State possessed control over the funds collected or over the bodies responsible for administering them.

In the context of that examination, the Court finds that the surcharge at issue is imputable to the State, a finding that is without prejudice to the question of whether the 2011 BNetzA decision may be considered to be a decision that is ultra vires according to German law, and to the question of the annulment of that decision by the German courts, that decision having been actually applied during the relevant period.

As regards whether the surcharge at issue was compulsory, the Court notes that that surcharge, introduced by an administrative authority through a regulatory measure, was legally binding on the

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87 Decision (EU) 2019/56 on aid scheme SA.34045 (2013/c) (ex 2012/NN) implemented by Germany for baseload consumers under Paragraph 19 StromNEV [2011] (OJ 2019 L 14, p. 1).

88 In particular, judgments of the Court of Justice of 28 March 2019, *Germany* v *Commission* (C-405/16 P, EU:C:2019:268), and of 15 May 2019, *Achema and Others* (C-706/17, EU:C:2019:407).

persons ultimately liable for payment, being the network users, that is to say the suppliers themselves and the end consumers directly connected to the network, and not the other end consumers. The 2011 BNetzA decision required distribution system operators to pass on to those consumers the extra costs related to the surcharge at issue, so that surcharge constitutes a parafiscal charge and therefore involves the use of State resources.

As regards State control over the administration of the surcharge mechanism, the Court finds, in addition, that, first, there is an analogy between the surcharge at issue and the extra costs related to the exemption at issue and that, secondly, the network operators acted as mere intermediaries in the implementation of a mechanism totally governed by State provisions. Consequently, there was State control over the entire mechanism for collecting and allocating the surcharge at issue. The distribution system operators were required to collect from the network users, including the end consumers, the surcharge, as calculated by the BNetzA (for the year 2012) or according to the methodology set out by the BNetzA (for the year 2013). Moreover, the proceeds were allocated exclusively to pursuing the objectives of the scheme, under the legislative and regulatory provisions which stated that those proceeds should be paid to the transmission system operators to offset the extra costs related to the exemption at issue.

In the light of the foregoing, the Court finds that the surcharge at issue constitutes a parafiscal charge or a compulsory charge, the amount of which was set by a public authority (for the year 2012) or according to a methodology imposed by that authority (for the year 2013), which pursues public-interest objectives, that it was imposed on the network operators according to objective criteria and that it was collected by those operators according to rules laid down by the national authorities, and therefore it constitutes a measure granted through State resources.

Judgment of the General Court (Third Chamber) of 6 October 2021, Tempus Energy Germany and T Energy Sweden v Commission, T-167/19

Link to the complete text of the judgment

State aid – Polish electricity market – Capacity mechanism – Decision not to raise any objections – Aid scheme – Article 108(2) and (3) TFEU – Concept of doubts – Article 4(3) and (4) of Regulation (EU) 2015/1589 – Serious difficulties – Article 107(3)(c) TFEU – Guidelines on State aid for environmental protection and energy 2014-2020 – Procedural rights of the interested parties – Obligation to state reasons

By decision of 7 February 2018, [89] the European Commission decided not to raise objections to an aid scheme notified by Poland, which provides for the payment of four billion Polish zlotys (PLN), spread over a period of 10 years, to capacity providers on the Polish electricity market ('the notified aid scheme'). Without initiating the formal investigation procedure, the Commission, more specifically, considered that scheme to be compatible with the internal market pursuant to Article 107(3)(c) TFEU. [90]

The capacity mechanism thus authorised is intended to fill expected gaps on the Polish electricity market between electricity demand and capacity and, in so doing, ensure security of supply in a sustainable manner. In application of that mechanism, capacity providers are selected through

89 Commission Decision C(2018) 601 final of 7 February 2018, not to raise objections to the aid scheme notified by Poland – State aid SA.46100 (2017/N).

90 According to this provision, aid to facilitate the development of certain activities or of certain economic areas may be considered compatible with the internal market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

centrally managed auctions, which are organised at regular intervals. In return for a steady payment for the duration of the agreement, providers are to ensure the provision of capacity during delivery periods and its actual provision during emergency periods. That capacity can be made available either by generating and providing electricity or, in the case of demand-side response ('DSR'), by reducing demand at times of system stress.

Auctions are open to existing and new generators, DSR and storage operators, located in Poland or in the control area of neighbouring countries. The length of the capacity agreements to be granted is determined, in principle, in relation to the level of the investment expenditure of the capacity providers concerned. The steady payments are financed through a levy on electricity supplies, collected from final consumers.

The decision not to raise objections to the notified aid scheme has been challenged by Tempus Energy Germany GmbH and T Energy Sweden AB (together, 'Tempus'), which sell DSR technology to individuals and professionals, inter alia in the German and Swedish electricity markets.

The action for annulment brought by Tempus is, however, dismissed by the General Court. In its judgment, it provides, in particular, details relating to the admissibility of an action for annulment brought against a decision of the Commission not to raise objections to a notified aid scheme, as well as clarifications as to the scope of certain provisions of the Guidelines on State aid for environmental protection and energy. [91]

Findings of the General Court

As regards, in the first place, the admissibility of the action for annulment brought by Tempus, the Court notes that Tempus is an interested party within the meaning of Article 108(2) TFEU and Article 1(h) of the Regulation laying down detailed rules for the application of Article 108 TFEU, [92] in so far as it was prevented, by the decision not to raise objections, from submitting its observations during a formal investigation procedure within the meaning of Article 108(2) TFEU.

In that regard, the Court rejects the argument according to which Tempus does not warrant the status of interested party on the ground that it is not a 'direct competitor' present on the Polish capacity market. To the extent that it has the firm intention and an inherent ability to enter it in the near future and that the notified aid scheme raises barriers making that entry more difficult, Tempus is at least a potential competitor on that market. Tempus has thus demonstrated, to the requisite legal standard, that its interests are liable to be affected by the aid scheme and that the grant both of the agreements and the capacity payments is likely to have a material impact on its situation. Tempus's status as an interested party is, moreover, borne out by its status as an operator active on the adjacent German and Swedish electricity markets, which enables it to participate in the Polish capacity market.

Thus, in finding that the pleas for annulment relied on by Tempus are aimed at alleging the existence of serious difficulties which should have led the Commission to initiate the formal investigation procedure in order to safeguard its procedural rights which it would have enjoyed under Article 108(2) TFEU, the Court confirms that its action is admissible.

In the second place, the Court examines the substantive question of whether the preliminary examination carried out by the Commission in the present case had given rise to serious difficulties or doubts [93] as to the compatibility of the notified aid scheme with the internal market, with the result that it should have initiated the formal investigation procedure under Article 108(2) TFEU, without having any discretion in that regard.

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91 Communication from the Commission Guidelines on State aid for environmental protection and energy for the period 2014-2020 (OJ 2014 C 200, p. 1).

92 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9).

93 Within the meaning of Article 4(3) of Regulation 2015/1589.

After specifying that the existence of serious difficulties or doubts must be sought not only in the circumstances in which the Commission's decision was adopted at the end of the preliminary examination but also in the assessments upon which it has relied, the Court dismisses all the arguments put forward by Tempus concerning the existence of serious difficulties or doubts as to the compatibility of the notified aid scheme with the internal market. Those arguments related, first, to the conduct and length of the procedure and, second, to the content of the decision not to raise objections and, more specifically, to the alleged erroneous, incomplete or insufficient nature of the assessment of the compatibility of the aid with the internal market in the light of the provisions of the Guidelines on State aid for environmental protection and energy protection.

In that latter regard, the Court notes, in particular, that, under the Guidelines on State aid for environmental protection and energy, Member States are required to balance the potentially conflicting objectives of security of energy supply against environmental protection, all the while observing the principle of proportionality. Thus, even though those guidelines lay down the more general objective of supporting the shift towards a resource-efficient, competitive low-carbon economy, [94] they cannot be interpreted as prohibiting aid measures for conventional power plants where these prove necessary to guarantee generation adequacy and therefore the security of energy supply, or as requiring them to give absolute priority to alternative techniques, such as DSR.

3. APPROXIMATION OF LAWS

3.1 Intellectual and industrial property

Judgment of the General Court (Fifth Chamber) of 15 September 2021, Residencial Palladium v EUIPO - Palladium Gestion (PALLADIUM HOTELS & RESORTS), T-207/20

EU trade mark – Invalidity proceedings – EU figurative mark PALLADIUM HOTELS & RESORTS – Conditions of admissibility of the application for the declaration of invalidity – Article 53(4) of Regulation (EC) No 207/2009 (now Article 60(4) of Regulation (EU) 2017/1001) – Article 56(3) of Regulation No 207/2009 (now Article 63(3) of Regulation 2017/1001)

Palladium Gestión, SL, is the proprietor of the EU figurative mark PALLADIUM HOTELS & RESORTS for the provision of food and drink and temporary accommodation services. On 2 March 2006, Residencial Palladium, SA, lodged with the European Union Intellectual Property Office (EUIPO) a first application for a declaration that that mark was invalid, based on the existence of relative grounds for invalidity. It withdrew that first application on 18 April 2006.

On 20 June 2017, Residencial Palladium, which had become Residencial Palladium, SL, filed a second application for a declaration of invalidity based, inter alia, on the existence of relative grounds for invalidity. That application was declared inadmissible in that regard by the Cancellation Division. The Board of Appeal of EUIPO confirmed that decision, for the reason that an application for a declaration of invalidity was inadmissible where two conditions were met: first, where the applicant for a declaration of invalidity has previously filed an application for a declaration that the same EU trade mark is invalid and, secondly, where the new application for a declaration of invalidity is based on the same earlier right or on a right other than that which provided the basis for the initial application for a declaration of invalidity but which could have been validly invoked in the initial application.

94 See Guidelines, paragraph (30).

Hearing an action for the annulment, the General Court finds that the Board of Appeal erred in law. It holds that, where the same earlier right is invoked in support of a new application for a declaration of invalidity which has the same subject matter and cause of action, and involves the same parties, that new application will be inadmissible only if the initial application has been adjudicated on the merits and the decision has become final. On the other hand, if the new application is based on other earlier rights, it will be inadmissible even if the initial application has not been adjudicated on the merits.

The Court annuls the decision of the Board of Appeal on the ground of breach of the duty to state reasons, such as to prevent the Court from assessing the consequences of the error of law committed.

Findings of the Court

At the outset, the Court points out that, under Article 53(4) of Regulation No 207/2009, [95] a proprietor of earlier rights referred to in paragraphs 1 or 2 of Article 53 who has previously applied for a declaration that an EU trade mark is invalid may not submit a new application for a declaration of invalidity on the basis of another of the said rights which he or she could have invoked in support of his first application. Article 56(3) of Regulation No 207/2009 provides that an application for a declaration of invalidity is inadmissible where an application relating to the same subject matter and cause of action, and involving the same parties, has been adjudicated on its merits and the decision has become final. The Court therefore finds that, in Regulation No 207/2009, a distinction is drawn between applications for a declaration of invalidity based on the same earlier right and those based on different earlier rights.

With regard to applications for a declaration of invalidity based on the same earlier right, the Court points out that inadmissibility under Article 56(3) of Regulation No 207/2009 requires a decision on the merits to have been adopted and to have become final. Accordingly, a new application for a declaration of invalidity is not inadmissible, inter alia, where the initial application for a declaration of invalidity has been ruled inadmissible or where it is withdrawn before any decision on the application becomes final.

With regard to applications for a declaration of invalidity based on different earlier rights, the Court considers that a new application will be inadmissible whether or not the initial application has been adjudicated on the merits. No such condition is in fact laid down in Article 53(4) of Regulation No 207/2009, the purpose of which is to prevent applicants for a declaration of invalidity from filing separate applications based on different rights where those other rights could have been invoked at the time of filing the initial application. Therefore, the new application will be inadmissible even if the initial application has been withdrawn or ruled inadmissible.

Consequently, the Court concludes that the Board of Appeal erred in law in holding that Article 53(4) of Regulation No 207/2009 applied both when a different earlier right is invoked in support of a new application for a declaration of invalidity and when the same earlier right is invoked.

The Court nevertheless emphasises that that error of law would be capable of resulting in the annulment of the contested decision only if the first and second applications for a declaration of invalidity were based on the same earlier rights. The Court finds that it is not clear from the Board of Appeal's decision what rights were invoked in support of each of the applications for a declaration of invalidity. The Board of Appeal's decision does not therefore enable the Court to assess the consequences of the error of law committed with regard to the legality of the decision. The Court therefore holds that the Board of Appeal breached its duty to state reasons.

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

Judgment of the General Court (Second Chamber) of 6 October 2021, Daw v EUIPO (Muresko), T-32/21

EU trade mark – EU word mark Muresko – Earlier national word marks Muresko – Claiming seniority of the earlier national marks after registration of the EU mark – Articles 39 and 40 of Regulation (EU) 2017/1001 – Registration of earlier national marks which have expired by the date of the claim

The applicant, Daw SE, is the proprietor of the EU word mark Muresko, which was registered on 12 September 2016 by the European Union Intellectual Property Office (EUIPO).

On 3 February 2020, with regard to that trade mark, the applicant brought before EUIPO a seniority claim in respect of identical Polish and German marks, in accordance with Article 40 of Regulation 2017/1001. [96] The applicant did not dispute that the registration of those national trade marks had expired, but relied on the fact that a seniority claim in respect of those marks had been accepted for another EU trade mark.

EUIPO rejected the contested claim on the ground that the registration of the national marks had expired at the time that claim was filed.

The General Court dismisses the action for annulment of EUIPO's decision. It finds, for the first time, that an earlier national mark must be registered and in force on the date on which the seniority of that mark is claimed for an identical EU trade mark.

Findings of the Court

In the first place, the Court adopts a literal interpretation of Article 40 of Regulation 2017/1001. It concludes that, taking into account the various language versions, the wording of that article clearly states that the identical earlier national mark, the seniority of which is claimed for the EU trade mark, must be registered at the time the seniority claim is filed.

In the second place, the Court states that that interpretation is confirmed by the context of that article. [97] Once the seniority claim based on the identical earlier national mark has been accepted for the EU trade mark, the proprietor may let the first mark expire, while continuing to enjoy the same rights under the second mark as those which he or she would have had if the first trade mark had continued to be registered. Thus, the system of claiming seniority of a national trade mark following registration of an EU trade mark is based on the principle that the proprietor of the earlier national mark will not surrender that mark or allow it to lapse before the seniority claim which he or she has filed has been accepted for the EU trade mark. This is based on the premiss that, at the date on which that claim is filed, the registration of the identical earlier national mark has not already expired.

In the third place, that interpretation is also consistent with the aim of the system of claiming seniority, which is to enable the proprietors of national trade marks and identical EU trade marks to streamline their trade mark portfolios while maintaining their earlier rights. The presumption that the rights attached to an identical earlier national mark will be maintained, which must be interpreted narrowly, is not to be applied generally, but only in favour of an identical EU trade mark and in respect of identical goods or services for which the seniority claim has been accepted and in the event of non-renewal of the registration of the identical earlier national mark. A seniority claim which has

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96 Article 40(1) of 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) provides that the proprietor of an EU trade mark who is the proprietor of an earlier identical trade mark registered in a Member State ... for goods or services which are identical to those for which the earlier trade mark has been registered, or contained within them, may claim the seniority of the earlier trade mark in respect of the Member State in or for which it was registered.

97 Article 40 of Regulation 2017/1001, read in conjunction with Article 39(3) of that regulation.

been accepted does not therefore have the effect of ensuring the survival of the earlier national mark concerned or even of merely maintaining certain rights attached to it separately from the EU trade mark for the benefit of which that claim was accepted.

Therefore, although the applicant may rely on the presumption that the rights attached to the earlier Polish and German trade marks would be maintained after their expiry, for the benefit of another EU trade mark for which the seniority claim had been accepted before their expiry, it cannot, nevertheless, rely on that same presumption in support of the contested seniority claim for the EU trade mark at issue.

3.2 Machines

Judgment of the General Court (Second Chamber) of 8 September 2021, Brunswick Bowling Products v Commission, T-152/19

Link to the complete text of the judgment

Protection of the health and safety of consumers and workers – Directive 2006/42/EC – Safeguard clause – National measure of withdrawal from the market and prohibition of placing on the market of a pinsetter machine and a supplementary kit – Essential health and safety requirements – Commission decision declaring the measure justified – Equal treatment

The applicant, Brunswick Bowling Products LLC, is an undertaking which is active in the market as an operator of full-service bowling and recreation centres. It produces, inter alia, pinsetter machines and supplementary kits of parts, which are placed on the market in 26 Member States of the European Union.

On 30 August 2013, the Swedish authorities issued a decision by which they adopted safeguard measures under Directive 2006/42, [98] seeking, first, to prohibit the placing on the market of the products at issue and, secondly, subject to certain reservations, to withdraw them from the market. The reasons relied on to justify the safeguard measures were the failure of the products at issue to satisfy certain essential health and safety requirements ('EHSRs') [99] and the incorrect application of certain harmonised standards. By Implementing Decision (EU) 2018/1960, [100] the European Commission considered that the measures taken by the Kingdom of Sweden were justified. [101]

The General Court dismisses the action brought by the applicant against the contested decision and supplements the existing case-law on the application of the principle of proportionality, in the context of safeguard measures outlined in Directive 2006/42. Furthermore, it clarifies the consequences of a manufacturer choosing to rely on the application of a harmonised standard.

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98 Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on machinery, and amending Directive 95/16/EC (recast) (OJ 2006 L 157, p. 24), Article 11(1). This provision sets out the procedure to be followed by the Member States and the Commission when implementing the safeguard clause.

99 Set out in Annex 1 to Directive 2006/42.

100 Commission Implementing Decision (EU) 2018/1960 of 10 December 2018 on a safeguard measure taken by Sweden pursuant to Directive 2006/42/EC of the European Parliament and of the Council, to prohibit the placing on the market [of] a type of pinsetter machine and a supplementary kit to be used together with that type of pinsetter machine, manufactured by Brunswick Bowling & Billiards, and to withdraw those machines already placed on the market (OJ 2018 L 315, p. 29) ('the contested decision').

101 Under Article 11(3) of Directive 2006/42.

Findings of the Court

First, the Court finds that the Commission did not infringe the principle of proportionality in finding that the safeguard measures at issue were justified.

It states, first of all, that it is for the Member States to implement Directive 2006/42 correctly, by taking safeguard measures where appropriate. The Commission is solely competent to verify whether or not those safeguard measures are justified and proportionate and, consequently, whether those measures may be definitively maintained. That review is based only on circumstances which existed at the time of the adoption of the national decision introducing safeguard measures, and not on subsequent circumstances, such as improvements to the products at issue.

Next, the Court notes that the objective of the protection of the health and life of humans ranks foremost among the assets or interests protected by Article 36 TFEU. In the present case, given that the infringements of the EHSRs found by the Commission constitute risks to human health and safety, the Commission was correct in concluding that the safeguard measures were justified. The Court also observes that, in the light of the principle of proportionality, the seriousness of the risks and the cost of withdrawing the products at issue were weighed up. Thus, the products to be sold subsequently were distinguished from the products at issue already established on the market and a number of alternative solutions were implemented concerning the withdrawal of those products.

The Court also finds that, in the present case, the risks posed by the products at issue to the health and safety of humans justify the need to prohibit the placing on the market and the withdrawal from the market of those products, notwithstanding the cost to the applicant. Therefore, the approach adopted by the Swedish authorities and the Commission is proportionate to the financial burden which the safeguard measures impose on the applicant.

Lastly, the Court points out that the contested decision is binding in its entirety on all the Member States. That decision requires that each of the Member States take appropriate measures relating to the placing or retaining of the products at issue on the market, which is an essential element of the safeguard clause procedure. Furthermore, following notification of the safeguard measures taken by the Swedish authorities, the Commission was under an obligation to act and to take a decision as to whether those measures were justified.

In the second place, the Court finds that the Commission did not infringe the procedural rules laid down in Annex I to Directive 2006/42.

First, it notes that, according to that directive, compliance with a harmonised standard, the references to which have been published in the *Official Journal of the European Union*, form the basis for a presumption that machinery complies with the EHSRs covered by that standard. However, while remaining free to choose the methods for assessing the conformity of their products with the EHSRs, the manufacturer is obliged to ensure such conformity and to demonstrate it in the technical file.

Secondly, the Court points out that Directive 2006/42 does not lay down any procedural rule requiring the provision, in a decision adopted in the context of the safeguard clause procedure, of an analysis of the application of the principle of the state of the art. Moreover, the omission of such an analysis does not in itself imply an infringement of that principle.

Thirdly, the General Court states that harmonised standards form part of EU law and that, even if they are not obligatory, the choice to apply them and to rely on them in the declaration of conformity requires that they be properly applied. In the event of incorrect application, the competent national authority is entitled to declare the non-compliance of the products at issue and to take measures under the safeguard clause procedure. In the present case, the applicant chose freely to apply that harmonised standard and, consequently, should have complied with it in its entirety. Thus, as a result of the failure to comply with that standard, the applicant should have presented another technical solution ensuring the same level of safety and should have shown that the products at issue complied with the respective EHSRs.

Judgment of the Court (Grand Chamber) of 15 July 2021, FBF, C-911/19

Link to the complete text of the judgment

Reference for a preliminary ruling – Articles 263 and 267 TFEU – EU act which is not legally binding – Judicial review – Guidelines issued by the European Banking Authority (EBA) – Product oversight and governance arrangements for retail banking products – Validity – Power of the EBA

In 2016 the European Banking Authority (EBA) issued guidelines on product oversight and governance arrangements for retail banking products. [102] In a notice published on its website on 8 September 2017 the Autorité de contrôle prudentiel et de résolution (Authority for prudential supervision and resolution, France; 'ACPR') announced that it complied with the contested guidelines, thus making them applicable to all financial institutions under its supervision.

On 8 November 2017 the Fédération bancaire francaise (French banking federation; 'FBF') lodged an application seeking the annulment of the ACPR notice before the Conseil d'État (Council of State, France). The FBF claimed that the contested guidelines, which were made applicable by the notice, were not valid because the EBA did not have the competence to issue such guidelines.

The Conseil d'État (Council of State), harbouring doubts, first, as to the remedies available for reviewing the legality of the contested guidelines by the Courts of the European Union, and secondly, as to the validity of the contested guidelines in the light of the framework of the mandate granted to the EBA by secondary legislation, made a reference to the Court of Justice for a preliminary ruling, asking it to rule on these aspects.

In its Grand Chamber judgment, the Court, having first held that the contested guidelines cannot be the subject of an action for annulment under Article 263 TFEU, then declared it had jurisdiction to assess the validity of the contested guidelines by way of a preliminary ruling under Article 267 TFEU and, finally, confirmed their validity.

Findings of the Court

As regards the judicial review of the contested guidelines by the Courts of the European Union, the Court notes these acts cannot be the subject of an action for annulment under Article 263 TFEU, since they are not intended to have binding legal effects.

In that regard, it points out that it follows from Regulation No 1093/2010 [103] that the competent authorities to which the contested guidelines are addressed are not required to comply with them and have the power to depart from them, in which case they must state the reasons for their position. Thus, these guidelines cannot be regarded as producing binding legal effects vis-à-vis the competent authorities or the financial institutions. Therefore, according to the Court, by authorising the EBA to issue guidelines and recommendations, the EU legislature intended to confer on that authority a power to exhort and to persuade, distinct from the power to adopt acts having binding force.

However, the fact that the contested guidelines do not have any binding legal effects does not preclude the Court's jurisdiction to give a preliminary ruling on their validity. In that regard, the Court

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102 Guidelines of 22 March 2016 (EBA/GL/2015/18) ('the contested guidelines').

103 Article 16(3) of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ 2010 L 331, p. 12).

declares that it has jurisdiction under Article 267 TFEU to assess the validity of the contested guidelines.

It therefore assesses that validity in the light of the provisions of Regulation No 1093/2010, in order to ascertain whether the contested guidelines fall within the EBA's power.

First of all, it points out that, since it is apparent from Regulation No 1093/2010 that the EU legislature has precisely delineated the EBA's power to issue guidelines, on the basis of objective criteria, the exercise of that power must be amenable to stringent judicial review in the light of those criteria. The fact that the contested guidelines do not produce any binding legal effects is not such as to affect the scope of that review.

Next, the Court states that the EBA's power to act is limited, in the sense that that authority is competent to issue guidelines only to the extent expressly provided for by the EU legislature. After outlining the content of the provisions of Regulation No 1093/2010 relating to the scope of the powers conferred on the EBA, the Court finds first that the validity of guidelines issued by that authority is subject to compliance with the provisions of that regulation specifically delineating the EBA's power to issue them, but also to the condition that those guidelines fall within the EBA's scope of action which that regulation establishes by reference to the application of certain European Union acts, referred to by that regulation. Moreover, the EBA may, with a view to ensuring the common, uniform and consistent application of EU law, issue guidelines relating to the prudential supervisory obligations on the institutions concerned, inter alia in order to protect the interests of depositors and investors by an appropriate framework for the taking of financial risks. There is nothing in Regulation No 1093/2010 to suggest that measures relating to the design and marketing of products are excluded from that power, provided that those measures fall within the EBA's scope of action.

It is in the light of those considerations that the Court examines whether the contested guidelines are, on the one hand, within the EBA's scope of action or, on the other hand, within the specific framework laid down by the EU legislature for the exercise of the EBA's power to issue guidelines.

As regards the EBA's scope of action, the Court points out that the validity of the contested guidelines is subject to the condition that they fall within the scope of at least one of the acts referred to in Regulation No 1093/2010 [104] or that they are necessary to ensure the effective and consistent application of such act.

In that regard, it concludes that the contested guidelines may be regarded as necessary to ensure the consistent and effective application of the provisions of Directives 2013/36, 2007/64, 2009/110 and 2014/7, referred to directly and indirectly by Regulation No 1093/2010.

As regards, in particular, those first three directives, the Court points out that, since the contested guidelines are intended to establish how the institutions concerned should include product oversight and governance arrangements, aimed at ensuring that the characteristics of the relevant markets and of the consumers concerned are taken into account, in their internal structures and procedures, those guidelines must be regarded as laying down principles intended to ensure effective processes to identify, manage and monitor risks as well as adequate internal control mechanisms within the

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104 The Court found that four directives must be regarded as constituting acts referred to in Article 1(2) of Regulation No 1093/2010, namely: 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); Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1); Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (OJ 2009 L 267, p. 7); and Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ 2014 L 60, p. 34).

meaning of the relevant provisions of the acts referred to in Regulation No 1093/2010 [105] in order to ensure the existence of the robust corporate governance arrangements required by that provision.

As regards the specific framework adopted by the EU legislature for the exercise of the EBA's power to issue guidelines, the Court finds that the contested guidelines do indeed fall within that framework. [106]

In that regard, it states, first, that the purpose of the contested guidelines is to contribute to the protection of consumers as well as depositors and investors, referred to in Regulation No 1093/2010. Secondly, the contested guidelines are linked to the function conferred on the EBA in accordance with that regulation, as regards the framework for the taking of risks by financial institutions. Thirdly, they must be regarded as contributing to the establishment of consistent, efficient and effective supervisory practices within the European System of Financial Supervision. [107]

The Court concludes that the contested guidelines do indeed fall within the specific framework adopted by the EU legislature for the exercise of the EBA's power to issue guidelines, and consequently within the EBA's powers, and therefore considers that the examination of validity requested by the referring court has disclosed no factor of such a kind as to call into question the validity of the contested guidelines.

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105 Article 74(1) of Directive 2013/36, Article 10(4) of Directive 2007/64, and Article 3(1) of Directive 2009/110.

106 As follows from Article 8(1) and (2) and Article 16(1) of Regulation No 1093/2010, read in conjunction with Article 1(5) thereof.

107 Practices referred to in Article 8(1)(b) and Article 16(1) of Regulation No 1093/2010.

Nota:

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

- Judgment of 11 November 2021, Stichting Cartel Compensation and Equilib Netherlands, C-819/19, ECLI:EU:C:2021:904
- Judgment of 11 November 2021, Manpower Lit, C-948/19, ECLI:EU:C:2021:906
- Judgment of 25 November 2021, Aurubis, C-271/20, ECLI:EU:C:2021:959
- Judgment of 20 October 2021, JMS Sports v EUIPO - Inter-Vion (Élastique pour cheveux en spirale), T-823/19, ECLI:EU:T:2021:718
- Order of 25 October 2021, 4B Company v EUIPO - Deenz [Pendentif (bijou)], T-329/20, ECLI:EU:T:2021:732
- Judgment of 10 Novembre 2021, Google and Alphabet v Commission (Google Shopping), T-612/17, ECLI:EU:T:2021:763
- Order of 30 Novembre 2021, Airoldi Metalli v Commission, T-744/20, ECLI:EU:T:2021:853