COURT OF JUSTICE
OF THE EUROPEAN UNION

ANNUAL REPORT 2021

JUDICIAL ACTIVITY

COURT OF JUSTICE
OF THE EUROPEAN UNION

Annual Report 2021
Judicial activity

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

Luxembourg, 2022

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Printed by the Court of Justice of the European Union in Luxembourg

Text completed in March 2022

Luxembourg: Court of Justice of the European Union | Communications Directorate
Publications and Electronic Media Unit, 2022

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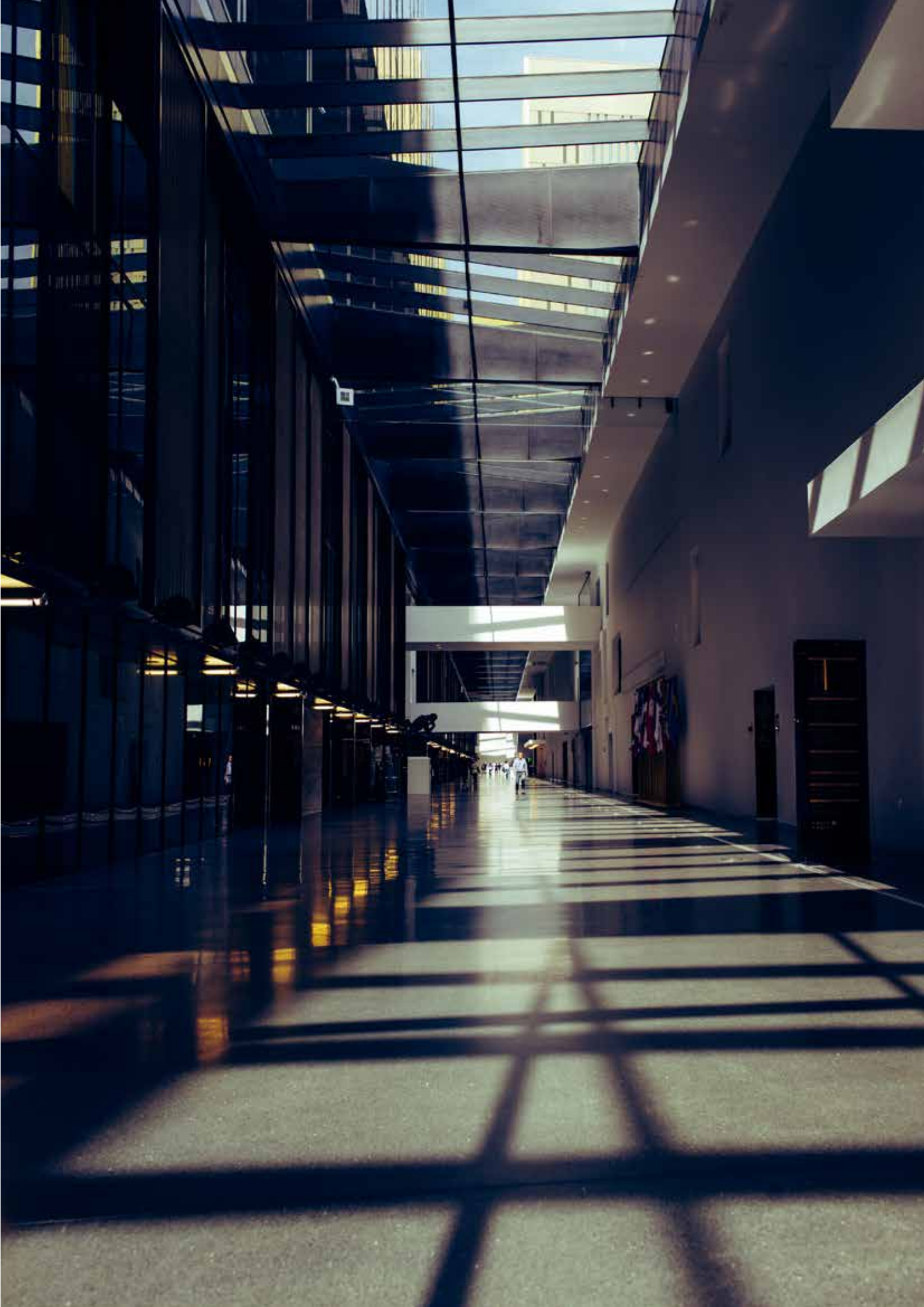

Koen Lenaerts

President of the Court of Justice
of the European Union

This year, 2021, was, alas, devoted to coping with the persistence of health measures and restrictions in our private and professional life in order to deal with the successive waves of the Covid-19 pandemic. Thanks to the use of the remote working and communications tools deployed from the onset of the pandemic in March 2020 the institution was, however, able to ensure that its activities at the service of European justice could continue without interruption.

This adaptability and inventiveness displayed by the services of the institution in order to overcome the digital barrier resulted in the institution receiving the Award for good administration for excellence in innovation and transformation from the European Ombudsman in June 2021. This award was made in recognition of the design and implementation of a videoconferencing system that allowed the parties' representatives to participate remotely in the hearings before both Courts, with simultaneous interpretation.

The year 2021 was also marked by a significant partial renewal of the composition of the Court of Justice. The solemn sitting held on 7 October 2021 thus provided the occasion to pay tribute to the nine Members who left the Court of Justice, in most cases following a very long term in the service of the institution, and to welcome nine new Members. The General Court, for its part, welcomed five new Members during the year.

Statistically, 2021 was marked by a resumption of the increase in the number of cases brought before both Courts, following the fall dictated by circumstances prevailing in 2020 (1720 cases in 2021, against 1584 in 2020). This increase is significant in the case of the Court of Justice (838 cases in 2021, against 737 in 2020), owing essentially to an appreciable increase in the number of appeals brought against decisions of the General Court (232 in 2021, against 131 in 2020). A comparable increase may be seen, by comparison with 2020, in the number of cases disposed of by both Courts (1723 cases in 2021, against 1540 in 2020), the increase being particularly marked in the case of the General Court, which thus takes full advantage of the reform of the institutional architecture of the European Union, essentially achieved since September 2019 (951 cases disposed of in 2021, against 748 in 2020). This parallel increase in the overall number of cases brought and disposed of in 2021 explains why the number of pending cases has remained stable (2541 cases pending on 31 December 2021, against 2544 in 2020).

The decisions delivered throughout the past year concerning the rule of law, the environment, personal data protection, social protection or aid granted in the context of the health crisis show the extent to which the institution's activities are at the heart of contemporary reality and have a real impact on the lives of the citizens and undertakings of the European Union.

At a time when we are witnessing a widespread tendency to challenge the authority of judicial decisions, even, in certain Member States, to call in question, more fundamentally, the project of European integration and the values and founding principles of that project, the legitimacy of the decisions delivered by the institution lies above all in the quality and persuasiveness of those decisions. Such guarantees attest to a European justice at the exclusive service of respect for the rule of law.

2021 marked the 20th anniversary of the signature of the Treaty of Nice, which prepared for the great enlargement of 2004 and made important changes to the judicial system of the European Union, in particular by paving the way to the great reform of the judicial architecture which came into being in December 2015.

2022 will be the year in which the 70th anniversary of the Court of Justice is celebrated. To mark the occasion, different events will be held, both within and outside the institution, in order to strength the interface with citizens and to increase the transparency of the role and the case-law of both Courts. These initiatives, together with the existing projects relating to the broadcast by streaming of hearings and the handing down of judgments, are the result of a common intention: to open the doors of the institution to Europe as a whole and no longer just to groups of visitors.

While expressing the wish for a rapid return to normality, I would like to reiterate my deepest recognition to my colleagues and to all the staff of the institution for the exemplary devotion and adaptability which they have shown during what was once again a very remarkable year.


CVRIA
GRANDE SALLE D'AUDIENCE

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Chapter 1
The Court of Justice

A.

The Court of Justice: changes and activity in 2021

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

This first chapter summarises the activities of the Court of Justice in 2021. It begins, in this part (A), by describing briefly how the Court evolved during the past year and providing an overview of its judicial activity. The second part (B) presents, as it does each year, the main developments in the case-law, arranged by subject matter. The third and fourth parts (C and D) outline the main statistical trends relating to the past year, while the fifth and last part (E) sets out the Court's composition during 2021.

1.1. 2021 was characterised by a significant partial renewal of the composition of the Court, resulting in the departure and simultaneous arrival of nine members. At the formal sitting on 7 October 2021, the Court thus paid tribute to Rosario Silva de Lapuerta (Judge at the Court of Justice since 2003, President of a five-Judge Chamber from 2012 to 2018 and Vice-President since 2018), Michail Vilaras (Judge at the General Court from 1998 to 2010, Judge at the Court of Justice since 2015 and President of a five-Judge Chamber since 2018), Endre Juhász (Judge at the Court of Justice since 2004), Camelia Toader (Judge at the Court of Justice since 2007), Daniel Šváby (Judge at the General Court from 2004 to 2009 and Judge at the Court of Justice since 2009), Henrik Saugmandsgaard Øe and Michal Bobek (Advocates General since 2015), Evgeni Tanchev (Advocate General since 2016), and Gerard Hogan (Advocate General since 2018).

At the same time, Dimitrios Gratsias (Greece), Maria Lourdes Arastey Sahún (Spain), Miroslav Gavalec (Slovakia), Zoltán Csehi (Hungary) and Octavia Spineanu-Matei (Romania) took office as judges and Anthony Collins (Ireland), Nicholas Emiliou (Cyprus), Tamara Ćapeta (Croatia) and Laila Medina (Latvia) as advocates general.

Moreover, seven judges were reappointed, namely Koen Lenaerts (Belgium), who was re-elected as head of the institution on 8 October 2021, Lars Bay Larsen (Denmark), who was elected Vice-President of the Court that same day, Siniša Rodin (Croatia), François Biltgen (Luxembourg), Küllike Jürimäe (Estonia), Eugene Regan (Ireland) and Niilo Jääskinen (Finland). Juliane Kokott (Germany), Manuel Campos Sánchez-Bordona (Spain) and Athanasios Rantos (Greece) were reappointed as advocates general.

Lastly, on 26 October 2021 Alfredo Calot Escobar was re-elected as Registrar of the Court for the period from 7 October 2022 to 6 October 2028.

1.2. As in 2020, the public-health crisis also had an impact on judicial activity in 2021 but, as a result of the measures taken at the beginning of that crisis to enable the Court to fulfil its mission in spite of the difficulties it faced and, in particular, as a result of the use of videoconferencing allowing the parties' representatives to plead remotely at hearings, the Court of Justice was able to maintain a high level of activity. Without prejudice to the more detailed comments set out in Part C of this chapter of the annual report, a number of trends emerge from a reading of the statistics relating to the past year.

In 2021, 838 new cases were brought before the Court. This marks a significant upswing compared with the previous year (737 in 2020) and is mainly attributable to the increase in the number of appeals, appeals on intervention and appeals against interim measures (232 against 131 the year before). The number of requests

for a preliminary ruling submitted to the Court in 2021 (567) also rose compared with the previous year (557), but what stands out the most is the different geographical spread of those requests. While the number of requests from some Member States (such as Germany and Austria) fell sharply over the past year, requests from Bulgaria, Romania, Lithuania and Slovenia more than doubled, which testifies to the vitality of the preliminary ruling dialogue that the Court maintains with the courts and tribunals of the Member States. By contrast, only 29 direct actions were lodged in 2021, one of the lowest figures ever recorded by the Court.

As for the number of cases disposed of, the Court achieved a very similar result to that of the previous year, disposing of 772 cases in 2021 compared with 792 in 2020. The breakdown of those cases by court formation is reminiscent of that observed in 2020, but the proportion of orders involving a judicial determination is on the rise, particularly as regards appeals. Almost half of all appeals disposed of in 2021 were decided on by means of an order made under either Article 170b or Article 181 of the Rules of Procedure.

The average length of proceedings (16.6 months) is up on last year's figure (15.4 months), but that increase is largely due to the measures taken by the Court to mitigate the effects of the public-health crisis and, in particular, its decision (i) to give parties an additional period of one month to submit their pleadings or written observations, and (ii) to put questions to the parties requiring a written answer in lieu of a hearing, which inevitably lengthened the duration of the case because of the need to allow the parties sufficient time to reply and the time taken to translate the replies into the language of the case and into the Court's working language.

Those factors are responsible for the increase in the number of cases pending before the Court, which stood at 1113 as of 31 December 2021. Since a further upturn in the number of new cases cannot be ruled out, the Court will continue to monitor the evolution of those figures closely in 2022 and will, if necessary, take appropriate measures to ensure that it can continue to perform its mission in the service of litigants, which includes, as the case may be, the submission of legislative proposals.

B.
Case-law of the Court of Justice in 2021

I. Values of the European Union

1. Respect for the rule of law

In 2021, the Court ruled on a number of occasions on issues concerning the fundamental values of the European Union enshrined in Article 2 TEU. The seven judgments set out in this section provide, in that regard, considerable guidance on respect for the rule of law. One of the ways by which that value is upheld is through the right to effective judicial protection, which entails respect for the principles of independence, irremovability and impartiality of judges. The first two decisions relate to a reform in the field of justice and the fight against corruption in Romania, while the following four concern a judicial reform in Poland. The last decision deals with the procedure for appointing members of the Maltese judiciary.

Judgment of 18 May 2021 (Grand Chamber), *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393)

Six requests for a preliminary ruling were brought before the Court by Romanian courts in proceedings between legal persons or natural persons and authorities or bodies such as the Inspecţia Judiciară (Judicial Inspectorate, Romania), the Consiliul Superior al Magistraturii (Supreme Council of the Judiciary, Romania) and the Parchetul de pe lângă Înalta Curte de Casaţie şi Justiţie – Procurorul General al României (prosecutor's office attached to the High Court of Cassation and Justice – Prosecutor General of Romania).

The disputes in the main proceedings follow on from a wide-ranging reform in the field of justice and the fight against corruption in Romania, a reform which has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 [1] on the occasion of Romania's accession to the European Union ('the CVM').

1| Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

In the context of the negotiations for its accession to the European Union, Romania had, in the course of 2004, adopted three laws, known as 'the Justice Laws', on the rules governing judges and prosecutors, on the organisation of the judicial system and on the Consiliul Superior al Magistraturii (Supreme Council of the Judiciary), with the aim of improving the independence and effectiveness of the judicial system. Between 2017 and 2019, amendments were made to those Justice Laws by laws and government emergency ordinances adopted on the basis of the Romanian Constitution. The applicants in the main proceedings disputed whether some of those legislative amendments were compatible with EU law. In support of their actions, they referred to certain opinions and reports drawn up by the European Commission on progress in Romania under the CVM, opinions and reports which, in their view, were critical of the provisions adopted by Romania between 2017 and 2019 in the light of the requirements of the effectiveness of the fight against corruption and the guarantee of the independence of the judiciary.

In that context, the referring courts were uncertain as to the legal nature and effects of the CVM and the scope of the reports drawn up by the Commission under it. According to those courts, the content, nature and duration of that mechanism should be regarded as falling within the scope of the Treaty of Accession and the requirements set out in those reports should be binding on Romania. In that regard, however, the referring courts mentioned national case-law according to which EU law would not take precedence over the Romanian constitutional order and Decision 2006/928 could not constitute a reference provision in the context of a review of constitutionality, since that decision was adopted before Romania's accession to the European Union and has not been interpreted by the Court in terms of whether its content, nature and duration fall within the scope of the Treaty of Accession.

Findings of the Court

In the first place, the Court, sitting as the Grand Chamber, found that Decision 2006/928 and the reports drawn up by the Commission on the basis of that decision constitute acts of an EU institution, which are amenable to interpretation under Article 267 TFEU. The Court held, next, that as regards its legal nature, content and temporal effects, Decision 2006/928 falls within the scope of the Treaty of Accession, because that decision is a measure adopted on the basis of the Act of Accession which has been binding on Romania since the date of its accession to the European Union.

As regards the legal effects of Decision 2006/928, the Court held that that decision is binding in its entirety on Romania as from its accession to the European Union and obliges it to address the benchmarks, which are also binding, set out in the annex to the decision. Those benchmarks, defined on the basis of the deficiencies established by the Commission before Romania's accession to the European Union, seek in particular to ensure that that Member State complies with the value of the rule of law. Romania is, therefore, required to take appropriate measures to meet those benchmarks and to refrain from implementing any measure which could jeopardise their being met.

As regards the legal effects of the reports drawn up by the Commission on the basis of Decision 2006/928, the Court made clear that those reports formulate requirements with regard to Romania and address 'recommendations' to it with a view to the benchmarks being met. In accordance with the principle of sincere cooperation, Romania must take due account of those requirements and recommendations, and must refrain from adopting or maintaining measures in the areas covered by the benchmarks which could jeopardise the result prescribed by those requirements and recommendations.

- Interim appointments to management positions within the Judicial Inspectorate

In the second place, after finding that the legislation governing the organisation of justice in Romania falls within the scope of Decision 2006/928, the Court pointed out that the very existence of effective judicial review, designed to ensure compliance with EU law, is the essence of the value of the rule of law, which is

protected by the Treaty on European Union. The Court emphasised next that, under Article 19 TEU, every Member State must ensure that the bodies which, as 'courts or tribunals', come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection. Since the national legislation at issue applies to the ordinary courts which are called upon to rule on questions relating to the application or interpretation of EU law, that national legislation must therefore meet those requirements. In that regard, maintaining the independence of the judges in question is essential, in order to protect them from external intervention or pressure, and thus preclude any direct influence but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.

Lastly, as regards the rules governing the disciplinary regime for judges, the Court found that the requirement of independence means that the necessary guarantees must be provided in order to prevent that regime being used as a system of political control of the content of judicial decisions. National legislation cannot, therefore, give rise to doubts, in the minds of individuals, that the powers of a judicial body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors might be used as an instrument to exert pressure on, or political control over, the activity of those judges and prosecutors.

In the light of those general considerations, the Court held that national legislation is likely to give rise to such doubts where, even temporarily, it has the effect of allowing the government of the Member State concerned to make appointments to the management positions of the body responsible for conducting disciplinary investigations and bringing disciplinary proceedings against judges and prosecutors, by disregarding the ordinary appointment procedure laid down by national law.

- The creation of a special prosecution section with exclusive competence for offences committed by judges

In the third place, and again in the light of those same general considerations, the Court examined whether national legislation providing for the creation of a specialised section of the public prosecutor's office with exclusive competence to investigate offences committed by judges and prosecutors is compatible with EU law. The Court clarified that, in order to be compatible with EU law, such legislation must, first, be justified by objective and verifiable requirements relating to the sound administration of justice and, secondly, ensure that that section cannot be used as an instrument of political control over the activity of those judges and prosecutors and that the section exercises its competence in compliance with the requirements of the Charter of Fundamental Rights of the European Union ('the Charter'). If it fails to fulfil those requirements, that legislation could be perceived as seeking to establish an instrument of pressure and intimidation with regard to judges, which would prejudice the trust of individuals in justice. The Court added that the national legislation at issue cannot have the effect of contravening Romania's specific obligations under Decision 2006/928 in the area of the fight against corruption.

It is for the national court to ascertain that the reform which resulted, in Romania, in the creation of a specialised section of the public prosecutor's office responsible for investigating judges and prosecutors and the rules relating to the appointment of prosecutors assigned to that section are not such as to make the section open to external influences. As regards the Charter, it is for the national court to ascertain that the national legislation at issue does not prevent the case of the judges and prosecutors concerned being heard within a reasonable time.

- The State's financial liability and the personal liability of judges for a judicial error

In the fourth place, the Court held that national legislation governing the financial liability of the State and the personal liability of judges in respect of the damage caused by a judicial error can be compatible with EU law only in so far as the engagement, in an action for indemnity, of a judge's personal liability for such a judicial error is limited to exceptional cases and is governed by objective and verifiable criteria, arising from

requirements relating to the sound administration of justice, and also by guarantees designed to avoid any risk of external pressure on the content of judicial decisions. To that end, clear and precise rules defining the conduct which may give rise to the personal liability of judges are essential, in order to guarantee the independence inherent in their task and to avoid exposing them to the risk that their personal liability may be incurred solely because of their decision. The fact that a decision contains a judicial error cannot, in itself, suffice to render the judge concerned personally liable.

As regards the detailed rules for putting in issue the personal liability of judges, the national legislation must provide clearly and precisely the necessary guarantees ensuring that neither the investigation to determine whether the conditions and circumstances which may give rise to such liability are satisfied nor the action for indemnity appears capable of being converted into an instrument of pressure on judicial activity. In order to ensure that such detailed rules cannot have a chilling effect on judges in the performance of their duty to adjudicate with complete independence, the authorities empowered to initiate and conduct that investigation and bring that action must themselves be authorities which act objectively and impartially, and the substantive conditions and detailed procedural rules must be such as not to give rise to reasonable doubts concerning the impartiality of those authorities. Similarly, it is important that the rights enshrined in the Charter, in particular the rights of defence of a judge, should be fully respected and that the body with jurisdiction to rule on the personal liability of a judge should be a court. In particular, a finding of judicial error cannot be binding in the action for indemnity brought by the State against the judge concerned when that judge was not heard during the previous proceedings seeking to establish the financial liability of the State.

- The principle of the primacy of EU law

In the fifth place, the Court held that the principle of the primacy of EU law precludes national legislation with constitutional status which deprives a lower court of the right to disapply of its own motion a national provision falling within the scope of Decision 2006/928 and which is contrary to EU law. The Court recalled that, in accordance with settled case-law, the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, and that provisions of domestic law relating to the attribution of jurisdiction, including constitutional provisions, are unable to prevent that. Recalling also that national courts are required, to the greatest extent possible, to interpret national law in conformity with the requirements of EU law, or to disapply of their own motion any conflicting provision of national law which could not be interpreted in conformity with EU law, the Court held that, where it is proved that the EU Treaty or Decision 2006/928 has been infringed, the principle of the primacy of EU law will require the referring court to disapply the provisions at issue, whether they are of a legislative or constitutional origin.

Judgment of 21 December 2021 (Grand Chamber), *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU :C :2021 :1034)

The present cases follow on from the reform of the judicial system with regard to combating corruption in Romania, which was the subject of a previous judgment of the Court. [2] That reform has been monitored at EU level since 2007 under the cooperation and verification mechanism established by Decision 2006/928 on the occasion of Romania's accession to the European Union ('the CVM').

2| Judgment of 18 May 2021, ***Asociaţia 'Forumul Judecătorilor din România' and Others*** (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393)

In those cases, the question arose as to whether the application of the case-law arising from various decisions of the Curtea Constituțională a României (Constitutional Court, Romania) on the rules of criminal procedure applicable to fraud and corruption proceedings was liable to infringe EU law, in particular the provisions of EU law intended to protect the financial interests of the European Union, the guarantee of judicial independence and the value of the rule of law, as well as the principle of the primacy of EU law.

In Cases C-357/19, C-547/19, C-811/19 and C-840/19, the Înalta Curte de Casaţie şi Justiţie (High Court of Cassation and Justice, Romania; 'the HCCJ') had convicted several persons, including former Members of Parliament and Ministers, of offences of VAT fraud, corruption and influence peddling, inter alia in connection with the management of European funds. The Curtea Constituțională a României (Constitutional Court) set aside those decisions on the grounds of the unlawful composition of the panel of judges, stating, first, that the cases on which the HCCJ had ruled at first instance should have been heard by a panel specialised in corruption [3] and, secondly, that in the cases on which the HCCJ had ruled on appeal, all the judges of the panel of judges should have been selected by drawing lots. [4]

In Case C-379/19, criminal proceedings had been brought before the Tribunalul Bihor (Regional Court, Bihor, Romania) against several persons accused of corruption offences and influence peddling. In the context of a request for the exclusion of evidence, that court was faced with the application of case-law of the Curtea Constituțională a României (Constitutional Court) which declared the gathering of evidence in criminal proceedings with the participation of the Romanian intelligence service to be unconstitutional, resulting in the retroactive exclusion of the evidence concerned from the criminal proceedings. [5]

Against that background, the HCCJ and the Tribunalul Bihor (Regional Court, Bihor), referred questions for a preliminary ruling to the Court concerning the compliance of those decisions of the Curtea Constituțională a României (Constitutional Court) with EU law. [6] First of all, the Tribunalul Bihor (Regional Court, Bihor), raised the issue of whether the CVM and the reports prepared by the Commission in accordance with that mechanism are binding. [7] Next, the HCCJ raised the issue of a possible systemic risk of impunity in the field of the fight against fraud and corruption. Lastly, those courts also asked whether the principles of the primacy of EU law and of judicial independence allow them to disapply a decision of the Curtea Constituțională a României (Constitutional Court), whereas under Romanian law the judges' failure to comply with a decision of the Curtea Constituțională a României (Constitutional Court) constitutes a disciplinary offence.

3| Judgment of 3 July 2019, No 417/2019.

4| Judgment of 7 November 2018, No 685/2018.

5| Judgments of 16 February 2016, No 51/2016, of 4 May 2017, No 302/2017, and of 16 January 2019, No 26/2019.

6| Article 2 and the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU, Article 2 of the Convention drawn up on the basis of Article K.3 TEU, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 49), and Decision 2006/928.

7| According to the judgment of the Curtea Constituțională a României (Constitutional Court) of 6 March 2018, No 104/2018, Decision 2006/928 cannot constitute a benchmark in the context of a review of constitutionality.

Findings of the Court

- The binding nature of the CVM

The Court, sitting as the Grand Chamber, confirmed its case-law following from an earlier judgment, according to which the CVM is, in its entirety, binding on Romania. [8] Thus, the measures adopted, prior to accession, by the EU institutions are binding on Romania since the date of its accession. That is the case with Decision 2006/928, which is binding in its entirety on Romania as long as it has not been repealed. The benchmarks which seek to ensure compliance with the rule of law are also binding. Romania is thus required to take the appropriate measures to meet those benchmarks, taking due account of the recommendations made in the reports drawn up by the Commission. [9]

- The obligation to provide for effective and dissuasive penalties for offences of fraud affecting the financial interests of the European Union or offences of corruption

EU law precludes the application of the case-law of the Curtea Constituțională a României (Constitutional Court) leading to the setting aside of judgments delivered by improperly composed panels of judges, in so far as that case-law, in conjunction with the national provisions on limitation periods, creates a systemic risk of impunity in respect of acts constituting serious offences of fraud affecting the financial interests of the European Union or offences of corruption.

First of all, even though the rules governing the organisation of the judicial system in the Member States, in particular those relating to the composition of the panels of judges in matters of fraud and corruption, fall, in principle, within the jurisdiction of those States, the Court pointed out that they are nevertheless required to comply with their obligations under EU law.

Such obligations include the fight against any illegal activities, which include corruption offences, affecting the financial interests of the European Union by means of effective measures which act as a deterrent. [10] In respect of Romania, that obligation is supplemented by that Member State's obligation, stemming from Decision 2006/928, to combat corruption and, in particular, high-level corruption effectively.

The ensuing requirement of effectiveness necessarily extends both to proceedings and penalties for those offences and to the application of the penalties imposed in so far as, unless the penalties for fraud offences affecting those interests and for corruption offences in general are enforced effectively, those penalties cannot be effective and act as a deterrent. Next, the Court noted that it is primarily for the national legislature to take the measures necessary to ensure that the procedural rules applicable to those offences do not present a systemic risk of impunity. National courts, for their part, must disapply domestic provisions which prevent the application of effective penalties that act as a deterrent.

In the present case, the application of the case-law of the Curtea Constituțională a României (Constitutional Court) in question has the consequence that the cases of fraud and corruption concerned must be re-examined, if necessary on several occasions, at first instance and/or on appeal. In view of its complexity and duration, such a re-examination necessarily has the effect of extending the duration of the corresponding criminal proceedings. Besides the fact that Romania has pledged to reduce the duration of proceedings in

8| Judgment of 18 May 2021, ***Asociația 'Forumul Judecătorilor din România' and Others*** (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU :C :2021 :393).

9| Under the principle of sincere cooperation laid down in Article 4(3) TEU.

10| In accordance with Article 325(1) TFEU.

corruption cases, the Court recalled that, in the light of the specific obligations on Romania under Decision 2006/928, the national rules and the national practice in that field cannot result in the duration of investigations into corruption offences being extended or the fight against corruption being in any way weakened. [11] Moreover, given the national rules on limitation, the re-examination of the cases at issue might lead to prosecution of the offences being time-barred and to the prevention of persons occupying the highest positions in the Romanian State, who have been convicted of committing, in the exercise of their duties, serious acts of fraud and/or corruption, from being penalised in a manner which is effective and acts as a deterrent. Therefore, the risk of impunity would become systemic for that category of persons and would call into question the objective of combating high-level corruption.

Lastly, the Court recalled that the obligation to ensure that such offences are subject to penalties which are effective and act as a deterrent does not exempt the referring court from verifying the necessary observance of the fundamental rights guaranteed in Article 47 of the Charter, but does not allow that court to apply a national standard of protection of fundamental rights entailing such a systemic risk of impunity. Therefore, the requirements arising from that article do not preclude the possible disapplication of the case-law of the Curtea Constituțională a României (Constitutional Court) on the specialisation and the composition of panels of judges in corruption cases, which entails such a risk.

- The guarantee of judicial independence

EU law does not preclude decisions of the Curtea Constituțională a României (Constitutional Court) from binding the ordinary courts, provided that the independence of the Curtea Constituțională a României (Constitutional Court) in relation to the legislature and executive is guaranteed. However, that law precludes national judges from incurring disciplinary liability due to any disapplication of such decisions.

First, since the existence of effective judicial review designed to ensure compliance with EU law is of the essence to the rule of law, any court called upon to apply or interpret EU law must satisfy the requirements of effective judicial protection. For that to be the case, maintaining the independence of the courts is essential. In that regard, it is necessary that judges are protected against external intervention or pressure liable to impair their independence. In addition, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive.

Secondly, even though EU law does not require the Member States to adopt a particular constitutional model governing the relationship between the various branches of the State, the Court noted that the Member States must nevertheless comply, inter alia, with the requirements of judicial independence stemming from EU law. In those circumstances, decisions of the Curtea Constituțională a României (Constitutional Court) may bind the ordinary courts provided that national law guarantees the independence of the Curtea Constituțională a României (Constitutional Court) in relation to the legislature and executive. On the other hand, if national law does not guarantee that independence, EU law precludes such national rules or national practice, since such a constitutional court is not in a position to ensure the effective judicial protection required by EU law.

Thirdly, for the purposes of safeguarding judicial independence, the disciplinary regime must provide the necessary guarantees in order to prevent any risk of that regime being used as a system of political control of the content of judicial decisions. In that regard, the fact that a judicial decision contains a possible error in the interpretation and application of the rules of national and EU law, or in the assessment of facts and

11| Point I(5) of Annex IX to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203).

the appraisal of the evidence, cannot, in itself, trigger the disciplinary liability of the judge concerned. The triggering of the disciplinary liability of a judge as a result of a judicial decision should be limited to entirely exceptional cases and governed by guarantees designed to avoid any risk of external pressure on the content of judicial decisions. National legislation under which any failure to apply the decisions of the Curtea Constituțională a României (Constitutional Court) by judges of the ordinary courts is such as to give rise to their disciplinary liability does not comply with those conditions.

- The primacy of EU law

The principle of the primacy of EU law precludes national courts from being prohibited, subject to disciplinary penalties, from disapplying decisions of the Curtea Constituțională a României (Constitutional Court) that are contrary to EU law.

The Court pointed out that, in its case-law on the EEC Treaty, it laid down the principle of the primacy of Community law, understood to enshrine the precedence of Community law over the law of the Member States. In that regard, the Court has held that the establishment by the EEC Treaty of the Community's own legal system, accepted by the Member States on a basis of reciprocity, means, as a corollary, that they cannot accord precedence over that legal system to a unilateral and subsequent measure or rely on rules of national law of any kind against the law stemming from the EEC Treaty, without depriving the latter law of its character as Community law and without the legal basis of the Community itself being called into question. In addition, the executive force of Community law cannot vary from one Member State to another in deference to subsequent domestic laws without jeopardising the attainment of the objectives of the EEC Treaty or giving rise to discrimination on grounds of nationality prohibited by that treaty. The Court has thus held that the EEC Treaty, albeit concluded in the form of an international agreement, constitutes the constitutional charter of a Community based on the rule of law and that the essential characteristics of the Community legal order thus established are, in particular, its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

Those essential characteristics of the EU legal order and the importance of complying with that legal order, as required, were confirmed by the ratification, without reservation, of the Treaties amending the EEC Treaty and, in particular, the Treaty of Lisbon. When that treaty was adopted, the conference of representatives of the governments of the Member States was keen to state expressly, in its Declaration No 17 concerning primacy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, that, in accordance with the settled case-law of the Court, the Treaties and the law adopted by the European Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by that case-law.

The Court added that, since Article 4(2) TEU provides that the Union is to respect the equality of Member States before the Treaties, the European Union can respect such equality only if the Member States are unable, under the principle of the primacy of EU law, to rely on, as against the EU legal order, a unilateral measure, whatever its nature. In that context, the Court also noted that, in the exercise of its exclusive jurisdiction to give a definitive interpretation of EU law, it is for it to clarify the scope of the principle of the primacy of EU law in the light of the relevant provisions of EU law, since that scope cannot turn on the interpretation of provisions of national law or on the interpretation of provisions of EU law by a national court which is at odds with the interpretation given by the Court.

The Court recalled that the effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without provisions of domestic law, including constitutional provisions, being able to prevent that. National courts are thus required to disapply, on their own authority, any national rule or practice contrary to a provision of EU law which has direct effect, without having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means.

Moreover, for national judges, not being exposed to disciplinary proceedings or penalties for having exercised the discretion to make a reference for a preliminary ruling under Article 267 TFEU, which is exclusively within their jurisdiction, constitutes a guarantee that is essential to their independence. Thus, if a national judge of an ordinary court were to find, in the light of a judgment of the Court, that the case-law of the national constitutional court is contrary to EU law, that national judge's disapplication of that constitutional case-law cannot trigger his or her disciplinary liability.

Judgment of 2 March 2021 (Grand Chamber), *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153)

By resolutions adopted in August 2018, the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') decided not to present to the President of the Republic of Poland proposals for the appointment of five persons ('the appellants') to positions as judges at the Sąd Najwyższy (Supreme Court, Poland) and to put forward other candidates for those positions. The appellants lodged appeals against those resolutions before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), the referring court. Such appeals were governed at that time by the Law on the National Council of the Judiciary ('the Law on the KRS'), as amended by a law of July 2018. Under those rules, it was provided that unless all the participants in a procedure for appointment to a position as judge at the Sąd Najwyższy (Supreme Court) challenged the relevant resolution of the KRS, that resolution would become final with respect to the candidate presented for that position, so that the latter could be appointed by the President of the Republic. Moreover, any annulment of such a resolution on appeal of a participant not put forward for appointment could not lead to a fresh assessment of that participant's situation for the purposes of any assignment of the position concerned. In addition, under those rules, such an appeal could not be based on an allegation that there was an incorrect assessment of the candidates' fulfilment of the criteria taken into account when a decision on the presentation of the proposal for appointment was made. In its initial request for a preliminary ruling, the referring court, taking the view that such rules preclude in practice any effectiveness of the appeal lodged by a participant who was not put forward for appointment, decided to refer questions to the Court on whether those rules complied with EU law.

After that initial referral, the Law on the KRS was once again amended, in 2019. Pursuant to that reform, it became impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Sąd Najwyższy (Supreme Court). Moreover, that reform declared such still pending appeals to be discontinued by operation of law, *de facto* depriving the referring court of its jurisdiction to rule on that type of appeal and of the possibility of obtaining an answer to the questions that it had referred to the Court for a preliminary ruling. Accordingly, in its complementary request for a preliminary ruling, the referring court submitted a question to the Court for a preliminary ruling on whether those new rules were compatible with EU law.

Findings of the Court

In the first place, the Court, sitting as the Grand Chamber, held, first of all, that both the system of cooperation between the national courts and the Court established in Article 267 TFEU and the principle of sincere cooperation laid down in Article 4(3) TEU preclude legislative amendments, such as those cited above, made in 2019 in Poland, where it is apparent that they have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put by the referring court and of precluding any possibility of a national court repeating similar questions in the future. The Court stated, in that regard, that it is for the referring court to assess, taking account of all the relevant factors and, in particular, the context in which the Polish legislature adopted those amendments, whether that is the case here.

Next, the Court considered that the Member States' obligation to provide remedies sufficient to ensure effective legal protection for individuals in the fields covered by EU law, provided for in the second subparagraph of Article 19(1) TEU, may also preclude that same type of legislative amendments. That is the case where it is apparent – which again it is for the referring to assess on the basis of all the relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed on the basis of the KRS resolutions to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them. Such amendments would then be liable to lead to those judges not being seen to be independent or impartial, with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

In reaching that conclusion, the Court recalled that the guarantees of independence and impartiality required under EU law presuppose the existence of rules governing the appointment of judges. Moreover, the Court drew attention to the decisive role of the KRS in the process of appointment to a position as judge at the Sąd Najwyższy (Supreme Court), since the proposal act that it adopts is an essential condition for a candidate to be appointed subsequently. Thus, the degree of independence enjoyed by the KRS in respect of the Polish legislature and the executive may be relevant in order to ascertain whether the judges which it selects will be capable of meeting the requirements of independence and impartiality. Furthermore, the Court stated that the possible absence of any legal remedy in the context of a process of appointment to judicial positions at a national supreme court may prove to be problematic where all the relevant contextual factors characterising such an appointment process in the Member State concerned may give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process. In that regard, the Court specified that if the referring court were, on the basis of all the relevant factors that it mentioned in its order for reference and, in particular, of the legislative amendments that have recently affected the process of appointing members of the KRS, to conclude that the KRS does not offer sufficient guarantees of independence, the existence of a judicial remedy available to unsuccessful candidates would be necessary in order to help safeguard the process of appointing the judges concerned from direct or indirect influence and, ultimately, to prevent the doubts referred to above from arising.

Lastly, the Court held that if the referring court reaches the conclusion that the 2019 legislative amendments were adopted in breach of EU law, the principle of the primacy of EU law requires the referring court to disapply those amendments, whether they are of a legislative or constitutional origin, and to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made.

In the second place, the Court took the view that the second subparagraph of Article 19(1) TEU precludes legislative amendments, such as those cited above, made in 2018 in Poland, where it is apparent that they are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed to external factors, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial, with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.

It is ultimately for the referring court to rule on whether that is the case here. With regard to the considerations which the referring court will have to take into account in that regard, the Court stated that the national provisions concerning the judicial remedy available in the context of a process of appointment to judicial positions at a national supreme court may prove to be problematic in the light of the requirements arising from EU law where they undermine the effectiveness of the appeal procedure which existed until then. The Court observed, first, that following the 2018 legislative amendments, the appeal in question was devoid of any real effectiveness and offered no more than an appearance of a judicial remedy. Secondly, the Court stated that, in this instance, the contextual factors associated with all the other reforms that have recently

affected the Sąd Najwyższy (Supreme Court) and the KRS must also be taken into account. In that regard, the Court noted, in addition to the doubts previously mentioned in relation to the independence of the KRS, the fact that the 2018 legislative amendments were made very shortly before the KRS in its new composition was called upon to decide on applications, such as those of the appellants, submitted in order to fill numerous judicial positions at the Sąd Najwyższy (Supreme Court) which had been declared vacant or newly created as a result of the entry into force of various amendments to the Law on the Supreme Court.

Lastly, the Court specified that, if the referring court reaches the conclusion that the 2018 legislative amendments infringe EU law, it will be for that court, under the principle of the primacy of that law, to disapply those amendments and to apply instead the national provisions previously in force while itself exercising the review envisaged by those latter provisions.

Judgment of 15 July 2021 (Grand Chamber), *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU :C :2021 :596)

In 2017, Poland adopted a new disciplinary regime concerning judges of the Sąd Najwyższy (Supreme Court, Poland) and judges of the ordinary courts. In the context of that legislative reform, a new chamber, the Izba Dyscyplinarna ('the Disciplinary Chamber'), was established within the Sąd Najwyższy (Supreme Court). That chamber was made responsible, inter alia, for hearing disciplinary cases relating to judges of the Sąd Najwyższy (Supreme Court) and, on appeal, those relating to judges of the ordinary courts.

Taking the view that, by adopting that new disciplinary regime, Poland had failed to fulfil its obligations under EU law, [12] the European Commission brought an action for failure to fulfil obligations before the Court. The Commission submitted, in particular, that that disciplinary regime guaranteed neither the independence nor the impartiality of the Disciplinary Chamber, which is made up exclusively of judges selected by the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'), a body of which 23 of its 25 members are appointed by the political authorities.

In the judgment delivered in that case, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the Commission. First, it found that the new disciplinary regime for judges undermined their independence. Secondly, that regime did not enable the judges concerned to comply, acting with complete independence, with their obligations under the preliminary ruling mechanism.

Findings of the Court

First, the Court found that Poland had failed to fulfil its obligations, under the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The Court recalled that, according to its settled case-law, that provision and the requirement that judges be independent deriving from it mean that the disciplinary regime applicable to judges of the national courts which come within their judicial systems in the fields covered by EU law must provide the necessary guarantees

12| The Commission considered that Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU – which lays down the obligation, for the Member States, to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law – and under the second and third paragraphs of Article 267 TFEU – which gives 'lower' national courts the discretion (second paragraph) to make a reference for a preliminary ruling, and places national courts of last instance under the obligation (third paragraph) to do so.

in order to prevent any risk of such a regime being used as a system of political control of the content of judicial decisions, which presupposes, inter alia, rules that define the forms of conduct amounting to disciplinary offences, that provide for the intervention of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and that lay down the possibility of bringing legal proceedings challenging the decisions of disciplinary bodies.

However, according to the Court, Poland had, in the first place, failed to guarantee the independence and impartiality of the Disciplinary Chamber and had thereby undermined the independence of judges by failing to ensure that disciplinary proceedings brought against them would be reviewed by a body offering such guarantees. In accordance with the principle of the separation of powers, the independence of the judiciary must be ensured in relation to the legislature and the executive. Nevertheless, under the 2017 legislative reform, the process for appointing judges to the Supreme Court and, in particular, for appointing the members of the Disciplinary Chamber of the Supreme Court was essentially determined by the KRS – a body which was significantly reorganised by the Polish executive and legislature. The Court also noted that the Disciplinary Chamber was to be made up exclusively of new judges selected by the KRS who were not already sitting within the Supreme Court and who would benefit from, inter alia, a very high level of remuneration and a particularly high degree of organisational, functional and financial autonomy in comparison with the conditions prevailing in the other judicial chambers of that court. All of those factors are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that disciplinary body to the direct or indirect influence of the Polish legislature and executive, as well as its neutrality with respect to the interests before it.

The Court noted, in the second place, while taking into account, in that regard, the fact that the independence and impartiality of the Disciplinary Chamber are thus not guaranteed, that Poland had allowed the content of judicial decisions to be classified as a disciplinary offence as regards judges of the ordinary courts. Recalling the need to avoid the disciplinary regime being used in order to exert political control over judicial decisions or to exert pressure on judges, the Court noted that, in the present case, the new disciplinary regime for judges, which did not meet the requirements of clarity and precision as regards the forms of conduct likely to trigger the liability of judges, also undermined the independence of those judges.

In the third place, Poland had also failed to guarantee that disciplinary cases brought against judges of the ordinary courts would be examined within a reasonable time, thereby once again undermining the independence of those judges. According to the new disciplinary regime, a judge who has been the subject of disciplinary proceedings closed by a final ruling could, once again, be subject to such proceedings in the same case, such that that judge would permanently remain under the potential threat of such proceedings. In addition, the new procedural rules applicable to disciplinary proceedings concerning judges were liable to restrict the rights of defence of accused judges. Under those new rules, actions relating to the appointment of a judge's defence counsel and the conduct of the defence by that counsel would not suspend the proceedings, not to mention the fact that the proceedings could continue despite the justified absence of the judge or his or her defence counsel. Moreover, the new procedural rules referred to above could, especially where, as in the present case, they are applied in the context of a disciplinary regime displaying the shortcomings already noted above, increase the risk of the disciplinary regime being used as a system of political control of the content of judicial decisions.

In the fourth place, the Court found that, by conferring on the President of the Disciplinary Chamber referred to above the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in disciplinary cases relating to judges of the ordinary courts, Poland had failed to guarantee that such cases would be examined by a tribunal 'established by law' as is also required by the second subparagraph of Article 19(1) TEU.

Secondly, the Court found that, by allowing the right of national courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, Poland had failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU. The provisions of national legislation from which it follows that national judges may be exposed to disciplinary proceedings as a result of the fact that they have made a reference for a preliminary ruling to the Court of Justice cannot be accepted, because they undermine the effective exercise by the national judges concerned of the discretion or the obligation, provided by those provisions, to make a reference for a preliminary ruling to the Court of Justice, as well as the system of cooperation between the national courts and the Court of Justice thus established by the Treaties in order to secure uniformity in the interpretation of EU law and to ensure the full effect of that law.

Judgment of 6 October 2021 (Grand Chamber), *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment),* (C-487/19, EU :C :2021 :798)

In August 2018, the judge W.Ż., who held office in a regional court in Poland, was transferred without his consent from the division of the court to which he was assigned to another division of that court. He brought an action against that transfer before the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'), which resulted in a resolution that there was no need to adjudicate. In November 2018, W.Ż. challenged that resolution before the Sąd Najwyższy (Supreme Court, Poland), also seeking the recusal of all the judges making up the chamber that was to hear his appeal, namely the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs Poland; 'the Chamber of Extraordinary Control'). He considered that, in view of the manner in which they were appointed, the members of that chamber did not offer the necessary guarantees of independence and impartiality.

In that regard, the Sąd Najwyższy (Izba Cywilna) (Supreme Court (Civil Division), Poland), which was required to rule on that application for recusal, stated, in its order for reference, that appeals had been brought before the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) against Resolution No 331/2018 of the KRS, proposing to the President of the Republic the list of new judges of the Chamber of Extraordinary Control. However, notwithstanding the suspension of the effects of that resolution ordered by that court, the President of the Republic appointed to the posts of judge of that chamber some of the candidates put forward in that resolution.

In March 2019, although, first, those proceedings before the Naczelny Sąd Administracyjny (Supreme Administrative Court) were still pending and, secondly, that court had made a reference to the Court for a preliminary ruling concerning another resolution of the KRS proposing to the President of the Republic a list of candidates for posts as judges of the Sąd Najwyższy (Supreme Court), [13] a new judge was appointed to the Chamber of Extraordinary Control ('the judge of the Chamber of Extraordinary Control') on the basis of Resolution No 331/2018 of the KRS. Ruling as a single judge, without having access to the case file and without hearing W.Ż., that new judge made an order ('the order at issue') dismissing as inadmissible the latter's action against the resolution of the KRS declaring that there was no need to adjudicate.

13| Namely the case giving rise to the judgment of 2 March 2021, ***A.B. and Others (Appointment of judges to the Supreme Court – Actions)*** (C-824/18, EU:C:2021:153) In that case, brought in November 2018, the (Supreme Administrative Court) essentially asked whether EU law precludes certain amendments made to the provisions of the Law on the KRS concerning the remedies available in respect of KRS resolutions relating to the appointment of judges to the Sąd Najwyższy (Supreme Court).

The referring court asked the Court whether a judge appointed in such circumstances may be regarded as an independent and impartial tribunal previously established by law, within the meaning, in particular, of the second subparagraph of Article 19(1) TEU, [14] and requested the Court to specify the possible implications for the order at issue if that judge were found not to have that status.

In its Grand Chamber judgment, the Court ruled on the circumstances which must be taken into account by a national court in order to find that, in the procedure for the appointment of a judge, there are irregularities such as to prevent that court from being regarded as an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU, and on the consequences which, in such a case, the principle of the primacy of EU law entails for a decision such as the order at issue, made by such a judge.

Findings of the Court

The Court noted, first of all, that an ordinary court such as a Polish regional court forms part of the Polish system of legal remedies in the 'fields covered by EU law' within the meaning of the second subparagraph of Article 19(1) TEU. In order for such a court to be able to ensure the effective legal protection required by that provision, the preservation of its independence is essential. A transfer of a judge without consent is potentially capable of undermining the principles of irremovability of judges and judicial independence. It is capable of affecting the scope of the activities allocated to the judge concerned and the handling of cases entrusted to him or her and of having significant consequences for that judge's life and career. It may therefore constitute a way of controlling the content of judicial decisions and producing effects similar to those of a disciplinary sanction. Consequently, the requirement of judicial independence requires the system applicable to transfers not consented to by judges to provide the necessary guarantees to prevent that independence from being jeopardised by direct or indirect external intervention. Such transfer measures, which can be decided only on legitimate grounds relating in particular to the distribution of available resources, should therefore be open to challenge before the courts, in accordance with a procedure fully safeguarding the rights of the defence of the judge concerned.

The Court found, next, that the appointment of the judge of the Chamber of Extraordinary Control in breach of the final decision of the Naczelny Sąd Administracyjny (Supreme Administrative Court) ordering the suspension of the effects of Resolution No 331/2018 of the KRS, without awaiting the judgment of the Court in ***A.B. and Others (Appointment of judges to the Supreme Court – Actions)*** (C-824/18), undermined the effectiveness of the preliminary ruling system laid down by Article 267 TFEU. When that appointment was made, the reply awaited from the Court in that case was capable of requiring the Naczelny Sąd Administracyjny (Supreme Administrative Court), if necessary, to annul Resolution No 331/2018 of the KRS in its entirety.

As regards the other circumstances surrounding the appointment of the judge of the Chamber of Extraordinary Control, the Court also noted that it had recently held that certain circumstances mentioned by the referring court, relating to recent changes affecting the composition of the KRS, were liable to give rise to reasonable doubts concerning the independence of that body. [15] Furthermore, that appointment and the order at issue were made even though the referring court was seised of an application for recusal in respect of all the judges then sitting in the Chamber of Extraordinary Control.

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

15| See, to that effect, judgment of 15 July 2021, ***Commission*** v ***Poland (Disciplinary regime for judges)***, C-791/19, EU :C :2021 :596, paragraphs 104 to 108.

Viewed together, the abovementioned circumstances are, subject to the referring court's final assessments, capable of leading to the conclusion that the appointment of the judge of the Chamber of Extraordinary Control was made in clear disregard of the fundamental rules governing the appointment of judges at the Sąd Najwyższy (Supreme Court). The same circumstances may also lead the referring court to conclude that the conditions in which that appointment took place undermined the integrity of the outcome of the appointment process, by serving to create, in the minds of individuals, reasonable doubts and a lack of appearance of independence or impartiality on the part of the judge of the Chamber of Extraordinary Control likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

Consequently, the Court held that, by virtue of the second subparagraph of Article 19(1) TEU and the principle of the primacy of EU law, a national court hearing an application for recusal, such as that at issue in the main proceedings, must, where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law, declare an order such as the order at issue to be null and void, if it follows from all the conditions and circumstances in which the process of appointment of the judge who made that order took place that that judge does not constitute an independent and impartial tribunal previously established by law, within the meaning of that provision.

Judgment of 16 November 2021 (Grand Chamber), *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* (C-748/19 to C-754/19, EU :C :2021 :931)

In connection with seven criminal cases pending before it, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) questioned whether the composition of the adjudicating panels called upon to rule on those cases was 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. [16]

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 as to whether the rules referred to above were in line with the second subparagraph of Article 19(1) TEU [17] and as to whether those rules undermined the presumption of innocence applicable to criminal proceedings resulting from, inter alia, Directive 2016/343. [18]

By its judgment, delivered by the Grand Chamber, the Court ruled that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Directive 2016/343 [19] 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

16| 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).

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

18| 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).

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

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 found that the Polish ordinary courts, which include the Sąd Okręgowy w Warszawie (Regional Court), 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 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 emphasised 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 stated, 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 found that that minister has thus, 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 also occupy 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, [20] 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 appeared that, in the circumstances referred to above, the independence and impartiality of judges and, accordingly, the presumption of innocence could be jeopardised.

Judgment of 20 April 2021 (Grand Chamber), *Repubblika* (C-896/19, EU :C :2021 :311)

Repubblika is an association whose purpose is to promote the protection of justice and the rule of law in Malta. Following the appointment, in April 2019, of new members of the judiciary, that association brought an *actio popularis* before the Prim'Awla tal-Qorti Ċivili – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta), with a view, in particular, to challenging the procedure for the appointment of members of the Maltese judiciary, as governed by the Constitution. [21] The constitutional provisions concerned, which had remained unchanged from the time of their adoption in 1964 until a reform in 2016, confer on Il-Prim Ministru (Prime Minister, Malta) the power to submit to the President of the Republic the appointment of a candidate to such office. In practice, the Prime Minister thus has a decisive power in the appointment of members of the Maltese judiciary, which, according to Repubblika, raises doubts as to the independence of those judges and magistrates. Nevertheless, the candidates must satisfy certain conditions, also laid down by the Constitution and, since the 2016 reform, a Judicial Appointments Committee has been established, which is charged with assessing candidates and providing an opinion to the Prime Minister.

In that context, the referring court decided to refer questions to the Court of Justice on the conformity of the Maltese system for appointing members of the judiciary with EU law and, more specifically, with the second subparagraph of Article 19(1) TEU and with Article 47 of the Charter. The second subparagraph of Article 19(1) TEU, it should be recalled, requires Member States to provide remedies sufficient to ensure effective judicial protection in the fields covered by EU law, while Article 47 of the Charter sets out the right to an effective remedy for any litigant relying, in a given case, on a right that he or she derives from EU law.

The Court, sitting as the Grand Chamber, held that EU law does not preclude national constitutional provisions such as the provisions of Maltese law on the appointment of members of the judiciary. It does not appear that those provisions might lead to those members of the judiciary not being seen to be independent or impartial, the consequence of which would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

Findings of the Court

First, the Court stated that the second subparagraph of Article 19(1) TEU is intended to apply in the present case, since the action seeks to challenge the conformity with EU law of provisions of national law governing the procedure for the appointment of members of the judiciary called upon to rule on questions relating to the application or interpretation of EU law and which it is alleged are liable to affect judicial independence. In so far as Article 47 of the Charter is concerned, the Court stated that, although it is not applicable as such

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

21| Articles 96, 96A and 100 of the Maltese Constitution.

inasmuch as Repubblika does not rely on a subjective right that it derives from EU law and therefore, in the present case, there is no implementation of that law, [22] it must nonetheless be taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU.

Secondly, the Court held that that provision of the TEU does not preclude national provisions which confer on a Prime Minister a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body tasked, in particular, with assessing candidates for judicial office and providing an opinion to that Prime Minister.

In order to reach that conclusion, the Court first pointed out, generally, that amongst the requirements of effective judicial protection which must be satisfied by national courts which are liable to rule on the application or interpretation of EU law, the independence of the judiciary is of fundamental importance, in particular to the EU legal order, in a number of respects. It is essential to the proper working of the preliminary-ruling procedure, laid down in Article 267 TFEU, which may be activated only by an independent court or tribunal. Furthermore, it forms part of the essence of the fundamental right to effective judicial protection and to a fair trial provided for in Article 47 of the Charter.

Next, the Court recalled its recent case-law, [23] in which it clarified the guarantees of judicial independence and impartiality, required under EU law. Those guarantees presuppose, inter alia, rules that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of members of the judiciary to external factors, in particular to direct or indirect influence from the legislature or the executive, and to their neutrality with respect to the interests before them.

Lastly, the Court pointed out that, under Article 49 TEU, the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, such as the rule of law, which respect those values and undertake to promote them. A Member State cannot therefore amend its legislation, particularly with regard to the organisation of justice, in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression to, inter alia, by Article 19 TEU. Against that backdrop, the Member States are required to refrain from adopting rules which would undermine the independence of the judiciary.

Having clarified those points, the Court held, first, that the creation in 2016 of the Judicial Appointments Committee serves, on the contrary, to reinforce the guarantee of judicial independence in Malta in comparison with the situation arising from the constitutional provisions which were in force when Malta acceded to the European Union. In that connection, the Court stated that, in principle, the involvement of such a body may be such as to contribute to rendering more objective the process for appointing members of the judiciary, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard, provided that that body is sufficiently independent. In the present case, the Court found that there is a series of rules which appear to be such as to guarantee that independence.

Secondly, the Court pointed out that, although the Prime Minister has a certain power in the appointment of members of the judiciary, the exercise of that power is circumscribed by the requirements of professional experience, laid down in the Constitution, which must be satisfied by candidates for judicial office. Moreover, although the Prime Minister may decide to submit to the President of the Republic the appointment of a candidate not put forward by the Judicial Appointments Committee, the Prime Minister is then required to

22| Contrary to the requirements of Article 51(1) of the Charter.

23| See, for example, judgments of 19 November 2019, ***A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*** (C-585/18, C-624/18 and C-625/18, EU :C :2019 :982), and of 2 March 2021, ***A.B. and Others (Appointment of judges to the Supreme Court – Actions)*** (C-824/18, EU :C :2021 :153).

communicate his or her reasons to, in particular, the legislature. According to the Court, provided that the Prime Minister exercises that power only in exceptional circumstances and adheres to strict and effective compliance with the obligation to state reasons, that power is not such as to give rise to legitimate doubts concerning the independence of the candidates selected.

2. Procedure for determining that there is a clear risk of a serious breach of EU values by a Member State

Judgment of 3 June 2021 (Grand Chamber), *Hungary* v *Parliament* (C-650/18, EU :C :2021 :426)

On 12 September 2018, the European Parliament adopted a resolution [24] on a proposal calling on the Council of the European Union to determine, pursuant to Article 7(1) TEU, [25] the existence of a clear risk of a serious breach by Hungary of the common values on which the Union is founded. That declaration triggered the procedure laid down in Article 7 TEU, capable of leading to the suspension of certain rights resulting from EU membership.

Under the fourth paragraph of Article 354 TFEU, which sets out the voting arrangements for the purposes of applying Article 7 TEU, the adoption by the Parliament of the resolution at issue required a two-thirds majority of votes cast, representing the majority of its component Members. In applying its Rules of Procedure which provide that, in calculating whether a text has been adopted or rejected, account is to be taken only of votes cast 'for' and 'against', except in those cases for which the Treaties lay down a specific majority, [26] the Parliament only took into consideration, in calculating the votes on the resolution at issue, the votes in favour and against cast by its Members and excluded abstentions. [27]

Taking the view that, when calculating the votes cast, the Parliament should have taken account of the abstentions, Hungary brought an action under Article 263 TFEU for annulment of that resolution.

The Court, sitting as the Grand Chamber, dismissed that action. It found, in the first place, that the contested resolution may be subject to judicial review under Article 263 TFEU. In the second place, it considered that MEPs' abstentions do not have to be counted in order to determine whether the majority of two thirds of the votes cast, referred to in Article 354 TFEU, has been reached.

24| Resolution (2017/2131(INL)) (OJ 2019 C 433, p. 66).

25| Article 7(1) TEU provides: 'On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

26| Rule 178(3) of the Rules of Procedure of the Parliament.

27| The resolution was adopted with 448 votes cast in favour and 197 cast against; 48 MEPs present abstained.

Findings of the Court

In the first place, the Court ruled on its jurisdiction to decide on the present action, and then on the admissibility of that action.

First of all, it stated that Article 269 TFEU, which provides for a limited possibility of bringing an action for annulment against acts adopted by the European Council or the Council under the procedure referred to in Article 7 TEU, does not exclude the Court's jurisdiction to hear and determine the present action. By making the right of action set out in Article 269 TFEU subject to stricter conditions than those imposed by Article 263 TFEU, Article 269 TFEU entails a limitation on the general jurisdiction of the Court of Justice of the European Union to review the legality of acts of the EU institutions and must, therefore, be interpreted narrowly. Furthermore, resolutions of the Parliament, adopted under Article 7(1) TEU, are not referred to in Article 269 TFEU. Thus, the authors of the Treaties did not intend to exclude an act such as the contested resolution from the general jurisdiction conferred on the Court of Justice of the European Union by Article 263 TFEU. Such an interpretation contributes to the observance of the principle that the European Union is a union based on the rule of law which has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union to review the legality of acts of the EU institutions.

Next, the Court considered that the contested resolution constitutes a challengeable act. It produces binding legal effects from the time of its adoption since, until the Council takes a decision on the action to be taken on it, that resolution has the immediate effect of lifting the prohibition which is imposed on the Member States on taking into consideration or declaring admissible for examination an asylum application made by a Hungarian national. [28]

Moreover, the contested resolution does not constitute an intermediate measure the legality of which can be challenged only in the event of a dispute concerning the definitive act for which it represents a preparatory step. First, in adopting that resolution, the Parliament did not express a provisional position, even though a subsequent determination by the Council of the existence of a clear risk of a serious breach by a Member State of EU values is subject to the prior approval of the Parliament. Secondly, the resolution at issue produces independent legal effects in so far as, even though the Member State concerned can rely on the unlawfulness of that resolution in support of any action for annulment against the Council's subsequent determination, the potential success of that action would not, in any event, make it possible to eliminate all the binding effects of that resolution.

The Court noted, however, that certain specific conditions, laid down in Article 269 TFEU, relating to the bringing of an action for annulment against a determination made by the Council, which may be adopted following a reasoned proposal by the Parliament such as the contested resolution, must also apply to an action for annulment brought, pursuant to Article 263 TFEU, against such a reasoned proposal, failing which Article 269 TFEU would be deprived of its practical effect. Thus, the latter action may be brought only by the Member State which is the subject of the reasoned proposal and the grounds for annulment relied on in support of such an action can only be based on infringement of the procedural rules referred to in Article 7 TEU.

In the second place, ruling on the substance, the Court observed that the concept of 'votes cast', contained in the fourth paragraph of Article 354 TFEU is not defined in the Treaties and that that autonomous concept of EU law must be interpreted in accordance with its usual meaning in everyday language. That concept, in its usual sense, covers only the casting of a positive or negative vote on a given proposal, whereas abstention,

28 | In accordance with the sole article of Protocol No (24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305).

understood as a refusal to adopt a position, cannot be treated in the same way as a 'vote cast'. Consequently, the rule laid down in the fourth paragraph of Article 354 TFEU, which requires a majority of votes cast, must be interpreted as precluding the taking into account of abstentions.

That being so, after recalling that the fourth paragraph of Article 354 TFEU lays down a dual requirement for a majority, that is to say that acts adopted by the Parliament under Article 7(1) TEU must obtain, on the one hand, agreement from two thirds of the votes cast and, on the other hand, the agreement of the majority of MEPs, the Court observed that, in any event, abstentions are taken into account in order to ascertain that the votes in favour represent the majority of MEPs.

Lastly, the Court considered that the exclusion of abstentions in the calculation of votes cast, within the meaning of the fourth paragraph of Article 354 TFEU, is not contrary either to the principle of democracy or to the principle of equal treatment, in the light, in particular, of the fact that the MEPs who abstained on the occasion of the vote acted with full knowledge of the facts, since they had been informed in advance that abstentions would not be counted as votes cast.

II. Fundamental Rights

In 2021, the Court ruled on numerous occasions on the protection of fundamental rights in the EU legal order. The five decisions set out in this section shed light on the scope of some of the rights and principles enshrined in the Charter of Fundamental rights of the European Union ('the Charter'), such as the right to a fair trial, the principle *ne bis in idem*, freedom of thought, conscience and religion, and the right to the protection of personal data. [29]

1. Right to a fair trial

Judgment of 2 February 2021 (Grand Chamber), *Consob* (C-481/19, EU :C :2021 :84)

On 2 May 2012, the Commissione Nazionale per le Società e la Borsa (National Companies and Stock Exchange Commission, Italy; Consob) imposed on DB penalties totalling EUR 300 000 for an administrative offence of insider dealing committed in 2009.

It also imposed on him a penalty of EUR 50 000 for failure to cooperate. DB, after applying on several occasions for postponement of the date of the hearing to which he had been summoned in his capacity as a person aware of the facts, had declined to answer the questions put to him when he appeared at that hearing.

Following the dismissal of his appeal against those penalties, DB brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy). On 16 February 2018, that court referred an interlocutory question of constitutionality to the Corte costituzionale (Constitutional Court, Italy) concerning the provision of Italian law [30] on the basis of which the penalty for failure to cooperate was imposed. That

29| A number of other decisions taken in the area of fundamental rights also deserve to be mentioned under this heading: judgments of 2 March 2021, ***A.B. and Others (Appointment of judges to the Supreme Court – Actions)*** (C-824/18, EU:C:2021:153), of 20 April 2021, ***Repubblika*** (C-896/19, EU :C :2021 :311), of 18 May 2021, ***Asociaţia 'Forumul Judecătorilor din România' and Others*** (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU :C :2021 :393), of 16 November 2021, ***Prokuratura Rejonowa w Mińsku Mazowieckim and Others*** (C-748/19 to C-754/19, EU :C :2021 :931), of 15 July 2021, ***Commission*** v ***Poland (Disciplinary regime for judges)*** (C-791/19, EU :C :2021 :596), and of 21 December 2021, ***Euro Box Promotion and Others*** (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU :C :2021 :1034), presented in Section I 'Values of the European Union'; judgments of 14 December 2021, ***Stolichna obshtina, rayon 'Pancharevo'*** (C-490/20, EU :C :2021 :1008), of 15 July 2021, ***The Department for Communities in Northern Ireland*** (C-709/20, EU :C :2021 :602), and of 2 September 2021, ***Belgian State (Right of residence in the event of domestic violence)*** (C-930/19, EU :C :2021 :657), presented in Section IV 'Citizenship of the Union'; judgments of 29 April 2021, ***Banco de Portugal and Others*** (C-504/19, EU :C :2021 :335), of 3 February 2021, ***Fussl Modestraße Mayr*** (C-555/19, EU :C :2021 :89), and of 14 October 2021, ***Landespolizeidirektion Steiermark (Gaming machines)*** (C-231/20, EU :C :2021 :845), presented in Section VII 'Freedom of movement'; judgment of 24 February 2021, ***M and Others (Transfer to a Member State)*** (C-673/19, EU :C :2021 :127), presented in Section VIII 'Border control, asylum and immigration'; judgments of 28 January 2021, ***Spetsializirana prokuratura (Letter of Rights)*** (C-649/19, EU :C :2021 :75), of 29 April 2021, ***X (European arrest warrant – Ne bis in idem)*** (C-665/20 PPU, EU :C :2021 :339), of 17 March 2021, ***JR (Arrest warrant – Conviction in a third State, member of the EEA)*** (C-488/19, EU :C :2021 :206), and of 21 October 2021, ***Okrazhna prokuratura – Varna*** (C-845/19 and C-863/19, EU :C :2021 :864), presented in Section IX 'Judicial cooperation in criminal matters'; judgments of 17 June 2021, ***M.I.C.M.*** (C-597/19, EU :C :2021 :492), and of 2 September 2021, ***LG and MH (Self-laundering)*** (C-790/19, EU :C :2021 :661), presented in Section XIV 'Approximation of laws'; judgment of 15 July 2021, ***Commission*** v ***Landesbank Baden-Württemberg and SRB*** (C-584/20 P and C-621/20 P, EU :C :2021 :601), presented in Section XV 'Economic and monetary policy'; judgment of 2 September 2021, ***Commission*** v ***Germany (Transposition of Directives 2009/72 and 2009/73)*** (C-718/18, EU :C :2021 :662), presented in Section XVIII 'Energy'; and judgment of 21 December 2021, ***Bank Melli Iran*** (C-124/20, EU :C :2021 :1035), presented in Section XX 'Common commercial policy'.

30| Article 187 *quindecies* of the Decreto legislativo n. 58 – Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52 (Legislative Decree No 58 consolidating all provisions in the field of financial intermediation, within the meaning of Articles 8 and 21 of Law of 6 February 1996, No 52) of 24 February 1998.

provision penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of that body's supervisory functions, including with regard to the person in respect of whom Consob alleges an offence of insider dealing.

The Corte costituzionale (Constitutional Court) pointed out that, under Italian law, insider dealing constitutes both an administrative offence and a criminal offence. It then noted that the provision concerned was adopted in performance of a specific obligation under Directive 2003/6 [31] and now implements a provision of Regulation No 596/2014. [32] Next, it asked the Court whether those measures were compatible with the Charter and, in particular, the right to remain silent.

The Court, sitting as the Grand Chamber, recognised the existence, for natural persons, of a right to silence, protected by the Charter, [33] and held that Directive 2003/6 and Regulation No 596/2014 allow Member States to respect that right in an investigation carried out in respect of such persons and capable of establishing their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability.

Findings of the Court

In the light of the case-law of the European Court of Human Rights on the right to a fair trial, [34] the Court emphasised that the right to silence, which lies at the heart of the notion of a 'fair trial', precludes, inter alia, penalties being imposed on natural persons who are 'charged' for refusing to provide the competent authority, under Directive 2003/6 or Regulation No 596/2014, with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability. The Court stated, in that regard, that the case-law relating to the obligation on undertakings to provide, in proceedings that may lead to the imposition of penalties for anticompetitive conduct, information which may subsequently be used to establish their liability for such conduct cannot apply by analogy to establish the scope of the right to silence of natural persons charged with insider dealing. The Court added that the right to silence cannot, however, justify every failure to cooperate on the part of the person concerned with the competent authorities, such as refusing to appear at a hearing planned by those authorities or using delaying tactics designed to postpone it.

Finally, the Court noted that both Directive 2003/6 and Regulation No 596/2014 lend themselves to an interpretation which is consistent with the right to silence, in that they do not require penalties to be imposed on natural persons for refusing to provide the competent authority with answers which might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal

31| Pursuant to Article 14(3) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), Member States are to determine the sanctions to be applied for failure to cooperate in an investigation covered by Article 12 of that directive. The latter article states that, in that context, the competent authority must be able to demand information from any person and, if necessary, to summon and hear any such person.

32| Article 30(1)(b) of Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1). This provision requires that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 23(2) of that regulation, subparagraph (b) of which specifies that this includes questioning a person with a view to obtaining information.

33| Second paragraph of Article 47 and Article 48 of the Charter.

34| That right to a fair trial is also enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

liability. In those circumstances, the absence of an express prohibition against the imposition of a penalty for such a refusal cannot undermine the validity of those measures. It is for the Member States to ensure that natural persons cannot be penalised for refusing to provide such answers to the competent authority.

2. The *ne bis in idem* Principle

Judgment of 12 May 2021 (Grand Chamber), *Bundesrepublik Deutschland (Interpol red notice)* (C-505/19, EU :C :2021 :376)

In 2012, the International Criminal Police Organisation ('Interpol') published, at the request of the United States and on the basis of an arrest warrant issued by the authorities of that country, a red notice in respect of WS, a German national, with a view to his potential extradition. Where a person who is the subject of such a notice is located in a State affiliated to Interpol, that State must, in principle, provisionally arrest that person or monitor or restrict his or her movements.

However, even before that red notice was published, a procedure investigating WS, which related, according to the referring court, to the same acts as those which formed the basis for that notice, had been carried out in Germany. That procedure was definitively discontinued in 2010 after a sum of money had been paid by WS as part of a specific settlement procedure provided for under German criminal law. The Bundeskriminalamt (Federal Criminal Police Office, Germany) subsequently informed Interpol that, in its view, as a result of that earlier procedure, the *ne bis in idem* principle was applicable in the present case. That principle, which is enshrined in both Article 54 of the CISA [35] and Article 50 of the Charter, prohibits, inter alia, a person whose trial has been finally disposed of from being prosecuted again for the same offence.

In 2017, WS brought an action against the Federal Republic of Germany before the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) seeking an order requiring that Member State to take the measures necessary to arrange for that red notice to be withdrawn. In that regard, WS relied not only on an infringement of the *ne bis in idem* principle, but also on an infringement of his right to freedom of movement, as guaranteed under Article 21 TFEU, since he could not travel to any State that is a party to the Schengen Agreement or to any Member State without risking arrest. He also argued that, due to those infringements, the processing of his personal data appearing in the red notice was contrary to Directive 2016/680, which concerns the protection of personal data in criminal matters. [36]

That is the context in which the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden) decided to ask the Court about how the *ne bis in idem* principle is to be applied and, specifically, whether it is possible provisionally to arrest a person who is the subject of a red notice in a situation such as the one at issue. Furthermore, in the event that that principle does apply, that court wished to know what the consequences would be for the processing, by Member States, of the personal data contained in such a notice.

35| Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19; 'the CISA').

36| Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

In its Grand Chamber judgment, the Court found that Article 54 of the CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, must be interpreted as not precluding the provisional arrest, by the authorities of a State that is a party to the Schengen Agreement or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a State that is a party to that agreement or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a State that is a party to that agreement or by a Member State respectively. The Court also found that the provisions of Directive 2016/680, read in the light of Article 54 of the CISA and Article 50 of the Charter, must be interpreted as not precluding the processing of personal data appearing in a red notice issued by Interpol in the case where it has not been established, by means of such a judicial decision, that the *ne bis in idem* principle applies in respect of the acts on which that notice is based, provided that such processing satisfies the conditions laid down by that directive.

Findings of the Court

As a preliminary point, the Court noted that the *ne bis in idem* principle may apply in a situation such as the one at issue in the present case, namely where a decision has been adopted which definitively discontinues criminal proceedings provided that the person concerned meets certain conditions, such as the payment of a sum of money set by the public prosecutor.

After having noted the foregoing, the Court ruled, in the first place, that Article 54 of the CISA, Article 50 of the Charter and Article 21(1) TFEU do not preclude the provisional arrest of a person who is the subject of an Interpol red notice where it has not been established that that person's trial has been finally disposed of by a State that is a party to the Schengen Agreement or by a Member State in respect of the same acts as those forming the basis of the red notice and that, consequently, the *ne bis in idem* principle applies.

In that regard, the Court noted that, where the applicability of the *ne bis in idem* principle remains uncertain, provisional arrest may be an essential step in order to carry out the necessary checks while avoiding the risk that the person concerned may abscond. That measure is therefore justified by the legitimate objective of preventing the impunity of the person concerned. By contrast, as soon as it has been established by a final judicial decision that the *ne bis in idem* principle applies, both the mutual trust between the States that are parties to the Schengen Agreement and the right to freedom of movement prohibit that person from being provisionally arrested or from being kept in custody. The Court pointed out that it is for the States that are parties to the Schengen Agreement and for Member States to ensure the availability of legal remedies enabling the persons concerned to obtain such a final judicial decision. It also found that, where provisional arrest is incompatible with EU law, because the *ne bis in idem* principle is applicable, a State affiliated to Interpol which refrains from making such an arrest would therefore not fail to fulfil its obligations as an affiliate of that organisation.

In the second place, as regards the matter of personal data appearing in an Interpol red notice, the Court noted that any operation performed on those data, such as registering them in a Member State's list of wanted persons, constitutes 'processing' which falls under Directive 2016/680. [37] Additionally, the Court found, first, that that processing pursues a legitimate objective and, secondly, that it cannot be regarded as

37| See Article 2(1) and Article 3(2) of Directive 2016/680.

unlawful solely on the ground that the *ne bis in idem* principle may apply to the acts on which that red notice is based. [38] That processing, by the authorities of the Member States, may indeed be indispensable precisely in order to determine whether that principle applies.

In those circumstances, the Court also found that Directive 2016/680, read in the light of Article 54 of the CISA and Article 50 of the Charter, does not preclude the processing of personal data appearing in a red notice where no final judicial decision has established that the *ne bis in idem* principle applies in the relevant case. However, such processing must be carried out in compliance with the conditions laid down by that directive. In that respect, it must, inter alia, be necessary for the performance of a task carried out by a competent national authority for purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. [39]

By contrast, where the *ne bis in idem* principle does apply, the recording, in the Member States' lists of wanted persons, of the personal data contained in an Interpol red notice is no longer necessary, because the person concerned can no longer be the subject of criminal proceedings in respect of the acts covered by that notice and, consequently, cannot be arrested for those same acts. It follows that the data subject must be able to request that his or her data be erased. If, nevertheless, those data remain recorded, they must be accompanied by a note to the effect that the person in question can no longer be prosecuted in a Member State or in a State that is a party to the Schengen Agreement for the same acts by reason of the principle of *ne bis in idem*.

3. Freedom of thought, conscience and religion

Judgment of 15 July 2021 (Grand Chamber), *WABE and MH Müller Handel* (C-804/18 and C-341/19, EU :C :2021 :594)

IX and MJ, who are employed in companies governed by German law as a special needs carer and a sales assistant and cashier respectively, wore an Islamic headscarf at their respective workplaces.

Taking the view that the wearing of such a headscarf did not observe the policy of political, philosophical and religious neutrality pursued with regard to parents, children and third parties, IX's employer, WABE eV ('WABE') asked her to remove that headscarf and, following her refusal, temporarily suspended her from her duties on two occasions and gave her a warning. MJ's employer, MH Müller Handels GmbH ('MH'), following MJ's refusal to remove that headscarf at her workplace, first transferred her to another post in which she could wear that headscarf and then, after sending her home, instructed her to attend her workplace without conspicuous, large-sized signs of any political, philosophical or religious beliefs.

IX brought an action before the Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) seeking an order that WABE remove from her personal file the warnings concerning the wearing of the Islamic headscarf. As for MJ, she brought an action before the national courts seeking a declaration that MH's instruction was invalid and compensation for the damage suffered. MJ's action before those courts was upheld and MH subsequently brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court, Germany).

38| See Article 4(1)(b) and Article 8(1) of Directive 2016/680.

39| See Article 1(1) and Article 8(1) of Directive 2016/680.

In that context, the two courts decided to refer questions to the Court concerning the interpretation of Anti-discrimination Directive. [40] The Court was asked, inter alia, whether an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, constitutes, with regard to workers who observe certain dress codes based on religious precepts, direct or indirect discrimination on the grounds of religion or belief, in what circumstances a difference of treatment indirectly based on religion or belief resulting from that rule may be justified and what elements must be taken into consideration in examining the appropriateness of such a difference of treatment.

In its judgment, delivered by the Grand Chamber, the Court explained inter alia the circumstances in which a difference of treatment indirectly based on religion or belief, resulting from such an internal rule, may be justified.

Findings of the Court

The Court examined, first, in connection with Case C-804/18, whether an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, constitutes, with regard to workers who observe certain dress codes based on religious precepts, direct discrimination on grounds of religion or belief, prohibited by the Anti-discrimination Directive. [41]

In that respect, the Court noted that the wearing of signs or clothing to manifest religion or belief is covered by the 'freedom of thought, conscience and religion'. [42] In addition, for the purposes of applying the Anti-discrimination Directive, the terms 'religion' and 'belief' must be analysed as two facets of the same single ground of discrimination.

Furthermore, the Court recalled its case-law according to which such a rule does not constitute direct discrimination provided that it covers any manifestation of such beliefs without distinction and treats all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, to dress neutrally, which precludes the wearing of such signs. The Court considered that that finding is not called into question by the fact that some workers observe religious precepts requiring certain clothing to be worn. Although a rule such as that referred to above is indeed capable of causing particular inconvenience for such workers, that has no bearing on the finding that that rule, reflecting a policy of neutrality on the part of the undertaking, does not, in principle, establish a difference in treatment between workers based on a criterion that is inextricably linked to religion or belief.

In the present case, the rule at issue appeared to have been applied in a general and undifferentiated way, since the employer concerned also required an employee wearing a religious cross to remove that sign. The Court concluded that, in those circumstances, a rule such as that at issue in the main proceedings does not constitute, with regard to workers who observe certain dress codes based on religious precepts, direct discrimination on the grounds of religion or belief.

40| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16; 'the Anti-discrimination Directive').

41| Article 1 and Article 2(2)(a) of the Anti-discrimination Directive.

42| Protected by Article 10 of the Charter.

The Court examined, secondly, whether a difference of treatment indirectly based on religion or belief, [43] arising from such an internal rule, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes. It answered that question in the affirmative, while identifying the elements on which that conclusion is based.

In that regard, the Court noted, first of all, that an employer's desire to display, in relations with customers, a policy of political, philosophical or religious neutrality may be regarded as a legitimate aim. The Court stated, however, that that mere desire is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a *genuine need* on the part of that employer. The relevant elements for identifying such a need are, inter alia, the rights and legitimate wishes of customers or users and, more specifically, as regards education, parents' wishes to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children.

In assessing whether such a need exists, particular relevance should be attached to the fact that the employer has adduced evidence that, in the absence of such a policy of neutrality, its freedom to conduct a business [44] would be undermined, in that, given the nature of its activities or the context in which they are carried out, it would suffer adverse consequences.

The Court then stated that that difference in treatment must be appropriate for the purpose of ensuring that that policy of neutrality adopted by the employer is properly applied, which entails that the policy is pursued in a consistent and systematic manner. Lastly, the prohibition on wearing any visible sign of political, philosophical or religious beliefs in the workplace must be limited to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

Thirdly, the Court examined, in connection with Case C-341/19, whether indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting the wearing of visible signs of political, philosophical or religious beliefs in the workplace, with the aim of ensuring a policy of neutrality within that undertaking, can be justified only if that prohibition covers all visible forms of expression of political, philosophical or religious beliefs or whether a prohibition limited to conspicuous, large-sized signs is permissible, provided that is implemented consistently and systematically.

It pointed out, in that regard, that such a limited prohibition is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering. Thus, where the criterion of wearing conspicuous, large-sized signs of the aforementioned beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition on wearing those signs based on that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, which would amount to direct discrimination, which cannot be justified.

Should direct discrimination not be found to exist, the Court observed that a difference of treatment such as that at issue in the main proceedings would, if it results in a particular disadvantage for persons adhering to a particular religion or belief, constitute indirect discrimination which can be justified only if the prohibition covers all visible forms of expression of political, philosophical or religious beliefs. It noted, in that regard,

43| Within the meaning of Article 2(2)(b) of the Anti-discrimination Directive, which prohibits any indirect discrimination on the grounds of, inter alia, religion or belief, unless the provision, criterion or practice from which it derives is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

44| Recognised in Article 16 of the Charter.

that a policy of neutrality within an undertaking may constitute a legitimate objective and must meet a genuine need on the part of the undertaking, such as the prevention of social conflicts or the presentation of a neutral image of the employer vis-à-vis customers, in order to justify objectively a difference in treatment indirectly based on religion or belief. Such a policy can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued.

Finally, the Court held that national provisions protecting the freedom of religion may be taken into account, as more favourable provisions, [45] in examining the appropriateness of a difference of treatment indirectly based on religion or belief. In that regard, it noted, in the first place, that when examining whether the restriction resulting from a measure intended to ensure the application of a policy of political, philosophical and religious neutrality is appropriate, within the meaning of Article 2(2)(b)(i) of the Anti-discrimination Directive, account must be taken of the various rights and freedoms in question and that it is for the national courts, having regard to all the material in the file in question, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary That ensures that, when several fundamental rights and principles enshrined in the Treaties are at issue, the assessment of observance of the principle of proportionality is carried out in accordance with the need to reconcile the requirements of the protection of the various rights and principles at issue, striking a fair balance between them. The Court noted, in the second place, that by not itself carrying out, in the Anti-discrimination Directive, the necessary reconciliation between the freedom of thought, conscience and religion and the legitimate aims that may be invoked in order to justify unequal treatment, and by leaving it to the Member States and their courts to achieve that reconciliation, the EU legislature allowed account to be taken of the specific context of each Member State and allowed each Member State a margin of discretion in achieving that reconciliation.

45| Within the meaning of Article 8(1) of the Anti-discrimination Directive, which refers to provisions which are more favourable to the protection of the principle of equal treatment than those laid down in that directive. That would be the case, for example, of national provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of the Anti-discrimination Directive.

4. Protection of personal data

Judgment of 2 March 2021 (Grand Chamber), *Prokuratuur (Conditions of access to data relating to electronic communications)* (C-746/18, EU :C :2021 :152)

Criminal proceedings were brought in Estonia against H. K. on counts of theft, use of another person's bank card and violence against persons party to court proceedings. A court of first instance convicted H. K. of those offences and imposed a custodial sentence of two years. That judgment was then upheld on appeal.

The reports relied upon in order to find H. K. guilty of those offences were drawn up, inter alia, on the basis of personal data generated in the context of the provision of electronic communications services. The Riigikohus (Supreme Court, Estonia), before which H. K. had lodged an appeal on a point of law, expressed doubts as to whether the conditions under which the investigating authority had access to those data were compatible with EU law. [46]

Those doubts concerned, first, whether the length of the period in respect of which the investigating authority has had access to the data is a criterion for assessing the seriousness of the interference, constituted by that access, with the fundamental rights of the persons concerned. Thus, the referring court raised the question whether, where that period is very short or the quantity of data gathered is very limited, the objective of combating crime in general, and not only combating serious crime, is capable of justifying such an interference. Secondly, it had doubts as to whether it is possible to regard the Estonian public prosecutor's office, in the light of the various duties which are assigned to it by national legislation, as an 'independent'. administrative authority, within the meaning of the judgment in ***Tele2 Sverige and Watson and Others***, [47] that is capable of authorising access of the investigating authority to the data concerned.

By its judgment, delivered by the Grand Chamber, the Court held that the Directive on privacy and electronic communications, read in the light of the Charter, precludes national legislation that permits public authorities to have access to traffic or location data, that are liable to provide information regarding the communications made by the user of a means of electronic communication or regarding the location of the terminal equipment which he or she uses and to allow precise conclusions to be drawn concerning his or her private life, for the purposes of the prevention, investigation, detection and prosecution of criminal offences, without such access being confined to procedures and proceedings to combat serious crime or prevent serious threats to public security. According to the Court, the length of the period in respect of which access to those data is sought and the quantity or nature of the data available in respect of such a period are irrelevant in that regard. The Court further held that that directive, read in the light of the Charter, precludes national legislation that confers upon the public prosecutor's office the power to authorise access of a public authority to traffic and location data for the purpose of conducting a criminal investigation.

46| To be more precise, with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

47| Judgment of 21 December 2016, ***Tele2 Sverige and Watson and Others*** (C-203/15 and C-698/15, EU :C :2016 :970, paragraph 120).

Findings of the Court

As regards the circumstances in which access to traffic and location data retained by providers of electronic communications services may, for the purposes of the prevention, investigation, detection and prosecution of criminal offences, be granted to public authorities, pursuant to a measure adopted under the Directive on privacy and electronic communications, [48] the Court recalled, in line with the content of its ruling in *La Quadrature du Net and Others*, [49] that that directive authorises the Member States to adopt, for those purposes amongst others, legislative measures to restrict the scope of the rights and obligations provided for by the directive, inter alia the obligation to ensure the confidentiality of communications and traffic data, [50] only if the general principles of EU law – which include the principle of proportionality – and the fundamental rights guaranteed by the Charter [51] are observed. Accordingly, the Directive on privacy and electronic communications precludes legislative measures which impose on providers of electronic communications services, as a preventive measure, an obligation requiring the general and indiscriminate retention of traffic and location data.

So far as concerns the objective of preventing, investigating, detecting and prosecuting criminal offences, which is pursued by the legislation at issue, the Court held that, in accordance with the principle of proportionality, only the objectives of combating serious crime or preventing serious threats to public security are capable of justifying public authorities having access to a set of traffic or location data, that are liable to allow precise conclusions to be drawn concerning the private lives of the persons concerned, and other factors relating to the proportionality of a request for access, such as the length of the period in respect of which access to such data is sought, cannot have the effect that the objective of preventing, investigating, detecting and prosecuting criminal offences in general is capable of justifying such access.

As regards the power conferred upon the public prosecutor's office to authorise access of a public authority to traffic and location data for the purpose of conducting a criminal investigation, the Court pointed out that it is for national law to determine the conditions under which providers of electronic communications services must grant the competent national authorities access to the data in their possession. However, in order to satisfy the requirement of proportionality, such legislation must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose personal data are affected have sufficient guarantees that data will be effectively protected against the risk of abuse. That legislation must be legally binding under domestic law and must indicate in what circumstances and under which substantive and procedural conditions a measure providing for the processing of such data may be adopted, thereby ensuring that the interference is limited to what is strictly necessary.

According to the Court, in order to ensure, in practice, that those conditions are fully observed, it is essential that access of the competent national authorities to retained data be subject to a prior review carried out either by a court or by an independent administrative body, and that the decision of that court or body be made following a reasoned request by those authorities submitted, inter alia, within the framework of procedures for the prevention, detection or prosecution of crime. In cases of duly justified urgency, the review must take place within a short time.

48| Article 15(1) of the Directive on privacy and electronic communications.

49| Judgment of 6 October 2020, ***La Quadrature du Net and Others*** (C-511/18, C-512/18 and C-520/18, EU :C :2020 :791, paragraphs 166 to 169).

50| Article 5(1) of the Directive on privacy and electronic communications.

51| In particular, Articles 7, 8 and 11 and Article 52(1) of the Charter.

In that regard, the Court stated that one of the requirements for the prior review is that the court or body entrusted with carrying it out must have all the powers and provide all the guarantees necessary in order to reconcile the various interests and rights at issue. As regards a criminal investigation in particular, it is a requirement of such a review that that court or body must be able to strike a fair balance between, on the one hand, the interests relating to the needs of the investigation in the context of combating crime and, on the other, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access. Where that review is carried out not by a court but by an independent administrative body, that body must have a status enabling it to act objectively and impartially when carrying out its duties and must, for that purpose, be free from any external influence.

According to the Court, it follows that the requirement of independence that has to be satisfied by the authority entrusted with carrying out the prior review means that that authority must be a third party in relation to the authority which requests access to the data, in order that the former is able to carry out the review objectively and impartially and free from any external influence. In particular, in the criminal field the requirement of independence entails that the authority entrusted with the prior review, first, must not be involved in the conduct of the criminal investigation in question and, secondly, has a neutral stance vis-à-vis the parties to the criminal proceedings. That is not so in the case of a public prosecutor's office which, like the Estonian public prosecutor's office, directs the investigation procedure and, where appropriate, brings the public prosecution. It follows that such a public prosecutor's office is not in a position to carry out the prior review.

Judgment of 15 June 2021 (Grand Chamber), *Facebook Ireland and Others* (C-645/19, EU :C :2021 :483)

On 11 September 2015, the President of the Commissie ter bescherming van de Persoonlijke Levenssfeer (Belgian Privacy Commission; 'the Privacy Commission') brought an action before the Nederlandstalige rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium), seeking an injunction against Facebook Ireland, Facebook Inc. and Facebook Belgium, aiming to put an end to alleged infringements of data protection laws by Facebook. Those infringements consisted, inter alia, of the collection and use of information on the browsing behaviour of Belgian internet users, whether or not they were Facebook account holders, by means of various technologies, such as cookies, social plug-ins [52] or pixels.

On 16 February 2018, that court held that it had jurisdiction to give a ruling on that action and, on the substance, held that the Facebook social network had not adequately informed Belgian internet users of the collection and use of the information concerned. Further, the consent given by the internet users to the collection and processing of that data was held to be invalid.

On 2 March 2018, Facebook Ireland, Facebook Inc. and Facebook Belgium brought an appeal against that judgment before the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), the referring court in the present case. Before that court, the Gegevensbeschermingsautoriteit (Belgian Data Protection Authority; 'the DPA') acted as the legal successor of the President of the Privacy Commission. The referring court held that it alone had jurisdiction to give a ruling on the appeal brought by Facebook Belgium.

52| For example, the 'Like' or 'Share' buttons.

The referring court was uncertain as to the effect of the application of the 'one-stop shop' mechanism provided for by the GDPR [53] on the competences of the DPA and, in particular, as to whether, with respect to the facts subsequent to the date of entry into force of the GDPR, namely 25 May 2018, the DPA could bring an action against Facebook Belgium, since it was Facebook Ireland which had been identified as the controller of the data concerned. Since that date, and in particular under the 'one-stop shop' rule laid down by the GDPR, only the Data Protection Commissioner (Ireland) is competent to bring injunction proceedings, subject to review by the Irish courts.

In its Grand Chamber judgment, the Court specified the powers of national supervisory authorities within the scheme of the GDPR. Thus, it considered, inter alia, that that regulation authorises, under certain conditions, a supervisory authority of a Member State to exercise its power to bring any alleged infringement of the GDPR before a court of that State and to initiate or engage in legal proceedings in relation to an instance of cross-border data processing, [54] although that authority is not the lead supervisory authority with regard to that processing.

Findings of the Court

In the first place, the Court specified the conditions governing whether a national supervisory authority, which does not have the status of lead supervisory authority in relation to an instance of cross-border processing, must exercise its power to bring any alleged infringement of the GDPR before a court of a Member State and, where necessary, to initiate or engage in legal proceedings in order to ensure the application of that regulation. Thus, the GDPR must confer on that supervisory authority a competence to adopt a decision finding that that processing infringes the rules laid down by that regulation and, in addition, that power must be exercised with due regard to the cooperation and consistency procedures provided for by that regulation. [55]

With respect to cross-border processing, the GDPR provides for the 'one-stop shop' mechanism, [56] which is based on an allocation of competences between one 'lead supervisory authority' and the other national supervisory authorities concerned. That mechanism requires close, sincere and effective cooperation between those authorities in order to ensure consistent and homogeneous protection of the rules for the protection of personal data, and thus preserve its effectiveness. As a general rule, the GDPR guarantees in that respect the competence of the lead supervisory authority for the adoption of a decision finding that an instance of cross-border processing is an infringement of the rules laid down by that regulation, [57] whereas the competence of the other supervisory authorities concerned for the adoption of such a decision, even provisionally, constitutes the exception to the rule. [58] However, in the exercise of its competences, the lead supervisory authority cannot eschew essential dialogue and sincere and effective cooperation with the other supervisory

53| Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1; 'the GDPR'). Under Article 56(1) of the GDPR: 'Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor.'

54| Within the meaning of Article 4(23) of the GDPR.

55| Laid down in Articles 56 and 60 of the GDPR.

56| Article 56(1) of the GDPR.

57| Article 60(7) of the GDPR.

58| Article 56(2) and Article 66 of the GDPR set out exceptions to the general rule that it is the lead supervisory authority that is competent to adopt such decisions.

authorities concerned. Accordingly, in the context of that cooperation, the lead supervisory authority may not ignore the views of the other supervisory authorities concerned, and any relevant and reasoned objection made by one of the other supervisory authorities has the effect of blocking, at least temporarily, the adoption of the draft decision of the lead supervisory authority.

The Court also added that the fact that a supervisory authority of a Member State which is not the lead supervisory authority with respect to an instance of cross-border data processing may exercise the power to bring any alleged infringement of the GDPR before a court of that State and to initiate or engage in legal proceedings only when that exercise complies with the rules on the allocation of competences to adopt decisions between the lead supervisory authority and the other supervisory authorities [59] is compatible with Articles 7, 8 and 47 of the Charter, which guarantee data subjects the right to the protection of their personal data and the right to an effective remedy, respectively.

In the second place, the Court held that, in the case of cross-border data processing, it is not a prerequisite for the exercise of the power of a supervisory authority of a Member State, other than the lead supervisory authority, to initiate or engage in legal proceedings [60] that the controller or the processor with respect to the cross-border processing of personal data to which that action relates has a main establishment or another establishment on the territory of that Member State. However, the exercise of that power must fall within the territorial scope of the GDPR, [61] which presupposes that the controller or the processor with respect to the cross-border processing has an establishment in the European Union.

In the third place, the Court ruled that, in the event of cross-border data processing, the power of a supervisory authority of a Member State, other than the lead supervisory authority, to bring any alleged infringement of the GDPR before a court of that Member State and, where appropriate, to initiate or engage in legal proceedings, may be exercised both with respect to the main establishment of the controller which is located in that authority's own Member State and with respect to another establishment of that controller, provided that the object of the legal proceedings is a processing of data carried out in the context of the activities of that establishment and that that authority is competent to exercise that power.

However, the Court added that the exercise of that power presupposes that the GDPR is applicable. In this instance, since the activities of the establishment of the Facebook group located in Belgium were inextricably linked to the processing of personal data at issue in the main proceedings, with respect to which Facebook Ireland was the controller within the European Union, that processing was carried out 'in the context of the activities of an establishment of the controller' and, therefore, does fall within the scope of the GDPR.

In the fourth place, the Court held that, where a supervisory authority of a Member State which is not the 'lead supervisory authority' has brought, before the date of entry into force of the GDPR, legal proceedings concerning an instance of cross-border processing of personal data, that action may be continued, under EU law, on the basis of the provisions of Directive 95/46, [62] which remains applicable in relation to infringements of the rules laid down in that directive committed up to the date when that directive was repealed. In addition, that action may be brought by that authority with respect to infringements committed after the date of entry into force of the GDPR, provided that that action is brought in one of the situations where, exceptionally,

59| Laid down in Articles 55 and 56, read together with Article 60 of the GDPR.

60| Pursuant to Article 58(5) of the GDPR.

61| Article 3(1) of the GDPR provides that that regulation is applicable to the processing of personal data 'in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not'.

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

that regulation confers on that authority a competence to adopt a decision finding that the processing of data in question is in breach of the rules laid down by that regulation, and that the cooperation procedures provided for by the regulation are respected.

In the fifth and last place, the Court recognised the direct effect of the provision of the GDPR under which each Member State is to provide by law that its supervisory authority is to have the power to bring infringements of that regulation to the attention of the judicial authorities and, where appropriate, to initiate or engage otherwise in legal proceedings. Consequently, such an authority may rely on that provision in order to bring or continue a legal action against private parties, even where it has not been specifically implemented in the legislation of the Member State concerned.

Judgment of 22 June 2021 (Grand Chamber), *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU :C :2021 :504)

B is a natural person upon whom penalty points were imposed on account of one or more road traffic offences. The Ceļu satiksmes drošības direkcija (Road Safety Directorate, Latvia; 'the CSDD') entered those penalty points in the national register of vehicles and their drivers.

Under the Latvian Law on road traffic, [63] information relating to the penalty points imposed on drivers of vehicles entered in that register is accessible to the public and disclosed by the CSDD to any person who so requests, without that person having to establish a specific interest in obtaining that information, including to economic operators for re-use. B disputed the lawfulness of that legislation and brought a constitutional appeal before the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia), requesting the court to examine whether the legislation complied with the constitutional right to respect for private life.

The Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) held that, in its assessment of the scope of that constitutional law, it must take account of the GDPR. Thus, it asked the Court to clarify the scope of several provisions of the GDPR with the aim of determining whether the Latvian Law on road traffic was compatible with that regulation.

By its judgment, delivered in the Grand Chamber, the Court held that the GDPR precluded the Latvian legislation. It noted that it had not been established that disclosure of personal data relating to the penalty points imposed for road traffic offences was necessary, particularly with regard to the objective of improving road safety invoked by the Latvian Government. Furthermore, according to the Court, neither the right of public access to official documents nor the right to freedom of information justified such legislation.

63| Article 141(2) of the Ceļu satiksmes likums (Law on road traffic) of 1 October 1997 (Latvijas Vēstnesis 1997, No 274/276).

Findings of the Court

In the first place, the Court held that the processing of personal data relating to penalty points constitutes 'processing of personal data relating to criminal convictions and offences', [64] in respect of which the GDPR provides for enhanced protection because of the particular sensitivity of the data at issue.

In that context, it noted, as a preliminary point, that the information relating to penalty points is personal data and that its disclosure by the CSDD to third parties constitutes processing which falls within the material scope of the GDPR. That scope is very broad and that processing is not covered by the exceptions to the applicability of that regulation.

Thus, first, that processing is not covered by the exception relating to the non-applicability of the GDPR to processing carried out in the course of an activity which falls outside the scope of EU law. [65] That exception must be regarded as being designed solely to exclude from the scope of that regulation the processing of personal data carried out by State authorities in the course of an activity which is intended to safeguard national security or of an activity which can be classified in the same category. Those activities encompass, in particular, those that are intended to protect essential State functions and the fundamental interests of society. Activities relating to road safety do not pursue that objective and consequently cannot be classified in the category of activities having the aim of safeguarding national security.

Secondly, the disclosure of personal data relating to penalty points is not processing covered by the exception providing for the non-applicability of the GDPR to processing of personal data carried out by the competent authorities in criminal matters either. [66] The Court found, in fact, that in carrying out that disclosure, the CSDD cannot be regarded as such a 'competent authority'. [67]

In order to determine whether access to personal data relating to road traffic offences, such as penalty points, amounts to processing of personal data relating to 'offences', [68] which enjoy enhanced protection, the Court found, relying in particular on the history of the GDPR, that that concept refers only to criminal offences. However, the fact that, in the Latvian legal system, road traffic offences are classified as administrative offences is not decisive when determining whether those offences fall within the concept of 'criminal offence', since it is an autonomous concept of EU law which requires an autonomous and uniform interpretation throughout the European Union. Thus, after recalling the three criteria relevant for assessing whether an offence is criminal in nature, namely the legal classification of the offence under national law, the nature of the offence and the degree of severity of the penalty incurred, the Court found that the road traffic offences at issue were covered by the term 'offence' within the meaning of the GDPR. As regards the first two criteria, the Court found that, even if offences are not classified as 'criminal' by national law, the nature of the offence, and in particular the punitive purpose pursued by the penalty that the offence may give rise to, may result in its being criminal in nature. In the present case, the imposition of penalty points for road traffic offences, like other penalties to which the commission of those offences may give rise, are intended, inter alia, to have

64| Article 10 of the GDPR.

65| Article 2(2)(a) of the GDPR.

66| Article 2(2)(d) of the GDPR.

67| Article 3(7) of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ 2016 L 119, p. 89).

68| Article 10 of the GDPR.

such a punitive purpose. As regards the third criterion, the Court observed that only road traffic offences of a certain seriousness entail the imposition of penalty points and that they are therefore liable to give rise to penalties of a certain severity. Moreover, the imposition of such points is generally additional to the penalty imposed, and the accumulation of those points has legal consequences which may extend to a driving ban.

In the second place, the Court held that the GDPR precludes the Latvian legislation requiring the CSDD to make the data relating to the penalty points imposed on drivers of vehicles for road traffic offences accessible to the public, without the person requesting access to those data having to establish a specific interest in obtaining the data.

In that regard, the Court pointed out that the improvement of road safety, referred to in the Latvian legislation, is indeed an objective of general interest recognised by the European Union and that Member States are therefore justified in classifying road safety as a 'task carried out in the public interest'. [69] However, it had not been established that the Latvian scheme of disclosing personal data relating to penalty points was necessary to achieve the objective pursued. First, the Latvian legislature has a large number of methods which would have enabled it to achieve that objective by other means less restrictive of the fundamental rights of the persons concerned. Secondly, account must be taken of the sensitivity of the data relating to penalty points and of the fact that their public disclosure is liable to constitute a serious interference with the rights to respect for private life and to the protection of personal data, since it may give rise to social disapproval and result in stigmatisation of the data subject.

Furthermore, the Court took the view that, in the light of the sensitivity of those data and of the seriousness of that interference with those two fundamental rights, those rights prevail over both the public's interest in having access to official documents, such as the national register of vehicles and their drivers, and the right to freedom of information.

In the third place, for the same reasons, the Court held that the GDPR also precludes the Latvian legislation in so far as it authorises the CSDD to disclose the data on penalty points imposed on drivers of vehicles for road traffic offences to economic operators in order for the data to be re-used and disclosed to the public by them.

In the fourth and last place, the Court stated that the principle of the primacy of EU law precludes the referring court, before which the action had been brought challenging the Latvian legislation, classified by the Court as incompatible with EU law, from deciding that the legal effects of that legislation be maintained until the date of delivery of its final judgment.

On a final note, reference should also be made under this heading to the judgment of 12 May 2021, ***Bundesrepublik Deutschland (Interpol red notice)*** (C-505/19, EU :C :2021 :376), delivered in the context of a red notice issued by Interpol. [70]

69| Under Article 6(1)(e) of the GDPR, the processing of personal data is lawful where it is 'necessary for the performance of a task carried out in the public interest …'.

70| That judgment is presented in Section II.2 'The *ne bis in idem* Principle'.

III. Withdrawal of the United Kingdom from the European Union

In two judgments, the Court clarified the consequences of the United Kingdom's withdrawal from the European Union.

Judgment of 15 July 2021 (Grand Chamber), *The Department for Communities in Northern Ireland* (C-709/20, EU :C :2021 :602)

CG, who has dual Croatian and Dutch nationality, has lived in the United Kingdom since 2018, without carrying out any economic activity. She lived there with her partner, a Dutch national, and their two children before moving to a women's refuge. CG has no resources at all.

On 4 June 2020, the Home Office (United Kingdom) granted her a temporary right of residence in the United Kingdom, on the basis of a new British scheme applicable to Union citizens residing in that country, established in the context of the withdrawal of the United Kingdom from the European Union. The grant of such a right of residence is not subject to any condition as to resources.

On 8 June 2020, CG applied to the Department for Communities in Northern Ireland for the social assistance benefit known as Universal Credit. That application was refused, on the ground that the Universal Credit Regulations exclude Union citizens with a right of residence granted on the basis of the new scheme from the category of potential beneficiaries of Universal Credit.

CG challenged that refusal before the Appeal Tribunal (Northern Ireland, United Kingdom), alleging, inter alia, a difference in treatment between Union citizens residing legally in the United Kingdom and British nationals. That court decided to refer a question to the Court about the potential incompatibility of the British Universal Credit Regulations with the prohibition of discrimination on grounds of nationality, laid down in the first paragraph of Article 18 TFEU.

The Court, sitting as the Grand Chamber, found that the British legislation was compatible with the principle of equal treatment laid down by Article 24 of the Residence Directive, [71] while requiring the competent national authorities to confirm that a refusal to grant social assistance based on that legislation would not expose the Union citizen and her children to an actual and current risk of violation of their fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union ('the Charter').

71| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34; 'the Residence Directive').

Findings of the Court

Since the question of the referring court was referred before the end of the transition period, that is to say, before 31 December 2020, the Court, as a preliminary point, declared that it had jurisdiction to give a preliminary ruling on that request, pursuant to Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. [72]

That preliminary observation having been made, the Court identified, first, the provisions of EU law applicable in the present case and concluded that the question whether CG faces discrimination on the grounds of nationality must be assessed in the light of Article 24 of the Residence Directive, and not of Article 18 TFEU; since the first of those articles gives specific expression to the principle of non-discrimination on the grounds of nationality enshrined among others in the second, in relation to Union citizens who exercise their right to move and to reside within the territory of the Member States.

After finding that the Universal Credit at issue must be categorised as social assistance, within the meaning of that directive, the Court noted that access to that benefit is reserved for Union citizens who meet the requirements set out in the Residence Directive. In that regard, the Court recalled that, by virtue of Article 7 of that directive, the obligation for an economically inactive Union citizen to have sufficient resources constitutes a requirement in order for the latter to enjoy a right of residence for longer than three months but less than five years.

The Court then confirmed its case-law to the effect that a Member State has the possibility, pursuant to that article, of refusing to grant social benefits to economically inactive Union citizens who, like CG, exercise their right to freedom of movement and do not have sufficient resources to claim a right of residence under the Residence Directive. It stated that, in the context of the specific examination of the economic situation of each person concerned, the benefits claimed are not taken into account in order to determine whether the person in question has sufficient resources.

The Court stressed, moreover, that the Residence Directive does not prevent the Member States from establishing more favourable rules than those laid down by that directive, in accordance with Article 37 thereof. However, a right of residence granted on the basis of national law alone, as is the case in the dispute in the main proceedings, cannot be regarded in any way as being granted 'on the basis of' that directive.

Nevertheless, CG made use of her fundamental freedom, laid down by the TFEU, to move and to reside in the territory of the Member States, with the result that her situation falls within the scope of EU law, even though her right to reside derives from UK law, which has established more favourable rules than those laid down by the Residence Directive. The Court held that, where they grant a right of residence such as that at issue in the main proceedings, without relying on the conditions and limitations in respect of that right laid down by the Residence Directive, the authorities of the host Member State implement the provisions of the TFEU on Union citizenship, which is destined to be the fundamental status of nationals of the Member States.

In accordance with Article 51(1) of the Charter, those authorities are thus obliged, when examining an application for social assistance such as that made by CG, to comply with the provisions of that Charter, in particular Articles 1 (human dignity), 7 (respect for private and family life) and 24 (rights of the child). In the context of that examination, those authorities may take into account all means of assistance provided for by national law, from which the citizen concerned and her children are actually entitled to benefit.

72| OJ 2020 L 29, p. 7.

Judgment of 16 November 2021 (Grand Chamber), *Governor of Cloverhill Prison and Others* (C-479/21 PPU, EU :C :2021 :929)

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. After their arrest, SD and SN were detained in Ireland, 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 (Ireland), the Irish law transposing the Framework Decision 2002/584 [73] 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 Withdrawal Agreement [74] and the TCA, [75] 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 – which fall within the area of freedom, security and justice ('the AFSJ') and are therefore, in principle, not binding on Ireland under Protocol (No 21). [76] Ireland did not make use of the possibility, offered by Protocol (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. [77]

In its judgment, the Court ruled, in particular, on the question whether the legal bases of the Withdrawal Agreement and of the TCA, namely, Article 50(2) TEU (which provides for the European Union's external competence to conclude a withdrawal agreement) and Article 217 TFEU (which provides for the European Union's external competence to conclude 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.

73| 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).

74| 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').

75| 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').

76| 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). According to that protocol, Ireland is not bound by measures within the AFSJ unless it has expressed its wish to apply one of them.

77| 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.

Findings of the Court

In the context of the urgent preliminary ruling procedure, the Court, sitting as the Grand Chamber, found 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 noted 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 Framework Decision 2002/584, is to apply in the United Kingdom during the transition period.

The Court added 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 of that article, 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, 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 observed, first of all, 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 examined whether the inclusion of that mechanism in an association agreement also requires the addition of a specific EU legal basis relating to the AFSJ. [78] 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 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.

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

Five other judgments concerning the United Kingdom may also be mentioned under this heading: judgments of 20 January 2021, ***Secretary of State for the Home Department*** (C-255/19, EU :C :2021 :36), [79] of 18 March 2021, ***Kuoni Travel*** (C-578/19, EU :C :2021 :213), [80] of 24 March 2021, ***MCP*** (C-603/20 PPU, EU :C :2021 :231), [81] of 20 May 2021, ***Renesola UK*** (C-209/20, EU :C :2021 :400), [82] and of 3 June 2021, ***Tesco Stores*** (C-624/19, EU :C :2021 :429). [83]

IV. Citizenship of the Union

The Court delivered several judgments relating to citizenship of the Union in 2021. Two of them concern the obtaining or presenting of identity documents by Union citizens in their Member State of nationality. Two other judgments deal with expulsion decisions adopted by a host Member State against Union citizens and their family members. One further judgment examines the derived right of residence of a third-country national who is a family member of a Union citizen. [84]

1. Right to move and reside freely in the territory of the Member States

Judgment of 6 October 2021, *A (Crossing borders in a pleasure boat)* (C-35/20, EU :C :2021 :813)

A, a Finnish national, made a round trip between Finland and Estonia on board a pleasure boat in August 2015. During that journey, he crossed international waters between Finland and Estonia. However, he was not in possession of his Finnish passport when he travelled. Consequently, in the course of a border check carried out in Helsinki (Finland) on his return, A was unable to present that passport or any other travel document, although his identity could be established on the basis of his driving licence.

The Syyttäjä (Public Prosecutor, Finland) prosecuted A for a minor border offence. Under Finnish law, Finnish nationals must, on pain of criminal sanctions, carry a valid identity card or passport when, by whatever means of transport and route, they make a journey to another Member State or enter Finland by arriving from another Member State.

79| That judgment is presented in Section VIII.1 'Asylum policy'.

80| That judgment is presented in Section XIV.7 'Package travel, package holidays and package tours'.

81| That judgment is presented in Section X 'Judicial cooperation in civil matters'.

82| That judgment is presented in Section VII.1 'Free movement of goods'.

83| That judgment is presented in Section XVI.1 'Equal treatment in employment and occupation'.

84| Reference should also be made under this heading to the following judgments: judgments of 12 May 2021, ***Bundesrepublik Deutschland (Interpol red notice)*** (C-505/19, EU:C:2021:376), which was delivered in the context of a red notice issued by Interpol and is presented in Section II.2 'Principle *ne bis in idem*'; of 15 July 2021, ***The Department for Communities in Northern Ireland*** (C-709/20, EU:C:2021:602), concerning the principle of non-discrimination based on nationality in a case involving a Union citizen residing in the United Kingdom in the context of the withdrawal of that country from the European Union, which is presented in Section III 'Withdrawal of the United Kingdom from the European Union'; and of 15 July 2021, ***A (Public health care)*** (C-535/19, EU:C:2021:595), relating to the right of economically inactive Union citizens residing in a Member State other than their Member State of origin to be affiliated to the public sickness insurance system of the host Member State, which is presented in Section XVI.4 'Coordination of social security systems'.

At first instance, it was held that A had committed an offence by crossing the Finnish border without being in possession of a travel document. However, no penalty was imposed on him, since the offence was minor and the amount of the fine that could be imposed on him under the Penal Code provided for in Finnish law, based on his average monthly income, was excessive, the total amount of that fine being EUR 95 250.

Since the appeal brought by the Public Prosecutor against that decision was dismissed, the Public Prosecutor brought an appeal before the Korkein oikeus (Supreme Court, Finland). The referring court then decided to ask the Court about the compatibility with the right of Union citizens to freedom of movement laid down in Article 21 TFEU [85] of the Finnish legislation at issue in the present case and, in particular, the rules on criminal sanctions in accordance with which the crossing of the national border without a valid identity card or passport is punishable by a fine which may amount to 20% of the offender's net monthly income.

Findings of the Court

In its judgment, the Court set out, first of all, the conditions under which an obligation to carry an identity card or passport may be imposed, on pain of sanctions, including criminal sanctions, for travel to a Member State other than that of which the person concerned is a national.

In the first place, the Court observed that the words 'with a valid identity card or passport' used in the Residence Directive, [86] clarifying Article 21 TFEU, mean that the exercise by nationals of a Member State of their right to travel to another Member State is subject to the condition that they carry one of those two valid documents. That formality related to free movement [87] is intended to facilitate the exercise of that freedom by ensuring that all persons who enjoy that right are identified as such in the context of a possible check. Consequently, a Member State which requires its nationals to carry one of the documents referred to, when crossing the national border in order to travel to another Member State, contributes to compliance with that formality.

In the second place, as regards the sanctions that may be imposed on a Union citizen who does not comply with that formality, the Court stated that the Member States may, in accordance with the autonomy they enjoy in that regard, provide for sanctions, where necessary of a criminal nature, provided that those sanctions comply, inter alia, with the principles of proportionality and non-discrimination.

The Court therefore concluded that the right of Union citizens to freedom of movement does not preclude national legislation by which a Member State requires its nationals, on pain of criminal sanctions, to carry a valid identity card or passport when they travel to another Member State, irrespective of the means of transport used and the route. However, the detailed rules for those sanctions must comply with the general principles of EU law, including those of proportionality and non-discrimination.

85| Having regard to the provisions on border crossing set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

86| Article 4(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; 'the Residence Directive').

87| Recital 7 of the Residence Directive.

Moreover, the Court reached the same conclusion as regards the requirement to carry an identity card or passport when a national of one Member State enters the territory of that Member State arriving from another Member State. It stated, however, that although the presentation of an identity card or passport may be requested when the national of a Member State returns to its territory, the requirement to carry such a document cannot affect the right of entry.

Finally, the Court examined the question whether Article 21(1) TFEU and the Residence Directive, read in the light of the principle of proportionality of the sanction, laid down by the Charter of Fundamental Rights of the European Union, [88] preclude rules on criminal sanctions such as those laid down in Finnish law in connection with the crossing of the national border without a valid identity card or passport.

In that regard, it observed that, while it is open to the Member States to impose a fine in order to penalise a failure to comply with a formal requirement relating to the exercise of a right conferred by EU law, that sanction must nevertheless be proportionate to the gravity of the infringement. Where, as in the present case, the obligation to be in possession of a valid identity card or passport is disregarded by a beneficiary of the right to freedom of movement who possesses such a document but has merely failed to carry it when travelling, it is a minor offence. Therefore, a heavy financial penalty, such as a fine of 20% of the offender's average net monthly income, is not proportionate to the seriousness of that offence.

Judgment of 14 December 2021 (Grand Chamber), *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU :C :2021 :1008)

V.M.A., a Bulgarian national, and K.D.K. have resided in Spain since 2015 and were married in 2018. Their child, S.D.K.A., was born in Spain in 2019. The child's birth certificate, drawn up by the Spanish authorities, refers to both mothers as being the parents of the child.

Since a birth certificate issued by the Bulgarian authorities is necessary to obtain a Bulgarian identity document, V.M.A. applied to the Sofia municipality [89] for a birth certificate for S.D.K.A. to be issued to her. In support of her application, V.M.A. submitted a legalised and certified translation into Bulgarian of the extract from the Spanish civil register relating to S.D.K.A.'s birth certificate.

The Sofia municipality instructed V.M.A. to provide evidence of the parentage of S.D.K.A., with respect to the identity of her biological mother. The model birth certificate applicable in Bulgaria has only one box for the 'mother' [90] and another for the 'father', and only one name may appear in each box.

V.M.A. took the view that she was not required to provide the information requested, whereupon the Sofia municipality refused to issue the requested birth certificate because of the lack of information concerning the identity of the child's biological mother and the fact that a reference to two female parents on a birth certificate was contrary to Bulgarian public policy, which does not permit marriage between two persons of the same sex.

88| Article 49(3) of the Charter.

89| Stolichna obshtina, rayon 'Pancharevo' (Sofia municipality, Pancharevo district, Bulgaria; 'the Sofia municipality').

90| According to the Semeen kodeks (Bulgarian Family Code), in the version applicable to the main proceedings, parentage with respect to the mother is determined by birth, the mother of the child being defined as the woman who gave birth to that child, including in the case of assisted reproduction.

V.M.A. brought an action against that refusal decision before the Administrativen sad Sofia-grad (Administrative Court of the City of Sofia, Bulgaria), the referring court.

That court was uncertain as to whether the refusal by the Bulgarian authorities to register the birth of a Bulgarian national, [91] which occurred in another Member State and has been attested by a birth certificate referring to two mothers, issued in the latter Member State, infringes the rights conferred on that Bulgarian national by Articles 20 and 21 TFEU and by Articles 7, 24 and 45 of the Charter. That refusal could make it more difficult for a Bulgarian identity document to be issued and, therefore, hinder the child's exercise of the right of free movement and thus full enjoyment of her rights as a Union citizen.

In those circumstances, the referring court decided to ask the Court about the interpretation of Article 4(2) TEU, [92] Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter. It asked, in essence, whether those provisions oblige a Member State to issue a birth certificate, in order for an identity document to be obtained, for a child, a national of that Member State, whose birth in another Member State is attested by a birth certificate that has been drawn up by the authorities of that other Member State in accordance with the national law of that other State, and which designates, as the mothers of that child, a national of the first of those Member States and her wife, without specifying which of the two women gave birth to that child.

In its judgment, delivered by the Grand Chamber, the Court interpreted the provisions referred to above as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

Findings of the Court

In reaching that conclusion, the Court recalled first of all that, in order to enable nationals of the Member States to exercise their right to move and reside freely within the territory of the Member States, [93] a right which every citizen of the Union enjoys under Article 21(1) TFEU, the Residence Directive requires Member States, acting in accordance with their laws, to issue to their own nationals an identity card or passport stating their nationality.

Accordingly, since S.D.K.A. has Bulgarian nationality, the Bulgarian authorities are required to issue to her a Bulgarian identity card or passport stating her surname as it appears on the birth certificate drawn up by the Spanish authorities, regardless of whether a new birth certificate is drawn up.

91| According to the referring court, it is common ground that, even without a birth certificate issued by the Bulgarian authorities, the child has Bulgarian nationality under, in particular, Article 25(1) of the Bulgarian Constitution.

92| Under which, in particular, the Union is to respect the national identities of its Member States, inherent in their fundamental structures, political and constitutional.

93| The 'right of free movement'.

Such a document (identity card or passport), whether alone or accompanied by a document issued by the host Member State, must enable a child such as S.D.K.A. to exercise the right of free movement, with each of her two mothers, whose status as parents of that child has been established by the host Member State during a stay in accordance with the Residence Directive.

The rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State. Since the Spanish authorities have lawfully established that there is a parent-child relationship, biological or legal, between S.D.K.A. and her two parents, attested in the birth certificate issued in respect of the child, V.M.A. and K.D.K. must, pursuant to Article 21 TFEU and the Residence Directive, be recognised by all Member States as having the right, as parents of a Union citizen who is a minor and of whom they are the primary carers, to accompany that child when she is exercising her rights. It follows, first, that the Member States must recognise that parent-child relationship in order to enable S.D.K.A. to exercise, with each of her parents, her right of free movement. Secondly, both parents must have a document which enables them to travel with that child. The authorities of the host Member State are best placed to draw up such a document, which may consist in a birth certificate and which the other Member States are obliged to recognise. Admittedly, a person's status is a matter which falls within the competence of the Member States, which are free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. However, in exercising that competence, each Member State must comply with EU law, in particular the Treaty provisions on Union citizens' freedom of movement and of residence, by recognising, for that purpose, the civil status of persons that has been established in another Member State in accordance with the law of that other Member State.

In the present case, the obligation for a Member State to issue an identity document to a child who is a national of that State, who was born in another Member State in which the birth certificate was drawn up and designates as parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of her rights under Article 21 TFEU and secondary legislation relating thereto, does not undermine the national identity or pose a threat to the public policy of that Member State. It does not require the Member State concerned to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which the child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.

Lastly, a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where it is consistent with the fundamental rights guaranteed by the Charter. [94] It is contrary to the fundamental rights guaranteed by Articles 7 and 24 of the Charter for the child to be deprived of the relationship with one of her parents when exercising her right of free movement or for her exercise of that right to be made impossible or excessively difficult on the ground that her parents are of the same sex.

94| Relevant rights in the situation with which the main proceedings are concerned are the right to respect for private and family life guaranteed by Article 7 of the Charter and the rights of the child guaranteed by Article 24 of the Charter, in particular the right to have the child's best interests taken into account and the right to maintain on a regular basis a personal relationship and direct contact with both parents.

2. Expulsion decisions against Union citizens taken by a host Member State

Judgment of 22 June 2021 (Grand Chamber), *Staatssecretaris van Justitie en Veiligheid (Effects of an expulsion decision)* (C-719/19, EU :C :2021 :506)

By decision of 1 June 2018, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') found that FS, a Polish national, was residing illegally in the territory of the Netherlands on the ground that he no longer satisfied the conditions laid down in Article 7 of the Residence Directive, relating to the right of residence for more than three months, and ordered him to leave the territory of the Netherlands. By decision of 25 September 2018 ('the expulsion decision'), the State Secretary declared unfounded the objection which FS had lodged against the decision of 1 June 2018. It set a period of four weeks for voluntary departure, expiring on 23 October 2018, beyond which FS could be expelled on the ground that he was illegally resident in the Netherlands.

FS left the Netherlands by 23 October 2018 at the latest, since the German police arrested him on that date on suspicion of shoplifting. FS stated that he was resident in Germany, near the Netherlands border. FS also stated that, owing to his dependence on marijuana, he travelled to the Netherlands on a daily basis to purchase it. On 22 November 2018, he was apprehended in a supermarket in the Netherlands on suspicion of theft. Following his arrest and detention by the police, the State Secretary placed FS in administrative detention with a view to expelling him to his country of origin. The grounds stated for that decision were the risk of FS evading the monitoring of foreign nationals or avoiding or impeding preparations for his departure or for the expulsion procedure.

By judgment delivered in December 2018, the rechtbank Den Haag, zittingsplaats Groningen (District Court, The Hague, sitting in Groningen, Netherlands), dismissed as unfounded the action brought by FS against the detention decision. FS lodged an appeal against that judgment before the referring court, the Raad van State (Council of State, Netherlands). That court observed that the expulsion decision adopted against FS was an expulsion decision within the meaning of Article 15 of the Residence Directive. [95] According to that court, the lawfulness of FS's detention following his return to the Netherlands depended on the issue of whether he had a right of residence in the Netherlands once again on the date on which he was placed in detention. Consequently, the Court was asked to rule on the circumstances in which a Union citizen who has been the subject of an expulsion decision adopted on grounds other than public policy, public security or public health may rely on a new right of residence in the host Member State.

In its Grand Chamber judgment, the Court held that a decision to expel a Union citizen from the territory of the host Member State, adopted on the basis of Article 15(1) of the Residence Directive on the ground that that Union citizen no longer enjoys a temporary right of residence in that territory under that directive, cannot be deemed to have been complied with in full merely because that Union citizen has physically left that territory within the period prescribed by that decision for his or her voluntary departure. The Court also stated that, in order to enjoy a new right of residence under Article 6(1) of the Residence Directive in the same territory, the Union citizen who has been the subject of such an expulsion decision must not only have

95| That provision provides, inter alia, that certain procedures provided for in Chapter VI of that directive, entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health' (the procedures laid down in Articles 30 and 31), are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

physically left the territory of the host Member State, but must also have genuinely and effectively terminated his or her residence there, with the result that, upon his or her return to that territory, his or her residence cannot be regarded as constituting in fact a continuation of his or her previous residence in that territory.

Findings of the Court

To reach that conclusion, the Court examined, in the first place, whether the mere physical departure of a Union citizen from the host Member State is sufficient in order for an expulsion decision taken against that Union citizen under Article 15(1) of the Residence Directive to be regarded as having been complied with in full. In that regard, the Court observed that the temporal effects of such an expulsion decision are not apparent from the wording of that directive. Next, having regard to the objective pursued by that provision and its context and the aim of the Residence Directive, the Court observed that the possibility offered to the host Member State of expelling Union citizens who are no longer legally resident in its territory is consistent with the specific objective provided for by that directive, which is to prevent Union citizens and their family members from becoming an unreasonable burden on the social assistance system of the host Member State during their temporary residence. The Court also pointed out that an interpretation which consists of stating that the mere physical departure of the Union citizen is sufficient for the purposes of complying with an expulsion decision would result in him or her being allowed to rely on multiple successive temporary periods of residence in a Member State in order, in fact, to reside there permanently, even though such a citizen did not satisfy the conditions for a right of permanent residence laid down in the Residence Directive. According to the Court, such an interpretation would be inconsistent with the overall context of the Residence Directive, which introduced a gradual system as regards the right of residence in the host Member State, which culminates in the right of permanent residence.

Furthermore, the Court considered that the grant of a minimum period of one month from notification of the expulsion decision to comply with that decision, [96] inasmuch as it enables the citizen concerned to prepare his or her departure, supports an interpretation of Article 15(1) of the Residence Directive to the effect that an expulsion decision is complied with when that citizen has terminated genuinely and effectively his or her residence in that territory.

In the second place, the Court provided useful indications to the referring court to enable it to determine, on the basis of an overall assessment of all the circumstances of the dispute before it, whether the Union citizen in question has genuinely and effectively terminated his or her residence in the host Member State, in such a way that the expulsion decision to which he or she was subject may be regarded as having been complied with in full. In that regard, the Court stated first of all that to oblige such a citizen, in all cases, to leave the host Member State for a minimum period, for example three months, in order to be able to rely on a new right of residence in that Member State, under Article 6(1) of the Residence Directive, would be to render the exercise of that fundamental right subject to a limitation not provided for either by the Treaties or by that directive. However, the length of the period spent by that person outside the territory of the host Member State following the adoption of the expulsion decision by that Member State may be of some importance, in so far as the longer the person concerned is absent from the host Member State, the more that absence attests to the genuine and effective nature of the end of his or her residence there. In addition, among the other useful indications provided by the Court, the latter emphasised the importance of all the factors evidencing a break in the links between the Union citizen concerned and the host Member State,

96| Provided for in Article 30(3) of the Residence Directive and applicable by analogy to a decision taken on the basis of Article 15 of that directive.

such as the termination of a lease contract or moving house or flat. The Court stated that the relevance of such factors must be assessed by the competent national authority in the light of all the specific circumstances characterising the particular situation of the Union citizen concerned.

In the last place, the Court set out the consequences of failure to comply with an expulsion decision. On that matter, the Court stated that if it follows from the verification carried out by the competent national authority that the Union citizen has not genuinely and effectively terminated his or her temporary residence in the territory of the host Member State, that Member State is not obliged to adopt a new expulsion decision on the basis of the same facts as those which gave rise to the expulsion decision already taken against that citizen, but may rely on that latter decision in order to oblige him or her to leave its territory. However, the Court pointed out that a material change in circumstances enabling the Union citizen to satisfy the conditions laid down in Article 7 of the Residence Directive, concerning the right of residence for more than three months, would deprive the expulsion decision of which he or she is the subject of any effect and would require, despite the failure to comply with that decision, that his or her residence on the territory of the Member State concerned be regarded as legal. With respect to the possibility for a Member State to check whether such an expulsion decision has been complied with in full, the Court pointed out that, despite the limitations imposed by EU law on such controls, certain provisions of the Residence Directive are intended to enable the host Member State to ensure that the temporary residence of nationals of other Member States in its territory is carried out in a matter consistent with that directive. [97] Finally, the Court stated that an expulsion decision taken against a Union citizen under Article 15(1) of the Residence Directive cannot be enforced against him or her where, under Article 5 of that directive, which provides for the right of entry to the territory of the host Member State, that citizen travels to that territory on an ad hoc basis for purposes other than to reside there.

Judgment of 22 June 2021 (Grand Chamber), *Ordre des barreaux francophones et germanophone and Others (Preventive measures for removal)* (C-718/19, EU :C :2021 :505)

Two actions for annulment were brought before the Cour constitutionnelle (Constitutional Court, Belgium) in respect of the loi du 24 février 2017, modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers afin de renforcer la protection de l'ordre public et de la sécurité nationale (Law of 24 February 2017 amending the Law of 15 December 1980 on the admission, residence, establishment and removal of foreign nationals in order to enhance protection of public policy and national security). [98] The first of those actions was brought by Ordre des barreaux francophones et germanophone and the second by four non-profit associations involved in the defence of migrants' rights and the protection of human rights.

The national legislation of 2017 provides, first, for the possibility of imposing on Union citizens and their family members, during the period allowed for them to leave the territory of Belgium following the adoption of an expulsion decision taken against them on grounds of public policy or during an extension of that period, preventive measures aimed at avoiding any risk of absconding, such as house arrest. Secondly, it allows Union citizens and their family members who have not complied with such an expulsion decision to be kept

97| That is true, inter alia, of Article 5(5) of the Residence Directive, according to which the Member State may require the person concerned to report his or her presence within its territory within a reasonable and non-discriminatory period of time, since failure to comply with that obligation, like a failure to comply with the registration obligation, may make the person concerned liable to non-discriminatory and proportionate sanctions.

98| Moniteur Belge of 19 April 2017, p. 51890.

in detention, for a maximum period of eight months, in order to ensure that that decision is enforced. Those provisions are similar or identical to those which are applicable to illegally staying third-country nationals and which are intended to transpose the Return Directive into Belgian law.[99]

In those circumstances, the referring court asked the Court about the compatibility of that Belgian legislation with the freedom of movement guaranteed to Union citizens and their family members by Articles 20 and 21 TFEU and by the Residence Directive.

Findings of the Court

The Grand Chamber of the Court found, as a preliminary point, that in the absence of EU rules on the enforcement of a decision to expel Union citizens and their family members, the mere existence of rules provided for by the host Member State relating to such enforcement that are based on those applicable to the return of third-country nationals is not, in itself, contrary to EU law. However, such rules must comply with EU law, in particular concerning the freedom of movement and residence of Union citizens and their family members. The Court went on to determine whether those rules constitute restrictions on that freedom and, if so, whether those rules are justified.

Thus, the Court found, in the first place, that in so far as the national provisions concerned limit the movements of the person concerned, they constitute restrictions on the freedom of movement and residence.

In the second place, as to whether there is any justification for such restrictions, the Court recalled first of all that the measures at issue are aimed at enforcing expulsion decisions adopted on grounds of public policy or public security and must therefore be assessed in the light of the requirements laid down in Article 27 of the Residence Directive. [100]

First, as regards the preventive measures aimed at avoiding the risk of absconding, the Court ruled that Articles 20 and 21 TFEU and the Residence Directive do not preclude the application to Union citizens and their family members, during the period allowed for them to leave the territory of the host Member State following the adoption of such an expulsion decision, of provisions that are similar to provisions whose purpose is, as regards third-country nationals, to transpose the Return Directive [101] into national law, provided that the former provisions respect the general principles, laid down in the Residence Directive, [102] relating to the restriction on the right of entry and the right of residence on grounds of public policy, public security or public health and are no less favourable than the latter provisions.

99| Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals (OJ 2008 L 348, p. 98; 'the Return Directive').

100| In accordance with paragraph 2 of that article, restrictive measures taken on grounds of public policy or public security are to comply with the principle of proportionality and are to be based exclusively on the personal conduct of the individual concerned.

101| Article 7(3) of the Return Directive. According to that provision, 'certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure'.

102| Article 27 of the Residence Directive.

Such preventive measures necessarily contribute to the protection of public policy, in so far as their purpose is to ensure that a person who represents a threat to public policy in the host Member State is expelled from the territory of that State. Those measures must therefore be regarded as restricting the freedom of movement and residence of that person 'on grounds of public policy', within the meaning of the Residence Directive, [103] and are thus capable, in principle, of being justified under that directive.

Furthermore, those measures cannot be considered contrary to the Residence Directive solely on the ground that they are similar to the measures which are intended to transpose the Return Directive into national law. However, the Court pointed out that the beneficiaries of the Residence Directive enjoy a status and rights entirely different from those that may be relied upon by the beneficiaries of the Return Directive. Consequently, in view of the fundamental status of Union citizens, measures which may be imposed on them in order to avoid a risk of absconding cannot be less favourable than measures provided for under national law to avoid a risk of third-country nationals absconding, during the period for voluntary departure, where such third-country nationals are subject to a return procedure on grounds of public policy.

Secondly, as regards detention for the purpose of removal, the Court ruled that Articles 20 and 21 TFEU and the Residence Directive preclude national legislation which applies to Union citizens and their family members who, after the expiry of the period allowed for them to leave the territory or an extension of that period, have not complied with an expulsion decision taken against them on grounds of public policy or public security, a detention measure for a maximum period of detention of eight months, that period being identical to that applicable, in national law, to third-country nationals who have not complied with a return decision issued on such grounds pursuant to the Return Directive. [104]

In that regard, the Court stated that the period of detention provided for by the national provision concerned, which is identical to that applicable to the removal of third-country nationals, must be proportionate to the objective pursued, which is to establish an effective removal policy in respect of Union citizens and their family members. As regards specifically the duration of the removal procedure, Union citizens and their family members are not in a comparable situation to that of third-country nationals, with the result that there is no justification for treating all those individuals in the same way as regards the maximum period of detention.

In particular, the Member States have, in the context of the expulsion of Union citizens or their family members to another Member State, systems of cooperation and facilities that they do not necessarily have in the context of the removal of a third-country national to a third country. Since relations between Member States are based on the duty of sincere cooperation and the principle of mutual trust, they should not give rise to the same difficulties as those which may arise where there is cooperation between Member States and third countries. Nor should the practical difficulties involved in organising the return journey generally be the same for both categories of individual. Lastly, the return of a Union citizen to the territory of the Member State of origin is facilitated by the Residence Directive. [105]

According to the Court, it follows that a maximum period of detention of eight months for the purpose of removal for Union citizens and their family members goes beyond what is necessary to achieve the objective pursued.

103| Article 27(1) of the Residence Directive.

104| Article 6(1) of the Return Directive.

105| Under Article 27(4), the Member State which issued the passport or identity card must allow the holder of such a document who has been expelled from another Member State to re-enter its territory without any formality.

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

Judgment of 2 September 2021 (Grand Chamber), *Belgian State (Right of residence in the event of domestic violence)* (C-930/19, EU :C :2021 :657)

In 2012, X, an Algerian national, joined his French wife in Belgium, where he was issued with a residence card of a family member of a Union citizen.

In 2015, he was forced to leave the matrimonial home because of acts of domestic violence which he suffered at the hands of his wife. A few months later, his wife left Belgium to move to France. Almost three years after that departure, X initiated divorce proceedings. The divorce was granted on 24 July 2018.

In the meantime, the Belgian State terminated X's right of residence, on the ground that he had not adduced evidence that he had sufficient resources to support himself. According to the provision of Belgian legislation intended to transpose Article 13(2) of the Residence Directive, in the event of divorce or when the spouses no longer live together as a single household, the retention of the right of residence by a third-country national who has been the victim of acts of domestic violence committed by his or her spouse, who is a Union citizen, is subject to certain conditions, including the requirement to have sufficient resources.

X brought an action against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), on the ground of an unjustified difference in treatment between the spouse of a Union citizen and the spouse of a third-country national residing lawfully in Belgium. In the event of divorce or separation, the provision of Belgian legislation transposing Article 15(3) of Directive 2003/86 [106] makes the retention of the right of residence by a third-country national who has benefited from the right to family reunification with another third-country national and has been the victim of acts of domestic violence committed by that other third-country national subject only to proof of the existence of those acts.

The Conseil du contentieux des étrangers (Council for asylum and immigration proceedings) considered that, as regards the conditions for the retention, in the event of divorce, of the right of residence by third-country nationals who have been the victims of acts of domestic violence committed by their spouses, the regime laid down in the Residence Directive is less favourable than that laid down in Directive 2003/86. It therefore asked the Court of Justice to rule on the validity of Article 13(2) of the Residence Directive, in particular in the light of the principle of equal treatment laid down in Article 20 of the Charter.

In its judgment, delivered by the Grand Chamber, the Court, in the first place, restricted the scope of its case-law concerning the scope of point (c) of the first subparagraph of Article 13(2) of the Residence Directive, in particular the judgment in ***NA.*** [107] In the second place, it did not find any factor of a kind such as to affect the validity of Article 13(2) of that directive in the light of Article 20 of the Charter.

106| Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

107| Judgment of 30 June 2016, ***NA*** (C-115/15, EU :C :2016 :487).

Findings of the Court

Before carrying out an assessment of validity, the Court clarified the scope of point (c) of the first subparagraph of Article 13(2) of the Residence Directive, pursuant to which the right of residence is retained in the event of divorce where that is warranted by particularly difficult circumstances, such as having been the victim of acts of domestic violence during the marriage. The issue arises, in particular, as to whether that provision is applicable where, as in the main proceedings, divorce proceedings were initiated after the departure of the spouse who is a Union citizen from the host Member State concerned.

Contrary to the judgment in *NA*, the Court considered that, in order to retain the right of residence on the basis of that provision, divorce proceedings may be initiated after such departure. However, in order to ensure legal certainty, a third-country national – who has been the victim of acts of domestic violence committed by his or her spouse who is a Union citizen and in relation to whom divorce proceedings have not been initiated before the departure of that spouse from the host Member State – can rely on the retention of his or her right of residence only in so far as those proceedings are initiated within a reasonable period following such departure. It is important to leave the third-country national concerned sufficient time to choose between the two options offered to him or her by the Residence Directive in order to retain a right of residence, namely either the commencement of divorce proceedings for the purpose of enjoying a personal right of residence under point (c) of the first subparagraph of Article 13(2) of that directive, or his or her establishment in the Member State in which the Union citizen resides in order to retain his or her derived right of residence.

Regarding the validity of Article 13(2) of the Residence Directive, the Court concluded that that provision does not result in discrimination. Notwithstanding the fact that point (c) of the first subparagraph of Article 13(2) of the Residence Directive and Article 15(3) of Directive 2003/86 share the objective of ensuring protection for family members who are victims of domestic violence, the regimes introduced by those directives relate to different fields, the principles, subject matters and objectives of which are also different. In addition, the beneficiaries of the Residence Directive enjoy a different status and rights of a different kind to those upon which the beneficiaries of Directive 2003/86 may rely, and the discretion which the Member States are recognised as having to apply the conditions laid down in those directives is not the same. In the present case, it is thus, in particular, a choice made by the Belgian authorities in connection with the exercise of the broad discretion conferred on them by Article 15(4) of Directive 2003/86 which led to the difference in treatment complained of by the applicant in the main proceedings.

Therefore, as regards the retention of their right of residence, third-country nationals who are spouses of Union citizens, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of the Residence Directive, on the one hand, and third-country nationals who are spouses of other third-country nationals, have been the victims of acts of domestic violence committed by their spouses, and fall within the scope of Directive 2003/86, on the other, are not in a comparable situation for the purposes of the possible application of the principle of equal treatment guaranteed by Article 20 of the Charter.

V. Institutional provisions

Three judgments are worthy of note under this heading: the first concerns access to documents, the second relates to the privileges and immunities of the European Union, and the third – delivered by the full Court – deals with the obligations of the Members of the Court of Auditors.

1. Access to documents

Judgment of 21 January 2021, *Leino-Sandberg* v *Parliament* (C-761/18 P, EU :C :2021 :52)

The appellant, a university professor, submitted to the European Parliament, in the context of two research projects relating to transparency in trilogues, a request for access to the decision of that institution refusing to grant a person access to certain documents containing information obtained in the context of trilogues. [108] By its decision of 3 April 2017, [109] the Parliament refused to grant the appellant access to the requested document.

The General Court held [110] that there was no longer any need to adjudicate on the appellant's action lodged against the latter decision, since, following the disclosure on the internet, by its addressee, of the document access to which the appellant had requested, those proceedings had become devoid of purpose.

Hearing an appeal brought by the appellant, the Court of Justice set aside the order of the General Court and referred the case back to that court.

Findings of the Court

Relying on its case-law, [111] the Court held that, even though the document at issue had been disclosed by a third party, the decision at issue had not been formally withdrawn by the Parliament, with the result that the action retained its purpose.

In order to ascertain whether the General Court should have ruled on the substance of the action, the Court of Justice examined whether the appellant, notwithstanding the disclosure of the document at issue by a third party, retained her interest in bringing proceedings. As a preliminary observation, the Court noted that, while it is true that an interest in bringing proceedings – which must continue until the final decision is delivered failing which there will be no need to adjudicate – constitutes a procedural condition independent of the substantive law applicable to the substance of the case, it cannot however be detached from that law. Thus, taking into account the fact that the request for access made by the appellant was based on Regulation

108| European Parliament Decision of 8 July 2015, A(2015) 4931.

109| European Parliament Decision A(2016) 15112.

110| Order of 20 September 2018, ***Leino-Sandberg* v *Parliament*** (T-421/17, not published, EU :T :2018 :628).

111| Judgment of 4 September 2018, ***ClientEarth*** v ***Commission*** (C-57/16 P, EU :C :2018 :660).

No 1049/2001, [112] the Court recalled that that regulation, which is based on the principle of openness, seeks to confer on the public as wide a right of access as possible to documents of the institutions. The Court stated that that regulation establishes, first, the right, in principle, for any person to access documents of an institution and, secondly, the obligation, in principle, of an institution to grant access to its documents. The exceptions to the right of access to documents of the institutions are listed exhaustively therein.

Next, the Court noted that, even though, according to the provisions of Regulation No 1049/2001, [113] the institution concerned may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document if the document has already been released by the institution concerned and is easily accessible, that is not the case if the document of an institution has been disclosed by a third party. In that regard, the Court stressed that a document disclosed by a third party cannot be regarded as constituting an official document, or as expressing the official position of the institution in the absence of an unequivocal endorsement by that institution according to which the document obtained emanates from it and expresses its official position.

The Court held that, in a situation where the appellant has only obtained access to the document at issue disclosed by a third party and where the Parliament continues to refuse to grant her access to the requested document, it cannot be considered that the appellant has obtained access to that document, within the meaning of Regulation No 1049/2001, nor that, therefore, she no longer has any interest in seeking the annulment of the decision at issue solely as a result of that disclosure. On the contrary, in such circumstances, the appellant retains a genuine interest in obtaining access to an authenticated version of the requested document, guaranteeing that that institution is the author and that the document expresses its official position.

Consequently, the Court of Justice found that the General Court had erred in law in treating the disclosure of a document by a third party as being the same as disclosure by the institution concerned of the requested document and in having inferred from this that there was no longer any need to adjudicate on the appellant's action on the ground that, since the document had been disclosed by a third party, the appellant could access it and use it in a way which is as lawful as if she had obtained it as a result of her application under the regulation.

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

113| Article 10(1) and (2) of Regulation No 1049/2001.

2. Privileges and immunities of the European Union

Judgment of 30 November 2021 (Grand Chamber), *LR Ģenerālprokuratūra* (C-3/20, EU:C:2021:969)

In June 2018, the Latvian Public Prosecutor charged the Governor of the Central Bank of Latvia ('AB') with various offences of corruption before the Rīgas rajona tiesa (Riga District Court, Latvia). Specifically, AB was 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 concluded 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 asked whether, by virtue of his status as a member of the General Council and the Governing Council of the ECB, AB could enjoy immunity under Article 11(a) of Protocol (No 7) on the privileges and immunities of the European Union, [114] 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 proceedings under the Protocol on privileges and immunities in the context of criminal proceedings against him or her.

Findings of the Court

After 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, observed, 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.

As regards the purpose and scope of the protection provided for in Article 11(a) of the Protocol on privileges and immunities, the Court pointed 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.

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

Thus, it is for the ECB alone, when seised of an application for waiver of immunity from legal proceedings concerning a governor of a national 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 stated that, where the authority responsible for the criminal proceedings finds that the conduct in question was manifestly not carried out by the governor of a national 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, that authority is required to consult the ECB and, if the latter considers that the acts were carried out in that official capacity, to request it to waive the immunity of that governor. Such requests for waiver of immunity must be granted, unless it is established that the interests of the European 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 if 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 stated 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 noted 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 were not 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.

3. Obligations of the Members of the Court of Auditors

Judgment of 30 September 2021 (full Court), *Court of Auditors* v *Pinxten* (C-130/19, EU :C :2021 :782)

Mr Pinxten was a Member of the European Court of Auditors from 1 March 2006 to 30 April 2018, completing two terms of office.

In that capacity Mr Pinxten received, among other things, reimbursement of various expenses and an official car. Furthermore, between 2006 and March 2014 the Court of Auditors provided Mr Pinxten with a driver.

The Court of Auditors stated that, in the course of 2016, it received information concerning a number of serious irregularities attributed to Mr Pinxten. On 18 July 2016, Mr Pinxten was informed of the allegations made against him.

On 14 October 2016, the Secretary-General of the Court of Auditors, acting on instructions from the President of that institution, forwarded a file to the European Anti-Fraud Office (OLAF) relating to the activities of Mr Pinxten which had led to possible undue expenditure from the budget of the European Union.

On 2 July 2018, the Court of Auditors received OLAF's final report following the completion of its investigation. That report found, in respect of Mr Pinxten, misuse of the resources of the Court of Auditors in the context of activities unrelated to his duties, misuse of fuel cards and the motor insurance contract for his official car, unjustified absences, failure to declare certain external activities, transmission of confidential information and the existence of conflicts of interest. Furthermore, considering that some of the facts revealed by the investigation could constitute criminal offences, OLAF forwarded information and its recommendations to the Luxembourg judicial authorities.

After submitting written observations to the Court of Auditors, Mr Pinxten was heard by the Members of that institution in a closed session on 26 November 2018. On 29 November 2018, in one such session, the Court of Auditors decided to refer Mr Pinxten's case to the Court of Justice pursuant to Article 286(6) TFEU. [115]

Alongside this, in the light of the information forwarded by OLAF, the State Prosecutor at the Tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) requested, by letter of 1 October 2018, that the Court of Auditors waive Mr Pinxten's immunity from legal proceedings. On 15 November 2018, that institution granted that request.

By its action, which was brought on 15 February 2019, the Court of Auditors claimed that the Court should declare that Mr Pinxten no longer met the obligations arising from his office and impose, consequently, the penalty laid down in Article 286(6) TFEU.

115| Article 286(6) TFEU provides: 'A member of the Court of Auditors may be deprived of his office or of his right to a pension or other benefits in its stead only if the Court of Justice, at the request of the Court of Auditors, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.'

Sitting in full Court, its most formal composition, the Court ruled inter alia that Mr Pinxten had breached the obligations arising from his office as a Member of the Court of Auditors in respect of:

- the undeclared and unlawful exercise of an activity within the governing body of a political party;
- improper use of the resources of the Court of Auditors to finance activities unrelated to the duties of a Member of that institution to the extent specified in the judgment;
- the use of a fuel card to purchase fuel for vehicles belonging to third parties, and
- the creation of a conflict of interest through a relationship with the head of an audited entity.

On the other hand, the Court rejected the complaints raised by the Court of Auditors relating to:

- the purportedly undeclared and unlawful exercise of an activity as manager of a société civile immobilière (non-trading real estate company);
- the holding and use of a fuel card by one of Mr Pinxten's children when he was no longer a member of Mr Pinxten's household;
- allegations of false insurance claims in connection with accidents involving the official vehicle and the driver assigned to Mr Pinxten's Cabinet.

In the light of those findings, the Court ruled that Mr Pinxten be deprived of two thirds of his right to a pension from the date of delivery of the judgment in that case, namely 30 September 2021.

Findings of the Court

As regards the admissibility of the action, the Court rejected, in succession, all the arguments put forward by Mr Pinxten concerning, first, the incompatibility of the procedure concerning him with the right to effective judicial protection, secondly, the irregularity of the investigation by OLAF, thirdly, the irregularity of the procedure followed within the Court of Auditors for authorising the bringing of the action before the Court of Justice and, fourthly, the delay in bringing that action. The Court therefore declared the action to be admissible.

On the substance of the action, after noting the nature of the obligations arising from the office of Member of the Court of Auditors, the Court stated that the expression 'obligations arising from his office', within the meaning of Article 286(6) TFEU, is to be broadly construed. Having regard to the importance of the responsibilities assigned to them, it is important that the Members of the Court of Auditors observe the highest standards of conduct and ensure that the general interest of the European Union takes precedence at all times, not only over national interests, but also over personal interests. With that in mind, the obligations of the Members of the Court of Auditors set out in EU primary law are reproduced and given concrete expression in the internal rules adopted by that institution, which those Members are required to observe rigorously.

Against that background, the Court was required to examine all the evidence submitted to it, both by the Court of Auditors, which had to establish the existence of the breach of obligations which it attributed to Mr Pinxten, and by Mr Pinxten. The Court was required inter alia to assess the material accuracy and reliability of that evidence in order to ascertain whether it was sufficient to find a breach of a certain degree of gravity for the purposes of Article 286(6) TFEU.

Thus, after examining all the evidence submitted by the Court of Auditors and by Mr Pinxten, the Court ruled that, by exercising an undeclared activity within the governing body of a political party, which was incompatible with his duties as a Member of the Court of Auditors, by misusing the resources of that institution to finance activities unrelated to the duties of a Member of that institution [116] and by acting in a manner likely to create a conflict of interest with an audited entity, Mr Pinxten was liable for breaches of a significant degree of gravity and therefore acted in breach of the obligations arising from his office as a Member of that institution within the meaning of Article 286(6) TFEU.

According to the Court, the breach of those obligations calls, in principle, for the imposition of a penalty under that provision. Article 286(6) TFEU permits the Court to impose a penalty in the form of compulsory retirement or the deprivation of the right of the person concerned to a pension or other benefits in its stead.

As there is no provision in Article 286(6) TFEU as to the extent of the deprivation of the right to a pension under that provision, the Court may order deprivation in whole or in part thereof. That penalty must, however, be proportionate to the gravity of the breaches of the obligations arising from the office of Member of the Court of Auditors established by the Court.

In that regard, the Court noted that a number of circumstances were such as to establish that the irregularities attributable to Mr Pinxten had a particularly high degree of gravity. Thus, in the course of his two terms of office as a Member of the Court of Auditors, Mr Pinxten, first, deliberately and repeatedly infringed the applicable rules within that institution, systematically breaching the most basic obligations arising from his office. Next, Mr Pinxten frequently attempted to conceal those infringements of the rules. In addition, the irregularities committed by Mr Pinxten served, to a large extent, to contribute to his personal enrichment. Furthermore, Mr Pinxten's conduct caused considerable damage to the Court of Auditors, not only financially but also to its image and its reputation. Lastly, the specific function for which the Court of Auditors is responsible in examining whether all expenditure has been incurred by the European Union in a lawful and regular manner and whether the financial management has been sound [117] further increased the gravity of the irregularities committed by Mr Pinxten.

However, the Court observed that other factors were such as to mitigate the liability of Mr Pinxten. First, he acquired his right to a pension in respect of work carried out over 12 years of service at the Court of Auditors. The quality of that work was not called into question and Mr Pinxten was even elected by his peers to the office of Dean of Chamber III of the Court of Auditors from 2011. Secondly, although the breaches committed by Mr Pinxten of the obligations arising from his office were determined, first and foremost, by personal choices which he must have known were incompatible with the most basic obligations arising from his office, the fact remains that the perpetuation of those irregularities was facilitated by a lack of precision in the internal rules of that institution and permitted by deficiencies in the controls established by it.

In the light of all the evidence examined, the Court considered that on a fair assessment of the circumstances of the case Mr Pinxten should be deprived of two-thirds of his right to a pension from the date of delivery of its judgment.

116| A series of irregularities connected with mission expenses, daily allowances, representation and hospitality expenses, use of the official car and use of a driver.

117| Article 287(2) TFEU.

VI. Proceedings of the European Union

Three judgments deserve to be mentioned under this heading. In the first judgment, the Court clarified the criteria identified in ***Cilfit and Others***, [118] concerning the situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling. The second judgment considers the power of a higher court to declare a request for a preliminary ruling submitted to the Court of Justice by a lower court to be unlawful. In the third judgment delivered on appeal in the context of annulment proceedings, the Court ruled on the admissibility of an action for annulment brought by a third State against restrictive measures adopted by the Council in view of the situation in that State.

1. References for a preliminary ruling

Judgment of 6 October 2021 (Grand Chamber), *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU :C :2021 :799)

In 2017, the Consiglio di Stato (Council of State, Italy), a national court of last instance ('the referring court'), made a reference to the Court of Justice for a preliminary ruling in proceedings concerning a public contract for the supply of services relating to the cleaning, inter alia, of Italian railway stations. The Court delivered its judgment in 2018. [119] The parties to those proceedings then asked the referring court to refer other questions for a preliminary ruling.

It was against that background that, in 2019, the referring court made a new reference to the Court for a preliminary ruling. It sought, inter alia, to ascertain whether a national court or tribunal of last instance must bring before the Court a question concerning the interpretation of EU law where that question is put to it by a party at an advanced stage of the proceedings, after the case has been set down for judgment for the first time or where a reference for a preliminary ruling has already been made in that case.

Findings of the Court

In its judgment, the Court, sitting as the Grand Chamber, reasserted the criteria identified in ***Cilfit and Others***, which provides for three situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling: [120]

- the question is irrelevant for the resolution of the dispute;
- the provision of EU law in question has already been interpreted by the Court;
- the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.

118| Judgment of 6 October 1982, ***Cilfit and Others*** (283/81, EU :C :1982 :335).

119| Judgment of 19 April 2018, ***Consorzio Italian Management and Catania Multiservizi*** (C-152/17, EU :C :2018 :264).

120| That obligation is laid down in the third paragraph of Article 267 TFEU.

Accordingly, the Court held that a court or tribunal of last instance cannot be relieved of its obligation to make a reference for a preliminary ruling merely because it has already made a reference to the Court for a preliminary ruling in the same national proceedings.

With regard to the third situation referred to above, the Court clarified that the absence of reasonable doubt must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union. Before concluding that there is no reasonable doubt as to the correct interpretation of EU law, the national court or tribunal of last instance must be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice.

In that regard, the mere fact that a provision of EU law may be interpreted in several ways is not sufficient for the view to be taken that there is a reasonable doubt as to the correct interpretation of that provision. Nonetheless, where the national court or tribunal of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court or tribunal must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of that provision.

National courts or tribunals of last instance must take upon themselves, independently and with all the requisite attention, the responsibility for determining whether the case before them involves one of the three situations in which they may refrain from submitting to the Court a question concerning the interpretation of EU law which has been raised before them. If such a court or tribunal takes the view that it is relieved of its obligation to make a reference to the Court, the statement of reasons for its decision must show that the matter involves one of those three situations.

Moreover, where the case before the court or tribunal of last instance involves one of those situations, it is not required to bring the matter before the Court, even when the question concerning the interpretation of EU law is raised by a party to the proceedings before it.

By contrast, if the question concerning the interpretation of EU law does not involve any of those situations, the court or tribunal of last instance must bring the matter before the Court. The fact that that court or tribunal has already made a reference to the Court for a preliminary ruling in the same national proceedings does not affect the obligation to make a reference for a preliminary ruling when a question concerning the interpretation of EU law the answer to which is necessary for the resolution of the dispute remains after the Court's decision.

It is for the national court or tribunal alone to decide at what stage in the proceedings it is appropriate to refer a question to the Court for a preliminary ruling. However, a court or tribunal of last instance may refrain from referring a question to the Court for a preliminary ruling on grounds of inadmissibility specific to the procedure before that court or tribunal. Where the pleas in law raised before such a court or tribunal must be declared inadmissible, a request for a preliminary ruling cannot be regarded as necessary and relevant for that court or tribunal to be able to give judgment. The applicable national procedural rules must however observe the principles of equivalence [121] and effectiveness. [122]

121| The principle of equivalence requires that all the rules applicable to actions apply without distinction to actions alleging infringement of EU law and to similar actions alleging infringement of national law.

122| According to the principle of effectiveness, national procedural rules must not be such as to render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order.

Judgment of 23 November 2021 (Grand Chamber), *IS (Illegality of the order for reference)* (C-564/19, EU :C :2021 :949)

A judge of the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) was 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 was 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 was in a position to verify the quality of the interpretation. In those circumstances, he considered 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 [123] on the right to interpretation and translation in criminal proceedings and Directive 2012/13 [124] on the right to information in such proceedings. In the event of incompatibility, he also asked whether the criminal proceedings could be continued in the absence of the accused, as such a possibility is provided for under Hungarian law, in certain cases, where the accused is not present at the hearing.

Following that initial reference to the Court of Justice, 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 concerned. On the same grounds as those underlying the decision of the Kúria (Supreme Court), disciplinary proceedings, which had 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) were 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, held 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 brought 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 has exclusive jurisdiction. Furthermore, such a finding of illegality is liable, first, to weaken the authority of the answers that the Court will provide to the referring court and, secondly, to limit the exercise of the national courts' jurisdiction to make a reference to the Court for a preliminary ruling. Consequently, it is liable to restrict the effective judicial protection of the rights which individuals derive from EU law.

123| 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).

124| 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).

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 found 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, since the mere prospect of being the subject of such proceedings could 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.

In the third and last place, the Court examined the obligations of the Member States under Directive 2010/64 concerning interpretation and translation in criminal proceedings. In that regard, the Member States must take specific measures ensuring, first, that the quality of interpretation and translation 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 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 was 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*.

Reference should also be made under this heading to the following judgments: of 15 July 2021, ***FBF*** (C-911/19, EU :C :2021 :599), which considers, first, whether guidelines issued by the European Banking Authority (EBA) addressed to competent authorities or financial institutions are actionable and, secondly, whether the Court has jurisdiction to assess the validity of those guidelines by way of a preliminary ruling; [125] of 15 July 2021, ***Commission v Poland (Disciplinary regime for judges)*** (C-791/19, EU :C :2021 :596), and of 6 October 2021, ***W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)*** (C-487/19, EU :C :2021 :798), [126] in which the Court ruled on matters relating to the protection of the rule of law as a value of the European Union; of 2 September 2021, ***Republic of Moldavia*** (C-741/19, EU:C:2021:655); [127] and of 26 October 2021, ***PL Holdings*** (C-109/20, EU :C :2021 :875). [128]

125| That judgment is presented in Section XV 'Economic and monetary policy'.

126| Those two judgments are presented in Section I 'Values of the European Union'.

127| That judgment is presented in Section XIX.2 'Energy Charter Treaty'.

128| That judgment is presented in Section XIX.1 'Arbitration clause in an international agreement between Member States'.

2. Actions for annulment

Judgment of 22 June 2021 (Grand Chamber), *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU :C :2021 :507)

In 2017, the Council of the European Union adopted restrictive measures against the Bolivarian Republic of Venezuela ('Venezuela'), in view of the deterioration of democracy, the rule of law and human rights in that country. Articles 2, 3, 6 and 7 of Regulation 2017/2063 [129] laid down, inter alia, a prohibition on selling or supplying military equipment and related technology which might be used for internal repression to any natural or legal person, entity or body in Venezuela, and a prohibition on providing certain technical, brokering or financial services connected with the supply of such equipment to those natural or legal persons, entities or bodies in Venezuela.

On 6 February 2018, Venezuela brought an action before the General Court of the European Union for annulment of Regulation 2017/2063, in so far as its provisions concerned Venezuela. It subsequently adapted its application so that it also referred to Decision 2018/1656 and Implementing Regulation 2018/1653, [130] by which the Council had extended the restrictive measures adopted. By judgment of 20 September 2019, the General Court dismissed that action as inadmissible, on the ground that the legal situation of Venezuela was not directly affected by the contested provisions. [131]

The Court of Justice, before which Venezuela had lodged an appeal, ruled on the application of the criteria for admissibility laid down in the fourth paragraph of Article 263 TFEU in relation to an action for annulment brought by a third State against restrictive measures adopted by the Council in view of the situation in that State. It set aside the judgment of the General Court in so far as the latter had declared inadmissible the action brought by Venezuela for annulment of Articles 2, 3, 6 and 7 of Regulation 2017/2063 and referred the case back to the General Court for judgment on the merits of that action.

Findings of the Court

As a preliminary point, the Court of Justice noted that, since Venezuela's appeal did not relate to the part of the judgment under appeal in which its action for annulment of Decision 2018/1653 and Implementing Regulation 2018/1656 was dismissed as inadmissible, the General Court had given a final ruling in that respect. Next, the Court of Justice pointed out that, according to settled case-law, it may rule, if necessary of its own motion, on whether there is an absolute bar to proceeding arising from disregard of the conditions as to admissibility laid down in Article 263 TFEU.

In the present case, it raised of its own motion the question whether Venezuela may be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU. In that regard, it observed that it does not follow from that provision that certain categories of legal persons cannot avail themselves of the possibility of bringing an action for annulment provided for in that provision of the TFEU. Nor, moreover,

129| Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21).

130| Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10), and Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

131| Judgment of 20 September 2019, ***Venezuela*** v ***Council*** (T-65/18, EU :T :2019 :649).

does it follow from its earlier case-law that the concept of a 'legal person', used in the fourth paragraph of Article 263 TFEU, is to be interpreted restrictively. The Court then pointed out that the principle that that the European Union is founded, among other values, on the rule of law follows from both Article 2 TEU and Article 21 TEU, to which Article 23 TEU, relating to the common foreign and security policy (CFSP), refers. In those circumstances, it considered that, under the fourth paragraph of Article 263 TFEU, read in the light of the principles of effective judicial review and the rule of law, a third State must have standing to bring proceedings as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied. It stated in that regard that the European Union's obligations to ensure respect for the rule of law are not subject to a condition of reciprocity. Accordingly, Venezuela, as a State with international legal personality, must be regarded as a 'legal person' within the meaning of the fourth paragraph of Article 263 TFEU.

Next, the Court of Justice held that the General Court had erred in law in considering that the restrictive measures at issue did not directly affect the legal situation of Venezuela. In that regard, it noted that the restrictive measures at issue were adopted against Venezuela. Prohibiting EU operators from carrying out certain transactions amounted to prohibiting Venezuela from carrying out those transactions with those operators. Furthermore, since the entry into force of Regulation 2017/2063 had the effect of immediately and automatically applying the prohibitions laid down in Articles 2, 3, 6 and 7 thereof, those prohibitions prevented Venezuela from obtaining numerous goods and services. The Court concluded from this that those provisions directly affected the legal situation of that State. It considered, in that regard, that it was not necessary to draw a distinction according to whether the commercial transactions of that State constitute acts carried out in a private capacity (*iure gestionis*) or acts carried out in the exercise of State sovereignty (*iure imperii*). Similarly, it noted that the fact that the restrictive measures at issue did not constitute an absolute obstacle preventing Venezuela from procuring the goods and services in question was irrelevant in that respect.

Subsequently, the Court of Justice gave final judgment on the other grounds of inadmissibility initially raised by the Council before the General Court. As regards the ground alleging that Venezuela had no interest in bringing proceedings, the Court considered that, since the prohibitions laid down in Articles 2, 3, 6 and 7 of Regulation 2017/2063 were liable to harm the interests, in particular the economic interests, of Venezuela, their annulment was, by itself, capable of procuring an advantage for it. As regards the ground that Venezuela was not directly concerned by the contested provisions, the Court considered that the prohibitions laid down by the articles of Regulation 2017/2063 mentioned above applied without leaving any discretion to the addressees responsible for implementing them and without requiring the adoption of implementing measures. Since it had already found that those provisions affected the legal situation of Venezuela, the Court rejected that ground.

Finally, the Court noted that Regulation 2017/2063 constituted a 'regulatory act' within the meaning of the fourth paragraph of Article 263 TFEU. Since, moreover, the articles of that regulation contested by Venezuela did not entail implementing measures, the Court concluded that that third State did indeed have standing to bring proceedings against those articles on the basis of that provision, without having to establish that those articles were of individual concern to it.

Reference should also be made under this heading to the judgment of 21 January 2021, ***Germany* v *Esso Raffinage*** (C-471/18 P, EU :C :2021 :48), concerning, inter alia, whether a statement of non-compliance following a registration dossier evaluation decision of the European Chemicals Agency (ECHA) is actionable, [132] and the judgment of 6 May 2021, ***ABLV Bank* v *ECB*** (C-551/19 P and C-552/19 P, EU :C :2021 :369), concerning,

132| That judgment is presented in Section XIV.5 'Chemical substances'.

in particular, whether an assessment by the European Central Bank declaring a credit institution to be failing or likely to fail is preparatory in nature. [133] The judgment of 2 September 2021, ***EPSU* v *Commission*** (C-928/19 P, EU :C :2021 :656), examines the judicial review carried out in the context of an action against a Commission decision refusing to submit a proposal for the implementation of agreements concluded between social partners. [134] Lastly, mention must be made of the judgment of 21 January 2021, ***Leino-Sandberg* v *Parliament*** (C-761/18 P, EU :C :2021 :52), which considers whether an applicant retains an interest in bringing proceedings in an action against a decision by an institution refusing access to a document which was disclosed by a third party after the action was lodged. [135]

VII. Freedom of movement

1. Free movement of goods

Judgment of 20 May 2021, *Renesola UK* (C-209/20, EU :C :2021 :400)

In 2016, the Commissioners for Her Majesty's Revenue and Customs (United Kingdom) imposed anti-dumping and countervailing duties on Renesola UK Ltd ('Renesola') in respect of the import, into the United Kingdom, of solar modules assembled in India from solar cells originating in China. Their imposition was founded, in particular, on Implementing Regulation No 1357/2013, [136] which has the effect of rendering those duties applicable, inter alia, to solar modules and panels produced in third countries other than China from solar cells coming from China, by classifying solar modules whose production involved more than one country as originating in the country from which their constituent solar cells come. That classification of origin is based on the principle set out in Article 24 of the Community Customs Code, [137] according to which the country of origin is determined by the last, substantial, economically justified processing or working of a product in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture.

Renesola contested the imposition of those duties on the ground that Implementing Regulation No 1357/2013 was invalid and that, in the light of Article 24 of the Community Customs Code, the solar modules at issue should be regarded as originating in India. The Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), before which an appeal had been brought, decided to make a reference to the Court on the validity of Implementing Regulation No 1357/2013 in so far as it determines the country of origin of solar modules in the light of the criteria set out in Article 24 of the Community Customs Code. That tribunal took the view that

133| That judgment is presented in Section XV 'Economic and monetary policy'.

134| That judgment is presented in Section XVI.5 'Implementation at EU level of agreements concluded between social partners'.

135| That judgment is presented in Section V.1 'Access to documents'.

136| Commission Implementing Regulation (EU) No 1357/2013 of 17 December 2013 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2013 L 341, p. 47).

137| Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17; 'the Community Customs Code').

the assembly of solar modules carried out in India using solar cells produced in China must be regarded as a technically complex and delicate process that enables products possessing specific properties to be obtained, with the result that the solar modules at issue should be regarded as products which underwent their last substantial processing in India and, on that basis, as being products originating in that country and not in China.

In its judgment, the Court confirmed the validity of Implementing Regulation No 1357/2013, holding in particular that the assessment of the European Commission was free of any error of law or manifest error of assessment and, furthermore, that the adoption of that regulation was justified by the objective of coherent and uniform implementation of not only EU customs rules but also EU anti-dumping rules.

Findings of the Court

As a preliminary point, the Court pointed out that the Community Customs Code empowers the Commission to take any measure which is necessary or useful for its implementation. In particular, on the basis of Articles 247 and 247a of the Community Customs Code, the Commission may adopt implementing measures, such as Implementing Regulation No 1357/2013, for the purposes of interpreting and applying the abstract criteria set out in Article 24 of that code. Thus, where there are one or more specific categories of goods whose production involved more than one country, the country in which those goods must be regarded as originating may be specified by means of an implementing measure, provided that the criteria set out in Article 24 of the code are fulfilled and that the country selected consequently constitutes the country in which the goods underwent their 'last substantial processing or working'. The Court explained in particular that the term 'last substantial processing or working' refers to the production stage during which the use to which the goods are to be put is established and they acquire specific properties and composition, which they did not possess previously, and which are not required to undergo significant qualitative changes subsequently.

The Court observed, next, that an implementing measure adopted by the Commission must be justified by objectives such as those of ensuring legal certainty or the uniform application of EU customs rules. Finally, the reasons stated for such a measure must enable the EU judicature to review its legality, whether in the context of a direct action or of a reference for a preliminary ruling.

In this instance, the Court held, in the first place, relying upon recitals 1, 3 and 4 of Implementing Regulation No 1357/2013, that the objective of coherent and uniform implementation of EU customs and anti-dumping rules, in the course of which anti-dumping and countervailing duties are laid down, justified the adoption of that regulation.

In the second place, as regards the reasons stated for that regulation, the Court held that the Commission had set out to the requisite legal standard the grounds which led it to specify the origin of the solar modules and panels, grounds which enabled the operators concerned to understand and contest the Commission's reasoning and the Court to assess the validity of the regulation at issue.

In the third and last place, the Court reviewed the Commission's reasoning relating to the determination of the country of origin of the products at issue in the light of the criterion of the 'last substantial processing or working' set out in Article 24 of the Community Customs Code. In that regard, the Court stated that the Commission had not committed any error of law or manifest error of assessment. In particular, the Court upheld the Commission's assessment that the ability to capture solar energy, and the ability then to convert it into electricity, constitute fundamental properties of the solar cells, modules and panels and determine the use to which they are to be put, so that the processing of silicon wafers into solar cells possesses an

importance greater than that of the improvements made in the subsequent stage of assembling solar cells in solar modules or panels and thus constitutes the 'last substantial processing' of those various products for the purposes of Article 24 of the Community Customs Code.

2. Freedom of establishment

Judgment of 11 February 2021, *Katoen Natie Bulk Terminals and General Services Antwerp* (C-407/19 and C-471/19, EU :C :2021 :107)

Under Belgian law, dock work is governed inter alia by the Wet betreffende de havenarbeid (Law organising dock work), according to which that type of work may be carried out only by recognised dockers. In 2014, the European Commission sent the Kingdom of Belgium a letter of formal notice informing that Member State that its dock work legislation infringed the freedom of establishment (Article 49 TFEU). Following that letter, Belgium adopted, in 2016, a royal decree relating to the recognition of dockers in port areas and establishing the arrangements for the implementation of the Law organising dock work, which led the Commission to close the infringement procedure against it.

In ***Katoen Natie Bulk Terminals and General Services Antwerp*** (C-407/19), the two eponymous companies, which carry out port operations in Belgium and abroad, asked the Raad van State (Council of State, Belgium) to annul that 2016 royal decree, being of the view that it impeded their freedom to engage dockers from Member States other than Belgium to work in Belgian port areas.

In ***Middlegate Europe*** (C-471/19), the company concerned had been ordered to pay a fine following the finding, by the Belgian police, of the infringement involving the carrying out of dock work by an unrecognised docker. In the context of proceedings brought before the referring court in that second case, namely the Grondwettelijk Hof (Constitutional Court, Belgium), that company challenged the constitutionality of the Law organising dock work, being of the view that that legislation disregarded the freedom of trade and industry of undertakings. That court, noting that that freedom guaranteed by the Belgian Constitution was closely linked to a number of fundamental freedoms guaranteed by the TFEU, such as the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU), decided – like the Raad van State (Council of State) in the first case – to refer questions to the Court on the compatibility of those national rules, which maintain a special regime for the recruitment of dockers, with those two provisions. By those joined cases, in addition to the answer which it had to provide to that question, the Court was asked to identify additional criteria enabling the conformity of the docker regime with EU law requirements to be clarified.

Findings of the Court

The Court stated first of all that the legislation at issue – which obliges non-resident undertakings wishing to establish themselves in Belgium in order to carry out port activities there or which, without establishing themselves there, wish to provide port services there to have recourse only to dockers recognised as such in accordance with that legislation – prevents such undertakings from using its own staff or from recruiting other non-recognised workers. Therefore, that legislation, which may render less attractive the establishment of those undertakings in Belgium or their provision of services in that Member State, constitutes a restriction on the freedom of establishment and the freedom to provide services. Next, the Court recalled that such a restriction may be justified by an overriding reason in the public interest, provided that it is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it. In the case at hand, the Court noted that the legislation at issue cannot in itself be considered

unsuitable or disproportionate for attaining the objective which it pursues, namely ensuring safety in port areas and preventing workplace accidents. After conducting an overall assessment of the regime at issue, the Court found that such legislation is compatible with Articles 49 and 56 TFEU, provided that the conditions and arrangements laid down pursuant to that legislation, first, are based on objective, non-discriminatory criteria known in advance and which allow dockers from other Member States to prove that they satisfy, in their State of origin, requirements equivalent to those applied to national dockers and, secondly, do not establish a limited quota of workers eligible for such recognition.

Next, examining the compatibility of the contested royal decree with the freedoms of movement guaranteed by the TFEU, the Court stated that the national legislation at issue also constitutes a restriction on the freedom of movement for workers enshrined in Article 45 TFEU, in so far as it is liable to have a dissuasive effect on employers and workers from other Member States. The Court then assessed whether the various measures contained in that legislation are necessary and proportionate to the objective of ensuring safety in port areas and preventing workplace accidents.

In that regard, in the first place, the Court considered that the legislation at issue, according to which, in particular:

- the recognition of dockers is carried out by an administrative committee composed jointly of members designated by employers' organisations and by workers' organisations;
- that committee also decides, according to the need for labour, whether or not recognised workers must be included in a quota of dockers, it being understood that, for dockers not included in that quota, the duration of their recognition is limited to the duration of their employment contract, such that a fresh recognition procedure must be initiated for each new contract that they conclude;
- no maximum period within which that committee must act is prescribed,

in so far as it is neither necessary nor appropriate for attaining the objective pursued, is not compatible with the freedoms of movement enshrined in Articles 45, 49 and 56 TFEU.

In the second place, the Court examined the conditions for recognition of dockers. Under the national legislation at issue, a worker must, unless he or she can show that he or she satisfies equivalent conditions in another Member State, meet requirements of medical fitness and successfully complete a psychological test and prior vocational training. According to the Court, those requirements are conditions appropriate for ensuring safety in port areas and proportionate to such an objective. Consequently, such measures are compatible with the freedoms of movement provided for in Articles 45, 49 and 56 TFEU. However, the Court considered that it is for the referring court to verify that the role conferred on the employers' organisation and, as the case may be, on the recognised dockers' unions in the designation of the bodies responsible for conducting those examinations or tests is not such as to call into question their transparent, objective and impartial nature.

In the third place, the Court found that the national legislation concerned, which provides for the maintenance of the recognition obtained by a docker under a previous statutory regime and for his or her inclusion in the quota of recognised dockers, does not appear to be inappropriate for attaining the objective pursued or disproportionate to that objective, such that, in that respect, it is also compatible with the freedoms enshrined in Articles 45, 49 and 56 TFEU.

In the fourth place, the Court considered that the legislation at issue, under which the transfer of a docker to the quota of workers of a port area other than that in which he or she obtained his or her recognition is subject to conditions and arrangements laid down by a collective labour agreement, complies with the

freedoms of movement provided for in Articles 45, 49 and 56 TFEU. It is nevertheless for the referring court to determine that those conditions and arrangements are necessary and proportionate to the objective of ensuring security in each port area.

In the last place, the Court held that national legislation according to which logistics workers must hold a 'security certificate' whose issuance modalities are fixed by a collective labour agreement is not incompatible with the freedoms enshrined in Articles 45, 49 and 56 TFEU, provided that the conditions for the issuing of such a certificate are necessary and proportionate to the objective of ensuring safety in port areas and the procedure prescribed for its obtainment does not impose unreasonable and disproportionate administrative burdens.

Judgment of 29 April 2021, *Banco de Portugal and Others* (C-504/19, EU :C :2021 :335)

In 2008, VR, a natural person, concluded a contract with Banco Espírito Santo, Sucursal en España ('BES Spain'), the Spanish branch of the Portuguese bank Banco Espírito Santo ('BES'), by which she purchased preferential shares in an Icelandic credit institution. In view of the serious financial difficulties faced by BES, by a decision adopted in August 2014, Banco de Portugal decided to create a 'bridge bank', called Novo Banco SA, to which the assets, liabilities and other off-balance sheet items of BES were transferred. However, certain liabilities were excluded from the transfer to Novo Banco. Following that transfer, Novo Banco SA, Sucursal en España ('Novo Banco Spain') maintained the commercial relationship which VR had established with BES Spain.

On 4 February 2015, VR brought an action before the Juzgado de Primera Instancia de Vitoria (Court of First Instance, Vitoria, Spain) against Novo Banco Spain seeking, primarily, a declaration that the contract was null and void or, in the alternative, its termination. Novo Banco Spain claimed that it could not be sued because, pursuant to the decision of August 2014, the alleged liability was a liability that had not been transferred to it.

As the court of first instance, Vitoria, upheld VR's application, Novo Banco Spain brought an appeal before the Audiencia Provincial de Álava (Provincial Court, Álava, Spain). In the course of the proceedings, it lodged two decisions adopted by Banco de Portugal on 29 December 2015. Those decisions modified the August 2014 decision, stating inter alia that 'as of today, the following liabilities of BES have not been transferred to Novo Banco: … any liability subject to one of the procedures described in Annex I', which included the action brought by VR. In addition, they provided that, to the extent that assets, liabilities or off-balance sheet items should have remained part of BES' assets and liabilities but had, in fact, been transferred to Novo Banco, they were transferred back from Novo Banco to BES, with effect from 3 August 2014.

As the Provincial de Álava (Provincial Court, Álava), dismissed Novo Banco Spain's appeal, Novo Banco Spain brought an action before the referring court, the Tribunal Supremo (Supreme Court, Spain). Novo Banco Spain took the view that, under Directive 2001/24 on the reorganisation and winding up of credit institutions, [138] the decisions of 29 December 2015 were effective in all Member States without any further formalities. The Tribunal Supremo (Supreme Court), taking the view that those decisions modified the decision of August 2014 with retroactive effect, referred the matter to the Court in order to ascertain whether such substantive changes should be recognised in the ongoing judicial proceedings.

138| Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ 2001 L 125, p. 15).

Findings of the Court

The Court observed that, under Article 3(2) of Directive 2001/24, reorganisation measures are, in principle, applied in accordance with the law of the home Member State and are to take effect in accordance with the legislation of that State throughout the European Union without further formalities. However, as an exception to that principle, Article 32 of Directive 2001/24 provides that the effects of reorganisation measures on a pending lawsuit concerning an asset or a right of which the credit institution has been divested are governed solely by the law of the Member State in which the lawsuit is pending.

In the first place, the Court pointed out that the application of Article 32 requires three cumulative conditions to be fulfilled, all of which were satisfied in the dispute in the main proceedings. First, there must be reorganisation measures within the meaning of Article 2 of Directive 2001/24, which is applicable in the present case, since the decisions of 29 December 2015 were intended to preserve or restore the financial situation of a credit institution.

Secondly, there must be a pending lawsuit, a concept which covers only proceedings on the merits. In the present case, the main proceedings must be regarded as proceedings on the merits and the decisions of 29 December 2015 were adopted at a time when the proceedings initiated by VR on 4 February 2015 were already ongoing.

Thirdly, the pending lawsuit must concern 'an asset or a right of which the credit institution has been divested'. In view of the disparities between the language versions of Article 32 of Directive 2001/24, the Court examined the purpose of that provision and held that it is intended to make the effects of reorganisation measures or winding-up proceedings on pending proceedings subject to the law of the Member State in which those proceedings are pending. In the light of such a purpose, it would be illogical to exclude the effects produced by reorganisation measures on a pending lawsuit from the application of that law, where that action concerns potential liabilities which, by means of such reorganisation measures, have been transferred to another entity. Thus, Article 32 must apply to one or more of the credit institution's assets and liabilities which are subject to reorganisation measures, as is the case with the potential liability at issue in the main proceedings.

In the second place, as regards the extent of the effects of the reorganisation measures governed by the law of the Member State in which the lawsuit is pending, the Court observed that the law of that Member State governs all the effects which such measures may have on such proceedings, whether procedural or substantive.

Therefore, it follows from Article 3(2) and Article 32 of Directive 2001/24 that the effects, both procedural and substantive, of a reorganisation measure on ongoing judicial proceedings on the merits are exclusively those determined by the law of the Member State in which those proceedings are pending.

Furthermore, the Court pointed out, first, that the recognition, in the main proceedings, of the effects of the decisions of 29 December 2015, in so far as it is capable of calling into question the judicial decisions already taken in favour of VR, would be incompatible with the general principle of legal certainty. Secondly, to accept that reorganisation measures taken by the competent authority of the home Member State after an action has been brought in another Member State, which have the effect of modifying, with retroactive effect, the relevant legal framework for the resolution of the dispute that gave rise to that action, might lead the court before which the action has been brought to dismiss it, and would so constitute a restriction on the right to an effective remedy, within the meaning of the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

The Court concluded that Article 3(2) and Article 32 of Directive 2001/24, read in the light of the principle of legal certainty and the first paragraph of Article 47 of the Charter, preclude recognition without any further conditions, in ongoing legal proceedings on the merits, of the effects of a reorganisation measure, such as the decisions of 29 December 2015, where such recognition has the result that the credit institution to which

the liabilities had been transferred by the first reorganisation measure can no longer be sued, with retroactive effect, for the purposes of those ongoing proceedings, thereby calling into question the judicial decisions already taken in favour of the applicant who is the subject of those proceedings.

Judgment of 8 July 2021, *VAS Shipping* (C-71/20, EU :C :2021 :550)

VAS Shipping, a company established in Denmark and owned by a Swedish company, is the managing owner of four part-owned companies established in Sweden. They registered four vessels in Denmark in order to pursue their maritime transport activities there. Under Danish law, VAS Shipping has authority over all legal transactions normally involved in that activity.

In 2018, a Danish court ordered VAS Shipping to pay a fine for having employed, on board those four vessels flying the Danish flag, third-country national seafarers who did not hold a Danish work permit and were not exempt from the requirement to have such a permit. It is only when vessels enter Danish ports on no more than 25 occasions in 1 year that third-country nationals working on board those vessels are exempt from the requirement to hold a work permit in Denmark. In the present case, the 4 vessels called at Danish ports more than 25 times from August 2010 to August 2011. According to that court, although the requirement of a work permit laid down by national legislation constitutes a restriction on the freedom of establishment within the meaning of Article 49 TFEU, that requirement is, however, justified and proportionate in order to avoid disturbances on the national labour market.

Hearing the appeal brought by VAS Shipping, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to refer a question to the Court asking whether the Danish legislation requiring third-country nationals employed on a vessel flying the Danish flag and owned by a company established in another Member State to have a work permit in Denmark, unless the vessel concerned has called at ports in Denmark no more than 25 times in 1 year, was compatible with the freedom of establishment.

In its judgment, the Court defined the scope of the obligations of the Member States in respect of the freedom of establishment, in the light of the right which they enjoy under Article 79(5) TFEU to determine volumes of admission of third-country nationals coming to their territory in order to seek work, whether employed or self-employed.

Findings of the Court

As a preliminary point, the Court noted that the situation at issue in the main proceedings falls within the scope of the freedom of establishment enshrined in Article 49 TFEU. The Court recalled, in that regard, that that freedom confers, in accordance with Article 54 TFEU, on companies lawfully established in a Member State, the right to exercise their activity in another Member State through a subsidiary, a branch or an agency, including through the acquisition of a holding in the capital of a company established in that other Member State which allows it to exert a definite influence on that company and to determine its activities. Furthermore, as regards the registration of a vessel, the Court pointed out that it cannot be separated from the freedom of establishment where the vessel serves as a vehicle for the pursuit of an economic activity that includes a fixed establishment in the Member State of registration.

It was in the light of the above clarifications that the Court examined whether the national legislation concerned was liable to constitute a restriction on the freedom of establishment.

In that regard, the Court noted, first of all, that under Article 79(5) TFEU, Member States retain the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, the flag State of a vessel being, in that context, the State in which a third-country national working on board that vessel is employed.

Relying on that provision, the Court considered, next, that the requirement for third-country nationals employed in the territory of a Member State, including on a vessel registered in that State, to have a work permit is a measure intended to regulate access to work and to residence of those nationals on the national territory. Therefore, the Member State concerned is entitled to provide that those nationals must obtain a work permit, providing also, where appropriate, for exceptions from that requirement. Accordingly, the Court held that the national legislation at issue, applicable without distinction to all vessels flying the flag of the Member State concerned, which lays down an obligation for all third-country nationals employed as crew members of such vessels to have a work permit, and which exempts from that obligation only crew members of such vessels who, in the course of a year, call at the ports of that Member State no more than 25 times, does not constitute a restriction on the freedom of establishment within the meaning of the first paragraph of Article 49 TFEU.

Lastly, the Court observed that such legislation may, admittedly, disadvantage companies established in a first Member State which then establish themselves in a second Member State in order to operate a vessel flying the flag of that second Member State, as compared to companies which operate, in the second Member State, vessels flying the flag of another Member State and whose legislation does not impose a similar obligation. However, such adverse consequences stem from possible differences in the application, by the Member States, of the right provided for in Article 79(5) TFEU, enabling those States to determine volumes of admission of third-country nationals seeking work in their territory, which is a right that they are expressly granted.

3. Freedom to provide services

Judgment of 3 February 2021, *Fussl Modestraße Mayr* (C-555/19, EU :C :2021 :89)

Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law, operates a network of fashion shops in Austria and the Land of Bavaria (Germany). In 2018, it concluded a contract with SevenOne Media GmbH, the marketing company of the German television station ProSiebenSat.1. That contract concerned the broadcasting, solely in the Land of Bavaria, of advertising in the context of programmes of the national channel ProSieben.

However, SevenOne Media refused to perform that contract. Since 2016, a State Treaty concluded by the *Länder* has prohibited television broadcasters from inserting, in their national broadcasts, television advertisements whose broadcasting is limited to a regional level. That prohibition aims at reserving revenue from regional television advertising for regional and local channels, thus ensuring them a source of financing and consequently their sustainability, in order to enable them to contribute to the pluralistic character of the offer of television programmes. The prohibition is accompanied by an 'opening clause', allowing the *Länder* to authorise regional advertising in the context of national broadcasts.

Under those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), ruling on a dispute relating to the performance of the contract in question, enquired about the conformity of that prohibition with EU law.

That case required the Court, in particular, to apply certain principles enshrined in its case-law on the freedom to provide services and to interpret the Charter in the particular context of a prohibition on regional advertising on national television channels, taking account of the existence of advertising services provided on internet platforms which may constitute competition for traditional media.

Findings of the Court

In the first place, as regards the Audiovisual Media Services Directive, [139] the Court noted that Article 4(1) thereof, according to which Member States may, under certain conditions, provide for more detailed or stricter rules in the fields coordinated by that directive, for the purpose of ensuring the protection of the interests of viewers, does not apply in the present case. Although the prohibition at issue falls within a field covered by the directive, namely that of television advertising, it concerns however a specific matter which is not governed by any of the articles of that directive and does not, moreover, pursue the objective of protecting viewers. Therefore, it cannot be qualified as a 'more detailed' or 'stricter' rule within the meaning of Article 4(1) of the Audiovisual Media Services Directive, so that that provision does not preclude such a prohibition.

In the second place, as regards the conformity of the prohibition at issue with the freedom to provide services guaranteed by Article 56 TFEU, the Court found, first of all, that such a prohibition entails a restriction on that fundamental freedom to the detriment of both the providers of advertising services, namely television broadcasters, and the recipients of those services, namely advertisers, in particular those established in other Member States. Next, as regards the justification for that restriction, the Court noted that the preservation of the pluralistic nature of the offer of television programmes may constitute an overriding reason in the public interest. Finally, as regards the proportionality of the restriction, the Court recalled that, admittedly, the objective of maintaining media pluralism, in so far as it is linked to the fundamental right to freedom of expression, gives the national authorities a wide discretion. However, the prohibition at issue must be such as to guarantee the attainment of that objective and may not go beyond what is necessary to attain it.

In that regard, the Court pointed out, first, that the prohibition at issue could be vitiated by an inconsistency, relating to the fact, to be verified by the national court, that it applies only to advertising services provided by national television broadcasters and not to advertising services, in particular linear advertising services, provided on the internet. At issue could be two competing types of services on the German advertising market which are likely to present the same risk to the financial health of regional and local television broadcasters and, hence, to the objective of protecting media pluralism. [140] Secondly, concerning the necessity for the prohibition, the Court considered that a less restrictive measure could result from the effective implementation of the authorisation system at the level of the *Länder* provided for by the 'opening clause'. However, it is for the national court to verify whether that *a priori* less restrictive measure can actually be adopted and implemented in such a way as to ensure that, in practice, the objective pursued can be achieved.

In the third place, as regards the freedom of expression and information guaranteed by Article 11 of the Charter, the Court noted that the latter does not preclude a prohibition of regional advertising on national television channels, such as that contained in the national measure at issue. That prohibition is essentially a balancing act between, on the one hand, the freedom of commercial expression of national television

139| Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ 2010 L 95, p. 1).

140| The circumstances of the case in the main proceedings are, in that regard, substantially comparable to those which gave rise to the judgment of 17 July 2008, ***Corporación Dermoestética*** (C-500/06, EU :C :2008 :421).

broadcasters and advertisers and, on the other hand, the protection of media pluralism at regional and local level. Therefore, the German legislature was entitled to consider, without exceeding the wide margin of appreciation which it is entitled to in that context, that safeguarding the public interest should prevail over the private interest of national television broadcasters and advertisers.

In the fourth and last place, the Court held that the principle of equal treatment, enshrined in Article 20 of the Charter, also does not preclude the prohibition at issue, provided that it does not give rise to unequal treatment between national television broadcasters and providers of advertising, in particular linear advertising, on the internet as regards the broadcasting of advertising at regional level. In that regard, it is for the national court to ascertain whether the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the internet, with respect to the provision of regional advertising services, is significantly different as regards the elements characterising their respective situations, meaning, in particular, the usual ways in which advertising services are used, the manner in which they are provided or the legal framework within which they are provided.

Judgment of 14 October 2021, *Landespolizeidirektion Steiermark (Gaming machines)* (C-231/20, EU :C :2021 :845)

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 Glücksspielgesetz (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 (3 days for each offence), and in addition was ordered to pay EUR 10 000 as a contribution to the costs of the proceedings. Following 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 those new penalties, the Verwaltungsgerichtshof (Supreme Administrative Court, Austria) decided to refer several questions to the Court 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, explained the scope of the duty of national courts to examine, in the light of that freedom, the national system of penalties laid down in relation to games of chance.

Findings of the Court

As a preliminary point, the Court stated 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 national legislation 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 called on 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 freedom.

Next, the Court found 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.

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 found 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 observed 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 noted 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.

Concerning the freedom to provide services, reference should also be made under this heading to the judgments of 11 February 2021, ***Katoen Natie Bulk Terminals and General Services Antwerp*** (C-407/19 and C-471/19, EU:C:2021:107), [141] and of 3 June 2021, ***TEAM POWER EUROPE*** (C-784/19, EU:C:2021:427). [142]

141| That judgment is presented in Section VII.2 'Freedom of establishment'.

142| That judgment is presented in Section XVI.4 'Coordination of social security systems'.

VIII. Border control, asylum and immigration

1. Asylum policy

Against the backdrop of the European migration crisis which has been holding sway for some years now and, in consequence, the arrival of a high number of applicants for international protection in the European Union, the Court continues to hear numerous cases relating to EU asylum policy. In that connection, four judgments deserve to be mentioned. [143] The first judgment, delivered in the context of infringement proceedings, deals with the grounds of inadmissibility of an application for international protection laid down in the Procedures Directive [144] and the Reception Directive. [145] The second concerns the grant of refugee status, as a derived right and for the purpose of maintaining family unity, to a minor 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 a Member State and, through that child's other parent, has the nationality of another third country in which he or she would not be at risk of persecution. The third considers the concept of 'subsequent application' for international protection where a first application has been refused by a third State participating in the mechanism established by the Dublin III Regulation. [146] The fourth and last judgment concerns the conditions for the cessation of refugee status.

Judgment of 16 November 2021 (Grand Chamber), *Commission* v *Hungary (Criminalisation of assistance to asylum seekers)* (C-821/19, EU :C :2021 :930)

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, secondly, 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 and Reception Directives, the European Commission brought an action for failure to fulfil obligations before the Court.

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

143| Reference should also be made under this heading to *opinion 1/19* ***(Istanbul Convention),*** of 6 October 2021, in which the Court ruled on the competence of the European Union to sign the Istanbul Convention on preventing and combating violence against women and domestic violence. That judgment is presented in Section XIX.4 'Istanbul Convention on preventing and combating violence against women and domestic violence'.

144| 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').

145| 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').

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

Findings of the Court

First, the Court found that Hungary had failed to fulfil its obligations under the Procedures Directive [147] by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant had 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 was guaranteed. The Procedures Directive [148] 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 does correspond to any of those situations. [149]

Secondly, the Court found that Hungary had failed to fulfil its obligations under the Procedures Directive [150] and the Reception Directive [151] 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 proven beyond all reasonable doubt that that person knew that that application would not be accepted under that law.

In reaching that conclusion, the Court examined (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.

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 held 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 [152] and, secondly, the effectiveness of the right afforded to asylum seekers to be able to consult, at their own expense, a legal adviser or other counsellor. [153]

In the second place, the Court considered 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 noted that the Hungarian legislation also suppresses actions which cannot be regarded as a fraudulent or an abusive practice. Once it has been proven that the accused was aware of the fact that the individual whom he or she was assisting could not obtain refugee status under

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

148| Article 33(2) of the Procedures Directive.

149| 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).

150| 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.

151| 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.

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

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

Hungarian law, the accused could 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 was provided in strict compliance with procedural rules and without any intention to mislead the determining authority.

Thus, first of all, 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 if it can actually be proven that he or she must have known that the applicant he or she assisted did not satisfy the conditions for obtaining asylum, the Court found 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. Secondly, the risk that the persons concerned might be subject to a particularly severe criminal sentence, namely deprivation of liberty, on the sole ground that they could not have been 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 pursued by the Hungarian legislation, the Court found 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 held that Hungary had failed to fulfil its obligations under the Procedures Directive [154] and the Reception Directive [155] by depriving of the right to approach its external borders any person 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 proven 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 the person concerned is suspected of having committed an offence by providing assistance in the abovementioned circumstances, despite the criminalisation of such action being contrary to EU law. It follows that such a restriction cannot reasonably be justified under EU law.

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

155| Article 10(4) of the Reception Directive.

Judgment of 9 November 2021 (Grand Chamber), *Bundesrepublik Deutschland (Maintaining family unity)* (C-91/20, EU :C :2021 :898)

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 stated that LW could not 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 [156] 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. That legislation should be interpreted as meaning that 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 was compatible with the Qualification II Directive, [157] the referring court stayed proceedings in order to seek a ruling from the Court on the interpretation of Article 3 [158] and Article 23(2) [159] of that directive. By its judgment, the Court, sitting as the Grand Chamber, replied 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 or she would not be at risk of persecution. The compatibility of such national provisions with the Qualification II Directive 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..

156| 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 grant, on request, to the minor unmarried child of a refugee of entitlement to international protection where the status acquired by his or her parent is final.

157| 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; 'the Qualification II Directive').

158| That 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.

159| 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.

Findings of the Court

In the first place, the Court found 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 the Qualification II Directive.

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 pointed out, in that context, that under the system established by the Qualification II Directive, 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. [160]

In the second place, the Court noted that the Qualification II Directive does not provide for the extension, as a derived right, of refugee status to the family members of a refugee who do not individually qualify for 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 pointed out that Article 3 of the Qualification II Directive 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. [161] However, the national provision at issue in the main proceedings, which provides – with a view to maintaining the family unity of refugees – for the automatic extension, as a derived right, of refugee status to the minor child of a person to whom that status has been granted, irrespective of whether or not that child individually satisfies the conditions for the grant of refugee status and including where that child was born in the host Member State, has a connection with the rationale of international protection.

Nonetheless, the Court pointed out that there may be situations in which such an automatic extension would, despite the existence of that connection, be incompatible with the Qualification II Directive.

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

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

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

Secondly, the reservation set out in Article 23(2) of the Qualification II Directive 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 clarified 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 the Qualification II Directive 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 the Qualification II Directive 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 did not appear that LW, through her Tunisian nationality or any other element characterising her personal legal status, would be 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 stated that the compatibility with the Qualification II Directive of the application of more favourable national provisions, such as those at issue in the main proceedings, to a situation such as LW's does not depend on whether it would be 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 would be possible for LW's family to move to Tunisia cannot justify the reservation in paragraph 2 of that provision being understood as precluding LW 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 20 May 2021, *L.R. (Asylum application rejected by Norway)* (C-8/20, EU :C :2021 :404)

In 2008, L.R., an Iranian national, lodged an application for asylum in Norway. His application was rejected and he was surrendered to the Iranian authorities. In 2014, L.R. lodged a further application in Germany. In so far as the Dublin III Regulation, which allows the Member State responsible for examining an application for international protection to be determined, is also implemented by Norway, [162] the German authorities contacted the authorities of that country requesting it to take charge of L.R. However, those authorities refused to do so, taking the view that Norway was no longer responsible for examining his application, in accordance with the Dublin III Regulation. [163] Subsequently, the German authorities rejected L.R.'s application for asylum as inadmissible, on the ground that it was a 'second application' and that, in such a case, the

162| Pursuant to the Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway – Declarations (OJ 2001 L 93, p. 40; 'the Agreement between the European Union, Iceland and Norway').

163| See Article 19(3) of the Dublin III Regulation.

necessary conditions for the initiation of a further asylum procedure were not met. L.R. then brought an action against that decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany).

In that context, that court decided to seek the guidance of the Court as regards the concept of 'subsequent application', defined in the Procedures Directive. [164] Member States may reject a subsequent application as inadmissible where it does not refer to any new elements or findings. [165]

According to the Administrative Court, Schleswig-Holstein, it is apparent from the Procedures Directive that an application for international protection may not be classified as a 'subsequent application' where the first procedure, which led to a rejection, took place not in another EU Member State but in a third State. Nevertheless, in that court's view, that directive should be interpreted more broadly, in the light of Norway's participation in the Common European Asylum System, pursuant to the Agreement between the European Union, Iceland and Norway, with the result that the Member States are not obliged to conduct a complete first asylum procedure in a situation such as that at issue in the main proceedings.

In its judgment, the Court did not share that view and ruled that EU law [166] precludes legislation of a Member State which provides for the possibility of rejecting an application for international protection as inadmissible on the ground that the person concerned made a previous application seeking the grant of refugee status in a third State implementing the Dublin III Regulation in accordance with the Agreement between the European Union, Iceland and Norway and that application was rejected.

Findings of the Court

The Court recalled that a 'subsequent application' is defined in the Procedures Directive as a 'further application for international protection made after a final decision has been taken on a previous application'. [167] It follows clearly from that directive, [168] first, that an application addressed to a third State cannot be understood as an 'application for international protection' and, secondly, that a decision taken by a third State cannot fall within the definition of 'final decision'. Therefore, the existence of a previous decision of a third State rejecting an application seeking the grant of refugee status does not permit the classification as a 'subsequent application' of an application for international protection made to a Member State by the person concerned after that previous decision was adopted.

The Court added that the existence of an agreement between the European Union, Iceland and Norway is irrelevant in that regard. While, pursuant to that agreement, Norway is to implement certain provisions of the Dublin III Regulation, that is not the case with regard to the provisions of the Qualification II Directive or the Procedures Directive. Thus, in a situation such as that at issue, the Member State to which the person concerned has made a further application for international protection may indeed, where appropriate, request Norway to take back that person. However, where such taking back is not possible or does not take place, the Member State concerned is not entitled to regard the further application as a 'subsequent application' which may, where relevant, be declared inadmissible. Furthermore, even assuming that the Norwegian

164| Article 2(q) of the Procedures Directive.

165| See Article 33(2)(d) of the Procedures Directive.

166| More specifically, Article 33(2)(d) of the Procedures Directive, read in conjunction with Article 2(q) thereof.

167| Article 2(q) of the Procedures Directive.

168| Article 2(b) and (e) of the Procedures Directive.

asylum system provides for a level of protection for asylum seekers equivalent to that under EU law, that fact cannot lead to a different conclusion. First, it is clear from the wording of the provisions of the Procedures Directive that, as matters currently stand, a third State cannot be treated in the same way as a Member State for the purpose of applying the ground of inadmissibility in question. Secondly, such treatment cannot depend, on the risk of affecting legal certainty, on an assessment of the specific level of protection of asylum seekers in the third State concerned.

Judgment of 20 January 2021, *Secretary of State for the Home Department* (C-255/19, EU :C :2021 :36)

OA is a Somali national who is a member of the minority Reer Hamar clan. In the course of the 1990s, OA and his wife were the victims of persecution at the hands of the militia of the majority Hawiye clan. Because of that persecution, they fled Somalia in 2001 and OA's wife obtained refugee status in the United Kingdom. In 2003 OA joined her and also obtained that status, as a dependent of his wife.

However, in September 2016 the Secretary of State for the Home Department (United Kingdom) revoked OA's refugee status on the ground that the minority clans were no longer subject to persecution in Somalia and that that State offered effective protection. In that regard, under Qualification I Directive, [169] refugee status comes to an end when the circumstances that justified recognition of that status have ceased to exist, and the person concerned can then no longer continue 'to refuse to avail himself or herself of the protection of the country of nationality'. [170] OA then brought an action against that decision to be heard by the Upper Tribunal (Immigration and Asylum Chamber) (United Kingdom). He claimed that he continued to have a fear of persecution and that the Somali authorities were unable to protect him. Furthermore, he submitted that it could not be inferred that there was sufficient 'protection' in his country of origin from the fact that social and financial support was provided by his family or other members of his clan, who are private and not State actors.

In that context, the national court hearing the action decided to refer questions to the Court in order to determine, in essence, whether social and financial support that may be provided by private actors, such as the family or the clan, can support the conclusion that there exists 'protection' within the meaning of the Qualification I Directive and whether such support is of relevance to the assessment of the effectiveness or availability of the protection provided by the State or to the determination of whether there continues to be a well-founded fear of persecution. In addition, that court seeks to ascertain whether the criteria governing the examination of that protection, made when analysing the cessation of refugee status, are the same criteria as applied in relation to the grant of that status.

169| Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12; 'Qualification I Directive'). That directive was repealed with effect from 21 December 2013 by the Qualification II Directive.

170| See Article 11(1)(e) of the Qualification I Directive.

Findings of the Court

First, the Court held that the requirements to be met by the 'protection' to which the provisions of the Qualification I Directive refer in relation to the cessation of refugee status must be the same as those which arise from the provisions in relation to the grant of that status. [171] In that regard, the Court emphasised the parallelism between the granting and the cessation of refugee status. The Qualification I Directive provides that refugee status is to be lost when the conditions governing the grant of refugee status are no longer met. Thus, the circumstances which demonstrate the country of origin's inability or, conversely, its ability to provide protection from acts of persecution constitute a crucial element in the assessment which leads to the grant of refugee status, or, correspondingly, where appropriate, to the cessation of that status. Such cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status.

Secondly, the Court stated that any social and financial support provided by private actors, such as the family or the clan of a third-country national, falls short of what is required under the provisions of the Qualification I Directive to constitute protection. Consequently, that support is of no relevance either to the assessment of the effectiveness or availability of the protection provided by the State, [172] or to the determination of whether the national concerned continues to have a well-founded fear of persecution. [173]

To reach that conclusion, the Court stated, first of all, that protection from acts of persecution is generally considered to be provided when the State itself, or the parties or organisations controlling the State or a substantial part of the territory of that State, take reasonable steps to prevent those acts, inter alia, by operating an effective legal system for the detection, prosecution and punishment of such acts of persecution, and the applicant has access to such protection. Furthermore, the Court noted that, in order to constitute acts of persecution, the relevant acts must be sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights, or be an accumulation of various measures that are sufficiently severe to affect an individual in a similar manner to a such a violation. The Court held that mere social and financial support from the family or a clan is inherently incapable of either preventing or punishing acts of persecution and cannot, therefore, be regarded as providing the protection required from those acts. That is particularly the case where the objective of that social and financial support is not to protect the third-country national concerned from such acts, but rather to ensure his or her reintegration in his or her country of origin.

Consequently, the Court found, next, that such social and financial support is of no relevance to the assessment of the effectiveness or availability of the protection provided by the State. The Court noted, in that regard, that economic hardship cannot, as a general rule, be classified as 'persecution', [174] with the result that support intended to remedy such hardship should not have any bearing on the assessment of the adequacy of State protection from acts of persecution. Moreover, the Court added that even if the clans were to provide – in addition to such social and financial support – protection in terms of security, that protection could not, in any event, be taken into account in order to ascertain whether State protection meets the requirements that arise from the Qualification I Directive.

171| See, respectively, Article 11(1)(e) and Article 2(c) of the Qualification I Directive. With respect to the requirements in question, see Article 7(1) and (2) of that directive.

172| See Article 7(1)(a) of the Qualification I Directive.

173| See Article 11(1)(e) of the Qualification I Directive, read together with Article 2(c) thereof.

174| See Article 9 of the Qualification I Directive.

Lastly, the Court held that a fear of persecution cannot be excluded, irrespective of what is required to constitute protection under the Qualification I Directive, by the fact that social and financial support is provided by the family or clan of the person concerned. The conditions for refugee status in relation to, on the one hand, a person's fear of persecution in his or her country of origin and, on the other, to the lack of protection from acts of persecution, are intrinsically linked. Consequently, in order to determine whether that fear is well-founded, it is necessary to take into account whether or not there is protection from such acts. However, that protection permits the inference that there is no such fear only if it meets the requirements arising from the Qualification I Directive. [175] Given the intrinsic link between the conditions relating to the fear of persecution and those relating to protection from acts of persecution, their examination cannot be subject to a separate criterion of protection; their assessment must be made in the light of the requirements laid down in that directive. The Court held that to adopt an interpretation to the effect that the protection existing in the third country of origin may rule out a well-founded fear of persecution even though that protection does not satisfy those requirements would be liable to call into question the minimum requirements laid down by that directive.

2. Immigration policy

Judgment of 14 January 2021, *Staatssecretaris van Justitie en Veiligheid (Return of an unaccompanied minor)* (C-441/19, EU :C :2021 :9)

In June 2017, TQ, an unaccompanied minor who was then 15 years and 4 months old, applied in the Netherlands for a fixed-term residence permit on grounds of asylum. In the context of that application, TQ stated that he was born in Guinea in 2002. Following the death of his aunt with whom he lived in Sierra Leone, TQ came to Europe. In Amsterdam (Netherlands), he claimed to have been the victim of human trafficking and sexual exploitation, as a result of which he now suffers serious psychological problems. In March 2018, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') decided of his own motion that TQ was not eligible for a fixed-term residence permit. The referring court explained that TQ does not qualify for refugee status or subsidiary protection. In accordance with Netherlands law, the decision of the State Secretary constitutes a return decision.

In April 2018, TQ brought an appeal against that decision before the referring court, claiming inter alia that he did not know where his parents lived, that he would not be able to recognise them upon his return, that he did not know any other family members and that he did not even know whether any such members existed.

The referring court explained that Netherlands legislation draws a distinction based on the age of the unaccompanied minor. As regards minors under the age of 15 on the date on which the asylum application is lodged, an investigation as to whether there are adequate reception facilities in the State of return, provided for in Article 10 of the Return Directive, [176] is carried out before a decision on that application is adopted. Those minors are granted an ordinary residence permit where there are no such reception facilities. For minors aged 15 or over on the date on which the asylum application is lodged, like TQ, such an investigation is not carried out; the Netherlands authorities appear to wait until the minors in question reach the age of

175| See, in particular, Article 7(2) of the Qualification I Directive.

176| Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98; 'the Return Directive').

18 in order subsequently to implement the return decision. Thus, during the period between his or her application for asylum and reaching the age of majority, the residence of an unaccompanied minor aged 15 or over is irregular but tolerated in the Netherlands.

It was in that context that the referring court decided to refer questions to the Court on whether the distinction drawn by Netherlands legislation between unaccompanied minors over the age of 15 and those under the age of 15 was compatible with EU law.

Findings of the Court

The Court ruled that, where a Member State intends to issue a return decision against an unaccompanied minor under the Return Directive, it must necessarily take into account the best interests of the child [177] at all stages of the procedure, which entails a general and in-depth assessment of the situation of that minor being carried out. According to the Court, if the Member State concerned adopts a return decision without first being satisfied that there are adequate reception facilities in the State of return, the consequence would be that, although that minor was the subject of a return decision, he or she could not be removed in the absence of such facilities. Such a minor would thus be placed in a situation of great uncertainty as to his or her legal status and future, in particular as regards his or her schooling, his or her link with a foster family or the possibility of remaining in the Member State concerned; that would be contrary to the requirement to protect the best interests of the child at all stages of the procedure. It follows that, if such reception facilities are not available in the State of return, the minor concerned cannot be the subject of a return decision.

The Court stated, in that context, that the age of the unaccompanied minor in question constitutes only one factor among others in order to ascertain whether there are adequate reception facilities in the State of return and to determine whether the best interests of the child must result in a return decision against that minor not being issued. Accordingly, a Member State may not distinguish between unaccompanied minors solely on the basis of the criterion of their age for the purpose of ascertaining whether there are such reception facilities.

The Court also held that, in the light of the obligation for Member States to issue a return decision against any third-country national staying illegally on their territory [178] and to remove him or her [179] as soon as possible, the Return Directive precludes a Member State, after it has adopted a return decision in respect of an unaccompanied minor and has been satisfied that there are adequate reception facilities in the State of return, from refraining from subsequently removing that minor until he or she reaches the age of 18 years. In such a case, the minor concerned must be removed from the territory of the Member State concerned, subject to any changes in his or her situation. In the latter respect, the Court stated that, in the event that adequate reception facilities in the State of return are no longer guaranteed at the stage of the removal of the unaccompanied minor, the Member State concerned would be unable to enforce the return decision.

177| See Article 5(a) of the Return Directive.

178| See Article 6(1) of the Return Directive.

179| See Article 8 of the Return Directive.

Judgment of 24 February 2021, *M and Others (Transfer to a Member State)* (C-673/19, EU :C :2021 :127)

Three third-country nationals, M, A and T, lodged applications for international protection in the Netherlands although they already had refugee status in other Member States, namely Bulgaria, Spain and Germany, respectively. For that reason, the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary') rejected their applications. Having established that they were staying illegally in the Netherlands, the State Secretary ordered them to return immediately to those Member States. Since the persons concerned did not comply, they were detained and then forcibly transferred to the Member States concerned.

M, A and T brought actions before the rechtbank Den Haag (District Court, The Hague, Netherlands). They claimed that without a return decision, within the meaning of the Return Directive, being issued against them beforehand, their detention was unlawful. They therefore sought compensation for the harm suffered as a result of their detention. While the actions brought by M and A were dismissed, T was successful. M and A then lodged appeals before the Raad van State (Council of State, Netherlands), while the State Secretary also appealed against the judgment upholding T's action.

It was in that context that the referring court decided to ask the Court whether the Return Directive [180] precludes a Member State from placing in detention a third-country national staying illegally on its territory in order to carry out the forced transfer of that national to another Member State in which he or she has refugee status, where that third-country national has refused to comply with the order given to him or her to go to that other Member State and it is not possible to adopt a return decision against him or her. In its judgment, the Court answered that question in the negative.

Findings of the Court

In order to arrive at that conclusion, the Court recalled, in the first place, that pursuant to the Return Directive, any illegally staying third-country national must, in principle, be subject to a return decision. [181] That decision must identify the third country to which the person concerned is to be removed, namely his or her country of origin, a transit country or a third country to which he or she decides to return voluntarily and which is prepared to admit that person to its territory. [182] By way of derogation, where an illegally staying third-country national holds a residence permit in another Member State, he or she must be allowed to return immediately to that Member State rather than issuing a return decision against him or her from the outset. [183] That being the case, where that national refuses to return to the Member State concerned, or where his or her immediate departure is required on grounds of public policy or national security, the Member State in which the national concerned is staying illegally must then issue a return decision.

In the second place, the Court noted, however, that it was legally impossible in the present case for the Netherlands authorities to adopt a return decision against the persons concerned, following their refusal to go to the Member States which had granted them refugee status. None of the third countries referred to in

180| See, more specifically, Articles 3, 4, 6 and 15 of the Return Directive.

181| See Article 6(1) of the Return Directive.

182| See Article 3(3) of the Return Directive.

183| See Article 6(2) of the Return Directive.

the Return Directive [184] could constitute a return destination here. In particular, owing to their status as refugees, the persons concerned could not be returned to their country of origin without infringing the principle of non-refoulement. That principle, which is guaranteed by the Charter of Fundamental Rights of the European Union, [185] must be respected by the Member States in the implementation of the Return Directive. [186] Moreover, the Court found that, in such circumstances, none of the standards or procedures laid down in that directive allows the expulsion of those nationals, even though they are staying illegally on the territory of a Member State.

In the third place, the Court observed that the Return Directive is not intended to harmonise in their entirety the rules of the Member States relating to the stay of foreign nationals. In particular, that directive is not intended to determine the consequences of an illegal stay by a third-country national in respect of whom no return decision to a third country may be issued, in particular where, as in the present case, the application of the principle of non-refoulement renders such a decision impossible. Thus, in such a situation, the decision of a Member State to proceed with the forced transfer of that national to the Member State which has granted him or her refugee status is not governed by the common standards and procedures laid down by the Return Directive. It also does not fall within the scope of that directive, but rather within that of the exercise of the sole competence of the first Member State in matters of illegal immigration. Consequently, the same applies to the detention of that national, ordered for the purpose of transferring him or her to the Member State concerned. The Court stated, however, that that forced transfer and detention are subject to respect for fundamental rights, in particular those guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [187] and the Convention relating to the Status of Refugees. [188]

184| See Article 3(3) of the Return Directive.

185| See Article 18 and Article 19(2) of the Charter of Fundamental Rights of the European Union.

186| See Article 5 of the Return Directive.

187| Convention signed at Rome on 4 November 1950.

188| Convention signed at Geneva on 28 July 1951.

IX. Judicial cooperation in criminal matters

In relation to judicial cooperation in criminal matters, five judgments deserve to be mentioned. Two of them involve European arrest warrants governed by the EAW Framework Decision. [189] The third judgment concerns the right to information in criminal proceedings in connection with the issuing of a European arrest warrant. The fourth relates to the mutual recognition of judgments in criminal matters and the taking account of convictions between Member States in the course of new criminal proceedings. The fifth and last judgment deals with freezing and confiscation of instrumentalities and proceeds of crime in the European Union. [190]

1. European arrest warrant

Judgment of 17 March 2021, *JR (Arrest warrant – Conviction in a third State, member of the EEA)* (C-488/19, EU :C :2021 :206)

In 2014, JR, a Lithuanian national, was sentenced in Norway to a term of imprisonment. Pursuant to a bilateral agreement between Norway and Lithuania, [191] that judgment was recognised and became enforceable in Lithuania and JR was transferred there so that the remaining sentence could be executed. In November 2016, he benefited from a conditional release measure, but it was subsequently revoked and the remainder of his sentence was then ordered to be executed. JR having absconded to Ireland, the Lithuanian authorities issued a European arrest warrant (EAW) against him. In January 2019, JR was arrested in Ireland.

Before the High Court (Ireland), JR disputed his surrender to the Lithuanian authorities by relying, first, on the fact that only Norway could request his extradition and, secondly, on the ground for optional non-execution of an EAW relating to the extra-territorial nature of the offence. [192] In his view, since the offence giving rise to the EAW had been committed in a State (Norway) other than the State issuing the EAW, Ireland was required to refuse to execute that EAW.

It was in that context that the High Court (Ireland) referred the matter to the Court. It asked whether an EAW may be issued with a view to executing a sentence imposed by a court of a third State but which, pursuant to a bilateral agreement, has been recognised and executed in part in the issuing Member State. If so, that court raised the question of the classification of the offence as an 'extra-territorial offence', in order to ascertain whether the ground for optional non-execution concerned was applicable in the case in point.

189| 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) ('the EAW Framework Decision').

190| Reference should also be made under this heading to *Opinion 1/19* ***(Istanbul Convention),*** of 6 October 2021, in which the Court ruled on the competence of the European Union to sign the Istanbul Convention on preventing and combating violence against women and domestic violence. That judgment is presented in Section XIX.4 'Istanbul Convention on preventing and combating violence against women and domestic violence'. The judgment of 23 November 2021, ***IS (Illegality of the order for reference)*** (C-564/19, EU:C:2021:949), which concerns, inter alia, the scope of the obligations of Member States with regard to the right to interpretation and translation in criminal proceedings, is presented in Section VI.1 'References for a preliminary ruling'.

191| Bilateral Agreement on the recognition and enforcement of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty concluded between the Kingdom of Norway and the Republic of Lithuania on 5 April 2011.

192| See Article 4(7)(b) of the EAW Framework Decision.

Findings of the Court

In the first place, the Court noted that an EAW must be based on a national judicial decision that is separate from the decision issuing the EAW. From that point of view, a judgment delivered by a court of a third State imposing a custodial sentence cannot, as such, constitute the basis of an EAW. By contrast, the Court held that an EAW may be based on an act of a court of the issuing Member State recognising such a judgment and rendering it enforceable, provided that the custodial sentence at issue is of at least four months.

In reaching that conclusion, the Court stated, first of all, that such acts of recognition and enforcement of a Member State constitute judicial decisions, for the purposes of the EAW Framework Decision, [193] where they have been adopted for the purpose of executing a sentence. Next, in so far as those acts allow a judgment to be enforced in that Member State, it is appropriate to treat them, as the case may be, as an 'enforceable judgment' or an 'enforceable decision'. Finally, in accordance with the EAW Framework Decision, [194] such acts fall within its scope, provided that the sentence in question is a custodial sentence of at least four months. The sentence to be executed is not required to stem from a judgment delivered by the courts of the issuing Member State or by those of another Member State.

However, the Court added that the judicial authorities of the issuing Member State are required to ensure compliance with the requirements inherent in the EAW system in relation to procedure and fundamental rights. More specifically, the law of the issuing Member State must make provision for judicial review to verify that, in the procedure leading to the adoption in the third State of the sentencing judgment, the fundamental rights of the person concerned have been complied with. That applies, in particular, to compliance with the obligations arising under Article 47 (right to an effective remedy and to a fair trial) and Article 48 (presumption of innocence and rights of defence) of the Charter of Fundamental Rights of the European Union.

In the second place, the Court held that, in order to determine whether the offence giving rise to the sentence imposed in a third State and the subsequent issuing of an EAW was committed 'outside the territory of the issuing Member State', [195] it is necessary to take into consideration the criminal jurisdiction of that third State (in this instance, Norway), and not that of the issuing Member State.

In that regard, first, the Court pointed out that such an interpretation is compatible with the objective pursued by the ground for optional non-execution of an EAW relating to the extra-territorial nature of the offence. That ground makes it possible to refuse to grant an EAW seeking execution of a sentence imposed for an offence prosecuted under an international criminal jurisdiction that is broader than that recognised by the law of the executing State. Secondly, the Court noted that, by contrast, an interpretation to the contrary would jeopardise the attainment of the general objectives of the EAW Framework Decision. If the executing State could refuse surrender in a situation where the judgment delivered by the court of a third State has been recognised by the State issuing the EAW, that refusal not only would be liable to delay the execution of the sentence, but could also lead to the impunity of the requested person. Moreover, it might discourage Member States from requesting the recognition of judgments and, in a situation such as that in the main proceedings, encourage the State enforcing a recognised judgment to limit the use of conditional release instruments.

193| See Article 1(1), Article 2(1) and Article 8(1)(c) of the EAW Framework Decision.

194| See Article 1(1) and Article 2(1) of the EAW Framework Decision.

195| See Article 4(7)(b) of the EAW Framework Decision.

Judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)* (C-665/20 PPU, EU :C :2021 :339*)*

In September 2019, an EAW was issued by the German judicial authorities against X, in order to conduct criminal proceedings for acts committed in 2012 against his partner and her daughter. In March 2020, X was arrested in the Netherlands. He objected to his surrender to those authorities, asserting that he had previously been prosecuted and finally judged in respect of the same acts in Iran. More specifically, he had been acquitted in respect of some of those acts and sentenced in respect of the others to a term of imprisonment which he had served almost in full before the sentence was remitted. That remission was the result of a general leniency measure granted by a non-judicial authority, the Supreme Leader of Iran, to mark the 40th anniversary of the Islamic Revolution. Thus, according to X, due to his prior conviction in Iran, the ne bis in idem principle, as set out in Article 4(5) of the EAW Framework Decision, transposed into Netherlands law, precluded the execution of the EAW concerning him.

In accordance with that provision, the executing judicial authority may refuse to execute an EAW if the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country. That ground 'for optional non-execution' is similar to the one 'for mandatory non-execution' provided for in Article 3(2) of the framework decision, with the exception that the latter refers to a judgment given not 'by a third State' but 'by a Member State'.

In that context, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) decided to seek the guidance of the Court on the interpretation of Article 4(5) of the EAW Framework Decision. That district court, called upon to rule on the surrender of X, was uncertain as to the margin of discretion it enjoys in such a case, as to the concept of 'same acts' referred to in that provision, in so far as the Iranian courts did not explicitly rule on certain acts which X was alleged to have committed in Germany, and as to the scope of the condition that, where there has been a sentence, that sentence 'has been served … or may no longer be executed under the law of the sentencing country'.

By its judgment, delivered in the context of the urgent preliminary ruling procedure, the Court ruled, first of all, that the executing judicial authority must have a margin of discretion in order to determine whether it is appropriate to refuse to execute an EAW on the ground concerned. Next, the concept of 'same acts' must be interpreted uniformly. Lastly, the condition relating to the execution of the sentence is met in a situation such as that at issue in the case in the main proceedings.

Findings of the Court

In the first place, the Court recalled that the EAW Framework Decision sets out, first, the grounds for mandatory non-execution of an EAW [196] and, secondly, the grounds for optional non-execution [197] which the Member States are free to transpose or not into their domestic law. Nevertheless, where the grounds for optional non-execution are transposed, the Member States may not provide that the judicial authorities are required to automatically refuse to execute any EAW concerned. Those authorities must have a margin of discretion, allowing them to carry out an examination on a case-by-case basis, taking into consideration all the relevant

196| In Article 3 of the EAW Framework Decision.

197| In Articles 4 and 4a of the EAW Framework Decision.

circumstances. Depriving them of that possibility would have the effect of substituting a mere option to refuse to execute an EAW with a genuine obligation, although such a refusal constitutes the exception, the execution of the EAW being the general rule.

Furthermore, the Court emphasised the difference with the ground for mandatory non-execution provided for in Article 3(2) of the EAW Framework Decision, the application of which, by contrast, does not leave any discretion to the executing judicial authority. The principles of mutual trust and mutual recognition, which prevail between the Member States and require them to consider that each of them complies with EU law and, more specifically, fundamental rights, are not automatically transferrable to judgments rendered by the courts of third States. Thus, a high level of trust in the criminal justice system, as it exists between the Member States, cannot be presumed as regards third States. For that reason, the executing judicial authority must be allowed a margin of discretion.

In the second place, the Court found that the concept of 'same acts', referred to in Article 3(2) and Article 4(5) of the EAW Framework Decision, must be interpreted uniformly. For reasons of consistency and legal certainty, those two concepts, worded in identical terms, must be given the same scope. The Court added that the fact that Article 3(2) concerns judgments given in the European Union, whereas Article 4(5) refers to those given in a third State, cannot, as such, justify a different scope being conferred on that concept.

In the third place, the Court ruled that the condition relating to the execution of the sentence, provided for in Article 4(5) of the EAW Framework Decision, is met in a situation such as that at issue in the main proceedings. In that regard, the Court emphasised that that article refers, in a general manner, to the 'law of the sentencing country', without providing further details as to why it would be impossible to execute the sentence. It is therefore necessary, in principle, to recognise all leniency measures provided for by the law of the sentencing country which have the effect that the imposed sanction may no longer be executed. In that regard, the seriousness of the acts, the nature of the authority which granted the measure, or the considerations in which that measure is rooted, where, for instance, it is not based on objective criminal policy considerations, have no impact.

Nevertheless, the Court added that the executing judicial authority must strike a balance when exercising the discretion it enjoys for the purpose of applying the ground for optional non-execution provided for in Article 4(5) of the EAW Framework Decision. It must reconcile preventing the impunity of convicted and sentenced persons and combating crime with ensuring legal certainty as regards those persons through respect for decisions of public bodies which have become final. The *ne bis in idem* principle, set out in the framework decision in both Article 4(5) and Article 3(2), encompasses those two aspects.

Reference should also be made under this heading to the judgment of 16 November 2021, ***Governor of Cloverhill Prison and Others*** (C-479/21 PPU, EU :C :2021 :929), in which the Court ruled on the EAW regime and the new surrender mechanism between the European Union and the United Kingdom established in the context of the latter's withdrawal from the European Union, [198] and the judgment of 28 January 2021, ***Spetsializirana prokuratura (Letter of Rights)*** (C-649/19, EU :C :2021 :75), delivered in connection with the issuing of a EAW by the referring court. [199]

198| That judgment is presented in Section III 'Withdrawal of the United Kingdom from the European Union'.

199| That judgment is presented in Section IX.2 'Right to information in criminal proceedings'.

2. Right to information in criminal proceedings

Judgment of 28 January 2021, *Spetsializirana prokuratura (Letter of Rights)* (C-649/19, EU :C :2021 :75)

The Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) brought criminal proceedings against IR, who was accused of having participated in a criminal group for the purpose of committing tax offences. During the pre-trial stage of the criminal proceedings, IR, as an 'accused person', was informed of only some of his rights. When the trial stage of the criminal proceedings commenced in February 2017, IR could not be found. In April 2017, the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) adopted a pre-trial detention measure in respect of him; that measure constituted a national arrest warrant. In May 2017, as IR had still not been found, an EAW was issued. Nevertheless, since it had doubts regarding the compatibility of that EAW with EU law, the Spetsializiran nakazatelen sad (Specialised Criminal Court) annulled it.

Having decided to issue a new EAW in respect of IR, that court sought clarification as regards the information to be attached to that warrant, in order to ensure observance of the rights provided for by the Directive 2012/13 on the right to information in criminal proceedings. [200] More specifically, it enquired whether persons who are arrested for the purposes of the execution of an EAW can rely, in addition to the rights expressly conferred on them by Directive 2012/13, on the rights of 'suspects or accused persons who are arrested or detained' within the meaning of that directive. Should that question be answered in the negative, the Spetsializiran nakazatelen sad (Specialised Criminal Court) raised the issue of the validity of the EAW Framework Decision, in the light of the right to liberty and the right to an effective remedy enshrined in Articles 6 and 47, respectively, of the Charter. The information communicated to persons arrested for the purposes of the execution of an EAW on the basis of the EAW Framework Decision is more limited than the information communicated to suspects or accused persons who are arrested or detained in accordance with Directive 2012/13, such that that court questioned whether it would not become impossible or excessively difficult for persons arrested for the purposes of the execution of an EAW to challenge warrants issued against them.

Findings of the Court

In the first place, the Court stated that the rights of suspects or accused persons who are arrested or detained provided for by Directive 2012/13 do not apply to persons who are arrested for the purposes of the execution of an EAW. Those rights include, inter alia, the right to be provided with a written Letter of Rights on arrest, which must contain information about the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, or making a request for provisional release. [201] Also included are the right to information about the accusation [202] and the right of access to the materials of the case that are essential to challenging the lawfulness of the arrest or detention. [203]

200| 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).

201| See Article 4 of Directive 2012/13, in particular Article 4(3) thereof.

202| See Article 6(2) of Directive 2012/13.

203| See Article 7(1) of Directive 2012/13.

In order to reach that conclusion, and after finding that an analysis of the wording of the provisions of Directive 2012/13 conferring those various rights did not, in itself, enable it to be determined whether persons who are arrested for the purposes of the execution of an EAW are included in the suspects or accused persons who are arrested or detained within the meaning of that directive and to whom those rights apply, the Court analysed, first, the context of those provisions. In that regard, it stated that Directive 2012/13 contains other provisions which expressly concern the rights of persons who are arrested for the purposes of the execution of an EAW. [204] Moreover, references in Directive 2012/13 to suspects or accused persons who are arrested or detained should be understood to refer to any situation where those suspects or persons are deprived of liberty within the meaning of Article 5(1)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). [205] Such a situation differs from that corresponding to the case of an EAW, involving the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition, also referred to in the ECHR. [206] For the Court, it follows from this that the provisions referring to suspects or accused persons who are arrested or detained do not concern persons who are arrested for the purposes of the execution of an EAW.

Secondly, the Court considered that that interpretation is confirmed by the fact that Directive 2012/13 sets out a twofold objective. [207] It lays down minimum standards to be applied in the field of information to be provided to suspected or accused persons, in order to enable them to prepare their defence and to safeguard the fairness of the proceedings. It also seeks to preserve the specific characteristics of the procedure relating to EAWs, which is characterised by a desire to simplify and expedite the surrender procedure.

In the second place, the Court confirmed the validity of the EAW Framework Decision in the light of Articles 6 and 47 of the Charter, which enshrine the right to liberty and the right to an effective remedy, respectively.

In that regard, the Court recalled, first of all, that since the issuing of an EAW is capable of impinging on the right to liberty of the person concerned, the protection of procedural rights and fundamental rights that that person must enjoy means that a decision meeting the requirements of effective judicial protection should be adopted either when the national arrest warrant is adopted or when the EAW is issued.

Next, the Court emphasised that the person who is the subject of an EAW issued for the purposes of criminal prosecution acquires, from the moment of his or her surrender, the status of 'accused person' within the meaning of Directive 2012/13. Thus, from that moment, that person enjoys all the rights associated with that status, so that he or she can prepare his or her defence and safeguard the fairness of the proceedings.

As regards the period preceding that surrender, the Court stated, first, that the EAW Framework Decision provides that an EAW must contain information concerning the nature and legal classification of the offence and a description of the circumstances in which the offence was committed. [208] That information corresponds, in essence, to the information referred to in the provisions of Directive 2012/13 concerning the right of suspects or accused persons to information about the accusation. [209] Secondly, the Court recalled that the

204| See Article 5 of Directive 2012/13. See also Annex II to that directive, which sets out the indicative model Letter of Rights for persons arrested on the basis of an EAW; that model letter is distinct from the indicative model Letter of Rights to be provided to suspects and accused persons who are arrested or detained, set out in Annex I thereto and referred to in Article 4 of Directive 2012/13.

205| See recital 21 of Directive 2012/13.

206| See Article 5(1)(f) of the ECHR.

207| See Article 1 of the directive, read in conjunction with recitals 14, 27 and 39 thereof.

208| See Article 8(1)(d) and (e) of the EAW Framework Decision.

209| See Article 6 of Directive 2012/13.

right to effective judicial protection does not require that the right to challenge the decision to issue an EAW can be exercised before the surrender of the person concerned. Consequently, the mere fact that the person in question is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered to the competent authorities of that Member State cannot result in any infringement of the right to effective judicial protection.

The interpretation of Directive 2012/13 was also the subject of the Court's judgment of 23 November 2021, ***IS (Illegality of the order for reference)*** (C-564/19, EU:C:2021:949). [210]

3. Mutual recognition of judgments in criminal matters

Judgment of 15 April 2021, *AV (Aggregate sentence)* (C-221/19, EU :C :2021 :278)

In 2010 and 2017, AV, a Polish national, received prison sentences delivered by the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk, Poland), the referring court, and a German court, respectively. The German judgment was recognised for the purpose of its enforcement in Poland by the referring court under Framework Decision 2008/909, [211] which enables a Member State to recognise a judgment delivered in another Member State and to enforce the sentence. While the sentence imposed by the German court was to be served in Poland from 1 September 2016 to 29 November 2021, the sentence imposed by the referring court was to be served from 29 November 2021 to 30 March 2030.

In 2018, AV made an application to the Sąd Okręgowy w Gdańsku (Regional Court, Gdańsk), seeking an aggregate sentence covering those two sentences. Under the Polish Criminal Code, such an aggregate sentence makes it possible to change the duration of several sentences imposed on one person and to commute them into a new single sentence. When the conditions for issuing a cumulative sentence are met, an aggregate sentence may be delivered.

However, the referring court considered that the Polish Criminal Code does not allow an aggregate sentence to cover convictions handed down in Poland and convictions handed down in another Member State and recognised for the purpose of their enforcement in Poland, which is to the detriment of a person convicted several times in different Member States as compared with a person convicted several times in a single Member State. It was in that context that that court decided to refer questions to the Court for a preliminary ruling concerning the interpretation of both Framework Decision 2008/909 and Framework Decision 2008/675, [212] relating to the taking in account, in the course of new criminal proceedings, of previous convictions handed down in other Member States against the same person. The Court was asked whether and in what circumstances an aggregate sentence could be delivered where it covers not only convictions delivered previously against the person concerned in the Member State where the aggregate sentence is delivered, but also convictions delivered against that person in another Member State and enforced in the first Member State.

210| That judgment is presented in Section VI.1 'References for a preliminary ruling'.

211| Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

212| Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32).

Findings of the Court

In the first place, the Court examined whether Framework Decision 2008/909 allows the delivery of an aggregate sentence such as that at issue in the main proceedings.

In that regard, it noted first that that framework decision lays down strict conditions for the adaptation, by the competent authority of the executing State, of the sentence handed down in the issuing State. The Court held that the framework decision permits the delivery of an aggregate sentence, such as that at issue in the main proceedings, provided that that sentence does not result in an adaptation of the duration or nature of the conviction, delivered in another Member State and enforced in the Member State in which the aggregate sentence is delivered, which exceeds the strict limits laid down for that adaptation. The contrary solution would not only entail an unjustified difference in treatment between persons subject to a number of sentences in a single Member State and those sentenced in several Member States where, in both cases, the sentences are enforced in the same Member State. It would also involve an application of Framework Decision 2008/909 which does not comply with the right of citizens of the European Union to move and reside freely within the territory of the Member States conferred on them by Article 21 TFEU.

The Court then made clear that the Member State in which the aggregate sentence is delivered must deduct in full the period of deprivation of liberty already served by the sentenced person in the issuing State from the total duration of the deprivation of liberty to be enforced. Finally, it noted that, since only the issuing State may decide on applications for review of the judgment imposing the sentences to be enforced in another Member State, Framework Decision 2008/909 permits the delivery of an aggregate sentence, such as that at issue in the main proceedings, only where it does not result in review of those sentences.

In the second place, the Court examined whether the delivery of an aggregate sentence, such as that at issue in the main proceedings, is permitted in the light of Framework Decision 2008/675, which requires the taking into account, in the course of new criminal proceedings brought against a person, of previous convictions handed down in another Member State against the same person for different facts. Such taking into account may not have the effect either of interfering with previous convictions or their enforcement in the Member State in which the new criminal proceedings take place, or of revoking or reviewing them.

In that regard, the Court found that a cumulative sentence may interfere with a previous conviction or its enforcement where that initial conviction has not yet been enforced or the person concerned has not been transferred to the second Member State for the purpose of the enforcement of that initial conviction. However, in the case in the main proceedings, the conviction handed down by the German court was forwarded and recognised, in accordance with Framework Decision 2008/909, for the purpose of its enforcement in Poland. Therefore, the Court considered that the taking into account of that conviction with a view to the delivery of the aggregate sentence did not have the effect of interfering with that conviction or its enforcement, or of revoking or reviewing it, within the meaning of Framework Decision 2008/675, provided that the aggregate sentence observes the conditions and limits laid down in Framework Decision 2008/909. Subject to compliance with those conditions and limits, the court before which new criminal proceedings, such as the aggregate sentencing proceedings at issue in the main proceedings, are brought must take into account the previous conviction handed down in another Member State in the same way as it would take into consideration a previous national conviction.

4. Freezing and confiscation of instrumentalities and proceeds of crime in the European Union

Judgment of 21 October 2021, *Okrazhna prokuratura – Varna* (C-845/19 and C-863/19, EU :C :2021 :864)

Two Bulgarian nationals ('the persons concerned') were convicted of the unauthorised possession, in February 2019 in Varna (Bulgaria), of highly dangerous narcotics with a view to their distribution. Following that criminal conviction, the Okrazhna prokuratura – Varna (Regional Public Prosecutor's Office, Varna, Bulgaria) applied to the Okrazhen sad Varna (Regional Court, Varna, Bulgaria) for the confiscation of sums of money which had been discovered in their respective homes in the course of searches.

At the hearing before that court, the persons concerned stated that the sums of money seized belonged to members of their respective families. Those family members did not take part in the proceedings before that court, since national law did not permit them to do so. The referring court refused to authorise the confiscation of those sums of money, taking the view that the criminal offence of which the persons concerned had been convicted was not such as to generate an economic benefit. In addition, although there was evidence that the persons concerned had been selling narcotics, they had not been charged with or convicted of such a criminal offence. The Okrazhna prokuratura – Varna (Regional Public Prosecutor's Office, Varna), brought an appeal against that judgment, arguing that that court had failed to take account of Directive 2014/42 when applying the relevant national provisions. [213]

In those circumstances, the referring court decided to ask the Court whether Directive 2014/42 only applies in cross-border situations, and further referred questions concerning the extent of the confiscation provided for by that directive and the scope of the right to an effective remedy of a third party who claims, or in respect of whom it is claimed, that he or she is the owner of property which is subject to confiscation. In its judgment, the Court thus ruled on questions of crucial importance for defining the scope of Directive 2014/42 and the interpretation of some of its key concepts.

Findings of the Court

In the first place, the Court found that the possession of narcotics for the purposes of their distribution comes within the scope of Directive 2014/42, even though all the elements inherent in the commission of that offence are confined within a single Member State. Under the TFEU, [214] such an offence is a particularly serious crime with a cross-border dimension, as referred to in that treaty. Consequently, the EU legislature is competent to adopt minimum harmonisation rules concerning the definition of criminal offences and sanctions in that area, a competence that also covers situations in which the elements inherent in the commission of a particular offence are confined within a single Member State.

In the second place, the Court found that Directive 2014/42 not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from other criminal conduct. Such

213| Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (OJ 2014 L 127, p. 39).

214| Article 83(1) TFEU.

confiscation must, however, be carried out in compliance with the safeguards provided for in that directive [215] and is subject to the condition that the offence in respect of which the perpetrator has been convicted is among those listed in the directive [216] and that that offence is liable to give rise, directly or indirectly, to economic benefit.

As regards the first type of confiscation, it is necessary that the proceeds whose confiscation is being contemplated arise from the criminal offence in respect of which the perpetrator has been finally convicted.

As regards the second situation, which corresponds to extended confiscation, [217] the Court noted, first, that in order to determine whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, for example whether the offence was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. [218] Secondly, the national court must be satisfied on the basis of the circumstances of the case, including the specific facts and available evidence, that the property is derived from criminal conduct. [219] To that end, that court may take account of the fact that the value of the property in question is disproportionate to the lawful income of the convicted person. [220]

Lastly, confiscation from a third party [221] presupposes that it has been established that a suspected or accused person has transferred proceeds to a third party or a third party has acquired such proceeds, and that that third party was aware of the fact that the purpose of that transfer or acquisition was to avoid confiscation.

In the third place, the Court held that Directive 2014/42, read in conjunction with Article 47 of the Charter, precludes national legislation which allows for the confiscation, in favour of the State, of property allegedly belonging to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings. That directive requires Member States to take the necessary measures to ensure that the persons affected by the measures provided for therein, including third parties who claim or in respect of whom it is claimed that they are the owner of the property whose confiscation is being contemplated, have the right to an effective remedy and a fair trial in order to uphold their rights. [222] In addition, that directive provides for several specific safeguards in order to guarantee the preservation of the fundamental rights of such third parties. Among those safeguards is the right of access to a lawyer throughout the confiscation proceedings, [223] which entails the right of third parties to be heard in the context of those proceedings, including the right to claim ownership of the property concerned by the confiscation. [224]

215| Article 8(8) of Directive 2014/42.

216| Article 5(2) of Directive 2014/42.

217| Article 5 of Directive 2014/42.

218| Recital 20 of Directive 2014/42.

219| Recital 21 of Directive 2014/42.

220| Article 5(1) of Directive 2014/42.

221| Article 6 of Directive 2014/42.

222| Article 8(1) of Directive 2014/42.

223| Article 8(7) of Directive 2014/42.

224| Article 8(9) of Directive 2014/42.

X. Judicial cooperation in civil matters

Two judgments, concerning Regulation No 2201/2003 [225] applying to matrimonial matters and parental responsibility, deserve to be mentioned under this heading. The first judgment deals with the determination of the court with jurisdiction where a child has been abducted to a third State in which that child has acquired his or her habitual residence. The second relates specifically to the concept of 'habitual residence' for the purposes of determining the court with jurisdiction in a divorce case.

Judgment of 24 March 2021, *MCP* (C-603/20 PPU, EU :C :2021 :231)

SS and MCP, two Indian citizens with leave to remain in the United Kingdom, are parents of P, a citizen of the United Kingdom born in 2017. In October 2018, the mother went to India with the child, who has since lived there with her maternal grandmother and, therefore, no longer has her habitual residence in the United Kingdom. It was on that ground that the mother challenged the jurisdiction of the courts of England and Wales, which were called upon to give a decision on the application of the father, who sought the return of the child to the United Kingdom and, in the alternative, rights of access in the context of an action brought before the High Court of Justice (England & Wales), Family Division (United Kingdom).

The referring court considered it necessary to determine whether it had jurisdiction on the basis of the Brussels IIa Regulation. In that regard, it stated that when it was seised by the father, the child was habitually resident in India and was fully integrated into an Indian social and family environment, her concrete factual connections with the United Kingdom being non-existent, apart from citizenship.

The High Court of Justice noted that Article 10 of the Brussels IIa Regulation establishes the grounds of jurisdiction in cases of wrongful removal or retention of a child, while stating that it harboured doubts, in particular, as to whether that provision could apply to a conflict of jurisdiction between the courts of a Member State and the courts of a third State. It therefore asked the Court whether that provision must be interpreted as meaning that, where a child has acquired his or her habitual residence in a third State following abduction to that State, the courts of the Member State where the child was habitually resident immediately before his or her abduction retain their jurisdiction indefinitely. This case thus enabled the Court to give a ruling on the territorial scope of that provision.

Findings of the Court

The Court stated, first, that regarding jurisdiction in the event of child abduction, Article 10 of the Brussels IIa Regulation lays down criteria relating to a situation which is confined to the territory of the Member States. The fact that that article uses the expression 'Member State' and not the words 'State' or 'third State' implies that it deals solely with jurisdiction in cases of child abduction from one Member State to another.

As regards, secondly, the context of Article 10 of the Brussels IIa Regulation, the Court stated that that provision constitutes a special ground of jurisdiction with respect to the general ground [226] which provides that the courts of the Member State where a child is habitually resident are, as a general rule, to have

225| 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').

226| Laid down in Article 8(1) of the Brussels IIa Regulation.

jurisdiction in matters of parental responsibility. That special ground of jurisdiction defeats what would otherwise be the effect of the application of the general ground of jurisdiction in the event of child abduction, namely the transfer of jurisdiction to the Member State where the child may have acquired a new habitual residence. However, where the child has acquired a habitual residence outside the European Union, there is no room for the application of the general rule of jurisdiction. Consequently, Article 10 of that regulation loses its raison d'être and there is not, therefore, any reason to apply it.

Furthermore, the Court observed that it is apparent from the travaux préparatoires of the Brussels IIa Regulation that the EU legislature did not intend to include within the scope of Article 10 the situation of child abductions to a third State, since such abductions were to be covered, inter alia, by international conventions such as the Hague Conventions of 1980 [227] and 1996. [228] Under certain circumstances (such as acquiescence or inaction on the part of one of the persons concerned who holds a right of custody), the 1996 Hague Convention does make provision for the transfer of jurisdiction to the courts of the State where the child has acquired a new habitual residence. Such transfer of jurisdiction would be deprived of any effect if the courts of a Member State were to retain their jurisdiction indefinitely.

Thirdly, the Court stated that an indefinite retention of jurisdiction would not be compatible with one of the fundamental objectives pursued by the Brussels IIa Regulation, namely that of respecting the best interests of the child, by giving priority, for that purpose, to the criterion of proximity. Interpreting Article 10 of that regulation in such a way would also disregard the logic of the mechanism of prompt return or non-return established by the 1980 Hague Convention.

The Court concluded that Article 10 of the Brussels IIa Regulation is not applicable to a situation where a finding is made that a child has, at the time when an application relating to parental responsibility is brought, acquired his or her habitual residence in a third State following abduction to that State. In that situation, the jurisdiction of the court seised will have to be determined in accordance with the applicable international conventions or, in the absence of any such international convention, in accordance with Article 14 of the Brussels IIa Regulation.

Judgment of 25 November 2021, *IB (Habitual residence of a spouse – Divorce)* (C-289/20, EU :C :2021 :955)

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 court was asked to determine whether the tribunal de grande instance de Paris (Regional Court, Paris), had jurisdiction, in the light of IB's habitual residence, in accordance with the Brussels IIa Regulation. In that respect, it noted, inter alia, that there were numerous circumstances indicating IB's personal and family ties with Ireland, where he had lived since 1999 with his wife and children. However, it also pointed out that, for several years, IB had returned every week to France, where he had established the centre of his professional interests.

227| Convention on the Civil Aspects of International Child Abduction, signed on 25 October 1980 in the framework of the Hague Conference on Private International Law.

228| Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996 (OJ 2008 L 151, p. 39).

Accordingly, that 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.

It was against that background that the tribunal de grande instance de Paris (Regional Court, Paris), decided to refer the matter to the Court in order to determine which courts had jurisdiction to rule on the divorce of IB and FA, pursuant to Article 3(1)(a) of the Brussels IIa Regulation. In particular, it asked 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 would have jurisdiction to rule on the divorce.

In its judgment, the Court clarified the concept of the 'habitual residence' of a spouse and held 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 took the view that that concept must be given an autonomous and uniform interpretation. It observed, 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 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, [229] the Court considered that the concept of 'habitual residence', 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 drew attention to 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, as it consists 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.

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

In the light of those considerations, the Court concluded 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 transferred his habitual residence, for the purposes of Article 3(1)(a) of the Brussels IIa Regulation, to the Member State of that court.

XI. Transport

Judgment of 23 March 2021 (Grand Chamber), *Airhelp* (C-28/20, EU :C :2021 :226)

A passenger had booked a seat on a flight from Malmö to Stockholm (Sweden) that was to be operated by Scandinavian Airlines System Denmark – Norway – Sweden ('SAS') on 29 April 2019. The flight was cancelled on the day of the flight because of a strike by SAS's pilots in Denmark, Sweden and Norway ('the strike at issue').

Following the breakdown of negotiations conducted by the trade unions representing SAS's pilots aimed at concluding a new collective agreement with the airline, the trade unions called on their members to strike. That strike lasted seven days and resulted in SAS cancelling a number of flights, including the flight booked by the passenger concerned.

Airhelp, to which that passenger had assigned any rights he had vis-à-vis SAS, brought proceedings before the Attunda tingsrätt (Attunda District Court, Sweden), claiming the compensation laid down by the Air Passenger Rights Regulation [230] for cancellation of a flight. In this instance, SAS had refused to pay the compensation, taking the view that the strike by its pilots constituted an 'extraordinary circumstance' within the meaning of that regulation, [231] since it was not inherent in the normal exercise of its activity of providing air transport services and was beyond its actual control. Airhelp took the view that the strike did not constitute such an 'extraordinary circumstance' because industrial action, such as a strike, which is liable to take place when collective agreements are negotiated and concluded, falls within the ordinary course of business of an airline.

The Attunda tingsrätt (Attunda District Court) expressed doubts as to whether the concept of 'extraordinary circumstances' within the meaning of the Air Passenger Rights Regulation encompasses a strike which is announced by workers' organisations following the giving of notice, is lawfully initiated and is intended in particular to secure pay increases. It pointed out in particular that, under Swedish law, notice of a strike does not have to be lodged until one week before the strike begins.

230| Article 5(1)(c), read in conjunction with Article 7(1)(a), of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1; 'the Air Passenger Rights Regulation').

231| Under Article 5(3) of the Air Passenger Rights Regulation, an operating air carrier is not to be obliged to pay compensation in accordance with Article 7 of the Air Passenger Rights Regulation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

Findings of the Court

By its judgment, delivered by the Grand Chamber, the Court held that strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the conditions laid down by national legislation, in particular the notice period imposed by it, which is intended to assert the demands of that carrier's workers and which is followed by a category of staff essential for operating a flight does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

First of all, the Court pointed out that the concept of 'extraordinary circumstances' in the Air Passenger Rights Regulation refers to events which meet two cumulative conditions, the fulfilment of which must be assessed on a case-by-case basis, namely, first, they must not be inherent, by their nature or origin, in the normal exercise of an air carrier's activity and, secondly, they must be beyond its actual control. [232] It also explained that that concept must be interpreted strictly, in view of the fact that, first, the regulation has the objective of ensuring a high level of protection for air passengers and, secondly, the exemption from the obligation laid down by the regulation to pay compensation constitutes a derogation from the principle that air passengers have the right to compensation.

Next, the Court examined whether a strike which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the notice period imposed by national legislation, which is intended to assert the demands of that carrier's workers and which is followed by one or more categories of staff whose presence is necessary to operate a flight is capable of constituting an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

As regards, in the first place, the question whether the strike at issue could be categorised as an event which is not inherent in the normal exercise of an air carrier's activity, the Court observed that the right to take collective action, including strike action, is a fundamental right, laid down in Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'). In that regard, it stated that a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of that fundamental right. That interpretation must also apply where the employer is an operating air carrier, as measures relating to the working conditions and remuneration of the staff of such a carrier fall within the normal management of its activities. Therefore, a strike whose objective is limited to obtaining from an air transport undertaking an increase in the pilots' salary, a change in their work schedules and greater predictability as regards working hours constitutes an event that is inherent in the normal exercise of that undertaking's activity, in particular where such a strike is organised within a legal framework.

So far as concerns, in the second place, the question whether the strike at issue could be entirely beyond an air carrier's actual control, the Court pointed out, first, that since the right to strike is a right of workers guaranteed by the Charter, a strike's launch is foreseeable for any employer, in particular where notice of the strike is given.

232| See, to that effect, judgments of 22 December 2008, ***Wallentin-Hermann*** (C-549/07, EU :C :2008 :771**,** paragraph 23); of 17 September 2015, ***van der Lans*** (C-257/14**,** EU :C :2015 :618**,** paragraph 36); of 17 April 2018, ***Krüsemann and Others*** (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU :C :2018 :258, paragraphs 32 and 34); and of 11 June 2020, ***Transportes Aéros Portugueses*** (C-74/19, EU :C :2020 :460, paragraph 37).

Secondly, since a strike is foreseeable for the employer, it retains control over events inasmuch as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences. In that respect, like any employer, an operating air carrier faced with a strike by its staff that is founded on demands relating to working and remuneration conditions cannot claim that it does not have any control over that action.

Therefore, according to the Court, a strike by the staff of an operating air carrier that is connected to demands relating to the employment relationship between the carrier and its staff that are capable of being dealt with through management-labour dialogue within the undertaking, including pay negotiations, does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

Thirdly, the Court noted that, unlike events whose origin is 'internal' to the operating air carrier, events whose origin is 'external' are not controlled by that carrier, because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity. Thus, it pointed out that the reference in the Air Passenger Rights Regulation [233] to extraordinary circumstances that may, in particular, occur in the case of strikes that affect the operation of an operating air carrier must be understood as relating to strikes external to the activity of the air carrier concerned, such as strikes by air traffic controllers or airport staff. On the other hand, a strike set in motion and observed by members of the relevant air transport undertaking's own staff is an event 'internal' to that undertaking, including when the strike is set in motion upon a call by trade unions, since they are acting in the interest of that undertaking's workers. However, if such a strike originates from demands which only the public authorities can satisfy, it is capable of constituting an 'extraordinary circumstance' since it is beyond the air carrier's actual control.

Fourthly, the Court held that the air carrier's freedom to conduct a business, its property rights [234] and its right of negotiation [235] are not impaired by not categorising the strike at issue as an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation. As regards the right of negotiation, the fact that an air carrier, because of a strike by members of its staff that is organised within a legal framework, is faced with the risk of having to pay the compensation due to passengers for flight cancellation does not compel it to accept, without discussion, the strikers' demands in their entirety. The air carrier remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners. So far as concerns an air carrier's freedom to conduct a business and right to property, the Court pointed out that these are not absolute rights and that the importance of the objective of consumer protection, [236] including the protection of air passengers, may therefore justify even substantial negative economic consequences for certain economic operators.

233| Recital 14 of the Air Passenger Rights Regulation.

234| Guaranteed by Articles 16 and 17 of the Charter.

235| Guaranteed by Article 28 of the Charter.

236| As provided for by Article 169 TFEU and Article 38 of the Charter.

XII. Competition

1. Agreements, decisions and concerted practices (Article 101 TFEU)

In the field of agreements, decisions and concerted practices, four judgments are worthy of note. The first concerns the conditions governing the civil liability of subsidiaries where their parent company has been punished by a Commission decision. The second concerns the conditions governing the liability of parent companies for their subsidiaries in the context of the payment of fines. The third deals with domestic rules on limitation periods for the imposition of penalties by national competition authorities. The fourth and last judgment relates to the applicability by national courts of Article 101 TFEU to infringements committed in the air transport sector before the entry into force of the regulations implementing EU competition rules.

Judgment of 6 October 2021 (Grand Chamber), *Sumal* (C-882/19, EU :C :2021 :800)

Between 1997 and 1999, the company Sumal SL acquired two trucks from Mercedes Benz Trucks España ('MBTE'), which is a subsidiary of the Daimler group, whose parent company is Daimler AG.

By decision of 19 July 2016, [237] the Commission found an infringement, by Daimler AG, of EU law rules prohibiting cartels [238] in that Daimler had concluded, between January 1997 and January 2011, arrangements with 14 other European truck producers on pricing and gross price increases for trucks in the European Economic Area (EEA).

Following that decision, Sumal brought an action for damages against MBTE, seeking payment of the sum of EUR 22 204.35 for loss resulting from that cartel. Sumal's action was nevertheless rejected by the Juzgado de lo Mercantil no 07 de Barcelona (Commercial Court No 7, Barcelona, Spain) on the ground that MBTE was not referred to in the Commission's decision.

Sumal brought an appeal against that judgment before the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain). In that context, that court submitted questions to the Court asking whether and, if so, under what conditions an action for damages may be brought against a subsidiary following a Commission decision finding anticompetitive practices by its parent company.

By its judgment delivered by the Grand Chamber, the Court set out the conditions under which victims of an anticompetitive practice by a company punished by the Commission are entitled to invoke, by way of an action for damages brought before the national courts, the civil liability of the punished company's subsidiary companies, which are not referred to in the Commission decision.

237| Commission Decision C(2016) 4673 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39824 – Trucks), a summary of which was published in the *Official Journal of the European Union* of 6 April 2017 (OJ 2017 C 108, p. 6).

238| Article 101 TFEU and Article 53 of the EEA Agreement.

Findings of the Court

In accordance with settled case-law, any person is entitled to claim compensation from 'undertakings' which have participated in a cartel or practices prohibited under Article 101 TFEU for the harm caused by those anticompetitive practices. Even if such actions for damages are brought before the national courts, the determination of which entity is required to provide compensation for the harm caused is governed directly by EU law.

Given that such actions for damages are an integral part of the system for enforcement of EU competition rules, in the same way as their enforcement by public authorities, the concept of an 'undertaking', within the meaning of Article 101 TFEU, cannot have a different meaning in the context of the imposition of fines by the Commission on 'undertakings' (public enforcement) and in actions for damages brought against those 'undertakings' before the national courts (private enforcement).

According to the Court's case-law, the concept of an 'undertaking', within the meaning of Article 101 TFEU, covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed, and thus designates an economic unit even if in law that unit consists of several persons, natural or legal.

Where it is established that a company belonging to such an economic unit has infringed Article 101(1) TFEU such that the 'undertaking' of which it is part has committed an infringement of that provision, the concept of an 'undertaking' and, through it, that of 'economic unit', automatically entail the application of joint and several liability amongst the entities of which the economic unit is comprised at the time that the infringement was committed.

In that regard, the Court observed, moreover, that the concept of an 'undertaking', used in Article 101 TFEU, is a functional concept, so that the economic unit of which it is constituted must be identified having regard to the subject matter of the agreement at issue.

Thus, where the existence of an infringement of Article 101(1) TFEU has been established as regards a parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company on the condition that the victim proves that, having regard to, first, the economic, organisational and legal links that connect the two legal entities and, secondly, the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible, that subsidiary, together with its parent company, constituted an economic unit.

It follows that, in circumstances such as those at issue in the main proceedings, in order to bring an action for damages against MBTE as a subsidiary of Daimler AG, Sumal must establish, in principle, that the anticompetitive agreement concluded by Daimler AG concerns the same products as those marketed by MBTE. In so doing, Sumal would show that it is precisely the economic unit of which MBTE, together with its parent company, forms part that constitutes the undertaking which committed the infringement found by the Commission pursuant to Article 101(1) TFEU.

However, in the context of such an action for damages brought against a subsidiary company of a parent company which has been found to have infringed Article 101 TFEU, before the national court concerned, that subsidiary company must dispose of all the means necessary for the effective exercise of its rights of the defence, in particular so as to be able to dispute that it belongs to the same undertaking as its parent company.

That said, where an action for damages relies, as in the present case, on a finding by the Commission of an infringement of Article 101(1) TFEU in a decision addressed to the parent company of the defendant subsidiary company, the latter cannot challenge, before the national court, the existence of an infringement thus found by the Commission. Indeed, Article 16(1) of Regulation No 1/2003 [239] provides that national courts cannot take decisions running counter to the decision adopted by the Commission.

By contrast, where the Commission has not made a finding of conduct amounting to an infringement against the parent company in a decision adopted under Article 101 TFEU, the subsidiary company is entitled to dispute not only that it belongs to the same 'undertaking' as its parent company, but also the very existence of the infringement alleged against that parent company.

In that regard, the Court stated, moreover, that the possibility for a national court of making a finding of the subsidiary company's liability for the harm caused is not excluded merely because, as the case may be, the Commission has not adopted any decision or that the decision in which it found that there was an infringement did not impose an administrative penalty on that company.

The Court concluded that Article 101(1) TFEU precludes a national law which provides for the possibility of imputing liability for one company's conduct to another company only in circumstances where the second company controls the first company.

Judgment of 27 January 2021, *The Goldman Sachs Group* v *Commission* (C-595/18 P, EU :C :2021 :73)

The Goldman Sachs Group ('the appellant') is a company established in the United States. It is an investment bank which operates in all the major financial centres around the world. From 29 July 2005 to 28 January 2009 ('the infringement period'), it was the (indirect) parent company, through certain funds which it had established, of Prysmian SpA and its wholly owned subsidiary, Prysmian Cavi e Sistemi Srl, two companies established in Italy, which together form the Prysmian group, one of the leading businesses worldwide in the submarine and underground power cables sector. While its shareholding in Prysmian was initially 100% of the shares, that holding subsequently decreased to 84.4% when part of Prysmian's capital was floated on the stock exchange on 3 May 2007. [240]

Following an investigation initiated in 2008, the Commission, by decision of 2 April 2014 [241] ('the decision at issue'), (i) found that there had been a single and continuous infringement of Article 101 TFEU in the 'sector for (extra) high voltage underground and/or submarine power cables' consisting in an allocation of the worldwide market between the main European, Japanese and South Korean producers concerned, and (ii) imposed fines for their participation in the cartel at issue.

The appellant was found liable as Prysmian's parent company during the infringement period, and a distinction was drawn between the situation that prevailed until a part of Prysmian's capital was floated on the stock exchange and the subsequent situation. Thus, as regards the first period, the Commission found that the

239| Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

240| During the infringement period, the period prior to the floatation on the stock exchange of part of Prysmian's capital will be referred to below as 'the first period'.

241| Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 – Power cables).

appellant had remained in a situation similar to that of a sole and exclusive owner, despite the divestments of shares, so that it could be presumed, in accordance with the case-law principles established by the Court, [242] that it had exercised decisive influence over Prysmian's market conduct. Furthermore, as regards the entire infringement period, the Commission relied on a body of evidence revealing the economic, organisational and legal links between the appellant and Prysmian in order to conclude that such decisive influence had actually been exercised.

Disputing the approach followed by the Commission in order to impute to it liability for the infringement at issue, Goldman Sachs brought an action before the General Court (i) for annulment of the decision at issue in so far as that decision concerned it, and (ii) for the reduction of the amount of the fine which had been imposed on it. That action was dismissed in its entirety by judgment of the General Court of 12 July 2018. [243] In its judgment of 27 January 2021, the Court of Justice dismissed the appeal lodged by Goldman Sachs against the judgment of the General Court. In that context, the Court of Justice provided further clarifications on the conditions governing the liability of parent companies where their subsidiaries have infringed the competition rules.

Findings of the Court

In the first place, the Court of Justice held that the General Court had been fully entitled to take the view that, where a parent company holds all the voting rights associated with its subsidiary's shares, the Commission is entitled to rely on a presumption that the parent company actually exercises decisive influence over its subsidiary's market conduct. The Court of Justice recalled that that presumption, as enshrined in its case-law, is intended to enable the parent company to be held liable for the conduct of its subsidiary, unless it is able to demonstrate that the subsidiary acts independently on the market. Thus, the implementation of that presumption does not require the Commission to produce indicia capable of establishing the actual exercise of such influence. In that regard, the Court of Justice stated that it is not the mere holding of all or virtually all the capital of the subsidiary in itself that gives rise to the presumption, but the resulting degree of control of the parent company over its subsidiary. Where a parent company holds all the voting rights associated with its subsidiary's shares, without however being the sole shareholder of that subsidiary, it is able to exercise decisive influence over the conduct of the latter. Observing that it was not disputed that the appellant held all the voting rights associated with its subsidiary's shares, the Court of Justice concluded that the criticism of the General Court put forward in the appeal for having treated such a situation in the same way as that of a company holding all or virtually all of the capital of its subsidiary was not justified in the light of the conditions for applying the presumption of actual exercise of decisive influence.

In the second place, as regards the examination of the elements on which the Commission relied in order to conclude that the appellant had exercised decisive influence over its subsidiary's market conduct during the entire infringement period, the Court of Justice noted that the Commission had relied, as regards the first period, on two grounds in order to hold the appellant liable for the infringement, namely a presumption of actual exercise of decisive influence, on the ground that the appellant held all the voting rights associated with Prysmian's shares, and its conclusion that the appellant had actually exercised such influence over Prysmian. Given that the Commission was entitled to rely on such a presumption and since the General Court

242| Judgment of 10 September 2009, ***Akzo Nobel and Others*** v ***Commission*** (C-97/08 P, EU :C :2009 :536, paragraph 58). See also judgments of 24 June 2015, ***Fresh Del Monte Produce*** v ***Commission and Commission*** v ***Fresh Del Monte Produce*** (C-293/13 P and C-294/13 P, EU :C :2015 :416, paragraph 75 and the case-law cited), and of 28 October 2020, ***Pirelli & C.*** v ***Commission*** (C-611/18 P, not published, EU :C :2020 :868, paragraph 68 and the case-law cited).

243| Judgment of 12 July 2018, ***The Goldman Sachs Group*** v ***Commission*** (T-419/14, EU :T :2018 :445).

did not err in law in finding that the appellant had not succeeded in rebutting that presumption, the Court of Justice considered that the appeal was ineffective in so far as it concerned the General Court's findings as regards the second ground on which the Commission had relied in order to hold the appellant liable for the infringement at issue in that period.

As regards the period following the flotation of a part of Prysmian's capital on the stock exchange, the Court of Justice held that the General Court did not err in law in finding that personal links between the parent company and its subsidiary other than those resulting from an accumulation of posts could be relevant in that regard, since such links are capable of establishing the existence of a single economic entity. The General Court was therefore correct to accept that personal links relating to the exercise, by the director of a company, of consultancy activities for the other company were relevant.

Lastly, the Court of Justice observed that no reduction of the fine was granted to Prysmian on account of the unsuccessful nature of the appeal lodged by the companies in that group, [244] with the result that the appellant was not eligible for such a reduction. Consequently, the appeal was dismissed in its entirety.

Judgment of 21 January 2021, *Whiteland Import Export* (C-308/19, EU :C :2021 :47)

On 7 September 2009, the Consiliul Concurenţei (Competition Authority, Romania) initiated an investigation into the retail food market against several undertakings, including Whiteland Import Export SRL ('Whiteland'), in order to ascertain whether those undertakings had infringed the rules of competition law, in particular those laid down in Article 101 TFEU. The undertakings were accused of having concluded anticompetitive agreements between 2006 and 2009 aimed at distorting and impeding competition on the relevant market, by fixing the selling and resale price of the suppliers' products. By decision of 14 April 2015, the Consiliul Concurenţei (Competition Authority) imposed fines on them.

Finding that, under the applicable national rules, the limitation period had expired when the Competition Authority adopted its decision, the Curtea de Apel București (Court of Appeal, Bucharest, Romania), hearing an action brought by Whiteland, annulled that decision in so far as it concerned that company. After finding that the limitation period had started to run on 15 July 2009, the date on which the infringement of which Whiteland was accused had ended, that court held that the decision of 7 September 2009 to initiate the investigation had interrupted the limitation period and caused a new limitation period to start to run, expiring on 7 September 2014. It stated that, under a strict interpretation of the national rules governing limitation periods, the measures taken by the Consiliul Concurenţei (Competition Authority) after the decision to initiate the investigation were not capable of interrupting the new limitation period and, therefore, that decision was the last action of that authority capable of interrupting that period. In addition, that same court held that Article 25(3) of Regulation No 1/2003, concerning the interruption of the limitation period, applied only to the European Commission and did not govern limitation periods for the imposition of fines by national competition authorities

It was in that context that the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania; 'the referring court'), hearing an appeal brought by the Competition Authority against the judgment of the Curtea de Apel București (Court of Appeal, Bucharest), asked the Court, in essence, whether national courts are required to apply Article 25(3) of Regulation No 1/2003 to the time-barring of a national competition authority's powers to impose penalties for infringements of EU competition law. The referring court also

244| Judgment of 12 July 2018, ***Prysmian and Prysmian Cavi e Sistemi*** v ***Commission*** (T-475/14, EU :T :2018 :448), upheld by the judgment of 24 September 2020, ***Prysmian and Prysmian Cavi e Sistemi*** v ***Commission*** (C-601/18 P, EU :C :2020 :751).

requested the Court to clarify, in essence, whether Article 4(3) TEU and Article 101 TFEU, read in the light of the principle of effectiveness, must be interpreted as precluding national legislation, as interpreted by the national courts having jurisdiction, according to which the decision to initiate an investigation, adopted by the national competition authority, concerning an infringement of EU competition law rules, is the final action of that authority which may have the effect of interrupting the limitation period relating to its power to impose penalties and excludes any subsequent action, for the purpose of proceedings or the investigation, from interrupting that period.

Findings of the Court

As regards the first question, the Court stated that national courts are not required to apply Article 25(3) of Regulation No 1/2003 to the time-barring of a national competition authority's powers to impose penalties for infringements of EU competition law.

In that regard, it pointed out that, in the present case, the possible relevance of Article 25(3) of Regulation No 1/2003 – according to which any action taken by the Commission or by the competition authority of a Member State for the purpose of the investigation or proceedings in respect of an infringement is to interrupt the limitation period for the imposition of fines or periodic penalty payments – depends entirely on whether that provision is applicable to the factual situation in the main proceedings. The Court found that, in the light of the context of which that provision forms part and its purpose, the provision governs only the powers available to the Commission in relation to penalties. It follows that that same provision does not lay down limitation rules relating to the national competition authorities' powers to impose penalties.

As regards the second question, the Court noted, at the outset, that in the absence of binding regulation under EU law on the subject, it is for Member States to establish and apply national rules on limitation periods for the imposition of penalties by national competition authorities, including the procedures for suspension and/or interruption. However, the establishment and application of those rules may not render the implementation of EU law impossible in practice or excessively difficult.

The Court made clear that, for the purposes of not detracting from the full and uniform application of EU law and not introducing or maintaining in force measures which may render ineffective the competition rules applicable to undertakings, Member States must ensure that national rules laying down limitation periods are devised in such a way as to strike a balance between, on the one hand, the objectives of providing legal certainty and ensuring that cases are dealt with within a reasonable time as general principles of EU law and, on the other, the effective and efficient application of Articles 101 and 102 TFEU, in order to help safeguard the public interest in preventing the operation of the internal market being distorted by agreements or practices harmful to competition.

The Court noted in that regard that account must be taken of the specific features of competition law cases and in particular of the fact that those cases require, in principle, a complex factual and economic analysis. Consequently, national legislation laying down the date from which the limitation period starts to run, the duration of that period and the rules for suspending or interrupting it must be adapted to those specific features and the objectives of applying the rules of competition law by the persons concerned, so as not to prejudice the full effectiveness of the relevant EU rules. The Court also found that national rules on limitation which, for reasons inherent to them, are systematically an obstacle to the imposition of effective and dissuasive penalties for infringements of EU competition law are liable to render application of the rules of that law impossible in practice or excessively difficult.

In the present case, according to a strict interpretation of the national rules governing limitation periods at the material time – adopted in some of the national case-law, and in particular by the Curtea de Apel București (Court of Appeal, Bucharest) in the context of the main proceedings – the decision to initiate an investigation

for the purpose of proceedings or investigation in respect of an infringement of the rules of competition law is the final action of the national competition authority which may have the effect of interrupting the limitation period relating to its power to impose penalties; none of the actions taken subsequently for the purpose of the investigation or proceedings in respect of the infringement can interrupt that period, even if the taking of such forms of action would constitute an important stage in the investigation and show that authority's willingness to prosecute the infringement.

In those circumstances, the Court concluded that such a strict interpretation of the national legislation appeared likely to compromise the effective application of the rules of EU law by national competition authorities. Indeed, such an interpretation, totally prohibiting the limitation period from being interrupted by action taken subsequently in the course of the investigation, could present a systemic risk that acts constituting infringements of EU law may go unpunished. It is, however, for the referring court to determine whether that is the case here.

If that should prove to be the case, the Court stated that it would be for the referring court to interpret the national legislation at issue so far as at all possible in the light of EU law, and particularly the rules of EU competition law, as interpreted by the Court, or, as necessary, to disapply that legislation.

In that regard, the Court noted that the question whether a national provision must be disapplied, in so far as it conflicts with EU law, arises only if no interpretation of that provision in conformity with EU law proves possible.

However, in the present case, it was apparent from the order for reference that such an interpretation appeared possible, which would, however, be for the referring court ultimately to ascertain.

Judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904)

By decision of 17 March 2017, the European Commission found that, by coordinating various elements of their pricing relating to airfreight services, 19 airlines had infringed Article 101 TFEU and/or Article 53 of the EEA Agreement, [245] as well as Article 8 of the Agreement between the Swiss Agreement, [246] which prohibit cartels and trade practices that restrict competition. [247]

Taking the view that the applicable rules did not allow it to penalise those airlines' practices from their inception on routes which were not confined to the European Economic Area (EEA), the Commission set the starting date of the infringement period at different times depending on the routes concerned. While the infringement period used for routes between airports within the EEA ranged from December 1999 to February 2006, the starting date of the infringement period for routes between airports within the European Union

245| Article 1(1) of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3; 'the EEA Agreement'').

246| Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1; 'the Swiss Agreement'').

247| Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight).

and airports outside the EEA was set at 1 May 2004. For routes between airports in countries that are contracting parties to the EEA Agreement but are not Member States and third countries, that date was set at 19 May 2005, and for routes between EU airports and airports in Switzerland, at 1 June 2002.

Following the adoption of that decision, Stichting Cartel Compensation ('SCC') and Equilib Netherlands, two legal persons specialising in the recovery of compensation for damage resulting from infringements of competition law, brought several actions before the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), seeking, first, a declaration that the 19 airlines, by coordinating, between 1999 and 2006, their pricing relating to airfreight services, acted unlawfully with regard to the shippers that made use of those services and, secondly, an order requiring those airlines to pay compensation for the harm which those shippers suffered as a result of that conduct.

However, the Rechtbank Amsterdam (District Court, Amsterdam), had doubts as to whether, in a dispute governed by private law, it had jurisdiction to apply Article 81 EC (now Article 101 TFEU) or Article 53 of the EEA Agreement to the conduct at issue of the 19 airlines on routes not confined to the EEA, in so far as that conduct took place before the starting dates of the infringement periods set in the Commission decision. It therefore decided to refer that question to the Court for a preliminary ruling.

Findings of the Court

As regards the anticompetitive practices of airlines on routes between airports within the European Union and those in third countries, the Court noted, first of all, that as regards air transport on those routes, the provisions adopted by the Council pursuant to Article 83(1) EC (now Article 103(1) TFEU) with a view to organising the implementation of Article 81 EC did not enter into force until 1 May 2004. Consequently, only the arrangements provided for in Articles 84 and 85 EC (now Articles 104 and 105 TFEU) – under which, in the absence of provisions adopted pursuant to Article 83(1) EC, the (administrative) authorities of the Member States are responsible for implementing the principles contained in Article 81 EC – are applicable to those services before that date. The same applies, moreover, in relation to the conduct of the airlines that took place between 1999 and the date of entry into force of the Swiss Agreement, that is to say 1 June 2002, in so far as that conduct directly related to air transport services between airports in the European Union and those in Switzerland.

However, that finding entails neither that air transport services between airports in the European Union and those in third countries or in Switzerland were excluded from the application of Article 81 EC until 1 May 2004, in the case of third countries, or until 1 June 2002, in the case of Switzerland, nor that national courts are precluded from applying that provision in the absence of a decision of the competent national authorities or a Commission decision finding an infringement before those dates

It is clear from the Court's case-law that air transport has been subject to the general rules of the Treaties, including the rules on competition, since the entry into force of those treaties.

The Court also recalled that Article 81(1) EC produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect. Accordingly, national courts have jurisdiction to apply Article 81 EC in particular in disputes governed by private law, such jurisdiction deriving from the direct effect of that article.

That jurisdiction is not affected by the application of Articles 84 and 85 EC, since neither of those two provisions limits the application of Article 81 EC by the national courts, in particular in disputes governed by private law.

Nevertheless, the exercise by national courts of their jurisdiction to apply Article 81 EC in disputes governed by private law may be limited, inter alia, by the principle of legal certainty, in particular by the need to ensure that those courts and the entities responsible for the administrative implementation of EU competition rules do not adopt conflicting decisions, as well as by the need to preserve the decision-making or legislative powers of the EU institutions responsible for implementing those rules and to ensure that their acts have binding force.

Nonetheless, as regards the anticompetitive practices of airlines on routes between airports in the European Union and those in third countries or in Switzerland that occurred before the starting dates of the infringement periods set by the Commission in its decision of 17 March 2017, there is no risk that a national court's decision in a dispute governed by private law might conflict with an administrative decision implementing EU competition rules or interfere with the decision-making or legislative powers of the EU institutions.

As regards, lastly, the application of Article 53 of the EEA Agreement to the conduct of the 19 airlines in question, the Court noted that that agreement, which is intended, inter alia, to extend the internal market established within the European Union to the States of the European Free Trade Association, forms an integral part of EU law. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the TFEU are interpreted uniformly within the Member States.

It follows that, since Article 53 of the EEA Agreement is in essence identical to Article 81 EC, the former must be interpreted in the same way as the latter.

Accordingly, in the light of all the foregoing, the Court concluded that a national court, such as the Rechtbank Amsterdam (District Court, Amsterdam), has jurisdiction, in a dispute governed by private law, to apply Article 81 EC and Article 53 of the EEA Agreement to the anticompetitive practices of airlines on routes between airports in the European Union and those in third countries or in Switzerland that occurred before the dates on which, respectively, the provisions adopted by the Council pursuant to Article 83(1) EC, which became applicable to the first routes, and the Swiss Agreement entered into force.

2. Abuse of a dominant position (Article 102 TFEU)

Judgment of 25 March 2021, *Deutsche Telekom* v *Commission* (C-152/19 P, EU :C :2021 :238)

Judgment of 25 March 2021, *Slovak Telekom* v *Commission* (C-165/19 P, EU :C :2021 :239)

Slovak Telekom a.s. ('ST') offers, in its capacity as the incumbent telecommunications operator in Slovakia, broadband services on its fixed copper and fibre optic networks. ST's networks include also the 'local loop', namely the physical lines which connect the subscriber's telephone jack with the main distribution frame of the fixed telephone network.

Following an analysis of its domestic market, the Slovak national regulatory authority for telecommunications adopted, on 8 March 2005, a decision designating ST as an operator with significant market power on the wholesale market for unbundled access to the local loop. Consequently, ST was obliged, under the EU regulatory framework, [248] to grant alternative operators access to the local loop owned by it, so as to allow new entrants to use that infrastructure with a view to offering their own services to end users.

On 15 October 2014, the Commission adopted a decision in which it found that ST, and its parent company Deutsche Telekom AG ('DT'), had abused its dominant position on the Slovak market for broadband internet services, by limiting the access of alternative operators to its local loop between 2005 and 2010 ('the decision at issue'). The Commission found, more specifically, that ST, and DT, had infringed Article 102 TFEU by setting unfair terms and conditions in its reference offer concerning unbundled access to its local loop and by applying unfair tariffs which did not allow an equally efficient competitor to replicate the retail services offered by ST without incurring a loss. As a result, the Commission imposed a fine of EUR 38 838 000 on ST and DT, jointly and severally, and a fine of EUR 31 070 000 on DT.

By judgments of 13 December 2018, ***Deutsche Telekom*** v ***Commission*** [249] and ***Slovak Telekom*** v ***Commission,*** [250] the General Court partially annulled the decision at issue, setting the fine for which ST and DT had been found jointly and severally liable at EUR 38 061 963 and the fine for which DT alone had been found liable at EUR 19 030 981.

The appeals lodged by ST and DT were dismissed by the Court of Justice, which clarified, in that context, the scope of its judgment in ***Bronner*** [251] as regards the classification as abusive, for the purposes of Article 102 TFEU, of a refusal of access to infrastructures owned by a dominant undertaking. In that judgment, the Court had set a higher threshold for a finding that a practice consisting in a refusal, on the part of a dominant undertaking, to make available infrastructure it owns to competing undertakings, is abusive.

248| This includes Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33).

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

250| Judgment of 13 December 2018, ***Slovak Telekom*** v ***Commission*** (T-851/14, EU :T :2018 :929).

251| Judgment of 26 November 1998, ***Bronner*** (C-7/97, EU :C :1998 :569).

Findings of the Court

The Court made clear, first, that any undertaking, even if dominant, remains, in principle, free to refuse to conclude contracts for access to and use of the infrastructure that it has developed for its own needs. Imposing on a dominant undertaking, as a result of its abusive refusal to conclude a contract, an obligation to conclude a contract with a competing undertaking with a view to allowing that competing undertaking access to its own infrastructure is therefore especially detrimental to the freedom of contract and the right to property of the dominant undertaking. Thus, where a dominant undertaking refuses to give access to its infrastructure, the decision to oblige it to grant its competitors access cannot be justified, at a competition policy level, unless the dominant undertaking has a genuinely tight grip on the market concerned.

The Court noted, next, that the application of the conditions laid down by it in the judgment in *Bronner*, and in particular the third condition, makes it possible to determine whether a dominant undertaking has a genuinely tight grip on the market by virtue of its infrastructure. In accordance with that judgment, a dominant undertaking may be forced to give access to an infrastructure that it has developed for the needs of its own business only where, first, refusing that access is likely to eliminate all competition on the part of the competing undertaking requesting access, secondly, that refusal cannot be objectively justified, and thirdly, such access is indispensable to the business of the competing undertaking, that is to say, there is no actual or potential substitute for that infrastructure.

By contrast, where a dominant undertaking gives access to its infrastructure but makes that access subject to unfair conditions, the conditions laid down by the Court in its judgment in *Bronner* do not apply. While such practices can be abusive, in that they are able to give rise to anticompetitive effects on the markets concerned, they cannot be equated to a refusal by the dominant undertaking to give access to its infrastructure, since the competition authorities will not be able to force that undertaking to give access to its infrastructure, as that access has already been granted. The measures to be taken in such a context will thus be less detrimental to the freedom of contract of the dominant undertaking and to its right to property than forcing it to give access to its infrastructure where it has reserved that infrastructure for the needs of its own business.

In view of the EU regulatory framework, which requires ST to give competing undertakings access to its local loop, the Court recalled that that Slovak telecommunications operator could not and did not actually refuse to give access to that local loop. On the contrary, it was pursuant to its decision-making autonomy in respect of the configuration of that access that ST set the terms and conditions for access called into question in the decision at issue. Since those terms and conditions did not constitute a refusal of access comparable to the one at issue in the judgment in *Bronner*, the conditions set out by the Court in that regard do not apply in the present case. Contrary to the arguments put forward by ST and DT, the Commission was therefore not required to demonstrate that access to ST's local loop was indispensable for competing undertakings to enter the market, in order to be able to classify the terms and conditions for access called into question as an abuse of dominant position.

The other grounds of appeal relied on by ST and DT, relating inter alia to the assessment of ST's pricing practice which resulted in a margin squeeze and to the imputability of the infringement to DT as the parent company, were also rejected. In consequence, the Court dismissed the appeals in their entirety.

3. State aid

In the area of State aid, mention should be made of three judgments. The first concerns the existence of an 'economic advantage' for professional football clubs within the framework of a tax regime applicable to non-profit legal persons. The other two judgments deal with the existence of a possible 'selective advantage' and relate, respectively, to a tax on the retail sector introduced in Poland and a tax on advertising introduced in Hungary.

Judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona* (C-362/19 P, EU :C :2021 :169)

A Spanish law adopted in 1990 obliged all Spanish professional sports clubs to convert into public limited sports companies, with the exception of professional sports clubs that had achieved a positive financial balance during the financial years preceding adoption of that law. Fútbol Club Barcelona ('FCB'), and three other professional football clubs which came within that exception – Club Atlético Osasuna (Pamplona), Athletic Club (Bilbao) and Real Madrid Club de Fútbol (Madrid) – had thus chosen to continue operating in the form of non-profit legal persons and enjoyed, in that capacity, a special rate of income tax. As that specific tax rate remained, until 2016, below the rate applicable to public limited sports companies, the Commission took the view, by decision of 4 July 2016, [252] that that legislation, by introducing a preferential corporate tax rate for the four clubs concerned, constituted an unlawful aid scheme that was incompatible with the internal market and ordered Spain to discontinue it and to recover the individual aid provided to the beneficiaries of that scheme.

Hearing an action brought by FCB against the decision at issue, the General Court, by judgment of 26 February 2019, [253] annulled that decision on the ground that the Commission had not proven to the requisite legal standard the existence of an economic advantage conferred on the beneficiaries of the measure in question. In particular, the General Court found that the Commission had not sufficiently assessed whether the advantage resulting from the reduced tax rate could be offset by the less favourable deduction rate for reinvestment of extraordinary profits applicable to professional football clubs operating in the form of non-profit legal persons compared to that applicable to entities operating in the form of public limited sports companies.

In its judgment of 4 March 2021, the Court of Justice, granting the form of order sought in the appeal brought by the Commission, set aside the judgment under appeal. In support of its appeal, the Commission had raised a single ground alleging infringement of Article 107(1) TFEU, so far as concerns, first, the concept of an 'advantage capable of constituting State aid', for the purposes of that provision, and, secondly, the Commission's obligations in connection with the examination of the existence of aid, in particular from the point of view of the existence of an advantage. In that context, the Court of Justice set out the evidentiary requirements incumbent on the Commission in the analysis of whether a tax regime confers an advantage on its beneficiaries and, therefore, whether it is capable of constituting 'State aid' within the meaning of Article 107(1) TFEU.

252| Commission Decision (EU) 2016/2391 of 4 July 2016 on the State aid SA.29769 (2013/C) (ex 2013/NN) implemented by Spain for certain football clubs (OJ 2016 L 357, p. 1; 'the decision at issue').

253| Judgment of 26 February 2019, ***Fútbol Club Barcelona*** v ***Commission*** (T-865/16, EU :T :2019 :113; 'the judgment under appeal').

Findings of the Court

In its assessment of the merits of the single ground of appeal, the Court of Justice found, in the first place, that the General Court had erred in law in finding that the decision at issue had to be construed as a decision relating both to an aid scheme [254] and to individual aid, since the Commission also expressed its view, in its decision, on the aid individually granted to the four clubs named as beneficiaries. In the case of an aid scheme, a distinction must be drawn between the adoption of that scheme and the aid granted on the basis of it. Individual measures which merely implement an aid scheme constitute mere measures implementing the general scheme, which do not, in principle, have to be notified to the Commission.

In the present case, the Court of Justice observed that the disputed measure concerned such an aid scheme, since the specific tax provisions applicable to non-profit entities, in particular the reduced tax rate, were capable of benefitting, by virtue of that measure alone, each of the eligible football clubs, defined in a general and abstract manner, for an indefinite period of time and an indefinite amount, without further implementing measures being required and without those provisions being linked to the realisation of a specific project. Therefore, the mere fact that, in the present case, aid was granted individually to the clubs on the basis of the aid scheme at issue cannot have any bearing on the examination to be carried out by the Commission to determine the existence of an advantage. In those circumstances, therefore, the General Court was wrong to find such a fact to be relevant.

In the second place, the Court of Justice found that the error of law thus committed by the General Court vitiated the conclusions which the General Court drew from it as to the extent of the obligations incumbent on the Commission as regards proof of the existence of an advantage. That erroneous premiss led the General Court to consider that the Commission ought to have taken into account, for the purpose of its analysis, not only the advantage resulting from the reduced tax rate, but also the other components of the tax regime at issue, which the General Court found to be inseparable from that regime, such as the possibilities of deductions, in so far as capping those deductions could offset that advantage. The Court of Justice recalled that, admittedly, the Commission is required to carry out a global assessment of the aid scheme, taking into account all the components which constitute its specific features, both favourable to its beneficiaries and unfavourable to them. However, the examination of the existence of an advantage cannot depend on the financial situation of the beneficiaries at the time of the subsequent grant of individual aid on that basis. In particular, the impossibility of determining, at the time of the adoption of an aid scheme, the exact amount, per tax year, of the advantage actually conferred on each of its beneficiaries, cannot prevent the Commission from finding that that scheme was capable, from that moment, of conferring an advantage on those beneficiaries and cannot, accordingly, exempt the Member State concerned from its substantive obligation to notify such a scheme. If, as the General Court acknowledged in the judgment under appeal, the Commission were required to verify, in the context of the analysis of a tax regime, on the basis of updated data, whether the advantage has actually materialised in subsequent tax years, and, where relevant, whether the advantage has been offset by the disadvantages recorded in other tax years, Member States which fail to comply with their obligation to notify such a scheme would be favoured by the approach in question. It is, therefore, only at the stage of the possible recovery of the individual aid granted on the basis of the aid scheme at issue that the Commission is required to look at the individual situation of each beneficiary, such recovery requiring the exact amount of aid which those beneficiaries have actually obtained in each tax year to be determined.

254| Within the meaning of Article 1(d) of 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).

In the present case, it was common ground that, from the time of its adoption, the aid scheme resulting from the disputed measure, in so far as it granted certain clubs eligible for that scheme – including FCB – the possibility of continuing to operate, by way of derogation, as a non-profit entity, allowed them to benefit from a reduced tax rate compared to that applicable to clubs operating as public limited sports companies. In so doing, the aid scheme at issue was, from the time of its adoption, liable to favour clubs operating as non-profit entities over clubs operating in the form of public limited sports companies, thereby conferring on them an advantage capable of falling within the scope of Article 107(1) TFEU. It follows that, to demonstrate to the requisite legal standard that the aid scheme at issue confers on its beneficiaries an advantage falling within the scope of that provision, the Commission was not required to examine, in the decision at issue, the effect of the deduction for reinvestment of extraordinary profits or that of the possibilities of deferral in the form of a tax credit, and, in particular, whether that deduction or those possibilities would neutralise the advantage resulting from the reduced tax rate. Therefore, the General Court erred in law in ruling that the Commission was obliged to carry out such an examination, if necessary, by requesting relevant information. Consequently, the Court set aside the judgment under appeal on that point.

Lastly, as regards the consequences of setting aside the judgment under appeal, the Court observed, first of all, that to uphold the action seeking annulment of the decision at issue, the General Court admittedly upheld, by the judgment under appeal, the second plea in law alleging, in essence, an incomplete analysis of the existence of an advantage, but first rejected the plea alleging infringement of Article 49 TFEU, in that the Commission ought, according to the FCB, to have found that the obligation imposed on professional sports clubs to convert themselves into public limited sports companies was contrary to the freedom of establishment guaranteed by that provision. In such circumstances, the Court found that FCB or Spain, intervening in support of the form of order sought by the football club, were entitled to challenge, in the context of a cross-appeal, the merits of the grounds for rejecting the plea in question, even if the General Court had upheld their forms of order on other grounds. In the absence of such an appeal, the judgment under appeal therefore has the force of *res judicata* on that point.

That being clear, the Court considered that the state of the proceedings was such that it could give final judgment in the matter and, ruling, accordingly, on it, it rejected the four other pleas relied on at first instance alleging, respectively, errors which the Commission committed in its examination of the advantage conferred by the measure in question, infringement of the principles of the protection of legitimate expectations and of legal certainty, infringement of Article 107(1) TFEU, in that the Commission did not consider that the disputed measure was justified by the internal logic of the tax system at issue, and infringement of the rules applicable to the recovery of existing aid. Consequently, the Court dismissed the action brought by FCB.

Judgment of 16 March 2021 (Grand Chamber), *Commission* v *Poland* (C-562/19 P, EU :C :2021 :201)

Judgment of 16 March 2021 (Grand Chamber), *Commission* v *Hungary* (C-596/19 P, EU :C :2021 :202)

By a law which entered into force on 1 September 2016, Poland introduced a tax on the retail sector. That tax was based on the monthly turnover of any retailer involved in the sale of goods to consumers, above a sum of 17 million zlotys (PLN) (approximately EUR 4 million). That tax included two bands: a rate of 0.8% applied to turnover between PLN 17 million and 170 million (between, approximately, EUR 4 and 40 million) and a rate of 1.4% charged on the portion of turnover exceeding that latter amount.

Following the formal investigation procedure in respect of that measure initiated by decision of 19 September 2016, [255] the European Commission considered, by decision of 30 June 2017, [256] that that progressive tax constituted State aid incompatible with the internal market and required Poland to cancel all the payments suspended in respect of that tax, with effect from the date of adoption of that second decision.

By judgment of 16 May 2019, [257] the General Court, hearing a case brought by Poland, annulled the opening decision and the negative decision concerning Poland. It held, first, that the Commission was wrong to consider that the establishment of a progressive tax on turnover generated by the retail sale of goods would lead to a selective advantage in favour of undertakings with low turnover linked to that activity and, secondly, that as regards the opening decision, the Commission was not entitled, on the basis of the case file at the time of the adoption of that decision, provisionally to classify the tax measure in question as new aid without relying on the existence of legitimate doubts on that point.

For its part, Hungary had introduced, by a law that entered into force on 15 August 2014, a progressive tax on revenue linked to the publication and broadcasting of advertisements in that Member State. That tax, based on the net turnover of persons who broadcast or publish advertisements (print media, audiovisual media or billposters), operating in Hungary, initially included a scale of six progressive rates based on turnover, later adapted to include only two rates, accompanied by the option, for taxable persons whose profits before tax in the 2013 financial year were zero or negative, to deduct from their tax base 50% of the losses carried forward from previous years.

Following the formal investigation procedure in respect of that measure, initiated by the decision of 12 March 2015, [258] the Commission considered, by decision of 4 November 2016, [259] that the tax measure adopted by Hungary, on account of both its progressive structure and the possibility of deducting the losses carried forward that it included, constituted State aid that was incompatible with the internal market and it ordered the immediate and effective recovery of the aid paid to the beneficiaries thereof.

By judgment of 27 June 2019, [260] the General Court, hearing a case brought by Hungary, annulled that decision, holding that the Commission had erred in finding that the tax measure in question and the mechanism for the partial deductibility of losses carried forward constituted selective advantages.

In two judgments delivered on 16 March 2021, the Court of Justice, sitting as the Grand Chamber, dismissed the appeals brought by the Commission against the judgments under appeal. In support of its appeals, the Commission claimed in particular that the General Court had infringed Article 107(1) TFEU, in holding that the progressive nature of the taxes on turnover respectively in question did not lead to a selective advantage.

255| Decision of 19 September 2016 on State aid SA.44351 (2016/C) (ex 2016/NN) – Polish tax on the retail sector – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2016 C 406, p. 76; 'the opening decision' or 'the opening decision concerning Poland').

256| Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (OJ 2018 L 29, p. 38; 'the negative decision concerning Poland').

257| Judgment of 16 May 2019, ***Poland*** v ***Commission*** (T-836/16 and T-624/17, EU :T :2019 :338).

258| Decision of 12 March 2015 on State aid SA.39235 (2015/C) (ex 2015/NN) – Hungary – Advertisement tax – Invitation to submit comments pursuant to Article 108(2) [TFEU] (OJ 2015 C 136, p. 7).

259| Commission Decision (EU) 2017/329 of 4 November 2016 on the measure SA.39235 (2015/C) (ex 2015/NN) implemented by Hungary on the taxation of advertisement turnover (OJ 2017 L 49, p. 36; 'the negative decision concerning Hungary' or, together with the negative decision concerning Poland, 'the decisions at issue').

260| Judgment of 27 June 2019, ***Hungary*** v ***Commission*** (T-20/17, EU:T:2019:448; together with the abovementioned judgment in ***Poland*** v ***Commission***; 'the judgments under appeal').

Rejecting, in its judgments, the Commission's objections, the Court reaffirmed, in the sphere of State aid, the principle established concerning the fundamental freedoms of the internal market to the effect that, given the current state of harmonisation of EU tax law, the Member States are free to establish the system of taxation which they deem most appropriate, so that the application of progressive taxation based on turnover falls within the discretion of each Member State, [261] provided that the characteristics constituting the measure in question do not entail any manifestly discriminatory element.

Findings of the Court

As a preliminary point, the Court noted that, for the purpose of classifying a measure that is of general scope as 'State aid', within the meaning of Article 107(1) TFEU, the condition relating to the selectivity of the advantage provided for by the measure in question requires a determination as to whether it is such as to favour 'certain undertakings or the production of certain goods' over others, which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory. In particular, where it concerns a national tax measure, it is for the Commission, after having identified the reference system, namely the 'normal' tax regime applicable in the Member State concerned, to demonstrate that the tax measure in question derogates from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that measure, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

It was in the light of those considerations that the Court of Justice examined, first, whether, in the present cases, the General Court was right to find, in essence, that the Commission had not demonstrated that the progressive nature of the tax measures in question entailed conferring a selective advantage on 'certain undertakings or the production of certain goods'. With regard to that point, the Court of Justice upheld the General Court's analysis that the progressivity of the rates provided for by each of the tax measures in question formed an integral part of the reference system in the light of which it was necessary to assess whether the existence of a selective advantage could be established.

Taking into account the fiscal autonomy which the Member States are recognised as having outside the fields subject to harmonisation under EU law, they are free to establish the system of taxation which they deem most appropriate and to adopt, as required, progressive taxation. In particular, EU law on State aid does not preclude, in principle, Member States from deciding to opt for progressive tax rates, intended to take account of the ability to pay of taxable persons, nor does it require Member States to reserve the application of progressive rates only to taxes based on profits, to the exclusion of those based on turnover.

In those circumstances, the characteristics constituting the tax, which include progressive tax rates, form, in principle, the reference system or the 'normal' tax regime for the purposes of analysing the condition of selectivity. It is for the Commission, where necessary, to demonstrate that the characteristics of a national tax measure were designed in a way that is manifestly discriminatory, with the result that they should be excluded from the reference system, which could in particular reveal an inconsistent choice of taxation criteria in the light of the objective pursued by that measure. In that regard, the Court found, however, in the present cases, that the Commission had not established that the characteristics of the measures adopted by the Polish and Hungarian legislatures respectively had been designed in a manifestly discriminatory manner, with the aim of circumventing the requirements of EU law on State aid. In those circumstances, the

261| See, inter alia, to that effect, judgments of 3 March 2020, ***Vodafone Magyarország,*** (C-75/18, EU :C :2020 :139, paragraph 49), and of 3 March 2020, ***Tesco-Global Áruházak*** (C-323/18, EU :C :2020 :140, paragraph 69), and, as regards State aid, judgment of 26 April 2018, ***ANGED*** (C-233/16, EU :C :2018 :280, paragraph 50).

General Court was therefore justified in holding, in the judgments under appeal, that the Commission had incorrectly relied on an incomplete and notional system in considering that the progressive scale of tax measures respectively in question did not form part of the reference system in the light of which the selective nature of those measures had to be assessed.

In the case (C-562/19 P) concerning the tax on the retail sector established in Poland, the Court of Justice then examined the grounds relied on by the General Court in order also to annul the opening decision. In that instance, the General Court held, in essence, that the Commission had based the provisional classification of the tax measure in question as new aid on a manifestly incorrect analysis of that measure, which was, consequently, not capable of substantiating to the requisite legal standard the existence of legitimate doubts concerning that classification. In that regard, the Court of Justice noted that the EU Courts, when reviewing the validity of such a decision opening a formal investigation procedure, are called upon to carry out a limited review of the assessment made by the Commission as regards the classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU. However, the Court of Justice found that, in ruling as it did, the General Court merely carried out in respect of the Commission's provisional 'State aid' classification in the opening decision a review of the manifest error of assessment and noted in that regard that the General Court did not, in any event, annul that decision following mere repetition of the grounds that led it to annul the negative decision concerning Poland. Consequently, the Court of Justice rejected the grounds of appeal concerning the judgment of the General Court in so far as it annulled the opening decision and the accompanying suspensory injunction.

Finally, in the case (C-596/19 P) concerning the tax on advertising established in Hungary, the Court of Justice found that the General Court did not err in law in considering that the transitional measure of the partial deductibility of losses carried forward did not lead to a selective advantage. The establishment of a transitional measure taking into account profits is not inconsistent in the light of the redistribution objective pursued by the Hungarian legislature, when establishing the tax on advertising. The Court of Justice made clear in that regard that, in that case, the criterion concerning the lack of profits recorded in the financial year preceding the entry into force of that tax was objective in nature, since the undertakings benefiting from the transitional measure of partial deductibility of the losses had, from that point of view, a lesser ability to pay than others.

On those grounds, the Court of Justice rejected all the appeals brought by the Commission against the judgments under appeal in their entirety.

XIII. Tax provisions

Judgment of 4 March 2021, *Frenetikexito* (C-581/19, EU :C :2021 :167)

Frenetikexito is a commercial company which manages and operates in Portugal sports facilities, physical well-being and fitness activities and nutrition monitoring and advice activities. In 2014 and 2015, it provided nutrition monitoring services on its premises by means of a qualified nutritionist certified for that purpose. Value added tax (VAT) was not invoiced for those services.

Frenetikexito offered various programmes in its facilities, some of which included only physical well-being and fitness services, while others also included nutrition monitoring. Each customer could choose the desired programme and make use, or not, of all the services made available in the context of the programme selected; the nutrition monitoring service was thus invoiced, irrespective of whether or not the customer used it. In addition, it was possible to sign up for that service separately from any other service, in return for payment of a certain amount.

In its invoices, Frenetikexito drew a distinction between amounts relating to physical well-being and fitness services and those relating to the nutrition monitoring service. There was no correspondence between the nutrition monitoring services invoiced and the nutrition consultations.

In the course of an inspection, the tax authority found that, for the tax years in question, Frenetikexito's customers had paid for the nutrition monitoring service even where they had not used it. Taking the view, therefore, that the supply of that service was ancillary to that of the physical well-being and fitness service, the tax authority applied the same tax treatment to that supply as that of the principal supply and issued an additional VAT assessment together with the corresponding compensatory interest. Since those sums were not paid, enforcement procedures were initiated for their recovery. Nevertheless, considering that the nutrition monitoring services were independent of the physical well-being and fitness services, Frenetikexito brought an action before the Tribunal Arbitral Tributário (Centro de Arbitragem Administrativa) (Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal) seeking a declaration that the additional assessment in question was unlawful.

It was in those circumstances that the referring court decided to ask the Court about the interpretation of Article 132(1)(c) of the VAT Directive, [262] read in conjunction with Article 2(1)(c) thereof. Under the latter provision, the supply of services for consideration within the territory of a Member State by a taxable person acting as such is to be subject to VAT. By way of exception to that principle, under Article 132(1)(c) of the VAT directive, Member States are to exempt 'the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned'.

In its judgment, the Court examined whether a nutrition monitoring service, supplied in circumstances such as those at issue in the main proceedings, must be regarded as a 'supply ancillary to the main supply', subject to VAT, or whether, on the contrary, it constitutes a distinct and independent supply of services and, if so, whether and under what conditions such a supply may be exempt from VAT.

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

Findings of the Court

Before answering the question whether a nutrition monitoring service supplied by a certified and authorised professional in sports facilities, and potentially in the context of programmes that also include physical well-being and fitness services, constitutes an independent supply of services, the Court considered, first of all, whether that service falls within the scope of the exemption provided for in Article 132(1)(c) of the VAT Directive.

In that regard, the Court stated that 'the provision of medical care' within the meaning of that article must necessarily have a therapeutic purpose, that is to say, it must be carried out with the aim of protecting, including maintaining or restoring, the health of persons. In order to be covered by the abovementioned exemption, a supply must therefore satisfy two conditions: it must have a therapeutic purpose and take place in the exercise of the medical and paramedical professions as defined by the Member State concerned.

As regards the second condition, it is necessary to determine whether a nutrition monitoring service, such as that at issue in the main proceedings, is defined by the law of the Member State concerned as being supplied in the exercise of a medical or paramedical profession. The Court observed that, in the present case, the service in question was carried out by a person qualified and authorised to carry out paramedical activities as defined by the Member State concerned.

If that is indeed the case, it is necessary to examine the purpose of the supply in question, which corresponds to the first condition laid down in Article 132(1)(c) of the VAT Directive. In so far as the exemptions provided for in Article 132 of that directive form part of a chapter entitled 'Exemptions for certain activities in the public interest', an activity cannot be exempted if it does not meet that objective in the public interest.

In that regard, a nutrition monitoring service provided in a sports facility may, like the sporting practice itself, help to prevent certain illnesses, such as obesity. Such a service therefore, in principle, has a health purpose, but not necessarily a therapeutic one. In the absence of any indication that it is supplied for that purpose, the nutrition monitoring in question does not therefore satisfy the criterion of activity in the public interest, which is common to all the exemptions provided for in Article 132 of the VAT Directive. Consequently, it does not fall within the exemption provided for in Article 132(1)(c) of that directive, with the result that it is, in principle, subject to VAT.

The Court then examined whether the nutrition monitoring service was independent of the physical well-being and fitness services, which is relevant for the purpose of determining the respective tax treatment of those services. It pointed out that, where an economic transaction comprises a bundle of elements and acts, regard must be had to all the circumstances in which that transaction takes place in order to determine whether it gives rise to one or more supplies. As a general rule, each supply must be regarded as a distinct and independent supply. By way of exception to that rule, acts supplied by the taxable person to the customer which are so closely linked that they form, objectively, a single, indivisible economic supply are regarded as a single complex supply. One other exception corresponds to the situation in which certain elements are to be regarded as constituting the main supply, while other elements are to be regarded as ancillary supplies which share the tax treatment of the main supply. The relevant criteria in that regard are the absence of a distinct purpose of the supply from the perspective of the average consumer and the taking into account of the respective value of each of the supplies forming part of the economic transaction.

Subject to verification by the referring court, none of those exceptions is applicable in the present case. First, supplies such as those at issue in the main proceedings, which are not inextricably linked, do not constitute a single complex supply. Secondly, dietary monitoring has, for the average consumer, an autonomous purpose, of a health and aesthetic nature, compared with physical well-being and fitness services, the purpose of which relates to sport. Furthermore, the invoicing of those supplies, mentioned by the referring court, shows

that 40% of the overall monthly fee was attributable to the nutrition advice service, with the result that dietary monitoring services such as those at issue in the main proceedings cannot be regarded as ancillary to the main services, consisting of physical well-being and fitness services. Therefore, such supplies must be regarded as distinct and independent of one another for the purposes of the application of Article 2(1)(c) of the VAT Directive.

In addition, it should be noted that, in its judgments of 16 March 2021 in ***Commission* v *Poland*** (C-562/19 P, EU :C :2021 :201) and ***Commission* v *Hungary*** (C-596/19 P, EU :C :2021 :202), the Court also ruled on a tax on the retail sector introduced in Poland and a tax on advertising introduced in Hungary. [263]

XIV. Approximation of laws

1. Intellectual property

In the field of intellectual property, four judgments are worthy of note. The first three concern copyright. The fourth judgment relates to designs and gave the Court the opportunity to rule on the concept of 'individual character' of a design under EU law and on the concept of 'making available to the public' of an unregistered design.

1.1 Copyright

In the area of copyright, the Court ruled, in the first judgment cited below, on the circumstances in which a 'communication to the public' is deemed to be made by the operators of an online sharing platform and on their liability for infringements of intellectual property rights committed by users of their platform. In the second judgment, the Court provided guidance on the concept of 'communication to the public' in the context of the embedding and making available to the public, on a website, of a work available on another website. The third judgment concerns the interpretation of the concept of 'making available to the public' and the circumstances in which a holder of intellectual property rights may benefit from the system of protection of those rights.

Judgment of 22 June 2021 *(*Grand Chamber*), YouTube and Cyando (*C-682/18 *and* C-683/18, EU :C :2021 :503)

In the dispute giving rise to the first case (C-682/18), Frank Peterson, a music producer, brought an action against YouTube and its legal representative Google before the German courts in respect of the posting online, on YouTube, in 2008, of a number of recordings over which he claims to hold various rights. Those works were posted by users of that platform without his permission. They consist of songs from the album 'A Winter Symphony' by Sarah Brightman and private audio recordings made during concerts on her 'Symphony Tour'.

263| Those judgments are presented in Section XII.3 'State aid'.

In the dispute giving rise to the second case (C-683/18), the publisher Elsevier brought an action against Cyando before the German courts in respect of the posting online, on the 'Uploaded' file-hosting and -sharing platform, in 2013, of various works over which Elsevier holds exclusive rights. Those works were posted by users of that platform without Elsevier's permission. They are 'Gray's Anatomy for Students', 'Atlas of Human Anatomy' and 'Campbell-Walsh Urology', which could be consulted on Uploaded via the link collections rehabgate.com, avaxhome.ws and bookarchive.ws.

The Bundesgerichtshof (Federal Court of Justice, Germany), before which the two cases had been brought, referred a number of questions to the Court for a preliminary ruling seeking clarification on, inter alia, the rules governing the liability of operators of online platforms as regards copyright-protected works illegally posted online on such platforms by platform users.

The Court examined that liability under the rules, applicable at the material time, set out in the Copyright Directive, [264] Directive on electronic commerce [265] and Directive 2004/48 on the enforcement of copyright. [266] The questions referred did not concern the rules established by Directive 2019/790 relating to copyright and related rights in the Digital Single Market, [267] which came into force after the material time.

In its Grand Chamber judgment, the Court found, inter alia, that as EU law currently stands, operators of online platforms do not themselves make a communication to the public of copyright-protected content illegally posted online by users of those platforms unless those operators contribute, beyond merely making those platforms available, to giving access to such content to the public in breach of copyright. Moreover, the Court held that such operators may benefit from the exemption from liability under Directive on electronic commerce unless they play an active role of such a kind as to give them knowledge of or control over the content uploaded to their platform.

264| Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10; 'the Copyright Directive').

265| Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ 2000 L 178, p. 1).

266| Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

267| Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92). That directive establishes, for operators of online platforms, a new specific liability regime in respect of works illegally posted online by users of those platforms. The directive, which had to be transposed by each Member State into its national law by 7 June 2021 at the latest, requires, inter alia, those operators to seek permission from rightholders, for example by concluding a licensing agreement, for works posted online by users of their platform.

Findings of the Court

In the first place, the Court examined whether the operator of a video-sharing platform or a file-hosting and file-sharing platform on which users can illegally make protected content available to the public itself carries out, in circumstances such as those at issue in the present cases, a 'communication to the public' of that content within the meaning of the Copyright Directive. [268] To that end, it drew attention to the objectives and definition of the concept of a 'communication to the public' as well as the associated criteria which must be taken into account when making an individual assessment of what that concept means.

Amongst those criteria, the Court emphasised the indispensable role played by the platform operator and the deliberate nature of its intervention. The platform operator makes an 'act of communication' when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not, in principle, be able to enjoy the broadcast work.

In that context, the Court found that the operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of the Copyright Directive, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright.

That is the case, inter alia, where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform to communicate protected content illegally to the public via that platform.

In the second place, the Court considered whether the operator of an online platform may benefit from the exemption from liability, provided for in Directive on electronic commerce, [269] in respect of protected content which users illegally communicate to the public via its platform. In that regard, it pointed out that it is necessary to examine whether the role played by that operator is neutral, that is to say, whether its conduct is merely technical, automatic and passive, which means that it has no knowledge of or control over the content it stores, or whether, on the contrary, that operator plays an active role that gives it knowledge of or control over that content. Such an operator can thus benefit from that exemption from liability provided that it does

268| Article 3(1) of the Copyright Directive. Under that provision, Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

269| Article 14(1) of Directive on electronic commerce. Under that provision, where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States are to ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

not play an active role of such a kind as to give it knowledge of or control over the content uploaded to its platform. To be excluded from entitlement to that exemption, the operator must have knowledge or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

In the third place, the Court clarified the circumstances in which rightholders covered by the Copyright Directive [270] may obtain injunctions against operators of online platforms. It found that that directive does not preclude a situation under national law whereby a copyright holder or the holder of a related right may not obtain an injunction against an operator whose service has been used by a third party to infringe his or her right, that operator having had no knowledge or awareness of that infringement, within the meaning of Directive on electronic commerce, [271] unless, before court proceedings are commenced, that infringement has first been notified to that operator and the latter has failed to intervene expeditiously in order to remove the content in question or to block access to it and to ensure that such infringements do not recur.

It is, however, for the national courts to satisfy themselves, when applying such a condition, that that condition does not result in the actual cessation of the infringement being delayed in such a way as to cause disproportionate damage to the rightholder.

Judgment of 9 March 2021 *(*Grand Chamber*), VG Bild-Kunst (*C-392/19, EU :C :2021 :181*)*

Stiftung Preußischer Kulturbesitz ('SPK'), a German foundation, is the operator of the Deutsche Digitale Bibliothek, a digital library devoted to culture and knowledge, which networks German cultural and scientific institutions. The website of that library contains links to digitised content stored on the internet portals of participating institutions. As a 'digital showcase', the Deutsche Digitale Bibliothek itself stores only thumbnails, that is to say smaller versions of original images.

VG Bild-Kunst, a visual arts copyright collecting society in Germany, maintained that the conclusion with SPK of a licence agreement for the use of its catalogue of works in the form of thumbnails should be subject to the condition that the agreement include a provision whereby SPK would undertake, when using the works covered by the agreement, to implement effective technological measures against the framing, [272] by third parties, of the thumbnails of such works on the website of the Deutsche Digitale Bibliothek.

SPK considered that such a term in the agreement was unreasonable in the light of copyright and brought an action before the German courts seeking a declaration that VG Bild-Kunst was required to grant SPK that licence without that grant being subject to any condition requiring the implementation of measures to prevent framing. [273]

270| Article 8(3) of the Copyright Directive. Under that provision, Member States are to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

271| Article 14(1)(a) of Directive on electronic commerce.

272| The technique of framing consists in dividing a website page into several frames and posting within one of them, by means of a clickable link or an embedded internet link (inline linking), an element coming from another site in order to hide from the users of that site the original environment to which that element belongs.

273| Under German law, collecting societies are obliged to grant to any person who so requests, on reasonable terms, a licence to use the rights whose management is entrusted to them. However, according to German case-law, they could, exceptionally, refuse to grant a licence, provided that that refusal was not an abuse of monopoly power and that the licence application was objectionable by reference to overriding legitimate interests.

Against that background, the Bundesgerichtshof (Federal Court of Justice, Germany) asked the Court to determine whether that framing must be held to be a communication to the public within the meaning of the Copyright Directive, [274] which, if that is the case, would permit VG Bild-Kunst to require SPK to implement such measures.

The Grand Chamber of the Court held that the embedding by means of framing, in a website page of a third party, of works protected by copyright and made freely accessible to the public with the authorisation of the copyright holder on another website constitutes a communication to the public where that embedding circumvents protection measures against framing adopted or imposed by the copyright holder.

Findings of the Court

First, the Court stated that the alteration in the size of the works in framing is not a factor in the assessment of whether there is an act of communication to the public, so long as the original elements of those works are perceptible.

Next, the Court pointed out that the technique of framing constitutes an act of communication to a public, since the effect of that technique is to make the posted element available to all the potential users of a website. Furthermore, the Court noted that, provided that the technical means used by the technique of framing are the same as those previously used to communicate the protected work to the public on the original website, namely the internet, that communication does not satisfy the condition of being made to a new public and accordingly does not fall within the scope of a communication 'to the public', within the meaning of the Copyright Directive.

However, that consideration is applicable only in a situation where access to the works concerned on the original website is not subject to any restrictive measure. In that situation, the rightholder has authorised from the outset the communication of his or her works to all internet users.

Conversely, where the rightholder has established or imposed from the outset restrictive measures linked to the publication of his or her works, he or she has not agreed to third parties being able to communicate his or her works freely to the public. On the contrary, his or her intention was to restrict the public having access to his or her works solely to the users of a particular website.

Consequently, where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of the technique of framing, constitutes an act of 'making that work available to a new public'. That communication to the public must, therefore, be authorised by the rightholders concerned.

The contrary approach would amount to creating a rule on exhaustion of the right of communication. Such a rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his or her work. Accordingly, the consequence of such an approach would be that the need to safeguard a fair balance in the digital environment between, on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, and, on the other, the protection of the interests and fundamental rights of users of protected subject matter, would be disregarded.

274| Under Article 3(1) of the Copyright Directive Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

Lastly, the Court made clear that a copyright holder may not limit his or her consent to framing by means other than effective technological measures. In the absence of such measures, it might prove difficult to ascertain whether that rightholder intended to oppose the framing of his or her works.

Judgment of 17 June 2021, *M.I.C.M.* (C-597/19, EU :C :2021 :492)

The undertaking Mircom International Content Management Consulting (M.I.C.M.) Limited ('Mircom') submitted a request for information directed against Telenet BVBA, an internet service provider, to the Ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium; 'the referring court'). That request sought a decision requiring Telenet to produce the identification data of its customers on the basis of IP addresses collected, by a specialised company, on behalf of Mircom. The internet connections of Telenet's customers had been used to share films in the Mircom catalogue, on a peer-to-peer network, using the BitTorrent protocol. Telenet challenged that request.

It was in that context that the referring court, first of all, asked the Court whether the sharing of pieces of a media file containing a protected work on that network constituted a communication to the public under EU law. Next, it sought to ascertain whether a holder of intellectual property rights, such as Mircom, which does not use them, but claims damages from alleged infringers, can benefit from the measures, procedures and remedies provided for by EU law in order to ensure that those rights are enforced, for example by requesting information. Finally, it asked the Court to clarify the question of the lawfulness of the way in which the customers' IP addresses had been collected by Mircom and of the communication of the data requested by Mircom from Telenet.

In its judgment, the Court held, first, that uploading pieces of a media file to a peer-to-peer network, such as that at issue in the main proceedings, constitutes making available to the public within the meaning of EU law. [275] Secondly, a holder of intellectual property rights, such as Mircom, may benefit from the system of protection of those rights, but its request for information, in particular, must be non-abusive, justified and proportionate. [276] Thirdly, the systematic registration of IP addresses of users of such a network and the communication of their names and postal addresses to that rightholder or to a third party in order to enable an action for damages to be brought are permissible under certain conditions. [277]

275| Article 3(1) and (2) of the Copyright Directive.

276| Article 3(2) and Article 8 of Directive 2004/48.

277| Point (f) of the first subparagraph of Article 6(1) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1), read in conjunction with Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

Findings of the Court

In the first place, the Court – which has already ruled on the concept of 'communication to the public' in the context of copyright protection – clarified that the uploading of pieces, previously downloaded, of a media file containing a protected work using a peer-to-peer network constitutes 'making [a work] available to the public', even though those pieces are unusable in themselves and the uploading is automatically generated when the user has subscribed to the BitTorrent client sharing software in giving his or her consent to its application after having duly been informed of its characteristics.

The Court made clear, in that connection, that any user of that network can easily reconstruct the original file from pieces available on the computers of other users. By downloading the pieces of a file, that user simultaneously makes them available for uploading by other users. In that regard, the Court found that the user must not in fact download a minimum threshold of pieces and that any act by which he or she gives access to protected works in full knowledge of the consequences of his or her conduct may constitute an act of making available. The present case indeed concerns such an act, because the act in question refers to an indeterminate number of potential recipients, involves a fairly large number of persons and is carried out with regard to a new public. That interpretation seeks to maintain the fair balance between the interests and fundamental rights of the holders of intellectual property rights, on the one hand, and users of protected subject matter, on the other.

In the second place, the Court considered that the holder of intellectual property rights, such as Mircom, which has acquired those rights by assigning claims and does not use them, but seeks damages from alleged infringers, may, in principle, benefit from the measures, procedures and remedies provided for by EU law, unless that holder's claim is abusive. The Court stated that any finding of such an abuse is a matter for the referring court, which could, for example, ascertain, for that purpose, whether legal proceedings have actually been brought on account of an amicable settlement being refused. It found that a request for information, such as that made by Mircom, cannot be regarded as inadmissible because it was made during a pre-litigation stage. However, that request must be rejected if it is unjustified or disproportionate, which is for the referring court to determine. By that interpretation, the Court sought to ensure a high level of protection of intellectual property in the internal market.

In the third place, the Court held that EU law does not preclude, in principle, the systematic registration, by the holder of intellectual property rights or by a third party on his or her behalf, of IP addresses of users of peer-to-peer networks whose internet connections have allegedly been used in infringing activities (upstream processing of data), or the communication of the names and postal addresses of users to that holder or to a third party for the purposes of an action for damages (downstream processing of data). However, initiatives and requests in that regard must be justified, proportionate, not abusive and provided for by a national legislative measure which limits the scope of the rights and obligations under EU law. The Court stated that EU law does not impose an obligation on a company such as Telenet to communicate personal data to private individuals in order to be able to bring proceedings before the civil courts for copyright infringements. However, EU law allows Member States to impose such an obligation.

1.2 Designs

Judgment of 28 October 2021, *Ferrari (*C-123/20, EU :C :2021 :889*)*

On 2 December 2014, Ferrari SpA presented to the public for the first time the top-of-the-range FXX K car model, in a press release containing two photographs showing, respectively, a side view and a front view of that vehicle.

Since 2016, Mansory Design & Holding GmbH ('Mansory Design'), established in Germany, has produced and marketed sets of personalisation accessories, known as 'tuning kits', designed to alter the appearance of another road-going Ferrari model, produced in a series, in such a way as to make it resemble the appearance of the Ferrari FXX K.

Ferrari brought an action for infringement and related claims against Mansory Design, on account of an alleged infringement of the rights conferred by three unregistered Community designs in respect of parts of the FXX K model, namely components of its bodywork. Those Community designs arose at the time of the publication of the press release of 2 December 2014.

The Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) dismissed those claims in their entirety.

Following an appeal brought before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), that court dismissed Ferrari's appeal, holding that the first and second designs claimed never existed, since Ferrari had not shown that the minimum requirement of a certain autonomy and consistency of form had been satisfied, whereas the third design claimed did indeed exist, but had not been infringed by Mansory Design.

It was in that context that the Bundesgerichtshof (Federal Court of Justice, Germany), before which Ferrari had brought an appeal, asked the Court to clarify whether the making available to the public of images of a product, such as the publication of photographs of a car, could lead to the making available to the public of a design on a part or on a component part of that product and, if so, to what extent the appearance of that part or component part must be independent of the product as a whole in order for it to be possible to examine whether that appearance has individual character.

In its preliminary ruling, the Court held, inter alia, that EU law must be interpreted as meaning that the making available to the public of images of a product, such as the publication of photographs of a car, results in the making available to the public of a design on a part of that product or on a component part of that product, as a complex product, provided that the appearance of that part or component part is clearly identifiable at the time that design is made available. [278]

278| Within the meaning of Article 3(a) and (c), Article 4(2) and Article 11(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

Findings of the Court

In the first place, the Court noted that the material conditions required for the protection of a Community design to arise, whether registered or not, namely novelty and individual character, are the same for both products and parts of a product. [279] Provided that those material conditions are satisfied, the formal condition for giving rise to an unregistered Community design is that of making available to the public within the meaning of Article 11(2) of Regulation No 6/2002. [280] In order for the making available to the public of the design of a product taken as a whole to entail the making available of the design of a part of that product, it is essential that the appearance of that part is clearly identifiable when the design is made available. However, that does not imply an obligation for designers to make available separately each of the parts of their products in respect of which they seek to benefit from unregistered Community design protection.

In the second place, the Court pointed out that the concept of 'individual character', within the meaning of Article 6 of Regulation No 6/2002, [281] governs not the relationship between the design of a product and the designs of its component parts, but rather the relationship between those designs and other earlier designs. In order for it to be possible to examine whether the appearance of a part of a product or a component part of a complex product satisfies the condition of individual character, it is necessary for that part or component part to constitute a visible section of the product or complex product, clearly defined by particular lines, contours, colours, shapes or texture. That presupposes that the appearance of that part or component part is capable, in itself, of producing an overall impression and cannot be completely lost in the product as a whole.

2. Telecommunications

Judgment of 15 April 2021, *Eutelsat* (C-515/19, EU :C :2021 :273)

In order to facilitate the development of a competitive internal market for mobile satellite services across the European Union and to ensure gradual coverage in all Member States, the European Parliament and the Council adopted the MSS decision. [282] At the end of a selection procedure for operators of pan-European systems providing mobile satellite services, [283] the European Commission selected, among others, the undertaking Inmarsat Ventures SE ('Inmarsat'). That company developed a system called the 'European Aviation Network', designed to provide aviation connectivity services. By decision of 21 October 2014, the Autorité de régulation des communications électroniques et des postes (Authority for the Regulation of

279| Within the meaning of Articles 4 to 6 of Regulation No 6/2002.

280| In accordance with that provision, 'a design shall be deemed to have been made available to the public within the European Union if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the [European Union]'.

281| Article 6(1) of Regulation No 6/2002 provides that a design is to be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public.

282| Article 2(2)(a) and (b) and Article 8(1) and (3) of Decision No 626/2008/EC of the European Parliament and of the Council of 30 June 2008 on the selection and authorisation of systems providing mobile satellite services (MSS) (OJ 2008 L 172, p. 15; 'the MSS decision').

283| Article 2(2)(a) and (b) of the MSS decision, read in conjunction with Article 8(1) and (3) thereof.

Electronic Communications and Postal Services, France) granted that undertaking authorisation to use specific frequencies in metropolitan France and, by decision of 22 February 2018, granted it an authorisation to operate complementary ground components ('CGCs') [284] of mobile satellite systems. It was against that background that Eutelsat, a competitor of Inmarsat, brought an action before the Conseil d'État (Council of State, France) seeking annulment of that latter decision on the ground, inter alia, of an infringement of EU law.

Ruling on a request for a preliminary ruling from the supreme French administrative court, the Court provided an interpretation of the concept of 'mobile satellite systems' and of the concepts of 'CGC' and 'mobile earth station' [285] within the meaning of the MSS decision. In addition, the Court clarified the powers of the competent authorities of the Member States to grant or to refuse to grant an operator the authorisations necessary for the provision of the components of mobile satellite systems.

Findings of the Court

The Court noted, first of all, that a 'mobile satellite system' does not necessarily have to be principally based, in terms of capacity of transmitted data, on the satellite component of that system. The relevant provisions of the MSS decision do not define, in terms of capacity of transmitted data, the relationship between the satellite component of a mobile satellite system, on the one hand, and the ground component of that system, on the other. Furthermore, it is not possible to draw any conclusion from the use of the word 'complementary' in the term 'complementary ground components', since that word is silent on the relative importance of the two components.

Next, the Court stated that a ground-based station may be classified as a 'CGC of mobile satellite systems' when two main requirements are fulfilled. In terms of positioning, that station must be used at a fixed location and cover a geographical area within the footprint of the satellite or satellites of the mobile satellite system concerned. In addition, in terms of function, the ground-based station must be used to improve the availability of the mobile satellite service in areas where communications with the satellite component of that system cannot be ensured with the required quality. Where those requirements have been satisfied and the other common conditions [286] have been fulfilled, no limitation as to the number of CGCs that can be used or the extent of their geographical coverage may be inferred from the provisions of the MSS decision. [287] In that regard, the concept of 'required quality' must be understood as being the level of quality necessary to provide the service offered by the operator of that system and must be read with reference to the objective of promoting innovation, technological progress and consumer interests.

However, the operation of CGCs must not result in competition being distorted on the market concerned and the satellite component of the mobile satellite system must have real and specific usefulness, in that such a component must be necessary for the functioning of that system, save where there is independent operation of the CGCs, in the case of failure of the satellite component, which must not exceed 18 months. It is for the competent national authorities to oversee compliance with those conditions.

284| Article 2(2) (b) of the MSS decision, read in conjunction with Article 8(1) and (3) thereof

285| Article 2(2)(a) of the MSS decision.

286| Article 8(3) of the MSS decision.

287| In particular, Article 2(2)(b) of the MSS decision.

Lastly, according to the Court, in order to fall within the concept of 'mobile earth station', there is no requirement that such a station is capable of communicating, without the use of separate equipment, with both a CGC and a satellite. In that regard, after noting a number of requirements that have to be satisfied, the Court found that those requirements are met by a combination of two separate reception terminals linked by a communication driver, the first terminal being located above the aircraft fuselage and communicating with a space station, and the second located below that fuselage and communicating with CGCs. The Court stated that it is irrelevant, in that context, that the individual components do not form a physically indivisible whole.

It should also be borne in mind that, in its judgments in ***Deutsche Telekom* v *Commission*** (C-152/19 P, EU :C :2021 :238) and ***Slovak Telekom* v *Commission*** (C-165/19 P, EU :C :2021 :239), delivered on 25 March 2021, the Court ruled on an abuse of a dominant position in the Slovak market for broadband internet services. [288]

3. Public procurement

Judgment of 3 February 2021, *FIGC and Consorzio Ge.Se.Av.* (C-155/19 and *C*-156/19, EU :C :2021 :88)

The Federazione Italiana Giuoco Calcio (Italian Football Federation; 'the FIGC') organised a negotiated procedure for the award of a contract for porterage services for accompanying the national football teams and for the purposes of the FIGC store for a period of three years. At the end of that procedure, one of the tenderers invited to participate in it, but to whom the contract was not awarded, brought an action before a regional administrative court to challenge the detailed rules governing the conduct of that procedure. According to that tenderer, the FIGC must be regarded as a body governed by public law and should, therefore, have complied with the rules on publication laid down by the legislation on public procurement.

Since the regional administrative court upheld that action and annulled the award of the contract at issue, the FIGC and the entity to which it awarded the contract each brought an appeal against that court's judgment before the Consiglio di Stato (Council of State, Italy). Before that court, they disputed, inter alia, the premiss that the FIGC should be classified as a 'body governed by public law'.

It was in that context that the Consiglio di Stato (Council of State) decided to refer to the Court of Justice for a preliminary ruling two questions concerning the interpretation of the directive on public procurement. [289] That court sought clarification on whether the FIGC fulfils certain conditions, laid down by that directive, in order to be classified as a 'body governed by public law' and therefore required to apply the rules relating to the award of public contracts. More specifically, it asked the Court to interpret, first, the condition that a 'body governed by public law' must have been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character [290] and, secondly, the condition that such a body must be subject to management supervision by a public authority. [291]

288| Those judgments are presented in Section XII.2 'Abuse of a dominant position (Article 102 TFEU)'.

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

290| Article 2(1)(4)(a) of Directive 2014/24.

291| Article 2(1)(4)(c) of Directive 2014/24.

Findings of the Court

In the first place, the Court observed that, in Italy, the activity of general interest comprised by sport is pursued by each of the national sports federations within the framework of tasks of a public nature expressly assigned to those federations by national legislation, bearing in mind that several of those tasks appear not to be of an industrial or commercial character. The Court concluded from this that, if a national sports federation, such as the FIGC, does in fact carry out such tasks, that federation may be regarded as having been established for the specific purpose of meeting needs in the general interest not having an industrial or commercial character.

The Court stated that that conclusion was not called into question by the fact that the FIGC, first, has the legal form of an association governed by private law and, secondly, pursues, alongside the activities of general interest exhaustively listed in the national rules, other activities which constitute a large part of its overall activities and are self-financed.

In the second place, as regards whether a national sports federation must be regarded as being subject to management supervision by a public authority such as, in the present case, the Comitato Olimpico Nazionale Italiano (Italian National Olympic Committee; 'the CONI'), the Court found that a public authority responsible, in essence, for laying down sporting rules, verifying that they are properly applied and intervening only as regards the organisation of competitions and Olympic preparation, without regulating the day-to-day organisation and practice of the different sporting disciplines, cannot be regarded, prima facie, as a hierarchical body capable of controlling and directing the management of national sports federations. It added that the management autonomy conferred on the national sports federations in Italy seems, *a priori*, to militate against active control on the part of the CONI to the extent that it would be in a position to influence the management of a national sports federation such as the FIGC, particularly in relation to the award of public contracts.

However, the Court made clear that such a presumption may be rebutted if it is established that the various powers conferred on the CONI in relation to the FIGC have the effect of making the FIGC dependent on the CONI to such an extent that the CONI may influence its decisions with regard to public contracts.

While pointing out that it is for the referring court to ascertain whether there is dependency coupled with such a possibility of influence, the Court provided clarification to guide that court in its decision. To that end, the Court stated, inter alia, that in order to assess the existence of active control by the CONI over the management of the FIGC and of the possibility of the CONI influencing the FIGC's decisions with regard to public contracts, the analysis of the CONI's various powers in relation to the FIGC must be the subject of an overall assessment.

Furthermore, the Court found that, if it were concluded that the CONI exercises supervision over the management of national sports federations, the fact that the latter may, on account of their majority participation in the CONI's main bodies, exert an influence over the CONI's activity is relevant only if it can be established that each national sports federation, considered individually, is in a position to exert a significant influence over the management supervision exercised by the CONI over it, with the result that that supervision would be offset and such a federation would thus regain control over its management.

4. Motor insurance

Judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny* (C-383/19, EU :C :2021 :337)

On 7 February 2018, the Powiat Ostrowski (District of Ostrów, Poland), a Polish local government authority, became the owner, by judicial means following a forfeiture order, of a vehicle registered in Poland. After service of that decision, on 20 April 2018, the district insured the vehicle from the next day the administration was open, Monday 23 April 2018.

Given its poor technical state, the district decided to have the vehicle destroyed. On the basis of the certificate issued by the disassembly facility, the vehicle was deregistered on 22 June 2018.

On 10 July 2018, the Ubezpieczeniowy Fundusz Gwarancyjny (Insurance Guarantee Fund, Poland) imposed a fine of 4 200 zlotys (PLN) (approximately EUR 933) on the district for failing to fulfil its obligation to take out a contract of insurance against civil liability in respect of the use of that vehicle during the period from 7 February to 22 April 2018 ('the period at issue').

The district brought an action before the Sąd Rejonowy w Ostrowie Wielkopolskim (District Court, Ostrów Wielkopolski, Poland) seeking a declaration that, during the period at issue, it was not obliged to insure the vehicle. That court asked the Court whether there was an obligation to conclude a contract of insurance against civil liability [292] in respect of a vehicle registered in a Member State, which is on private land, which is not capable of being driven on account of its technical state and which, in accordance with the choice of its owner, is to be destroyed.

By its judgment, the Court held that the conclusion of a contract of insurance against civil liability in respect of the use of a motor vehicle is compulsory where the vehicle concerned is registered in a Member State, as long as that vehicle has not been officially withdrawn from use in accordance with the applicable national rules.

Findings of the Court

In the first place, the Court noted that the conclusion of a contract of insurance against civil liability in respect of the use of a motor vehicle is, in principle, compulsory for a vehicle registered in a Member State, which is on private land and which is to be destroyed in accordance with the choice of its owner, even where that vehicle is not, at a given time, capable of being driven on account of its technical state.

In that regard, the Court pointed out that the concept of 'vehicle' [293] is objective and is independent of the use which is made or may be made of the vehicle in question or of the intention of the owner or of another person actually to use it.

292| Article 3, first paragraph, of Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11).

293| Article 1(1) of Directive 2009/103.

The technical state of a vehicle may vary over time and whether it may be restored depends on subjective factors, such as the intention of its owner or its keeper to carry out or have carried out the necessary repairs and the availability of the budget necessary for that purpose. Consequently, if the mere fact that a vehicle is not, at a given time, capable of being driven were sufficient to deprive it of its status as a vehicle and to exempt it from the insurance obligation, the objective nature of that concept of 'vehicle' would be called into question. Furthermore, the insurance obligation [294] is not linked to the use of the vehicle as a means of transport at a given time or to the question whether or not the vehicle concerned has caused damage. Consequently, a registered vehicle cannot be exempted from that obligation by the mere fact that it is not, at a given time, capable of being driven on account of its technical state and is therefore not capable of causing loss or injury, even if that is the case as of the point at which the right of ownership is transferred. Similarly, the intention of the owner or of another person to have the vehicle destroyed cannot of itself lead to the conclusion that that vehicle loses its status as 'vehicle' and thereby avoids that insurance obligation. The classification as a 'vehicle' and the scope of the insurance obligation cannot be dependent on those subjective factors, since that would undermine the predictability, stability and continuity of that obligation, compliance with which is, however, necessary in order to ensure legal certainty.

In the second place, the Court held that the obligation, in principle, to insure a vehicle registered in a Member State, which is on private land and which is intended by its owner to be destroyed, even if, at a given time, that vehicle is not capable of being driven because of its technical state, is necessary, first, in order to ensure the protection of victims of traffic accidents, given that the intervention of the body providing compensation for damage to property or personal injuries caused by an uninsured vehicle [295] is provided for only in cases in which taking out the insurance is compulsory. That interpretation guarantees that those victims are, in any event, compensated, either by the insurer, under a contract concluded for that purpose, or by the compensation body where the vehicle involved in the accident was uninsured or has not been identified. Secondly, it ensures the best possible compliance with the objective of guaranteeing the free movement of both vehicles normally based in the territory of the European Union and of the persons travelling in them. It is only by ensuring robust protection of potential victims of motor vehicle accidents that it is possible to ask Member States [296] to refrain from carrying out systematic checks on the insurance of vehicles entering their territory from the territory of another Member State, which is essential in order to guarantee that free movement.

In the third and last place, the Court stated that, in order for a vehicle to be exempted from the insurance obligation, it must be officially withdrawn from use, in accordance with the applicable national rules. While registration of a vehicle certifies, in principle, that it is capable of being driven and thus used as a means of transport, a registered vehicle may, objectively, be definitively not capable of being driven on account of its poor technical state. The finding that a vehicle is not capable of being driven and has lost its status as a 'vehicle' must, however, be made objectively. In that regard, although the deregistration of the vehicle may constitute such an objective finding, EU law [297] does not lay down the manner in which a vehicle may as a matter of law be withdrawn from use. Consequently, that withdrawal may, under the applicable national rules, be established other than by the deregistration of the vehicle in question.

294| Article 3, first paragraph, of Directive 2009/103.

295| Article 10(1) of Directive 2009/103.

296| Article 4 of Directive 2009/103.

297| Directive 2009/103.

5. Chemical substances

Judgment of 21 January 2021, *Germany* v *Esso Raffinage* (C-471/18 P, EU :C :2021 :48)

Esso Raffinage ('Esso') submitted to the European Chemicals Agency (ECHA) an application for registration of a substance it manufactures.

By decision of 6 November 2021, ECHA requested that Esso provide it with additional information before the expiry of one year. In reply, Esso provided ECHA with information other than that requested, but which it considered to be alternative to that information.

On 1 April 2015, ECHA sent to the ministère de l'Écologie, du Développement durable, des Transports et du Logement (Ministry of Ecology, Sustainable Development, Transport and Housing, France) a letter headed 'Statement of non-compliance following a dossier evaluation decision under Regulation (EC) No 1907/2006' ('the letter at issue'). In that letter, ECHA stated that Esso had not met its obligations. [298]

The General Court upheld Esso's action, after declaring it admissible, and annulled the letter at issue. The Court of Justice, before which the Federal Republic of Germany had brought an appeal, dismissed that appeal and provided guidance on the scope of ECHA's power to take decisions following a compliance check of information contained in substance registration dossiers.

Findings of the Court

In the first place, the Court of Justice reviewed the General Court's findings relating to the admissibility of Esso's action, in particular as regards whether the letter at issue was open to challenge. In that regard, the Court pointed out, first of all, that in order to determine whether an act is intended to produce binding legal effects, account may be taken of objective criteria, such as the content of the act in question, the context in which it was adopted and the powers of the body which adopted it, and of a subjective criterion relating to the intention that led the institution, body, office or agency of the EU which drafted the contested act to adopt it. However, that subjective criterion can play only a complementary role as compared with the objective criteria referred to above and, therefore, cannot be given greater weight than those objective criteria, nor can it affect the assessment of the effects of the resulting contested act.

Next, the Court stated that, by providing that ECHA may adopt 'any appropriate decisions', [299] the EU legislature conferred on ECHA the power to draw legally binding conclusions from the evaluation of the information submitted by a registrant who has previously been notified of a decision asking it to bring its registration dossier into compliance with the requirements of the REACH Regulation. [300] ECHA is thus able to decide whether the information in question complies with those requirements and whether the registrant has complied with the corresponding obligations. Those obligations include not only the obligation to comply

298| Those obligations arise from the decision of 6 November 2012 and from Article 5 and Article 41(4) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, and corrigendum OJ 2007 L 136, p. 3; 'the REACH Regulation').

299| Article 42(1) of the REACH Regulation.

300| Decision taken under Article 41(3) of the REACH Regulation.

with the decision requiring the submission of the information in question, but ultimately also the obligation on manufacturers and importers of chemical substances in quantities of one tonne or more per year [301] to comply with all the requirements applicable to the registration of those substances. In that regard, the Court pointed out that the EU legislature established the substance registration and evaluation system in order to allow ECHA to determine that industry is meeting its obligations, subject to penalties if those obligations are not met. In that context, it is for the Member States to establish a system of penalties applicable to the undertakings concerned and to take the measures necessary to ensure that they are implemented, [302] in the event that ECHA finds that those undertakings have infringed the obligations arising from the REACH Regulation. [303] The Court of Justice concluded that the General Court was therefore right to find that it is ECHA and not, as the Federal Republic of Germany submitted in its appeal, the Member States, which has the power to adopt a decision declaring that those obligations have been infringed, such as that contained in the letter at issue.

Lastly, the Court stated that that analysis of the allocation of competences between ECHA and the Member States is supported by the objectives of the REACH Regulation. That regulation introduces an integrated system for monitoring chemical substances that are manufactured, imported or placed on the market in the Union, with the aim of ensuring a high level of protection of human health and the environment. One of the essential elements of that system is the establishment of ECHA, a central and independent entity responsible for, first, receiving applications for registration of those substances and updates to those applications, next, checking that they are complete and rejecting them if they are incomplete and, lastly, checking the compliance of the information they contain with the relevant requirements, if necessary after they are completed. [304]

In the second place, the Court of Justice examined the General Court's findings relating to ECHA's exercise of its decision-making powers. In that regard, the Court stated, first of all, that the obligation on ECHA to evaluate substance registration dossiers that are submitted to it and to check the compliance of the information contained therein also includes, if a registrant has submitted 'adaptations to the standard information requirements', the question whether those adaptations and their justifications comply with the rules governing them. Every registrant has the possibility to submit, with their registration dossier, alternative information to the 'standard information' required, referred to as 'adaptations', subject to compliance with the requirements governing such adaptations. Next, the Court noted that the possibility for registrants to have recourse to such 'adaptations' at subsequent stages of the procedure for the registration and evaluation of chemical substances, in particular where ECHA has adopted a decision requesting that a registration dossier be supplemented by a study involving animal testing, arises from the relevant general provisions of the REACH Regulation and from the guiding principle of limiting animal testing which those general provisions reflect. In particular, the REACH Regulation requires the use of information obtained by means other than animal testing 'wherever possible' and that such testing be undertaken 'only as a last resort'. Finally, the Court of Justice found that ECHA must examine those adaptations and rule on their compliance in accordance with the procedural and decision-making arrangements laid down by the REACH Regulation, which it did not do in the present case, as the General Court was correct to find.

301| Article 5 and Article 6(1) of the REACH Regulation.

302| Articles 125 and 126 of the REACH Regulation, read in the light of recitals 121 and 122 thereof.

303| Article 51 of the REACH Regulation.

304| Articles 6, 20, 22, 41 and 42 and recitals 19, 20 and 44 of the REACH Regulation.

6. Money laundering

Judgment of 2 September 2021, *LG and MH (Self-laundering)* (C-790/19, EU :C :2021 :661)

LG, the manager of a company, was sentenced by the Tribunalul Brașov (Regional Court, Brașov, Romania) to imprisonment, with a conditional suspension of execution of the sentence, for the offence of money laundering in respect of 80 acts committed between 2009 and 2013. The funds in question were derived from the offence of tax evasion committed by the same person ('the predicate offence').

Hearing the appeals brought against that judgment, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court, harboured doubts as to whether the perpetrator of the predicate offence and the perpetrator of the offence of money laundering could be the same person.

In its judgment, the Court found that Directive 2005/60 [305] does not preclude national legislation which provides that the offence of money laundering may be committed by the perpetrator of the predicate offence.

Findings of the Court

The Court pointed out, first, that the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his or her action, is an act which, when committed intentionally, is to be regarded as constituting the offence of money laundering. [306] Consequently, for a person to be regarded as the perpetrator of that offence, that person must be aware that the property is derived from criminal activity or from an act of participation in such activity. Since that condition is necessarily satisfied as regards the perpetrator of the predicate offence, Directive 2005/60 does not preclude that person from also being the perpetrator of the offence of money laundering. Furthermore, in so far as such conduct constitutes a contingent material act which does not automatically result from the predicate offence, it may be committed both by the perpetrator of the predicate offence and by a third party.

Next, the Court analysed the legislative context of Directive 2005/60 and, in particular, the international commitments of the Member States [307] and the EU measures [308] in force on the date of its adoption. In that regard, the Court stated that, on that date, it was open to the Member States not to criminalise, under their penal law, as regards the perpetrator of the predicate offence, acts which constitute money laundering. The obligation imposed by Directive 2005/60 on the Member States to prohibit certain acts of money laundering, without that directive prescribing the means for implementing such a prohibition, and the definition by that directive of money laundering in a manner which permits, but does not require, the criminalisation of such

305| Article 1(2)(a) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

306| Article 1(2)(a) of Directive 2005/60.

307| The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed in Strasbourg on 8 November 1990 (European Treaty Series No 141).

308| Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ 2001 L 182, p. 1).

acts as regards the perpetrator of the predicate offence, leave that decision to the Member States, [309] in accordance with their international commitments and the fundamental principles of their domestic law. Furthermore, it was only Directive 2018/1673 [310] which imposed an obligation on the Member States to criminalise such conduct.

Lastly, the Court stated that that criminalisation is in line with the objectives of Directive 2005/60, in so far as it is liable to make the introduction of criminal funds into the financial system more difficult and thereby contributes to the proper functioning of the internal market. Consequently, a Member State may criminalise, as regards the perpetrator of the predicate offence, the offence of money laundering.

Furthermore, as regards the *ne bis in idem* principle [311] and, in particular, the prohibition on prosecuting or punishing under criminal law a person for the same offence, the Court pointed out that the relevant criterion is the identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together which resulted in the final acquittal or conviction of the person concerned. Accordingly, the imposition, with respect to identical facts, of several criminal penalties at the conclusion of different proceedings brought for those purposes is prohibited. In the present case, the *ne bis in idem* principle does not preclude the perpetrator of the predicate offence from being prosecuted for the offence of money laundering where the facts in respect of which the prosecution is brought are not identical to those constituting the predicate offence. In that regard, the Court stated that money laundering constitutes an act distinguishable from the predicate offence, even if that money laundering is carried out by the perpetrator of the predicate offence.

The Court clarified the scope of the national court's obligations of verification. Thus, the national court must determine whether the predicate offence was the subject of criminal proceedings in which the perpetrator was finally acquitted or convicted and satisfy itself that the material facts constituting the predicate offence are not identical to those in respect of which the perpetrator is prosecuted for money laundering.

309| Article 1(1) and Article 1(2)(a) of Directive 2005/60.

310| Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (OJ 2018 L 284, p. 22).

311| Article 50 of the Charter of Fundamental Rights of the European Union.

7. Package travel, package holidays and package tours

Judgment of 18 March 2021, *Kuoni Travel* (C-578/19, EU :C :2021 :213)

The applicant, X, and her husband entered into a package travel contract with Kuoni Travel Ltd ('Kuoni'), a travel organiser established in the United Kingdom. During her stay, X encountered N, an employee of the hotel who, on the pretext that he wished to accompany her to reception, raped and assaulted her.

X claimed damages against Kuoni in respect of the rape and assault suffered, on the ground that these were the result of the improper performance of the package travel contract as well as a breach of the 1992 Regulations. [312] Kuoni contested those claims, relying on a clause in that contract referring to the conditions under which it incurs liability for the proper performance of its contractual obligations, [313] together with a provision of the 1992 Regulations concerning its exemption from liability where the failure to perform or improper performance of the contract is due to an event which it or another supplier of services could not foresee or forestall. [314]

Following an appeal against the dismissal of X's claim for compensation, the Supreme Court of the United Kingdom referred questions to the Court for a preliminary ruling on the scope of the third indent of Article 5(2) of Directive 90/314, in so far as it provides for a ground for exemption from liability of the organiser of package travel from the proper performance of the obligations arising from a contract relating to such travel concluded between that organiser and a consumer and governed by that directive. In answer to those questions, the Court held that that provision must be interpreted as meaning that, in the event of the non-performance or improper performance of those obligations resulting from the actions of an employee of a supplier of services performing that contract, that employee cannot be regarded as a supplier of services for the purposes of the application of that provision and the organiser cannot be exempted from its liability arising from such non-performance or improper performance, pursuant to that provision.

312| The Package Travel, Package Holidays and Package Tours Regulations 1992 ('the 1992 Regulations') of 22 December 1992 transposed Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59) into United Kingdom law.

313| Under Clause 5.10(b) of the contract, the travel organiser incurs liability where, owing to fault attributable to it or attributable to one of its agents or suppliers, any part of the holiday arrangements booked before departure from the United Kingdom is not as described in the brochure, unless the damage caused to the other contracting party or a member of his or her group is due to fault attributable to the other contracting party or has been caused by unforeseen circumstances which, even with all due care, the organiser, its agents or suppliers could not have anticipated or avoided.

314| Pursuant to Regulation 15(2)(c)(ii) of the 1992 Regulations, 'the other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because [of] an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall'.

Findings of the Court

The Court recalled, first, that Directive 90/314 establishes a system of contractual liability for package travel organisers in respect of consumers who have concluded a contract with them for such travel, from which there may be no exclusion by means of a contractual clause. [315] The only exemptions which are allowed are those exhaustively set out in Directive 90/314. [316] One of the special features of that liability of organisers is that it extends to the proper performance of the obligations arising under the package travel contract by suppliers of services.

Next, as regards the concept of 'supplier of services', the Court found that it is not defined either by Directive 90/314 or by an express reference in that directive to the laws of the Member States, with the result that it must be given an autonomous and uniform interpretation. Given the usual meaning of that concept and the fact that the obligations arising under a package travel contract may be performed through persons other than the organiser, it must be understood as referring to a natural or legal person, who is distinct from the travel organiser and provides services for remuneration. However, the Court stated that an employee of a supplier of services cannot himself or herself be a supplier of services within the meaning of Directive 90/314 since, unlike a supplier of services, he or she has not concluded any agreement with the package travel organiser and performs his or her work in the context of a relationship of subordination with his or her employer and therefore under the latter's control. Nevertheless, the Court did not rule out the possibility that the acts or omissions of such an employee may, for the purposes of the system of liability laid down in Directive 90/314, be treated in the same way as those of the supplier of services which employs him or her. It thus found that the non-performance or improper performance of the obligations arising from the package travel contract, despite having its origin in acts committed by employees of a supplier of services, is such as to render the organiser liable where, first, there is a link between the act or omission which caused damage to the consumer and the organiser's obligations under that contract and, secondly, those obligations are performed by an employee of a supplier of services who is under the latter's control. In the absence of such liability, an unjustified distinction would be drawn between the liability of organisers for the acts committed by their suppliers of services and the liability arising from the same acts committed by employees of those suppliers of services performing the obligations arising from a package travel contract, which would enable an organiser to avoid its liability.

Lastly, the Court recalled that, while there may be a derogation from the rule providing for the liability of package travel organisers, the ground for exemption from such liability which covers situations in which non-performance or improper performance of the contract is due to an event which the organiser or supplier of services could not foresee or forestall [317] must be interpreted strictly, autonomously and uniformly. The event which cannot be foreseen or forestalled to which that ground for exemption refers differs from the case of force majeure and must, since that ground is based on the absence of fault on the part of the organiser or the supplier of services, be interpreted as referring to a fact or incident which does not fall within their sphere of control. As the acts or omissions of an employee of a supplier of services resulting in the non-performance or improper performance of the organiser's obligations vis-à-vis the consumer do fall within that sphere of control, they cannot be regarded as events which cannot be foreseen or forestalled. Accordingly, the organiser cannot be exempted from its liability arising from such non-performance or improper performance of the contract.

315| Article 5(3) of Directive 90/314.

316| Article 5(2) of Directive 90/314.

317| Article 5(2), third indent, of Directive 90/314.

XV. Economic and monetary policy

In relation to economic and monetary policy, four judgments deserve to be mentioned. In the first judgment, the Court clarified the conditions under which Member States may impose limitations on payments by means of banknotes and coins denominated in euro. In the second and third judgments, the Court provided guidance on the functioning of the Single Resolution Board (SRB) within the framework of the Single Resolution Mechanism. In the fourth and last judgment, the Court ruled on the scope of the powers of the European Banking Authority (EBA) to issue guidelines addressed to competent authorities or financial institutions.

Judgment of 26 January 2021 (Grand Chamber), *Hessischer Rundfunk* (C-422/19 and C-423/19, EU :C :2021 :63)

Two German citizens who were liable to pay a radio and television licence fee in the Land of Hesse (Germany) offered to pay it to Hessischer Rundfunk (Hesse's broadcasting body) in cash. Invoking its regulations on the procedure for payment of radio and television licence fees, which preclude any possibility of paying the licence fee in cash, [318] Hessischer Rundfunk refused their offer and sent them payment notices.

The two German citizens brought an action against those payment notices and the dispute reached the Bundesverwaltungsgericht (Federal Administrative Court, Germany). That court noted that the exclusion of the possibility of paying the radio and television licence fee by means of euro banknotes, as provided for by Hessischer Rundfunk's regulations on the payment procedure, infringes a higher-ranking provision of federal law, under which euro banknotes are to be unrestricted legal tender. [319]

Unsure as to whether that provision of federal law was compatible with the exclusive competence of the European Union in the area of monetary policy for the Member States whose currency is the euro, the Bundesverwaltungsgericht (Federal Administrative Court) referred the matter to the Court for a preliminary ruling. It also asked whether the status as legal tender of banknotes denominated in euro prohibited the public authorities of Member States from ruling out the possibility of a statutorily imposed payment obligation being discharged in cash, as is the case for payment of the radio and television licence fee in the Land of Hesse.

The Grand Chamber of the Court ruled that a Member State whose currency is the euro may, in the context of the organisation of its public administration, adopt a measure obliging that administration to accept payment in cash or introduce, for a reason of public interest and under certain conditions, a derogation from that obligation.

318| Paragraph 10(2) of the Satzung des Hessischen Rundfunks über das Verfahren zur Leistung der Rundfunkbeiträge (Regulations of Hessischer Rundfunk on the procedure for payment of radio and television licence fees) of 5 December 2012.

319| Second sentence of Paragraph 14(1) of the Gesetz über die Deutsche Bundesbank (Law on the German central bank), in the version published on 22 October 1992 (BGBl. 1992 I, p. 1782), as amended by the Law of 4 July 2013 (BGBl. 2013 I, p. 1981).

Findings of the Court

First, the Court interpreted the concept of 'monetary policy' in the area in which the European Union has exclusive competence for the Member States whose currency is the euro. [320]

It began by stating that that concept is not limited to the operational implementation of that policy, but also entails a regulatory dimension intended to guarantee the status of the euro as the single currency. Next, it noted that the attribution of the status of 'legal tender' only to euro banknotes issued by the European Central Bank and the national central banks [321] affirms the official nature of those banknotes in the euro area, excluding the possibility that other banknotes may also qualify for that status. It added that the concept of 'legal tender' of a means of payment denominated in a currency unit signifies that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit. Lastly, it pointed out that the fact that the EU legislature may lay down the measures necessary for the use of the euro as the single currency [322] reflects the need to establish uniform principles for all Member States whose currency is the euro and contributes to the pursuit of the primary objective of the European Union's monetary policy, which is to maintain price stability.

Consequently, the Court ruled that the European Union alone is competent to specify the status of legal tender accorded to banknotes denominated in euro. The Court recalled that, where competence is conferred exclusively on the European Union, Member States cannot adopt or retain a provision falling within that competence, even in a situation where the European Union has not exercised its exclusive competence.

However, the Court noted that it is not necessary for the establishment of the status of legal tender of banknotes denominated in euro or for the preservation of their effectiveness as legal tender to impose an absolute obligation to accept those banknotes as a means of payment. Nor is it necessary that the European Union lay down exhaustively and uniformly the exceptions to that fundamental obligation, so long as it is possible, as a general rule, to pay in cash.

Consequently, the Court concluded that the Member States whose currency is the euro are competent to regulate the procedures for settling pecuniary obligations, so long as it is possible, as a general rule, to pay in cash denominated in euro. Thus, a Member State can adopt a measure which obliges its public administration to accept cash payments in that currency.

Secondly, the Court observed that the status of legal tender of banknotes and coins denominated in euro implies, in principle, an obligation to accept them. However, it made clear that that obligation may, in principle, be restricted by the Member States for reasons of public interest, provided that those restrictions are proportionate to the public interest objective pursued, which means, in particular, that other lawful means for the settlement of monetary debts must be available.

In that regard, the Court stated that it is in the public interest that monetary debts to public authorities may be honoured in a way that does not involve those authorities in unreasonable expense which would prevent them from providing services cost-effectively. Thus, the public interest reason relating to the need to ensure

320| Under Article 3(1)(c) TFEU, given that, according to Article 2(1) TFEU, only the European Union may legislate and adopt legally binding acts in that area.

321| The status as legal tender of banknotes denominated in euro is established in the third sentence of Article 128(1) TFEU, the third sentence of the first paragraph of Article 16 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2016 C 202, p. 230), and the second sentence of Article 10 of Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro (OJ 1998 L 139, p. 1).

322| Article 133 TFEU.

the fulfilment of a statutorily imposed payment obligation is capable of justifying a limitation on cash payments, in particular where the number of licence fee payers from whom the debt has to be recovered is very high.

It is nevertheless for the Bundesverwaltungsgericht (Federal Administrative Court) to ascertain whether such a limitation is proportionate to the objective of actually recovering the radio and television licence fee, in particular in the light of the fact that the lawful alternative means of payment may not be readily accessible to everyone liable to pay it.

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

The appellants were ABLV Bank AS, a credit institution established in Latvia and the parent company of the ABLV group (Case C-551/19 P), and shareholders of ABLV Bank AS (Case C-552/19 P). ABLV Bank Luxembourg SA is a credit institution established in Luxembourg and is one of the subsidiaries of the ABLV group; ABLV Bank is the sole shareholder of ABLV Bank Luxembourg. Those two institutions were considered to be significant and, as such, were subject to supervision by the European Central Bank (ECB) as part of the single supervisory mechanism introduced by Regulation No 1024/2013. [323]

On 13 February 2018, the United States Department of the Treasury (United States of America) announced proposed measures to prevent the ABLV group from accessing the financial system in US dollars (USD). Following that announcement, the group found itself in difficulty, triggering the launch of an assessment as to whether a resolution should be adopted as provided for by the SRM Regulation. [324]

The resolution procedure is a complex procedure which, depending on the case, may involve several European authorities, such as the ECB, the Single Resolution Board ('the SRB'), the European Commission and the Council of the European Union, as well as the national resolution authorities concerned.

In the present case, on 18 February 2018, the ECB requested the Finanšu un kapitāla tirgus komisija (Financial and Capital Markets Commission, Latvia), Latvia's national resolution authority, to impose a moratorium to enable ABLV Bank to stabilise its situation. It also invited the Commission de surveillance du secteur financier (Financial Sector Supervisory Commission, Luxembourg), Luxembourg's national resolution authority, to adopt similar measures with respect to ABLV Bank Luxembourg.

In accordance with the SRM Regulation, on 22 February 2018 the ECB sent to the SRB its draft assessment as to whether ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail. On 23 February 2018, it concluded that ABLV Bank and ABLV Bank Luxembourg were failing or were likely to fail. [325] On the same day, however, the SRB found that a resolution measure was not necessary in the public interest in the case of those banks. [326]

323| Article 6(4) of Council Regulation (EU) N° 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the SSM Regulation').

324| Regulation (EU) N° 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1; 'the SRM Regulation').

325| According to point (a) of the first subparagraph of Article 18(1) of the SRM Regulation.

326| Within the meaning of point (c) of the first subparagraph of Article 18(1) and Article 18(5) of the SRM Regulation.

By applications of 3 May 2018 lodged at the General Court, [327] the appellants sought annulment of the acts of the ECB by which it was concluded that the banks were to be deemed to be failing or to be likely to fail. By orders of 6 May 2019, the General Court dismissed the actions as inadmissible, finding that the contested acts were preparatory measures in the procedure designed to allow the SRB to take a decision. [328]

The Court of Justice dismissed the appellants' appeals. In its judgment, it provided guidance on the distinction between the functions of the SRB and those of the ECB.

Findings of the Court

By their first ground of appeal, the appellants submitted that, in order to assess the admissibility of the actions, the General Court should have taken account of the ECB's assessment of the banks' failure.

The Court of Justice considered that the General Court did not infringe the case-law according to which, in order to assess the admissibility of an action, it is necessary to analyse the substance of the contested act by reference to the objective criteria of its content, the context in which it was adopted and the powers of the institution which adopted it. Moreover, the General Court did not err in law when it also took account of the ECB's intention, albeit conferring on that subjective criterion a complementary role.

According to the Court, it is incorrect to presume that all acts of the institutions are in the nature of a decision, unless it is clearly stated that that is not the case. Such a presumption would run counter to the Court's case-law. In response to the appellants' arguments, the Court pointed out that the ECB's assessment of the proportionality of the proposed measure is not sufficient evidence that that assessment is binding. Any measure must comply with the general principles of EU law, including the principle of proportionality, and the proportionality of a measure may therefore be analysed in an intermediate measure during an administrative procedure comprising several stages. As to the fact that the ECB communicates and publishes the acts in question, that does not mean that it intended to make them binding or that those acts are binding in their own right. As regards the ECB's statement regarding the inevitable liquidation of the credit institutions, the Court observed that such a liquidation did not arise because of the acts of the ECB, but by a decision of the shareholders following the SRB's decision that it was not necessary, in the public interest, to apply resolution schemes.

Before addressing the second ground of appeal, the Court set out the characteristics of the SRM Regulation. One of the objectives of that regulation is to adopt decisions speedily, so that the financial stability of the entity concerned is not jeopardised. Recognition of the ECB's assessment as to whether an entity is failing or is likely to fail as being in the nature of a decision could significantly affect the speediness of that procedure. Furthermore, the Court noted that the fact that provision is made for judicial review only in respect of decisions of the SRB [329] would seem to confirm that the EU legislature did not intend to confer a decision-making power on the ECB in that area.

327| Cases T-281/18 and T-283/18.

328| By applications also lodged at the General Court on 3 May 2018, the appellants brought actions for annulment of the decisions of the SRB of 23 February 2018 (T-280/18 and T-282/18). Those actions are pending before the General Court.

329| Article 86(2) of the SRM Regulation.

The Court pointed out that the SRB may adopt a resolution scheme only if three conditions are met: [330] the entity is failing or is likely to fail, there is no reasonable prospect that any measures other than resolution would prevent its failure within a reasonable timeframe, and a resolution action is necessary in the public interest.

The Court stated that the ECB's assessment that an entity is failing or is likely to fail concerns only one of those conditions. It also noted that the ECB has a primary role in respect of the assessment because of its expertise and its access to supervisory information. However, the SRB may itself carry out the assessment as to whether an entity is failing or is likely to fail, for example where the ECB considers that there is no failure, and the SRB has exclusive competence to determine whether the three conditions are met. It is not bound by the ECB's assessment and may not agree with that assessment. On the contrary, it is for the SRB to correct any irregularity since it is against the SRB's decisions that provision is made for judicial remedies. [331]

According to the Court, the ECB has particular expertise as supervisory authority. However, the distinction between supervision and resolution of credit institutions has no bearing on the nature of the assessment as a preparatory measure: a measure withdrawing an entity's authorisation is therefore not equivalent to an assessment as to whether an entity is failing or is likely to fail.

Judgment of 15 July 2021 (Grand Chamber), *Commission* v *Landesbank Baden-Württemberg and SRB* (C-584/20 P and C-621/20 P, EU :C :2021 :601)

On 11 April 2017, the SRB adopted, in connection with the financing of the Single Resolution Fund (SRF), a decision fixing the amount of the *ex ante* contributions due to the SRF by each credit institution for 2017. [332] Those institutions included Landesbank Baden-Württemberg, a German credit institution.

In an action for annulment brought by Landesbank Baden-Württemberg, the General Court annulled the decision at issue in so far as it concerned that institution. [333] The General Court took the view that that decision did not satisfy the requirement of authentication and, in the interests of the sound administration of justice, found, moreover, that that decision had been taken by the SRB in breach of the obligation to state reasons. In that regard, it held, inter alia, that the decision at issue barely contained any information for calculating the *ex ante* contribution to the SRF and that the annex thereto did not contain sufficient information to verify the accuracy of that contribution.

Following appeals brought by the Commission (Case C-584/20 P) and by the SRB (Case C-621/20 P), the Court of Justice, sitting as the Grand Chamber, set aside the judgment of the General Court. Giving final judgment in the matter, it annulled the decision at issue in so far as it concerned Landesbank Baden-Württemberg on the ground that the statement of reasons was inadequate, but adopted a different approach from that of the General Court concerning the scope of the requirement to state the reasons for such a decision.

330| Points (a) to (c) of the first subparagraph of Article 18(1) of the SRM Regulation.

331| Article 86(2) of the SRM Regulation.

332| Decision of the Executive Session of the SRB of 11 April 2017 on the calculation of the 2017 ex ante contributions to the Single Resolution Fund (SRB/ES/SRF/2017/05) ('the decision at issue').

333| Judgment of 23 September 2020, ***Landesbank Baden-Württemberg* v *SRB*** (T-411/17, EU :T :2020 :435).

Findings of the Court

In the first place, the Court of Justice concluded that the General Court had infringed the principle of *audi alteram partem* in so far as it did not give the SRB the opportunity effectively to state its position on the plea, raised by the General Court of its own motion, alleging a lack of sufficient evidence of the authentication of the decision at issue.

In that regard, it stated that in order to ensure effective compliance with the principle of *audi alteram partem*, the parties must first be invited to submit their observations on a plea which an EU Court is considering raising of its own motion in circumstances which allow them to respond appropriately and effectively to that plea, including, where necessary, by producing any evidence to that court which is necessary for it to rule in full cognisance on that plea. It was therefore for the General Court to inform the parties that it was considering whether to base its decision on the plea alleging a failure to authenticate the decision at issue and to invite them, as a result, to submit to it the arguments which they deemed appropriate for it to rule on that plea. In the present case, neither before nor at the hearing did the General Court actually give the SRB the opportunity to respond appropriately and effectively to that plea, in particular by adducing evidence relating to the authentication of the decision at issue.

Having thus found that the General Court had infringed the principle of *audi alteram partem*, the Court of Justice held that the SRB had ensured, to the requisite standard, the authentication of the decision at issue in its entirety, both as regards its body and annex, in particular by using the computer software 'ARES'.

In the second place, the Court of Justice ruled on the SRB's obligation to state reasons for the adoption of a decision such as the decision at issue.

First of all, it observed that the General Court did not correctly interpret the scope of that obligation in so far as it had found that the SRB was required to include in the statement of reasons for the decision at issue information enabling Landesbank Baden-Württemberg to verify the accuracy of the calculation of its 2017 ex ante contribution to the SRF, irrespective of whether the confidentiality of some of those figures could affect that obligation.

First, the statement of reasons for any decision of an EU institution, body, office or agency imposing the payment of a sum of money on a private operator need not necessarily include all the evidence enabling the addressee to verify the accuracy of the calculation of the amount of that sum of money. Secondly, EU institutions, bodies, offices and agencies are, in principle, required, in accordance with the principle of the protection of business secrets, as a general principle of EU law, not to disclose to the competitors of a private operator confidential information which that operator has provided.

In view of the logic of the system for financing the SRF and of the method for calculating ex ante contributions to the SRF, based, inter alia, on the use of confidential data relating to the financial situation of the institutions concerned by that calculation, the obligation to state reasons for the decision at issue must be balanced against the SRB's obligation to respect the business secrets of those institutions. However, that latter obligation cannot be given so wide an interpretation that the obligation to state reasons is thereby deprived of its essence. In that regard, giving reasons for a decision requiring a private operator to pay a sum of money without providing it with all the information needed to verify the exact calculation of the amount of that sum of money does not necessarily undermine, in every case, the substance of the obligation to state reasons.

Thus, the Court concluded that, in the present case, the obligation to state reasons is fulfilled where the persons concerned by a decision fixing ex ante contributions to the SRF, while not being sent data which are business secrets, have the method of calculation used by the SRB and sufficient information to understand, in essence, how their individual situation was taken into account, for the purposes of calculating their ex ante contribution to the SRF, relative to the situation of all the other financial institutions concerned.

Next, the Court of Justice did not uphold the General Court's finding that the infringement of the SRB's obligation to state reasons stemmed, for the part of the calculation of the *ex ante* contributions to the SRF relating to the adjustment according to the risk profile of the establishments concerned, from the illegality of certain provisions of Delegated Regulation 2015/63. [334]

After setting out the mechanism for adjusting the *ex ante* contributions to the SRF according to the risk profile, ensured in essence by allocating the establishments concerned on the basis of certain values to 'bins', which ultimately makes it possible to determine the adjustment multiplier according to the risk profile, the Court stated that the SRB may, without infringing its obligation to respect business secrets, disclose the limit values of each 'bin' and the related indicators. Such disclosure is intended to enable the financial institution concerned to satisfy itself, inter alia, that the profile attributed to it during the discretisation of the indicators in fact corresponds to its economic situation, that that discretisation was calculated consistently with the methodology set out in Delegated Regulation 2015/63 on the basis of plausible data, and that all the risk factors were taken into account.

Furthermore, the other stages of the methodology for calculating ex ante contributions to the SRF are based on aggregate data from the institutions concerned, which may be disclosed in collective form without infringing the SRB's obligation to respect business secrets.

The Court therefore concluded that Delegated Regulation 2015/63 does not prevent the SRB from disclosing, in collective and anonymised form, sufficient information to enable an institution to understand how its individual situation was taken into account in the calculation of its ex ante contribution to the SRF relative to the situation of all the other institutions concerned. It is true that a statement of reasons based on the disclosure of relevant information, in collective and anonymised form, does not enable every institution to detect systematically any error made by the SRB in the collection and aggregation of the relevant data. However, it is sufficient to enable that institution to satisfy itself that the information which it provided to the competent authorities was indeed included in the calculation of its ex ante contribution to the SRF, in accordance with the relevant rules of EU law, to identify, on the basis of its general knowledge of the financial sector, any use of implausible or manifestly incorrect information, and to determine whether it is worthwhile to bring an action for the annulment of a decision of the SRB fixing its ex ante contribution to the SRF. The Court stated, however, that that approach concerning the statement of reasons for a decision such as the decision at issue does not affect the power of the EU Courts, for the purpose of carrying out an effective judicial review in accordance with the requirements of Article 47 of the Charter of Fundamental Rights of the European Union, to request that the SRB produce data capable of justifying calculations the accuracy of which has been challenged before them, by ensuring, where necessary, the confidentiality of those data.

Lastly, the Court held that the decision at issue did not contain an adequate statement of reasons since the information included therein and the information available on the SRB's website at the date of the decision covered only part of the relevant information that the SRB could have provided without compromising business confidentiality. In particular, neither the annex to that decision nor the SRB's website contained data on the limit values of each 'bin' and the values of the corresponding indicators. Consequently, the decision at issue was annulled in so far as it concerned Landesbank Baden-Württemberg.

334| Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44). In the judgment under appeal, the General Court made a declaration of illegality in respect of Articles 4 to 7 and 9 of, and Annex I to, that regulation, concerning the method for calculating ex ante contributions to the SRF.

Judgment of 15 July 2021 (Grand Chamber), *FBF* (C-911/19, EU :C :2021 :599)

In 2016, the European Banking Authority (EBA) issued guidelines on product oversight and governance arrangements for retail banking products. [335] 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 those 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's notice before the Conseil d'État (Council of State, France). The FBF claimed that the EBA's guidelines, which were made applicable by that notice, were not valid because the EBA did not have the power to issue such guidelines.

The Council of State, harbouring doubts, first, as to the remedies available for reviewing the legality of the contested guidelines by the EU Courts and, secondly, as to the validity of those guidelines in the light of the framework of the mandate granted to the EBA by secondary legislation, made a reference to the Court for a preliminary ruling, asking it to rule on those aspects.

In its Grand Chamber judgment, the Court, after holding that the EBA's guidelines could not be the subject of an action for annulment under Article 263 TFEU, then declared it had jurisdiction to assess the validity of those guidelines by way of a preliminary ruling under Article 267 TFEU and confirmed their validity.

Findings of the Court

As regards the judicial review of the contested guidelines by the EU Courts, the Court pointed out that those 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 stated that it follows from Regulation No 1093/2010 [336] 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, those guidelines cannot be regarded as producing binding legal effects vis-à-vis those 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. Therefore, the Court declared that it had jurisdiction under Article 267 TFEU to assess the validity of the contested guidelines.

It conducted that assessment in the light of the provisions of Regulation No 1093/2010, in order to ascertain whether those guidelines fell within the EBA's powers.

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

336| 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).

First of all, it pointed out that, since it is apparent from Regulation No 1093/2010 that the EU legislature 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 stated 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 found 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, and 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 EU 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 was in the light of those considerations that the Court examined whether the contested guidelines fell within the EBA's scope of action and 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 made clear 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 [337] or that they are necessary to ensure the effective and consistent application of such act.

In that regard, it held that the contested guidelines could be regarded as being necessary to ensure the effective and consistent application of the provisions of Directives 2013/36, 2007/64, 2009/110 and 2014/17, referred to directly or indirectly by Regulation No 1093/2010.

As regards, in particular, those first three directives, the Court pointed out that, since the contested guidelines are intended to establish how the institutions concerned should include product oversight and governance arrangements, aimed at ensuring, in their internal structures and procedures, that the characteristics of the relevant markets and of the consumers concerned are taken into account, 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 meaning of the relevant provisions of the acts referred to in Regulation No 1093/2010 [338] in order to ensure the existence of the robust corporate governance arrangements required by those provisions.

337| The Court found that four directives must be regarded as constituting acts referred to in Article 1(2) of Regulation No 1093/2010: 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).

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

As regards the specific framework adopted by the EU legislature for the exercise of the EBA's power to issue guidelines, the Court found that the contested guidelines did indeed fall within that framework. [339]

In that regard, it stated, 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, those 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. [340]

The Court concluded from this that the contested guidelines did 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. It therefore held that the examination of validity requested by the referring court disclosed no factor of such a kind as to call into question the validity of those guidelines.

XVI. Social policy

In relation to social policy, several judgments deserve to be mentioned. They concern the principle of equal treatment in employment and occupation [341] as applied to workers with a disability, pay for male and female workers for equal work, and the organisation of working time of members of the armed forces. One judgment also relates to the protection of temporary agency workers. A further two judgments deal with the concept of an employer that 'normally carries out its activities' in a Member State and with the conditions governing affiliation to the public sickness insurance schemes of Member States in connection with the coordination of social security systems. The last judgment considers the implementation at EU level of agreements concluded between social partners

1. Equal treatment in employment and occupation

Judgment of 26 January 2021 (Grand Chamber), *Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C-16/19, EU :C :2021 :64)

VL was employed by a hospital in Kraków (Poland) from October 2011 to September 2016. In December 2011, she obtained a disability certificate, which she submitted to her employer that same month. In order to reduce the amount of the contributions payable by the hospital to the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych (State Fund for the Rehabilitation of Persons with Disabilities), the director of that establishment decided, following a meeting with staff which took place in the second half of 2013, to grant a monthly allowance to employees who, after that meeting, submitted certificates attesting to their disabilities.

339| 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.

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

341| Reference should also be made under this heading to the judgment of 15 July 2021, ***WABE and MH Müller Handel*** (C-804/18 and C-341/19, EU:C:2021:594), delivered in two cases concerning the wearing of an Islamic headscarf in the workplace, presented in Section II.3 'Freedom of thought, conscience and religion'.

On the basis of that decision, the allowance was granted to thirteen workers who had submitted their certificates after that meeting, whereas sixteen other workers, including VL, who had submitted their certificates earlier, did not receive that allowance.

The action brought against her employer having been dismissed at first instance, VL brought an appeal before the referring court, the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland). In her view, the practice adopted by her employer, the effect of which was to exclude certain workers with disabilities from receiving an allowance granted to workers with disabilities, and the sole aim of which was to reduce the contributions payable by the hospital by encouraging workers with disabilities who had not yet submitted disability certificates to do so, was contrary to the prohibition of any direct or indirect discrimination on the grounds of disability laid down by the Anti-discrimination Directive. [342]

In that context, having doubts as to the interpretation of Article 2 of that directive and, in particular, as to whether discrimination, within the meaning of that provision, may be taken to occur where a distinction is made by an employer within a group of workers with the same protected characteristic, the referring court enquired whether the practice adopted by an employer and consisting in the exclusion of workers with disabilities, who have already submitted disability certificates to that employer before the date chosen by that employer for the submission of such a certificate, from receiving an allowance paid to workers with disabilities may constitute discrimination for the purposes of that provision.

Findings of the Court

The Court, sitting as the Grand Chamber, began by examining whether a difference in treatment occurring within a group of persons who have disabilities may be covered by the 'concept of discrimination' referred to in Article 2 of the Anti-discrimination Directive. In that regard, it noted that the wording of that article does not permit the conclusion that, regarding that protected ground, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons who have disabilities and persons who do not have disabilities. The context of that article does not include such a limitation either. As regards the objective of that directive, it supports an interpretation whereby that directive does not limit the circle of persons in relation to whom a comparison may be made, in order to identify discrimination on the grounds of disability, to those who do not have disabilities. The Court also found that, while it is true that instances of discrimination on the grounds of disability, for the purposes of that directive, are, as a general rule, those where persons with disabilities are subject to less favourable treatment than persons who do not have disabilities, the protection granted by that directive would be diminished if a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the prohibition of discrimination laid down thereby. Thus, the principle of equal treatment enshrined in the Anti-discrimination Directive is intended to protect a worker who has a disability against any discrimination on the basis of that disability, not only as compared with workers who do not have disabilities but also as compared with other workers who do.

The Court went on to assess whether the practice at issue might constitute discrimination on the grounds of disability as prohibited by the Anti-discrimination Directive. In that regard, it stated, in the first place, that where an employer treats a worker less favourably than another worker in a comparable situation and where it is established, having regard to all the relevant circumstances of the case, that that unfavourable treatment is based on the former worker's disability, inasmuch as it is based on a criterion which is inextricably linked to that disability, such treatment is contrary to the prohibition of direct discrimination set out in Article 2(2)

342| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16; 'the Anti-discrimination Directive').

(a) of the Anti-discrimination Directive. As the practice at issue gave rise to a difference in treatment between two categories of workers with disabilities in a comparable situation, it is therefore for the referring court to determine whether the temporal condition imposed by the employer for receiving the allowance in question, namely the submission of the disability certificate after a date chosen by that employer, constitutes a criterion which is inextricably linked to the disability of the workers who were refused that allowance. The Court noted in that regard that, in the present case, the employer did not seem to have permitted workers with disabilities who had already submitted their disability certificates before that date to resubmit them or to file new ones, so that that practice may have made it impossible for a clearly identified group of workers, consisting of all the workers with disabilities whose disabled status was necessarily known to the employer when that practice was introduced – those workers having previously formalised that status by submitting disability certificates – to satisfy that temporal condition.

In the second place, the Court made clear that, should the referring court find that the difference in treatment in question stems from an apparently neutral practice, it would be for the referring court, in order to determine whether that practice constitutes indirect discrimination for the purposes of Article 2(2)(b) of the Anti-discrimination Directive, to ascertain whether it had the effect of placing persons who have certain disabilities at a particular disadvantage as compared with persons who have other disabilities and, in particular, whether it had the effect of putting certain workers with disabilities at a disadvantage because of the particular nature of their disabilities, including the fact that such disabilities were visible or required reasonable adjustments to be made. According to the Court, it could be held that it was primarily workers who have such disabilities who were obliged, before the date chosen by the hospital in question, to make their state of health formally known to their employer, by submitting disability certificates, whereas other workers who have disabilities of a different nature, for example because those disabilities are less serious or do not immediately require such adjustments to be made, still had a choice as to whether or not to take that step. Accordingly, a practice such as the one in question, although apparently neutral, may constitute discrimination indirectly based on disability if, without being objectively justified by a legitimate aim and without the means of achieving that aim being appropriate and necessary, which it is for the referring court to ascertain, it puts workers with disabilities at a particular disadvantage depending on the nature of their disabilities.

Judgment of 3 June 2021, *Tesco Stores* (C-624/19, EU :C :2021 :429)

Tesco Stores is a retailer that sells its products online and in stores located in the United Kingdom. The stores, of varying size, have a total of approximately 250 000 workers, who carry out various types of jobs. That company also has a distribution network with approximately 11 000 employees, who carry out various types of jobs. Approximately 6 000 employees or former employees of Tesco Stores, both female and male, who work or used to work in its stores, brought proceedings against it before the referring tribunal, the Watford Employment Tribunal (United Kingdom), from February 2018 onwards, on the ground that they had not received equal pay for male and female workers for equal work, contrary to national legislation and Article 157 TFEU. [343] The referring tribunal stayed the male workers' claims, taking the view that their outcome depended on the outcome of the claims brought by the female claimants in the main proceedings.

The female claimants in the main proceedings submitted that their work and that of the male workers employed by Tesco Stores in the distribution centres in its network are of equal value, within the meaning of Article 157 TFEU, and that they are entitled to compare their work and that of those workers, although the work is carried out in different establishments. They contended that, in accordance with that article, there

343| Under that provision, 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

is a 'single source', namely Tesco Stores, for their terms and conditions of employment and the terms and conditions of employment of those workers. Tesco Stores submitted that Article 157 TFEU is not directly effective in the context of claims based on work of equal value, so that the female claimants in the main proceedings cannot rely on that provision before the referring tribunal. Furthermore, it disputed that it can be classified as a 'single source'.

The referring tribunal observed in respect of Article 157 TFEU that there is uncertainty, within United Kingdom courts and tribunals, regarding its direct effect, connected in particular with the distinction articulated by the Court between discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay and discrimination which can only be identified by reference to more explicit implementing provisions. [344] The claims at issue in the main proceedings could fall within the latter category, in respect of which Article 157 TFEU has no direct effect.

It was in that context that the referring tribunal sought a preliminary ruling from the Court. In its judgment, the Court held that Article 157 TFEU has direct effect in proceedings between individuals in which failure to observe the principle of equal pay for male and female workers for 'work of equal value', as referred to in that article, is pleaded.

Findings of the Court

As a preliminary point, the Court held that it had jurisdiction, pursuant to Article 86 of the withdrawal agreement, [345] to reply to the request for a preliminary ruling, despite the United Kingdom's withdrawal from the European Union.

As to the substance, the Court observed, first of all, that the wording of Article 157 TFEU clearly and precisely imposes an obligation to achieve a particular result and is mandatory as regards both 'equal work' and 'work of equal value'. It went on to state that, according to its settled case-law, Article 157 TFEU produces direct effects by creating rights for individuals which the national courts must safeguard, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether public or private. The Court pointed out, in that regard, that it has made clear that such discrimination is among the forms of discrimination which may be identified solely by reference to the criteria based on equal work and equal pay laid down by Article 119 of the EEC Treaty and that, in such a situation, a court is in a position to establish all the facts enabling it to decide whether a female worker is receiving lower pay than a male worker engaged in equal work or work of equal value. [346] Thus, it is apparent from settled case-law that, contrary to Tesco Stores' submissions, the direct effect of Article 157 TFEU is not limited to situations in which the workers of different

344| The referring tribunal made reference, in that regard, to paragraph 18 of the judgment of 8 April 1976, Defrenne (43/75, EU:C:1976:56).

345| See Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (EAEC) (OJ 2020 L 29, p. 1), by which the Council of the European Union approved that agreement (OJ 2020 L 29, p. 7), which was attached to the decision, on behalf of the European Union and the EAEC. The Court stated that it follows from Article 86 of that agreement that it is to continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom which were made before the end of the transition period set at 31 December 2020, as in the present instance.

346| See, to that effect, judgments of 8 April 1976, ***Defrenne*** (43/75, EU:C:1976:56, paragraphs 18 and 21 to 23), and, subsequently, of 11 March 1981, ***Worringham and Humphreys*** (69/80, EU:C:1981:63, paragraph 23), concerning Article 119 of the EEC Treaty, which became, after amendment, Article 141 EC, now Article 157 TFEU.

sex who are compared perform 'equal work', but extends to situations of 'work of equal value'. In that context, the Court stated that the question whether the workers concerned perform 'equal work' or 'work of equal value' is a matter of factual assessment by the court.

Furthermore, the Court held that the objective pursued by Article 157 TFEU, namely the elimination, for equal work or work of equal value, of all discrimination on grounds of sex as regards all aspects and conditions of remuneration, bears out such an interpretation. It observed in that regard that the principle, referred to in Article 157 TFEU, of equal pay for male and female workers for equal work or work of equal value forms part of the foundations of the European Union.

Finally, the Court pointed out that, where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no entity which could restore equal treatment, with the result that such a situation does not come within the scope of Article 157 TFEU. By contrast, where such pay conditions can be attributed to a single source, the work and the pay of those workers can be compared, even if they work in different establishments. Consequently, that provision may be relied upon before national courts in proceedings concerning work of equal value carried out by workers of different sex having the same employer and in different establishments of that employer, provided that the latter constitutes such a single source.

Judgment of 15 July 2021, *Tartu Vangla* (C-795/19, EU :C :2021 :606)

For almost 15 years, XX was employed as a prison officer by Tartu Prison (Estonia).

During that period, Regulation No 12 of the Government of the Republic of Estonia, on health requirements and medical checks for prison officers and on the form and content of medical certificates, entered into force. That regulation prescribes, inter alia, minimum standards of sound perception applicable to those officers and provides that impaired hearing falling below those standards constitutes an absolute medical impediment to the exercise of the duties of a prison officer. In addition, that regulation does not permit the use of corrective aids during the assessment of whether the hearing acuity requirements are met.

On 28 June 2017, the Governor of Tartu Prison dismissed XX following the issue of a medical certificate showing that XX's hearing acuity did not meet the minimum standards of sound perception prescribed in Regulation No 12.

XX brought an action before the Tartu Halduskohus (Administrative Court, Tartu, Estonia), arguing that that regulation constituted discrimination on grounds of disability contrary to, inter alia, the põhiseadus (Constitution). Following the dismissal of that action, the Tartu Ringkonnakohus (Court of Appeal, Tartu, Estonia), by judgment of 11 April 2019, upheld XX's appeal and declared that the decision to dismiss him was unlawful. That court also decided to initiate the procedure for reviewing the constitutionality of the provisions of that regulation before the referring court, the Riigikohus (Supreme Court, Estonia). Noting that the obligation to treat, without discrimination, persons who have a disability in the same way as other persons in a comparable situation results not only from the Constitution but also from EU law, that court decided to refer a question to the Court as to whether the provisions of the Anti-discrimination Directive preclude such national legislation.

Findings of the Court

After finding that Regulation No 12 falls within the scope of that directive and amounts to a difference in treatment directly based on disability, the Court examined whether that difference is capable of being justified pursuant to Article 4(1) of that directive, according to which Member States may provide that a difference of treatment which is based on a characteristic related to that ground shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. In so far as it allows a derogation from the principle of non-discrimination, that provision must be interpreted strictly.

The Court noted, in particular, that the requirement to be capable of hearing correctly and, therefore, of meeting a particular standard of hearing acuity follows from the nature of the duties of a prison officer, as described by the referring court, and held that, by reason of the nature of those duties and of the context in which they are carried out, the fact that his or her hearing acuity must satisfy minimum standards of sound perception may be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) of the Anti-discrimination Directive.

As Regulation No 12 seeks to preserve the safety of persons and public order, the Court found that that regulation pursues legitimate objectives. The Court then examined whether the requirement that it lays down – namely that a prison officer's hearing acuity must meet minimum standards of sound perception, without the use of corrective aids being permitted during the assessment of whether those standards are met, and where failure to meet those standards constitutes an absolute medical impediment to the exercise of his or her duties, resulting in their termination – is appropriate for attaining those objectives and does not go beyond what is necessary to attain them.

As to the appropriateness of that requirement, the Court recalled that legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner. The Court observed, however, that the regulation permits a prison officer to use corrective devices during an assessment as to whether the standards that it lays down in respect of visual acuity are met, whereas that possibility is excluded in respect of hearing acuity.

As regards the necessity of that requirement, the Court stated that the failure to meet the standards prescribed by Regulation No 12 is an absolute bar to the exercise of a prison officer's duties, as those standards apply to all prison officers, without any possibility of exemption. In addition, that regulation does not permit an individual assessment of an officer's capacity to fulfil the essential duties of that profession notwithstanding the hearing impairment on his or her part.

The Court also recalled the employer's obligation under Article 5 of the Anti-discrimination Directive to take appropriate measures, in accordance with the needs arising in a specific case, to enable a person with a disability to have access to and participate in employment, unless such measures would impose a disproportionate burden on that employer. In that regard, the Court observed that Regulation No 12 did not allow XX's employer to conduct, prior to his dismissal, checks in order to consider measures such as the use of a hearing aid, an exemption, for him, from the obligation of performing tasks requiring him to meet the minimum standards of sound perception prescribed, or his assignment to a post which did not require those standards to be reached, and that no indication was provided as to the possible disproportionate nature of the resulting burden.

That regulation thus appeared to have imposed a requirement that went beyond what was necessary to attain the objectives pursued.

The Court concluded that Article 2(2)(a), Article 4(1) and Article 5 of the Anti-discrimination Directive preclude national legislation which imposes an absolute bar to a prison officer remaining in employment when his or her hearing acuity does not meet the minimum standards of sound perception prescribed by that legislation, without allowing it to be ascertained whether that officer is capable of fulfilling those duties, where appropriate after the adoption of reasonable accommodation measures within the meaning of that Article 5.

2. Organisation of working time

Judgment of 15 July 2021 (Grand Chamber), *Ministrstvo za obrambo* (C-742/19, EU :C :2021 :597)

Between February 2014 and July 2015, B. K., a non-commissioned officer in the Slovenian army, performed uninterrupted 'guard duty' for seven days per month. During that duty, which included both periods during which B. K. was required to carry out actual surveillance activity and periods during which he was required only to remain available to his superiors, he was contactable and present at all times at the barracks where he was posted.

Taking the view that, for each of those days of 'guard duty', only eight hours constituted working time, the Ministry of Defence paid B. K. the corresponding ordinary salary in respect of those hours and, in respect of the other hours, paid him only a stand-by duty allowance amounting to 20% of his basic salary.

The action brought by B. K., seeking payment, as overtime, for the hours during which, in the course of his 'guard duty', he had not actually performed any activity for his employer, but had been obliged to remain available to his superiors, was dismissed at first instance and on appeal.

In that context, the Vrhovno sodišče (Supreme Court, Slovenia), hearing an appeal on a point of law, decided to refer questions to the Court on the applicability of Directive 2003/88, [347] which lays down minimum requirements concerning, inter alia, the duration of working time, to security activity carried out by a member of military personnel in peacetime and, as the case may be, on the issue of whether 'stand-by periods' during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, must be regarded as working time, within the meaning of Article 2 of that directive, for the purposes of determining the remuneration payable to him or her in respect of that period.

347| 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).

Findings of the Court

In its Grand Chamber judgment, the Court provided guidance, in the first place, on the instances in which security activity carried out by a member of military personnel is excluded from the scope of Directive 2003/88.

In doing so, the Court noted, at the outset, that Article 4(2) TEU, which provides that national security is to remain the sole responsibility of each Member State, [348] does not have the effect of excluding the organisation of the working time of military personnel from the scope of EU law.

In that regard, the Court noted that the principal tasks of the armed forces of the Member States, which are the preservation of territorial integrity and safeguarding national security, are expressly included among the essential functions of the State which the European Union must respect. However, it pointed out that it does not follow from the above that decisions taken by the Member States on the organisation of their armed forces fall entirely outside the scope of EU law, in particular where the harmonised rules at issue relate to the organisation of working time.

Although it does not therefore result from the respect which the European Union must have for the essential functions of the State that the organisation of the working time of military personnel entirely escapes the application of EU law, the fact remains that Article 4(2) TEU requires that the application to military personnel of the rules of EU law relating to the organisation of working time must not hinder the proper performance of those essential functions. EU law must take into consideration the specific features which each Member State imposes on the functioning of its armed forces which result, inter alia, from the particular international responsibilities assumed by that Member State, from the conflicts or threats with which it is confronted, or from the geopolitical context in which that State evolves.

Turning then to the question of who is covered by Directive 2003/88, the Court noted that the concept of 'worker' is defined by reference to the essential feature of an employment relationship, namely the fact that a person performs services for and under the direction of another person in return for which he or she receives remuneration. As that was the case for B. K. during the relevant period, that directive was applicable to his situation.

Lastly, as regards the matters covered by Directive 2003/88, which are defined by reference to Article 2 of Directive 89/391, [349] the Court pointed out that that directive is to apply to 'all sectors of activity, both public and private', [350] except where characteristics peculiar to certain specific public service activities, such as the armed forces, inevitably conflict with it. [351]

In that regard, the Court found that Article 2 of Directive 89/391 cannot be interpreted as meaning that all members of the armed forces of the Member States are permanently excluded from the scope of Directive 2003/88. Such an exclusion does not cover whole sectors of the public service, but rather only certain categories of activity in those sectors, by reason of their specific nature. With respect, specifically, to activities carried out by military personnel, the Court stated, inter alia, that those activities connected to administrative,

348| According to the wording of that provision, the European Union is to respect the essential functions of the State, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

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

350| Article 2(1) of Directive 89/391.

351| First subparagraph of Article 2(2) of Directive 89/391.

maintenance, repair and health services, as well as services relating to public order and prosecution, do not, as such, have particularities which make it impossible to plan working time in a manner compliant with the requirements laid down in Directive 2003/88, at least provided that those activities are not carried out in the context of a military operation or during the period of preparation immediately preceding such an operation.

However, the Court held that that directive does not apply to the activities of military personnel and, in particular, to their security activities where those activities take place in the course of initial or operational training or in the course of operations involving a military commitment by the armed forces, whether they are deployed, permanently or on a temporary basis, within the borders of the relevant Member State or outside of those borders. Furthermore, Directive 2003/88 equally does not apply to military activity which is so particular that it is not suitable for a staff rotation system which would ensure compliance with the requirements of that directive. That is also the case where it appears that the military activity is carried out in the context of exceptional events, the gravity and scale of which require the adoption of measures indispensable for the protection of the life, health and safety of the community at large, measures whose proper implementation would be jeopardised if all the rules laid down in that directive had to be observed, or where the application of that directive to such an activity, by requiring the authorities concerned to set up a rotation system or a system for planning working time, would inevitably be detrimental to the proper performance of actual military operations. It is for the referring court to determine whether the security activity performed by B. K. is covered by one of those situations. If not, then that activity will have to be deemed to fall within the scope of Directive 2003/88.

In the second place, the Court found that, assuming that Directive 2003/88 applies in the present case, a stand-by period imposed on a member of military personnel which involves him or her being continually present at his or her place of work must be regarded as being working time where that place of work is separate from his or her residence. However, since the way in which workers are remunerated for the period of stand-by time is covered by national law and not by Directive 2003/88, the latter does not preclude a stand-by period during which a member of military personnel is required to remain at the barracks to which he or she is posted, but does not perform actual work there, from being remunerated differently than a stand-by period during which he or she performs actual work.

3. Temporary agency workers

Judgment of 11 November 2021, *Manpower Lit* (C-948/19, EU :C :2021 :906)

Manpower Lit, a Lithuanian temporary-work agency, assigned five workers to the European Institute for Gender Equality (EIGE), a European Union agency established in Vilnius (Lithuania), as assistants and as an IT support worker respectively. Following termination of their employment relationships with Manpower Lit between April and December 2018, those workers, taking the view that they were owed arrears of remuneration, brought proceedings before the Valstybinės darbo inspekcijos Vilniaus teritorinio skyriaus Darbo ginčų komisija (Labour disputes commission of the Vilnius territorial section of the employment inspectorate, Lithuania) seeking payment of those arrears.
By decision of 20 June 2018, that commission, having regard to the provision of the Labour Code transposing into Lithuanian law the principle of equal treatment for temporary agency workers laid down by Directive 2008/104, [352] ordered the recovery of those arrears, finding that the workers in question did in fact perform the functions of permanent members of staff of the EIGE and that their pay conditions should correspond to those that the EIGE applied to its contract agents.

Its action against that decision having been dismissed both at first instance and on appeal, Manpower Lit brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court, Lithuania).

That court decided to refer questions to the Court seeking clarification on whether the principle of equal treatment for temporary agency workers laid down by Directive 2008/104 was applicable in the main proceedings, in the light of the fact that the user of temporary personnel services was an agency of the European Union.

In its judgment, the Court confirmed that Directive 2008/104, including the provisions seeking to ensure observance of the principle of equal treatment, applied to the dispute in the main proceedings.

Findings of the Court

The Court analysed, first, the scope of Directive 2008/104. It stated in that respect that the EIGE must satisfy three conditions [353] in order for the directive to apply, that is to say, it must fall within the definition of 'public and private undertakings', must be a 'user undertaking' and must be engaged in 'economic activities'.

As regards whether the EIGE can be regarded as a 'user undertaking', [354] the Court noted that the employees in question worked temporarily, as temporary agency workers, for the EIGE and under its supervision and direction. Moreover, that EU agency must be regarded as a 'legal person' within the meaning of Directive 2008/104. The Court concluded from the foregoing that the EIGE is, in that context, a 'user undertaking'.

352| Article 5 of Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

353| Set out in Article 1(2) of that directive. Under that article, the directive applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain.

354| Within the meaning of Article 3(1)(d) of Directive 2008/104, that is to say, 'any natural or legal person for whom and under the supervision and direction of whom a temporary agency worker works temporarily'.

Since the terms 'public and private undertakings' and 'economic activities' are not defined in the directive, in order to determine their meaning the Court examined whether the EIGE is engaged in any activity consisting in offering goods or services on a given market.

It found in that respect, first, that the activities of that EU agency do not fall within the exercise of public powers and are therefore not excluded from classification as an economic activity. Thereafter, having regard to certain activities of the EIGE, listed in Regulation No 1922/2006, [355] there are markets in which commercial undertakings operate in competition with the EIGE. The fact that, when it is engaged in those activities, the EIGE is not operating for gain is immaterial. Lastly, the EIGE's revenue includes [356] in particular payments received for services rendered, thereby confirming that the EU legislature envisaged that the EIGE would act, in part at least, as a market player.

Accordingly, the Court found that the EIGE must be regarded as being engaged, at least in part, in an activity consisting in offering services on a given market and, therefore, that the assignment by a temporary-work agency of persons who have concluded an employment contract with that agency to the EIGE for the performance of work falls within the scope of Directive 2008/104.

Secondly, the Court examined whether the post occupied by a temporary agency worker assigned to the EIGE can be regarded as being 'the same job' within the meaning of Directive 2008/104, given that, according to that directive, [357] the basic working and employment conditions of temporary agency workers must, for the duration of their assignment at a user undertaking, be at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

As regards whether the working and employment conditions of temporary agency workers can be compared with those of EIGE staff employed under the Staff Regulations of Officials of the European Union, the Court rejected the argument of the European Commission that such a comparison may infringe Article 335 TFEU, under which the European Union enjoys the most extensive legal capacity accorded to legal persons under national law, and Article 336 TFEU, on the adoption of the Staff Regulations of Officials by the EU legislature. That comparison does not in any respect have the effect of conferring the status of EU official on temporary agency workers. The Court clarified that in the absence of specific rules, where agencies of the European Union use temporary agency workers under contracts concluded with temporary-work agencies, the principle of equal treatment applies in full to those workers during their assignments within the EU agency.

The Court found that the job occupied by a temporary agency worker assigned to the EIGE can be regarded as being 'the same job' within the meaning of Directive 2008/104, even if all the jobs for which the EIGE recruits workers directly include tasks that can only be performed by workers employed under the Staff Regulations of Officials of the European Union.

Concerning the protection of temporary agency workers, reference should also be made under this heading to the judgment of 3 June 2021, ***TEAM POWER EUROPE*** (C-784/19, EU :C :2021 :427), in which the Court ruled, in the context of the coordination of social security systems, on the concept of employer that 'normally carries out its activities' in a Member State. [358]

355| Article 3(1) of Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality (OJ 2006 L 403, p. 9), which makes reference in particular, in Article 3(1)(g), to organising conferences, campaigns and meetings at European level.

356| In accordance with Article 14(3)(b) of Regulation No 1922/2006.

357| Article 5(1) of that directive.

358| That judgment is presented in Section XVI.4 'Coordination of social security systems'.

4. Coordination of social security systems

Judgment of 3 June 2021 (Grand Chamber), *TEAM POWER EUROPE* (C-784/19, EU :C :2021 :427)

In 2018, a Bulgarian national concluded a contract of employment with Team Power Europe, a company incorporated under Bulgarian law whose commercial purpose is the provision of temporary work and work placement services in Bulgaria and in other countries. Pursuant to that contract, he was assigned to a user undertaking established in Germany. From 15 October to 21 December 2018, he was required to work under the direction and supervision of that German undertaking.

Taking the view, first, that the direct relationship between Team Power Europe and the worker in question had not been maintained and, secondly, that that undertaking did not carry out any substantial activity in Bulgaria, the revenue service for the City of Varna rejected Team Power Europe's application for an A1 certificate certifying that Bulgarian social security legislation was applicable to the worker in question during the period of his assignment. According to the revenue service, that worker's situation did not therefore fall within the scope of Article 12(1) of Regulation No 883/2004, [359] under which Bulgarian legislation would apply. The administrative complaint brought by Team Power Europe against the revenue service's decision was rejected.

It was in those circumstances that the Administrativen sad – Varna (Administrative Court, Varna, Bulgaria), hearing an action for annulment of the decision rejecting that administrative complaint, decided to ask Court about the criteria to be taken into account in order to assess whether a temporary-work agency ordinarily performs 'substantial activities other than purely internal management activities' in the Member State in which it is established, within the meaning of Article 14(2) of Regulation Nº 987/2009, [360] which defines Article 12(1) of Regulation No 883/2004. The application of that latter provision to this case depended on Team Power Europe satisfying that requirement.

In its judgment, delivered by the Grand Chamber, the Court clarified, as regards temporary-work agencies, the meaning of the concept, laid down in that provision and defined in Article 14(2) of Regulation No 987/2009, of an employer that 'normally carries out its activities' in the Member State.

359| Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4). More specifically, pursuant to Article 12(1) of Regulation No 883/2004, 'a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another posted person'.

360| Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1). Article 14(2) of Regulation No 987/2009 provides that, 'for the purposes of the application of Article 12(1) of the basic Regulation, the words "which normally carries out its activities there" shall refer to an employer that ordinarily performs substantial activities, other than purely internal management activities, in the territory of the Member State in which it is established, taking account of all criteria characterising the activities carried out by the undertaking in question. The relevant criteria must be suited to the specific characteristics of each employer and the real nature of the activities carried out'.

Findings of the Court

The Court carried out, first of all, a literal interpretation of the latter provision and found that a temporary-work agency is characterised by the fact that it performs a set of activities consisting in the selection, recruitment and assignment of temporary agency workers to user undertakings. In that regard, it stated that, even though the activities of selecting and recruiting temporary agency workers cannot be regarded as 'purely internal management activities' within the meaning of that provision, the performance of those activities in the Member State in which such an undertaking is established is insufficient for it to be regarded as performing 'substantial activities' there. The sole aim of the activities of selecting and recruiting temporary agency workers is the subsequent assignment of those workers by it to user undertakings. The Court observed in that regard that, although the selection and recruitment of temporary agency workers contribute to generating the turnover achieved by a temporary-work agency, since those activities constitute an essential prerequisite for the subsequent assignment of such workers, it is only the assignment of those workers to user undertakings, in performance of the contracts concluded with those undertakings for that purpose, which actually generates that turnover. Indeed, the income of such an undertaking depends on the amount of remuneration paid to temporary agency workers who have been assigned to user undertakings.

As regards, next, the context of the provision at issue, the Court recalled that the situation in which a worker posted to perform work in another Member State remains subject to the legislation of the first Member State constitutes a derogation from the general rule that a person who pursues an activity as an employed or self-employed person in a Member State is subject to the legislation of that Member State. [361] Consequently, the provision governing such a situation must be subject to a strict interpretation. In those circumstances, that rule of derogation cannot apply to a temporary-work agency which, in the Member State in which it is established, does not assign any such workers to user undertakings which are also established there, or, at most, does so to a negligible extent. In addition, the definitions of the concepts of 'temporary-work agency' and 'temporary agency worker', laid down in Directive 2008/104, by making apparent the purpose of the activity of a temporary-work agency undertaking, also support the interpretation that such an undertaking cannot be regarded as carrying out, in the Member State in which it is established, 'substantial activities' unless it performs there, to a significant extent, activities of assigning workers for the benefit of user undertakings performing their activities in the same Member State.

As regards, lastly, the aim pursued by the provision in question, the Court stated that the derogation contained in Article 12(1) of Regulation No 883/2004, which represents an advantage offered to undertakings that exercise the freedom to provide services, cannot benefit temporary-work agencies that orient their activities of assigning temporary agency workers exclusively or mainly to one or more Member States other than that in which they are established. The contrary solution would be likely to encourage those undertakings to engage in forum shopping by establishing themselves in the Member States with the social security legislation that is most favourable to them. Ultimately, such a solution might lead to a reduction in the level of protection offered by the Member States' social security systems. Furthermore, the Court noted that to grant such a benefit to those undertakings would have the effect of creating a distortion of competition between the various possible modes of employment in favour of recourse to temporary agency work as opposed to undertakings directly recruiting their workers, who would be affiliated to the social security system of the Member State in which they work.

361| Laid down in Article 11(3)(a) of Regulation No 883/2004.

The Court concluded that a temporary-work agency established in a Member State must, in order for it to be considered that it 'normally carries out its activities' in that Member State, carry out a significant part of its activities of assigning temporary agency workers for the benefit of user undertakings established and carrying out their activities in the territory of that Member State.

Judgment of 15 July 2021 (Grand Chamber), *A (Public health care)* (C-535/19, EU :C :2021 :595)

A, an Italian national married to a Latvian national, left Italy and settled in Latvia to live with his wife and their two infant children.

Shortly after arriving in Latvia on 22 January 2016, he applied to the Latvijas Nacionālais Veselības dienests (National Health Service, Latvia) to become affiliated to the Latvian public compulsory sickness insurance system. His request was refused by decision of 17 February 2016, which was confirmed by the Ministry of Health on the ground that A was not included within any of the categories of recipients of medical care financed by the State since he was neither employed nor self-employed in Latvia.

His action against the refusal decision of the Latvian authorities having been dismissed, A brought an appeal before the Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), which also delivered a judgment unfavourable to him.

It was in that context that the Augstākā tiesa (Senāts) (Supreme Court, Latvia), hearing an appeal brought by A, decided to ask the Court about the compatibility with EU law in the areas of citizenship and social security of the dismissal by the Latvian authorities of A's request.

In its judgment, delivered by the Grand Chamber, the Court confirmed the right of economically inactive Union citizens residing in a Member State other than their Member State of origin to be affiliated to the public sickness insurance system of the host Member State in order to obtain medical care financed by that State. The Court explained, however, that EU law does not impose the obligation of affiliation free of charge to that system.

Findings of the Court

First, the Court reviewed the applicability of Regulation No 883/2004 to the provision of medical care such as that at issue in the main proceedings. It concluded that benefits financed by the State and granted, without any individual and discretionary assessment of personal needs, to persons falling within the categories of recipients defined by national legislation, constitute 'sickness benefits' within the meaning of Article 3(1)(a) of Regulation No 883/2004. Those benefits accordingly fall within the scope of that regulation, not being 'social and medical assistance' excluded from that scope. [362]

362| In accordance with Article 3(5)(a) of Regulation No 883/2004.

Secondly, the Court examined, in essence, whether Article 11(3)(e) of Regulation No 883/2004 and Article 7(1)(b) of the Residence Directive [363] preclude national legislation which excludes from the right to be affiliated to the public sickness insurance system of the host Member State, in order to obtain medical care financed by that State, economically inactive Union citizens who are nationals of another Member State and who fall, by virtue of Article 11(3)(e) of that regulation, within the scope of the legislation of the host Member State and who are exercising their right of residence in the territory of that State under Article 7(1)(b) of that directive.

In that regard, the Court stated, first, that in the context of the system of conflict rules established by Regulation No 883/2004 [364] for determining the national legislation applicable to the receipt of social security benefits, economically inactive persons are, in principle, covered by the legislation of the Member State in which they reside.

It noted, next, that when they lay down the conditions establishing the right to become a member of a social security scheme, the Member States are under an obligation to comply with the provisions of EU law in force. In particular, the conflict rules laid down by Regulation No 883/2004 are mandatory for the Member States and they cannot determine to what extent their own legislation or that of another Member State is applicable.

Accordingly, a Member State cannot, by its national legislation, refuse to affiliate to its public sickness insurance scheme a Union citizen who, under Article 11(3)(e) of Regulation No 883/2004 on the determination of the applicable legislation, comes under the legislation of that Member State.

Finally, the Court examined the effect on affiliation to the social security scheme of the host Member State of the provisions of the Residence Directive, in particular Article 7(1)(b). It follows from that provision that, throughout the period of residence in the territory of the host Member State of more than three months and less than five years, economically inactive Union citizens must in particular have comprehensive sickness insurance cover for themselves and their family members so as not to become an unreasonable burden on the public finances of that Member State.

As regards the relationship between that condition for residence in accordance with the Residence Directive and the obligation of affiliation under Regulation No 883/2004, the Court made clear that the host Member State of an economically inactive Union citizen may provide that access to that system is not free of charge in order to prevent that citizen from becoming an unreasonable burden on the public finances of that Member State.

The Court considered that the host Member State is entitled to make the affiliation to its public sickness insurance scheme of an economically inactive Union citizen residing in its territory on the basis of Article 7(1)(b) of the Residence Directive subject to conditions, such as the conclusion or maintenance by that citizen of comprehensive private sickness insurance, enabling the reimbursement to that Member State of the health expenses which it incurred for that citizen's benefit, or the payment, by that citizen, of a contribution to that Member State's public sickness insurance scheme. It is nevertheless for the host Member State to ensure that the principle of proportionality is observed in that context and, therefore, to ensure that it is not excessively difficult for that citizen to comply with such conditions.

363| Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p.35; 'the Residence Directive').

364| Article 11(3)(e) of Regulation No 883/2004.

The Court concluded that Article 11(3)(e) of Regulation No 883/2004, read in the light of Article 7(1)(b) of the Residence Directive, precludes national legislation which excludes from the right to be affiliated to the public sickness insurance system of the host Member State, in order to obtain medical care financed by that State, economically inactive Union citizens who are nationals of another Member State and who fall, by virtue of that regulation, within the scope of the legislation of the host Member State and who are exercising their right of residence in the territory of that Member State under that directive.

Those provisions, by contrast, do not preclude the affiliation of such Union citizens to that system from not being free of charge in order to prevent those citizens from becoming an unreasonable burden on the public finances of the host Member State.

5. Implementation at EU level of agreements concluded between social partners

Judgment of 2 September 2021 (Grand Chamber), *EPSU* v *Commission* (C-928/19 P, EU :C :2021 :656)

In April 2015, the European Commission launched a consultation concerning the possible extension of the scope of application of several directives on information and consultation of workers [365] to cover civil servants and employees of central administrations of the Member States. A few months later, in the context of that consultation, two social partners, the Trade Unions' National and European Administration Delegation (TUNED) and European Public Administration Employers (EUPAE), concluded an agreement establishing a general framework for informing and consulting civil servants and employees of those national administrations. The parties to the agreement then requested the Commission to submit to the Council of the European Union a proposal for a decision implementing the agreement at EU level, on the basis of Article 155(2) TFEU. [366] By decision of 5 March 2018, the Commission refused their request ('the contested decision').

In May 2018, EPSU, an association which brings together European trade unions representing public service workers and which contributed to the creation of TUNED, applied to the General Court for annulment of that decision. The General Court dismissed the action, [367] holding that Article 155(2) TFEU does not require the EU institutions to give effect to a joint request submitted by the signatories to an agreement seeking its implementation at EU level. After finding that the contested decision should be the subject of a limited review, the General Court ruled that that decision satisfied the obligation to state reasons laid down in Article 296 TFEU and that the contested reasons in the decision were well founded.

365| Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16), Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16) and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation (OJ 2002 L 80, p. 29).

366| Essentially, under that provision, agreements concluded between management and labour at EU level are to be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153 TFEU (that is to say, in fields falling within social policy), at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

367| Judgment of 24 October 2019, ***EPSU and Goudriaan*** v ***Commission*** (T-310/18, EU :T :2019:757).

Hearing an appeal brought by EPSU, the Court of Justice, sitting as the Grand Chamber, upheld the judgment of the General Court, while noting the discretion enjoyed by the Commission in that area and the limited judicial review of such decisions.

Findings of the Court

As regards, first of all, the literal interpretation of Article 155(2) TFEU, the Court observed that that provision does not contain any indication that the Commission may be obliged to submit a proposal for a decision to the Council. The imperative formulations used in a number of language versions are thus intended solely to express the exclusivity of the two alternative procedures laid down in that provision, one of which is a specific procedure resulting in the adoption of an EU act.

Next, so far as concerns the contextual and teleological interpretation of Article 155(2) TFEU, the Court analysed that provision within the framework of the powers conferred on the Commission by the Treaties, in particular by Article 17 TEU, paragraph 1 of which assigns it the task of promoting the general interest of the European Union and paragraph 2 of which accords it a general power of legislative initiative. The Court concluded from this that Article 155(2) TFEU confers upon the Commission a specific power, which falls within the scope of the role assigned to it in Article 17(1) TEU and consists in determining whether it is appropriate to submit a proposal to the Council on the basis of an agreement between management and labour (the social partners) for the purpose of its implementation at EU level. A different interpretation would have the effect that the interests of the management and labour signatories to an agreement alone would prevail over the task, entrusted to the Commission, of promoting the general interest of the European Union. That conclusion is not called into question by the autonomy of the social partners, which is enshrined in the first paragraph of Article 152 TFEU and must be taken into account in the context of the dialogue between management and labour promoted as an objective of the European Union by the first paragraph of Article 151 TFEU. The existence of that autonomy, which characterises the stage of negotiation of a possible agreement between social partners, does not mean that the Commission must automatically submit to the Council at their request a proposal for a decision implementing such an agreement at EU level, because that would be tantamount to according those social partners a power of initiative of their own that they do not have.

The Court pointed out, moreover, that the question, raised by EPSU, as to whether legal acts adopted on the basis of Article 155(2) TFEU are legislative in nature is separate from the question of the power that the Commission holds to decide whether it is appropriate to submit a proposal to the Council pursuant to that provision and that the scope of that power of the Commission is the same whether or not the act is legislative in nature.

Furthermore, regarding the issue of the standard of judicial review of the contested decision, the Court pointed out that the Commission has a discretion when deciding whether it is appropriate to submit a proposal to the Council pursuant to Article 155(2) TFEU. Given the complex assessments that must be carried out by the Commission for that purpose, judicial review of that type of decision is limited. It must be limited in particular when the EU institutions, as in the present instance, have to take account of potentially divergent interests and to take decisions involving policy choices that have regard to political, economic and social considerations.

Finally, the appellant pleaded an alleged infringement of its legitimate expectations, submitting that the Commission had departed from the communications previously published by it concerning social policy. In that regard, the Court acknowledged that, in adopting rules of conduct and announcing that through their publication that the Commission will henceforth apply them to the cases to which they relate, an institution imposes a limit on the exercise of its discretion. However, the view cannot be taken in the absence of an explicit and unequivocal commitment on the part of the Commission that in the present instance it imposed

a limit on the exercise of its power laid down in a provision of primary law, by undertaking to examine only certain specific considerations before submitting its proposal, thereby transforming that discretion into a circumscribed power where certain conditions are met.

Thus, the Court of Justice confirmed that the General Court did not commit any error of law and dismissed EPSU's appeal in its entirety.

XVII. Environment

Reference must be made to five judgments in connection with environmental protection. The first judgment concerns the interpretation of the Habitats Directive [368] on the conservation of natural habitats and of wild fauna and flora. That directive is further interpreted in the second judgment, alongside the Birds Directive [369] on the conservation of wild birds. Directive 2009/147 is also the subject of the third judgment. The last two judgments deal with requests for access to environmental information made within the framework of the Directive on public access to environmental information [370] implementing the Aarhus Convention.

1. Habitats Directive

Judgment of 4 March 2021, *Föreningen Skydda Skogen* (C-473/19 and C-474/19, EU :C :2021 :166)

After receiving a notification of tree felling relating to an area of forest in the municipality of Härryda (Sweden), the Skogsstyrelsen (Forest Agency, Sweden) issued guidance stating that, on condition that the recommended precautionary measures were complied with, the final felling of almost all the trees in the area concerned, which is the natural habitat of a number of protected species, would not be contrary to Swedish legislation on the protection of species.

Three environmental protection associations, which regarded the planned felling as being in breach of that legislation, transposing the Birds Directive and the Habitats Directive into Swedish law, requested the Länsstyrelsen i Västra Götalands län (Regional Administrative Board of Västra Götaland, Sweden) to take action. The Regional Administrative Board nevertheless decided not to take any supervision measures, endorsing, in essence, the favourable guidance issued by the Forest Agency.

The associations challenged the Regional Administrative Board's decision in proceedings brought before the Vänersborgs tingsrätt, mark- och miljödomstolen (Vänersborg District Court, Land and Environment Court, Sweden). That court, which thus had to determine the impact of the forestry activity at issue on the protection

368| Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

369| Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive').

370| Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26; 'the Directive on public access to environmental information').

of the species present in the area concerned, referred several questions to the Court for a preliminary ruling on the conditions for applying and the scope of the prohibitions laid down in that regard in the Birds and Habitats Directives.

Findings of the Court

First of all, so far as concerns the Birds Directive, the Court noted that that directive requires the Member States, in accordance with its Article 5, to take the requisite measures to establish a general system of protection of birds, including, in particular, prohibitions on the deliberate killing, capture or disturbance of birds and their eggs. [371]

The Court made clear that the scope of those prohibitions covers all species of wild birds naturally occurring in the territory of the Member States and, in contrast to Swedish practice, does not therefore cover only certain categories of species, namely those which are listed in Annex I to that directive, which are at some level at risk or which are suffering a long-term decline in population. That interpretation is supported by the object and purpose of the Birds Directive and by the context of Article 5 thereof. [372] The conservation of bird species is necessary in order to achieve a high level of protection of the environment and the European Union's objectives in terms of sustainable development and improvement of living conditions. In addition, the Birds Directive makes a distinction between the system of general protection applicable to all species of birds and the system of targeted and reinforced protection established for the species of birds listed in its Annex I.

Next, the Court noted that, like the Birds Directive, the Habitats Directive provides for the establishment of a system of strict protection for protected animal species, based on, among other things, the prohibitions set out in Article 12(1)(a) to (c) on the deliberate capture, killing or disturbance of specimens of those species, and the destruction or taking of their eggs. [373]

In that regard, the Court stated that the condition as to deliberate action means that the author of the act at issue intended one of the types of harm referred to above or, at the very least, accepted the possibility of such a thing, so that the prohibitions listed in Article 12(1)(a) to (c) of the Habitats Directive are capable of being applied to an activity, such as forestry work, the purpose of which is manifestly different from the capture, killing or disturbance of animal species or the deliberate destruction or taking of eggs. Having regard to the objectives of the Habitats Directive and to the wording and context of the aforementioned provision, [374] the applicability of those prohibitions is likewise not subject to the condition of a risk of an adverse effect caused by a given activity on the conservation status of the species concerned. An interpretation to the contrary would lead to a circumvention of the requirement to examine of the effect of an activity on the conservation status of an animal species even though such an examination is necessary for the purposes of adopting derogations from those prohibitions. [375]

371| Article 5 of the Birds Directive.

372| Article 5 of the Birds Directive.

373| Article 12(1)(a) to (c) of the Habitats Directive.

374| Article 12(1)(a) to (c) of the Habitats Directive.

375| Article 16 of the Habitats Directive.

Furthermore, to the extent that the Habitats Directive seeks, for the purpose of preserving biodiversity, to ensure the restoration or maintenance of natural habitats and species of wild fauna and flora at a favourable conservation status, the prohibitions laid down in Article 12(1)(a) to (c) thereof apply even to species which have achieved such a conservation status, as those species must be protected against any deterioration of that status.

The Court then noted that, for the purpose of achieving the objectives of the Habitats Directive, the competent authorities must adopt preventive measures and anticipate what activities could harm protected species. It is thus a matter for the referring court to determine whether, in the main proceedings, the forestry work at issue is based on a preventive approach which has regard for the conservation needs of the species concerned, while taking into consideration the economic, social, cultural, regional and local requirements.

Lastly, as regards the prohibition on the deterioration or destruction of breeding sites or resting places, set out in Article 12(1)(d) of the Habitats Directive, [376] the Court stated that the strict protection laid down in that provision is not dependent on the number of specimens of a species present in the area concerned. A fortiori, that protection cannot depend on the risk of an adverse effect on the conservation status of the species concerned where, in spite of precautionary measures, the continuous ecological functionality of the natural habitat of that species is lost.

Judgment of 28 October 2021, *Magistrat der Stadt Wien (Grand hamster – II)* (C-357/20, EU :C :2021 :881)

A property developer carried out construction work on land on which the European hamster (*Cricetus cricetus*), a species protected under Annex IV(a) to the Habitats Directive, had settled. Before the works in question were carried out, the property developer, without the prior authorisation of the competent authority, took steps, inter alia, to remove that species from the construction site and to relocate it to other specially protected areas, which led to the destruction of at least two of the burrow entrances.

The Magistrat der Stadt Wien (City Council of Vienna, Austria) therefore ordered IE, as an employee of the property developer, to pay a fine for having damaged and destroyed resting places and breeding sites of the European hamster.

IE brought an action before the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) challenging the imposition of the fine on the grounds that the burrows on the relevant land were not being used by the European hamster when the measures at issue were implemented and, moreover, that those measures did not lead to the deterioration or destruction of resting places or breeding sites of that animal species.

That was the background against which that court decided to ask the Court about the scope in both place and time of the concept of 'breeding site' and of the criteria for distinguishing between 'deterioration' and 'destruction' of a breeding site and/or a resting place, within the meaning of Article 12(1)(d) of the Habitats Directive.

376| Article 12(1)(d) of the Habitats Directive.

Findings of the Court

First of all, as regards the scope of the spatial protection of breeding sites, the Court gave a literal, systematic and teleological interpretation of Article 12(1)(d) of the Habitats Directive.

In the first place, the Court pointed out that the wording of that provision requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range, prohibiting the deterioration or destruction of breeding sites or resting places.

In the second place, the Court stated, as regards the context of which that provision forms part, that the prohibition laid down therein seeks to safeguard the ecological functionality of breeding sites and to preserve significant parts of the habitat of protected animal species, so that those species may benefit from the conditions required in order, inter alia, to reproduce there. It follows that the term 'breeding site' must be understood as encompassing all the areas necessary to enable the animal species concerned to reproduce successfully, including the surroundings of that site.

That interpretation is borne out by the objectives of the Habitats Directive. That directive aims, with a view to the preservation of biodiversity, to maintain or restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of interest for the European Union. It follows from this that the system of protection provided for in Article 12(1) of the directive must therefore be capable of effectively preventing harm being caused to the habitat of protected animal species.

An interpretation of the term 'breeding site' which seeks to limit the scope of that concept only to the burrows of the European hamster is liable to exclude from that protection areas necessary for the reproduction and for the birth of the offspring of that animal species. Furthermore, the protection of a breeding site would be rendered redundant if human activities, carried out in the vicinity of that site, had the aim or effect of that animal species no longer frequenting the breeding site concerned.

Next, as regards the temporal scope of the protection of breeding sites, the Court adopted a broad interpretation of that protection, akin to the broad interpretation given to the temporal scope of the concept of 'resting place'. [377]

Thus, in order to ensure the strict protection afforded by Article 12(1)(d) of the Habitats Directive, the breeding sites of a protected animal species must enjoy protection for as long as is necessary in order for that animal species successfully to reproduce. From that point of view, the protection referred to therein also extends to breeding sites that are no longer occupied, where there is a sufficiently high probability that that animal species will return to those sites in order to reproduce there.

Finally, the Court clarified the criterion for distinguishing between the concepts of 'deterioration' and 'destruction' of a breeding site or resting place within the meaning of Article 12(1)(d) of the Habitats Directive.

Taking into consideration the usual meaning of those words in everyday language, the context in which they are used and the objectives pursued by the Habitats Directive, the Court concluded that the decisive criterion for establishing a distinction between, on the one hand, an act causing deterioration of a breeding site or a

377| The dispute in the main proceedings had already given rise to a request for a preliminary ruling, on which the Court ruled in its judgment of 2 July 2020, ***Magistrat der Stadt Wien (European hamster)*** (C-477/19, EU:C:2020:517). In that judgment, the Court held that the protection of the resting places of the European hamster (*Cricetus cricetus*) also covers resting places which are no longer occupied by that animal species where there is a sufficiently high probability that that animal species will return to those resting places.

resting place and, on the other, an act causing its destruction, is the degree of harm to the ecological functionality of the breeding site or of that resting place, whether or not that interference is intentional. For the purposes of that determination, account must be taken of the ecological requirements of each animal species concerned and of the situation at individual level of the members of that animal species occupying the breeding site or resting place concerned.

It follows that the concepts of 'deterioration' and 'destruction', referred to in Article 12(1)(d) of the Habitats Directive, must be interpreted as meaning, respectively, the gradual reduction of the ecological functionality of a breeding site or resting place of a protected animal species and the total loss of that functionality, irrespective of whether or not such harm is intentional.

2. Birds Directive

Judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux* (C-900/19, EU :C :2021 :211)

The associations One Voice and the Ligue pour la protection des oiseaux (League for the Protection of Birds) oppose the use of limes for the purpose of capturing birds. They challenged, before the Conseil d'État (Council of State, France), the legislation authorising the use of limes in certain French departments. [378] In support of their actions, the two associations alleged infringement of provisions of the Birds Directive, in particular Article 9 thereof, which lays down the requirements and conditions under which the competent authorities may derogate, inter alia, from the prohibition of hunting using limes, which is laid down in Article 8 of, and point (a) of Annex IV to, that directive.

In those circumstances, the Conseil d'État (Council of State) referred questions to the Court concerning the interpretation of those provisions of the Birds Directive. In its judgment, the Court provided clarification on the possibility for the competent authorities to derogate from the prohibition, laid down in Article 8 of that directive, on certain methods of capture of protected birds in the context of hunting activities.

Findings of the Court

In the first place, the Court held that Article 9(1) and (2) of the Birds Directive must be interpreted as meaning that the fact that a method of capture of birds is traditional is not, in itself, sufficient to establish that another satisfactory solution, within the meaning of those provisions, cannot be substituted for that method.

It noted, first of all, that when applying the derogating provisions, Member States are required to ensure that all action affecting protected species is authorised solely on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Birds Directive. National legislation making use of a derogation does not fulfil the conditions relating to the obligation to state reasons where it merely states that there is no other satisfactory solution, that statement not being supported by a detailed statement of reasons based on the best relevant scientific knowledge.

378| That legislation concerns five decrees of 24 September 2018 on the use of limes for the capture of thrushes and blackbirds intended for use as decoys during hunting seasons in certain French departments (JORF of 27 September 2018, texts Nos 10 to 13 and 15) and a decree of 17 August 1989 on the same subject matter (JORF of 13 September 1989, p. 11560).

Next, the Court made clear that, although traditional methods of hunting may constitute 'judicious use' authorised by the Birds Directive, the preservation of traditional activities cannot, however, constitute an autonomous derogation from the system of protection established by that directive.

Lastly, the Court noted that, when determining that there are no other satisfactory solutions, the competent authority must compare the various solutions that fulfil the conditions of the derogation in order to determine the solution that appears to be the most satisfactory. For that purpose, since, in formulating and implementing the European Union's policies in certain areas, the European Union and the Member States are, pursuant to Article 13 TFEU, to pay full regard to the welfare requirements of animals, the satisfactory nature of the alternative solutions must be assessed in the light of the reasonable options and the best available techniques. Such solutions appeared to exist in this case. The breeding and reproduction of protected species in captivity may, if they prove to be possible, constitute another satisfactory solution and the transport of birds which have been lawfully captured or kept also constitutes judicious use. In that regard, the fact that the breeding and reproduction of the species concerned in captivity are not yet feasible on a large scale by reason of the national legislation is not, in itself, capable of calling into question the relevance of those solutions.

In the second place, the Court held that Article 9(1)(c) of the Birds Directive must be interpreted as precluding national legislation which authorises, by way of derogation from Article 8 of that directive, a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.

The Member States may derogate from the prohibition of certain methods of hunting, provided, inter alia, that those methods permit the capture of certain birds on a selective basis. For the purpose of assessing the selectivity of a method, it is necessary to consider not only the details of that method and the size of the catch that it entails for the non-target birds, but also its possible consequences for the species captured in terms of the harm caused to the birds captured.

Accordingly, in the context of a non-lethal method of capture leading to by-catch, the condition of selectivity cannot be satisfied unless that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally, for a limited period, which can be released without sustaining harm other than negligible harm. However, the Court stated that it was highly likely, subject to the findings ultimately made by the Conseil d'État (Council of State), that despite being cleaned, the birds captured would sustain irreparable harm, since limes are capable, by their very nature, of damaging the feathers of any bird captured.

It should also be borne in mind that, in its judgment in ***Föreningen Skydda Skogen*** (C-473/19 and C-474/19, EU :C :2021 :166), delivered on 4 March 2021, the Court also ruled on the scope of the prohibitions laid down in the Birds Directive. [379]

379| That judgment is presented in Section XVII.1 'Habitats Directive'.

3. Access to environmental information

Judgment of 20 January 2021, *Land Baden-Württemberg (Internal communications)* (C-619/19, EU :C :2021 :35)

In October 2010, trees were felled in Stuttgart Castle Park, Baden-Württemberg (Germany), for the purpose of carrying out the 'Stuttgart 21' infrastructure and urban development project. It was against that background that D.R., a natural person, sent a request to the State Ministry of the Land of Baden-Württemberg seeking access to certain documents. Those documents involved, first, an item of information transmitted to that ministry relating to the work of a committee of inquiry in respect of a police operation preceding the felling of the trees and, secondly, notes of that ministry relating to the carrying out of a conciliation procedure in connection with the 'Stuttgart 21' project. The request for access was refused.

The legal action brought by D.R. against the decision refusing access was upheld by the Verwaltungsgerichtshof Baden-Württemberg (Higher Administrative Court, Baden-Württemberg, Germany), according to which no ground for refusing access applied to the documents requested. That court held inter alia that the ground for refusal applicable to 'internal communications' of public authorities could no longer be relied upon after completion of the decision-making process of the authority concerned. That ground for refusing access is laid down by the legislation transposing into German law the Directive on public access to environmental information, which gives the Member States the power to establish such an exception to the public's right of access. [380]

The Bundesverwaltungsgericht (Federal Administrative Court, Germany), before which an appeal on a point of law had been brought, proceeded on the basis of the premiss that D.R. had requested access to environmental information within the meaning of the Directive on public access to environmental information. Since it had doubts as to the scope and the limitation in time of the ground for refusing access to 'internal communications' referred to in that directive, it decided to submit questions to the Court in that regard.

Findings of the Court

First of all, the Court considered the interpretation of the concept of 'internal communications' of public authorities, within the meaning of the Directive on public access to environmental information.

In the first place, the Court observed that the word 'communication' relates to information addressed by an author to someone, an addressee who or which may be an abstract entity or a specific person belonging to such an entity. That interpretation is supported by the context of the exception that the Member States may lay down for internal communications. That directive adopts the distinction established by the Aarhus Convention [381] between the term 'material', which does not necessarily concern information that is addressed to someone, and the term 'communication'.

In the second place, the Court pointed out, as regards the word 'internal', that only environmental information which does not leave the internal sphere of a public authority is considered to be 'internal'. That also applies to information from an external source after it has been received, provided that it has not been disclosed

380| Article 4(1)(e) of the Directive on public access to environmental information.

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

to a third party or been made available to the public. That interpretation is supported by the objective, pursued by the exception available to the Member States, of ensuring that public authorities have a protected space in order to engage in reflection and to pursue internal discussions.

The Court stated, in that regard, that the fact that an item of environmental information may be liable to leave the internal sphere of a public authority at a given time cannot cause the communication containing it to cease immediately to be internal in nature. Whilst exceptions to the right of access are to be interpreted strictly, that cannot limit the scope of the exception for internal communications in disregard of the directive's wording.

Consequently, the term 'internal communications' encompasses all information which circulates within a public authority and which, on the date of the request for access, has not left that authority's internal sphere – as the case may be, after being received by that authority, provided that it was not or should not have been made available to the public before it was so received.

Next, the Court examined the temporal applicability of the ground for refusal of access to environmental information included in internal communications. It stated, in that regard, that its applicability is not limited in time and does not depend on the drawing up of a document or on the progress in or completion of some administrative process.

However, refusal of access to environmental information because it is included in an internal communication must always be founded on a weighing of the interests involved in the particular case. Indeed, in the light of the particularly broad material scope of that exception, the weighing of the interests, which must be carried out on the basis of an actual examination of each situation, is especially important and must therefore be tightly controlled.

In carrying out that examination, the public authority to which a request for access has been made is required to consider, in any event, reasons which may support disclosure, such as bringing about a free exchange of views, more effective participation by the public in environmental decision-making or a better environment. It must also examine any particulars provided by the applicant that support disclosure of the information sought, without the applicant being required to set out a specific interest justifying disclosure.

Furthermore, when the information requested is contained in an internal communication, the public authority must take into account the time that has passed since that communication and the information contained in it were drawn up. That authority may take the view that, in the light of the time that has passed since it was drawn up, such information is no longer sensitive. Accordingly, the exception to the right of access that the Member States may lay down for internal communications can apply only for the period during which protection of the information sought is justified.

Finally, the Court stated that the weighing of interests must be capable of being checked and be amenable to administrative and judicial review at national level. In order to meet that requirement, a decision refusing access must be notified to the applicant and set out why there is a foreseeable risk that the disclosure of information could specifically and actually undermine the interest protected by the exception relied upon.

Judgment of 15 April 2021, *Friends of the Irish Environment* (C-470/19, EU :C :2021 :271)

In 2016, the non-governmental organisation Friends of the Irish Environment submitted to the Courts Service of Ireland a request for access to environmental information contained in the court file relating to proceedings challenging a building permit issued for the construction of wind turbines in County Cork (Ireland). That request, made under the Aarhus Convention and the Directive on public access to environmental information, referred to certain procedural documents and final orders bringing those judicial proceedings to an end.

The Courts Service of Ireland refused the request for access on the ground that Irish law does not provide for access to environmental information connected with judicial proceedings. Seised of an action against the decision refusing access, the Commissioner for Environmental Information confirmed that decision, taking the view, first, that the Courts Service of Ireland held the files requested in the exercise of judicial powers on behalf of the judicial authority and, secondly, that that Service, when exercising such powers, was not a 'public authority' within the meaning of Irish law. The national legislation transposing the Directive on public access to environmental information excludes from the definition of public authorities bodies when acting in a judicial capacity, thus making use of the option which the directive gives to the Member States in that regard. [382]

The non-governmental organisation brought an action against the decision of the Commissioner for Environmental Information before the High Court (Ireland), claiming that the derogation from the right of access for which Member States may provide for bodies acting in a judicial capacity does not cover court files in closed cases.

Harbouring doubts as to the scope of the option to exclude from the notion of 'public authority' bodies or institutions when acting in a judicial or legislative capacity, [383] the High Court decided to refer a question to the Court on that point.

Findings of the Court

As a preliminary point, the Court recalled that the purpose of the Directive on public access to environmental information is to ensure that citizens have access to environmental information held by the public authorities of the Member States. However, that directive allows the Member States to exclude from its scope public authorities when acting 'in a judicial capacity'. That option to derogate concerns only bodies or institutions coming within the definition of 'public authority' set out in that directive.

For that reason, the Court first of all examined whether courts and natural or legal persons under their control constitute 'public authorities' within the meaning of the Directive on public access to environmental information and, accordingly, whether they fall within the scope of that directive.

In that regard, it considered, first, that the reference to 'public authorities', in the Aarhus Convention and in the Directive on public access to environmental information, does not cover judicial authorities, in particular courts, but only administrative authorities of the Member States, since it is they which are normally required, in the exercise of their functions, to hold environmental information. Courts are not in any of the categories of bodies referred to in the definition of 'public authorities' given in that directive. More specifically, the Court found that they do not fall within any of the categories of public authorities referred to in the directive, since

382| First sentence of the second subparagraph of Article 2, point 2, of the Directive on public access to environmental information.

383| Article 2, point 2, of the Directive on public access to environmental information.

they do not form part of either the government or other public authorities referred to in the directive, or natural or legal persons performing public administrative functions in relation to the environment, a category which concerns only natural or legal persons performing executive functions or assisting in the performance of those functions. Consequently, the courts are not, a fortiori, included in the persons or bodies under the control of a body or institution falling within those categories.

The Court also noted that although, by adopting the Directive on public access to environmental information, the EU legislature intended to promote public access to environmental information held by administrative authorities and participation by the public in administrative environmental decision-making, it did not intend to promote public information in judicial matters and public involvement in decision-making in that area. On the contrary, the EU legislature took into account the diversity of national rules on access to information contained in court files by giving Member States the option of excluding from the scope of the right of access to that information bodies or institutions which may occasionally be called upon to act in a judicial capacity without themselves having the nature of a court, such as certain independent administrative authorities. Similarly, the EU legislature gave Member States the option to derogate from the principle of public access to environmental information when disclosure could adversely affect the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature. [384]

It follows that the courts and natural or legal persons under their control are not 'public authorities' within the meaning of the Directive on public access to environmental information. They do not therefore fall within the scope of that directive and, accordingly, are not subject to the obligation laid down in the directive to provide public access to environmental information in their possession. In those circumstances, it is for the Member States alone to provide, where appropriate, for a right of public access to information contained in court files and to determine the manner in which it may be exercised.

In the present case, the Court observed that, according to the information in the file before it, the Courts Service of Ireland is responsible for storing, archiving and managing court files on behalf of and under the supervision of the court concerned. It is for the referring court to ascertain whether, because that body has close links with the Irish courts, under the supervision of which it is placed, it must be regarded, like those courts, as a judicial authority, which has the effect of removing it from the scope of that directive.

384| Article 4(2)(c) of the Directive on public access to environmental information.

XVIII. Energy

Judgment of 15 July 2021 (Grand Chamber), *Germany* v *Poland* (C-848/19 P, EU :C :2021 :598)

The Baltic Sea Pipeline Connector ('the OPAL pipeline') is the terrestrial section, to the west, of the Nord Stream 1 gas pipeline, which transports gas from Russia into Europe, circumventing the 'traditional' transit countries such as Poland, Slovakia and Ukraine. In 2009, the European Commission approved, subject to conditions, the decision of the German Federal Network Agency to exempt the OPAL pipeline from the rules under Directive 2003/55 [385] (later replaced by Directive 2009/73 [386]) on third-party access to the gas pipeline network [387] and on tariff regulation. [388] As Gazprom, the dominant undertaking on the market for the supply of gas, had never met one of the conditions imposed by the Commission, it was able to operate the OPAL pipeline only up to 50% of its capacity since it was put into service in 2011.

In 2016, at the request in particular of Gazprom, the German Federal Network Agency notified the Commission of its intention to vary certain provisions of the exemption granted in 2009. In essence, the variation proposed was to enable the OPAL pipeline to be operated at its full capacity, on condition that at least 50% of that capacity would be sold by way of auction. By decision of 28 October 2016, the Commission approved that variation subject to certain conditions [389] ('the decision at issue').

Taking the view that the decision at issue threatened the security of Poland's gas supply because of the transfer to the Nord Stream 1/OPAL transit route of part of the volumes of natural gas previously transported through the States of the central European region, including Poland, via pipelines competing with OPAL, the Republic of Poland brought an action for annulment of that decision before the General Court. The General Court upheld the action and annulled the decision at issue for breach of the principle of energy solidarity laid down in Article 194(1) TFEU. [390] According to the General Court, the Commission should have examined the impact of the variation of the regime governing the operation of the OPAL pipeline on Poland's security of supply and energy policy.

In the appeal brought by the Federal Republic of Germany, the Grand Chamber of the Court of Justice upheld the judgment of the General Court, ruling on the nature and scope of the principle of energy solidarity.

385| Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/ EC (OJ 2003 L 176, p. 57).

386| Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

387| Article 18 of Directive 2003/55 and Article 32 of Directive 2009/73.

388| Article 25(2) to (4) of Directive 2003/55.

389| Commission Decision C(2016) 6950 final of 28 October 2016 on review of the exemption of the OPAL pipeline from the requirements on third party access and tariff regulation granted under Directive 2003/55.

390| Judgment of 10 September 2019, ***Poland*** **v** ***Commission*** (T-883/16, EU :T :2019 :567).

Findings of the Court

The Court recalled, in the first place, that according to Article 194(1) TFEU, EU energy policy is to aim, in a spirit of solidarity between the Member States, to ensure the functioning of the energy market and security of energy supply in the European Union, and to promote energy efficiency and energy saving, the development of new and renewable forms of energy and the interconnection of energy networks.

In that regard, the Court noted that the principle of solidarity is a fundamental principle of EU law, which is mentioned in several provisions of the TEU and TFEU and which finds specific expression, in the field of energy, in Article 194(1) TFEU. That principle is closely linked to the principle of sincere cooperation, [391] which requires the European Union and the Member States, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties. In so far as the principle of solidarity forms the basis of all of the objectives of the European Union's energy policy, it cannot be ruled out that that principle produces binding legal effects. On the contrary, it entails rights and obligations both for the European Union and for the Member States, the European Union having an obligation of solidarity towards the Member States and the Member States having the same obligation between themselves and with regard to the common interest of the European Union.

The Court concluded that, contrary to the arguments put forward by the Federal Republic of Germany, the legality of any act of the EU institutions falling within the European Union's energy policy must be assessed in the light of the principle of energy solidarity, even if there is no express reference to that principle in the applicable secondary legislation, in this case, Directive 2009/73. [392] It is apparent, therefore, from the principle of energy solidarity in conjunction with the principle of sincere cooperation that, when adopting a decision amending an exemption regime that is taken pursuant to Directive 2009/73, [393] the Commission is required to examine the possible risks for security of gas supply on the markets of the Member States.

In the second place, the Court stated that the wording of Article 194 TFEU does not restrict the application of the principle of energy solidarity to the situations involving terrorist attacks or natural or man-made disasters referred to in Article 222 TFEU. On the contrary, the spirit of solidarity mentioned in Article 194(1) TFEU extends to any action falling within the European Union's energy policy.

Thus, the duty, for the EU institutions and the Member States, to take the principle of energy solidarity into account when adopting acts relating to the internal market in natural gas, ensuring in particular security of energy supply in the European Union, entails the adoption of measures to deal with emergencies as well as preventive measures. The European Union and the Member States must, in the exercise of their respective competences in that field, balance the energy interests involved, avoiding the adoption of measures that might affect the interests of stakeholders liable to be affected, as regards security of supply, economic and political viability and the diversification of sources of supply, and must do so in order to take account of their interdependence and *de facto* solidarity.

The Court of Justice concluded that the General Court did not err in law in ruling that the decision at issue should be annulled for breach of the principle of energy solidarity.

391| Article 4(3) TEU

392| Article 36(1) of Directive 2009/73.

393| Article 36 of Directive 2009/73.

Judgment of 2 September 2021, *Commission* v *Germany (Transposition of Directives 2009/72 and 2009/73)* (C-718/18, EU :C :2021 :662)

The purpose of Directives 2009/72 [394] and 2009/73 is to provide all EU consumers with a real choice in domestic electricity and natural gas markets. In order to avoid discrimination, the directives require the effective separation of transmission networks from activities of generation and supply ('effective unbundling'). Compliance with the provisions of those directives is ensured through the creation of independent, impartial and transparent national regulatory authorities ('NRAs'). [395]

By its judgment, the Court upheld, in its entirety, the action for failure to fulfil obligations brought by the European Commission against Germany. The four complaints put forward by the Commission in support of its action related to the incorrect transposition by Germany of several provisions of Directives 2009/72 and 2009/73 into the Law on the energy industry. [396]

Findings of the Court

The Court upheld the first complaint, by which the Commission claimed that Germany had failed to transpose correctly the concept of a 'vertically integrated undertaking' ('VIU'), by restricting its definition to undertakings operating in the European Union. [397] The Court pointed out that the concept of a 'VIU' is an autonomous concept of EU law which does not impose any territorial restriction and must be interpreted in the light of the concept of 'effective unbundling' in order to avoid a risk of discrimination as regards network access. There may be conflicts of interest between a transmission system operator located in the European Union and electricity or natural gas producers or suppliers carrying on activities in those fields outside the European Union. A broad interpretation of the concept of a 'VIU' may encompass, where appropriate, activities carried on outside the European Union, without however implying an extension of the European Union's regulatory power. Consequently, the restrictive interpretation of the concept of a 'VIU' advocated by Germany is not in line with the objectives pursued by the provisions of Directives 2009/72 and 2009/73.

As regards the independence of the staff and the management of the transmission system operator, the Court upheld the second complaint, by which the Commission submitted that the German legislation limited the application of the provisions of those directives concerning transitional periods – which relate to persons changing posts within the VIU – to those parts of the VIU which carry on their activities in the energy sector. [398] The Court pointed out that those provisions do not contain any such restriction. Such a restriction would be contrary to the objective of 'effective unbundling', which is necessary to ensure the functioning of the internal energy market and the security of energy supply. Under those provisions, 'transitional periods' apply to persons responsible for the management and/or members of the administrative bodies of the transmission

394| Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55). That directive was repealed with effect from 1 January 2021 by Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (OJ 2019 L 158, p. 125). However, it remains applicable to the case at issue *ratione temporis*.

395| Article 35(4) of Directive 2009/72 and Article 39(4) of Directive 2009/73.

396| Energiewirtschaftsgesetz (Law on the energy industry) of 7 July 2005 (BGBl. I, pp. 1970 and 3621), as amended by Paragraph 2(6) of the Law of 20 July 2017 (BGBl. I, p. 2808, 2018 I p. 472).

397| Infringement of Article 2(21) of Directive 2009/72 and of Article 2(20) of Directive 2009/73.

398| Infringement of Article 19(3) and (8) of Directives 2009/72 and 2009/73.

system operator who, before their appointment, exercised an activity in the VIU or in an undertaking which is the majority shareholder in one of the VIU undertakings, even if those activities were not carried on in the energy sector of the VIU or in such a majority shareholder.

In response to an argument by Germany relating to the freedom of movement for workers and the fundamental right to pursue a freely chosen occupation, the Court observed that those freedoms are not absolute rights and may be restricted under certain conditions, as is the case here. The Court concluded that the scope *ratione personae* of the German law was contrary to the provisions of Directives 2009/72 and 2009/73.

The Court upheld the third complaint, by which the Commission submitted that the provisions of those directives prohibiting the holding of certain interests in or the receipt of certain financial benefits from any part of the VIU had been transposed only partially into the German legislation, in so far as they did not apply to shareholdings of the transmission system operator's employees, [399] even though it is clear from the wording of the relevant provisions that those prohibitions also apply to such employees. That approach is supported by the objective of 'effective unbundling' and by the risk that employees who do not participate in the day-to-day management of the transmission system operator may nevertheless be able to influence the activities of their employer, with the result that situations of conflicts of interests could arise if those employees hold shares in the VIU or in parts thereof. In response to an argument by Germany relating to the right to property of employees, guaranteed by Article 17(1) of the Charter of Fundamental Rights of the European Union, the Court observed that the prohibitions flowing from the relevant provisions of Directives 2009/72 and 2009/73 do not constitute such a disproportionate and intolerable interference with that right as to impair its very substance.

The Court upheld the fourth complaint, by which the Commission claimed that Germany had infringed the exclusive powers of the NRAs as provided for by those directives, in so far as the German legislation attributed to the Federal Government the power to determine the methodologies used to calculate or establish the conditions for connection and access to national networks, including the applicable tariffs. [400] The Court pointed out in that regard that NRAs must be completely independent in order to ensure impartiality and non-discrimination towards economic actors and public entities. It observed that the procedural autonomy of Member States must be exercised in accordance with the objectives and obligations laid down in those directives. In particular, tariffs and calculation methodologies for both domestic and cross-border exchanges of electricity and natural gas must be determined on the basis of uniform criteria, such as those laid down by the directives and other EU legislative acts.

In response to Germany's argument that Paragraph 24 of the Law on the energy industry is legislative in nature, the Court made clear that the functioning of the European Union is founded on the principle of representative democracy and that directives are adopted following a legislative procedure. That principle of democracy does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The independent status of NRAs does not in itself deprive those authorities of their democratic legitimacy, since they are not shielded from all parliamentary influence. [401]

399| Infringement of Article 19(5) of Directives 2009/72 and 2009/73.

400| Infringement of Article 37(1)(a) and (6)(a) and (b) of Directive 2009/72 and Article 41(1)(a) and (6)(a) and (b) of Directive 2009/73.

401| To that effect, judgments of 9 March 2010, ***Commission*** v ***Germany*** (C-518/07, EU:C:2010:125, paragraphs 42, 43 and 46), and of 11 June 2020, ***Prezident Slovenskej republiky*** (C-378/19, EU:C:2020:462, paragraphs 36 to 39).

The Court pointed out that the powers reserved to NRAs are executive powers that are based on technical and specialist assessment and do not confer upon those authorities a margin of discretion which might entail political choices. It added that, in the present case, NRAs are subject to principles and rules established by a detailed legislative framework at EU level.

Reference should also be made under this heading to the judgment of 2 September 2021, ***Republic of Moldova*** (C-741/19, EU :C :2021 :655), which required the Court to interpret the Energy Charter Treaty. [402]

XIX. International agreements

Four decisions should be mentioned in relation to international agreements. One of them required the Court to rule on the validity of an arbitration clause contained in an international agreement concluded between two Member States. In another, the Court gave judgment on the interpretation of the Energy Charter Treaty. [403] The Court also ruled on the EU-Armenia Agreement and, in an opinion, on the Istanbul Convention on preventing and combating violence against women and domestic violence. [404]

1. Arbitration clause in an international agreement between Member States

Judgment of 26 October 2021 (Grand Chamber), *PL Holdings* (C-109/20, EU :C :2021 :875)

In 2013, the voting rights held by PL Holdings, a company incorporated under Luxembourg law, and which were attached to shares it owned in a Polish bank were suspended and PL Holdings was forced to sell those shares. PL Holdings disagreed with the decision requiring it to do so, which had been taken by the Komisja Nadzoru Finansowego (Polish Financial Supervision Authority), and decided to initiate arbitration proceedings against Poland. To that end, PL Holdings, relying on the bilateral investment treaty ('the BIT') concluded in 1987 between Belgium and Luxembourg, on the one hand, and Poland, on the other, [405] submitted a request for arbitration to the arbitral tribunal stipulated in an arbitration clause in that treaty. [406]

402| That judgment is presented in Section XIX.2 'Energy Charter Treaty'.

403| Energy Charter Treaty, signed at Lisbon on 17 December 1994 (OJ 1994 L 380, p. 24; 'the ECT'), approved on behalf of the European Communities by Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 (OJ 1998 L 69, p. 1).

404| Reference should also be made under this heading to the judgment of 16 November 2021, ***Governor of Cloverhill Prison and Others*** (C-479/21 PPU, EU:C:2021:929), concerning the Agreement on the Withdrawal of the United Kingdom from the European Union and the Trade and Cooperation Agreement between the European Union and that third State, which is presented in Section III 'Withdrawal of the United Kingdom from the European Union'.

405| Agreement between the Government of the Kingdom of Belgium and the Government of the Grand Duchy of Luxembourg, of the one part, and the Government of the People's Republic of Poland, of the other, concerning the reciprocal promotion and protection of investments, signed on 19 May 1987.

406| Article 9 of the BIT.

By two arbitral awards of 28 June and 28 September 2017, the arbitral tribunal concluded that it had jurisdiction to settle the dispute at issue, declared that Poland had failed to comply with its obligations under the BIT and ordered it to pay damages to PL Holdings.

The action before the Svea hovrätt (Svea Court of Appeal, Stockholm, Sweden) by which Poland sought to have the arbitral awards set aside was dismissed. That court held, inter alia, that even though the arbitration clause in the BIT, according to which a dispute relating to that treaty must be decided by an arbitration body, was invalid, that invalidity did not prevent a Member State and an investor from another Member State from concluding an ad hoc arbitration agreement at a later stage in order to settle that dispute.

Following an appeal brought against the decision of the court of appeal, the Högsta domstolen (Supreme Court, Sweden) decided to ask the Court whether Articles 267 and 344 TFEU precluded the conclusion of an ad hoc arbitration agreement between the parties to the dispute where the content of that agreement was identical to an arbitration clause set out in the BIT and contrary to EU law.

The Court, sitting as the Grand Chamber, expanded on its case-law deriving from the judgment in ***Achmea*** [407] and found that EU law prohibits the conclusion by a Member State of such an ad hoc arbitration clause.

Findings of the Court

In the first place, and relying on the judgment in ***Achmea***, the Court confirmed that the arbitration clause in the BIT, according to which an investor from one of the Member States may, in the event of a dispute concerning investments in the other Member State that concluded the BIT, bring arbitration proceedings against the latter State before an arbitral tribunal whose jurisdiction that State has undertaken to accept, is contrary to EU law. That clause is such as to call into question not only the principle of mutual trust between the Member States, but also the preservation of the particular nature of EU law, ensured by the preliminary ruling procedure provided for in Article 267 TFEU. It is, therefore, incompatible with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU and has an adverse effect on the autonomy of EU law enshrined, inter alia, in Article 344 TFEU.

In the second place, the Court took the view that, to allow a Member State to submit a dispute which may concern the application or interpretation of EU law to an arbitral body with the same characteristics as the body referred to in such an arbitration clause that is invalid because it is contrary to EU law, by concluding an ad hoc arbitration agreement with the same content as that clause, would in fact entail a circumvention of the obligations arising for that Member State under the Treaties and, specifically, the articles referred to above.

First of all, that ad hoc arbitration agreement would produce, with regard to the dispute in the context of which it was concluded, the same effects as those resulting from the arbitration clause at issue. The fundamental reason for that arbitration agreement is precisely to replace that clause in order to maintain its effects despite that provision's being invalid.

Next, the consequences of that Member State's circumventing its obligations are no less serious because this is an isolated case. In fact, that legal approach could be adopted in a multitude of disputes which may concern the application and interpretation of EU law, thus allowing the autonomy of that law to be undermined repeatedly.

407| Judgment of 6 March 2018, ***Achmea*** (C-284/16, EU :C :2018 :158).

Furthermore, each request for arbitration made to a Member State, on the basis of an invalid arbitration clause, may constitute an offer of arbitration and that State could then be regarded as having accepted that offer simply because it had failed to put forward specific arguments against the existence of an ad hoc arbitration agreement. That situation would have the effect of maintaining the effects of the commitment made by that Member State – which was entered into in breach of EU law and is, therefore, invalid – to accept the jurisdiction of the arbitration body before which the matter was brought.

Lastly, it follows both from the judgment in ***Achmea*** and from the principles of the primacy of EU law and of sincere cooperation not only that the Member States cannot undertake to remove from the judicial system of the European Union a dispute which may concern the application and interpretation of EU law, but also that, where that dispute is brought before an arbitration body on the basis of an undertaking which is contrary to EU law, they are required to challenge the validity of the arbitration clause or the ad hoc arbitration agreement on the basis of which the dispute was brought before that arbitration body. [408]

Any attempt by a Member State to remedy the invalidity of an arbitration clause by means of a contract with an investor from another Member State would run counter to that obligation to challenge the validity of that clause and would thus be liable to render the actual legal basis of that contract unlawful since it would be contrary to the provisions and fundamental principles governing the EU legal order.

Consequently, the Court concluded that the national court is obliged to set aside an arbitral award made on the basis of an arbitration agreement that infringes EU law.

Reference should also be made under this heading to the judgment of 2 September 2021, ***Republic of Moldova*** (C-741/19, EU :C :2021 :655), delivered in the context of a reference for a preliminary ruling arising from the implementation of an arbitration procedure contained in the ECT. [409]

2. Energy Charter Treaty

Judgment of 2 September 2021 (Grand Chamber), *Republic of Moldova* (C-741/19, EU :C :2021 :655)

In performance of a series of contracts concluded in 1999, Ukrenergo, a Ukrainian producer, sold electricity to Energoalians, a Ukrainian distributor, which resold that electricity to Derimen, a company registered in the British Virgin Islands, which in turn resold that electricity to Moldtranselectro, a Moldovan public undertaking with a view to exporting it to Moldova. The volumes of electricity to be supplied were agreed each month directly between Moldtranselectro and Ukrenergo.

Derimen paid Energoalians the full amounts due for the electricity purchased, whilst Moldtranselectro only partially settled the amounts due to Derimen for that electricity. On 30 May 2000, Derimen assigned to Energoalians the claim that it had against Moldtranselectro. The latter settled its debt to Energoalians in part

408| A conclusion also confirmed by Article 7(b) of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (OJ 2020 L 169, p. 1).

409| That judgment is presented in Section XIX.2 'Energy Charter Treaty'.

by assigning to it claims that it held. Energoalians attempted unsuccessfully to obtain payment of the remainder of that debt, a sum of 16 287 185.94 United States dollars (USD) (approximately EUR 13 735 000), by bringing proceedings before the Moldovan courts and subsequently the Ukrainian courts.

Energoalians considered that certain conduct by the Republic of Moldova in that context constituted serious breaches of the undertakings made under the ECT, the essential concept of which is to catalyse economic growth by means of measures to liberalise investment and trade in energy.

Energoalians, whose rights were subsequently assigned to Komstroy LLC, initiated the arbitration procedure provided for by the ECT. [410] The ad hoc arbitral tribunal constituted in order to resolve that dispute, sitting in Paris (France), held that it had jurisdiction and ordered the Republic of Moldova to pay a sum of money to Energoalians on the basis of the ECT. Following an action to set aside the arbitral award and a judgment of the Cour de cassation (Court of Cassation, France), the jurisdiction of that arbitral tribunal was disputed by the Republic of Moldova before the Cour d'appel de Paris (Court of Appeal, Paris, France), the referring court, on the ground that the claim arising from a contract for the sale of electricity does not constitute an 'investment' within the meaning of the ECT. [411] To that end, the referring court put three questions to the Court relating to the concept of 'investment'.

By its judgment, the Court, sitting as the Grand Chamber, held that the acquisition, by an undertaking of a Contracting Party to the ECT, of a claim arising from a contract for the supply of electricity, which is not connected with an investment, held by an undertaking of a third State to that treaty against a public undertaking of another Contracting Party to the same treaty, does not constitute an 'investment' within the meaning of the ECT.

Findings of the Court

As a preliminary matter, the Court ascertained whether it had jurisdiction to answer the questions referred for a preliminary ruling since several parties, including Komstroy, had submitted that EU law did not apply to the dispute in issue, the parties to the dispute being outsiders to the European Union.

The Court confirmed that it had jurisdiction to give a preliminary ruling on the interpretation of the ECT, which is a mixed agreement, namely an agreement concluded by the European Union and a large number of Member States. That jurisdiction is all the more justified because the questions referred concern the concept of 'investment' within the meaning of the ECT and, since the entry into force of the Treaty of Lisbon, the European Union has exclusive competence as regards foreign direct investment and shared competence as regards investments that are not direct. [412]

That conclusion is not called into question by the fact that the dispute at the origin of the main proceedings is between an investor of a non-member State and another non-member State. It is true that, in principle, the Court does not have jurisdiction to interpret an international agreement as regards its application in the context of a dispute not covered by EU law. That is the case in particular where such a dispute is between an investor of a non-member State and another non-member State. However, it is in the interest of the European Union that, in order to forestall future differences of interpretation, the concept of 'investment' within the meaning of the ECT should be interpreted uniformly, whatever the circumstances in which that concept is to apply. That is the situation of the provisions whose interpretation is sought by the referring

410| Article 26(1) of the ECT.

411| Article 1(6) and Article 26(1) of the ECT.

412| Article 207 TFEU; Opinion 1/17 ***(EU-Canada CET Agreement)*** of 30 April 2019 (EU :C :2019 :341).

court. In particular, if the case was covered by EU law, that court could be required to rule on the interpretation of those same provisions of the ECT whether in the context of an application to set aside an arbitral award or in ordinary court proceedings.

In any event, the parties to the dispute chose to submit that dispute to an ad hoc arbitral tribunal established on the basis of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) [413] and agreed, in accordance with those arbitration rules, that the seat of the arbitration should be established in Paris (France), that is to say on the territory of a Member State, in this case France, in which the ECT is applicable as an act of EU law. For the purposes of the proceedings brought in that Member State, that establishment of the seat of arbitration thus entails the application of EU law, compliance with which the court hearing the case is obliged to ensure in accordance with Article 19 TEU.

In order to answer the referring court's first question relating to the interpretation of the concept of 'investment' within the meaning of the ECT, that interpretation being necessary in order to ascertain whether the ad hoc arbitral tribunal has jurisdiction, the Court first of all examined which disputes may be brought before an arbitral tribunal pursuant to Article 26 of the ECT. Several Member States that participated in the written and oral parts of the procedure invited the Court to specify whether such a tribunal may, in compliance with the principle of the autonomy of the EU judicial system, rule on a dispute between an operator of one Member State and another Member State. [414]

The Court stated in that regard, in the first place, that the arbitral tribunal rules in accordance with the ECT, which is an act of EU law, and also in accordance with international law, so that that tribunal may be required to interpret and apply EU law.

In the second place, that arbitral tribunal does not constitute a component of the judicial system of a Member State, in this case France. It follows that that tribunal cannot be regarded as a court or tribunal 'of a Member State', within the meaning of Article 267 TFEU, and is not therefore entitled to make a reference to the Court for a preliminary ruling. [415]

In the third place, in order to ensure compliance with the principle of the autonomy of the EU judicial system, the arbitral award must be subject to review by a court of a Member State, capable of ensuring full compliance with EU law, guaranteeing that questions of EU law may, if necessary, be submitted to the Court by means of a reference for a preliminary ruling. In the present case, the parties to the dispute chose an arbitral tribunal on the basis of the UNCITRAL rules and accepted that the seat of arbitration be established in Paris, which renders French law applicable to proceedings for judicial review of the arbitration award made by that tribunal. However, such judicial review can be exercised by that national court only to the extent that national law so permits. French law provides only for limited review concerning, in particular, the jurisdiction of the arbitral tribunal. Moreover, the arbitration procedure in question is different from commercial arbitration proceedings, which originate in the freely expressed wishes of the parties concerned. That procedure derives from a treaty whereby Member States consent to remove from the system of judicial remedies that they are required to establish disputes that could involve the application and interpretation of EU law.

It follows from all of the characteristics of the arbitral tribunal that, if the dispute was between Member States, a mechanism for settling that dispute would not be capable of ensuring that disputes would be determined by a court within the EU judicial system, it being understood that only such a court is capable

413| Article 26(4)(b) of the ECT.

414| Article 26 of the ECT.

415| Judgment of 6 March 2018, ***Achmea*** (C-284/16, EU :C :2018 :158, paragraphs 43 to 49).

of guaranteeing the full effectiveness of EU law. [416] Consequently, the provision of the ECT at issue [417] does not apply to disputes between a Member State and an investor in another Member State on the subject of an investment made by the latter in the first Member State.

Next, the Court clarified the concept of 'investment' within the meaning of the ECT. In that regard, it held that a claim arising from a contract for the supply of electricity constitutes an asset held directly by an investor, it being specified that the term 'investor', defined by the ECT and used in particular in Article 26(1) ECT, designates, inter alia, as regards a Contracting Party such as Ukraine, any undertaking organised in accordance with the legislation applicable in the territory of that Contracting Party. However, a claim arising from a mere contract for the sale of electricity cannot be regarded as having been granted in order to undertake an economic activity in the energy sector. It follows that a mere contract for the supply of electricity, in this case produced by other operators, is a commercial transaction which cannot, in itself, constitute an 'investment'. That interpretation is consistent with the clear distinction made by the ECT between trade and investments.

Reference should also be made under this heading to the judgment in ***Stichting Cartel Compensation and Equilib Netherlands*** (C-819/19, EU :C :2021 :904), delivered on 11 November 2021, [418] in which the Court ruled on the interpretation of Article 53 of the Agreement on the European Economic Area [419] and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, [420] which prohibit cartels and trade practices that restrict competition. The Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998, [421] was also the subject of interpretation by the Court in its judgment in ***Land Baden-Württemberg (Internal communications)*** (C-619/19, EU :C :2021 :35), delivered on 20 January 2021, and its judgment in ***Friends of the Irish Environment*** (C-470/19, EU :C :2021 :271), delivered on 15 April 2021. [422]

416| Judgment of 6 March 2018, ***Achmea*** (C-284/16, EU:C:2018:158, paragraph 56).

417| Article 26(2)(c) of the ECT.

418| That judgment is presented in Section XII.1 'Agreements, decisions and concerted practices (Article 101 TFEU)'.

419| Agreement on the European Economic Area (OJ 1994 L 1, p. 3).

420| Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1).

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

422| Those judgments are presented in Section XVII.3 'Access to environmental information'.

3. EU-Armenia Partnership Agreement

Judgment of 2 September 2021 (Grand Chamber), *Commission* v *Council (Agreement with Armenia)* (C-180/20, EU :C :2021 :658)

The Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part ('the Partnership Agreement with Armenia'), was signed on 24 November 2017. [423] That agreement provides for the establishment of a Partnership Committee and the possibility of establishing subcommittees and other bodies. It also provides that the Partnership Council is to adopt its own Rules of Procedure and to determine therein the duties and functioning of the Partnership Committee.

On 29 November 2018, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy jointly adopted, under Article 218(9) TFEU, a proposal for a Decision of the Council of the European Union on the position to be adopted on behalf of the European Union within the Partnership Council as regards the adoption of decisions on the Rules of Procedure of the Partnership Council, the Partnership Committee and those of specialised subcommittees or any other body. In its amended proposal of 19 July 2019, the Commission deleted the reference to Article 37 TEU, which covers the conclusion of agreements in the field of the common foreign and security policy (CFSP), as a substantive legal basis. The Council split that proposal for a decision into two separate decisions. It thus adopted, first, Decision 2020/245, intended to ensure the application of the Partnership Agreement with Armenia, with the exception of Title II thereof, on substantive legal bases constituted by Articles 91, 207 and 209 TFEU, in the fields of transport, trade and development. Secondly, it adopted Decision 2020/246, intended to ensure the application of Title II of that agreement, covering cooperation in the field of the CFSP, on a substantive legal basis constituted solely by Article 37 TEU. Whereas Decision 2020/245 was adopted by qualified majority, Decision 2020/246 was adopted by unanimity. Before the Court, the Commission challenged the splitting of the Council act into two decisions, the choice of Article 37 TEU as the legal basis for Decision 2020/246 and the voting rule that resulted from that choice. In consequence, it sought the annulment of those two Council decisions.

The Court, sitting as the Grand Chamber, annulled Decisions 2020/245 and 2020/246. It held that, although the Partnership Agreement has some links with the CFSP, the components or declarations of intention it includes which may be linked to the CFSP are insufficient to constitute an autonomous component of that agreement capable of justifying the choice of Article 37 TEU as the substantive legal basis and the second subparagraph of Article 218(8) TFEU as the procedural legal basis for Decision 2020/246. It also held that, in those circumstances, there was nothing to justify splitting into two decisions the act on the position to be taken by the European Union within the Partnership Council established by the Partnership Agreement with Armenia.

423| Decision (EU) 2018/104 on the signing, on behalf of the Union, and provisional application of the Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part (OJ 2018 L 23, p. 1).

Findings of the Court

At the outset, the Court recalled that, pursuant to Article 218(8) TFEU, the Council is to act, in principle, by way of qualified majority and that it is only in the situations set out in the second subparagraph of that provision that it is to act by unanimity. In those circumstances, the applicable voting rule must, in each individual case, be determined according to whether or not it falls within one of the situations set out in the second subparagraph of Article 218(8) TFEU, as the choice of substantive legal basis for the decision concerned must be based on objective factors amenable to judicial review, which include the aim and the content of that measure.

The Court pointed out in that regard that, if examination of an EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component. In the present case, although the contested decisions formally concern different titles of the Partnership Agreement, the Court observed that the field that they cover and, thus, the legal basis for the external action of the European Union at issue must be assessed with regard to the agreement as a whole, as those decisions concern, overall, the functioning of the international bodies created on the basis of the Partnership Agreement with Armenia. Moreover, the adoption of two separate decisions of the Council, on different legal bases, but which seek to establish the single position to be adopted on behalf of the European Union on the functioning of the bodies established by that agreement, can be justified only if the agreement, considered as a whole, contains distinct components corresponding to the different legal bases used for the adoption of those decisions.

In that regard, the Court made clear that the characterisation of an agreement as a development cooperation agreement must be determined having regard to its essential object and not in terms of its individual clauses. Although some of the provisions of Title II of the Partnership Agreement with Armenia cover subjects capable of falling within the CFSP and reaffirm the will of the parties to collaborate in that area, those provisions are nevertheless few in number in the agreement and are, for the main part, limited to declarations of a programmatic nature which merely describe the relationship between the contracting parties and their common future intentions.

The Court next observed, as regards the aims of the agreement, that it seeks principally to establish the framework for cooperation in matters of transport, trade and development with Armenia. In that context, it found that to require a development cooperation agreement also to be based on a provision other than the provision relating to that policy whenever the agreement touches on a specific area would in practice be liable to render devoid of substance the competence and the procedure laid down in Article 208 TFEU. In the present case, while some of the specific aims seeking to strengthen political dialogue may be linked to the CFSP, the enumeration of those specific aims is not accompanied by any programme of action or concrete terms governing cooperation that may be capable of establishing that the CFSP constitutes one of the distinct components of that same agreement, outside the scope of those aspects connected with trade and development cooperation.

Finally, while a contextual element of a measure, such as, in the present case, the Nagorno-Karabakh conflict, may also be taken into account in order to determine the legal basis for that measure, the Court found that the Partnership Agreement with Armenia did not envisage any concrete or specific measure with a view to addressing that situation which puts international security in issue.

In the light of the foregoing, the Court annulled Decision 2020/246 since it was wrongly based on the substantive legal basis of Article 37 TEU. The Court also annulled Decision 2020/245. As is apparent from recital 10 and Article 1 thereof, that decision does not relate to the position to be adopted on behalf of the European Union within the Partnership Council established by the Partnership Agreement with Armenia in so far as that

position is covered by the application of Title II of that agreement. The provisions comprising that title do not constitute a distinct component of that agreement which obliged the Council to use, inter alia, Article 37 TEU and the second subparagraph of Article 218(8) TFEU as a basis for establishing that same position. Therefore, there was nothing to justify the Council excluding the position in question from the object of Decision 2020/245, in so far as it covers the application of Title II of that same agreement, and adopting a separate decision pursuant to Article 218(9) TFEU, which has as its object the establishment of that position in so far as it covers that same application.

The Court nonetheless decided, on grounds of legal certainty, to maintain the effects of the annulled decisions pending a new decision to be taken by the Council which complies with its judgment.

4. Istanbul Convention on preventing and combating violence against women and domestic violence

Opinion 1/19 (Istanbul Convention) of 6 October 2021 (Grand Chamber)

The Istanbul Convention on preventing and combating violence against women and domestic violence [424] falls, in part, within the competences of the European Union and, in part, within those of the Member States. It is therefore intended to be a mixed agreement, concluded as such by the European Union and the Member States. The Commission proposal for a decision on the signing of that convention, on behalf of the European Union, indicated, as the substantive legal basis, Article 82(2) and Article 84 TFEU. Since that proposal did not obtain sufficient support within the Council of the European Union, it was decided to limit the signature of that convention to the matters covered by it which fall within the exclusive competence of the European Union, as identified by the Council. The Council therefore replaced the abovementioned substantive legal basis with Article 78(2), Article 82(2) and Article 83(1) TFEU. Furthermore, in order to take account of Ireland's particular situation, in the light of Protocol No 21, [425] the signature decision was divided into two separate decisions.

Those two decisions concern the signature of the Istanbul Convention as regards, respectively, the matters linked to judicial cooperation in criminal matters [426] and to asylum and non-refoulement. [427] In accordance with those decisions, the Istanbul Convention was signed on behalf of the European Union on 13 June 2017. However, to date, no decision on the conclusion of that convention by the European Union has been adopted, since the Council appears to regard the adoption of such a decision as being contingent on the prior existence of a 'common accord' of all the Member States to be bound by that convention in the areas within their competence.

424| Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted on 7 April 2011 ('the Istanbul Convention').

425| 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 to the TFEU ('Protocol No 21').

426| Council Decision (EU) 2017/865 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters (OJ 2017 L 131, p. 11).

427| Council Decision (EU) 2017/866 of 11 May 2017 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to asylum and non-refoulement (OJ 2017 L 131, p. 13).

On 9 July 2019, the European Parliament submitted to the Court a request for an opinion under Article 218(11) TFEU concerning the conclusion of the Istanbul Convention by the European Union. By its first question, the Parliament asked what the appropriate legal bases for the Council act concluding that convention would be and whether it is necessary or possible to split both the act authorising the signature of the convention and the act concluding that convention into two separate decisions. By its second question, the Parliament asked whether the Treaties allow or require the Council to wait, before concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States to be bound by that convention in the fields falling within their competences.

In its opinion, the Court, sitting as the Grand Chamber, answered the Parliament's questions as follows.

First, subject to full compliance, at all times, with the requirements laid down in Article 218(2), (6) and (8) TFEU, the Treaties do not prohibit the Council, acting in conformity with its Rules of Procedure, from waiting, before adopting the decision concluding the Istanbul Convention on behalf of the European Union, for the 'common accord' of the Member States. However, the Treaties do prohibit the Council from adding a further step to the conclusion procedure laid down in that article by making the adoption of the conclusion decision contingent on the prior establishment of such a 'common accord'.

Secondly, the appropriate substantive legal basis for the adoption of the Council act concluding, on behalf of the European Union, the part of the Istanbul Convention covered by the envisaged agreement is made up of Article 78(2), Article 82(2) and Articles 84 and 336 TFEU.

Thirdly, Protocols No 21 and No 22 [428] justify the division of the act concluding the convention into two separate decisions only in so far as that division is intended to take account of the circumstance that Ireland or the Kingdom of Denmark is not participating in the measures adopted in respect of the conclusion of the envisaged agreement which fall within the scope of those protocols, considered in their entirety.

Findings of the Court

- Admissibility of the request for an Opinion

The purpose of the opinion procedure is to forestall complications which would result from legal disputes concerning the compatibility with the Treaties of international agreements binding upon the European Union. Having regard, inter alia, to that purpose, the Court found that the request for an opinion was admissible, with the exception of the second part of the first question, in so far as it relates to the division of the act authorising signature into two decisions. The Istanbul Convention was signed by the European Union more than two years before the request for an opinion was submitted, with the result that the preventive objective pursued by Article 218(11) TFEU could no longer be achieved. Furthermore, the Parliament could have challenged the signature decisions by means of an action for annulment.

- The practice of 'common accord'

As regards the practice of waiting for the 'common accord' of the Member States to be bound by a mixed agreement, the Court observed, first of all, that the Treaties prohibit the Council from making the initiation of the procedure for concluding a convention contingent upon the prior establishment of such a 'common accord'. If that practice were to have such a scope, it would establish a hybrid decision-making process, since the European Union's ability to conclude a mixed agreement would depend entirely on each Member State's

428| Protocol (No 22) on the position of Denmark, annexed to the TEU and the TFEU ('Protocol No 22').

willingness to be bound by that agreement in the fields falling within their competences. Such a hybrid decision-making process is incompatible with Article 218(2), (6) and (8) TFEU, which envisages the conclusion of an international agreement as an act which is adopted by the Council acting by a qualified majority.

That being said, within the limits of the procedure laid down in those provisions, both the decision whether or not to act on the proposal to conclude an international agreement, and, if so, to what extent, and the choice of the appropriate time for adopting such a decision fall within the Council's political discretion. Consequently, nothing precludes the Council from extending its discussions in order to achieve closer cooperation between the Member States and the EU institutions in the conclusion process, which may involve waiting for a 'common accord'.

However, that political discretion is to be exercised, in principle, by a qualified majority, so that such a majority within the Council may, at any time and in accordance with the rules laid down by its Rules of Procedure, require the closure of the discussions and the adoption of the decision concluding the international agreement.

- The appropriate legal bases for the conclusion of the Istanbul Convention

In the context of the question concerning the legal bases, the Court first had to define the subject matter and scope of its examination. In that regard, since the decision concluding the Istanbul Convention must be adopted by the Council by qualified majority, after obtaining the consent of the Parliament, it is for those institutions to specify, within the limits of the question referred, the scope of the 'agreement envisaged' within the meaning of Article 218(11) TFEU. Accordingly, the Court examined the Istanbul Convention solely in the light of the parts of that convention which, according to the wording of that question and the content of the signature decisions, were to be covered by the act concluding that convention. In the light of those factors, the Court started from the premiss that that act would relate to the provisions of the Istanbul Convention linked to judicial cooperation in criminal matters, asylum and non-refoulement, and the obligations of the institutions and public administration of the European Union, in so far as those provisions fall within the competence of the European Union.

As regards, in the first place, judicial cooperation in criminal matters, having regard to the number and scope of the provisions of the Istanbul Convention which fall within the competence of the European Union referred to in Article 82(2) TFEU [429] and Article 84 TFEU, [430] the Court held that those two provisions should be among the legal bases for the act concluding that convention. By contrast, the scope of the obligations contained in the convention falling within the area covered by Article 83(1) TFEU [431] is extremely limited for the European Union, with the result that the act concluding that convention cannot be based on that provision.

As regards, in the second place, asylum and non-refoulement, although the Istanbul Convention contains only three articles relating to those matters, they form a separate chapter which cannot be regarded as incidental or extremely limited in scope, with the result that Article 78(2) TFEU [432] should form part of the substantive legal basis for the act concluding that convention.

429| Under that provision, the European Union may establish minimum rules concerning, inter alia, the admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime.

430| That provision confers on the European Union the competence to establish measures to promote and support the action of Member States in the field of crime prevention.

431| In accordance with that provision, the European Union has the competence to establish minimum rules concerning the definition of criminal offences and sanctions in, inter alia, the area of trafficking in human beings and sexual exploitation of women and children.

432| That provision concerns the European Union's competences in the area of asylum, subsidiary protection and temporary protection.

In the third place, as regards its public administration, the European Union must ensure that the obligations imposed by the convention which fall within the scope of Article 336 TFEU [433] are fully satisfied, with the result that that provision must be one of the legal bases.

- The division of the act concluding the Istanbul Convention into two separate decisions

The question concerning the division of the act concluding the convention into two decisions is linked to the applicability of Protocol No 21 as regards Ireland, as a result of the identification of provisions falling within Title V of Part Three of the TFEU as legal bases for the conclusion of the envisaged agreement. In principle, Ireland does not take part in the adoption by the Council of measures falling under that title unless it notifies its wish to do so. On the basis of that protocol, Ireland intended not to take part in the conclusion, by the European Union, of the part of the Istanbul Convention relating to asylum and non-refoulement, while participating in the conclusion of other parts.

However, selective participation in a single measure covered by Protocol No 21 is precluded. Similarly, a division of the act concluding the envisaged agreement into two decisions in order to enable Ireland to participate in the adoption of one of the two decisions but not in the other is not authorised, even though each of the conclusion decisions would concern measures falling within Title V of Part Three of the TFEU.

That being said, if it is established that different legal bases are applicable to an act concluding an international agreement, there may be an objective need to divide that act into two or more decisions. That may be the case, inter alia, if such a division is intended to take account of the fact that Ireland or the Kingdom of Denmark is not taking part in the measures envisaged in respect of the conclusion of an international agreement which fall within the scope, respectively, of Protocols No 21 and No 22, whereas other measures envisaged in respect of that conclusion do not fall within that scope. In the present case, since the substantive legal bases for the act concluding the envisaged agreement include Article 336 TFEU, which does not fall within the scope of Protocols No 21 and No 22, an objective need to divide the act concluding the Istanbul Convention may be established.

433| Relating to the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union.

XX. Common commercial policy

Judgment of 21 December 2021 (Grand Chamber), *Bank Melli Iran* (C-124/20, EU :C :2021 :1035)

Bank Melli Iran ('BMI') is an Iranian bank owned by the Iranian state with a branch in Germany. It concluded with Telekom – which is the subsidiary of Deutsche Telekom AG, established in Germany and approximately half of the turnover of which is derived from its business in the United States – several contracts with a view to the provision of telecommunication services permitting it to carry on its commercial activities. In 2018, the United States withdrew from the Iranian nuclear deal, signed in 2015, the aim of which was to control Iran's nuclear programme and lift economic sanctions against Iran. As a result of that withdrawal, the United States once again imposed, pursuant to the Iran Freedom and Counter-Proliferation Act of 2012, sanctions against Iran and persons included on a list, [434] one of which was BMI. Since that date, it is once again prohibited for any person to trade, outside the territory of the United States, with any person or entity included in that list.

Following that decision, the European Union adopted Delegated Regulation 2018/1100 [435] amending the Annex to Regulation No 2271/96 [436] so that it included the Iran Freedom and Counter-Proliferation Act of 2012. It prohibited, in particular, the persons concerned from complying with the laws included in the annex or actions resulting therefrom (Article 5, first paragraph), unless an authorisation to be exempt from that prohibition was obtained, which could be granted by the European Commission where non-compliance with those foreign laws would seriously harm the interests of the persons covered by that regulation or those of the European Union (Article 5, second paragraph).

Since German law provided that 'any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law' [437] and Telekom had terminated, with effect from 2018, prior to their expiry, all of the contracts between it and BMI, without express reasons and without authorisation from the Commission, BMI challenged the termination of those contracts before the German courts. At first instance, Telekom was ordered to perform the contracts at issue until expiry of the notice period for ordinary termination. The ordinary termination of the contracts at issue was however regarded as being consistent with Article 5 of Delegated Regulation 2018/1100. It was against that background that BMI appealed to the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), which made a preliminary reference to the Court requesting an interpretation of the first paragraph of Article 5 of the regulation, having regard, in particular, to Articles 16 and 52 of the Charter of Fundamental Rights of the European Union ('the Charter') and the authorisation mechanism provided for in the second paragraph of Article 5 of the regulation.

434| Specially Designated Nationals and Blocked Persons List ('the SDN list').

435| Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199 I, p. 1).

436| Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1) and by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Regulation (EC) No 2271/96 (OJ 2018 L 199 I, p. 1).

437| Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code).

Findings of the Court

The Court, sitting as the Grand Chamber, finding that the first paragraph of Article 5 of Delegated Regulation 2018/1100 was broadly drafted, held, in the first place, that the prohibition on complying with the requirements or prohibitions laid down in certain laws adopted by a third country in breach of international law applies even in the absence of a specific order or instruction directing compliance issued by an administrative or judicial authority. According to the Court, that interpretation is supported by the objectives of the Regulation, which include protecting the established legal order and the interests of the European Union in general, with a view to achieving, to the greatest extent possible, the objective of free movement of capital between Member States and third countries, as well as protecting the interests of the persons concerned. The Court observed that, given the threat of legal consequences that such a law imposes on persons to whom the requirements or prohibitions apply in principle, the regulation would not be capable of counteracting the effects of those laws if the prohibition laid down in the first paragraph of Article 5 of Delegated Regulation 2018/1100 were made subject to the adoption of orders by a foreign administrative or judicial authority.

In the second place, the Court found that the prohibition laid down in the first paragraph of Article 5 of Delegated Regulation 2018/1100 is drafted in clear, precise and unconditional terms with the result that it may be relied on in civil proceedings, such those in the main action. It went on to confirm that a person covered by the regulation who does not have an authorisation granted by the Commission may, in the light of the first paragraph of Article 5, terminate contracts concluded with a person on the SDN list without providing reasons for that termination. However, in the context of civil proceedings concerning the alleged breach of the prohibition laid down by the regulation, it is the person to whom the prohibition is addressed who has the burden of proving, to the required legal standard, that his or her conduct, in this case the termination of all contracts, did not seek to comply with the American legislation referred to in the Regulation where, prima facie, that appears to be the case.

In the present case, the Court observed that German law permits the party alleging that a legal act is null and void, as a result of the infringement of a statutory prohibition, such as that laid down in the first paragraph of Article 5 of Delegated Regulation 2018/1100, to rely on that nullity before the courts. It nonetheless noted that, in this case, the burden of proof fell, under German law, entirely on the person relying on such an infringement, even though the evidence at issue is not generally available to that person, making it difficult for the court seised to make a finding of infringement and thereby undermining the effectiveness of the regulation.

In the third and last place, the Court held that Articles 5 and 9 [438] of Delegated Regulation 2018/1100, read in the light of Articles 16 and 52 of the Charter, do not preclude the annulment of a contractual termination, provided that that annulment does not entail disproportionate effects, including at an economic level, for the person concerned. In the present case, in the absence of authorisation within the meaning of the second paragraph of Article 5 of Delegated Regulation 2018/1100, the termination at issue, if proven to be contrary to the first paragraph of Article 5, would be null and void under German law. However, where such an annulment is liable to entail a limitation of the freedom to conduct a business, it may only be contemplated in compliance with the conditions imposed by Article 52(1) of the Charter.

In that respect, regarding in particular the condition relating to respect for the essence of the freedom to conduct a business, guaranteed by Article 16 of the Charter, the Court held that annulling the termination of the contracts concluded between BMI and Telekom would have the effect not of depriving the latter of

438| Article 9 provides that 'each Member State shall determine the sanctions to be imposed in the event of breach of any relevant provisions of this Regulation. Such sanctions must be effective, proportional and dissuasive'.

the possibility of asserting its interests generally in the context of a contractual relationship, but rather of limiting that possibility. In addition, the limitation on the freedom to conduct a business resulting from the possible annulment of a contractual termination that was contrary to the prohibition laid down in the first paragraph of Article 5 of Delegated Regulation 2018/1100 would appear, in principle, to be necessary in order to counteract the effects of the foreign laws in question, thereby protecting the established legal order and the interests of the European Union in general.

The Court thus invited the referring court, when assessing the proportionality of the limitation on the freedom to conduct a business enjoyed by Telekom, to weigh in the balance, on the one hand, the pursuit of the objectives of the Regulation served by annulling that contractual termination effected in breach of the prohibition laid down in the first paragraph of Article 5 of that regulation and, on the other hand, the probability that Telekom would be exposed to economic losses and the extent of those losses if it were unable to terminate its commercial relationship with BMI. Likewise, the fact that Telekom did not, subject to verification, apply to the Commission for an exemption from the prohibition imposed by the first paragraph of Article 5 of Delegated Regulation 2018/1100 is, according to the Court, also relevant in the context of that assessment of proportionality.

XXI. Common foreign and security policy

Judgment of 23 November 2021 (Grand Chamber), *Council* v *Hamas* (C-833/19 P, EU :C :2021 :950)

By judgment of 4 September 2019, ***Hamas*** v ***Council,*** [439] 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 [440] which had maintained Hamas 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

439| Judgment of 4 September 2019, ***Hamas* v *Council*** (T-308/18, EU :T :2019 :557).

440| 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).

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. [441]

The Court, sitting as the Grand Chamber, set aside the judgment of the General Court of 4 September 2019. It found that the General Court had 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 had been adopted by the Council simultaneously with those acts, to which they were inseparably attached, and their authenticity had not been validly challenged.

Findings of the Court

The Court of Justice recalled, in the first place, that it is apparent from the judgment in ***Commission* v *BASF***, [442] on which the General Court had 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. The Court nevertheless observed that although, in the judgment in *Commission* v *BASF*, it had also recalled that the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, the acts at issue in the present case, unlike the decision at issue in that judgment, 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 noted 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 concluded that its considerations in the judgment in *Commission* v *BASF* could not be applied to the present case.

The Court recalled, 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

441| Article 15 of the Council's Rules of Procedure, headed 'Signing of acts', provides: '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).)

442| Judgment of 15 June 1994, ***Commission* v *BASF and Others*** (C-137/92 P, EU :C :1994 :247).

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 was 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 was sufficient for that statement of reasons to 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 stated 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 of Justice thus ruled that the first ground of appeal was well founded and set aside the judgment of the General Court.

Since the state of the proceedings was, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, such that the Court could give final judgment in the matter, the Court found, in the third place, that the Council had produced documents demonstrating that the statements of reasons had been 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 had not put forward any evidence that could call into question the fact that the text of the statements of reasons notified to it and the text adopted by the Council corresponded perfectly. Since the authenticity of those statements of reasons had not been validly challenged by Hamas, the Court concluded that the action brought by Hamas should be dismissed in its entirety.

Reference may also be made under this heading to one other judgment delivered on the subject of restrictive measures adopted by the European Union under the common foreign and security policy. In that judgment, which was delivered on 22 June 2021 in ***Venezuela* v *Council (Whether a third State is affected)*** (C-872/19 P, EU :C :2021 :507), [443] the Court ruled on the admissibility of an action for annulment brought by a third State.

443| That judgment is presented in Section VI.2 'Actions for annulment'.

C.

Activity of the registry of the court of justice in 2021

A brief overview of the main statistical trends over the past year

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

As in 2020, the Covid-19 health crisis had a major impact on last year's judicial activity. This highly contagious virus, with its many variants, resulted in the institution once again having to adapt its rules and standard practices to address the real difficulties faced not only by its members and staff, but also by the parties' representatives (agents, lawyers and counsel) in order to participate fully in proceedings before the Court.

In 2021, the Court therefore had further recourse to the package of measures it had put in place at the beginning of the public-health crisis, which included extending by one month the time limit for submitting written observations in preliminary ruling proceedings, looking more favourably on requests to extend time limits for the lodging of other pleadings, allowing parties who were unable to travel to Luxembourg to attend hearings by videoconference, and replacing some of those hearings with questions requiring a written answer. [1] Together, those measures enabled the Court to maintain a high level of productivity, although they inevitably had repercussions on the length of proceedings. The partial renewal of the composition of the Court in October 2021, combined with the increase in the number of new cases, also had a knock-on effect on the results of the past year, as a short adjustment and running-in period was needed to enable the new members to find their feet. In 2021, no fewer than nine new members (five judges and four Advocates General) thus took up office at the Court of Justice.

1| For a more comprehensive overview of the measures taken by the Court in response to the public-health crisis, please refer to the 2020 Annual Report (pages 199 to 201).

I. New cases

The number of cases brought before the Court of Justice in 2021 is, unsurprisingly, up on last year's figures. While 737 cases were lodged in 2020 (compared with the record of 966 set in 2019), **838 new cases** were registered over the past year. That upswing (13.7%) is partly due to national courts returning to business as usual – after the dramatic fall in the number of references for a preliminary ruling during the first few months of the public-health crisis – but the rise in the number of appeals linked to the growth in activity at the General Court is also a factor. As the General Court disposed of more cases in 2021 (951) than in 2020 (748), that increase led, quite logically, to an upturn in the number of appeals lodged before the Court of Justice (232, compared with 131 in 2020).

Nonetheless, the increase did not fundamentally alter the ratio between the number of challengeable decisions delivered by the General Court and the number of decisions challenged before the Court of Justice; the appeal rate for 2021 (29%) fell within the usual range, which has fluctuated between 20% and 30% for more than ten years. That said, the number of appeals upheld by the Court of Justice over the past year declined significantly.

While the number of references for a preliminary ruling and appeals rose during the past year – those two types of case alone accounted for more than 95% of the total number of cases brought before the Court in 2021 – the number of direct actions fell to an all-time low. Only 29 direct actions were brought (all types combined: actions for annulment, for failure to act and for failure to fulfil obligations), accounting for barely 3.5% of disputes, while the number of special forms of procedure, including applications for legal aid, for taxation of costs, for interpretation, for revision or to remedy a failure to adjudicate, remained stable (10 new cases, as in 2020).

The statistical information on the subjects referred to the Court in 2021 also reveals a high degree of stability. The area of freedom, security and justice, with 106 new cases, and intellectual and industrial property, with 84, remain at the top of the ranking, but taxation, transport, consumer protection and social policy also account for a not inconsiderable share of the new cases brought before the Court in the past year. The same is true of State aid disputes, particularly owing to the measures taken by the EU institutions and national authorities in order to shore up economic activity, hard hit by the public-health crisis.

By contrast, the geographical spread of references for a preliminary ruling changed significantly. Although the German courts are still the most prolific source of requests for a preliminary ruling, the number of such requests dropped in the past year (from 140 in 2020 to 106 in 2021), while requests from several States that joined the European Union in 2004 and 2007 more than doubled in the space of a year. For example, Slovenia, Lithuania and Bulgaria submitted 2, 7 and 28 requests in 2020, respectively, figures which rose to 7, 15 and 58 in 2021. The Court also recorded a sharp increase in requests for a preliminary ruling from the Irish, Dutch and Romanian courts, which made 11, 27 and 38 references, respectively.

To round off this overview, mention should also be made of the record number of requests for the application of the expedited procedure. In 2021, no fewer than 60 such requests were made, while the application of the urgent preliminary ruling procedure was requested or proposed in around 30 cases! Those are the highest yearly figures ever recorded since those two procedures were introduced.

However, because of the considerable resources required by such procedures and the constraints they impose on all concerned, only some of those requests resulted in those procedures actually being triggered. At the request of Poland and the European Parliament, the expedited procedure was thus used in three

direct actions raising issues of major importance [2] and, at the request of the referring court, in two preliminary ruling cases. As in 2020, the urgent preliminary ruling procedure was applied on nine occasions. The cases in question concerned the interpretation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, [3] the review by the Court of the conditions for detaining an applicant for international protection, and the interpretation of the rules on the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, particularly involving the wrongful removal of children.

II. Cases disposed of

As noted in the introduction to this chapter, in spite of the difficulties associated with the continuing public-health crisis, the Court was able to maintain a high level of productivity. In 2021, the Court **disposed of 772 cases**, very close to the 792 cases disposed of in 2020, which was a remarkable figure in the circumstances since, with the exception of 2019, the Court had never resolved as many cases in a single year.

The Court was just one away from delivering the same number of judgments as in 2020 (450 in 2021 against 451 in 2020), while the number of orders made during the past year (257) was slightly down on the total number of orders made in 2020 (276). However, it is the increased proportion of orders involving a judicial determination made in 2021 that will capture the reader's eye, namely orders terminating the case other than by removal from the register, by a declaration that there is no need to give a decision or by referral to the General Court. Those orders accounted for 14% of the preliminary ruling cases disposed of in 2021 and almost half (47.30%) of the appeals decided on last year, figures which stood at 12% and 37%, respectively, in 2020. That increase is due in part to the greater use made of the possibilities afforded by Article 53(2) and Articles 99 and 181 of the Rules of Procedure of the Court of Justice, as well as, and perhaps above all, to the sustained activity of the chamber determining whether appeals may proceed. During the past year, that chamber adopted no fewer than 48 decisions and in 1 of them, for the first time since the mechanism for the prior admission of appeals came into being, it allowed the appeal to proceed. [4]

In 2021, the Court ruled on the European Parliament's request for an opinion on the choice of the appropriate legal basis for the conclusion by the European Union of the Istanbul Convention on preventing and combating violence against women and domestic violence. [5] Mention should also be made of the judgment delivered by the full Court on 30 September 2021 pursuant to the fourth paragraph of Article 16 of the Protocol on the Statute of the Court of Justice of the European Union [6] in a case between the Court of Auditors and one of its former members. [7]

2| Case C121/21, ***Czech Republic* v *Poland (Turów mine)***, disposed of by an order of 4 February 2022 removing the case from the register (EU:C:2022:82), and Cases C156/21, ***Hungary* v *European Parliament and Council*** and C157/21, ***Poland* v *European Parliament and Council***, both disposed of by judgments of 16 February 2022 (EU:C:2022:97 and EU:C:2022:98).

3| OJ 2002 L 190, p. 1.

4| Order of 10 December 2021, ***EUIPO* v *The KaiKai Company Jaeger Wichmann*** (C382/21 P, EU :C :2021 :1050).

5| Opinion 1/19 of the Court (Grand Chamber) of 6 October 2021 (EU :C :2021 :832).

6| Under that provision, the Court of Justice is to sit as a full Court where a case is brought before it pursuant to Article 286(6) of the Treaty on the Functioning of the European Union.

7| Judgment of the Court (full Court) of 30 September 2021, ***Court of Auditors* v *Pinxten*** (C-130/19, EU :C :2021 :782).

That was the only case which required the participation of all judges in 2021. Most cases were referred to court formations comprising three or five judges, while the Grand Chamber of the Court continued to play its central role in the development and consolidation of EU law. Over the past year, the Grand Chamber thus disposed of no fewer than 83 cases (compared with 71 in 2020), covering matters as diverse as respect for the fundamental rules and principles of the rule of law, such as the independence of the judiciary, the protection of personal data, asylum policy, banking and monetary union, consumer law and environmental protection.

While the number of appeals brought before the Court in 2021 was significantly higher than the year before – particularly in December, when no fewer than 48 appeals were lodged at the Registry, that is, almost a quarter of the total number of appeals registered during the entire year – the number of appeals upheld by the Court fell significantly. The General Court's decisions were set aside, in whole or in part, in 40 cases in 2020 (out of a total of 204 appeals disposed of that year), a figure which fell in 2021 to 23 (out of a total of 183 appeals disposed of by the Court of Justice), testifying to the quality of the decisions delivered at first instance.

Lastly, the duration of proceedings before the Court increased (all case types combined). The average time taken to deal with preliminary ruling cases, direct actions and appeals thus stood, respectively, at 16.7 months, 21.8 months and 15.1 months in 2021 (compared with 15.9 months, 19.2 months and 13.8 months in 2020). That increase is ascribable in part to the measures taken by the Court to address the difficulties faced by the parties' representatives in order to participate effectively in proceedings during the public-health crisis, which resulted, among other things, in the Court extending by one month the time limit for submitting pleadings and written observations in all cases brought before the Court and, subsequently, only in preliminary ruling cases. It is also due, more specifically, to the disposal of several groups of large cases in the field of competition law, some of which had been brought in 2016. Leaving aside those large cases, the average time taken to deal with appeals in 2021 was 14.1 months, which is very similar to the figure for 2020.

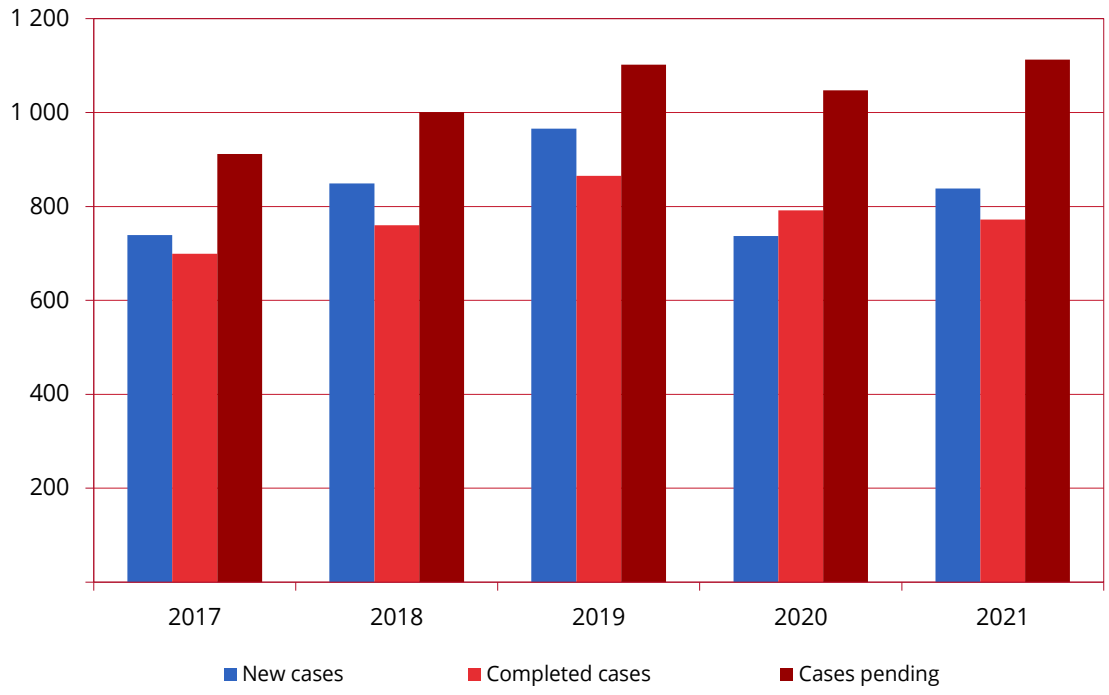
III. Cases pending

Since more cases were brought in the past year than disposed of, the number of cases pending as of **31 December 2021** was higher than at the end of 2020, standing at **1113**, with the lion's share taken by requests for a preliminary ruling (792) and appeals (246). With 69 cases pending as of 31 December 2021, direct actions accounted for only 6.2% of the Court's overall workload.

Against that backdrop, the once-mooted possibility of transferring jurisdiction to adjudicate on some of those actions to the General Court would do little to ease the workload of the Court of Justice, especially since the decisions handed down by the General Court in those actions could still be appealed. Although measures need to be taken to enable the Court of Justice to continue to fulfil its mission, they would be better targeted at references for a preliminary ruling and appeals. Such measures will, in any event, require a thorough analysis of the nature and specific characteristics of those cases before being shaped into more tangible proposals, of a legislative or regulatory nature, entailing, where appropriate, a redefinition of how jurisdiction is shared between the Court of Justice and the General Court.

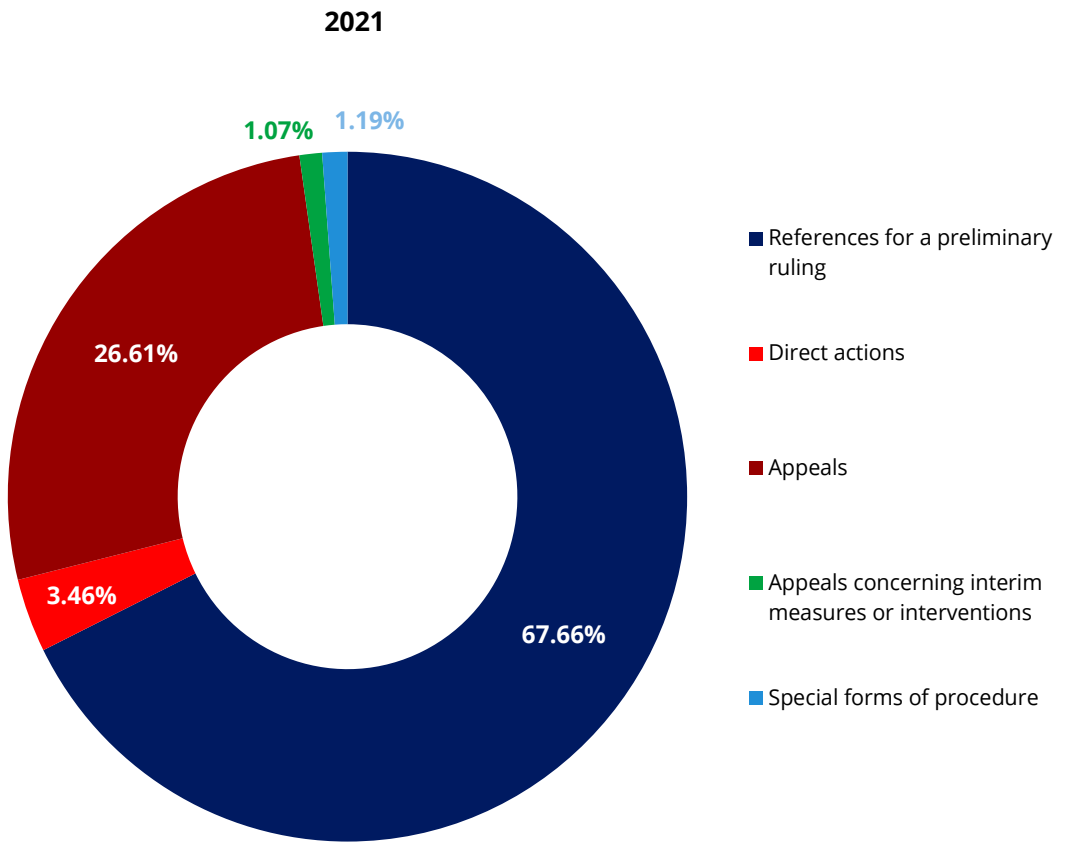
D.
Statistics concerning the judicial activity of the Court of Justice

I. General activity of the Court of Justice – New cases, completed cases, cases pending (2017 to 2021)



	2017	2018	2019	2020	2021
New cases	739	849	966	737	838
Completed cases	699	760	865	792	772
Cases pending	912	1 001	1 102	1 047	1 113

II. New cases – Nature of proceedings (2017 to 2021)



	2017	2018	2019	2020	2021
References for a preliminary ruling	533	568	641	557	567
Direct actions	46	63	41	38	29
Appeals	141	193	256	125	223
Appeals concerning interim measures or interventions	6	6	10	6	9
Requests for an opinion	1		1	1	
Special forms of procedure [1]	12	19	17	10	10
Total	**739**	**849**	**966**	**737**	**838**
Applications for interim measures	3	6	6	3	8

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

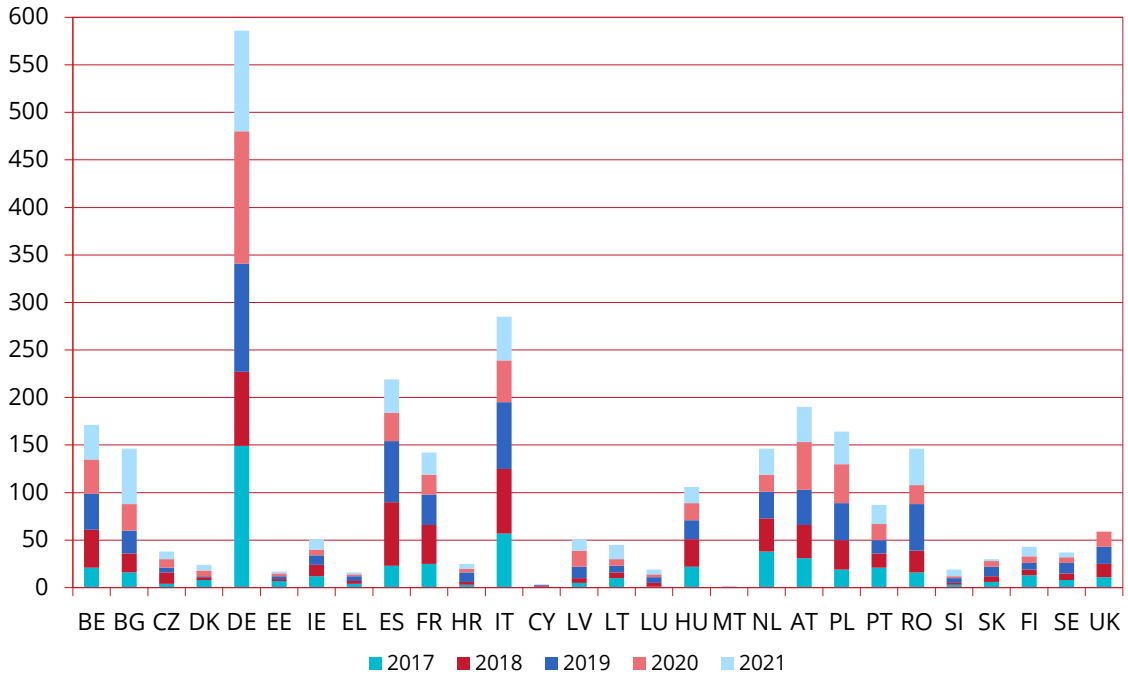
III. New cases – Subject matter of the action (2017 to 2021)

	2017	2018	2019	2020	2021
Access to documents	1	10	5	1	4
Accession of new States	1				
Agriculture	14	26	24	15	19
Approximation of laws	41	53	30	35	63
Arbitration clause	5	2	3	1	3
Area of freedom, security and justice	98	82	107	96	106
Citizenship of the Union	8	6	8	11	14
Commercial policy	8	5	10	8	5
Common fisheries policy	1	1	1	2	2
Common foreign and security policy	6	7	19	1	6
Company law	1	2	3	1	1
Competition	8	25	42	16	26
Consumer protection	36	41	72	37	52
Customs union and Common Customs Tariff	14	13	18	19	11
Economic and monetary policy	7	3	11	12	12
Economic, social and territorial cohesion	2	1	1	2	3
Education, vocational training, youth and sport	2				2
Employment				1	1
Energy	2	12	6	7	3
Environment	40	50	47	23	23
External action by the European Union	3	4	4	4	6
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	6	6	8	7	6
Free movement of capital	12	9	6	9	4
Free movement of goods	6	4	8	5	3
Freedom of establishment	8	7	8	23	9
Freedom of movement for persons	16	19	40	14	12
Freedom to provide services	18	37	12	10	11
Industrial policy	6	4	7	1	1
Intellectual and industrial property	73	92	74	51	84
Law governing the institutions	26	34	38	27	39
Principles of EU law	12	29	33	30	28
Public health	1	4	6	4	10
Public procurement	23	28	27	13	21
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	1	3		5
Research and technological development and space	3	1			
Social policy	43	46	41	33	46
Social security for migrant workers	7	14	2	6	7
State aid	21	26	59	18	42
Taxation	55	71	73	64	54
Trans-European networks					1
Transport	83	39	54	99	52
TFEU	**719**	**814**	**910**	**706**	**797**
Safety control		1			
Protection of the general public		1	1		
Euratom Treaty		**2**	**1**		
Principles of EU law		1	1		
EU Treaty		**1**	**1**		
Law governing the institutions					2
UK Withdrawal Agreement					**2**
Law governing the institutions		2			1
Privileges and immunities		2	3	2	
Procedure	12	12	16	10	7
Staff Regulations	8	16	35	19	31
Others	**20**	**32**	**54**	**31**	**39**
OVERALL TOTAL	**739**	**849**	**966**	**737**	**838**

IV. New cases – Subject matter of the action (2021)

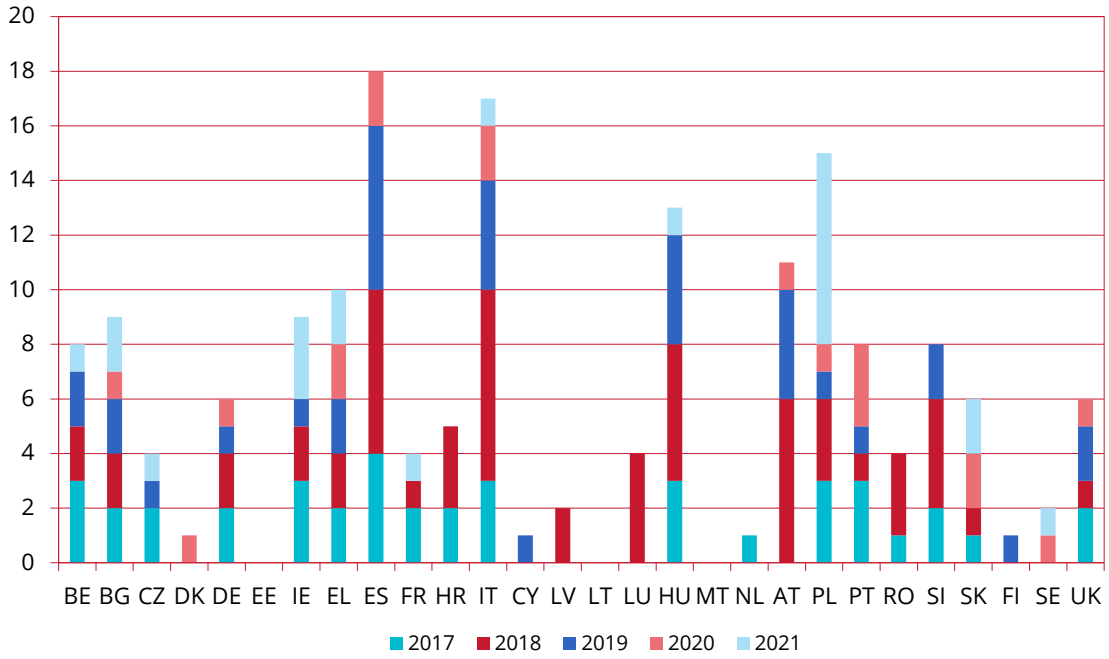
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Special forms of procedure	Total
Access to documents			4			**4**
Agriculture	15		3	1		**19**
Approximation of laws	62	1				**63**
Arbitration clause			3			**3**
Area of freedom, security and justice	102	4				**106**
Citizenship of the Union	10	3	1			**14**
Commercial policy			5			**5**
Common fisheries policy	1	1				**2**
Common foreign and security policy	2		4			**6**
Company law			1			**1**
Competition	15		10	1		**26**
Consumer protection	50	1	1			**52**
Customs union and Common Customs Tariff	11					**11**
Economic and monetary policy	5		7			**12**
Economic, social and territorial cohesion	2		1			**3**
Education, vocational training, youth and sport	1		1			**2**
Employment	1					**1**
Energy	2		1			**3**
Environment	12	8	3			**23**
External action by the European Union	2		4			**6**
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	4		2			**6**
Free movement of capital	4					**4**
Free movement of goods	3					**3**
Freedom of establishment	9					**9**
Freedom of movement for persons	11	1				**12**
Freedom to provide services	11					**11**
Industrial policy	1					**1**
Intellectual and industrial property	23		61			**84**
Law governing the institutions	1	3	28	2	5	**39**
Principles of EU law	24	3	1			**28**
Public health	3		6	1		**10**
Public procurement	18	1	1	1		**21**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			3	2		**5**
Social policy	46					**46**
Social security for migrant workers	7					**7**
State aid	6		35	1		**42**
Taxation	52	2				**54**
Trans-European networks			1			**1**
Transport	50		2			**52**
TFEU	**566**	**28**	**189**	**9**	**5**	**797**
Law governing the institutions			2			2
UK Withdrawal Agreement			**2**			**2**
Law governing the institutions		1				1
Procedure			2		5	7
Staff Regulations	1		30			31
Others	**1**	**1**	**32**		**5**	**39**
OVERALL TOTAL	**567**	**29**	**223**	**9**	**10**	**838**

V. New cases – References for a preliminary ruling by Member State (2017 to 2021)



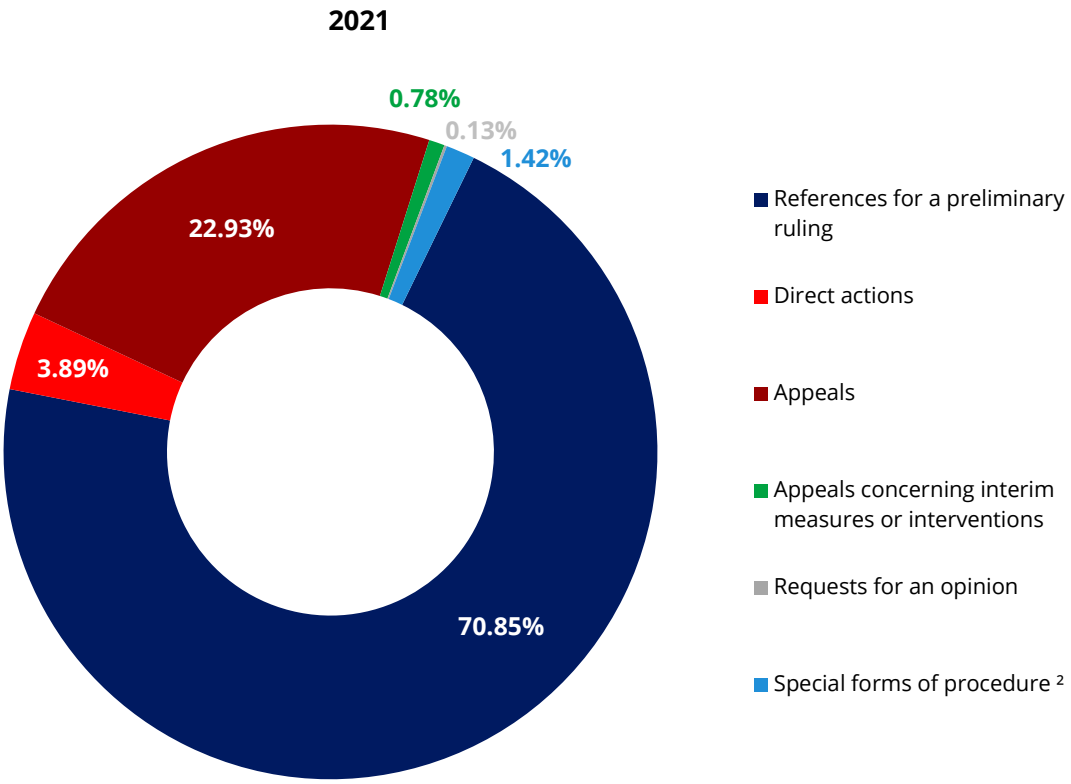
	2017	2018	2019	2020	2021	Total
Belgium	21	40	38	36	36	**171**
Bulgaria	16	20	24	28	58	**146**
Czech Republic	4	12	5	9	8	**38**
Denmark	8	3	1	6	6	**24**
Germany	149	78	114	140	106	**587**
Estonia	7	2	3	3	2	**17**
Ireland	12	12	10	5	11	**50**
Greece	4	3	5	2	2	**16**
Spain	23	67	64	30	35	**219**
France	25	41	32	21	23	**142**
Croatia	3	3	10	4	5	**25**
Italy	57	68	70	44	46	**285**
Cyprus		1	1			**2**
Latvia	5	5	12	17	12	**51**
Lithuania	10	6	7	7	15	**45**
Luxembourg	1	4	6	3	5	**19**
Hungary	22	29	20	18	17	**106**
Malta			1			**1**
Netherlands	38	35	28	18	27	**146**
Austria	31	35	37	50	37	**190**
Poland	19	31	39	41	34	**164**
Portugal	21	15	14	17	20	**87**
Romania	16	23	49	20	38	**146**
Slovenia	3	2	5	2	7	**19**
Slovakia	6	6	10	6	2	**30**
Finland	13	6	7	7	10	**43**
Sweden	8	7	11	6	5	**37**
United Kingdom	11	14	18	17		**60**
Total	**533**	**568**	**641**	**557**	**567**	**2 866**

VI. New cases – Actions for failure of a Member State to fulfil its obligations (2017 to 2021)



	2017	2018	2019	2020	2021	Total
Belgium	3	2	2		1	**8**
Bulgaria	2	2	2	1	2	**9**
Czech Republic	2		1		1	**4**
Denmark				1		**1**
Germany	2	2	1	1		**6**
Estonia						
Ireland	3	2	1		3	**9**
Greece	2	2	2	2	2	**10**
Spain	4	6	6	2		**18**
France	2	1			1	**4**
Croatia	2	3				**5**
Italy	3	7	4	2	1	**17**
Cyprus			1			**1**
Latvia		2				**2**
Lithuania						
Luxembourg		4				**4**
Hungary	3	5	4		1	**13**
Malta						
Netherlands	1					**1**
Austria		6	4	1		**11**
Poland	3	3	1	1	7	**15**
Portugal	3	1	1	3		**8**
Romania	1	3				**4**
Slovenia	2	4	2			**8**
Slovakia	1	1		2	2	**6**
Finland			1			**1**
Sweden				1	1	**2**
United Kingdom	2	1	2	1		**6**
Total	**41**	**57**	**35**	**18**	**22**	**173**

VII. Completed cases – Nature of proceedings (2017 to 2021) [1]

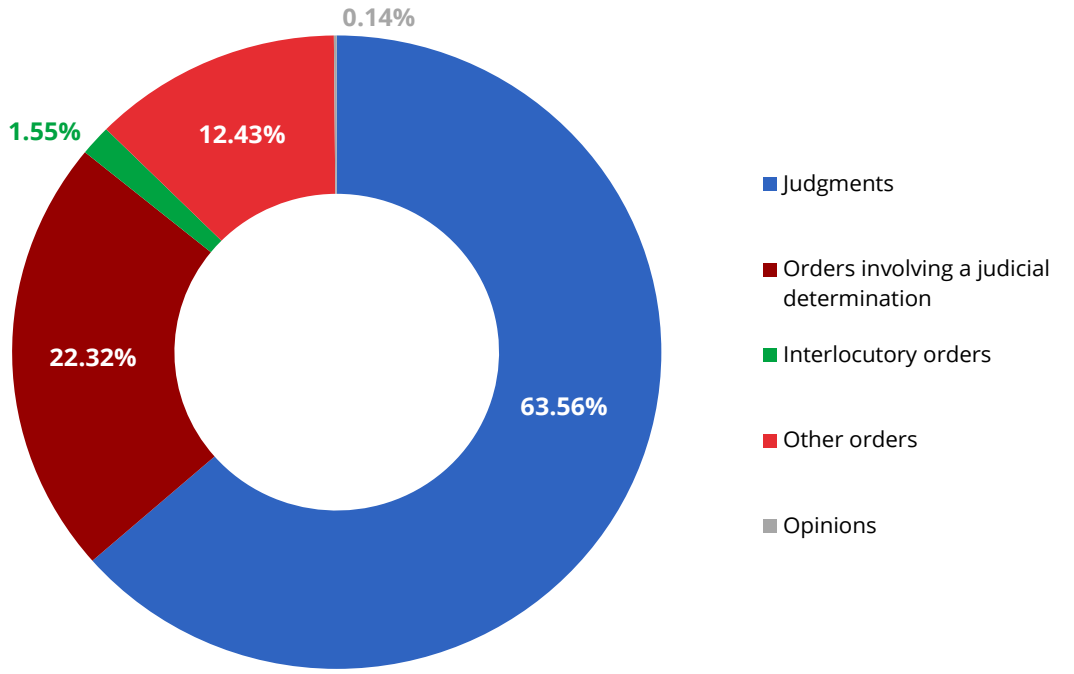


	2017	2018	2019	2020	2021
References for a preliminary ruling	447	520	601	534	547
Direct actions	37	60	42	37	30
Appeals	194	155	204	194	177
Appeals concerning interim measures or interventions	4	10	6	10	6
Requests for an opinion	3		1		1
Special forms of procedure [2]	14	15	11	17	11
Total	**699**	**760**	**865**	**792**	**772**

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

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

VIII. Completed cases – Judgments, opinions, orders (2021) [1]



	Judgments	Orders involving a judicial determination [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary	338	69		81		488
Direct actions	26	1	3	3		33
Appeals	86	78	2	3		169
Appeals concerning interim measures or interventions			6			6
Requests for an opinion					1	1
Special forms of procedure		10		1		11
Total	**450**	**158**	**11**	**88**	**1**	**708**

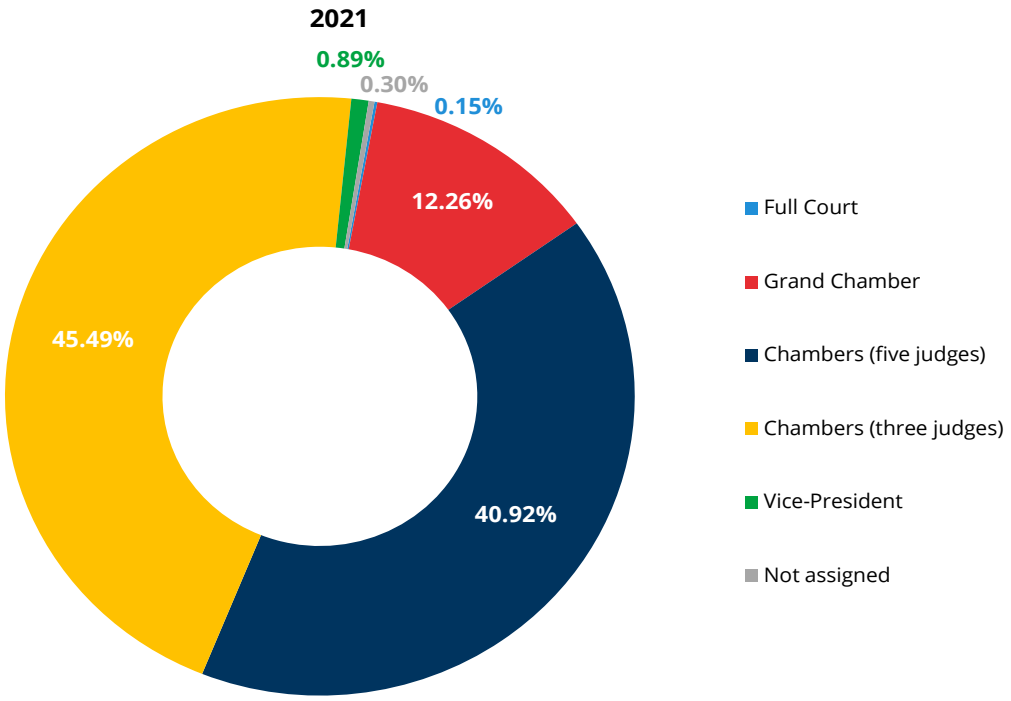
1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

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

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

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

IX. Cases completed by judgments, by opinions or by orders involving a judicial determination – Bench hearing action (2017 to 2021) [1]



	2017			2018			2019			2020			2021		
	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total
Full Court	1		**1**	1		**1**	1		**1**				1		**1**
Grand Chamber	46		**46**	76		**76**	77		**77**	70		**70**	83		**83**
Chambers (five judges)	312	10	**322**	300	15	**315**	317	21	**338**	237	4	**241**	271	6	**277**
Chambers (three judges)	151	105	**256**	153	93	**246**	163	176	**339**	191	142	**333**	154	154	**308**
Vice-President		3	**3**		7	**7**		6	**6**		10	**10**		6	**6**
Not assigned								2	**2**		3	**3**		2	**2**
Total	**510**	**118**	**628**	**530**	**115**	**645**	**558**	**205**	**763**	**498**	**159**	**657**	**509**	**168**	**677**

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

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

X. Cases completed by judgments, by opinions or by orders involving a judicial determination – Subject matter of the action (2017 to 2021) [1]

	2017	2018	2019	2020	2021
Access to documents	9	2	5	8	1
Accession of new States		1			
Agriculture	22	15	23	15	21
Approximation of laws	29	28	44	28	26
Arbitration clause		3	2	4	2
Area of freedom, security and justice	61	74	85	69	81
Citizenship of the Union	5	10	7	8	4
Commercial policy	14	6	11	4	7
Common fisheries policy	2	2	2		2
Common foreign and security policy	10	5	8	16	5
Company law	4	1	1	3	2
Competition	53	12	20	17	26
Consumer protection	20	19	38	36	39
Customs union and Common Customs Tariff	19	12	12	16	18
Economic and monetary policy	2	3	7	3	17
Economic, social and territorial cohesion		1		1	2
Education, vocational training, youth and sport	2				
Energy	2	1	9	8	4
Environment	27	33	50	32	22
External action by the European Union	1	3	4	3	3
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	7	2	6	5	5
Free movement of capital	1	13	8	5	8
Free movement of goods	2	6	2	8	2
Freedom of establishment	10	13	5	6	7
Freedom of movement for persons	17	24	25	21	18
Freedom to provide services	13	21	23	13	17
Industrial policy	8	2	7	6	1
Intellectual and industrial property	60	74	92	76	61
Law governing the institutions	27	28	28	26	27
Principles of EU law	14	10	17	18	34
Public health	5		6	3	5
Public procurement	15	22	20	19	13
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	7	1	1		6
Research and technological development and space	2	3	1	1	
Social policy	26	42	36	25	37
Social security for migrant workers	6	10	12	6	3
State aid	33	29	20	28	31
Taxation	62	58	68	58	63
Transport	17	38	25	22	26
TFEU	**614**	**627**	**730**	**617**	**646**
Protection of the general public			1		1
Euratom Treaty			**1**		**1**
Principles of EU law			1	1	
EU Treaty			**1**	**1**	
Law governing the institutions			2		
Privileges and immunities		1		4	3
Procedure	13	10	11	13	8
Staff Regulations	1	7	18	22	19
Others	**14**	**18**	**31**	**39**	**30**
OVERALL TOTAL	**628**	**645**	**763**	**657**	**677**

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

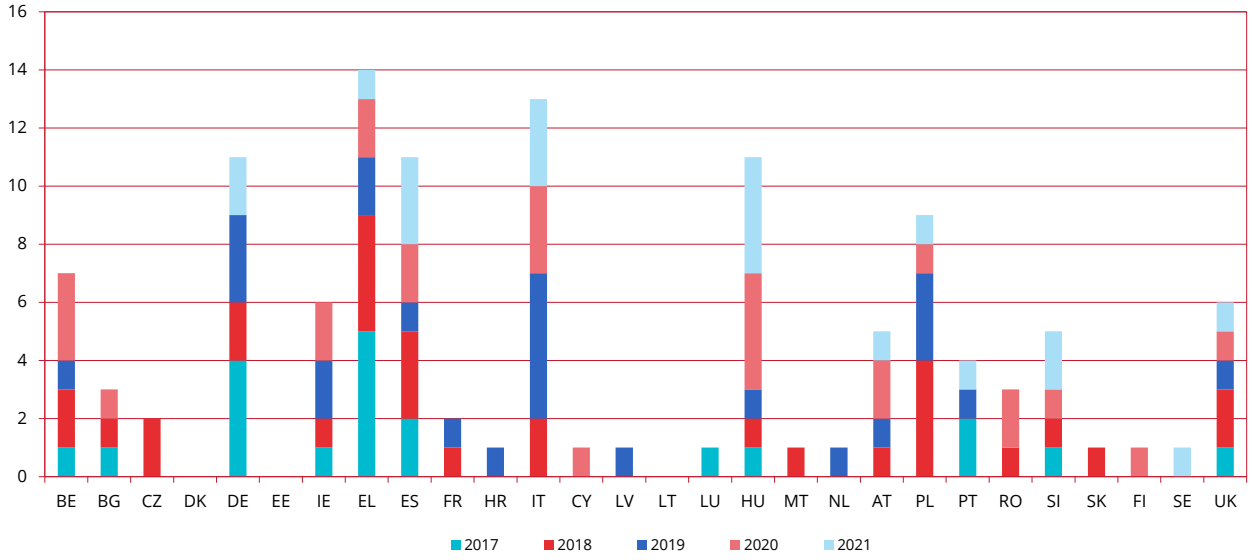
XI. Cases completed by judgments, by opinions or by orders involving a judicial determination – Subject matter of the action (2021) [1]

	Judgments/opinions	Orders [2]	Total
Access to documents	1		**1**
Agriculture	17	4	**21**
Approximation of laws	21	5	**26**
Arbitration clause	1	1	**2**
Area of freedom, security and justice	70	11	**81**
Citizenship of the Union	3	1	**4**
Commercial policy	7		**7**
Common fisheries policy	2		**2**
Common foreign and security policy	5		**5**
Company law	1	1	**2**
Competition	23	3	**26**
Consumer protection	27	12	**39**
Customs union and Common Customs Tariff	16	2	**18**
Economic and monetary policy	11	6	**17**
Economic and social cohesion	1	1	**2**
Energy	3	1	**4**
Environment	22		**22**
External action by the European Union	3		**3**
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	4	1	**5**
Free movement of capital	6	2	**8**
Free movement of goods	2		**2**
Freedom of establishment	7		**7**
Freedom of movement for persons	18		**18**
Freedom to provide services	13	4	**17**
Industrial policy	1		**1**
Intellectual and industrial property	11	50	**61**
Law governing the institutions	14	13	**27**
Principles of EU law	25	9	**34**
Public health	4	1	**5**
Public procurement	11	2	**13**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	4	2	**6**
Social policy	30	7	**37**
Social security for migrant workers	2	1	**3**
State aid	29	2	**31**
Taxation	55	8	**63**
Transport	22	4	**26**
TFEU	**492**	**154**	**646**
Protection of the general public	1		1
Euratom Treaty	**1**		**1**
Privileges and immunities	2	1	3
Procedure		8	8
Staff Regulations	14	5	19
Others	**16**	**14**	**30**
OVERALL TOTAL	**509**	**168**	**677**

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

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

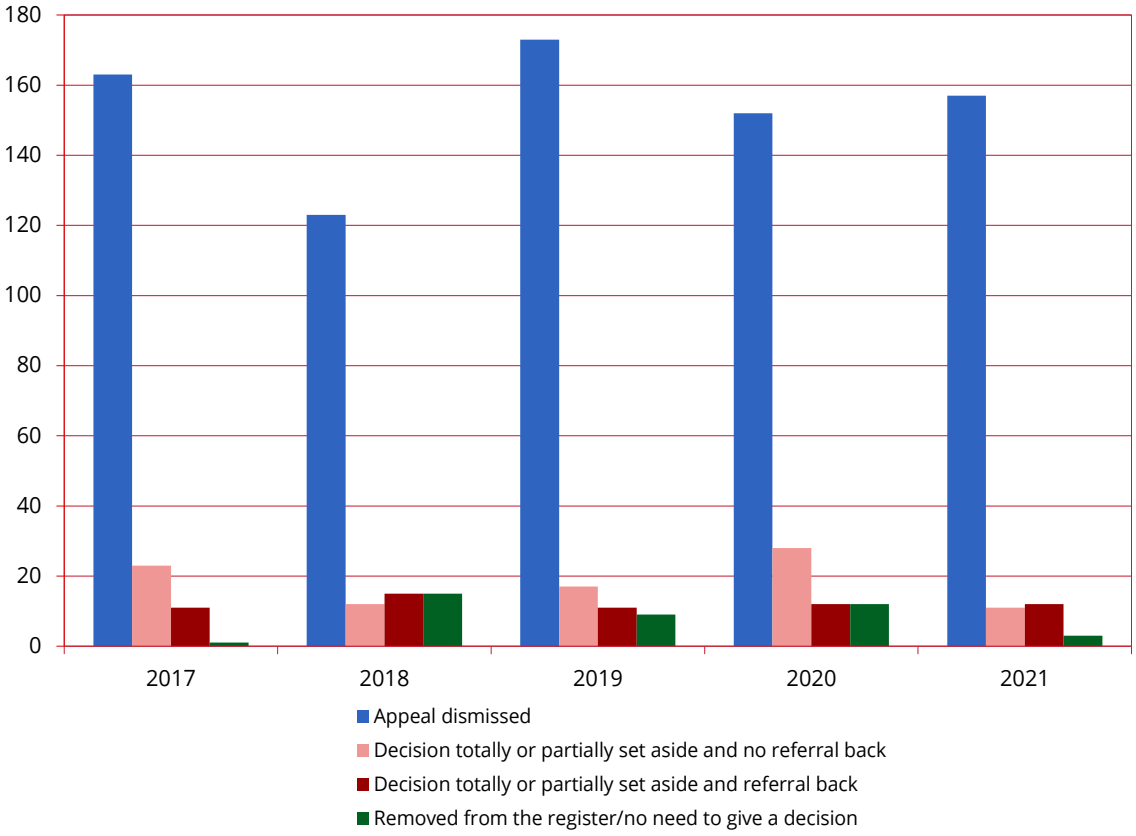
XII. Completed cases – Judgments concerning failure of a Member State to fulfil its obligations: outcome (2017 to 2021) [1]



	2017		2018		2019		2020		2021	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	1		2		1		3			
Bulgaria	1		1				1			
Czech Republic			2			1				
Denmark				1						
Germany	4		2	1	3			1	2	
Estonia										
Ireland	1		1		2		2			
Greece	5		4		2		2		1	
Spain	2		3		1	1	2		3	
France			1		1					
Croatia					1			1		
Italy			2		5	1	3		3	1
Cyprus							1			
Latvia					1					
Lithuania										
Luxembourg	1									
Hungary	1		1		1		4		4	
Malta			1							
Netherlands					1					
Austria			1	1	1		2		1	1
Poland			4		3		1		1	
Portugal	2				1			1	1	
Romania			1				2			
Slovenia	1		1				1		2	
Slovakia			1							
Finland							1			
Sweden									1	
United Kingdom	1		2		1		1		1	
Total	**20**		**30**	**3**	**25**	**3**	**26**	**3**	**20**	**2**

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

XIII. Completed cases – Appeals: outcome (2017 to 2021) [1] [2] (judgments and orders involving a judicial determination)

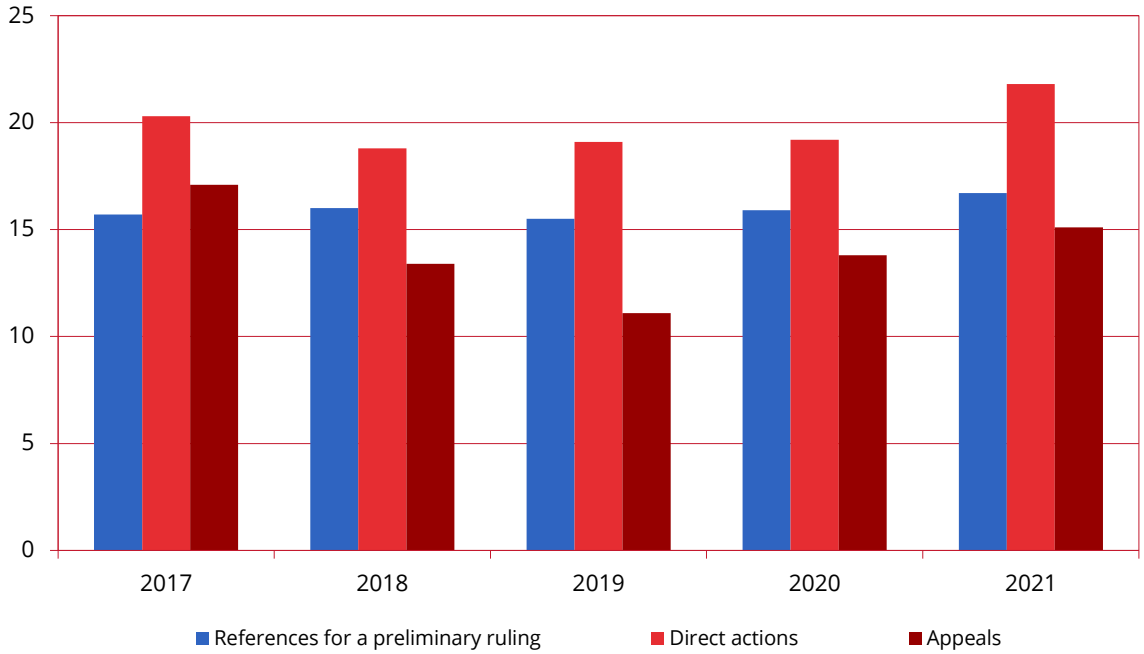


	2017			2018			2019			2020			2021		
	Judgments	**Orders**	**Total**	**Judgments**	**Orders**	**Total**	**Judgments**	**Orders**	**Total**	**Judgments**	**Orders**	**Total**	**Judgments**	**Orders**	**Total**
Appeal dismissed	103	60	**163**	59	64	**123**	63	110	**173**	75	77	**152**	71	86	**157**
Decision totally or partially set aside and no referral back	23		**23**	11	1	**12**	17		**17**	28		**28**	11		**11**
Decision totally or partially set aside and referral back	11		**11**	14	1	**15**	9	2	**11**	12		**12**	12		**12**
Removed from the register/no need to give a decision		1	**1**		15	**15**		9	**9**		12	**12**		3	**3**
Total	**137**	**61**	**198**	**84**	**81**	**165**	**89**	**121**	**210**	**115**	**89**	**204**	**94**	**89**	**183**

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

2| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case). They also include the appeals referred to in Article 58a of the Protocol on the Statute of the Court of Justice of the European Union and declared inadmissible or not allowed to proceed pursuant to Articles 170a or 170b of the Rules of Procedure. For more detailed information on the mechanism referred to in Article 58a of the Statute, see Table XX of the present report.

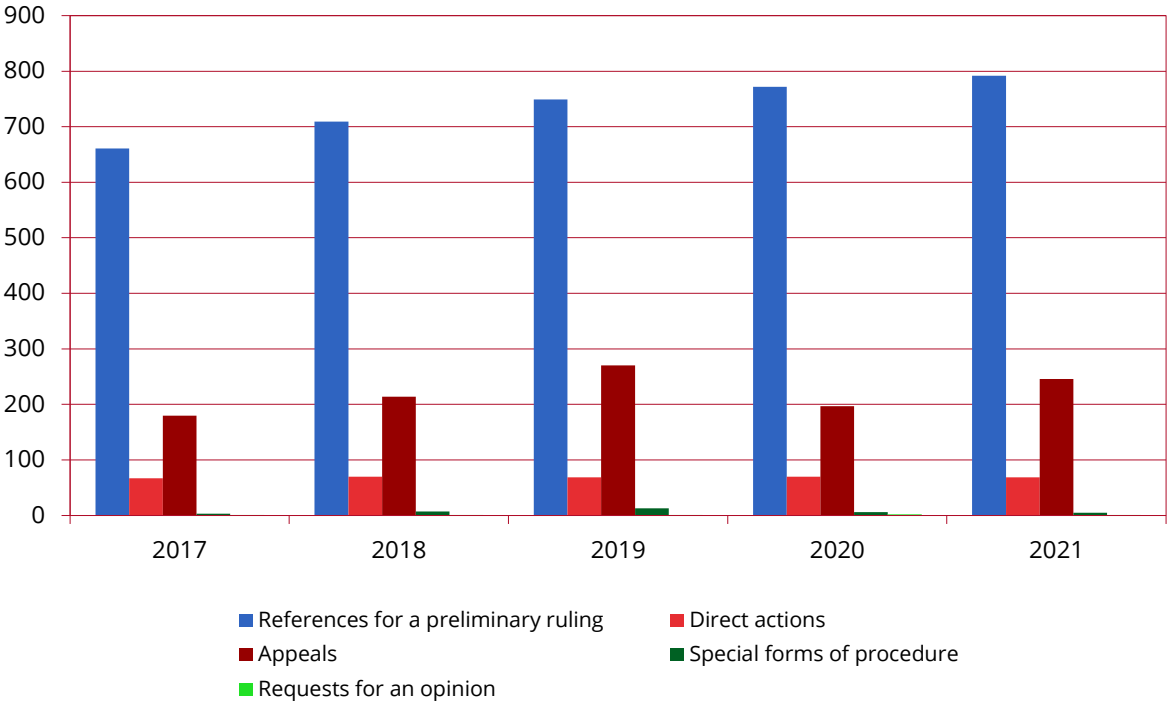
XIV. Completed cases – Duration of proceedings in months (2017 to 2021) [1] (judgments and orders involving a judicial determination)



	2017	2018	2019	2020	2021
References for a preliminary ruling	15.7	16	15.5	15.9	16.7
Urgent preliminary ruling procedure	2.9	3.1	3.7	3.9	3.7
Expedited procedures	8.1	2.2	9.9		10.7
Direct actions	20.3	18.8	19.1	19.2	21.8
Expedited procedures		9	10.3		
Appeals	17.1	13.4	11.1	13.8	15.1
Expedited procedures					8.4

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

XV. Cases pending as at 31 December – Nature of proceedings (2017 to 2021) [1]

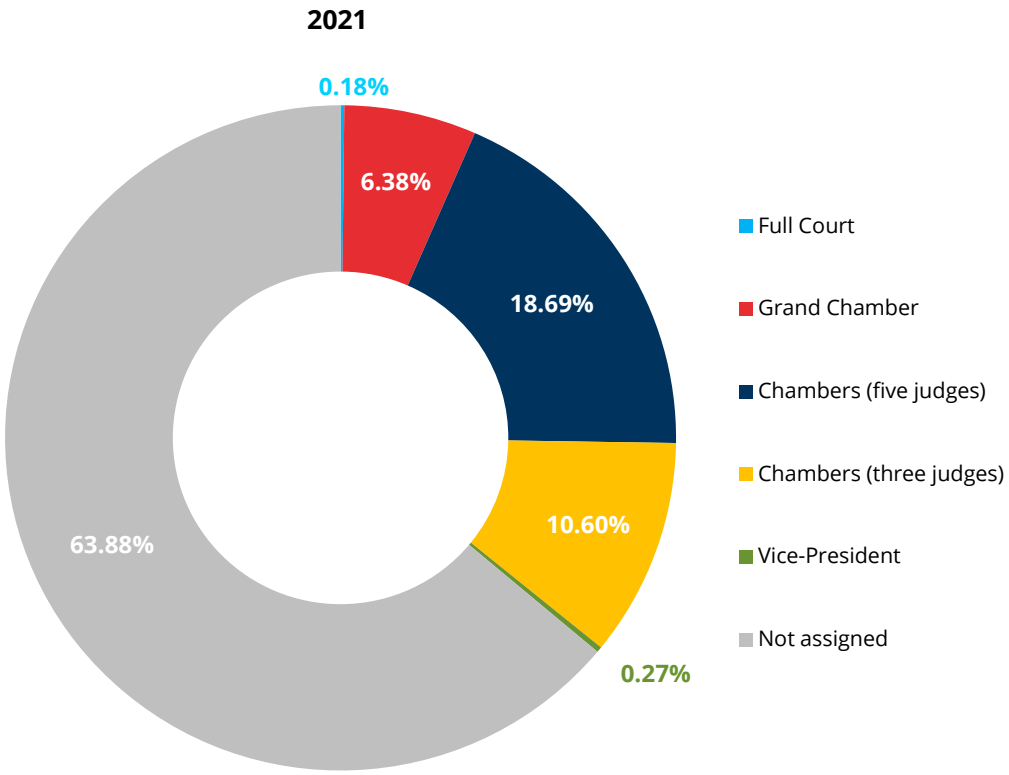


	2017	2018	2019	2020	2021
References for a preliminary ruling	661	709	749	772	792
Direct actions	67	70	69	70	69
Appeals	180	214	270	197	246
Special forms of procedure [2]	3	7	13	6	5
Requests for an opinion	1	1	1	2	1
Total	**912**	**1 001**	**1 102**	**1 047**	**1 113**

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

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

XVI. Cases pending as at 31 December – Bench hearing action (2017 to 2021) [1]



	2017	2018	2019	2020	2021
Full Court		1		1	2
Grand Chamber	76	68	65	74	71
Chambers (five judges)	194	236	192	225	208
Chambers (three judges)	76	77	130	103	118
Vice-President	4	1	4		3
Not assigned	562	618	711	644	711
Total	**912**	**1 001**	**1 102**	**1 047**	**1 113**

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

XVII. Expedited procedures (2017 to 2021)

Requests for an expedited procedure [1]

	2017	2018	2019	2020	2021	Total
References for a preliminary ruling	30	33	50	40	56	**209**
Direct actions	1	3	3		3	**10**
Appeals		1	4	2	1	**8**
Special forms of procedure			1			**1**
Total	**31**	**37**	**58**	**42**	**60**	**228**

Requests for an expedited procedure – outcome [2]

	2017	2018	2019	2020	2021	Total
Granted	4	9	3	3	6	**25**
Not granted	30	17	56	34	56	**193**
Not acted upon [3]	1	3	1	3	2	**10**
Decision pending		8	6	8	4	**26**
Total	**35**	**37**	**66**	**48**	**68**	**254**

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

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

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

XVIII. Urgent preliminary ruling procedure (2017 to 2021)

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

	2017	2018	2019	2020	2021	Total
Judicial cooperation in civil matters	5	5		2	1	**13**
Judicial cooperation in criminal matters	6	8	10	8	8	**40**
Police cooperation			4			**4**
Borders, asylum and immigration	4	5	5	6	8	**28**
Others		1	1	1	14	**17**
Total	**15**	**19**	**20**	**17**	**31**	**102**

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

	2017	2018	2019	2020	2021	Total
Granted	4	12	11	11	9	**47**
Not granted	11	7	7	8	20	**53**
Not acted upon [3]					3	**3**
Decision pending			2		1	**3**
Total	**15**	**19**	**20**	**19**	**33**	**106**

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

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

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

XIX. Proceedings for interim measures (2017 to 2021)

Applications for interim measures [1]

	2017	2018	2019	2020	2021	Total
Agriculture			1		1	**2**
Competition		1	3			**4**
Energy					1	**1**
Environment	1				1	**2**
Industrial policy	1					**1**
Law governing the institutions		2			1	**3**
Principles of EU law		1		1	1	**3**
Public procurement	1					**1**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)			1			**1**
Research and technological development and space					1	**1**
State aid		2	1	1	1	**5**
Transport				1	1	**2**
Total	**3**	**6**	**6**	**3**	**8**	**26**

Applications for interim measures – outcome [2]

	2017	2018	2019	2020	2021	Total
Granted	1	5	1	1	2	**10**
Not granted		3	4	1	4	**12**
Not acted upon [3]				1	2	**3**
Decision pending	2		1	1	1	**5**
Total	**3**	**8**	**6**	**4**	**9**	**30**

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

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

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

XX. Appeals referred to in Article 58a of the Statute (2019 to 2021)

Appeals brought against a decision of the General Court concerning the decision of an independent board of appeal

	2019	2020	2021	Total
European Union Intellectual Property Office	36	40	58	**134**
Community Plant Variety Office	2			**2**
Total	**38**	**40**	**58**	**136**

Decisions as to whether the appeal should be allowed to proceed [1]

	2019	2020	2021	Total
Allowed to proceed			1	**1**
Not allowed to proceed	27	37	47	**111**
Inadmissible	2	3		**5**
Not acted upon		1		**1**
Total	**29**	**41**	**48**	**118**

1| The figures mentioned in this table refer to the number of decisions taken during the year in question, irrespective of the year in which the request that the appeal be allowed to proceed was made.

XXI. General trend in the work of the Court (1952 to 2021) – New cases and judgments or opinions

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

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

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

Year	New cases [1]							Judgments/opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1987	144	251				395	21	208
1988	179	193				372	17	238
1989	139	244				383	19	188
1990	141	221	15	1		378	12	193
1991	186	140	13	1	2	342	9	204
1992	162	251	24	1	2	440	5	210
1993	204	265	17			486	13	203
1994	203	125	12	1	3	344	4	188
1995	251	109	46	2		408	3	172
1996	256	132	25	3		416	4	193
1997	239	169	30	5		443	1	242
1998	264	147	66	4		481	2	254
1999	255	214	68	4		541	4	235
2000	224	197	66	13	2	502	4	273
2001	237	187	72	7		503	6	244
2002	216	204	46	4		470	1	269
2003	210	277	63	5	1	556	7	308
2004	249	219	52	6	1	527	3	375
2005	221	179	66	1		467	2	362
2006	251	201	80	3		535	1	351
2007	265	221	79	8		573	3	379
2008	288	210	77	8	1	584	3	333
2009	302	143	105	2	1	553	1	376
2010	385	136	97	6		624	3	370
2011	423	81	162	13		679	3	370
2012	404	73	136	3	1	617		357
2013	450	72	161	5	2	690	1	434
2014	428	74	111		1	614	3	416
2015	436	48	206	9	3	702	2	399
2016	470	35	168	7		680	3	412
2017	533	46	141	6	1	727	3	466
2018	568	63	193	6		830	6	462
2019	641	41	256	10	1	949	6	491
2020	557	38	125	6	1	727	3	451
2021	567	29	223	9		828	8	450
Total	**12 482**	**9 201**	**3 001**	**159**	**29**	**24 872**	**390**	**13 344**

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

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

XXII. General trend in the work of the Court (1952 to 2021) – New references for a preliminary ruling by Member State per year

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

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

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1993	22			7	57		1	5	7	22		24				1			43			3						12		**204**
1994	19			4	44		2		13	36		46				1			13			1						24		**203**
1995	14			8	51		3	10	10	43		58				2			19	2		5					6	20		**251**
1996	30			4	66			4	6	24		70				2			10	6		6				3	4	21		**256**
1997	19			7	46		1	2	9	10		50				3			24	35		2				6	7	18		**239**
1998	12			7	49		3	5	55	16		39				2			21	16		7				2	6	24		**264**
1999	13			3	49		2	3	4	17		43				4			23	56		7				4	5	22		**255**
2000	15			3	47		2	3	5	12		50							12	31		8				5	4	26	1	**224**
2001	10			5	53		1	4	4	15		40				2			14	57		4				3	4	21		**237**
2002	18			8	59			7	3	8		37				4			12	31		3				7	5	14		**216**
2003	18			3	43		2	4	8	9		45				4			28	15		1				4	4	22		**210**
2004	24			4	50		1	18	8	21		48				1	2		28	12		1				4	5	22		**249**
2005	21		1	4	51		2	11	10	17		18				2	3		36	15	1	2				4	11	12		**221**
2006	17		3	3	77		1	14	17	24		34			1	1	4		20	12	2	3			1	5	2	10		**251**
2007	22	1	2	5	59	2	2	8	14	26		43			1		2		19	20	7	3	1		1	5	6	16		**265**
2008	24		1	6	71	2	1	9	17	12		39	1	3	3	4	6		34	25	4	1				4	7	14		**288**
2009	35	8	5	3	59	2		11	11	28		29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	**302**
2010	37	9	3	10	71		4	6	22	33		49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		**385**
2011	34	22	5	6	83	1	7	9	27	31		44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		**423**
2012	28	15	7	8	68	5	6	1	16	15		65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		**404**
2013	26	10	7	6	97	3	4	5	26	24		62	3	5	10		20		46	19	11	14	17	1	4	4	12	14		**450**
2014	23	13	6	10	87		5	4	41	20	1	52	2	7	6		23		30	18	14	8	28	4	3	8	3	12		**428**
2015	32	5	8	7	79	2	8	2	36	25	5	47		9	8	7	14		40	23	15	8	18	5	5	4	7	16	1	**436**
2016	26	18	5	12	84	1	6	6	47	23	2	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		**470**
2017	21	16	4	8	149	7	12	4	23	25	3	57		5	10	1	22		38	31	19	21	16	3	6	13	8	11		**533**
2018	40	20	12	3	78	2	12	3	67	41	3	68	1	5	6	4	29		35	35	31	15	23	2	6	6	7	14		**568**
2019	38	24	5	1	114	3	10	5	64	32	10	70	1	12	7	6	20	1	28	37	39	14	49	5	10	7	11	18		**641**
2020	36	28	9	6	140	3	5	2	30	21	4	44		17	7	3	18		18	50	41	17	20	2	6	7	6	17		**557**
2021	36	58	8	6	106	2	11	2	35	23	5	46		12	15	5	17		27	37	34	20	38	7	2	10	5			**567**
Total	**991**	**247**	**91**	**208**	**2 887**	**35**	**141**	**194**	**656**	**1 096**	**33**	**1 673**	**9**	**106**	**90**	**110**	**242**	**4**	**1 121**	**680**	**272**	**240**	**269**	**36**	**68**	**145**	**163**	**672**	**3**	**12 482**

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

XXIII. General trend in the work of the Court (1952 to 2021) – New references for a preliminary ruling by Member State and by court or tribunal

			Total
Belgium	Cour constitutionnelle	45	
	Cour de cassation	106	
	Conseil d'État	110	
	Other courts or tribunals	730	**991**
Bulgaria	Върховен касационен съд	8	
	Върховен административен съд	36	
	Other courts or tribunals	203	**247**
Czech Republic	Ústavní soud		
	Nejvyšší soud	13	
	Nejvyšší správní soud	38	
	Other courts or tribunals	40	**91**
Denmark	Højesteret	37	
	Other courts or tribunals	171	**208**
Germany	Bundesverfassungsgericht	2	
	Bundesgerichtshof	274	
	Bundesverwaltungsgericht	159	
	Bundesfinanzhof	351	
	Bundesarbeitsgericht	59	
	Bundessozialgericht	77	
	Other courts or tribunals	1 965	**2 887**
Estonia	Riigikohus	16	
	Other courts or tribunals	19	**35**
Ireland	Supreme Court	44	
	High Court	51	
	Other courts or tribunals	46	**141**
Greece	Άρειος Πάγος	14	
	Συμβούλιο της Επικρατείας	62	
	Other courts or tribunals	118	**194**
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	114	
	Other courts or tribunals	541	**656**
France	Conseil constitutionnel	1	
	Cour de cassation	156	
	Conseil d'État	160	
	Other courts or tribunals	779	**1 096**
Croatia	Ustavni sud		
	Vrhovni sud	2	
	Visoki upravni sud	1	
	Visoki prekršajni sud		
	Other courts or tribunals	30	**33**

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Italy	Corte Costituzionale	7	
	Corte suprema di Cassazione	180	
	Consiglio di Stato	241	
	Other courts or tribunals	1 245	**1 673**
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	5	**9**
Latvia	Augstākā tiesa (Senāts)	21	
	Satversmes tiesa	6	
	Other courts or tribunals	79	**106**
Lithuania	Konstitucinis Teismas	2	
	Aukščiausiasis Teismas	28	
	Vyriausiasis administracinis teismas	39	
	Other courts or tribunals	21	**90**
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	31	
	Cour administrative	33	
	Other courts or tribunals	45	**110**
Hungary	Kúria	38	
	Fővárosi Ítélőtábla	8	
	Szegedi Ítélötábla	5	
	Other courts or tribunals	191	**242**
Malta	Qorti Kostituzzjonali		
	Qorti tal-Appell		
	Other courts or tribunals	4	**4**
Netherlands	Hoge Raad	307	
	Raad van State	140	
	Centrale Raad van Beroep	71	
	College van Beroep voor het Bedrijfsleven	168	
	Tariefcommissie	35	
	Other courts or tribunals	400	**1 121**
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	164	
	Verwaltungsgerichtshof	123	
	Other courts or tribunals	388	**680**
Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	45	
	Naczelny Sąd Administracyjny	60	
	Other courts or tribunals	166	**272**
Portugal	Supremo Tribunal de Justiça	18	
	Supremo Tribunal Administrativo	78	
	Other courts or tribunals	144	**240**
Romania	Înalta Curte de Casație și Justiție	27	
	Curtea de Apel	131	
	Other courts or tribunals	111	**269**

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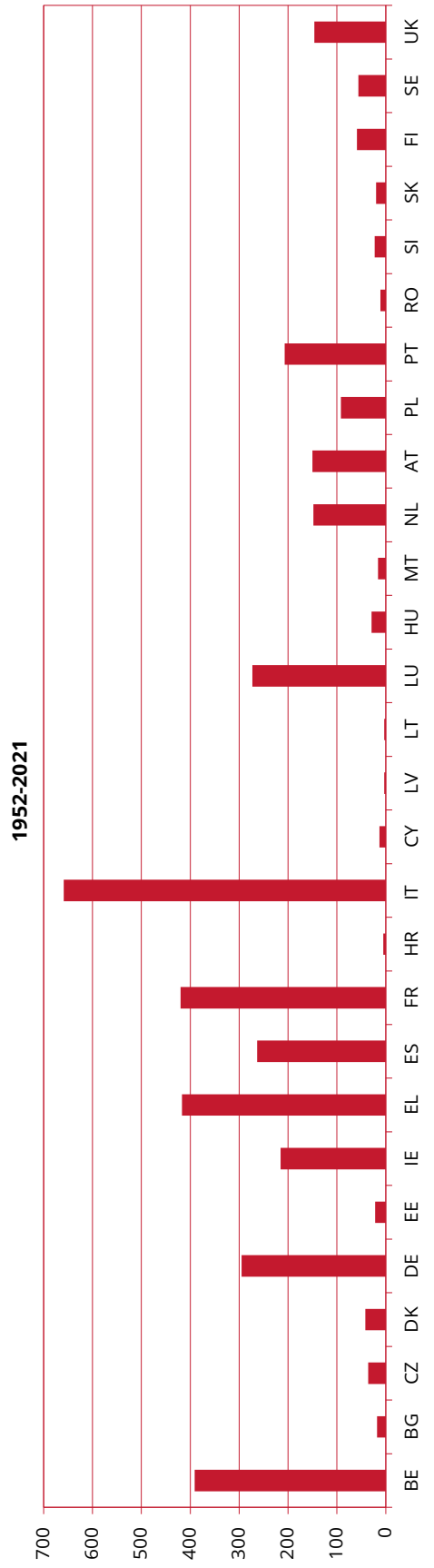
Slovenia	Ustavno sodišče	3	
	Vrhovno sodišče	22	
	Other courts or tribunals	11	**36**
Slovakia	Ústavný súd	1	
	Najvyšší súd	25	
	Other courts or tribunals	42	**68**
Finland	Korkein oikeus	32	
	Korkein hallinto-oikeus	71	
	Työtuomioistuin	5	
	Other courts or tribunals	37	**145**
Sweden	Högsta Domstolen	28	
	Högsta förvaltningsdomstolen	40	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	86	**163**
United Kingdom	House of Lords	40	
	Supreme Court	19	
	Court of Appeal	94	
	Other courts or tribunals	519	**672**
Others	Cour de justice Benelux/Benelux Gerechtshof [1]	2	
	Complaints Board of the European Schools [2]	1	**3**
Total			**12 482**

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

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

XXIV. General trend in the work of the Court (1952 to 2021) – Actions for failure to fulfil obligations brought against the Member States



BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Total
391	18	36	42	295	22	215	417	263	420	5	659	13	3	3	273	29	16	148	150	92	207	11	23	20	59	56	146	**4 032**

XXV. Activity of the Registry of the Court of Justice (2017 to 2021)

Type of intervention	2017	2018	2019	2020	2021
Documents entered in the register of the Registry	99 266	108 247	113 563	107 697	116 340
Pages lodged by e-Curia [1]	–	153 977	217 687	166 614	270 236
Procedural documents lodged by e-Curia (percentage)	73%	75%	80%	79%	85%
Hearings convened and organised	263	295	270	157	107
Sittings for the delivery of Opinions convened and organised	301	305	296	269	283
Judgments, opinions and orders terminating the proceedings served on the parties	654	684	785	726	703
Minutes of hearings drawn up (oral submissions, Opinions and judgments)	1 033	1 062	1 058	877	841
Notices in the OJ concerning new cases	679	695	818	601	676
Notices in the OJ concerning completed cases	637	661	682	759	690

1| Reliable data unavailable for 2017.

E.
Composition of the Court of Justice

(Order of precedence as at 31 December 2021)

First row, from left to right:

M. Szpunar, First Advocate General; C. Lycourgos, President of Chamber; A. Prechal, President of Chamber; L. Bay Larsen, Vice-President of the Court; K. Lenaerts, President of the Court; A. Arabadjiev, President of Chamber; K. Jürimäe, President of Chamber; E. Regan, President of Chamber; S. Rodin, President of Chamber

Second row, from left to right:

T. von Danwitz, Judge; M. Ilešič, Judge; J. Passer, President of Chamber; N. Jääskinen, President of Chamber; I. Jarukaitis, President of Chamber; I. Ziemele, President of Chamber; J. Kokott, Advocate General; J.-C. Bonichot, Judge

Third row, from left to right:

P. Pikamäe, Advocate General; L.S. Rossi, Judge; P.G. Xuereb, Judge; F. Biltgen, Judge; M. Safjan, Judge; M. Campos Sánchez-Bordona, Advocate General; N.J. Piçarra, Judge; G. Pitruzzella, Advocate General

Fourth row, from left to right:

M.L. Arastey Sahún, Judge; A. Rantos, Advocate General; N. Wahl, Judge; A. Kumin, Judge; J. Richard de la Tour, Advocate General; D. Gratsias, Judge; A.M. Collins, Advocate General

Fifth row, from left to right:

L. Medina, Advocate General; O. Spineanu-Matei, Judge; N. Emiliou, Advocate General; M. Gavalec, Judge; Z. Csehi, Judge; T. Ćapeta, Advocate General; A. Calot Escobar, Registrar

I. Changes in the Composition of the Court of Justice in 2021

Formal sitting of 7 October 2021

By decisions of 2 September 2020 and of 19 February, 21 April, 2 June and 7 July 2021, the representatives of the governments of the Member States renewed, for the period from 7 October 2021 to 6 October 2027, the term of office of seven Judges of the Court of Justice, namely Koen Lenaerts, Lars Bay Larsen, Niilo Jääskinen, Eugene Regan, Siniša Rodin, François Biltgen and Küllike Jürimäe.

By decisions of 19 February, 21 April and 7 July 2021, the representatives of the governments of the Member States also renewed for the same period the term of office of three Advocates General of the Court of Justice, namely Juliane Kokott, Athanasios Rantos and Manuel Campos Sánchez-Bordona.

By decisions of 19 February, 21 April, 2 June and 7 July 2021, Miroslav Gavalec, replacing Daniel Šváby; Octavia Spineanu-Matei, replacing Camelia Toader; Dimitrios Gratsias, replacing Michail Vilaras; Zoltán Csehi, replacing Endre Juhász and Maria Lourdes Arastey Sahún, replacing Rosario Silva de Lapuerta, were appointed as Judges at the Court of Justice for the period from 7 October 2021 to 6 October 2027.

By decisions of 21 April, 7 July and 8 September 2021, Anthony Michael Collins, replacing Gerard Hogan, was appointed as Advocate General at the Court of Justice for the period from 7 October 2021 to 6 October 2024, and Nicholas Emiliou, Tamara Ćapeta and Laila Medina, replacing, respectively, Michal Bobek, Evgeni Tanchev and Henrik Saugmandsgaard Øe, were appointed as Advocates General at the Court of Justice for the period from 7 October 2021 to 6 October 2027.

On the occasion of, first, the departure from office of Rosario Silva de Lapuerta, Camelia Toader, Michail Vilaras, Endre Juhász, Daniel Šváby, Henrik Saugmandsgaard Øe, Michal Bobek, Evgeni Tanchev and Gerard Hogan and, secondly, the taking of the oath and entry into office of the new Members of the Court, a formal sitting took place at the Court of Justice on 7 October 2021.

Elections of the President, Vice-President, First Advocate General and the Presidents of Chamber

Following the partial renewal of the Members of the Court of Justice, Koen Lenaerts was re-elected by his peers, on 8 October 2021, as President of the Court of Justice for the period from 8 October 2021 to 6 October 2024. Also on 8 October 2021, Lars Bay Larsen was elected Vice-President of the Court of Justice for the same period. He succeeds Rosario Silva de Lapuerta, whose term of office has ended.

In addition, the Judges of the Court of Justice also elected, for a period of three years, the Presidents of the Chambers of five judges, namely Alexander Arabadjiev, Alexandra Prechal, Küllike Jürimäe, Constantinos Lycourgos and Eugene Regan. Also, on 8 October, the Advocates General re-elected Maciej Szpunar as First Advocate General of the Court of Justice for the period from 8 October 2021 to 6 October 2024.

Lastly, on 11 October 2021, the Judges of the Court of Justice elected from among their number the Presidents of the Chambers of three judges, namely Siniša Rodin, Irmantas Jarukaitis, Niilo Jääskinen, Ineta Ziemele and Jan Passer.

II. Order of Precedence as at 31 December 2021

K. LENAERTS, President

L. BAY LARSEN, Vice-President

A. ARABADJIEV, President of the First Chamber

A. PRECHAL, President of the Second Chamber

K. JÜRIMÄE, President of the Third Chamber

C. LYCOURGOS, President of the Fourth Chamber

E. REGAN, President of the Fifth Chamber

M. SZPUNAR, First Advocate General

S. RODIN, President of the Ninth Chamber

I. JARUKAITIS, President of the Tenth Chamber

N. JÄÄSKINEN, President of the Eighth Chamber

I. ZIEMELE, President of the Sixth Chamber

J. PASSER, President of the Seventh Chamber

J. KOKOTT, Advocate General

M. ILEŠIČ, Judge

J.-C. BONICHOT, Judge

T. von DANWITZ, Judge

M. SAFJAN, Judge

F. BILTGEN, Judge

M. CAMPOS SÁNCHEZ-BORDONA, Advocate General

P.G. XUEREB, Judge

N. PIÇARRA, Judge

L.S. ROSSI, Judge

G. PITRUZZELLA, Advocate General

P. PIKAMÄE, Advocate General

A. KUMIN, Judge

N. WAHL, Judge

J. RICHARD DE LA TOUR, Advocate General

A. RANTOS, Advocate General

D. GRATSIAS, Judge

M. L. ARASTEY SAHÚN, Judge

A.M. COLLINS, Advocate General

M. GAVALEC, Judge

N. EMILIOU, Advocate General

Z. CSEHI, Judge

O. SPINEANU-MATEI, Judge

T. ĆAPETA, Advocate General

L. MEDINA, Advocate General

A. CALOT ESCOBAR, Registrar

2

Chapter 2
The General Court

A.
Activity of the General Court in 2021

Marc van der Woude, President of the General Court of the European Union

Once again, 2021 was a year marked by the pandemic. However, armed with the experience gained in 2020 – during which efficient arrangements for videoconferencing and remote working were rolled out – the Court was able to operate in close-to-normal conditions and achieve excellent results. Hearings, which could not be held for several weeks in 2020, were able to take place without major problems in 2021, in strict compliance with public-health protocols. Special mention should be made of the hearing in ***Google and Alphabet* v *Commission*** (Case T604/18) which lasted a whole week. Although the Court sometimes had no other choice but to postpone hearings because of restrictions on the movement of persons, the parties' representatives and the institution's staff rose to the occasion in order to ensure continuity in the handling of cases.

Those efforts have borne fruit. The Court was able to dispose of 951 cases, thus reducing the number of cases pending before it by 69. At the same time, the number of case referrals to chambers sitting in extended composition bears out the trend set in 2018, with more sittings in five-judge formations, allowing litigants to be heard by a higher number of judges. Although the average length of proceedings was slightly longer in 2021, that cyclical increase was mainly due to the postponement of hearings in 2020. In any event, the results achieved in 2021 confirm, once again, that the reform of the Court provided for in Regulation 2015/2422 [1] has made it possible to shorten proceedings considerably.

Those results are all the more satisfying because they were obtained against a backdrop of major instability in the composition of the Court. First of all, in August 2021 the Court received the sad news of the death of Judge Berke. We lost a great judge, hugely respected by his peers. Next, on 7 October 2021 four judges left the General Court to join the Court of Justice, coinciding with the date on which Judges Spineanu-Matei, Gratsias, Collins and Csehi were sworn in. At the same time, the Court was pleased to welcome several new members. Judges D. Petrlík, M. Brkan, P. Zilgalvis, K.A. Kecsmár and I. Gâlea were sworn in on 1 March, 6 July, 27 September and 27 October 2021. The succession of departures and arrivals throughout 2021 called for chambers to be rearranged and judges' portfolios reorganised on numerous occasions.

In addition to its sustained pace of judicial activity and despite the public-health situation, the Court also examined a number of cross-cutting matters. This is first and foremost a continuation of the cycle of review launched in 2020 in a context marked by the adoption of the Court of Justice's report on the functioning of the Court, provided for in Article 3 of Regulation 2015/2422. The state of play of that review is described below. In addition, the General Court adopted a series of proposals designed to amend several provisions of its Rules of Procedure. Those proposals seek to promote proactive case management, to support the specialisation of chambers, to comply with certain regulatory requirements, particularly in the field of the

1| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

protection of personal data, and to take account of the lessons learned from the public-health crisis, especially as regards the use of videoconferencing at hearings. These propositions were forwarded to the Court of Justice, in accordance with Article 254 TFEU, on 15 November 2021. Lastly, the General Court simplified the staff rules applying to officials and other staff assigned to it, by codifying the relevant texts. Still on the issue of staffing, the General Court established a cell of three legal secretaries who are available to assist judges' cabinets where their staff are absent for long periods or where they have to deal with exceptionally large cases.

As is apparent from the foreword of the Vice-President concerning the Court's case-law, in 2021 the Court delivered a number of undeniably important decisions for society, particularly as regards State aid granted to airlines to deal with the public-health crisis, the competition rules applied to major digital operators and intellectual property. The Court took the view in some of those cases that the need for a decision to be issued quickly justified the use of the expedited procedure (Articles 151 and 152 of the Rules of Procedure). By delivering high-quality justice within a tight time frame, the Court demonstrated throughout 2021 that it was capable of meeting the expectations expressed by the legislature when it adopted Regulation 2015/2422.

However, we must not rest on our laurels. Ensuring high-quality justice, delivered in a timely manner and tailored to the circumstances of the case, requires an unremitting effort on the part of any court. That also applies to the Court. Accordingly, special attention must continue be paid, particularly to large groups of cases, characterised by long periods of suspension, and to cases of major factual and technical complexity. The year ahead should therefore be a continuation of the efforts made in 2021 in that regard.

Action taken on the report provided for in Article 3(1) of Regulation 2015/2422

On 16 December 2015, the European Union legislature adopted a reform of the EU judicial architecture which consisted in doubling, in three successive stages, the number of judges of the General Court. In the context of the implementation of that reform, the Court of Justice was requested, pursuant to Article 3 of Regulation 2015/2422, [1] to present two reports to the European Parliament, the Council of the European Union and the European Commission. The first report, submitted on 14 December 2017, concerned, in particular, possible changes in the allocation of jurisdiction between the two Courts that compose the Court of Justice of the European Union. The second report, submitted on 21 December 2020, concerns the functioning of the General Court following the implementation of the reform ('the report of the Court of Justice'). The present section of the 2021 Annual Report of the institution presents an update on the action taken on the recommendations set out in the report submitted on 21 December 2020.

The third and final stage of the reform was completed in September 2019. Since then, the duration of proceedings, the reduction of which, as explained in recital 5 of Regulation 2015/2422, was one of the main objectives pursued, fell from 20.6 months in 2015 to 15.4 months at 31 December 2020. The slight increase to 17.3 months in 2021 is largely attributable to the health crisis, in particular to the difficulty in organising hearings encountered over several months in 2020. In addition, the greater speed in dealing with cases was accompanied by an increase in the number of cases assigned to Chambers of extended composition, and therefore by a thorough judicial review. Whereas only 11 cases had been heard by a 5 Judge Chamber in 2015, the corresponding number was 111 in 2020 and 87 in 2021. These positive trends were also welcomed in the report of the Court of Justice.

The General Court, which was involved in the preparatory works, supported the conclusions of the report of the Court of Justice in its observations annexed to that report. As the diagnosis and the prospects of change outlined were largely shared, the recommendations set out in the report overlap to a large extent with the measures for improvement identified and the projects previously initiated by the General Court itself.

As early as autumn 2020, the General Court embarked on an ambitious programme of discussions aimed at improving its organisation and its working methods. In that context, in-depth discussions took place at the end of 2020 and throughout 2021 on a large number of interrelated topics: the question of suspended cases, proactive case-management, case allocation and the dynamic balancing of the judges' workload, the functioning of the specialised Chambers and the choice of composition of the Chambers. Several sets of measures were adopted following those exchanges and others are still being studied. It should be noted that the General Court was able to deal with all of those issues in spite of the health context.

The prospects of change towards a 'prompt, active and smooth case management process' presented in the report of the Court of Justice are fully consistent with the General Court's desire to engage in proactive case management at an early stage in the written part of the procedure, within the limits laid down in the Rules of Procedure.

1| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 23 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

In that context, it became apparent that the Chambers were agreed on the need to identify as quickly as possible the cases that should be the subject of a proposal for referral to an extended composition, within the meaning of Article 28 of the Rules of Procedure. Likewise, the judges agreed that they would actively implement the possibilities offered by Article 83 of the Rules of Procedure, concerning examination of the need for a second exchange of pleadings and the possibility that this second exchange of pleadings should focus on certain specific points, in particular in disputes where the case-law is generally well established.

These measures, in conjunction with others, reflect the General Court's firm intention to bring about a paradigm shift, aimed not only at accelerating the handling of cases, but also at a more targeted judicial investigation and thus higher-quality decisions, with more support for litigants throughout the procedure.

As regards suspended proceedings, a number of actions have been taken with the aim of optimising the management of large groups of cases, directed in particular at a greater number of 'pilot' cases being dealt with in parallel and being dealt with as a matter of priority. Henceforth, the Chambers will also systematically explore the possibilities of dealing with cases belonging to a group of cases in parallel, where necessary by several Judge-Rapporteurs within the same Chamber. Judges responsible for groups of cases will, where appropriate, be able to benefit from a lighter workload so that they can devote themselves fully to dealing with the group of cases with the requisite diligence. The proactive approach to cases must be taken, in principle, in all cases which the General Court is required to deal with, foremost among which are the pilot cases identified in a group of cases. Reducing the stock of suspended proceedings is an essential objective for the General Court, and for the institution as a whole, since the length of the period during which a large number of cases are suspended depends on the outcome of the proceedings on appeal before the Court of Justice in the pilot cases.

Another important aspect of the action taken by the General Court concerned the optimisation of the process of assigning cases while observing the criteria set out in the decision of the General Court published in the *Official Journal of the European Union* and the best division of the workload between the judges, which is a key factor of productivity. In that regard, the allocation process has been improved in order to allow a very prompt allocation of cases coming within the two specific areas of law – the civil service and intellectual property – which are dealt with in accordance with a specialisation introduced within the General Court. At the same time, the internal tools used to evaluate the workload have been broadly remodelled and combined more systematically with the exercise of allocation (and re-allocation) of cases. Still with a view to an even spread of the workload between the judges, the possibility of adopting targeted measures to provide support for the judges responsible for particularly complex cases or large groups of cases has been introduced.

As regards the functioning of the specialised Chambers dealing with civil service and intellectual property matters, a preliminary assessment was carried out during the first quarter of 2021, in order to evaluate ways of improving proactive case management in those specific areas of law, reducing the length of proceedings (especially in civil service matters) and ensuring the consistency of decisions, which is a major challenge given the number of cases brought each year. Among the measures adopted, it should be noted that the period prescribed for the lodging of the preliminary report in civil service matters has been reduced.

Last, it should be mentioned that the General Court has completed an internal exercise for evaluating the length and the readability of its decisions, following which the Plenum adopted a series of recommendations for the Chambers.

It follows from the foregoing that the reform has already been partly successful, notwithstanding the health crisis. Numerous measures have already been adopted, with the unfailing support of the Registry of the General Court and the common services of the institution, in order to take action on the report of the Court

of Justice. The General Court has dealt with all of those issues with ambition and enthusiasm, in spite of a difficult context. However, it will be only in the medium term that the full effect of those decisions will be able to make itself felt.

Before that exercise is completed, certain avenues remain to be explored in 2022, foremost among which are the creation of an intermediate Chamber between the five-Judge Chamber and the Grand Chamber, the automatic transfer of certain disputes to Chambers composed of five judges and, finally, the possibility of extending the specialisation of Chambers to other types of disputes.

B.
Case-law of the General Court in 2021

Innovations in the case-law

By Vice-President **Savvas Papasavvas**

Like the preceding year, 2021 will occupy a special place in the memory of the General Court of the European Union. Thus, while 2020 demonstrated the Court's ability to marshal its resources and adapt both its working methods and it organisation to the constraints imposed by the Covid-19 epidemic, 2021 witnessed the health crisis inviting itself into the case-law and making an impression on it. The Court – like, moreover, numerous national courts during that period – dealt efficiently and pragmatically with the new questions raised by that singular branch of litigation in what was an unprecedented context.

It was first and foremost in relation to State aid that the Court was required to confront the consequences of the Covid-19 pandemic, when it was called upon to examine the legality of a number of aid schemes adopted, in that context, in the light of Article 107(3)(b) TFEU. Delivered in a chamber of extended composition, following an expedited procedure, the first two cases gave the Court the opportunity to clarify the relationship between the rules on State aid and the principle of non-discrimination on the ground of nationality, laid down in the first paragraph of Article 18 TFEU, and the principle of freedom to provide services. Thus, in the judgment of 17 February 2021, ***Ryanair* v *Commission*** (T-238/20, EU :T :2021 :91), the Court held that the system of loan guarantees put in place by Sweden to support airlines holding a Swedish operating licence in the context of the Covid-19 pandemic and designed to remedy the serious disruption of the economy of that Member State was compatible with EU law. Likewise, in the judgment of 17 February 2021, ***Ryanair* v *Commission*** (T-259/20, EU :T :2021 :92), it considered that the deferral of the payment of civil aviation tax and solidarity tax on airline tickets, due on a monthly basis, during the period from March to December put in place by France to support airlines holding a French licence, in the context of the Covid-19 pandemic, was also compatible with EU law.

Most fortunately, 2021 was not defined solely by that health crisis and the Court continued to develop its case-law with a number of unprecedented and innovative decisions.

In addition to questions linked with the Covid-19 pandemic, litigation relating to State aid was thus enriched by the particularly technical question of the tax rulings granted by Luxembourg to companies in the Engie group. Dealing with a number of actions, the Court, in particular, in its judgment of 12 May 2021, ***Luxembourg and Others* v *Commission*** (T-516/18 and T-525/18, EU :T :2021 :251), approved the European Commission's approach which, in the case of a complex financial and corporate arrangement, entailed considering the

economic and fiscal reality rather than taking a formalist approach that each transaction under the arrangement be taken in isolation. In addition, it found that the Commission had been right to determine that a selective advantage had been granted on account of the non-application of national provisions on abuse of law.

In connection with abuse of a dominant position, the Court was required to resolve a case that was noteworthy for both the renown of the parties involved and the extremely high economic stakes at issue. In its judgment of 10 November 2021, ***Google and Alphabet* v *Commission (Google Shopping)*** (T-612/17, EU :T :2021 :763), it essentially dismissed Google's action against the Commission decision finding that the undertaking had abused its dominant position on the market for online general search services by favouring its own comparison shopping service, a specialised search service, over competing product search services and deviating from competition on the merits. Consequently, the Court upheld the fine of EUR 2.42 billion imposed on Google.

In a different area, the withdrawal of the United Kingdom from the European Union led the Court to hold, for the first time, in the order of 8 June 2021, ***Silver and Others* v *Council*** (T-252/20, EU :T :2021 :347), and the order of 8 June 2021, ***Shindler and Others* v *Council*** (T-198/20, EU:T:2021:348), that a decision approving the conclusion of an international agreement – in this instance the decision approving the conclusion of the agreement setting out the arrangements for the withdrawal of the United Kingdom from the European Union – did not constitute a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. The Court therefore dismissed both actions as inadmissible, because the applicants did not have standing to bring proceedings against such a decision.

As regards access to documents, the Court, in its judgment of 14 July 2021, ***Public.Resource.Org and Right to Know* v *Commission*** (T-185/19, EU :T :2021 :445), considered that it was for the authority which had received a request for access to documents from a third party, where there was a claim for copyright protection for those documents, inter alia, to identify objective and consistent evidence such as to confirm the existence of the copyright claimed by the third party concerned. According to the Court, such a review corresponds to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright.

In relation to the civil service, the Court, adjudicating in its judgment of 28 April 2021, ***Correia* v *EESC*** (T-843/19, EU:T:2021:221) on the problem of the regrading of members of the temporary staff, held, for the first time, that the absence of clear, objective and transparent criteria or evaluation material was liable to undermine the principles of equal treatment and legal certainty and, consequently, the rights of members of the temporary staff assigned to the institutions, bodies, offices and agencies of the European Union who were eligible for regrading. The Court also clarified, in its judgment of 31 March 2021, ***Barata* v *Parliament*** (T-723/18, EU :T :2021 :113), the EU case-law concerning the starting point of the period prescribed for instituting proceedings in disputes governed by the Staff Regulations of the European Union where an individual decision is sent by registered letter with acknowledgement of receipt, but is not collected by the addressee. It held that, where the relevant legislation currently in force is silent, legal certainty and the need to avoid any discrimination or arbitrary treatment in the interest of the proper administration of justice preclude the application, in the present case, of the presumption of notification.

Last, with regard to restrictive measures, the Court was required to deal with the action against the acts adopted by the Council of the European Union on 5 March 2014. The purpose of those acts was, inter alia, to freeze the funds of persons identified as responsible for the misappropriation of public funds. By its judgment of 21 December 2021, ***Klymenko* v *Council*** (T-195/21, EU :T :2021 :925), the Court pointed out that it was for the Council, when it based restrictive measures on decisions of a third state, to satisfy itself that, when those decisions by the authorities of the third state in question were adopted, the rights recognised by the Charter of Fundamental Rights of the European Union and, more particularly, the rights of the defence and the right to effective judicial protection of the person concerned by those measures, were observed.

This non-exhaustive overview of the most significant decisions delivered by the Court in 2021 is further proof of its ability to adapt to the constraints imposed on its functioning and its organisation while developing and enriching its case-law.

I. Judicial proceedings

1. Concept of a measure against which an action may be brought

Judgment of 10 March 2021, *ViaSat* v *Commission* (T-245/17, EU :T :2021:128) [1]

By a call for applications, [2] the European Commission launched a procedure for selecting operators of pan-European systems providing mobile satellite services (MSS) [3] in the 2GHz frequency band, the conditions for the use and availability of which were harmonised by a Commission decision. [4] On completion of that procedure, the Commission selected two applicants, namely Inmarsat Ventures Ltd ('Inmarsat') and Solaris Mobile Ltd (now EchoStar Mobile Ltd).

Inmarsat applied for the necessary authorisations from the national regulatory authorities (NRAs) to operate the European Aviation Network system ('the EAN') using the frequency granted to it in the Selection Decision.

On 2 August 2016, the applicant, ViaSat, Inc., sent a letter to the Commission requesting that it take action to prevent the NRAs from granting the authorisations at issue to Inmarsat without a new call for applications under a joint selection procedure. The applicant, which did not participate in the selection procedure, wished to provide, inter alia, satellite connectivity services, through a joint venture set up in 2016 with Eutelsat SA, throughout the European Union and on the main air routes between North America and Europe.

On 31 October 2016, the Commission responded by email to the applicant's letter, stating that no decision had been taken on an application for authorisation of the use of the 2 GHz frequency band for MSS by one of the selected operators, since that question was, in any case, a matter to be dealt with by the competent national authorities.

Not satisfied with the Commission's reply, the applicant sent the Commission a letter on 22 December 2016 requesting that it define its position in response to the invitation referred to in its letter of 2 August 2016, in order to fulfil its obligation to act. [5]

1| See also, on the concept of 'a measure against which an action may be brought', judgment of 10 November 2021, ***Romania* v *Commission*** (T-495/19, under appeal, EU:T:2021:781), presented under the heading 'II. 3. European citizen initiative', and judgment of 28 April 2021, ***Correia* v *EESC*** (T-843/19, EU:T:2021:221), presented under the heading 'XIII. 3. Reclassification of temporary agents'.

2| OJ 2008 C 201, p. 4.

3| Title II of Decision N^{O} 626/2008/EC of the European Parliament and of the Council of 30 June 2008 on the selection and authorisation of systems providing mobile satellite services (MSS) (OJ 2008 L 172, p. 15; 'the MSS Decision').

4| 2007/98/EC: Commission Decision of 14 February 2007 on the harmonised use of radio spectrum in the 2 GHz frequency bands for the implementation of systems providing mobile satellite services (OJ 2007 L 43, p. 32; 'the Harmonisation Decision').

5| On the basis of Article 17 TFEU, the third subparagraph of Article 9(2) and recital 22 of the MSS Decision; of recitals 24 and 35 and of Article 5(2) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21); of Article 19 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33).

The Commission replied to that letter by letters of 14 and 21 February 2017.

Still dissatisfied with the Commission's replies, the applicant asked the General Court to declare that the Commission had failed to act [6] and, in the alternative, to annul all or part of the Commission's decision contained in those letters.

Ruling in extended composition, the Court dismisses the applicant's action in its entirety.

Findings of the General Court

As regards the admissibility of the application for a declaration of failure to act, the Court points out that it is clear from the Commission's letters that the latter took the view that, as it did not have the power to do so, it could not take any action following the applicant's request for action to be taken to prevent NRAs from granting authorisations to Inmarsat for the use of the 2 GHz frequency band for the operation of the EAN in order to preserve the internal market resulting from the harmonisation of the use of that frequency band for MSS. This is a refusal to act which constitutes the adoption of a position which put an end to the alleged failure to act before the action was brought. Consequently, the Court dismisses the application for a declaration of failure to act as inadmissible.

As regards the admissibility of the application for annulment of the decision contained in the letters in question, the Court recalls that, in order to assess whether the application for annulment concerned is admissible, it is necessary to examine whether the act which the Commission was asked to adopt would constitute in itself an act the legality of which would be actionable in the Court. That question is related to the question whether the Commission has any powers to adopt such a measure.

- Whether the Commission has express powers

First, the Court notes that the regulatory framework for radio spectrum management [7] and MSS provides for a clear allocation of powers between the Commission and the Member States. In that regard, while the Commission has powers to determine the availability and purpose of use of certain frequency bands, and to select MSS operators in the 2 GHz frequency band whose purpose of use for MSS has been harmonised, the NRAs have no discretion when granting authorisations, so that they cannot refuse authorisation if an application is lodged by an operator selected by the Commission. The Court also observes that the power to monitor compliance with the common conditions, to which authorisations are subject, [8] and with the commitments entered into by the operator in question in the context of the selection procedure, [9] as well as the power to impose penalties for any infringements were conferred on the Member States, the Commission having only coordinating powers in that regard. [10]

6| On the basis of Article 265 TFEU.

7| Decision N^{O} 676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the [European Union] (Radio Spectrum Decision) (OJ 2002 L 108, p. 1).

8| Article 7(2) and Article 8(3) of the MSS Decision.

9| Article 2(2)(a), Article 7(1) and (2)(a) and (c) and Article 8(3)(a) of the MSS Decision.

10| First and second subparagraphs of Article 9(2) and Article 10 of the MSS Decision.

As regards the Commission's powers in the context of the review and enforcement procedure, the Court points out that, whenever necessary, the Commission should be able to raise enforcement issues relating to the fulfilment by operators of the common conditions for authorisation by issuing a recommendation or an opinion to the competent national authorities. [11]

Consequently, the MSS Decision does not confer on the Commission express powers to assess the compatibility of the EAN with the Selection Decision or with the regulatory framework applicable to MSS, and to adopt thereafter an actionable measure preventing the NRAs from granting authorisations to Inmarsat or compelling them to withdraw the authorisations granted.

Secondly, as regards the Commission's powers under the Framework Directive, the Court notes that the nature of the decisions which the Commission has the power to adopt, [12] which are binding in nature, is limited. Such decisions concern only the definition of a harmonised or coordinated approach for dealing with the issues set out in the relevant provision. [13] Those matters do not include that of a harmonised approach to the authorisations to be granted to an operator selected under the common procedure once the use of the frequency has been harmonised.

Thirdly, as regards the powers of the Commission to change the purpose of use of the 2 GHz frequency band, the Court observes that the Commission could, on that basis of the Harmonisation Decision, adopt a new decision providing for harmonisation of the conditions of use and availability of the 2 GHz frequency band for purposes other than the operation of systems providing MSS, thereby repealing the Harmonisation Decision now in force. Furthermore, the Harmonisation Decision [14] confers on the Commission powers to revise it. Although such an act of the Commission could produce the effects sought by the applicant, the latter is not, however, entitled to seek the annulment of such an act because it does not have standing to bring proceedings.

Finally, as regards the Commission's powers under the Authorisation Directive, the Court points out that the powers of the NRAs in relation to authorisations are principally those provided for by the MSS Decision, and not those provided for in the Authorisation Directive. Consequently, any Commission powers in respect of the NRAs' application of the system of authorisations thus provided for fall within the scope of that decision and consist in the coordination of the procedures for monitoring and enforcement of the common conditions to which the authorisations are subject. [15]

- Whether the Commission has implicit powers

  In that connection, the Court observes that the existence of an implicit power, which constitutes a derogation from the principle of conferral of powers, [16] must be appraised strictly. Thus, it is only exceptionally that such implicit powers are recognised by the case-law and, in order to be so recognised, they must be necessary in order to ensure the practical effect of the provisions of the Treaty or of the basic regulation at issue. The Court points out that the Commission cannot regard itself as having been granted implicit powers in respect of authorisations without calling into question those expressly conferred

11| Recital 22 and the third subparagraph of Article 9(2) of the MSS Decision.

12| Article 19(1) of the Framework Directive.

13| Article 19(3) of the Framework Directive.

14| Recital 12 and Article 4 of the Harmonisation Decision.

15| Article 9 of the MSS Decision.

16| Article 5(1) TEU.

by the legislature on the Member States, nor as having been granted implicit powers going beyond the coordinating powers expressly conferred on it in respect of the enforcement measures. Consequently, the Court dismisses the present action in its entirety.

Order of 30 November 2021, *Airoldi Metalli* v *Commission* (T-744/20, EU:T:2021:853)

Following a complaint lodged by an association representing European producers of aluminium extrusions, the European Commission, on completion of its anti-dumping investigation, adopted an implementing regulation imposing a provisional anti-dumping duty on imports of aluminium extrusions originating in the People's Republic of China. [17]

By application lodged on 21 December 2020, Airoldi Metalli SpA ('the applicant'), an importer of aluminium extrusions, brought an action for annulment of the contested regulation.

After the applicant had brought that action, the Commission adopted an implementing regulation imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China. [18]

Before the Court, the Commission raised a plea alleging that of the action for annulment of the contested regulation was inadmissible, on the ground, in particular, that such a provisional regulation is not a reviewable act and that the applicant no longer has an interest in challenging it.

In upholding that plea of inadmissibility, the Court finds, for the first time, that a regulation imposing a provisional anti-dumping duty is not a reviewable act for the purposes of Article 263 TFEU.

Findings of the General Court

As to whether a regulation imposing a provisional anti-dumping duty may be classified as a reviewable act within the meaning of Article 263 TFEU, the Court observes, first of all, that only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his or her legal position, and which definitively lay down the position of the institution, may be the subject of an action for annulment. Conversely, intermediate measures, the purpose of which is to pave the way for the final decision, are not reviewable acts. The position would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the specific legal characteristics of reviewable acts but were themselves the culmination of a special procedure distinct from that intended to permit the institution to take a decision on the substance of the case and thus produced independent, immediate and irreversible legal effects justifying that those acts may be the subject of an action for annulment.

17| Commission Implementing Regulation (EU) 2020/1428 of 12 October 2020 imposing a provisional anti-dumping duty on imports of aluminium extrusions originating in the People's Republic of China (OJ 2020 L 336, p. 8; 'the contested regulation').

18| Commission Implementing Regulation (EU) 2021/546 of 29 March 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China (OJ 2021 L 109, p. 1; 'the definitive regulation').

A regulation imposing provisional anti-dumping duties constitutes an intermediate stage between the initiation of the anti-dumping proceeding and the termination of that proceeding, which results either in the imposition of definitive duties or in the non-fixing of duties. Such a regulation aims, in particular, to ensure appropriate protection of the European Union once a preliminary examination shows that dumping exists and to prevent injury being caused during the proceeding by provisionally imposing anti-dumping duties which can then be collected retroactively at the time of the termination of the proceeding.

It follows that the contested regulation, in so far as it imposes provisional anti-dumping duties, cannot be regarded as being the culmination of a procedure distinct from that terminated by the definitive regulation. The contested regulation must therefore be classified as an act preparatory to the definitive regulation, which is itself open to challenge.

Next, the Court observes that the contested regulation also does not immediately and irreversibly affect the applicant's legal situation.

In that regard, the Court emphasises that the contested regulation, which provides for a possibility for interested parties, including importers, to submit comments or to be heard, does not entail any obligation to cooperate in the investigation. Likewise, the contested regulation does not require either importers or the other economic operators concerned to alter or reconsider their commercial practices. Furthermore, although the contested regulation imposes anti-dumping duties, those duties are, by definition, provisional and are not, at that stage, required to be paid by importers.

Nor does the fact that the contested regulation provides that the import of aluminium extrusions originating in the People's Republic of China is to be subject to the provision of a security deposit equivalent to the amount of the provisional duty permit the assertion that it is open to challenge. Since that obligation is intended to ensure that the anti-dumping duties are paid in the event that their collection is ultimately decided, it is dependent on that payment obligation, which will be decided and imposed only subsequently by the definitive regulation. It follows that the obligation to provide a guarantee to cover the provisional duties did not have independent and irreversible legal effects at the time when the action for annulment was brought, which is also the date on which the admissibility of the action must be assessed.

Last, the Court observes that to hold that a provisional regulation constitutes a reviewable act would undermine the sound administration of justice and the institutional balance, since such an approach would lead to confusion between the administrative and judicial stages of the imposition of anti-dumping duties. Nor would any annulment of the provisional regulation necessarily imply an obligation for the Commission to draw the consequences of the annulment judgment for its definitive regulation under Article 266 TFEU. Furthermore, the inadmissibility of the action for annulment of the contested regulation would not deprive the applicant of the judicial protection to which it is entitled, since it remains open to the applicant, where appropriate, to bring an action for damages under Article 268 TFEU.

In the interest of completeness, the Court adds that, even if the contested regulation were held to be a reviewable act, the applicant in any event lost its interest in seeking its annulment following the adoption of the definitive regulation. In that regard, the Court states that, although such an interest might exist in relation to the amounts guaranteed in application of the contested regulation and released because the rate of the definitive duty proved to be lower than the rate of the provisional duty, the fact remains that the evidence adduced by the applicant does not permit actual harm relating to those amounts to be established.

2. Time limit for bringing an action

Order of 17 March 2021, *3M Belgium* v *ECHA* (T-160/20, EU:T:2021:149) [19]

On 5 August 2019, the competent Norwegian authority submitted a dossier proposing the identification of perfluorobutanesulfonic acid ('PFBS') and its salts as a substance of very high concern. [20] The European Chemicals Agency (ECHA) invited interested parties to submit their observations on the dossier in the context of a public consultation. Thus, 3M Belgium, the sole representative of the company 3M for all imports of a flame retardant additive composed of one of the salts of PFBS, submitted its observations.

Subsequently, the dossier was referred by ECHA to the Member State Committee, which unanimously identified PFBS and its salts as a substance for which there is scientific evidence of probable serious effects to human health and the environment, which gives rise to an equivalent level of concern to that raised by the use of the substances listed in Article 57(a) to (e) of the REACH Regulation.

On 16 January 2020, ECHA adopted a decision ('the contested decision') by which PFBS and its salts were identified as a substance of very high concern and were included in the list of substances identified with a view to their eventual inclusion in the list of substances subject to authorisation ('the candidate list').

3M Belgium brough an action before the Court for annulment of the contested decision. The Court dismisses the action as inadmissible and, in particular, rules, for the first time since the reform of the Rules of Procedure of the General Court in 2015, on the application of the additional time limit of 14 days to acts published on ECHA's website.

Findings of the Court

As regards, first of all, the argument that the contested decision should have been published in the *Official Journal of the European Union*, the Court observes that the concept of 'publication' in the context of the institution of proceedings, which appears in Article 263 TFEU, [21] does not necessarily have to correspond to the concept of 'publication' referred to in Article 297 TFEU. [22] First, that finding is corroborated by the fact that it is apparent from the wording of Article 263 TFEU that the concept of 'publication' is not confined solely to publication in the Official Journal but relates to the publication of acts in general. Secondly, although the

19| See also, on the time limits for bringing actions in civil service matters, judgment of 3 March 2021, ***Barata* v *Parliament*** (T-723/18, under appeal, EU:T:2021:113), presented under the heading 'XIII. 7. Time limit for bringing an action'.

20| Under Article 57(f) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1, corrigendum OJ 2007 L 136, p. 3; 'the REACH Regulation').

21| The sixth paragraph of Article 263 TFEU provides that 'the proceedings provided for in this Article shall be instituted within two months of the publication of the measure, of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be'.

22| Pursuant to the second subparagraph of Article 297(2) TFEU, 'regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed, shall be published in the Official Journal of the European Union', and, pursuant to the third subparagraph of that provision, 'other directives, and decisions which specify to whom they are addressed, shall be notified to those to whom they are addressed and shall take effect upon such notification'.

Court of Justice has indeed read Articles 263 and 297 TFEU together for the purpose of interpreting the concept of 'publication' in the context of the initiation of an action, that case-law concerned the subsidiary nature of the criterion of publication as compared with that of notification of the measure to the addressee and not, as in this instance, the interpretation of the criterion of publication alone.

Next, the Court notes that the argument relating to the unverifiable nature of a publication on ECHA's website by comparison with a publication in the Official Journal amounts to depriving of utility any other form of publication which would not meet the requirements applicable to a publication in the Official Journal. The fact that the EU legislature regulated the electronic publication of the Official Journal does not imply that similar requirements must govern dissemination on ECHA's website. In addition, the Court finds that, since the contested decision does not have an addressee, the taking effect of that decision on 16 January 2020 did not depend on its notification to an addressee or to the applicant. Furthermore, the Court states that a specific method of publication is prescribed for the candidate list: in fact, ECHA publishes and updates the candidate list on its website as soon as a decision has been taken on the inclusion of a substance in that list. [23] Since, moreover, the decisions ordering the updating of the candidate list are published only in that list, the date of publication of such a decision corresponds to the date of publication of the updated candidate list. Consequently, first, ECHA could validly publish the contested decision on its website and, secondly, that publication could cause the two-month time limit for bringing an action to run.

Furthermore, as regards the time limit for bringing the present action, the Court finds, in the first place, that time was not to run from the end of the 14th day following the date of publication of the contested decision. The rule on the extension by 14 days of the time limit for bringing an action applies only to measures published in the Official Journal. [24] In that regard, the Court makes clear, first, that there is an objective difference between measures published in the Official Journal and those published only on the internet, and specifically on ECHA's website, as regards their form of publication. The Court is thus entitled to lay down, in its Rules of Procedure, specific rules extending the time limit for bringing an action only in respect of measures of the institutions published in the Official Journal. Secondly, the contested decision was published only on ECHA's website, with the result that all potential applicants benefited from the same time limit for bringing an action. Thirdly, the publication in the Official Journal or on ECHA's website of a decision identifying a substance as being of very high concern, and the application of the rule on the 14-day extension of the time limit for bring an action, is not a matter of choice on the part of ECHA, but of whether such a decision is adopted by ECHA or by the Commission, as provided for in Article 59 of the REACH Regulation.

In the second place, the General Court notes that the Court of Justice had indeed extended to publications of ECHA on the internet the application of the rule, laid down in the former Rules of Procedure of the General Court, that the time limit for bringing an action against a measure adopted by an institution starts to run from the end of the 14th day following the date of publication of the measure in the Official Journal. [25] However, the Court points out that, while publication in the Official Journal was the only conceivable option at the time of the adoption of its former Rules of Procedure, that consideration cannot apply with regard to the comparable rule laid down in its present Rules of Procedure, adopted on 4 March 2015, that is to say, on a date on which publication on the internet, as distinct from publication in the Official Journal, whether in electronic or printed form, was conceivable. Furthermore, first, the latter rule refers exclusively to publication in the Official Journal

23| Article 59(10) of the REACH Regulation.

24| In the words of Article 59 of the Rules of Procedure of the General Court of 4 March 2015, 'where the time limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure in the *Official Journal of the European Union*, that time limit shall be calculated … from the end of the 14th day after such publication'.

25| Judgment of 26 September 2013, ***PPG and SNF v ECHA*** (C-625/11 P, EU:C:2013:594). Article 102(1) of the Rules of Procedure of the General Court of 2 May 1991.

and, secondly, the Rules of Procedure had been amended precisely in order to limit the scope of the additional 14-day time limit. Furthermore, the General Court emphasises that its Rules of Procedure and those of the Court of Justice are different acts, adopted by different measures, which govern different proceedings before separate courts and are therefore not identical. [26] Consequently, no unjustified discrimination results from the difference between the articles, in each of those two acts, relating to the rule on the 14-day extension of the time limit for bringing proceedings which they lay down.

In the light of the foregoing, the Court concludes that the action, brought on 27 March 2020, must be dismissed as inadmissible on the ground that it was out of time. As the contested decision was published on ECHA's website on 16 January 2020 and as time began to run from 17 January 2020, the two-month time limit therefore expired on 16 March 2020, since a time limit expressed in months ends with the expiry of whichever day in the last month falls on the same date as the day during which the event or action from which the time limit is to be calculated occurred or took place. In view of the extension on account of distance of 10 days which must be added to the procedural time limit, the time limit for bringing an action expired on 26 March 2020, the day before the application was lodged.

3. Withdrawal of the United Kingdom from the European Union

Order of 8 June 2021, *Shindler and Others* v *Council* (T-198/20, under appeal, [27] EU:T:2021:348) [28]

The applicants, including H. Shindler and J. Silver, are nationals of the United Kingdom residing in the United Kingdom and in a number of Member States of the European Union.

Following the referendum of 23 June 2016, the United Kingdom of Great Britain and Northern Ireland notified the European Council of its intention to withdraw from the European Union pursuant to Article 50(2) TFEU. On 24 January 2020, the representatives of the European Union and the United Kingdom signed the withdrawal agreement, [29] following which the Council of the European Union adopted the contested decision [30] whereby that agreement was approved on behalf of the European Union and the European Atomic Energy Community (EAEC). On 31 January 2020, the United Kingdom withdrew from the European Union and the EAEC. On 1 February 2020, the withdrawal agreement entered into force.

26| Article 63 of the Protocol on the Statute of the Court of Justice of the European Union (OJ 2016 C 203, p. 72).

27| Case C-501/21 **P, *Shindler and Others* v *Council***

28| See also, concerning the impact of the withdrawal of the United Kingdom from the European Union on European Union trade marks, the judgment of 6 October 2021, ***Indo European Food* v *EUIPO* – *Chakari (Abresham Super Basmati Selaa Grade One World's Best Rice)*** (T-342/20, under appeal, EU:T:2021:651), presented under the heading 'V. 2. Withdrawal of the United Kingdom from the European Union'.

29| 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').

30| Council Decision (EU) 2020/135 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1; 'the contested decision').

In those circumstances, the applicants brought two actions before the Court seeking annulment in part of the contested decision, in that it deprived them of their status as Union citizens and of the rights attaching to that status. [31]

In its two orders, delivered in a Chamber of extended composition, the Court holds, for the first time, that a decision approving the conclusion of an international agreement – in this instance the decision approving the conclusion of the agreement setting out the arrangements for the withdrawal of the United Kingdom from the European Union – is not a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. [32] Consequently, the Court dismisses both actions as inadmissible, as the applicants did not have standing to bring proceedings against such a decision.

Findings of the General Court

First of all, the Court finds that the applicants are not addressees of either the withdrawal agreement or the contested decision and therefore do not have a right of action on the basis of the first limb of the fourth paragraph of Article 263 TFEU. In those circumstances, the Court examines whether the applicants might have a right to bring an action on the basis of one or other of the situations provided for in the second and third limbs of the fourth paragraph of Article 263 TFEU.

As regards the second limb of the fourth paragraph of Article 263 TFEU, the Court observes that the conditions that the act in question should be of direct concern, on the one hand, and individual concern, on the other, laid down in that provision are cumulative. In the circumstances of the present case, the Court first of all examines whether the second condition, relating to individual concern, is satisfied. In that regard, it finds that the contested decision, which brings the withdrawal agreement into the EU legal order, is itself an act of general application and, as such, affects the applicants by reason of their objective status as United Kingdom nationals. The circumstances on which the applicants rely, alleging, inter alia, that they belong to particular categories of United Kingdom nationals who have exercised their right to freedom of movement within the European Union, do not permit the inference that they may be regarded as forming part of a limited class of persons individually concerned by the contested decision at the time of its adoption, in so far as the status of Union citizen and the rights attaching to that status cannot be classified as specific or exclusive rights the loss of which would have specific, different and significant effects for the applicants that would distinguish them individually from all other persons, in the same way as addressees of the contested decision.

Consequently, the Court considers that the applicants are not individually concerned by the contested decision and that, accordingly, they do not have standing to bring proceedings under the second limb of the fourth paragraph of Article 263 TFEU.

As regards the third limb of the fourth paragraph of Article 263 TFEU, the Court recalls that the conditions relating (i) to the regulatory nature of the contested act, (ii) to the applicants being directly concerned and (iii) to the absence of implementing measures provided for in the third limb of the fourth paragraph of Article 263 TFEU are cumulative. In the circumstances of the present case, the Court first of all examines

31| Rights including the right to move and reside freely within the territories of the Member States and the right to vote and to stand as a candidate in elections to the European Parliament and in the municipal elections of their Member State of residence.

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

whether the contested decision is a 'regulatory act'. In that regard, it recalls that the concept of 'regulatory act' within the meaning of that provision is more restricted in scope than that of 'acts' used in the first and second limbs of the fourth paragraph of Article 263 TFEU, in that it relates to a more restricted category of acts of general application and does not include legislative acts.

In the present case, the Court finds, in the first place, that the contested decision is a non-legislative act of general application, since it was adopted on the basis of Article 50(2) TEU. In that regard, the Court observes that although that provision states that the agreement setting out the arrangements for the withdrawal of a Member State is to be concluded on behalf of the European Union by the Council, acting by a qualified majority, after obtaining the consent of the Parliament, it makes no express reference either to the ordinary legislature procedure or to the special legislative procedure. It follows that the contested decision cannot be classified as a legislative act.

In the second place, the General Court observes that the Court of Justice has not yet had the opportunity to examine whether decisions approving the conclusion of an international agreement, and in particular decisions approving the conclusion of an agreement setting out the arrangements for the withdrawal of a Member State, must be classified as regulatory acts within the meaning of the third limb of the fourth paragraph of Article 263 TFEU. In those circumstances, the Court examines whether the concept of 'regulatory act' also covers such decisions. In that regard, it observes, in particular, that, like any international agreement concluded by the European Union, an agreement setting out the arrangements for the withdrawal of a Member State binds the EU institutions and takes precedence over the acts of general application, both legislative and regulatory, which they lay down. Consequently, the contested decision introduces into the EU legal order rules, contained in the withdrawal agreement, which prevail over legislative and regulatory acts and which, therefore, cannot themselves be of a regulatory nature. Accordingly, the concept of 'regulatory act', within the meaning of the third limb of the fourth paragraph of Article 263 TFEU, must be interpreted as not including decisions approving the conclusion of an international agreement, such as, in particular, decisions approving the conclusion of an agreement setting out the arrangements for the withdrawal of a Member State.

Consequently, the contested decision is not a regulatory act within the meaning of the third limb of the fourth paragraph of Article 263 TFEU and the applicants do not have standing to bring proceedings on the basis of that provision. [33]

Order of 7 December 2021, *Daimler* v *EUIPO* – *Volkswagen (IQ)* (T-422/21, EU:T:2021:888)

By application lodged at the Court Registry on 12 July 2021, Daimler AG brought an action against the decision of the Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 7 May 2021. Daimler stated that it was represented by two lawyers who were authorised to practise before the courts or tribunals of the United Kingdom.

The withdrawal agreement provides for a transition period which ended on 31 December 2020.

By its order, the Court dismisses Daimler's action as manifestly inadmissible. It rules, for the first time, on the issue of the admissibility of an action brought by an applicant, represented by lawyers authorised to practise before the courts or tribunals of the United Kingdom, against a decision of a Board of Appeal of EUIPO adopted after the end of the transition period.

33| The order of 8 June 2021, ***Price* v *Council*** (T-231/20, not published, EU:T:2021:349) relates to the same issue.

Findings of the General Court

In the first place, the Court recalls that only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Courts of the European Union. [34] In that regard, the withdrawal agreement provides for various situations in which a lawyer who is authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Courts of the European Union. [35]

In the second place, the Court holds that the present action is not covered by any of the situations set out in the withdrawal agreement, with the result that the applicant's lawyers could not represent it before the Courts of the European Union.

It points out that, since the application was lodged after the end of the transition period, the provision in the withdrawal agreement relating to proceedings that were pending before the Courts of the European Union before the end of that period is not applicable. Likewise, in the light of the fact that the contested decision was adopted after the end of the transition period, the provision relating to decisions adopted by the institutions, bodies, offices and agencies of the European Union before the end of that period also does not apply. [36]

Furthermore, the Court holds that the present case does not concern either proceedings for failure to fulfil obligations which had been brought by the Commission, [37] an administrative procedure concerning compliance with EU law by the United Kingdom, by persons residing or established there, or concerning compliance with EU law relating to competition, [38] a European Anti-Fraud Office procedure or a State aid procedure. [39] The case is likewise not covered by Article 97 of the withdrawal agreement, since that provision relates solely to representation in ongoing proceedings before EUIPO, and not before the Court.

34| Fourth paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

35| Article 91(1) and (2) of the withdrawal agreement.

36| Article 91(1) and (2), read with Article 95(1) of the withdrawal agreement.

37| Article 91(1), read with Article 87 of the withdrawal agreement.

38| Article 91(2), read with Article 92(1) of the withdrawal agreement.

39| Article 91(2), read with Article 93 of the withdrawal agreement.

II. Institutional law

1. Treaty of Lisbon – Transitional provisions

Judgment of 27 January 2021, *Poland* v *Commission* (T-699/17, under appeal,[40] EU :T :2021:44)

On 9 March 2017, the Commission submitted to the committee established by the Directive on industrial emissions [41] ('the committee') a draft implementing decision setting out best available techniques (BAT) conclusions for large combustion plants. In accordance with that directive, [42] its BAT conclusions serve as the reference for setting the permit conditions for the operation of large combustion plants granted by the authorities of the Member States.

In that regard, the Directive on industrial emissions provides that BAT conclusions are to be adopted in two stages. [43] The first stage consists in drawing up a technical BAT reference document. In the second stage, the Commission submits a draft implementing decision on BAT conclusions to the committee, which is composed of representatives of the Member States. Where that committee delivers a positive opinion, the Commission adopts an implementing decision setting out the BAT conclusions.

As regards, more specifically, the adoption of the draft submitted by the Commission at issue in the present case, the Regulation on comitology [44] required, moreover, that the opinion of the committee be delivered by the qualified majority defined in Article 16(4) and (5) TEU.

In that context, the Republic of Poland requested, on 30 March 2017, that the committee adopt its opinion in accordance with the qualified-majority voting rules laid down in Article 3(3) of Protocol (No 36) on transitional provisions [45] ('Protocol No 36'), which correspond to those applicable prior to the entry into force of the Treaty of Lisbon, in accordance with Article 3(2) of that protocol. That latter provision provides that, between 1 November 2014 and 31 March 2017, when an act is to be adopted by qualified majority, a member of the Council may request that it be adopted in accordance with the qualified majority provided for in Article 3(3) of Protocol No 36.

40| Case C-207/21 P, ***Commission* v *Poland (Protocol No 36)***

41| Article 75 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L 334, p. 17; 'the Directive on industrial emissions').

42| Article 14(3) of the Directive on industrial emissions.

43| Article 13 of the Directive on industrial emissions and Annex to Commission Implementing Decision 2012/119/EU of 10 February 2012 laying down rules concerning guidance on the collection of data and on the drawing up of BAT reference documents and on their quality assurance referred to in the Directive on industrial emissions (OJ 2012 L 63, p. 1).

44| Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13; 'the Regulation on comitology').

45| Protocol (No 36) on transitional provisions (OJ 2016 C 202, p. 321).

That Polish application was, however, rejected and the committee issued a favourable opinion by qualified majority in accordance with the new rules laid down in Article 16(4) TEU. Following that opinion, the Commission adopted the implementing decision establishing BAT conclusions for large combustion plants. [46]

The Republic of Poland brought an action for annulment against that implementing decision, alleging, inter alia, infringement of the provisions applicable in relation to the qualified majority.

That action is upheld by the Third Chamber, Extended Composition, of the Court. In its judgment, the Court examines the novel question whether, in order to benefit from the rules on qualified-majority voting provided for in Article 3(3) of Protocol No 36, corresponding to those applicable prior to the entry into force of the Treaty of Lisbon, it suffices for a Member State to make a request to that effect between 1 November 2014 and 31 March 2017, or whether it is necessary that the decision should also be taken during that period.

Findings of the General Court

Taking as its basis a literal, systematic, historical and teleological interpretation of Article 3(2) of Protocol No 36, the Court holds that, in order for a draft act to be adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36, it suffices that the application of those rules is requested by a Member State between 1 November 2014 and 31 March 2017, without it being necessary for the vote on the draft act in question also to take place between those dates.

The right conferred on the Member States to request, during the period from 1 November 2014 to 31 March 2017, qualified-majority voting in accordance with the rules laid down in Article 3(3) of Protocol No 36 necessarily implies that, following the submission of such a request by a Member State, the vote is to be taken in accordance with those rules, even when that vote takes place after 31 March 2017. According to the Court, that interpretation alone is capable of ensuring that a Member State is able effectively to exercise that right during the entirety of that period, up to the last day of the prescribed period.

In that regard, the Court further states that Article 3(2) of Protocol No 36 is a transitional provision governing one of the three transitional stages in relation to the application of the rules on qualified-majority voting following the entry into force of the Treaty of Lisbon, and not an exception to the rule laid down in that respect in Article 16(4) TEU.

That interpretation is also supported by the principle of legal certainty, which requires, inter alia, that legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and that those persons must be able to ascertain unequivocally their rights and obligations and to take steps accordingly.

Since a failure to comply with voting arrangements constitutes an infringement of an essential procedural requirement within the meaning of Article 263 TFEU, the Court upholds the action for annulment of the implementing decision establishing BAT conclusions for large combustion plants.

However, since the annulment of that implementing decision with immediate effect would be liable to jeopardise uniform permit conditions for large combustion plants in the European Union, would risk leading to legal uncertainty for the parties concerned and would run counter to the objectives of ensuring a high

46| Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions, under Directive 2010/75/EU of the European Parliament and of the Council, for large combustion plants (OJ 2017 L 212, p. 1).

level of environmental protection and the improvement of environmental quality, the Court maintains the effects of that decision until the entry into force, within a reasonable period, of a new act intended to replace it and adopted in accordance with the qualified-majority rules laid down in Article 3(3) of Protocol No 36.

2. Disciplinary measures applicable to Members of the European Parliament

Judgment of 3 February 2021, *Moi* v *Parliament* (T-17/19, under appeal, [47] EU:T:2021:51) [48]

The applicant was a Member of the European Parliament from 2014 to 2019. In November 2017, after submitting a request for assistance, [49] claiming problems with their working environment, two of her accredited parliamentary assistants lodged a harassment complaint with the Parliament's advisory committee responsible for those matters. [50]

By two separate letters of 2 October 2018, the President of the Parliament, after considering the opinion of the advisory committee and the applicant's comments, adopted, first, the decision finding that the two complainants had suffered psychological harassment and, secondly, the decision imposing on the applicant, as a penalty for her conduct towards the two complainants, the forfeiture of entitlement to the daily subsistence allowance for a period of 12 days.

On 16 October 2018, the applicant lodged an internal appeal [51] with the Bureau of the Parliament against the penalty decision of the President. By decision of 12 November 2018, delivered on 14 November 2018 in plenary sitting and notified on the same day, the Bureau of the Parliament confirmed the penalty decision of the President. On 11 January 2019, the applicant brought an action for annulment against the decisions of the President concerning both the harassment and the penalty and against the decision of the Bureau of the Parliament, and also an action for damages.

By its judgment, the Court, sitting in extended composition, annuls those three decisions and dismisses the applicant's action as to the remainder, including her action for damages. The Court thus clarifies the case-law in relation to, first, the relationship between the right to be heard and the rights of the defence and, secondly,

47| Case C-246/21 P, ***Parliament* v *Moi.***

48| See also, concerning a request for assistance on the ground of psychological harassment by a servant of the European Union, judgment of 14 July 2021, ***AI* v *ECDC*** (T-65/19, EU:T:2021:454), presented under the heading 'XIII. 6. Psychological harassment'.

49| Under Article 24 of the Staff Regulations of Officials of the European Union.

50| The committee dealing with harassment complaints between accredited parliamentary assistants and Members of Parliament and its prevention at the workplace was established by Article 1(1) of the internal rules of the European Parliament of 14 April 2014, as amended on 6 July 2015.

51| Under Rule 167 of the Rules of Procedure of the European Parliament.

the evidence which must be established in order to obtain an annulment following the finding of a breach of the rights of the defence. Furthermore, the Court provides clarification regarding the limits of the application of the rule 'of correspondence' [52] between the complaint and the application.

Findings of the General Court

Examining, in the first place, the admissibility of the application for annulment, in so far as it concerns the penalty decision of the President, the Court considers that the adoption of the decision of the Bureau of the Parliament does not prevent the applicant from bringing an action against the penalty decision of the President, even though that decision was the subject of an internal appeal under Rule 167 of the Rules of Procedure. [53] Furthermore, the Court considers that the applicant could seek annulment of the penalty decision of the President no later than the date of expiry of the period for bringing proceedings, calculated from the date of notification of the decision of the Bureau of the Parliament. In the present case, the Court considers that the application cannot be regarded as out of time and is therefore admissible.

Examining, in the second place, the admissibility of the application for annulment, in so far as it concerns the harassment decision of the President, the Court considers that the right to an effective remedy and the principle of the sound administration of justice, taken together, require that the question of the lawfulness of decisions constituting one and the same dispute, namely, in the present case, the decision finding that harassment had occurred and the decision, which is dependent on it, ruling on the penalty which such conduct should attract, be brought before the EU Court at the same time. Thus, since the harassment decision of the President was inextricably linked to the penalty decision, the time limit for bringing an action for annulment against both the former and the latter decision did not start to run until the date of notification of the decision of the Bureau of the Parliament adopted following the internal appeal. Similarly, the Court considers that that application cannot be regarded as being out of time and is, therefore, also admissible.

In relation to the admissibility of the first plea in law, alleging breach of the principle of respect for the rights of the defence, the Court, first, takes care to recall that the applicant's action is based on Article 263 TFEU, not on Article 270 TFEU, which concerns any dispute between the European Union and its servants. The rule of correspondence was developed in the context of proceedings brought on the basis of the latter provision and in connection with the mandatory prior complaint procedure established by the Staff Regulations. To date, neither the Court of Justice nor the General Court has extended that rule to cover actions which, being brought on the basis of Article 263 TFEU, are preceded by an administrative stage. Accordingly, the Court considers that the rule of correspondence is not applicable to a dispute such as that brought before it by the applicant and, consequently, that the first plea in law cannot be declared inadmissible on the ground that the breach of the principle of respect for the rights of the defence was not alleged before the Bureau of the Parliament in the internal appeal.

As regards the merits of the first plea in law, the Court takes care to recall that the rights of the defence include the right to be heard and the right to have access to the file and are among the fundamental rights forming an integral part of the European Union legal order and enshrined in the Charter of Fundamental Rights of the European Union. Thus, the Court emphasises that the general principle of respect for the rights of the defence applies in the present case as the procedure initiated against the applicant is liable to culminate,

52| That rule requires, failing which it will be deemed to be inadmissible, that a plea or head of claim submitted before the EU Courts must already have been raised in the pre-litigation procedure or must be closely linked to criticism made in the same context.

53| Judgments of 21 February 2018, ***LL* v *Parliament*** (C-326/16 P, EU:C:2018:83, paragraphs 34 to 37), and of 19 September 2018, ***Selimovic* v *Parliament*** (T-61/17, not published, EU:T:2018:565, paragraph 45).

and did indeed culminate, in the imposition of a penalty on a Member of Parliament for harassment. In a procedure intended to determine whether harassment has occurred, that principle means that, with due regard to any requirements of confidentiality, the person against whom allegations have been made must, prior to the adoption of the decision adversely affecting him or her, receive all documents in the file, both inculpatory and exculpatory, concerning that harassment and be able to state his or her views on them. In the present case, the Court notes that, during the procedure which resulted in the finding of harassment and the imposition of the penalty, while the applicant was informed of the content of the complaints of the two accredited parliamentary assistants, she had no access to either the statements made by them before the advisory committee or the documents in the file, particularly the full content of the emails and text messages, even though those different items of information were taken into consideration in order to conclude that harassment had occurred and to impose a penalty on the applicant. Consequently, the Court considers that the general principle of respect for the applicant's rights of defence was breached in the present case.

Addressing the consequences of the breach of that principle, the Court recalls that a breach of the rights of the defence results in the annulment of the decision taken at the end of a procedure only if, had it not been for such an irregularity, the outcome of the procedure might have been different. [54] That requirement is satisfied where, having not had access to the documents which should have been disclosed in accordance with respect for the rights of the defence, an applicant was not able effectively to submit his or her observations and was thus deprived of even a slight chance of being better able to defend himself or herself. In such a case, failure to disclose documents in the file which the authorities have relied on inevitably affects, in the light of the protection to be afforded to the rights of the defence, the lawfulness of the measures adopted at the end of a procedure liable to affect the applicant adversely. In the present case, the Court considers that, since the applicant did not have access to the full content of the file, she was deprived of the chance of being better able to defend herself and that that irregularity inevitably affected the content of the decisions taken on the existence of harassment and on the penalty.

Consequently, the Court considers that the three decisions in question must be annulled for breach of the general principle of respect for the rights of the defence.

3. European citizen's initiative

Judgment of 10 November 2021, *Romania* v *Commission* (T-495/19, under appeal, [55] EU :T :2021:781)

On 18 June 2013, the proposal for a 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. [56] According to the information provided by its organisers, the aim of the proposal was to ensure that the European Union, in the context of the Cohesion Policy, would pay special attention to regions with ethnic, cultural, religious or linguistic characteristics that are different from those of the surrounding regions.

54| Judgments of 4 April 2019, ***OZ* v *EIB*** (C-558/17 P, EU:C:2019:289, paragraphs 76 to 78), and of 25 June 2020, ***HF* v *Parliament*** (C-570/18 P, EU:C:2020:490, paragraph 73).

55| Case C-54/22 P, ***Romania* v *Commission***

56| 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').

By decision of 25 July 2013, [57] the Commission refused the request for registration of the ECI proposal 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. [58] On appeal, the Court of Justice set aside the judgment of the General Court and annulled the decision of 25 July 2013. [59]

On 30 April 2019, the Commission adopted a new decision by which it registered the ECI proposal at issue. [60] Romania brought an action for annulment of that decision.

The Court dismisses Romania's action and addresses explicitly, for the first time, the question whether a Commission decision to register an ECI proposal is a challengeable act. It also clarifies, on the one hand, the characteristics of the review exercised by the Commission for the purpose of adopting such a decision and, on the other hand, the nature of the Court's review of the legality of that decision.

Findings of the General Court

With regard to the admissibility of the action, the Court considers whether the contested decision is a challengeable act. [61] 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, in particular, in the first place, the right to submit the ECI to the Commission and explain it in detail, [62] in the second place, the right to require the Commission to issue the communication referred to in Article 10(1)(c) of Regulation 211/2011 [63] and, in the third place, 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 an ECI proposal creates an obligation on their part to authorise the collection of support statements and to verify and certify them.

In addition, the Court states that the decision to register an ECI proposal is not a preparatory or intermediate act intended to lay the groundwork for the adoption by the Commission of its communication on the ECI. The decision to register an ECI proposal 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

57| Commission Decision C(2013) 4975 final of 25 July 2013 refusing to register the proposed citizens' initiative entitled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures'.

58| Judgment of 10 May 2016, ***Izsák and Dabis* v *Commission*** (T-529/13, EU:T:2016:282).

59| Judgment of 7 March 2019, ***Izsák and Dabis v Commission*** (C-420/16 P, EU:C:2019:177).

60| Commission Decision (EU) 2019/721 of 30 April 2019 on the proposed citizens' initiative entitled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures' (OJ 2019 L 122, p. 55; 'the contested decision').

61| Within the meaning of Article 263 TFEU.

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

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

its 'legal and political conclusions'. The Court notes that, according to the case-law, [64] 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 an ECI proposal and the subsequent procedure and takes place before the Commission adopts its communication on the ECI. Accordingly, a decision to register an ECI proposal, 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, a challengeable act for the purposes of Article 263 TFEU.

As to the substance, the Court examines, in the first place, the conditions for registration of an ECI proposal and, in particular, the condition as to whether the ECI proposal falls within the framework of the Commission's powers. [65] In that context, it notes the characteristics of the examination that the Commission must carry out with respect to that condition for registration of an ECI proposal.

First, it observes that, in order to ensure that ECIs are easily accessible, the Commission is entitled to refuse to register an ECI proposal 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.

Secondly, the Court explains 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 an ECI proposal 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 an ECI proposal 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 refuse to register an ECI proposal only if, in examining whether the registration condition relating to whether an ECI proposal 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 ECI proposal in question in order to enable 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 ECI proposal at issue, the 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, [66] the Commission examined the proposed

64| Judgment of 19 December 2019, ***Puppinck and Others* v *Commission*** (C-418/18 P, EU :C :2019 :1113, point 70).

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

66| Judgment of 7 March 2019, ***Izsák and Dabis* v *Commission*** (C-420/16 P, EU:C:2019:177, paragraph 62).

measures, considered in the abstract, confining itself, in essence, to presenting the subject matter and the objectives of the ECI proposal at issue and to determining that that proposal fell within the scope of the EU Cohesion Policy.

In the third place, the Court rejects the complaint alleging the existence of some reservations in the Commission's assessment. The Court emphasises that the Commission may, if necessary, 'frame', 'qualify' or even partially register the ECI proposal at issue 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 an ECI proposal – to register it in a qualified manner, in order to preserve the effectiveness of the objective pursued by Regulation No 211/2011.

In the fourth and last place, ruling on the question whether Articles 174 to 178 TFEU might constitute a legal basis for EU action as envisaged in the ECI proposal at issue, [67] the Court observes that the Commission did not err in concluding, in the contested decision, that the ECI proposal at issue, inasmuch as it concerned 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.

III. Competition rules applicable to undertakings

1. Developments in the field of Article 102 TFEU

Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)* (T-612/17, under appeal, [68] EU :T :2021:763)

By decision of 27 June 2017, [69] the European Commission found that Google LLC had abused its dominant position on the market for online general search services in 13 countries in the European Economic Area (EEA), [70] by favouring its own comparison shopping service, a specialised search service, over competing comparison shopping services.

The Commission found that the results of product searches made using Google's general search engine were positioned and displayed in a more eye-catching manner when the results came from Google's own comparison shopping service than when they came from competing comparison shopping services. Moreover, the latter results, which appeared as simple generic results (displayed in the form of blue links), were, as a result, prone to being demoted by adjustment algorithms in the general results pages, unlike results from Google's

67| These articles fall within Title XVIII of the TFEU Treaty, which concerns economic, social and territorial cohesion.

68| Case C-48/22 P, ***Google and Alphabet* v *Commission (Google Shopping)***.

69| Commission Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)).

70| Belgium, Czech Republic, Denmark, Germany, Spain, France, Italy, Netherlands, Austria, Poland, Sweden, United Kingdom and Norway.

comparison shopping service. In that way, Google had, in essence, reduced the traffic from its general results pages to competing comparison shopping services while increasing such traffic to its own comparison shopping service ('the practice at issue').

According to the Commission, that practice had produced anticompetitive effects both on the 13 national markets for specialised comparison shopping search services and on the 13 national markets for general search services.

Concluding therefore that the prohibition of abuse of a dominant position under Article 102 TFEU and Article 54 of the EEA Agreement had been infringed, the Commission imposed a fine on Google of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet, Inc., its parent company.

The action brought by Google and Alphabet against that decision is largely dismissed by the Court, which also confirms the amount of the fine imposed by the Commission.

Findings of the General Court

As regards, in the first place, the anticompetitive nature of the practice at issue, the Court considers that a mere finding that an undertaking has a dominant position, even one on the scale of Google's, is not in itself a ground of criticism of the undertaking concerned, even if that undertaking is planning to expand into a neighbouring market. It is the 'abuse' of a dominant position that is prohibited by Article 102 TFEU. The special responsibility imposed, in that context, on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened.

Having regard to the importance of traffic generated by Google's general search engine for comparison shopping services, the behaviour of users, who typically focus on the first few results, the significant proportion of 'diverted' traffic and the fact that such traffic cannot be effectively replaced, the Court rules that the practice at issue constitutes a difference in treatment that deviates from competition on the merits and is liable to lead to a weakening of competition on the market that may be contrary to Article 102 TFEU.

Against that background, the Court points out that, given the universal vocation of Google's general search engine, which is designed to index results containing any possible content, the promotion on Google's general results pages of a single type of specialised result – its own – involves a certain form of abnormality.

The Court also notes that while Google's general results page has characteristics akin to those of an 'essential facility', in the sense of an indispensable service for which there is no actual or potential substitute, the practice at issue can be distinguished, in its constituent elements, from a refusal to supply an essential facility. As a result, the analysis set out by the Court of Justice in its judgment in ***Bronner***, [71] in relation to such a refusal cannot be applied in the present case.

Last, the Court observes that, since the differentiated treatment applied by Google is based on the origin of the results, that is, whether they come from its own or from competing comparison shopping services, it follows that the results from competing comparison shopping services can never receive the same treatment as results from Google's comparison shopping service as regards their positioning and their display. Thus, Google favours its own comparison shopping service over competing comparison shopping services rather than the best results.

71| Judgment of 26 November 1998, ***Bronner*** (C-7/97, EU:C:1998:569).

As regards, in the second place, the anticompetitive effects generated by the practice at issue, the Court recalls that an abuse of a dominant position exists where, through recourse to methods different from those governing normal competition, the dominant undertaking hinders the maintenance of the degree of competition or the growth of that competition. In that context, in order to establish an infringement of Article 102 TFEU, the Commission is not required to show that the practices concerned have had actual exclusionary effects, proof of potential effects being sufficient.

In that regard, the Court confirms the Commission's conclusion that the practice at issue could give rise to potentially anticompetitive effects on the market for specialised comparison shopping search services. The Commission had, more specifically, established that there were actual effects on traffic from Google's general results pages to the detriment of competing comparison shopping services and to the benefit of Google's comparison shopping service and, moreover, that competing comparison shopping services' traffic from those pages accounted for a large proportion of their total traffic and could not be effectively replaced by other sources, such as advertising (AdWords) or mobile applications, and therefore that the practice at issue could result in the disappearance of competitors, less innovation in the market and less choice for consumers, features which are characteristic of a weakening of competition.

By contrast, the Court finds that the Commission did not establish that Google's disputed conduct had had anticompetitive effects, even potential effects, on the market for general search services, and consequently annuls the finding of an infringement in respect of that market alone.

As regards potentially anticompetitive effects on the market for specialised comparison shopping search services, the Court also rejects Google's argument that competition remains strong because of the presence of merchant platforms on that market, and confirms the Commission's assessment that those platforms are not active in the same market.

The justifications on which Google relied in denying that its conduct was abusive are also rejected by the Court. In that regard, it notes that, while the algorithms ranking generic results or the criteria for the positioning and display of Google's specialised product results may as such represent pro-competitive service improvements, that does not justify the practice at issue, namely the unequal treatment of results from Google's comparison shopping service and results from competing comparison shopping services. Furthermore, Google had failed to show any efficiency gains linked to that practice that would counteract its negative effects for competition.

Following a fresh assessment of the infringement, the Court ultimately confirms the amount of the fine imposed by the Commission, rejecting Google's arguments as to the fact that the conduct at issue had been analysed for the first time by the Commission in the light of the competition rules and that, at one stage of the procedure, it had been willing to try to resolve the case by means of commitments.

Making its own assessment of the facts with a view to determining the level of the penalty, the Court finds, first, that the annulment in part of the contested decision in regard to the market for general search services has no impact on the amount of the fine, since the Commission did not take the value of sales on that market into account in order to determine the basic amount of the fine imposed. Secondly, the Court points out that while it takes account of the fact that the abuse has not been demonstrated on the market for general search services, it also takes into consideration the fact that the conduct at issue constitutes a particularly serious infringement and that it was adopted intentionally, not negligently.

Following that analysis, the Court confirms the amount of the pecuniary penalty imposed on Google.

2. Development in the field of concentrations

Judgments of 20 October 2021, *Polskie Linie Lotnicze 'LOT'* v *Commission* (T-240/18, EU:T:2021:723 and T-296/18, EU:T:2021:724)

Faced with a persistent deterioration in its financial situation, the airline Air Berlin plc implemented a restructuring plan in 2016. In that context, on 16 December 2016, it concluded an agreement with the airline Deutsche Lufthansa AG ('Lufthansa') under which it would sublease various crewed aircraft to Lufthansa.

However, the loss of the financial support granted to Air Berlin in the form of loans by one of its main shareholders forced it to apply, on 15 August 2017, for insolvency proceedings to be opened. In those circumstances, the guarantee-backed loan granted by the German authorities as rescue aid, endorsed by the Commission, [72] was intended to enable Air Berlin to continue its operations for a period of three months, in order to allow it, inter alia, to dispose of its assets.

That objective was reflected, in particular, by the conclusion of two agreements. First, an agreement concluded on 13 October 2017 providing for the takeover by Lufthansa of, inter alia, a subsidiary of Air Berlin, to which various crewed aircraft, as well as slots [73] that Air Berlin held at a number of airports, including, in particular, Düsseldorf, Zurich, Hamburg, Munich, Stuttgart and Berlin-Tegel, were to be transferred prior to the implementation of the agreement. Secondly, an agreement concluded on 27 October 2017 with the airline easyJet plc, aimed primarily at transferring the slots held by Air Berlin, in particular at Berlin-Tegel airport, to easyJet. Air Berlin ceased its operations the following day, before being declared insolvent by judicial decision of 1 November 2017.

On 31 October 2017, Lufthansa notified the Commission, in accordance with its powers in relation to the control of concentrations, [74] of the concentration provided for in the agreement of 13 October 2017. On 7 November 2017, easyJet likewise gave notice of the transaction provided for in the agreement of 27 October 2017 (together with the transaction notified by Lufthansa; 'the concentrations at issue'). In the light of the commitments given by Lufthansa, [75] the Commission found the concentration notified by Lufthansa to be compatible, by Decision C(2017) 9118 final of 21 December 2017, as it did with the concentration notified by easyJet, by Decision C(2017) 8776 final of 12 December 2017 ('the contested decisions'). The Commission concluded that the concentrations at issue did not raise serious doubts as to their compatibility with the internal market. On that occasion, for the first time in cases concerning passenger air transport services, the Commission did not define the relevant markets on the basis of the point of origin/point of destination ('the O&D markets') city-pair approach. First, it found that Air Berlin had ceased its operations prior to and independently of those concentrations. It concluded that Air Berlin had withdrawn from all the O&D markets in which it had previously been present. Secondly, it found that the concentrations at issue primarily concerned

72| Decision C(2017) 6080 final of 4 September 2017 on State aid SA.48937 (2017/N) – Germany – Rescue Aid in favour of Air Berlin (OJ 2017 C 400, p. 7).

73| Slots represent the permission granted to an airline to use the full range of airport infrastructure necessary to operate an air service on a specific date and time, for the purpose of take-off or landing from or to that airport.

74| In the present case, the powers provided for by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

75| In the present case, in order to dispel doubts as to the compatibility of the notified concentration relating to its position at Düsseldorf airport, Lufthansa had proposed to the Commission, pursuant to Article 6(2) of the EC Merger Regulation, a substantial reduction in the number of slots that would be transferred to it under that concentration.

the transfer of slots and found that those slots were not allocated to any particular O&D market. Consequently, it considered it preferable to aggregate, for the purposes of its assessment, all the O&D markets from or to each of the airports to which those slots related. In doing so, it therefore defined the relevant markets as the markets for passenger air transport services from or to those airports. The Commission then went on to verify that those concentrations were not such as to create 'a significant impediment to effective competition', in the present case, in particular, by giving easyJet and Lufthansa, respectively, the ability and incentive to foreclose access to those markets.

Taking the view that the assessment thus carried out by the Commission was incorrect, in terms of both its methodology and its results, Polskie Linie Lotnicze 'LOT', which presents itself as a direct competitor of the parties to the concentrations at issue, brought two actions before the Court, each seeking the annulment of one of the contested decisions.

By its judgments of 20 October 2021, the Court dismisses those actions, thus accepting, in particular, that the Commission could confine itself to a joint examination of the O&D markets from or to the airports to which Air Berlin's slots related, instead of examining individually each of the O&D markets in which Air Berlin, on the one hand, and Lufthansa and easyJet, on the other, were present.

Findings of the General Court

In the first place, with respect to the plea alleging the incorrect definition of the relevant markets, the Court considers, first of all, that it is futile for the applicant to seek to challenge the factual accuracy of the presentation, made by the Commission, of the concentrations at issue and of their context. In that connection, the Court observes, inter alia, that the Commission was entitled to consider that Air Berlin's operations had ceased prior to, and independently of, the concentrations at issue, and that, as a result, Air Berlin was no longer present in any O&D market. Next, in so far as Air Berlin's slots were not associated with any O&D market, the Court considers that the Commission rightly pointed out that those slots could be used by Lufthansa and easyJet, respectively, in O&D markets other than those in which Air Berlin operated. Consequently, the Court holds that, unlike concentrations involving airlines which are still in operation, it was not certain, in this particular case, that the concentrations at issue would have any effect on competition in the O&D markets in which Air Berlin had been present before it ceased its operations. Last, the Court finds that the applicant has not provided any serious evidence that an individual examination of the O&D markets that it identified could have made it possible to establish the existence of a significant impediment to effective competition which could not be revealed by the market definition adopted by the Commission.

In the second place, as regards the plea alleging a manifest error in the assessment of the effects of the concentrations at issue, the Court states, at the outset, that, when exercising the powers conferred on it by the EC Merger Regulation, the Commission has a certain discretion, especially with regard to assessments of an economic nature which it is called upon to make in that regard. Consequently, a review by the EU judicature of the exercise of that discretion must take account of the discretionary margin thus conferred on the Commission. Having provided that clarification, the Court considers that the assessment of the effects of the concentrations at issue on the markets for passenger air transport services from or to the airports concerned did not reveal any manifest error of assessment, in view of, inter alia, the low congestion rate at those airports and the limited impact of those concentrations on the increase in the slot holdings that Lufthansa and easyJet had at those airports. As regards, more specifically, the concentration notified by Lufthansa, the applicant is also not justified in claiming that the Commission had made a manifest error in its assessment of the effects of the agreement of 16 December 2016, given, inter alia, that, under that agreement, Lufthansa was already permitted to operate aircraft with crew for a period of six years before it definitively acquired them in the context of that concentration. Last, as regards the concentration notified

by easyJet, the Court points out that slots are necessary for the provision of passenger air transport services. It concludes that there is a 'vertical' relationship between the allocation of those slots and the provision of those services, and that the Commission was therefore entitled to refer to the guidelines on 'non-horizontal' mergers. [76]

In the third place, the Court rejects the complaints alleging that the commitments given by Lufthansa in the context of the concentration it had notified were insufficient, and that no such commitments were given as regards the concentration notified by easyJet, on the ground that the applicant is not justified in claiming that those concentrations are manifestly liable to constitute a significant impediment to effective competition. For that reason, it also considers the applicant's complaints that the Commission failed to take account of any potential efficiencies which could have been generated by those concentrations to be unfounded.

In the fourth place, the Court observes that the applicant has not shown that the financial support which Air Berlin had received under the rescue aid formed part of the assets transferred to easyJet and Lufthansa, respectively, in the context of the concentrations at issue, and, consequently, rejects the complaints that the Commission should have taken account of that aid for the purposes of its assessment. Furthermore, as regards the infringement of Article 8a(2) of Regulation No 95/93, [77] also alleged by the applicant in one of its actions, the Court points out that the Commission lacked competence to apply that provision.

Having held, in the last place, that the applicant's plea alleging a failure to state reasons was unfounded and, thus, having rejected all the pleas relied on in each of the two cases, the Court dismisses the two actions, without it being necessary, in those circumstances, to rule on their admissibility.

76| Guidelines on the assessment of non-horizontal mergers under the EC Merger Regulation (OJ 2008 C 265, p. 6) In addition, the Court rejects the applicant's complaint alleging infringement of those guidelines, pointing out that the existence of a significant degree of market power in one of the markets concerned is not, in itself, sufficient for a finding of competitive concerns.

77| More precisely, Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ 1993 L 14, p. 1), as amended by Regulation (EC) No 545/2009 of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 167, p. 24).

IV. State aid

1. Concept of State aid

a) Selective tax advantage

Judgment of 12 May 2021, *Luxembourg and Amazon* v *Commission* (T-816/17 and T-318/18, under appeal, [78] EU :T :2021:252)

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS ('LuxSCS'), a Luxembourg limited partnership, the partners of which were US entities of the Amazon group, and Amazon EU Sàrl ('LuxOpCo'), a wholly owned subsidiary of LuxSCS.

Between 2006 and 2014, LuxSCS held the intangible assets necessary for the Amazon group's activities in Europe. To that end, it had concluded various agreements with US entities of the Amazon group, namely licence and assignment agreements for pre-existing intellectual property with Amazon Technologies, Inc. (ATI) ('the Buy-In agreements') and an agreement for the sharing of costs linked to the development of those intangible assets ('the cost-sharing agreement') with ATI and a second entity, A9.com, Inc. Under those agreements, LuxSCS had obtained the right to exploit certain intellectual property rights, consisting essentially of technology, customer data and trade marks and to sub-licence those intangible assets. On that basis, LuxSCS concluded, inter alia, a licence agreement with LuxOpCo, as the principal operator of the Amazon group's business in Europe. Under that agreement, LuxOpCo undertook to pay a royalty to LuxSCS in return for the use of the intangible assets.

On 6 November 2003, in response to a request from the Amazon group, the Luxembourg tax authorities granted that group a tax ruling ('the tax ruling'). The Amazon group had requested confirmation of the treatment of LuxOpCo and LuxSCS for the purposes of Luxembourg corporate income tax. As regards, more specifically, the determination of LuxOpCo's annual taxable income, the Amazon group had proposed that the 'arm's length' royalty to be paid by LuxOpCo to LuxSCS should be calculated according to the transactional net margin method ('the TNMM'), using LuxOpCo as 'the tested party'.

The tax ruling, first, confirmed that LuxSCS was not subject to Luxembourg corporate income tax because of its legal form and, secondly, endorsed the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS under the abovementioned licence agreement.

In 2017, the European Commission considered that, in so far as it had endorsed the 'arm's length' nature of the method of calculating the royalty to be paid by LuxOpCo to LuxSCS, that tax ruling, and its annual implementation from 2006 to 2014, constituted State aid for the purpose of Article 107 TFEU, in this case operating aid which is incompatible with the internal market. [79] More specifically, the Commission found an

78| Case C-457/21 P, ***Commission* v *Amazon.com and Others***

79| Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1).

advantage in favour of LuxOpCo, considering essentially that the royalty paid by LuxOpCo to LuxSCS during the relevant period – calculated in accordance with the method endorsed in the tax ruling – was too high, with the result that LuxOpCo's remuneration and, consequently, its tax base were artificially reduced. In that respect, the Commission's decision was based on a primary finding and three subsidiary findings. The primary finding concerned an error as regards the 'tested party' for the purposes of applying the TNMM. The three subsidiary findings concerned, respectively, an error in the choice of the TNMM as such, an error in the choice of the profit level indicator as a relevant parameter for the application of the TNMM and an error consisting in the inclusion of a ceiling mechanism in the context of the TNMM. Having found, ultimately, that the tax ruling had been implemented by Luxembourg without having been notified to the Commission in advance, the Commission ordered the recovery, from LuxOpCo, of that aid, which was unlawful and incompatible with the internal market.

The Grand Duchy of Luxembourg and the Amazon group each brought an action seeking the annulment of that decision. In their actions, they contested, inter alia, each of the findings on which the Commission based its reasoning as regards the existence of an advantage.

In its judgment, the Court upholds, in essence, the applicant's pleas and arguments contesting both the primary and subsidiary findings of an advantage and, consequently, annuls the contested decision in its entirety.

Relying on the principles previously set out concerning the implementation of the criteria of the concept of 'State aid' in the context of tax rulings, the Court provides important clarifications as regards the scope of the burden of proof which the Commission must discharge when establishing the existence of an advantage where the level of taxable income of an integrated company belonging to a group is determined by the choice of transfer pricing method.

Findings of the General Court

The Court notes, first of all, the settled case-law according to which, in examining tax measures in the light of the EU rules on State aid, the very existence of an advantage may be established only when compared with 'normal' taxation, with the result that, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with its position in the absence of the measure at issue and under the normal rules of taxation.

In that respect, the Court observes that the pricing of intra-group transactions carried out by a company integrated within a group is not determined under market conditions. However, where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, it may be considered that that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. In those circumstances, when examining a fiscal measure granted to such an integrated company, the Commission may compare the tax burden of that undertaking resulting from the application of that fiscal measure with the tax burden resulting from the application of the normal rules of taxation under national law of an undertaking, placed in a comparable factual situation, carrying on its activities under market conditions.

In addition, the Court points out that, in examining the method of calculating an integrated company's taxable income endorsed by a tax ruling, the Commission can find an advantage only if it demonstrates that the methodological errors which, in its view, affect the transfer pricing do not allow a reliable approximation of an arm's length outcome to be reached, but rather lead to a reduction in the taxable profit of the company concerned by comparison with the tax burden resulting from the application of normal taxation rules.

In the light of those principles, the Court then examines the merits of the Commission's analysis in support of its finding that, by endorsing a transfer pricing method that did not allow a reliable approximation of an arm's length outcome to be reached, the tax ruling at issue granted an advantage to LuxOpCo.

In that context, the Court holds, in the first place, that the primary finding of an advantage is based on an analysis which is incorrect in several respects. Thus, first, in so far as the Commission relied on its own functional analysis of LuxSCS in order to assert, in essence, that, contrary to what had been taken into account for the purpose of granting the tax ruling at issue, that company was merely a passive holder of the intangible assets in question, the Court considers that analysis to be incorrect. In particular, according to the Court, the Commission did not take due account of the functions performed by LuxSCS for the purposes of exploiting the intangible assets in question or the risks borne by that company in that context. Nor did it demonstrate that it was easier to find undertakings comparable to LuxSCS than undertakings comparable to LuxOpCo, or that choosing LuxSCS as the tested entity would have made it possible to obtain more reliable comparison data. Consequently, contrary to its findings in the contested decision, the Commission did not, in the Court's view, establish that the Luxembourg tax authorities had incorrectly chosen LuxOpCo as the 'tested party' in order to determine the amount of the royalty.

In the second place, the Court holds that, even if the 'arm's length' royalty should have been calculated using LuxSCS as the 'tested party' in the application of the TNMM, the Commission had not succeeded in establishing the existence of an advantage since it had also been incorrect to assert that LuxSCS's remuneration could be calculated on the basis of the mere passing-on of the development costs of the intangible assets borne in relation to the Buy-In agreements and the cost-sharing agreement without in any way taking into account the subsequent increase in value of those intangible assets.

In the third place, the Court also considers that the Commission also erred in evaluating the remuneration that LuxSCS could expect, in the light of the arm's length principle, for the functions linked to maintaining its ownership of the intangible assets at issue. Contrary to what appears from the contested decision, such functions cannot be treated in the same way as the supply of 'low value adding' services, with the result that the Commission's application of a mark-up most often observed in relation to intra-group supplies of a 'low value adding' services is not appropriate in the present case.

In the light of all of those considerations, the Court concludes that the elements put forward by the Commission in its primary finding do not establish that LuxOpCo's tax burden was artificially reduced as a result of an over-pricing of the royalty.

Furthermore, after examining the three subsidiary findings of an advantage, the Court concludes that the Commission also failed to establish, in that context, that the methodological errors identified had necessarily led to an undervaluation of the remuneration that LuxOpCo would have received under arm's length conditions and, accordingly, to the existence of an advantage consisting in a reduction of its tax burden. More specifically, although the Commission could validly consider that certain functions performed by LuxOpCo in connection with the intangible assets went beyond mere 'management' functions, it nevertheless did not justify to the requisite legal standard the methodological choice it inferred from this. Nor did it demonstrate why LuxOpCo's functions, as identified by the Commission, should necessarily have led to a higher remuneration for LuxOpCo. Likewise, as regards both the choice of the most appropriate profit level indicator and the ceiling mechanism endorsed by the tax ruling at issue for the purposes of determining LuxOpCo's taxable income, even if they were erroneous, the Commission did not satisfy the evidential requirements it is required to meet.

On those grounds, the Court concludes that none of the findings set out by the Commission in the contested decision is sufficient to demonstrate the existence of an advantage for the purposes of Article 107(1) TFEU, with the result that the contested decision must be annulled in its entirety.

Judgment of 12 May 2021, rectified by order of 16 September 2021, *Luxembourg and Others* v *Commission* (T-516/18 and T-525/18, under appeal, [80] EU:T:2021:599)

Between 2008 and 2014, the Luxembourg tax authorities adopted two sets of tax rulings in connection with financial and corporate arrangements relating to transfers of activities between companies in the Engie group, all of which are resident in Luxembourg.

In broad outline, the transactions carried out under each arrangement are implemented in three successive stages. In the first place, a holding company transfers assets to a subsidiary. In the second place, in order to finance the assets transferred, that subsidiary takes out an interest-free loan mandatorily convertible into shares ('ZORA') with an intermediary company. Apart from the fact that the loan granted generates no periodic interest, the subsidiary that has taken out the ZORA is to repay the loan, upon its conversion, by issuing shares in an amount equivalent to the nominal amount of the loan, plus a premium representing, in essence, all of the profits made by the subsidiary during the term of the loan ('ZORA accretions'). In the third place, the intermediary company finances the loan granted to the subsidiary by entering into a prepaid forward sale contract with the holding company under which the holding company is to pay that intermediary company an amount equal to the nominal amount of the loan in return for the acquisition of the rights over the shares which the subsidiary is to issue on conversion of the ZORA. Therefore, if the subsidiary makes profits during the lifetime of the ZORA, the holding company will own the rights to all the shares issued, which will incorporate the value of any profits made as well as the nominal amount of the loan.

Those arrangements were endorsed by the tax rulings. For tax purposes, under the tax rulings, only the subsidiary is taxed on a margin agreed with the Luxembourg tax authorities. After requesting information about those tax rulings from the Luxembourg authorities, the Commission initiated a formal investigation procedure at the end of which it found that the effect of the arrangements endorsed by the tax authorities was that almost all the profits made by the subsidiaries established in Luxembourg were not taxed. Consequently, in a decision adopted in 2018 ('the contested decision'), it concluded that those tax rulings constituted State aid that was incompatible with the internal market, and therefore unlawful, and had to be recovered from the recipients by the Luxembourg authorities.

The Grand Duchy of Luxembourg (Case T-516/18) and the Engie group companies (Case T-525/18) brought an action before the Court for annulment of the contested decision.

In its judgment, the Court approves the Commission's approach, in the case of a complex financial and corporate arrangement, which entails considering the economic and fiscal reality rather than a formalistic approach that takes each transaction under the arrangement in isolation. In addition, the Court finds that the Commission was right to determine that a selective advantage was granted on account of the non-application of national provisions on abuse of law.

Findings of the General Court

Since direct taxation is a matter that falls within the exclusive competence of the Member States, the Court pointed out that, when examining whether the tax rulings complied with State aid rules, the Commission had not engaged in any 'disguised tax harmonisation', but exercised its powers under EU law. Since the Commission is competent to ensure compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers by examining the tax rulings in order to determine whether they constituted State aid and, if they did, whether that aid was compatible with the internal market. In the present case, the Court states that,

80| Cases C-451/21 P, ***Luxembourg* v *Commission***, and C-454/21 P, ***Engie Global LNG Holding and Others* v *Commission***.

when investigating whether the tax rulings complied with State aid rules, the Commission had only carried out an assessment of 'normal' taxation, defined by Luxembourg tax law as applied by the Luxembourg tax authorities.

The Court also rejects the pleas alleging, in essence, errors of assessment and of law in the identification of a selective advantage giving rise to State aid.

In the examination of those pleas, first of all, the arguments alleging confusion of the conditions for finding an advantage and those for demonstrating the selectivity of the tax rulings are rejected. In that regard, the Court points out that, in view of the fiscal nature of the tax rulings, those two conditions may be assessed simultaneously. In tax matters, the examination of an advantage overlaps with the examination of selectivity in so far as, for those two conditions to be satisfied, it must be shown that the tax measure at issue results in a reduction in the amount of tax which would normally have been payable by the beneficiary of the measure under the ordinary tax system, which, as such, applies to other taxpayers in the same situation. In the present case, the Court finds that the Commission sought to demonstrate that the tax rulings resulted in a reduction in the amount of tax which would normally have been payable under the ordinary tax system and that, consequently, those measures amounted to a derogation from the tax rules applicable to other taxpayers in a comparable factual and legal situation.

Next, the Court rejects the arguments relating to the absence of a selective advantage at the level of the holding companies in the light of a narrow reference framework established on the basis of Luxembourg tax provisions on the taxation of profit distributions and the exemption of participation income. [81] As regards the definition of that reference framework, after pointing out that it is apparent from an analysis of those tax provisions that the exemption of participation income is applicable solely to income which has not been deducted from the taxable income of the subsidiary, the Court holds that the Commission did not err in law in finding that the exemption of participation income at the level of a parent company is dependent on the taxation of distributed profits at the level of its subsidiary. As regards the identification of a derogation from the defined reference framework, the Court points out that, in contrast to a formalistic approach, whereby each of the transactions making up the sophisticated financial arrangement is considered in isolation, it is important to go beyond the legal form in order to understand the economic and fiscal reality of the arrangement. In the present case, the Court finds that the tax rulings endorse various transactions which constitute a system for implementing, in a circular and interdependent fashion, the transfer of a business sector and its financing between three companies belonging to the same group. Those transactions were designed to be implemented in three successive but interdependent stages, involving the intervention of a holding company, an intermediary company and a subsidiary. In those circumstances, the Court considers that the Commission was entitled to determine that the Luxembourg tax authorities derogated from the reference framework by confirming the exemption of participation income at the level of the holding companies, income corresponding, from an economic perspective, to the amount deducted, under a financial and corporate arrangement, as expenses at the level of the subsidiaries. [82] In the light of the links established by the Commission in this arrangement, the Court finds that the Commission did not err in law by looking at the combined effect, at the level of the holding companies, of the deductibility of income at the level of a subsidiary and the subsequent exemption of that income at the level of its parent company.

81| Articles 164 and 166 of the loi concernant l'impôt sur le revenu (Law on income tax).

82| This concerns the ZORA accretions deducted by the subsidiary as expenses.

After rejecting the arguments alleging, first, that the Commission failed to demonstrate an infringement of the national tax provisions and, secondly, a failure to identify other companies which had been refused identical tax treatment in respect of the same financial arrangement, the Court concludes that the Commission demonstrated the selectivity of the tax rulings in the light of the narrow reference framework.

In the contested decision, the Commission also assessed the selectivity of the tax rulings in the light of the provision on abuse of law, as an integral part of the Luxembourg corporate income tax system. In view of the unprecedented nature of that reasoning put forward to demonstrate the selectivity of the tax rulings, the Court considers it appropriate to examine the merits of the arguments raised against that reasoning. In that regard, since the Commission established that the criteria laid down by Luxembourg law for establishing an abuse of law are met, [83] the Court finds that it cannot be disputed that the Engie group received preferential tax treatment as a result of the non-application of the provision on abuse of law in the tax rulings. In the light of the objective pursued by the provision on abuse of law, namely to combat abusive practices in tax matters, Engie and, in particular, the holding companies are in a factual and legal situation comparable to that of all Luxembourg taxpayers, who cannot reasonably expect to benefit as well from the non-application of the provision on abuse of law in circumstances where the conditions for its application have been met. Consequently, the Court finds that the Commission demonstrated to the requisite legal standard that there was a derogation b) from the reference framework comprising the provision on abuse of law.

b) Financial advantage through State resources

Judgment of 9 June 2021, *Dansk Erhverv* v *Commission* (T-47/19, under appeal, [84] EU:T:2021:331)

The German Federal legislation 'VerpackV' [85] transposes Directive 94/62 on packaging and packaging waste. [86] In respect of certain non-reusable drinks packaging, that legislation establishes a deposit scheme, including value added tax which must be charged at each distribution level until transfer to the end-consumer and refunded on return of the packaging. Failure to collect the deposit constitutes an administrative offence punishable by a fine of up to EUR 100 000.

Under the division of competences laid down in the Basic Law for the Federal Republic of Germany, the implementation of that legislation is the responsibility of the regional authorities, which are in a position to enforce it through administrative orders or the imposition of fines. In that context, the Schleswig-Holstein and Mecklenburg-Vorpommern authorities took the view that the obligation to charge the deposit did not apply to border shops if the beverages were sold only to customers resident in particular in Denmark and if those customers undertook in writing (by signing an export declaration) to consume those beverages and to dispose of their packaging outside Germany.

83| The conditions for identifying an abuse of law are (i) the use of a legal form governed by private law; (ii) the reduction of the tax burden; (iii) the use of inappropriate legal means; and (iv) the absence of non-tax related reasons.

84| Cases C-508/21 P, ***Commission*** **v** ***Dansk Erhverv***, and C-509/21 P, ***IGG*** **v** ***Dansk Erhverv***.

85| The Verordnung über die Vermeidung und Verwertung von Verpackungsabfällen (Verpackungsverordnung) is an ordinance of 21 August 1998 on the prevention and recycling of packaging waste (BGBl. 1998 I, p. 2379).

86| European Parliament and Council Directive 94/62/CE of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

Taking the view that the exemption from charging the deposit on non-reusable drinks packaging amounted to granting unlawful aid incompatible with the internal market to a group of retail undertakings in the north of Germany, Dansk Erhverv ('the applicant'), a trade association representing the interests of Danish undertakings, submitted a State aid complaint to the European Commission. At the end of the preliminary examination stage, the Commission adopted a decision finding that the measures at issue, namely the non-charging of the deposit, the non-collection of value added tax relating to the deposit and the non-imposition of a fine on the undertakings which do not charge the deposit, do not constitute State aid within the meaning of Article 107(1) TFEU ('the contested decision'). [87]

On 23 January 2019, the applicant brought an action for annulment of that decision. In its examination of that action, the Court provides important clarification, first, as regards the relationship between the provisions on State aid and other provisions of EU or national law and, secondly, on the appropriate conclusions to be drawn, concerning fines, from the existence of difficulties in interpreting a legislative provision applicable to the determination of whether a State resource exists.

Findings of the General Court

In the first place, the Court clarifies the extent to which infringement of provisions which do not relate to the law on State aid may usefully be relied on in order to establish that a relevant decision adopted by the Commission is unlawful. In that regard, according to the Court, a distinction must be made depending on whether the Commission's decision concerns the compatibility of aid with the internal market or whether it concerns the existence of aid. In the first situation, where aid which, by some of its conditions, contravenes other provisions of the FEU Treaty cannot be declared compatible with the internal market, failure by a national measure, classified as State aid, to have regard to provisions of the FEU Treaty other than those relating to State aid may properly be relied on to challenge the legality of a decision by which the Commission considers that such aid is compatible with the internal market.

On the other hand, according to the Court, the same is not true of decisions on the existence of State aid. In that regard, it notes that it is true that Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of EU policies and activities. However, such integration is intended to be carried out at the stage of the examination of the compatibility of aid and not that of the examination of its existence. Since the taking into account of a ground of general interest is ineffective at the stage of classification as State aid, the Court holds that the fact that a national measure infringes provisions of EU law other than those relating to State aid cannot properly be relied on, in itself, for the purpose of establishing that that measure is State aid. It is contrary to the wording of Article 107(1) TFEU to consider that a national measure, because it infringes other provisions of the Treaties, constitutes aid even though it does not fulfil the conditions expressly laid down by that provision for the purpose of identifying aid.

According to the Court, the same applies, a fortiori, to legislation of a Member State. The need for uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the purpose of the legislation in question. The Court notes that no express reference is made to the law of the Member States in Article 107(1)

87| Commission Decision C(2018) 6315 final of 4 October 2018 concerning State Aid SA.44865 (2016/FC) – Germany – Alleged State aid to German beverage border shops.

TFEU. Furthermore, it is not for the Commission, but for the competent national courts, to review the legality of national measures in the light of national law. In that regard, if it were accepted that infringement of a Member State's legislation must lead the Commission to classify national measures as State aid, the Commission might be required to decide on the lawfulness of those measures in the light of national law, in disregard of the jurisdiction of the national courts.

Thus, the Court rejects the applicant's claim that the Commission should have taken into consideration, in examining whether the measure, consisting of exemption from charging of the deposit, was State aid, the obligations of the Federal Republic of Germany under Directive 94/62, the 'polluter pays principle' and German law.

In the second place, in examining the complaint that, in order to determine whether the non-imposition of a fine constituted an advantage financed through State resources, the Commission wrongly applied an unprecedented legal test alleging the existence of difficulties in interpreting the legislation at issue, the Court notes that, in the present case, the non-imposition of a fine is inseparable from the non-charging of the deposit and, therefore, from the interpretation of the legislation in force accepted in practice by the competent German regional authorities. Such a context does not correspond to any of the situations hitherto considered in the case-law on fines.

In those circumstances, according to the Court, the Commission was right to rely on a new legal test, based on the link between the interpretation of the relevant legislation and the exercise of the power to impose penalties by the authorities with that power, in order to examine whether the non-imposition a fine could be regarded as an advantage financed through State resources. The Commission was also fully entitled to take the view that the difficulties in interpreting legislation were, in principle, capable of precluding the non-imposition of a fine from being regarded as an exemption from a fine constituting State aid. The situation in which there are difficulties in interpreting a provision, non-compliance with which may be penalised by the imposition of a fine, is clearly different, from the point of view of the advantage in question, from that in which the competent authority decides to exempt an undertaking from payment of a fine which it would have to bear under the legislation. In the first situation, unlike the position in the second, there is no pre-existing charge. In view of the uncertain scope of the provision, the existence of unlawful conduct is not obvious and the penalising of such conduct by a fine does not therefore appear, where there is such uncertainty, to be necessary or inevitable.

The Court states, however, that the test relating to the existence of difficulties in interpreting the applicable legislation can apply only on condition that those difficulties are temporary and that they form part of a process of gradual clarification of legislative provisions. The Commission did not refer to the temporary and inherent nature of the gradual clarification of the difficulties of interpretation of the legislative provisions, although those two conditions must be satisfied in order for it to be possible to reach a finding that there are no State resources. As regards the temporary nature of any difficulties in interpreting the legislation, the Court notes that the Commission does not refer to any particular circumstance capable of justifying the continuation of such uncertainty from 2005, or even 2003. Furthermore, as regards the inherent nature of the gradual clarification of the difficulties in interpreting the legislation, it is noted that there is nothing in the documents before the Court to suggest that such difficulties were in the process of being resolved.

Consequently, the Court holds that the Commission erred in law in concluding that the condition relating to State resources was not satisfied without examining whether the difficulties of interpretation on which it relied were temporary and inherent in the gradual clarification of the legislative provisions. That finding constitutes evidence from which it may be concluded that the Commission was not in a position to overcome, at that preliminary stage, all the serious difficulties encountered in determining whether the non-charging

of the deposit and the non-imposition of a fine constituted State aid. Since other evidence of serious difficulties which the Commission could not overcome at the preliminary examination stage were identified, the Court annuls the contested decision in its entirety.

2. Aid in the air transport sector linked with the Covid-19 pandemic

Judgment of 17 February 2021, *Ryanair* v *Commission* (T-259/20, under appeal, [88] EU :T :2021:92) [89]

In March 2020, the French Republic notified the European Commission of an aid measure in the form of a deferral of the payment of civil aviation tax and solidarity tax on airline tickets due on a monthly basis during the period from March to December 2020 ('the deferral of the payment of the taxes'). That deferral, which benefits airlines holding a French licence, [90] involves postponing the payment of those taxes to 1 January 2021 and then spreading payments over a period of 24 months, that is to say, until 31 December 2022. The precise amount of the taxes is determined by reference to the number of passengers carried and the number of flights operated from a French airport.

By its decision of 31 March 2020, [91] the Commission classified the deferral of the payment of the taxes as State aid [92] compatible with the internal market, in accordance with Article 107(2)(b) TFEU. Pursuant to that provision, aid to make good the damage caused by natural disasters or exceptional occurrences is to be compatible with the internal market.

The airline Ryanair brought an action for the annulment of that decision, which is dismissed by Tenth Chamber (Extended Composition) of the General Court. In that context, the Court examines, for the first time, the legality of a State aid scheme adopted in order to address the consequences of the Covid-19 pandemic under Article 107(2)(b) TFEU. The Court also clarifies the relationship between the rules on State aid and the principle of non-discrimination on grounds of nationality laid down in the first paragraph of Article 18 TFEU, on the one hand, and the principle of the freedom to provide services, on the other.

88| Case C-210/21 P, ***Ryanair* v *Commission***.

89| See also, concerning the same issue, judgments of 14 April 2021, ***Ryanair* v *Commission (SAS, Denmark; Covid-19)*** (T-378/20, under appeal, EU:T:2021:194); of 14 April 2021 ***Ryanair* v *Commission*** (SAS, Sweden; Covid-19) (T-379/20, under appeal, EU:T:2021:195); of 14 April 2021 ***Ryanair* v *Commission (Finnair I; Covid-19)*** (T-388/20, under appeal, EU:T:2021:196); of 19 May 2021, ***Ryanair* v *Commission (TAP; Covid-19)*** (T-465/20, EU:T:2021:284), of 19 May 2021 ***Ryanair v Commission*** (Spain; Covid-19) (T-628/20, under appeal, EU:T:2021:285); of 19 May 2021 ***Ryanair* v *Commission*** (KLM; Covid-19) (T-643/20, EU:T:2021:286); of 9 June 2021, ***Ryanair* v *Commission*** (Condor; Covid-19) (T-665/20, EU:T:2021:344); and of 14 July 2021***, Ryanair and Laudamotion* v *Commission (Austrian Airlines; Covid-19)*** (T-677/20, under appeal, EU:T:2021:465).

90| Licence issued under Article 3 of Regulation (EC) N^{o} 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ 2008 L 293, p. 3).

91| Commission decision C(2020) 2097 final of 31 March 2020 concerning State aid SA.56765 (2020/N) – France – Covid-19 – Deferral of the payment of airline taxes in favour of public air transport undertakings.

92| Within the meaning of Article 107(1) TFEU.

Findings of the General Court

In the first place, the Court carries out a review of the Commission's decision in the light of the first paragraph of Article 18 TFEU, which prohibits any discrimination on grounds of nationality within the scope of application of the Treaties, without prejudice to any special provisions contained therein. However, since Article 107(2)(b) TFEU is, according to the Court, included in those special provisions, it examines whether the deferral of the payment of the taxes could be declared compatible with the internal market under that provision.

In that regard, the Court confirms, first, that the Covid-19 pandemic and the travel restrictions and lockdown measures adopted by the French Republic to deal with it, taken together, constitute an exceptional occurrence within the meaning of Article 107(2)(b) TFEU, which has caused economic damage to the airlines operating in France. Nor can it be disputed, according to the Court, that the objective of the deferral of the payment of the taxes is actually to make good the damage in question.

The Court finds, secondly, that limiting the deferral of the payment of the taxes to airlines possessing a French licence is appropriate for achieving the objective of making good the damage caused by the exceptional occurrence in question. In that regard, the Court notes that, under the regulation on common rules for the operation of air services in the Community, possession of a French licence means in practice that the principal place of business of the airlines is on French territory and that they are subject to financial and reputational monitoring by the French authorities. According to the Court, the provisions of that regulation create reciprocal obligations between the airlines holding a French licence and the French authorities and, therefore, a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(2)(b) TFEU.

As regards the proportionality of the deferral of the payment of the taxes, the Court notes, in addition, that the airlines eligible for the aid scheme are those most severely affected by the travel restrictions and lockdown measures adopted by France. The extension of that deferral to companies not established in France would not, by contrast, have made it possible to achieve the objective of making good the economic damage suffered by the airlines operating in France in so precise a manner and without a risk of overcompensation.

In the light of those findings, the Court confirms that the objective of the deferral of the payment of the taxes satisfies the requirements of the derogation laid down in Article 107(2)(b) TFEU and that the conditions for granting that aid do not go beyond what is necessary to achieve that objective. Nor therefore does that scheme amount to discrimination prohibited under the first paragraph of Article 18 TFEU.

In the second place, the Court examines the Commission's decision in the light of the freedom to provide services under Article 56 TFEU. In that respect, the Court points out that that fundamental freedom does not apply as such to the air-transport sector, which is subject to a particular set of legal rules covered by the aforementioned regulation on common rules for the operation of air services in the Community. The purpose of that regulation is precisely to define the conditions for applying the principle of the freedom to provide services within the air-transport sector. However, Ryanair did not allege any infringement of that regulation.

In the third place, the Court rejects the plea that the Commission committed a manifest error in the assessment of the value of the advantage accorded to the airlines benefiting from the deferral of the payment of the taxes. The Court finds that the amount of damage suffered by the beneficiaries of the deferral of the payment of the taxes is, in all probability, higher, in nominal terms, than the total amount, in nominal terms, of the deferral, so that the spectre of possible overcompensation must evidently be ruled out. In addition, the Court notes that the Commission took into account the commitments given by the French Republic to provide it with a detailed methodology of the way in which that Member State intended to quantify, *ex post facto* and for each beneficiary, the amount of the damage associated with the crisis caused by the pandemic, which is an additional safeguard for avoiding any risk of overcompensation.

Finally, the Court rejects as unfounded the plea alleging an infringement of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

Judgment of 17 February 2021, *Ryanair* v *Commission* (T-238/20, under appeal, [93] EU:T:2021:91)

In April 2020, the Kingdom of Sweden notified the European Commission of an aid measure in the form of a loan guarantee scheme aimed at supporting airlines holding a Swedish operating licence amid the Covid-19 pandemic ('the loan guarantee scheme'). More particularly, that scheme is aimed at airlines which, on 1 January 2020, held a Swedish licence to conduct commercial activities in aviation, with the exception of airlines operating unscheduled flights. The maximum amount of the loans guaranteed under that scheme is 5 thousand million kronor (SEK), and the guarantee must be granted until 31 December 2020 for a maximum of six years.

Taking the view that the notified scheme constituted State aid within the meaning of Article 107(1) TFEU, the Commission assessed the aid in the light of its communication of 19 March 2020, entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [94] By decision of 11 April 2020, [95] the Commission declared the notified scheme compatible with the internal market in accordance with Article 107(3)(b) TFEU. Under that provision, aid intended to remedy a serious disturbance in the economy of a Member State may be regarded as compatible with the internal market.

The airline Ryanair brought an action for annulment of that decision, which is dismissed by the Tenth Chamber (Extended Composition) of the General Court. In that context, that Chamber examines for the first time the legality of a State aid scheme adopted in order to address the consequences of the Covid-19 pandemic in the light of Article 107(3)(b) TFEU. The Court also clarifies the relationship between the rules on State aid and, on the one hand, the principle of non-discrimination on grounds of nationality laid down in the first paragraph of Article 18 TFEU and, on the other, the principle of freedom to provide services.

Findings of the General Court

In the first place, the Court reviews the Commission's decision in the light of the first paragraph of Article 18 TFEU, which prohibits any discrimination on grounds of nationality within the scope of application of the Treaties, without prejudice to any special provisions contained therein. However, since Article 107(3)(b) TFEU is, according to the Court, included in those special provisions, it examines whether the loan guarantee scheme could be declared compatible with the internal market under that provision.

93| Case C-209/21 P, ***Ryanair* v *Commission***.

94| (OJ 2020 C 91 I, p. 1), as amended by the Commission Communication, Amendment of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 112 I, p. 1).

95| Commission Decision C(2020) 2366 final of 11 April 2020 on State Aid SA.56812 (2020/N) – Sweden – COVID-19: Loan guarantee scheme to airlines.

In that regard, the Court confirms, first, that the objective of the loan guarantee scheme satisfies the conditions laid down in Article 107(3)(b) TFEU in so far as it effectively seeks to remedy a serious disturbance in the Swedish economy caused by the Covid-19 pandemic, more particularly the significant adverse effects of the pandemic on the aviation sector in Sweden and therefore on air services in the territory of that Member State.

The Court holds, secondly, that the limitation of the loan guarantee scheme to airlines in possession of a Swedish licence is appropriate for achieving the objective of remedying the serious disturbance in Sweden's economy. In that respect, the Court notes that, under the regulation on common rules for the operation of air services in the Community, possession of a Swedish licence in practice means that the principal place of business of the airlines is on Swedish territory and that they are subject to financial and reputational monitoring by the Swedish authorities. In the Court's view, the provisions of the regulation establish reciprocal obligations between the airlines holding a Swedish licence and the Swedish authorities, and therefore a specific, stable link between them that adequately satisfies the conditions laid down in Article 107(3)(b) TFEU.

With regard to the proportionate nature of the loan guarantee scheme, the Court states further that the airlines eligible for the aid scheme contribute most to Sweden's regular air service, as regards both freight and passenger transport, which meets the objective of ensuring Sweden's connectivity. The extension of that aid scheme to airlines not established in Sweden, however, would not have made it possible to achieve that objective.

Taking into consideration the different situations at issue, the Court also confirms that the Commission did not commit any error of assessment in considering that the aid scheme at issue did not go beyond what was necessary to achieve the stated objective of the Swedish authorities, which became crucial given that, at the end of March 2020, that State had recorded a drop of around 93% of the passenger air traffic in the three main Swedish airports.

In the light of those considerations, the Court confirms that the objective of the loan guarantee scheme satisfies the requirements of the derogation laid down in Article 107(3)(b) TFEU and that the conditions for granting the aid do not go beyond what is necessary to achieve that objective. Nor therefore does that scheme amount to discrimination prohibited under the first paragraph of Article 18 TFEU.

In the second place, the Court examines the Commission's decision in the light of the freedom to provide services under Article 56 TFEU. In that respect, the Court points out that that fundamental freedom does not apply as such to the air-transport sector, which is subject to a particular set of legal rules covered by the abovementioned regulation laying down common rules for the operation of air services in the Community. The purpose of that regulation is precisely to define the conditions for applying the principle of freedom to provide services within the air-transport sector. However, Ryanair had not alleged any infringement of that regulation.

In the third place, the Court rejects the plea that the Commission infringed its obligation to weigh the beneficial effects of the aid against its adverse effects on trading conditions and the maintenance of undistorted competition. In that regard, the Court points out that such a balancing exercise is not required under Article 107(3)(b) TFEU, in that the aid measures adopted to remedy a serious disturbance in the economy of a Member State, such as the loan guarantee scheme at issue, are accordingly presumed to be adopted in the interests of the European Union where they are necessary, appropriate and proportionate.

Finally, the Court rejects as unfounded the plea alleging a breach of the duty to state reasons and finds that it is not necessary to examine the substance of the plea alleging an infringement of the procedural rights under Article 108(2) TFEU.

3. Aid in the energy sector

Judgment of 15 September 2021, *CAPA and Others* v *Commission* (T-777/19, under appeal, [96] EU:T:2021:588)

In 2011 and 2013, France launched a call for tenders for the construction of the first offshore wind farms operated in France. Those six projects, which are expected to operate for 25 years, are located inside marine areas exploited as fisheries.

The projects for the construction and operation of the wind farms are subsidised by means of an obligation to purchase electricity at a price higher than the market price, in respect of which the State offsets the entirety of the additional cost.

By a decision of 26 July 2019 [97] ('the contested decision'), the European Commission found those subsidies to be State aid compatible with the internal market [98] ('the aid at issue'). It decided for that reason not to raise any objection.

Coopérative des artisans pêcheurs associés (CAPA), a company whose customers are fishermen, and 10 fisheries undertakings or skippers of fishing vessels ('the applicant fishermen') brought proceedings before the General Court seeking annulment of the contested decision, However, the Ninth Chamber (Extended Composition) of the Court dismisses that action as inadmissible, finding that the applicants do not have *locus standi* in respect of the contested decision.

Findings of the General Court

As a preliminary point, the Court recalls that the contested decision is a decision not to raise objections to the aid at issue, by which the Commission necessarily, albeit implicitly, declined to open the formal investigation procedure provided for in Article 108(2) TFEU. Since that decision prevents the 'interested parties' [99] from submitting their observations in a formal investigation procedure relating to the aid at issue, an action by those parties challenging that decision before the EU judicature is admissible since the decision infringes their procedural rights. In order to be categorised as an 'interested party', a person, undertaking or association of undertakings must establish, to the requisite legal standard, that the aid is likely to have a specific effect on his, her or its situation.

96| Case C-742/21 P, ***CAPA and Others* v *Commission***.

97| Commission Decision C(2019) 5498 final of 26 July 2019 concerning the State aid SA.45274 (2016/NN), SA.45275 (2016/NN), SA.45276 (2016/NN), SA.47246 (2017/NN), SA.47247 (2017/NN) and SA.48007 (2017/NN) implemented by the French Republic in favour of six offshore wind farms (Courseulles-sur-Mer, Fécamp, Saint-Nazaire, Île d'Yeu and Île de Noirmoutier, Dieppe and Le Tréport, Saint Brieuc).

98| Under Article 107(3)(c) TFEU.

99| Within the meaning of Article 1(h) of 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).

In respect of whether the applicant fishermen are 'interested parties' entitled to bring an action against the contested decision, the Court notes that, as grounds for their *locus standi*, they submit, first, that there is an indirect competitive relationship between their activities and those of the beneficiaries of the aid at issue and, secondly, and in any event, that the aid is likely to have a specific effect on their situation.

As regards the indirect competitive relationship claimed by the applicant fishermen, the Court notes that the applicants cannot argue that their production process involves using the same 'raw material' as that of wind farm operators. In common parlance, 'raw material' denotes a natural resource or an unprocessed product used as an input in a process to manufacture goods. In the present case, the 'raw material' of their respective economic activities is not access to the area of maritime public space used by both the fishermen and the operators of offshore wind farms but the natural resources found therein, that is to say, the fish stocks, on the one hand, and kinetic wind energy, on the other. Since those resources are different, the applicant fishermen are thus not in competition with the wind farm operators to exploit those resources.

The Court accordingly finds that the applicant fishermen cannot be regarded as 'interested parties' entitled to bring an action against the contested decision on the basis of an alleged indirect competitive relationship with the beneficiaries of the aid at issue.

As regards the claim that the aid at issue is likely to have a specific effect on the situation of the applicant fishermen, the Court then examines whether the alleged adverse effects of the operation of the wind farms on their environment – in particular on coexisting fishing activities, the marine environment and fish stocks – can be regarded as a specific effect of the grant of that aid on the situation of the fisheries undertakings concerned.

The Court states in that regard that, although in principle it is not inconceivable that aid may specifically affect the interests of third parties as a result of the effects which the subsidised development has on their environment and, in particular, on other activities carried on in the vicinity, in order for those third parties to be categorised as interested parties they must demonstrate to the requisite legal standard that such a specific effect is likely. It is furthermore not sufficient for that purpose to demonstrate that those effects exist; it is also necessary to establish that they result from the aid itself. The applicant fishermen have not provided that evidence.

The alleged effects of the projects at issue on the activities of the applicant fishermen are in fact inherent, first, in the decisions by the French authorities to locate those projects in the areas concerned as part of their policy to exploit energy resources and, second, in the rules governing maritime public space and in the technical measures applicable to those projects. Although the decision by those authorities to grant aid to the operators of those projects in the form of a purchase obligation funded by the State does give them an advantage over producers of non-subsidised electricity, it does not, on its own, affect the applicant fishermen's economic performance.

In the light of the foregoing, the Court concludes that the aid at issue cannot, on its own, be considered likely to have a specific effect on the situation of the applicant fishermen, and therefore does not give them *locus standi* to challenge the contested decision.

As regards, last, whether CAPA can be categorised as an 'interested party', the Court notes that the activity of that company, whose customers are fishermen, is determined by the economic decisions of its customers, not by the payment of the aid at issue. It follows that it has not in any event been demonstrated that the aid is likely to have a specific effect on CAPA's situation, and that it, too, cannot be categorised as an interested party.

Judgment of 6 October 2021, *Tempus Energy Germany and T Energy Sweden* v *Commission* (T-167/19, EU:T:2021:645)

By decision of 7 February 2018, [100] 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. [101]

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 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 was 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 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 clarification concerning the scope of certain provisions of the Guidelines on State aid for environmental protection and energy. [102]

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,) 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.

100| Decision C(2018) 601 final of the European Commission of 7 February 2018 not to raise objections to the aid scheme for the capacity mechanism in Poland – State aid SA.46100 (2017/N).

101| In accordance with 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.

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

In that regard, the Court rejects the argument that 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 that market 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 of 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 the 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 whether the preliminary examination carried out by the Commission in the present case had given rise to serious difficulties or doubts [103] 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.

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, secondly, 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, [104] 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.

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

104| See guidelines, paragraph 30.

V. Intellectual property – European Union trade mark

1. Absolute grounds for refusal

a) Sound mark

Judgment of 7 July 2021, *Ardagh Metal Beverage Holdings* v *EUIPO (Combination of sounds on opening a can of soft drink)* (T-668/19, EU:T:2021:420)

Ardagh Metal Beverage Holdings GmbH & Co. KG filed an application for registration of a sound sign as an EU trade mark with the European Union Intellectual Property Office (EUIPO). That sign, submitted as an audio file, recalls the sound made by a drinks can being opened, followed by a silence of approximately one second and a fizzing sound lasting approximately nine seconds. Registration was sought in respect of various drinks and metal containers for storage or transport.

EUIPO rejected the application for registration on the ground that the mark applied for was not distinctive.

In its judgment, the Court dismisses the action brought by Ardagh Metal Beverage Holdings and rules for the first time on the registration of a sound mark submitted in audio format. It clarifies the criteria for assessing the distinctive character of sound marks and the perception of those marks in general by consumers.

Findings of the General Court

First of all, the Court recalls that the criteria for assessing the distinctive character [105] of sound marks are not different from those applicable to the other categories of marks and that a sound mark must have a certain resonance which enables the target consumer to perceive it as a trade mark and not as a functional element or as an indicator without any inherent characteristics. [106] Thus, the consumer of the goods or services in question must, by the perception alone of the mark, without its being combined with other elements such as, inter alia, word or figurative elements, or even another mark, be able to associate it with their commercial origin.

Next, in so far as EUIPO applied by analogy the case-law [107] according to which only a mark which departs significantly from the norm or customs of the sector is not devoid of distinctive character, the Court emphasises that that case-law was developed in respect of three-dimensional marks consisting in the shape of the product itself or of its packaging, when there are norms or customs of the sector relating to that shape. In such

105| Within the meaning of Article 7(1)(b) 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).

106| Judgment of 13 September 2016, ***Globo Comunicação e Participações* v *EUIPO (Sound mark)*** (T-408/15, EU:T:2016:468, paragraphs 41 and 45).

107| See, in particular, judgment of 7 October 2004, ***Mag Instrument/OHMI*** (C-136/02 P, EU:C:2004:592, paragraph 31).

circumstances, the consumer concerned, who is accustomed to seeing one or several shapes corresponding to the norm or customs of the sector will not perceive the three-dimensional mark as an indication of the commercial origin of the goods if its shape is identical or similar to the usual shape or shapes. The Court adds that that case-law does not establish any new criteria for assessing the distinctive character of a mark, but merely specifies that, in the context of the application of those criteria, the perception of the average consumer is not necessarily the same in the case of a three-dimensional mark as in the case of a word, figurative or sound mark, which consists of a sign independent of the exterior appearance or shape of the goods. Consequently, the Court holds that that case-law relating to three-dimensional marks cannot, in principle, be applied to sound marks. However, even though EUIPO incorrectly applied that case-law, the Court states that that error is not such as to vitiate the reasoning set out in the contested decision, which is also based on another ground.

Regarding that other ground, based on the perception of the mark applied for by the relevant public as being a functional element of the goods in question, the Court observes, first, that the sound produced by the opening of a can will indeed be considered, having regard to the type of goods, to be a purely technical and functional element. The opening of a can or bottle is inherent to a technical solution connected to the handling of drinks in order to consume them, and such a sound will therefore not be perceived as an indication of the commercial origin of those goods. Secondly, the relevant public immediately associates the sound of fizzing bubbles with drinks. In addition, the Court observes that the sound elements and the silence of approximately one second, taken as a whole, do not have any inherent characteristic which would make it possible for them to be perceived by that public as being an indication of the commercial origin of the goods. Those elements are not resonant enough to distinguish themselves from comparable sounds in the field of drinks. Therefore, the Court confirms EUIPO's findings relating to the lack of distinctive character of the mark applied for.

Last, the Court refutes EUIPO's finding that it is unusual on the market for drinks and their packaging to indicate the commercial origin of a product using sounds alone on the ground that those goods are silent until they are consumed. The Court points out that most goods are silent in themselves and produce a sound only when they are consumed. Thus, the mere fact that a sound is made only on consumption does not mean that the use of sounds to indicate the commercial origin of a product on a specific market would still be still unusual. The Court explains nonetheless that any error on EUIPO's part in that regard does not lead to the annulment of the contested decision, because it did not have a decisive influence on the operative part of that decision.

b) Mark including an emblem – PGI symbol

Judgment of 1 December 2021, *Schmid* v *EUIPO – Landeskammer für Land- und Forstwirtschaft in Steiermark (Steirisches Kürbiskernöl g.g.A)* (T-700/20, EU:T:2021:851)

Ms Schmid is the proprietor of an EU trade mark, registered in respect of the product 'Pumpkin seed oil, corresponding to the protected geographical indication Styrian pumpkin seed oil'. That figurative mark includes the EU symbol for 'protected geographical indications' ('the PGI symbol'). For that reason, an application for a declaration of invalidity was filed with EUIPO by the Landeskammer für Land- und Forstwirtschaft in Steiermark (Regional Chamber of Agriculture and Forestry of Styria, Austria).

The Cancellation Division of EUIPO declared the contested mark invalid. The Board of Appeal of EUIPO confirmed that invalidity on the ground that the contested mark included the PGI symbol in its entirety and that neither the right nor the obligation to use that symbol covered the right to have it protected as an element of a trade mark.

The Court annuls the decision of the Board of Appeal. It considers that the Board of Appeal should have examined whether, taken as a whole, the trade mark including an emblem protected by Article 7(1)(i) of Regulation No 207/2009 [108] was likely to mislead the public as to the connection between, on the one hand, its proprietor or user and, on the other, the authority to which the emblem in question relates. It states that the various elements of which such a trade mark consists must be taken into account in that assessment.

Findings of the General Court

First of all, the Court notes that the prohibition laid down in Article 7(1)(i) of Regulation No 207/2009 applies when three cumulative conditions are fulfilled:

- the badge, emblem or escutcheon in question is of particular public interest, the existence of a connection with one of the activities of the European Union being sufficient to show that a public interest attaches to its protection;
- the competent authority has not consented to the registration;
- the trade mark including the badge, emblem or escutcheon in question is likely to mislead the public as to the connection between, on the one hand, its proprietor or user and, on the other, the authority to which the element in question relates.

As regards that third condition, it stems from the fact that the extent of the protection conferred by Article 7(1)(i) of Regulation No 207/2009 cannot be greater than that of the protection conferred upon the emblems of international intergovernmental organisations that have been duly communicated to the States Parties to the Paris Convention. [109] Such emblems are protected only when, taken as a whole, the trade mark which includes such an emblem suggests, in the public mind, a connection between, on the one hand, its proprietor or user and, on the other, the international intergovernmental organisation in question. [110]

Thus, Article 7(1)(i) of Regulation No 207/2009 is applicable where the public may believe that the goods or services designated originate from the authority to which the emblem reproduced in the trade mark refers, or that they have the approval or warranty of that authority, or that they are connected in some other way with that authority.

Next, the Court finds that the Board of Appeal failed to examine the third condition and thus erred in law. It did not assess the way in which the public would perceive the PGI symbol as a component of the contested mark, taken as a whole, or whether that perception might lead the public to believe that the goods covered by such a mark had the warranty of the European Union.

108| Article 7(1)(i) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) prohibits the registration of trade marks which include badges, emblems or escutcheons other than those referred to in Article 7(1)(h) of that regulation, that is to say, other than those of States or international intergovernmental organisations that have been duly communicated to States which are parties to the Convention for the Protection of Industrial Property signed in Paris on 20 March 1883, last revised at Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, vol. 828, No 11851, p. 305; 'the Paris Convention'), where they are of particular public interest, unless consent has been given to such registration by the competent authority.

109| Pursuant to Article 7(1)(h) of Regulation No 207/2009.

110| That condition stems from Article 6ter(1)(c) of the Paris Convention.

Last, the Court clarifies that EUIPO must not only examine whether the emblem concerned is reproduced in whole or in part in the trade mark into which it is incorporated. The various elements of which such a trade mark consists must also be taken into account in that assessment. That obligation to carry out a specific overall examination is not called into question by the fact that the grant of protection under trade mark law to the PGI symbol is, as a general rule, such as to affect adversely the system of protected geographical indications established by the European Union.

2. Withdrawal of the United Kingdom from the European Union

Judgment of 6 October 2021, *Indo European Foods* v E*UIPO* – *Chakari (Abresham Super Basmati Selaa Grade One World's Best Rice)* (T-342/20, under appeal, [111] EU:T:2021:651)

Mr Chakari applied to the EUIPO for registration of an EU figurative mark Abresham Super Basmati Selaa One World's Best Rice for rice flour and other food products made of rice. Indo European Foods Ltd filed a notice of opposition to registration of that mark on the basis of the non-registered word mark in the United Kingdom, BASMATI, used to refer to rice, which, under the applicable law in the United Kingdom, would allow it to prohibit the use of the mark applied for.

By decision of 2 April 2020, the Board of Appeal of EUIPO rejected the opposition on the ground that Indo European Foods had failed to prove that the name 'basmati' allowed it to prohibit the use of the mark applied for in the United Kingdom.

The Court annuls the decision of the Board of Appeal of EUIPO and adjudicates on the effects of the withdrawal of the United Kingdom from the European Union on pending cases relating to EU trade marks.

Findings of the General Court

In the first place, the Court holds that the withdrawal of the United Kingdom from the European Union has not rendered the dispute devoid of purpose.

First of all, it points out that the withdrawal agreement, [112] which sets out the arrangements for the withdrawal of the United Kingdom from the European Union, entered into force on 1 February 2020 and provides for a transition period from 1 February to 31 December 2020, during which EU law continues to be applicable in the United Kingdom.

Next, the Court notes that the decision of the Board of Appeal was taken on 2 April 2020, that is to say, during the transition period. Until the end of that period, the earlier mark continued to receive the same protection as it would have received had the United Kingdom not withdrawn from the European Union.

111| Case C-801/21 P, ***EUIPO* v *Indo European Foods***.

112| 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).

Finally, since the purpose of the action before the Court is to review the legality of decisions of the Boards of Appeal of EUIPO, the Court must take into account the date of the contested decision when assessing that legality. For the Court to find that the litigation becomes devoid of purpose following the withdrawal of the United Kingdom from the European Union would amount, for the Court, to taking into account matters arising after the adoption of the contested decision, which do not affect its merits.

In the second place, the Court finds that Indo European Foods retains an interest in bringing proceedings. In that regard, the Court recalls that the interest in bringing proceedings must continue until the final decision, which presupposes that the action must be able to procure an advantage to the party bringing it. First, it rejects EUIPO's argument that the trade mark applicant had no interest in bringing proceedings because, if the opposition were upheld, the applicant would be able to convert his mark into national trade mark applications in all EU Member States. Those considerations apply, in principle, to any opposition proceedings. Secondly, the Court considers that if it were to annul the decision of the Board of Appeal and refer the case back to it, the Board of Appeal would not be obliged to dismiss the action in the absence of an earlier trade mark protected by the law of a Member State. Following the annulment of a decision of the Board of Appeal, the Board of Appeal must take a new decision on that same action by reference to the situation at the time that the action was brought, since the action is again pending at the same stage as it was before the contested decision.

Moreover, the Court annuls the decision of the Board of Appeal on the ground that the Board of Appeal misapplied the legal tests for the extended form of passing off under the law applicable in the United Kingdom, in that it ruled out the risk of misrepresentation and damage to the goodwill enjoyed by the term 'basmati'.

VI. Common foreign and security policy – Restrictive measures

1. Ukraine

Judgment of 3 February 2021, *Klymenko* v *Council* (T-258/20, EU :T :2021:52) [113]

Following the suppression of demonstrations in Independence Square in Kiev (Ukraine) in February 2014, the Council of the European Union adopted, on 5 March 2014, Decision 2014/119 [114] and Regulation No 208/2014 [115] concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine. The purpose of those acts is, inter alia, to freeze the funds of persons identified as responsible for misappropriation of State funds. The applicant had been included on the list of persons and entities covered by those measures on 14 April 2014, on the ground that he was the subject of preliminary investigations

113| See also, concerning the same issue, judgment of 21 December 2021, ***Klymenko* v *Council*** (T-195/21, EU:T:2021:925).

114| Council Decision 2014/119/CFSP of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 26).

115| Council Regulation (EU) No 208/2014 of 5 March 2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2014 L 66, p. 1).

in Ukraine for offences related to the misappropriation of State funds and their illegal transfer outside Ukraine. The Council had subsequently extended that listing on several occasions, [116] on the ground that the applicant was the subject of criminal proceedings by the Ukrainian authorities for the misappropriation of public funds or assets.

Following the adoption of Decision 2020/373 [117] and Regulation 2020/370, [118] by which the Council had extended the inclusion of his name on the list at issue, maintaining the same grounds against him, the appellant brought an action for annulment of those acts.

The Court annuls those two acts in so far as they concern the applicant and recalls that it is for the Council, when it bases restrictive measures on decisions of a non-Member State, to ensure itself that, when those decisions were adopted by the authorities of the non-Member State in question, the fundamental rights recognised by the Charter of Fundamental Rights of the European Union ('the Charter') were observed.

Findings of the General Court

The Court notes, first of all, that the Courts of the European Union must review the lawfulness of all EU acts in the light of fundamental rights. The Courts of the European Union must ensure in particular that the contested act has a sufficiently solid factual basis. In that regard, although the Council may base the adoption or the maintenance of restrictive measures on a decision of a non-Member State, it must verify that that decision was taken in accordance with the rights of the defence and the right to effective judicial protection. The Court also makes clear that, while the fact that a non-Member State is among the States which have acceded to the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') entails the review, by the European Court of Human Rights ('the ECtHR'), of the fundamental rights guaranteed by the ECHR, that cannot render superfluous the requirement to carry out that verification.

In the present case, although, with reference to its duty to state reasons, the Council set out the reasons why it considered that the Ukrainian authorities' decision to initiate and conduct criminal proceedings for misappropriation of public funds had been adopted in accordance with the rights of the defence and the right to effective judicial protection, the Court recalls, however, that the duty to state reasons must be distinguished from the examination of the merits of the statement of reasons, which goes to the substantive legality of the contested acts, of which the Court ensures the review.

In that regard, the Court observes, in the first place, that the Council failed to demonstrate the extent to which the judicial decisions mentioned in the contested acts showed that the applicant's rights of defence and right to effective judicial protection had been observed in the course of the criminal proceedings. As regards, first of all, the decision of the investigating judge of 19 August 2019, the Court notes that the Council should have sought clarification from the Ukrainian authorities as to the information on which the investigating judge had based his or her view that the applicant was included on an 'international list of requested persons', in accordance with the Ukrainian Code of Criminal Procedure. As regards, moreover, the decisions of the

116| See order 10 June 2016, ***Klymenko* v *Council*** (T-494/14, EU:T:2016:360); judgments of 8 November 2017, ***Klymenko* v *Council*** (T-245/15, not published, EU:T:2017:792); of 11 July 2019, ***Klymenko* v *Council*** (T-274/18, EU:T:2019:509); of 26 September 2019, ***Klymenko* v *Council*** (C-11/18 P, not published, EU:C:2019:786); and of 25 June 2020, ***Klymenko* v *Council*** (T-295/19, EU:T:2020:287).

117| Council Decision (CFSP) 2020/373 of 5 March 2020 amending Decision 2014/119/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2020 L 71, p. 10).

118| Council Implementing Regulation (EU) 2020/370 of 5 March 2020 implementing Regulation (EU) N^{O} 208/2014 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Ukraine (OJ 2020 L 71, p. 1).

investigating judge of 1 March 2017 and 5 October 2018 and the decision of the investigating judge of 8 February 2017, the Court does not take them into account, and observes that they were, in particular, taken before the contested measures were adopted. The Court notes, finally and in any event, that not all the decisions referred to are, in themselves, capable of establishing that the decision of the Ukrainian authorities to conduct the criminal proceedings, on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of the defence and the right to effective judicial protection. All the judicial decisions referred to by the Council, which form part of the context of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list, are merely incidental in the light of those proceedings, since they are procedural in nature.

The Court considers, in the second place, that the Council also failed to demonstrate the extent to which the information available to it concerning, in particular, the process of familiarisation by the defence in criminal proceedings and the judicial decisions relating thereto, allowed it to conclude that the protection of the rights in question was guaranteed, when the Ukrainian criminal proceedings were still at the preliminary investigation stage and when the cases in question, concerning acts allegedly committed between 2011 and 2014, had not yet been examined by a court as to their substance. In that regard, the Court refers to the ECHR [119] and to the Charter, [120] according to which the principle of the right to effective judicial protection includes, inter alia, the right to a hearing within a reasonable time. The Court states that the ECtHR has already considered that a violation of that principle may be established, in particular, where the investigation phase of criminal proceedings is characterised by a certain number of stages of inactivity attributable to the authorities responsible for that investigation. On that point, the Court notes that, where a person has been subject to restrictive measures for several years, on account of the same criminal proceedings being conducted in the relevant non-Member State, the Council is required to explore in greater detail the question of a possible breach of that person's fundamental rights by the authorities. Therefore, the Council should, at the very least, have set out the reasons why it was able to consider that those rights had been observed with regard to whether the applicant's case had been heard within a reasonable time.

Consequently, the Court found that it had not been established that the Council satisfied itself that the Ukrainian judicial authorities had complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council based its decision. Therefore, it concludes that the Council made an error of assessment in maintaining the applicant's name on the list at issue, of such a kind as to entail the annulment of Decision 2020/373 and Regulation 2020/370.

However, the General Court decides, in the light of the provisions of the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union and of Article 264 TFEU, to maintain the effects of Decision 2020/373, as regards the applicant, until the annulment of Implementing Regulation 2020/370 takes effect. In so far as those two acts impose identical measures on the applicant, the existence of a difference between the date of annulment of the implementing regulation and that of the decision might, if the effects of the decision were not maintained, entail a serious breach of legal certainty.

119| Article 6(1) of the ECHR.

120| Article 47 of the Charter.

2. Syria

Judgment of 24 November 2021, *Assi* v *Council* (T-256/19, EU:T:2021:818)

Mr Bashar Assi is a businessman of Syrian nationality with interests and activities in multiple sectors of Syria's economy. His name had been 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 [121] 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, third, 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 had 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, [122] as amended by Directive 2015/1836, and in Article 15(1a)(a) of Regulation No 36/2012, [123] as amended by Regulation 2015/1828, and, secondly, on the criterion of association with the regime defined in Article 17(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 2020/719 and of Implementing Regulation 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 were well founded, in particular in view of the evidence to the contrary adduced by the applicant.

Findings of the General 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

121| 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).

122| 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).

123| 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).

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 may overlap and that a person may therefore be considered to be a leading businesswoman or businessman 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 of that airline, 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 therefore annuls Council 2020/719 and Council Implementing Regulation 2020/716 in so far as they concern the applicant.

VII. Health protection

Judgment of 5 May 2021, *Pharmaceutical Works Polpharma* v *EMA* (T-611/18, under appeal, [124] EU :T :2021:241) [125]

The applicant, Pharmaceutical Works Polpharma S.A., is a pharmaceutical company that develops and markets various medicinal products, including generic medicinal products. In June 2018, the applicant submitted to the European Medicines Agency (EMA) an application for marketing authorisation for a generic version of the medicinal product Tecfidera, composed of a single active substance. [126]

By its decision of 30 July 2018 ('the contested decision'), the EMA refused that application on the basis of the assessments that appeared in the Commission's implementing decision of 2014 ('the implementing decision'), by which the Commission had granted the company Biogen Idec marketing authorisation for the medicinal product Tecfidera. [127] EMA stated, inter alia, that, given that that reference medicinal product benefited from an eight-year period of data protection as from the date on which that authorisation was granted, [128] the applicant's application for authorisation would be accepted only on expiry of that period. In addition, EMA noted that, in the implementing decision, the Commission had taken the view that Tecfidera was not covered by the same global marketing authorisation [129] as another medicinal product, Fumaderm, which had been authorised and placed on the market in Germany and which was composed of, inter alia, the same active substance as Tecfidera. The authorisation for Fumaderm was granted in 1994 and transferred to the same company, Biogen Idec.

By its action before the Court, the applicant raised a plea of illegality in respect of the implementing decision in so far as, in that decision, the Commission had taken the view that Tecfidera was not covered by the same global marketing authorisation as Fumaderm. In addition, the applicant sought annulment of the contested decision.

The Court annuls the contested decision, ruling, first, on the admissibility of the plea of illegality and, secondly, on the conditions under which the Commission may consider that a marketing authorisation for a medicinal product composed of a single active substance which forms part of the composition of a previously authorised combination medicinal product is not covered by the same global marketing authorisation as that combination.

124| Cases C-438/21 P, ***Commission* v *Pharmaceutical Works Polpharma and EMA***, C-439/21 P, ***Biogen Netherlands* v *Pharmaceutical Works Polpharma and EMA*** and C-440/21 P, ***EMA* v *Pharmaceutical Works Polpharma***.

125| See also, concerning health protection in the context of the Covid-19 pandemic, order of 29 October 2021, ***Abenante and Others* v *Parliament and Council*** (T-527/21 R, not published, EU:T:2021:750), presented under the heading 'XIV. 1 Covid-19 pandemic'.

126| On the basis of Article 10(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67).

127| Commission Implementing Decision C(2014) 601 final of 30 January 2014 granting marketing authorisation for 'Tecfidera – Dimethyl fumarate', a medicinal product for human use, under Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

128| Pursuant to Article 14(11) of Regulation No 726/2004.

129| Within the meaning of Article 6(1) of Directive 2001/83.

Findings of the General Court

In the first place, the Court finds that the plea of illegality raised by the applicant in respect of the implementing decision is admissible.

First of all, the Court classifies the implementing decision as an 'act of general application', [130] inasmuch as the implementing decision finds that Tecfidera does not belong to the same global marketing authorisation as Fumaderm, which had previously been authorised. That decision applies to objectively determined situations on account of the finding as to the characteristics of those two medicinal products. Moreover, that decision, in so far as it implies that a period of regulatory protection of the data relating to Tecfidera is applicable, is capable of producing legal effects with respect to any operator whose activities are linked to Tecfidera and, in particular, any to operator that is capable of manufacturing a generic medicinal product derived from Tecfidera.

Next, the Court notes that, in order to demonstrate the unlawfulness of the implementing decision, the applicant is entitled to challenge the assessments that appear in the documents of the Committee for Medicinal Products for Human Use ('the CHMP') [131] relating to Tecfidera, which form the basis of, and are an integral part of the statement of reasons for, that decision. The Commission expressly relied on the CHMP's assessments in order to infer that Tecfidera and Fumaderm did not belong to the same global marketing authorisation.

Last, after carrying out a detailed analysis of the information in the file, the Court concludes that the applicant would not have been entitled to bring a direct action for annulment of the implementing decision because it did not satisfy the relevant criteria. In that regard, first, the Court states that that decision was not of individual concern to the applicant in so far as it concerned the applicant solely by reason of the applicant's objective capacity as a manufacturer of generic medicinal products, in the same way as any other economic operator in an identical situation. Secondly, the Court considers that the implementing decision entails implementing measures, in so far as that decision finds that Tecfidera does not belong to the same global marketing authorisation as Fumaderm, and that the contested decision, addressed to the applicant, constitutes one of those measures. In any event, the Court notes that the applicant's interest in seeking annulment of the implementing decision was not vested and current, but future and uncertain on the date on which the applicant would have been entitled to bring an action for annulment of that decision, in so far as it was not conceivable that the applicant it would submit an application for marketing authorisation for a generic medicinal product derived from Tecfidera on that date.

In the second place, the Court upholds the plea of illegality and finds that the contested decision, which is based on the implementing decision, is unfounded and must be annulled.

First of all, the Court observes that, in adopting the implementing decision, the Commission was faced, for the first time at EU level, with the question whether an authorised combination medicinal product, on the one hand, and a component of that combination, on the other, were or were not covered by the same global marketing authorisation. Furthermore, in answering the question whether the marketing authorisation for Tecfidera, the only active substance of which was a component of Fumaderm, was or was not covered by the same global marketing authorisation, the Commission had to take account of the fact that the state of EU law relating to combination medicinal products and scientific knowledge were significantly different from

130| Article 277 TFEU.

131| Established by Article 5(1) of Regulation No 726/2004 and forming part of EMA.

those applicable in 1994, when the national authority had granted authorisation for Fumaderm. The Commission was therefore fully entitled to request the CHMP to assess whether the only active substance in Tecfidera differed from Fumaderm, which contained, inter alia, that substance.

Next, the Court notes that, in particular cases of interest to the European Union, the Member States, the Commission, the applicant or the marketing authorisation holder may refer the matter to the CHMP, which is responsible for carrying out, at EU level, its own assessment of the medicinal product concerned, independent of that carried out by the national authorities. Thus, in the context of marketing-authorisation procedures for medicinal products, in particular at EU level, EMA and the Commission have a particular function that differs from that of the national authorities. In that sense, the principle of mutual recognition does not preclude the CHMP from examining the assessments previously carried out by a national authority or from carrying out an independent assessment. That is the case where an application for marketing authorisation is submitted at EU level for a substance that forms part of the composition of a combination medicinal product authorised 15 years previously at national level. That is all the more true since the question whether Tecfidera was covered by the same global marketing authorisation as Fumaderm, on which EMA, through the CHMP, and then the Commission, took a decision, constituted a particular case of interest to the European Union in the light of the objectives pursued by Directive 2001/83, in general, and by the concept of global marketing authorisation, in particular.

Last, the Court notes that, when the implementing decision was adopted, EMA and the Commission had, or could have had, data capable of rendering implausible the theory that the other active substance forming part of Fumaderm, but not of Tecfidera, played a role within Fumaderm. Thus, the Commission was not entitled to conclude that Tecfidera was covered by a different global marketing authorisation from Fumaderm, which had previously been authorised, without verifying, or requesting the CHMP to verify, the role played by that other active substance. Therefore, in the absence of such verification, and in view of the fact that the Commission did not analyse all the relevant data which had to be taken into consideration in order to conclude that Tecfidera and Fumaderm were covered by separate global marketing authorisations, the implementing decision is vitiated by a manifest error of assessment.

VIII. Environment

Judgment of 15 September 2021, *Daimler* v *Commission* (T-359/19, EU:T:2021:568) [132]

In the context of the application of Regulation No 443/2009, [133] which aims to reduce emissions of carbon dioxide (CO2) from light-duty vehicles, all manufacturers of passenger cars must ensure that their average specific emissions of CO2 do not exceed the specific emissions target assigned to them. [134] The regulation, which also aims to encourage investment in new technologies, provides, in particular, that CO2 savings achieved through the use of innovative technologies are to be deducted from the specific CO2 emissions of the vehicles in which those technologies are used. [135] To that end, the European Commission adopted an implementing regulation [136] establishing a procedure for the approval and certification of those innovative technologies.

In 2015, by Implementing Decision 2015/158, [137] the Commission approved two high efficient alternator models as eco-innovations for reducing CO2 emissions from passenger cars. For approval purposes, some of the alternators in question had undergone various preparation methods, falling under the generic description 'preconditioning'.

Daimler AG, a German car manufacturer which fits certain passenger cars with high efficient alternators, applied for and obtained certification from the competent German authorities of the CO2 savings achieved by the use of those alternators.

However, in 2017, following an ad hoc review of those certifications, the Commission found that the savings thus certified using a testing methodology that involved preconditioning were much higher than those that could be shown using the methodology prescribed by Implementing Decision 2015/158, [138] which did not, in

132| See also, concerning the protection of the environment, judgment of 27 January 2021, ***Poland* v *Commission*** (T-699/17, under appeal, EU :T :2021:44), presented under the heading 'II. 1. Treaty of Lisbon – Transitional provisions'.

133| Regulation (EC) No 443/2009 of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO2 emissions from light-duty vehicles (OJ 2009 L 140, p. 1).

134| Article 4 of Regulation No 443/2009.

135| Article 12 of Regulation No 443/2009.

136| Commission Implementing Regulation (EU) No 725/2011 of 25 July 2011 establishing a procedure for the approval and certification of innovative technologies for reducing CO2 emissions from passenger cars pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2011 L 194, p. 19).

137| Commission Implementing Decision (EU) 2015/158 of 30 January 2015 on the approval of two Robert Bosch GmbH high efficient alternators as the innovative technologies for reducing CO2 emissions from passenger cars pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2015 L 26, p. 31).

138| Article 1(3) of Implementing Decision 2015/158.

the Commission's view, allow for preconditioning. Consequently, in its Implementing Decision 2019/583 [139] ('the contested decision'), the Commission held that the savings attributed to Daimler AG's eco-innovations should not be taken into account in calculating its average emissions of CO2 for 2017. [140]

Daimler AG therefore brought an action for annulment of the contested decision in so far as it excluded, for Daimler AG, the average specific emissions of CO2 and the CO2 savings attributed to eco-innovations. In its judgment, the Second Chamber, Extended Composition, of the General Court upholds the action, finding that the Commission infringed the implementing regulation when it carried out the ad hoc review of the certifications of CO2 savings.

Findings of the General Court

First, the Court finds that the Commission erred in law when, in the ad hoc review of the certifications of CO2 savings, it excluded the use of a testing methodology that involved preconditioning, such as that used in the approval procedure for the alternators in question. Such an approach does not comply with Article 12 of the implementing regulation, which sets out, in particular, the procedure for that review.

By using a testing methodology that differed from the one used in the approval procedure for the alternators in question, the Commission made it impossible to compare the certified reductions in emissions with the savings set out in Implementing Decision 2015/158.

As regards the Commission's argument that its approach is justified in the light of the principles of equal treatment and legal certainty, the Court recalls, first, that the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. The Court notes, in that regard, that the testing methodology used by the Commission, which did not take into account the specific technical features of each alternator or the way in which it had been preconditioned, was liable to favour some car manufacturers and to disadvantage others.

The Court holds, moreover, that that methodology is not defined clearly and precisely in any legislation and is not standard industry practice. Accordingly, it cannot be regarded as an appropriate means of safeguarding the principle of legal certainty.

As for the Commission's objections to the use of preconditioning, which is standard industry practice, the Court holds that the Commission is able to raise objections or ask for further clarifications regarding the testing methodology at the time of the approval procedure for the alternators and not at the time of the ad hoc review.

Secondly, regarding the interpretation of Article 12(2) of the implementing regulation, which gives the Commission the right, in certain circumstances, not to take into account 'the certified CO2 savings … for the calculation of the average specific emissions of that manufacturer for the following calendar year', the Court clarifies that this right relates only to the calendar year following the year of the ad hoc review. In that regard, the Court observes that the expression 'following calendar year' cannot be interpreted as actually referring

139| Commission Implementing Decision (EU) 2019/583 of 3 April 2019 confirming or amending the provisional calculation of the average specific emission of CO2 and specific emissions targets for manufacturers of passenger cars for the calendar year 2017 and for certain manufacturers belonging to the Volkswagen pool for the calendar years 2014, 2015 and 2016 pursuant to Regulation (EC) No 443/2009 of the European Parliament and of the Council (OJ 2019 L 100, p. 66).

140| The Commission's right to carry out that review, and the procedure for carrying it out, are set out in Article 12 of Implementing Regulation No 725/2011.

to the calendar year preceding the year of the ad hoc review, as the Commission suggests. Such an interpretation is contrary to the clear and unambiguous wording of that provision and raises questions with regard to the principle of legal certainty, given that the contested decision retroactively has serious consequences for Daimler AG, whereas it should have had such consequences only for 'the following calendar year'.

Last, the Court finds that the provision of the implementing regulation at issue is clear and unambiguous, so that, contrary to the arguments put forward by the Commission, an interpretation consistent with the basic regulation, namely Regulation No 443/2009, is unnecessary.

IX. Supervision of the financial sector

Judgment of 20 January 2021, *ABLV Bank* v *SRB* (T-758/18, under appeal, [141] EU:T:2021:28)

The applicant, ABLV Bank AS, was, until 11 July 2018, a licensed Latvian credit institution as well as a 'significant entity' subject to supervision by the European Central Bank (ECB) under the Single Supervisory Mechanism (SSM).

On 13 February 2018, the United States Treasury Department announced a proposed measure to designate the applicant as an institution of primary money laundering concern. Following that announcement, the applicant was no longer able to make payments in dollars and experienced a wave of deposit withdrawals. The ECB therefore instructed the Latvian Financial and Capital Markets Commission to impose a moratorium to allow the applicant to stabilise its situation. On 23 February 2018, the ECB found that the applicant was failing or likely to fail and the Single Resolution Board (SRB) found that a resolution action in respect of the applicant was not necessary in the public interest.

The applicant paid the amounts due as *ex ante* contributions for the years 2015 and 2018, as indicated by the Financial and Capital Markets Commission.

Following the withdrawal of its licence by the ECB, on 11 July 2018, the applicant applied to the SRB for repayment of a proportion of the contributions paid for the year 2015, recalculation of the amount of its *ex ante* contribution for the year 2018 and repayment of the amounts overpaid as *ex ante* contributions.

By letter of 17 October 2018 ('the contested decision'), the SRB considered, first, that the ECB's decision concerning the applicant had no effect on its 2018 *ex ante* contribution, in that it did not require the SRB to recalculate or reimburse a proportion of that contribution. Secondly, with regard to the 2015 *ex ante* contributions, the SRB considered that the entities which had paid these contributions and whose licence had subsequently been withdrawn were not entitled to reimbursement of those contributions.

The applicant brought an action for annulment of the contested decision, relying in particular on pleas in law alleging failure to have regard to the alleged pro rata temporis nature of the *ex ante* contributions. That action is, however, dismissed by the Court, which, sitting in extended composition, rules for the first time on the non-refundable nature of the *ex ante* contributions duly received.

141| Case C-202/21 P, ***ABLV Bank* v *SRB***.

Findings of the General Court

In the first place, the Court examines the 2018 *ex ante* contribution. In that regard, it recalls, first, the annual nature of the *ex ante* contributions paid by each authorised institution established in a Member State participating in the Banking Union to the Single Resolution Fund (SRF) and, secondly, the non-refundable nature of those contributions, received in due form. [142] With regard to the annual nature of those contributions, it does not mean that they 'relate' to a specific year, with the consequence that an adjustment would necessarily have to be made when an institution loses its licence in the course of the year.

Next, the Court notes, first, that *ex ante* contributions paid to the SRF are collected from financial sector actors prior to and independently of any resolution operation. Secondly, resolution instruments can apply only to entities which are failing or likely to fail and only when necessary to achieve the objective of financial stability in the public interest. Consequently, it is only the preservation of the public interest, and not the individual interest of an institution, which is the decisive factor for the use of the SRF. In that regard, the Court states that the payment of the *ex ante* contributions does not guarantee any consideration, but is intended to provide the SRF with funds, in the public interest, and to ensure the stability of the European banking system. The applicant therefore paid its compulsory contribution to the SRF for the year 2018, as an actor in the financial sector, entrusted by the legislature with the task of financing the stabilisation of the financial system.

Finally, if the SRB had to take into account the evolution of the legal and financial situation of credit institutions during the contribution period concerned, it would be difficult, first, to calculate reliably and stably the contributions due by each of those institutions and, secondly, to pursue the objective of reaching, at the end of an initial period, at least 1% of the amount of deposits covered by all authorised credit institutions in the territory of a Member State.

In the second place, the Court examines the interpretation of the concept of 'change of the status' of a credit institution. [143] Thus, relying on the case-law of the Court of Justice according to which that concept may cover any kind of change in the legal or factual situation of an institution, [144] the Court concludes that the withdrawal of a credit institution's licence by the ECB falls under that concept, which must be understood as including the cessation of activity of an institution as a result of the loss of its licence during the contribution period. The Court also clarifies that such withdrawal does not affect the obligation of an institution to pay the full *ex ante* contribution due in respect of that contribution period.

As regards, in the third and last place, the reimbursement of the remaining balance of the *ex ante* contribution paid by the applicant for 2015, the Court notes first that the national resolution funds, created in 2015, had to be progressively replaced by a Single Resolution Fund common to all Member States forming part of the Banking Union. In that context, as a first step, the Member States had to levy *ex ante* contributions on institutions authorised in their territory as from 1 January 2015. As a second step, the contributions thus

142| Article 70(4) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

143| Article 12(2) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

144| Judgment of 14 November 2019, ***State Street Bank International*** (C-255/18, EU:C:2019:967).

received by the Member States were transferred to the SRF. [145] After their transfer, no distinction is made between contributions according to the year or the legal basis by reference to which they were collected. Therefore, both the contributions for 2015 and those for subsequent years are put together and mixed in that fund.

Next, the Court notes that the provision relating to the calculation method of the individual contributions of each institution by the SRB, during the initial period (2016 to 2023), makes no mention of a right to reimbursement of contributions for 2015 in the event that an institution withdraws from the resolution system during that period. Nor does that provision provide that the contributions for 2015 are advance payments for the initial period of the SRF. [146] Where that provision provides that the *ex ante* contributions are to be deducted from the amount owed by each institution, the aim pursued by that provision is to 'incorporate' the amounts transferred to the SRF into the calculation of individual contributions. Thus, when an institution loses its licence, it will no longer have to pay contributions in the future and is therefore no longer concerned by that calculation method. Consequently, the contributions for 2015 are not advance payments for the initial period of the SRF and, therefore, do not have to be reimbursed when an institution loses its licence. However, it cannot be ruled out that the calculation of an institution's annual contribution for, for example, 2018 may result, following the deduction of the contribution for 2015, in a negative amount and the payment of the corresponding sum to that institution. That reimbursement is however not based on the pro rata temporis principle, but rather on the result of a mathematical operation carried out to determine the amount of the annual contribution of that institution for 2018. Moreover, although the amount of the contributions for 2015 was set by the national resolution authorities, those contributions are to be considered as contributions to the SRF, [147] in the same way as those calculated by the SRB, owing to the fact that the contributions, once transferred, are put together and mixed in the SRF.

Finally, the Court concludes that the SRB was correct to hold that the withdrawal of a credit institution's licence by the ECB, during the contribution period, did not entitle that institution to a refund of the sums paid in respect of its *ex ante* contributions duly received.

145| Article 3 of the Intergovernmental Agreement on the Transfer and Pooling of Contributions to the SRF, signed in Brussels on 21 May 2014.

146| Article 8(2) of Council Implementing Regulation (EU) 2015/81 of 19 December 2014 specifying uniform conditions of application of Regulation (EU) No 806/2014 of the European Parliament and of the Council with regard to *ex ante* contributions to the Single Resolution Fund (OJ 2015 L 15, p. 1).

147| Article 70 of Regulation No 806/2014.

Judgment of 6 October 2021, *Ukrselhosprom PCF and Versobank* v *ECB* (T-351/18 and T-584/18, under appeal, [148] EU:T:2021:669)

Versobank AS is a credit institution established in Estonia, whose main shareholder is Ukrselhosprom PCF LLC.

Versobank, as a less significant credit institution, was under the prudential supervision of Finantsinspektsioon (FSA, Estonia), acting as the national competent authority (NCA). [149] The latter authority was also competent in relation to, inter alia, the monitoring of compliance with rules intended to combat money laundering and the financing of terrorism ('AML/CFT').

From 2015 onwards, the FSA identified recurring breaches by Versobank in connection with, first, the ineffectiveness of its AML/CFT regime as regards the management of the risks stemming from its business model and, secondly, the inadequacy of the AML/CFT governance arrangements which it had put in place. After carrying out an on-site inspection and sending Versobank a number of notices to comply with the legal requirements, the FSA adopted a precept requiring Versobank to remedy immediately the shortcomings identified during that inspection and requiring it to take certain steps.

Following further on-site inspections, the FSA found that Versobank had still not complied with all the obligations imposed by that precept and considered it necessary to carry out a thorough investigation. Thus, it found that there had been material and severe breaches of AML/CFT legislation.

On 8 February 2018, the ECB received from the FSA a proposal to withdraw Versobank's license. [150] On 26 March 2018, the ECB adopted and notified to Versobank its decision to withdraw Versobank's banking license. [151]

Following a request by Ukrselhosprom PCF for review of the ECB's decision of 26 March 2018, the Governing Council of the ECB adopted the decision of 17 July 2018, [152] which repealed and replaced the decision of 26 March.

The Court, sitting in an extended composition, considers that there is no need to adjudicate on Case T-351/18. In addition, in Case T-584/18, the Court dismisses the action of Ukrselhosprom PCF and Versobank in its entirety.

148| Case C-803/21 P, ***Versobank* v *ECB***.

149| Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63; 'the Basic SSM Regulation'), Articles 2(2) and 6 (the Basic SSM Regulation).

150| Regulation (EU) No 468/2014 of the ECB of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and NCAs and with national designated authorities (OJ 2014 L 141, p. 1; 'the SSM Framework Regulation'), Article 80.

151| Decision of the European Central Bank ECB/SSM/2018_EE_1 WHD_2017-0012 of 26 March 2018 withdrawing the banking licence of Versobank AS ('the decision of 26 March 2018').

152| Decision ECB/SSM/2018_EE_2 WHD_2017-0012 of the European Central Bank (ECB) of 17 July 2018, replacing the ECB's initial decision of 26 March 2018, to withdraw the authorisation of the credit institution Versobank ('the decision of 17 July 2018').

Findings of the General Court

In the first place, the Court finds that there is no longer any need to adjudicate on the action brought in Case T-351/18, seeking annulment of the decision of 26 March 2018.

In that regard, after recalling the scope and conduct of the procedure for the administrative review of ECB decisions, [153] the Court points out that the decision adopted following that review is retroactive to the time at which the initial decision took effect, whatever the outcome of that review. Thus, the replacement of the initial decision by an identical or amended decision at the end of the review procedure results in the definitive disappearance of the original decision from the legal order.

In the present case, the Court notes that the decision of 17 July 2018 was adopted following the administrative review of the decision of 26 March 2018 and is identical in content to that decision. Therefore, by its decision of 17 July 2018, the ECB replaced the decision of 26 March 2018 with retroactive effect to the time at which the latter decision took effect and did not merely abrogate that decision for the future. Consequently, Ukrselhosprom PCF and Versobank retain no interest in obtaining the annulment of the decision of 26 March 2018 and the action against that act is devoid of purpose.

In the second place, in relation to the action brought by Ukrselhosprom PCF and Versobank in Case T-584/18, the Court, first, confirms the ECB's competence to withdraw the authorisation of a credit institution and, more specifically, to adopt the decision of 17 July 2018. Thus, it states that a decision establishing that the resolution of a credit institution is not in the public interest, such as that adopted by the FSA in its functions as a national resolution authority, does not in any way prohibit the ECB from subsequently adopting a decision withdrawing authorisation. Moreover, the coexistence of the SSM and the Single Resolution Mechanism (SRM), which share the same mission of protecting the stability and safety of the European Union's financial system, cannot be understood as precluding the possibility for the competent authority for prudential supervision, in the present case the ECB, to withdraw authorisation, in the absence of the conditions required for adopting a resolution measure, namely where the credit institution in question is not at risk of becoming unviable.

Secondly, the Court confirms the power of the ECB to adopt a decision withdrawing authorisation on the ground of infringement of AML/CFT obligations, recalling that withdrawal of authorisation is also provided for where a credit institution fails to comply with those obligations. [154] Accordingly, the Court finds that it was therefore without disregarding the division of powers between the NCAs of the participating Member States and the ECB under the SSM that the facts constituting breaches of the AML/CFT legislation were established by the FSA, whereas the legal assessment of whether those facts justified withdrawal of authorisation and the assessment of proportionality were reserved for the ECB.

Thirdly, the Court holds that the notification procedure, known as the 'passporting' procedure, is binding in nature. [155] Thus, it recalls that a credit institution wishing to establish a branch within the territory of another Member State is to notify the competent authorities of its home Member State. [156] Moreover, the Court states that the fact that the notification procedure is not purely a formality stems (i) from the power of the competent

153| As described in Article 24(1) and (7) of the Basic SSM Regulation.

154| 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. 67), Article 67.

155| Directive 2013/36, Article 39.

156| Directive 2013/36, Article 35.

authority of the home Member State to refuse to communicate that information to the competent national authority of the host Member State and (ii) from the margin of discretion which that first authority enjoys when assessing that information.

Fourthly, as regards breach of the principle of proportionality, the Court considers that, in the present case, the withdrawal of authorisation did not go beyond what was appropriate and necessary to attain the objectives of putting an end to the breaches committed by Versobank. Furthermore, the Court notes, inter alia, that the options of self-liquidation and sale to another investor did not constitute alternative measures to the withdrawal of authorisation for the purposes of achieving the objectives lawfully pursued by the ECB.

Fifthly, the Court rejects the arguments alleging infringement of the principle of equal treatment and non-discrimination on the ground that there was no comparative analysis of the breaches alleged against Versobank by comparison with those committed by other credit institutions. According to the Court, such an analysis is not necessary in order to challenge any unlawful conduct whatsoever on the part of a natural or legal person.

Sixthly, and lastly, the Court rejects the arguments alleging breach of Ukrselhosprom PCF's right of access to the file. Adjudicating on the first request for access to the file, the Court notes that the ECB did not err in not granting that request since Ukrselhosprom PCF was not a party concerned [157] at the time that request was made. Furthermore, as regards the second request for access made in the course of the review procedure, the Court notes that the Administrative Board of Review accepted that request as it was made in Ukrselhosprom PCF's capacity as an applicant for review. [158]

157| The Basic SSM Regulation, Article 22(2); the SSM Framework Regulation, Articles 26 and 32.

158| Decision 2014/360/EU of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules (OJ 2014 L 175, p. 47), Article 20.

X. Public procurement by the EU institutions

Judgment of 21 April 2021, *Intering and Others* v *Commission* (T-525/19, EU :T :2021:202) [159]

On 19 March 2019, the European Union, represented by the European Commission, published a contract notice relating to a call for tenders for the award of a contract for dust and nitrogen oxide reduction measures at Kosovo B thermal power plant, Units B1 and B2 [160] ('the call for tenders'). The applicants, four commercial companies, formed a consortium and expressed their interest in participating in the restricted tendering procedure in question.

On 7 June 2019, the Commission informed the applicants that their tender had not been pre-selected on the ground that it did not meet the criteria set out in paragraph 17.2(a) and (c) of the contract notice relating to the selection and award criteria with regard to the technical and professional capacity of the tenderer ('the decision of 7 June 2019'). In accordance with paragraph 17.2(a) of the contract notice, the tenderer must have completed at least one project of the same nature and complexity covering certain categories clearly defined in the contract notice, executed on lignite fired power plants with rated electrical output of at least 200 megawatts (MW), in the last 8 years. Pursuant to paragraph 17.2(c), in the case of a tender from a joint venture or consortium, its Lead member must have the ability to carry out at least 40% of the contract works by its own means.

On 30 July 2019, the Commission informed the applicants, first, that the decision of 7 June 2019 had been annulled owing to the lack of clarity of the selection criterion set out in paragraph 17.2(c) of the contract notice which had consequently been removed from the selection criteria and, secondly, that their tender had again been rejected ('the decision of 30 July 2019'). It had been found that their tender did not contain any evidence that the criterion relating to technical and professional capacity set out in paragraph 17.2(a) of the contract notice had been met.

On 18 October 2019, the contract was definitively awarded to another consortium ('the decision of 18 October 2019'). Consequently, the applicants brought an action seeking annulment of the decision of 30 July 2019 to exclude the applicants from the restricted tendering procedure in question and, in the reply, annulment of the decision of 18 October 2019 relating to the award of the contract.

By its judgment, the Court upholds in part the applicants' action and annuls the Commission's decision of 30 July 2019 on the ground that, by removing the criterion set out in paragraph 17.2(c) of the contract notice, whilst continuing the public procurement procedure, the Commission failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency. In this judgment, the Court thus decides, for the first time that, where the contracting authority annuls a decision relating to a selection criterion, it authority cannot, without infringing those principles, validly continue the tender procedure leaving aside that criterion. That rule, which already existed for award criteria, now also applies to selection criteria.

159| See also, concerning an application for interim measures in relation to public procurement by the EU institutions, order of 26 May 2021, ***OHB System*** **v** ***Commission*** (T-54/21 R, not published, EU:T:2021:292), presented under the heading 'XIV. 3. Public procurement by the EU institutions'.

160| EuropeAid/140043/DH/WKS/XK.

Findings of the General Court

First, with regard to the argument put forward by the applicants that the Commission failed to submit its defence within the time limit set, the Court finds that the applicants' claim stems from confusion between the date of lodging the defence at the Court Registry, on the one hand, and its notification to the applicants, on the other. The Court observes in that regard that it is apparent from the documents in the file that the defence was lodged at the Court Registry on 8 October 2019, [161] and therefore within the two-month time limit, [162] extended on account of distance. [163] Accordingly, it was appropriate for the written stage of the procedure to be continued.

Secondly, as regards the claim for annulment of the decision of 18 October 2019 put forward by the applicants in their reply, the Court points out that a case is brought before the Court of Justice of the European Union by a written application addressed to the Registrar and not, as in the present case, by the lodging of a document in the course of proceedings which are already pending. [164] In that regard, the Court notes that the applicants, in the event that they simply intended to modify the form of order sought to cover that decision as well, must indicate the subject matter of the proceedings and set out the form of order sought in the application initiating proceedings. [165] Subject to the existence of certain circumstances, [166] only the form of order set out in the originating application may be taken into consideration and the substance of the action must be examined solely with reference to the form of order sought in the application initiating proceedings.

In that regard, having examined whether the application for annulment of the decision of 18 October 2019 falls within the scope of such circumstances, the Court notes that, whilst that decision was taken subsequent to the commencement of the present action, it neither replaces nor modifies the decision of 30 July 2019. Consequently, noting that the applicants cannot modify, at the time of the reply, the form of order sought to cover the decision of 18 October 2019 as well, the Court considers that the application for annulment of the latter decision is manifestly inadmissible.

Thirdly, as regards the action brought against the decision of 30 July 2019, the Court notes that the principles of equal treatment and transparency of award procedures imply an obligation on the part of contracting authority to interpret the award criteria in the same way throughout the procedure and that they must not be amended in any way during the tender procedure. It follows that, where the contracting authority annuls a decision relating to an award criterion, that authority cannot, without infringing the principles of equal treatment and transparency, validly continue the tender procedure leaving aside that criterion, since that would be tantamount to amending the criteria applicable to the procedure in question.

In that regard, the Court notes that those principles are applicable *mutatis mutandis* to the selection criteria. Even though the selection criteria applied during the first stage of a restricted tendering procedure are more objective in nature, in so far as they do not involve a weighing or balancing exercise, the fact remains that

161| Article 6 of the Decision of the General Court of 11 July 2018 on the lodging and service of procedural documents by means of e-Curia.

162| Article 81(1) of the Rules of Procedure of the General Court.

163| Article 60 of the Rules of Procedure of the General Court.

164| Article 21 of the Statute of the Court of Justice of the European Union, applicable to the General Court pursuant to Article 53 of that Statute.

165| Article 76 of the Rules of Procedure of the General Court.

166| Article 86 of the Rules of Procedure of the General Court.

the withdrawal, during a tendering procedure, of one of the selection criteria may have consequences and conflict with the principle of equal treatment. Accordingly, the withdrawal of that criterion has an impact on any tenderer who participated in the tendering procedure and was excluded from the remainder of the procedure for failing to meet the selection criterion which was subsequently withdrawn. Similarly, its withdrawal affects the position of any potential tenderer who did not participate in the call for tenders on the ground, in particular, that he considered that he was unable to meet the criterion which was subsequently removed without his knowledge.

The Court therefore finds that, by removing the criterion set out in paragraph 17.2(c) of the contract notice, whilst continuing the public procurement procedure, the Commission failed to fulfil its obligations under the principle of equal treatment and the consequent obligation of transparency.

Consequently, the Court upholds in part the applicants' action and annuls the Commission's decision of 30 July 2019 rejecting their request to participate in the restricted tendering procedure in question.

XI. Arbitration clause

Judgment of 24 February 2021, *Universität Koblenz-Landau* v *EACEA* (T-108/18, under appeal, [167] EU :T :2021:104)

Universität Koblenz-Landau (University of Koblenz-Landau, Germany) ('the applicant') is a German higher-education institution governed by public law.

In 2008 and 2010, within the framework of the European Union's cooperation with third countries for the modernisation of the higher-education systems of those countries, the applicant signed three grant agreements. The first agreement was signed between the applicant, as sole beneficiary, and the European Commission. The last two agreements were signed inter alia between the applicant, as coordinator and co-beneficiary, and the Education, Audiovisual and Culture Executive Agency (EACEA). The EACEA paid grants to the applicant under these three agreements.

By two letters of 21 December 2017 and 7 February 2018, the EACEA informed the applicant that it had decided to recover the grants paid in whole or in part. The total sum claimed under the three agreements amounted to EUR 1 795 826.30.

In 2018, the applicant brought an action under Article 263 TFEU, seeking annulment of the two letters of the EACEA relating to the amounts paid to the applicant in the context of the grant agreements.

In support of its action, the applicant relied in particular on three pleas in law, alleging (i) breach of the right to be heard, (ii) 'misapplication of EU law' and (iii) failure to state reasons. By its judgment, the Court, sitting in extended composition, dismisses the action and in doing so clarifies, in particular, the possibility of relying on the right to be heard and the obligation to state reasons in the context of a dispute of a contractual nature and examines the question whether the full recovery of a grant is consistent with the provisions of the applicable Financial Regulation.

167| Case C-288/21 P, ***Universität Koblenz-Landau* v *EACEA***.

Findings of the General Court

After finding the claim for annulment inadmissible on the ground that there is no a challengeable act within the meaning of Article 263 TFEU, and reclassifying the action as being based on Article 272 TFEU, seeking a declaration that the debts claimed under the grant agreements do not exist, the Court examines the first and the third pleas together.

In this respect, it rejects the EACEA's argument that the right to be heard and the obligation to state reasons cannot be usefully relied on in the context of a dispute of a contractual nature. Those rights have been enshrined in Article 41(2)(a) and (c) of the Charter of Fundamental Rights of the European Union ('the Charter'), which forms part of primary law. According to the case-law of the Court of Justice and the General Court, the fundamental rights of the Charter are designed to preside over the exercise of the powers conferred on the EU institutions, including in contractual matters, in particular during the performance of the contract. In addition, the Court recalls that if, as in the present case, an arbitration clause included in the contract confers jurisdiction on the EU Courts to hear disputes relating to that contract, those Courts will have jurisdiction, independently of the applicable law stipulated in that contract, to examine any infringements of the Charter or of the general principles of EU law.

As for the possible infringement of the right to be heard, the Court determines whether the EACEA gave the applicant the opportunity to make its views known usefully and effectively before communicating to it the letters at issue and the debit note issued under the first grant agreement. The Court recalls that, according to the case-law of the Court of Justice, the EU institutions, bodies, offices and agencies are required, in accordance, in particular, with the requirements of the principle of good administration, to respect the principle of adversarial proceedings in the context of an audit procedure, such as that in the present case. Those entities must obtain all relevant information, in particular that which the other party to the contract is in a position to provide, before they envisage proceeding with recovery.

The Court points out, in that regard, that the EACEA communicated the relevant documents to the applicant and informed it of its intention to recover the grants at issue on the basis of the possibly systemic and recurrent nature and the seriousness of the irregularities found in the audit. Noting that the applicant was requested to state its position concerning the auditors' findings, and that it did in fact do so in detail, the Court rejects as unfounded the plea alleging infringement of the right to be heard.

As for the possible breach of the obligation to state reasons, the Court recalls that the reasons given for a measure are sufficient if that measure was adopted in a context which was known to the addressee concerned and which enables him or her to understand the scope of the measure concerning him or her. The Court finds that the letters in question clearly identify the legal basis for the intended recovery and that the numerous written exchanges between the parties allowed the applicant to understand the reasons why the EACEA decided to claim the repayment in question and the manner in which the amounts to be repaid were determined. In this respect, the EACEA relied on the final audit report, which took account of all of the applicant's observations and the evidence which it submitted, examined them and rejected them individually, explaining on each occasion the reasons why those observations or that evidence did not call into question the findings reached by the auditors. Accordingly, the Court also rejects that plea as unfounded.

In addition, the Court rejects the plea alleging misapplication of EU law, whereby which the applicant claims that neither the agreements at issue nor EU law allow the EACEA to recover in full the amounts paid to it under the agreements at issue. After examining the contractual provisions and the relevant provisions of the applicable Financial Regulations, as interpreted by the EU Courts, according to their respective wording, the Court finds that they do not, in principle, prevent the EACEA from recovering the full amounts paid to the applicant under the agreements at issue.

Judgment of 10 November 2021, *Jenkinson* v *Council and Others* (T-602/15 RENV, under appeal, [168] EU:T:2021:764)

The applicant, an Irish national, was employed from August 1994 to November 2014 within three EU international missions under a series of consecutive fixed-term contracts ('FTCs'), with brief breaks between the periods of employment in each of those missions. Between April 2010 and November 2014, he was last employed as an international staff member by the Eulex Kosovo Mission, an international crisis management mission established within the framework of the Common Foreign and Security Policy (CFSP). His 11th and final FTC was not renewed beyond 14 November 2014, owing to a decision to restructure that mission, which entailed the abolition of his post.

In October 2015, the applicant brought an action before the Court against the Council of the European Union, the European Commission, the European External Action Service and the Eulex Kosovo Mission (together; 'the defendants'). By that action, he claimed, in essence:

- first, the recategorisation of all the consecutive FTCs as an employment contract of indefinite duration ('CID') and compensation for the contractual damage sustained as a result of the misuse of consecutive FTCs and the unlawful termination of the CID thus recategorised ('the first head of claim');
- secondly, compensation for the non-contractual damage which he sustained as a result of not being recruited under the conditions of employment for staff of the European Union ('the second head of claim'), and
- thirdly, and in the alternative, compensation for the harm suffered on account of the fact that the defendants, in the contractual relationship which they imposed on him, infringed a number of general principles of EU law ('the third head of claim').

By order of 9 November 2016, [169] the General Court dismissed that action, on the grounds that it manifestly lacked jurisdiction to hear and determine the first two heads of claim and that the third head of claim was manifestly inadmissible. However, by judgment of 5 July 2018, [170] delivered on appeal by the applicant, the Court of Justice set aside that order and referred the case back to the General Court.

By its judgment delivered following that referral, the Court declares that it has jurisdiction to hear and determine the three heads of claim, but nevertheless again dismisses the action in its entirety as in part unfounded and in part inadmissible. In that judgment, the Court rules on the extent of the jurisdiction enjoyed by the EU Courts under an arbitration clause and on the question of which arrangements and law apply to contracts of employment for international civilian staff in EU international missions.

168| Case C-46/22 P, ***Jenkinson* v *Council and Others***

169| Order of 9 November 2016, ***Jenkinson* v *Council and Others*** (T-602/15, EU:T:2016:660).

170| Judgment of 5 July 2018, ***Jenkinson* v *Council and Others*** (C-43/17 P, EU:C:2018:531).

Findings of the General Court

First of all, the Court confirms that it has jurisdiction to resolve the dispute.

As regards the first head of claim, seeking, in essence, the recategorisation of all the consecutive FTCs as a CID and compensation for the associated contractual damage, the Court notes that its jurisdiction derives from an arbitration clause, within the meaning of Article 272 TFEU, contained in the applicant's final FTC and conferring jurisdiction on the EU Courts over any dispute relating to the contract. In particular, it considers that that jurisdiction extends to the review of the FTCs preceding the final contract even though they did not contain such an arbitration clause, since the applicant's claims are linked to the existence of a single, continuous employment relationship based on a series of consecutive FTCs, claims also stemming from the final FTC.

As regards the second and third heads of claim, concerning, in essence, the defendants' potential non-contractual liability for acts of staff management relating to 'field' operations, including the recruitment of international civilian staff in EU international missions, the Court's jurisdiction to hear and determine those heads of claim flows from the general provisions of the FEU Treaty conferring jurisdiction on the EU Courts over disputes concerning non-contractual liability. [171]

Next, in its examination of the merits of the first head of claim, the Court notes, as a preliminary point, that in the light of the arbitration clause conferring jurisdiction on it, it must decide on the claim for recategorisation of the 11 FTCs concluded with the Eulex Kosovo Mission in accordance with the national substantive law on employment applicable to those contracts, with due regard to the general principles of EU law, in particular the prohibition on abuse of rights. In order to determine the applicable law, the Court has recourse to the rules of private international law and, in particular, to the provisions of the Rome I Regulation. [172]

Going on to consider the 11 FTCs in the light of those provisions, the Court concludes that Irish law should be applied to the whole of the contractual relationship entered into under those contracts. As regards the first nine FTCs, the Court finds, by applying the rule of the choice of law made by the parties, [173] that the contracting parties designated the law of the applicant's country of origin and permanent tax residence before he took up his post in the mission, namely Irish law, as the applicable national law on employment. As regards the last two FTCs, which did not contain any provision on the choice of applicable law, the Court applies the 'most closely connected' rule, [174] leading it to conclude that those two contracts remain subject to Irish law inasmuch as there was, in fact, a continuous employment relationship between the parties beginning with the first of the 11 FTCs and as the tax, social security and pension schemes covering the applicant were governed, in accordance with the last 2 FTCs, by Irish law.

171| See Article 268 TFEU, read with the second paragraph of Article 240 TFEU.

172| Regulation (EC) N^{o} 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

173| See Article 8(1) of the Rome I Regulation.

174| See Article 8(4) of the Rome I Regulation.

Thus, under the Irish legislation applicable to FTCs, [175] which transposes the relevant EU legislation, [176] after a maximum period of employment relationships, the subsequent renewal of an FTC presupposes the existence of 'objective reasons' justifying such renewal, without which the renewed contract is deemed to be of indefinite duration.

Since the Court finds that, in the present case, the maximum period permitted under Irish law was exceeded when the last two FTCs at issue were concluded, it examines whether there were objective reasons justifying their conclusion. It considers, in that regard, that the circumstances specific to the Eulex Kosovo Mission, notably the temporary and ever-changing nature of its mandate, in terms of duration, content and financing, which necessarily determine the equally temporary nature of the conditions of employment of its staff, constitute objective reasons justifying recourse to the consecutive FTCs at issue. As regards, more particularly, the final FTC, the Court acknowledges, in addition, that there were other, even more specific and detailed objective reasons for the decision to abolish the applicant's post following the restructuring of the mission, the date of termination of that final contract coinciding with the date scheduled for the abolition of his post. It infers from this that there was no abuse when the offer to conclude the FTCs at issue was made to the applicant.

Consequently, the Court rejects the claim for recategorisation of the FTCs as a single CID and, therefore, also rejects the resulting contractual compensation claim.

Moreover, the Court also rejects as unfounded the second head of claim, whereby the applicant seeks, in essence, compensation for the non-contractual damage which he claims to have sustained as a result of having been recruited as an international civilian staff member on a contractual basis rather than under the more favourable rules applying to EU staff seconded to the mission in question. In that regard, the Court considers, in particular, that EU primary law relating specifically to the CFSP and the legislative provisions concerning the Eulex Kosovo Mission provided a legal basis allowing the applicant to be recruited as an international civilian staff member on a contractual basis and that there was no discrimination or unequal treatment of the applicant by comparison with other contractual staff of that mission or other EU staff seconded to it.

Finally, the Court rejects the applicant's last head of claim as manifestly inadmissible because it lacks clarity and precision as to the existence of a sufficiently direct causal link between the infringements allegedly committed by the defendants and the damage claimed. Accordingly, the Court dismisses the action in its entirety.

175| Protection of Employees (Fixed-Term Work) Act 2003.

176| Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43) and the framework agreement itself set out in the annex thereto.

XII. Access to documents of the institutions

1. Exception relating to the protection of commercial interests

a) Protection by copyright

Judgment of 14 July 2021, *Public.Resource.Org and Right to Know* v *Commission* (T-185/19, under appeal [177] EU:T:2021:445)

Public.Resource.Org, Inc. and Right to Know CLG, the applicants, are non-profit organisations whose main focus is to make the law freely accessible to all citizens. On 25 September 2018, they made a request to the European Commission for access to four harmonised standards adopted by the European Committee for Standardisation (CEN) concerning, in particular, the safety of toys. [178]

The Commission refused to grant the request for access on the ground that those standards were protected by copyright. The refusal was based on the first indent of Article 4(2) of Regulation No 1049/2001, [179] pursuant to which access to a document must be refused where disclosure would undermine the protection of the commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure of the document in question.

The Court dismisses the action brought by the applicants and clarifies the scope of the review to be carried out by the EU institutions in order to find that there is an effect on commercial interests stemming from copyright protection for the requested documents.

Findings of the General Court

In the first place, the Court finds that the applicants have an interest in obtaining disclosure of the requested harmonised standards. In that regard, it reiterates that a person who is refused access to a document has already, by virtue of that very fact, established an interest in the annulment of the decision refusing access. Furthermore, the Court states that the possibility of consulting the requested harmonised standards on site in certain libraries does not affect the applicants' interest in bringing proceedings since, by that consultation, they do not obtain full satisfaction in the light of the objective which they pursue, which is to obtain freely available access to those standards without charge. As regards paid access to those standards, the Court finds that it also does not correspond to the objective pursued by the applicants.

177| Case C-588/21 P, ***Public.Resource.Org and Right to Know* v *Commission and Others***.

178| The standards concerned are EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and EN 12472:2005 + A1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items'.

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

In the second place, the Court holds that the Commission complied with the scope of the review required of it when applying the exception relating to the protection stemming from copyright.

First of all, the Court states that ultimate responsibility for the proper application of Regulation No 1049/2001 lies with the institution to which the request for access is addressed. In that regard, it observes that if that institution considers that it is clear that access to a document emanating from a third party must be refused because of copyright protection, it must refuse access to the applicant without even having to consult the third party from whom the document emanates.

Next, the Court notes that copyright remains largely governed by national law and that the extent of the protection conferred by copyright is governed exclusively by the laws of the country where protection is claimed. It then states that it is for the authority which has received a request for access to documents from a third party, where there is a claim for copyright protection for those documents, inter alia, to identify objective and consistent evidence such as to confirm the existence of the copyright claimed by the third party concerned. Such a review corresponds in fact to the requirements inherent in the division of competences between the European Union and the Member States in the field of copyright.

Last, the Court observes that in the present case the Commission based its finding on the existence of copyright protection for the requested harmonised standards on objective and consistent evidence such as to support the existence of the copyright claimed by CEN for those standards. In addition, it finds that the Commission did not err in finding that the necessary threshold of originality to be covered by copyright protection had been met for the harmonised standards in question.

In the third place, the Court finds that there was no overriding public interest justifying the disclosure of the requested harmonised standards. In that regard, the Court points out that the onus is on the party arguing for the existence of an overriding public interest to rely on specific circumstances to justify the disclosure of the documents concerned. The applicants put forward a generic ground that harmonised standards form part of 'EU law' which should be freely accessible to the public without charge, without explaining in what respect such considerations ought to prevail over the protection of the commercial interests of CEN or its national members. Accordingly, the Court endorses the Commission's assessment that the public interest in ensuring the functioning of the European standardisation system prevails over the guarantee of freely available access to the harmonised standards without charge. In addition, it points out that the applicants do not explain why those standards should be subject to the requirement of publication and accessibility attached to a 'law', inasmuch as such standards are not mandatory and produce the legal effects attached to them solely with regard to the persons concerned.

b) Research project financed by the European Union

Judgment of 15 December 2021, *Breyer* v *REA* (T-158/19, EU :T :2021:902)

In 2016, the European Research Executive Agency (REA) concluded a grant agreement with a consortium concerning a research project under the EU Framework Programme for Research and Innovation 'Horizon 2020', seeking to contribute to the management of the European Union's external borders. The applicant, who is a natural person, requested, on the basis of Regulation No 1049/2001, access to several documents relating to the various stages of development of that project which had been sent to the REA by the members of that consortium. The REA granted only partial access to the documents requested and justified the refusal to grant full access by the application of the exceptions provided for by Regulation No 1049/2001, in particular the exception relating to the protection of the commercial interests of the members of the consortium concerned. 180

Hearing an action against the REA's decision [181] to grant partial access to the documents requested, the Court annuls that decision in so far as the REA, first, failed to carry out a full examination of the application for access and, secondly, did not grant access to the information contained in the documents at issue which was not covered by the exception in question.

This case has allowed the Court to develop and supplement its case-law on access to documents in the context of the EU-funded research project, as well as its case-law on the requirement for a full examination of an application for access at the initial application stage. Moreover, it gave the Court the opportunity to answer questions not previously addressed concerning, in particular, the effect of Regulation No 1290/2013 [182] in the context of an application for access to documents made under Regulation No 1049/2001 and the consequences of conduct by an applicant consisting in obtaining, by his or her own efforts and before the Court rules on the action, access to the redacted parts of a document to which only partial access had been granted.

Findings of the General Court

First of all, the Court finds that, in this case, the REA breached its obligation to carry out a full examination of all the documents referred to in the application for access, since that obligation applies, in principle, not only when dealing with a confirmatory application for access, but also when dealing with an initial application for access. Specifically, the REA failed to give a decision in respect of the initial application for access in so far as that application concerned access to documents relating to the authorisation of the project at issue, thereby clearly undermining the objectives pursued by Regulation No 1049/2001.

In that context, the Court notes that, first, the applicant expressly stated in his confirmatory application for access that that application was a follow-up to his initial application for access, which, inter alia, concerned documents relating to the authorisation of the project at issue. Accordingly, there were no circumstances which would allow the REA to presume that the applicant had withdrawn that part of his application in his

180| Article 4(2), first indent, of Regulation No 1049/2001.

181| REA's Decision of 17 January 2019 (ARES (2019) 266593) concerning partial access to documents.

182| Regulation (EU) No 1290/2013 of the European Parliament and of the Council of 11 December 2013 laying down the rules for participation and dissemination in 'Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020)' and repealing Regulation (EC) No 1906/2006 (OJ 2013 L 347, p. 81).

confirmatory application. Secondly, the applicant was not obliged, in his confirmatory application, expressly to challenge the REA's failure, in its initial decision, to give a decision in respect of a part of the applicant's original application. That failure had the consequence that the second stage of the procedure concerning the documents to which that failure relates was not initiated. Moreover, even though, in the event of a refusal of access, a person may submit a new application for access, a failure to give a decision in respect of part of an application for access cannot be equated with a refusal of access. Therefore, a possibility of submitting a new application cannot serve to remedy a failure by the institution concerned to examine fully the first application for access or constitute an argument for depriving the applicant of the possibility of bringing proceedings.

Next, the Court rules on the consistent application of Regulations Nº 1290/2013 and No 1049/2001 in this case. In that regard, it states that the rule laid down in Regulation No 1290/2013, according to which documents communicated as confidential in the framework of an action such as the project at issue are to be kept confidential, [183] must be taken into account when examining a third party's application for access to those documents. The fact that, in this case, the parties to the agreement classified the documents communicated to the REA as confidential is an indication that the content of those documents is sensitive from the point of view of the interests of the members of the consortium. However, the classification of documents as confidential in the context of a project is not sufficient to justify the application of the exception relating to the protection of commercial interests provided for by Regulation No 1049/2001. Thus, that classification does not release the REA, in the context of the specific and individual examination of the application for access to those documents, from its obligation to examine whether they fall partially or entirely within that exception.

Then, after verifying that the REA carried out a specific and individual examination of the documents requested, the Court concludes that the REA's refusal to grant access to certain information contained in several of those documents was not justified by the protection of the commercial interests of the members of the consortium. The information in question is concerned, in particular, with general questions likely to arise irrespective of the specific design of the system and project developed by the members of the consortium and not with assessments relating to the specific legal and ethical implications of the project in question or to the solutions envisaged in developing the technologies or features of that project.

As regards the documents requested, or the parts of those documents in respect of which the REA correctly concluded that they were covered by the exception relating to the protection of the commercial interests of the members of the consortium, the Court finds that the applicant has not established the existence of an overriding public interest which would justify disclosure to the public of the information covered by that exception. [184]

In that context, ruling in particular on the public interest in dissemination of the results of projects financed by EU funds, the Court notes that that interest is ensured by the introduction of legislative and contractual provisions for the dissemination of the results of projects funded under the Horizon 2020 programme and that the need to disclose the information covered by the exception concerned has not been demonstrated by the applicant. As regards legislative provisions, the Court points out that Regulation No 1290/2013

183| Article 3 of Regulation Nº 1290/2013.

184| Under Article 4(2) of Regulation No 1049/2001, the institutions are to refuse access to a document where disclosure would undermine, in particular, the protection of commercial interests of a natural or legal person 'unless there is an overriding public interest in disclosure'..

establishes both an obligation for participants in an action to disseminate the results of the project subject to certain restrictions and a right for EU institutions, bodies, offices and agencies and for Member States to access information concerning results generated by those participants. [185]

Finally, the Court notes that the fact that the applicant obtained, by his own efforts, access to the full version of a document which, in a partially redacted version, had been communicated to him by the REA and that he disseminated that full version on the internet does not call into question his interest in having the contested decision annulled in so far as the REA had refused access to the redacted parts of that document. That conduct has no bearing on the lawfulness of the contested decision in that respect or on the Court's judicial review of it.

However, the Court considers that the applicant, by acting in that way, failed to comply with the procedures laid down by EU law relating to access to documents and did not await the outcome of the dispute in order to ascertain whether or not he could lawfully obtain access to the full version of the document in question. Accordingly, the Court takes the applicant's conduct in that respect into account when awarding costs, and orders him to pay the costs he unreasonably caused the REA to incur.

2. Exception relating to the protection of the confidentiality of the proceedings of the ECB's bodies

Judgment of 6 October 2021, *Aeris Invest* v *ECB* (T-827/17, under appeal, [186] EU :T :2021:660)

The applicant, Aeris Invest Sàrl, held shares in Banco Popular Español, SA ('Banco Popular'), a credit institution established in Spain which was subject to direct prudential supervision by the European Central Bank (ECB). [187] On 6 June 2017, the ECB, after consulting the Single Resolution Board (SRB), carried out an assessment regarding whether Banco Popular was failing or was likely to fail. [188] That same day, Banco Popular's board of directors informed the ECB that it had reached the conclusion that the bank was likely to fail. On 7 June 2017, the SRB adopted a decision concerning a resolution scheme for Banco Popular. [189] On the same day, the European Commission adopted Decision 2017/1246 [190] endorsing the resolution scheme.

185| Articles 4, 43 and 49 of Regulation No 1290/2013.

186| Case C-782/21 P, ***Aeris Invest* v *ECB*.**

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

188| In accordance with the second subparagraph of Article 18(1) of Regulation (EU) N^{O} 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) N^{O} 1093/2010 (OJ 2014 L 225, p. 1).

189| Under Regulation No 806/2014.

190| Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (OJ 2017 L 178, p. 15).

Between 19 June and 2 August 2017, the applicant, inter alia, sent three requests to the ECB for access to documents under Decision 2004/258. [191] On 7 November 2017, the ECB adopted three decisions refusing access to the requested documents. The ECB argued, in particular, that some of those documents were covered by a presumption of confidentiality based on various exceptions to the right of access laid down in Decision 2004/258.

The Court, sitting in extended composition, upholds in part the action brought by the applicant; it annuls the second contested decision in that it refuses access to the outcome of the vote in the Governing Council of the ECB and dismisses the action as to the remainder. This case affords the Court its first opportunity to rule on the recognition of a presumption of confidentiality on the basis of an exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law. [192] It also allows the General Court to clarify the case-law of the Court of Justice concerning the scope of the ECB's obligation to state reasons when applying the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies. [193]

Findings of the General Court

In the first place, the Court holds that the ECB failed to state to the requisite legal standard its reasons for the second contested decision, in that it refused access to information relating to the ceiling for emergency liquidity assistance ('ELA'), the amount of ELA actually granted and the guarantees provided, on the basis of the exception relating to the protection of the public interest in the confidentiality of the proceedings of the ECB's decision-making bodies, in so far as the information at issue is contained in a letter of 5 June 2017 from the Governor of the Bank of Spain to the President of the ECB entitled 'Emergency liquidity assistance', a follow-up letter of 5 June 2017 from the Governor of the Bank of Spain to the President of the ECB entitled 'Emergency liquidity assistance' and a proposal of 5 June 2017 from the Executive Board to the Governing Council of the ECB entitled 'Emergency liquidity assistance request from Banco de España'. The Court also considers that the second contested decision was vitiated by a failure to state reasons in that it refused access to the outcome of the vote in the Governing Council.

First, the Court observes that Decision 2004/258 lays down a right of access to ECB documents, subject to certain restrictions based on reasons of public or private interest, and establishes a system of exceptions to the right of access, [194] which must be interpreted and applied strictly.

Secondly, the General Court points out that in the judgment in ***ECB* v *Espírito Santo Financial (Portugal)***, [195] the Court of Justice held that a refusal to grant access to the outcome of the Governing Council's deliberations is sufficiently reasoned solely by reference to the exception to the right of access, laid down in Decision 2004/528, relating to the protection of the public interest in the confidentiality of the proceedings of the

191| Article 6(1) of Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the ECB of 9 May 2011 (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the ECB of 21 January 2015 (OJ 2015 L 84, p. 64).

192| Under Article 4(1)(c) of Decision 2004/258.

193| Under the first indent of Article 4(1)(a) of Decision 2004/258.

194| Article 4(1) and (2) of Decision 2004/258

195| Judgment of 19 December 2019, ***ECB* v *Espírito Santo Financial (Portugal)*** (C-442/18 P, EU:C:2019:1117, paragraphs 43, 44 and 46).

ECB's decision-making bodies, as regards documents reflecting the outcome of those deliberations. However, the Court finds that, in the present case, the ECB merely referred generally to the fact that the three categories of information were included in the documents to which it granted partial access. The only document recording the outcome of the deliberations of the ECB's Governing Council is the minutes of its 447th meeting, held by teleconference on 5 June 2017, which contain the ELA ceiling. The ECB therefore provided sufficient reasons for its refusal to grant access to that ceiling, in so far as that information is found in the minutes of the 447th meeting of the Governing Council, since that document reflects the outcome of the deliberations of the Governing Council. By contrast, the other documents predate the Governing Council's meeting and thus do not reflect the outcome of its deliberations. Accordingly, the Court considers that the ECB was fully entitled to refuse access to that information and those documents on the basis of the other exceptions to the right of access on which it relied.

Moreover, as regards the refusal to grant access to the outcome of the vote in the Governing Council, the Court takes the view that the ECB must provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine. Thus, the failure to state any reasons at all explaining why the refusal to grant access to those documents, in so far as they contained the information at issue, was covered by the exception prevented the applicant from understanding the reasons for the refusal to grant access to that information and from raising a plea seeking to challenge the justification for applying the exception to those documents. The statement of reasons must in principle be notified to the person concerned at the same time as the act adversely affecting him or her. A failure to state reasons cannot be remedied by the fact that the person concerned learns of the reasons for the decision during the proceedings before the EU Courts, as was the case here.

In the second place, the Court rules on whether there exists a general presumption of confidentiality on the basis of the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law.

In that regard, the Court points out that general presumptions are an exception to the rule that the EU institution concerned is obliged to make a specific and individual examination of every document which is the subject of an application for access and, more generally, to the principle that the public should have the widest possible access to the documents held by the EU institutions. Consequently, such presumptions must be interpreted and applied strictly.

First, the Court states that, in the light of the wording of the provision of Decision 2004/258 requiring the ECB to refuse access to a document where its disclosure would undermine the protection of the confidentiality of information that is protected as such 'under Union law', [196] a general presumption of confidentiality based on that provision would not be clearly and precisely circumscribed and would be at variance with the case-law according to which, since presumptions are an exception to the principle of the widest possible access, they must be interpreted strictly.

196| Article 4(1)(c) of Decision 2004/258.

Secondly, the General Court observes that the recognition of a general presumption of confidentiality based on that provision of Decision 2004/258 cannot be reconciled with the approach endorsed by the Court of Justice in ***Baumeister***. [197] The ECB must check that the two conditions established in that judgment [198] are satisfied in respect of each item of information to which access is requested. If they are, the ECB must refuse access to the information at issue, and it has no discretion whatsoever in that regard. That process necessarily requires a specific and individual examination of each item of information concerned, which cannot be circumvented by the application of a general presumption of confidentiality.

Thirdly, the Court recalls that the exception to the right of access referred to in that provision of Decision 2004/258 is an 'absolute' exception, the application of which is mandatory, since disclosure of the document concerned to the public is liable to undermine the interests which that exception protects.

Consequently, the ECB's decisions relying on that general presumption of confidentiality are not annulled by the Court on the ground that the information and documents concerned constitute confidential information to which access was rightly refused on the basis of the exception to the right of access, laid down in Decision 2004/258, relating to the protection of the confidentiality of information that is protected as such under EU law.

In the third place, the Court holds that the derogations from the obligation of professional secrecy provided for in Directives 2013/36 [199] and 2014/59 [200] do not apply to the requested documents.

The application of the derogation provided for in Directive 2013/36 allowing the disclosure, in civil or commercial proceedings, of confidential information which does not concern third parties involved in attempts to rescue the credit institution concerned is subject to the requirement that that institution has been declared bankrupt or is being compulsorily wound up, which is not the case here. The derogation provided for in Directive 2014/59 relates to the disclosure of confidential information only in the course of national proceedings. Indeed, the applicant conceded that its requests for access were motivated by its intention to bring an action before the Court.

In the fourth and last place, the Court examines the scope of the right to effective judicial protection, enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in the context of applications for access made pursuant to Decision 2004/258. The Court concludes that that right does not require the ECB to grant access to certain documents for the purpose of preparing an action for annulment of a decision adopted by another institution.

In that regard, first, the purpose of Decision 2004/258 is not to settle questions relating to the evidence to be adduced by the parties in court proceedings. Secondly, it is not intended to lay down rules designed to protect the specific interest that a person might have in gaining access to a document. Thirdly, the fact that

197| Judgment of 19 June 2018, ***Baumeister*** (C-15/16, EU:C:2018:464).

198| That the information held by the competent authorities is not public and its disclosure is likely to affect adversely the interests of the natural or legal person who provided it or of third parties, or the proper functioning of the system for monitoring the activities of investment firms.

199| The third subparagraph of Article 53(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

200| Article 84(6) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190.

a document becomes accessible to any person once it has been disclosed following a request for access manifestly exceeds the boundaries of the legitimate interests of a party seeking to rely on his or her right to an effective remedy for the purpose of making enquires in connection with another case before the Court. The Court finds that the ECB did not infringe Article 47 of the Charter.

XIII. Civil service

1. Termination of a contract concluded for an indefinite period

Judgment of 16 June 2021, *CE* v *Committee of the Regions* (T-355/19, under appeal, [201] EU:T:2021:369)

The applicant, CE, was recruited as a member of the temporary staff under Article 2(c) of the Conditions of Employment of Other Servants of the European Union ('the CEOS'), as Secretary-General of one of the political groups ('the group') within the Committee of the Regions.

Following a number of complaints relating to problems with the way in which the applicant exercised her managerial duties in respect of her subordinates, the authority empowered to conclude contracts of employment ('the AECE') of the Committee of the Regions terminated, with six months' notice, the applicant's contract as a member of the temporary staff on the basis of Article 47(c)(i) of the CEOS on the ground that the relationship of trust between the applicant and the group had broken down, on account of the inappropriate management of her colleagues resulting in colleagues suffering serious health issues ('the contested decision').

That decision was accompanied by measures governing its implementation. In that regard, it was stated that the applicant was to be placed on gardening leave during the notice period and that she would be replaced in her duties, that she could access her office to collect her personal belongings for a certain period, that she would receive a new access badge which would not enable her to attend meetings of the Bureau of the political group or plenary sessions and that she would have access to her email solely in 'read-only mode'. That decision also stated that the contract would end on the expiry of the notice period. The applicant lodged a complaint with the AECE of the Committee of the Regions, which was rejected.

The Court, before which an action for annulment of the contested decision was brought, clarifies the specific rules governing service of the notice period in connection with the termination of a contract on the basis of Article 47(c)(i) of the CEOS and finds that the AECE of the Committee of the Regions was entitled to terminate the applicant's contract on the basis of Article 47(c)(i) of the CEOS, before its expiry and with six months' notice, while deciding that she should not work during the notice period and without having to initiate disciplinary proceedings. However, the Court annulled the contested decision in so far as the applicant's right to be heard before the contested decision was adopted was infringed in respect of the specific terms governing the notice period.

201| Case C-539/21 P, ***CE* v *Committee of the Regions***.

Findings of the General Court

The Court observes, first of all, that, on account of the broad discretion enjoyed by the AECE where there is wrongful conduct capable of justifying the dismissal of a member of the temporary staff, there is no obligation on that authority to initiate disciplinary proceedings against that person instead of using the option of unilaterally terminating the contract provided for in Article 47(c) of the CEOS; it is only if the AECE intends to dismiss a member of the temporary staff without notice, in a serious case of failure to comply with his or her obligations, that a disciplinary procedure should be initiated, as provided for in Article 49(1) of the CEOS.

Next, with regard to the rules governing service of the notice period, the Court states that, although Article 47(c)(i) of the CEOS does not expressly provide that the conditions of employment of the staff member whose contract is terminated may be the subject of adjustments during the notice period, so that that period is presumed to constitute a period of normal work, the fact remains that the institutions, bodies, offices and agencies of the European Union have a wide discretion in the organisation of their departments and in assigning the staff available to them, provided that this assignment is carried out in the interest of the service and in conformity with the equivalence of posts, including for staff members who are serving during a notice period. In that regard, it cannot be ruled out that, in certain specific circumstances, the interests of the service require that the person concerned be relieved of all duties during the notice period. That may be the case specifically in the event of a dismissal, on the ground of a breakdown in the relationship of trust, of a member of staff who was recruited on the basis of Article 2(c) of the CEOS and in respect of whom no serious misconduct within the meaning of Article 23 of Annex IX to the Staff Regulations of the European Union ('the Staff Regulations') has been found or even alleged to have occurred. All temporary staff recruited on the basis of Article 2(c) of the CEOS have an employment contract concluded *intuitu personae*, the essential part of which is mutual trust. Thus, the breakdown in such a relationship of mutual trust may be such that it is impossible for the person or entity responsible for recruiting the member of the temporary staff to entrust him or her with any tasks during the notice period. In such a situation, the decision not to assign any tasks during the notice period constitutes a measure taken in the interest of the service and cannot necessarily be treated as a suspension decision taken under Articles 23 and 24 of Annex IX to the Staff Regulations. Similarly, where the situation which gave rise to the breakdown in the relationship of trust with a member of the temporary staff recruited on the basis of Article 2(c) of the CEOS makes it impossible for that staff member to be assigned tasks during the notice period, the AECE cannot be required to initiate disciplinary proceedings during that period.

The Court concludes, in that regard, that the AECE of the Committee of the Regions was entitled, without having to initiate disciplinary proceedings, to terminate the applicant's contract on the basis of Article 47(c)(i) of the CEOS, before its expiry and with six months' notice, and decide that she should not work during the notice period.

Last, with regard to the right to be heard in the context of the adoption of the contested decision in so far as it lays down the specific terms implementing the notice period, the Court finds that, before the contested decision was adopted, the applicant did not have the opportunity to submit her observations in that regard. Such measures may not be adopted without having first heard the person concerned in order to ensure that he or she has been able to express his or her views on them. In that regard, the Court recalls that the right to be heard is intended, in particular, to enable the person concerned to clarify certain information or to submit further information, for example relating to his or her personal circumstances, which may have an impact on the adoption or otherwise of the decision, or on the specific content thereof. The Court considers that it cannot reasonably be ruled out that the specific rules governing service of the notice period contained in the contested decision, in particular that exempting the applicant from performing her contractual duties during the notice period, might have had a different outcome if the applicant had been duly heard. Consequently,

the Court annuls the contested decision in so far as it set out specific rules governing service of the notice period, on account of the infringement of the applicant's right to be heard. However, that unlawful act does not, in itself, call into question the legality of that decision in so far as it terminated the applicant's contract.

2. Disciplinary penalty

Judgment of 6 October 2021, *IP* v *Commission* (T-121/20, EU:T:2021:665)

The applicant, IP, is a former member of the contract staff of the European Commission. In 2019, the Commission decided, as a disciplinary penalty, to terminate his employment without notice ('the contested decision'), alleging that he had submitted two applications for reimbursement of medical expenses that did not correspond to the actual amounts paid or the treatment received. It took the view that those acts constituted attempted fraud on the EU budget, which, in its view, constituted particularly serious misconduct. In imposing that disciplinary penalty, the Commission relied, in order to establish repeated misconduct, on the existence of an earlier penalty (a reprimand), which the applicant had received in 2010. In that connection, after finding that the applicant had committed acts similar to those which had formed the grounds for his reprimand, the Commission took the view that the applicant had thus shown that he had not learned from the previous disciplinary penalty and that he had continued to put his personal interests before those of the institution.

The Court, before which the applicant brought an action, annuls the contested decision and clarifies that a disciplinary authority which relies, in order to establish repeated misconduct, on a disciplinary penalty, all reference to which has been deleted from the personal file of the official concerned after a request made by that official was granted pursuant to Article 27 of Annex IX to the Staff Regulations, disregards the rights that the Staff Regulations, and in particular Article 26 thereof, guarantee for officials.

Findings of the General Court

The Court observes, first of all, that Article 26 of the Staff Regulations provides for a series of guarantees intended to protect officials by preventing decisions taken by the administration and affecting their administrative status from being based on acts the existence of which is recorded in documents not inserted into their personal file.

In the light of the essential role of the personal file in protecting and informing officials, the Court concludes that a decision imposing a penalty, even if it was previously inserted into an official's personal file, cannot be used against that official or relied on against him or her where all reference to that decision has since been deleted from that file.

Affording the administration the right to base a finding of repeated misconduct for the purposes of Article 10 of Annex IX to the Staff Regulations on a decision imposing a penalty which has been removed from an official's personal file would effectively render Article 27 of that annex (under which an official may request that a decision imposing a penalty be removed from his or her personal file and which leaves to the administration the decision whether to grant such a request) meaningless in that regard. Thus, by relying on a disciplinary measure which, in the exercise of its broad discretion, it has decided to expunge from the official's personal file, the administration is, in fact, re-inserting that decision into the file.

Next, the Court points out that personal files are unique in nature, which precludes the existence, in whatever form, of any other body of evidence consisting of documents relating to an official's administrative status.

It is true that the administration can produce a file relating to an investigation and, as the case may be, to a disciplinary proceeding related to that investigation. However, such a file is produced solely for the purposes of the proceeding in question. Accordingly, the evidence and the documents which it contains, in particular any decision imposing a penalty that closes that proceeding, cannot be used against an official or relied on against him or her outside the proceeding, unless they are inserted into that official's personal file.

In addition, the Court finds that, although there is an internal legal basis within the Commission that allows decisions imposing disciplinary penalties to be retained for a period of 20 years, the purpose of the rules in question, unlike that of Article 26 of the Staff Regulations, is not to lay down the conditions under which documents can be used against an official or relied on against him or her. Those rules cannot therefore allow the Commission to rely, in order to establish repeated misconduct, on a penalty previously imposed on an official, all reference to which has since been deleted from the personal file of the official concerned.

3. Regrading of members of the temporary staff

Judgment of 28 April 2021, *Correia* v *EESC* (T-843/19, EU:T:2021:221)

In September 2000, the applicant was recruited by the European Economic and Social Committee (EESC) – a consultative body representing European organisations of employers, employees and other participants in civil society – as a member of the temporary staff, under a contract for an indefinite period. In the course of her career at the EESC, the applicant was regraded on only two occasions, most recently in 2016.

On 10 July 2019, the applicant brought a complaint against the decision not to place her in a higher grade in the 2019 regrading process ('the contested decision').

After that complaint was rejected, the applicant brought an action before the Court, seeking annulment of the contested decision and an award of damages in the sum of EUR 2 000 by way of compensation for the non-material damage suffered.

The Court annuls the contested decision, which was adopted on a date unknown to the applicant, and rules for the first time on the issue of the regrading of members of the temporary staff, in the absence of criteria or material for a clear, objective and transparent evaluation . It holds, in that regard, that the absence of such criteria or material is liable to undermine the principles of equal treatment and legal certainty, and consequently the rights of members of the temporary staff assigned to the institutions, bodies, offices and agencies of the European Union who are eligible for regrading. The Court also orders the EESC to pay the applicant the claimed sum of EUR 2 000 in respect of the non-material damage which she suffered.

Findings of the General Court

The Court observes, first of all that, in respect of a decision relating to a specific individual, evidence of the point at which the person concerned had knowledge of such a decision, which marks the beginning of the periods for submitting a complaint and bringing an action, as laid down in Articles 90 and 91 of the Staff Regulations, may result from circumstances other than formal notification of that decision. In that regard, while mere circumstantial evidence suggesting that the decision was received is not sufficient, such evidence may be obtained from an email from the person concerned from which it is undoubtedly clear that he or she had had effective knowledge of the decision before the date alleged.

The Court also observes that the acts or decisions in respect of which an action for annulment may be brought are limited to those measures which produce binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in his or her legal position. Where the acts or decisions in question are formulated in several stages, for example in the course of an internal procedure such as that relating to the regrading of members of the temporary staff, the only acts which can be challenged are the measures definitively setting out the position of the institution at the outcome of that procedure. By contrast, the intermediary measures whose purpose is to prepare the final decision are not acts adversely affecting an official for the purposes of Article 90(2) of the Staff Regulations and can be challenged only incidentally in an action against the acts capable of being annulled. In that regard, it is only when the duly published list of regraded members of the temporary staff is established that the legal position of members of the temporary staff eligible for regrading can be affected.

Next, as regards the lack of any decision adopting rules for the regrading of members of the temporary staff within the EESC, the Court notes that, while EU institutions are not obliged to adopt one particular appraisal and regrading system rather than another, any regrading procedure must be carried out in accordance with general principles of law such as the principles of equal treatment and legal certainty. Compliance with the principle of equal treatment requires the institution, body, office or agency of the European Union to ensure that it has a set of evaluation material, for example staff reports, on which to base its assessment of merits, so as to avoid arbitrariness and ensure equal treatment of candidates eligible for promotion. The Court adds that considerations of a budgetary nature or relating to the 'eminently political' nature of the body in question do not absolve it of that obligation.

Furthermore, the Court indicates that the failure of the EESC to publish regrading decisions, in accordance with the third paragraph of Article 25 of the Staff Regulations, infringes the principle of legal certainty and the obligation of transparency, which is a corollary of the principle of equal treatment, intended to enable the impartiality and non-arbitrariness of the administration to be reviewed. Consequently, the EESC's non-publication of regrading decisions is not only contrary to the Staff Regulations, but also infringes the rights of members of the temporary staff assigned to the secretariats of the various EESC groups, in that it prevents a review of the impartiality of the administration in relation to a regrading procedure.

Last, in relation to the claim for damages, the Court finds that, in the present case, the annulment of the contested decision cannot, in itself, constitute full compensation for the non-material damage suffered by the applicant, and particularly her feelings of uncertainty as regards her career development. It is impossible to predict the nature of the evaluation material which could be adopted by the EESC, and difficult to determine how the applicant's performance could be assessed in the light of that material. Thus, whatever system the EESC may adopt in order to comply with the judgment, doubt will remain as to the applicant's prospects of retroactive regrading and, as the case may be, as to how she might have performed if the evaluation material to be used for the purposes of regrading had been defined from the outset.

4. Allowances

Judgment of 12 May 2021, *Alba Aguilera and Others* v *EEAS* (T-119/17 RENV, EU:T:2021:254)

The applicants, Mr Ruben Alba Aguilera and others, are officials or agents of the European External Action Service (EEAS) who were posted to Ethiopia when the EEAS adopted the decision revising the amount of the allowance for living conditions ('the ALC') paid to agents posted to third countries with effect from 1 January 2016 ('the contested decision'). [202]

By that decision, the ALC rate applicable to EU staff posted to Ethiopia was reduced from 30% to 25% of the reference amount. That reduction resulted, for the applicants, in the loss of the benefit of rest leave. [203]

In order to challenge the reduction in the ALC rate, the applicants each lodged complaints against the contested decision, in so far as it reduced, with effect from 1 January 2016, the ALC paid to EU staff posted to Ethiopia. Since those complaints were not upheld, the applicants brought an action before the Court seeking, in essence, annulment of the contested decision.

The Court annuls the contested decision and rules for the first time on the issue of the principle of regional coherence in order to determine the ALC in a place of employment.

Findings of the General Court

First of all, the Court rules on the alleged obligation of the EEAS to adopt general implementing provisions concerning Article 10 of Annex X to the Staff Regulations, which refers to the ALC. In that regard, the Court considers that, on account of its wording, its objectives and the procedural safeguards which it lays down for the revision of the ALC, each year and after the opinion of the Staff Committee has been obtained, that article, in so far as it governs the ALC, is not lacking in clarity or precision in order to prevent it from being applied arbitrarily and, therefore, does not require the adoption, exceptionally, of general implementing provisions.

Next, as regards the detailed rules for the application of Article 10 of Annex X to the Staff Regulations, the Court notes that the appointing authority has a broad discretion as regards the factors to be taken into consideration when adjusting the remuneration of officials. As a consequence, the Court holds that the guidelines adopted by the EEAS and establishing the methodology for fixing, in particular, the ALC ('the Guidelines'), in so far as they take account of the principle of regional coherence, do not infringe Article 10 of Annex X to the Staff Regulations.

202| Decision ADMIN(2016)7 of the EEAS Director-General for Budget and Administration of 19 April 2016, fixing the allowance for living conditions referred to in Article 10 of Annex X to the Staff Regulations – Financial Year 2016.

203| Article 8 of Annex X to the Staff Regulations, entitled 'Special and exceptional provisions applicable to officials serving in a third country', provides that 'by way of exception, the appointing authority may, by special reasoned decision, grant an official rest leave on account of particularly difficult living conditions at his place of employment. For each such place, the appointing authority shall determine the town(s) where rest leave may be taken'.

In that regard, the Court notes that the principle of regional coherence is intended, in accordance with the purpose of the ALC, to ensure the objectivity of the comparison between the living conditions in the places of employment with those in the European Union. The application of that principle is intended to ensure that similar conditions obtaining in two countries situated in the same region are assessed in a similar manner.

Last, the Court rules on the assessment made by the EEAS of the 'health and hospital environment' and the 'other local living conditions' parameters.

In that regard, the Court notes that the Guidelines provide that the score for the 'health and hospital environment' parameter is to be determined on the basis of the comparative Health Map established by International SOS, but does not require the levels on the scale used by that Health Map to correspond to the score to be given for that parameter. Accordingly, the EEAS's decision to award Ethiopia a score of four points out of a total of five does not exceed the limits of the discretion which the legislature intended to confer on the EEAS in fixing the ALC.

Finally, the Court ruled on the 'public services' criterion which led to a change in the score awarded to the 'other local conditions' parameter. In that regard, taking into account, first, the applicants' arguments that the quality of the public services in Ethiopia did not improve between 2014 and 2015 and, secondly, the EEAS's failure to provide any explanation justifying the reduction in the score awarded to that criterion, the Court concludes that the EEAS made a manifest error of assessment with regard to the assessment of that criterion. That error is such as to justify the annulment of the contested decision, given that it was the 'public services' criterion that led to a reduction of one point in the score awarded to the 'other local conditions' parameter, so that the total score given to Ethiopia fell below the threshold of 14 points required for fixing the ALC rate at 30%.

Judgment of 15 September 2021, *LF* v *Commission* (T-466/20, EU:T:2021:574)

The applicant, LF, is a Belgian national who lived in France between 1982 and 2013. On 1 May 2013, he entered the service of the European Commission in Brussels under a fixed-term contract as a member of the contract staff. That contract expired on 30 April 2019. He was subsequently registered as a jobseeker in Belgium until 1 September 2019, when he entered the service of the Research Executive Agency (REA).

By decision of 11 September 2019 ('the contested decision'), the Commission's Office for the Administration and Payment of Individual Entitlements refused to grant the applicant the expatriation allowance on the ground that he had failed to establish that his habitual residence had been outside the State of employment, namely Belgium, during the 10 years ending on the date on which he took up his duties at the REA, contrary to the requirements of Article 4(1)(b) of Annex VII to the Staff Regulations, [204] applicable to officials who are or have been nationals of the State of employment.

Taking the view that his presence in Belgium was exclusively linked to the work he did for the Commission, which precludes the creation of lasting ties between him and that State and, therefore, the transfer of his habitual residence from France to Belgium, the applicant brought an action before the Court for annulment of the contested decision.

204| Article 4(1) of Annex VII to the Staff Regulations is applicable by analogy to members of the contract staff under Article 20(2) and Articles 21 and 92 of the Conditions of Employment of Other Servants.

By its judgment, the Court dismisses that action and provides clarification regarding the conditions under which an official or other staff member who is a national of the State of employment may obtain the expatriation allowance after having performed duties in an international organisation which is itself established in that State of employment.

Findings of the General Court

In the first place, the Court defines the 10 year reference period to be taken into account for the purpose of applying Article 4(1)(b) of Annex VII to the Staff Regulations. It finds that that period covers 1 February 2006 to 31 August 2019 in the present case. In making that finding, the Court disregarded the period of three years and seven months during which the applicant had worked for a French ministry, in accordance with the provisions of the Staff Regulations which preclude account being taken of periods during which the official performed duties in the service of a State or in an international organisation outside the State of employment. [205] However, the period during which he had worked at the Commission was not disregarded, since the Staff Regulations do not provide for periods spent in the service of an international organisation in the State of employment itself to be disregarded.

That being the case, the Court states, in the second place, that work performed in an international organisation located in the State of employment may be taken into account in order to determine the habitual residence of an official or other staff member who is or has been a national of that State during the 10 year reference period. In that regard, while the performance of duties in such an organisation may hinder the creation of lasting ties between the official or other staff member and the State of employment, [206] the presumption that multiple and close ties exist between the person and his or her country of nationality plays a more decisive role in determining his or her place of habitual residence, [207] which requires an analysis of the personal and professional ties which that person has created in that country.

Thus, the Court considers, in the third place, the factual evidence concerning the applicant's private and professional life in order to determine whether he kept his habitual residence in France throughout the reference period, despite moving to Belgium, and whether he should therefore receive the expatriation allowance.

It concludes from this, first, that contrary to the applicant's claims, his habitual residence cannot be deemed to be situated in France simply because he had lived, studied and worked there prior to the beginning of the reference period. The same finding applies, secondly, to the fact that his close relatives live in France. Without denying the importance of parent-child relationships, the fact that an official or other staff member has founded his or her own family, lives with that family in a particular State and is able to witness how its members carry on activities appropriate to their stage in life is significant for the purpose of determining his or her habitual residence. However, the subjective reasons which led that person to settle with his or her family in a particular State or his or her spouse's nationality are not decisive in an area in which Union citizens may move freely without being subject to discrimination on grounds of nationality.

205| Article 4(1)(b) of Annex VII to the Staff Regulations.

206| That presumption was established by the judgment of 13 July 2018, ***Quadri di Cardano* v *Commission*** (T-273/17, EU:T:2018:480, paragraph 63).

207| This presumption was established by the judgment of 5 October 2020, ***Brown* v *Commission*** (T-18/19, EU:T:2020:465, paragraph 82).

Thirdly, the fact that the applicant still owns real estate in France and continues to have a mobile telephone number and a bank account there also do not prove that he intended to establish the permanent or habitual centre of his interests in France. Similarly, the fact that the applicant worked at the Commission only under a fixed-term contract does not prevent him from settling in Belgium with the intention of staying there. Proof of this is that, on the expiry of that contract, the applicant remained in Belgium with his family and registered as a jobseeker there for four months, which shows that he established his habitual residence in that State for at least part of the reference period. The Court points out, in that regard, that the fact that the applicant kept his residence in the State of employment of which he is a national, even briefly during the 10 year reference period, is sufficient to result in the loss or refusal of the grant of the expatriation allowance. Last, the fact that he received the expatriation allowance while employed at the Commission does not invalidate that finding, since his entitlement to that allowance had to be re-examined when he entered into service at the REA.

Since the applicant has failed to show that he established his habitual residence outside the State of his employment throughout the entire 10 year reference period, the Court dismisses the action.

5. Pension rights

Judgment of 24 March 2021, *Picard* v *Commission* (T-769/16, under appeal, [208] EU:T:2021:153)

The applicant, Mr Maxime Picard, has been a member of the contract staff at the European Commission's PMO since 2008. He was initially engaged as a member of the contract staff in the first function group, under a contract signed in 2008 ('the 2008 contract') which was renewed on three occasions for a fixed period, before being renewed for an indefinite period in 2011.

On 16 May 2014, the applicant signed a new contract as a member of the contract staff for an indefinite period with classification in the second function group, after demonstrating that he had performed tasks in that function group. That contract took effect on 1 June 2014 ('the 2014 contract').

In the meantime, the 2014 reform of the Staff Regulations and the Conditions of Employment of Other Servants [209] introduced a new annual pension accrual rate of 1.8%, which is less favourable than the previous rate of 1.9%, and set the retirement age at 66, up from age 63 years. [210] However, according to the transitional regime provided for therein, an official 'who entered into service between 1 May 2004 and 31 December 2013' is to continue to acquire pension rights at the annual acquisition rate of 1.9%. [211] Furthermore, 'officials

208| Case C-366/21 P, ***Picard* v *Commission***.

209| Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (OJ 2013 L 287, p. 15) entered into force on 1 November 2013 and is applicable, as regards the provisions relevant to the present case, from 1 January 2014.

210| Second and fifth paragraphs of Article 77 of the Staff Regulations, as amended by Regulation No 1023/2013.

211| Second paragraph of Article 21 of Annex XIII to the Staff Regulations.

aged 35 years or more on 1 May 2014 and who entered the service before 1 January 2014 shall become entitled to a retirement pension at the age of 64 years and 8 months'. [212] Those transitional provisions apply by analogy to other staff in post on 31 December 2013. [213]

As he had signed his new contract after the reform of the Staff Regulations came into force, the applicant requested clarifications from the manager of the PMO's 'Pensions Sector' regarding its implications for his position. In his reply, the manager confirmed that, because of the change of contract, from 1 June 2014, the applicant was not covered by the transitional arrangements relating to the rate of acquisition of pension rights and retirement age.

Since the complaint lodged by the applicant against that reply was dismissed, he brought an action before the Court for annulment of the manager's reply and the decision rejecting his complaint. In support of his action, the applicant claimed that, for the purposes of applying the transitional provisions at issue, the administration should have used 1 July 2008 as the date of entry into service, the date when he was initially recruited as a member of the contract staff in the first function group, and not the date on which the new 2014 contract began.

However, the First Chamber, Extended Composition of the General Court dismisses that action. In its judgment, the Court rules on the application of the transitional provisions concerning the accrual rate of pension rights and retirement age introduced by the reform of the Staff Regulations to contract staff who signed a new contract after that reform. [214]

Findings of the General Court

In the first place, the Court considers the interpretation of Article 1(1) of the Annex to the Conditions of Employment of Other Servants, according to which the transitional provisions relating to the rate of acquisition of pension rights and the retirement age, introduced by the reform of the Staff Regulations for officials, 'shall apply by analogy to other servants in service on 31 December 2013'. [215] The Court recalls, first of all, that the transitional provisions must be interpreted strictly and that their application by analogy to other servants requires consideration of the specific characteristics of officials and other servants. In that regard, the difference between those two categories of staff lies, in particular, in the nature of the tasks performed and the legal link between the official or other member of staff and the administration of the European Union. More specifically, an official enters and remains in the service of the Union administration by virtue of a relationship governed by the Staff Regulations, whereas a contract agent enters and remains in service by virtue of a contractual relationship. [216] Therefore, in order to be covered by the transitional rules, other staff must 'be in service on 31 December 2013', that is have a contract with the Union administration on that date.

212| Second subparagraph of Article 22(1) of Annex XIII to the Staff Regulations.

213| Article 1(1) of the Annex to the Conditions of Employment of Other Servants.

214| As regards officials, in the judgment of 14 December 2018, ***Torné* v *Commission*** (T-128/17, EU:T:2018:969), the Court interpreted the concept of 'entry into service' within the meaning of the transitional provisions concerning the rate of acquisition of pension rights and pensionable age laid down in Articles 21 and 22 of Annex XIII to the Staff Regulations.

215| Article 1(1) of the Annex to the Conditions of Employment of Other Servants of the European Union, as amended by Regulation No 1023/2013.

216| Article 3a of the Conditions of Employment of Other Servants of the European Union.

In the second place, the Court clarifies the concept of 'to be in service on 31 December 2013'. According to the Court, that situation can be established only where the contract staff member does not sign a new contract which entails the start of a new employment relationship with the EU administration, namely, where that contract does not substantially modify his duties, such as to call into question the functional continuity of that employment relationship. It follows that the transitional provisions apply by analogy to other staff serving on 31 December 2013 and who continue to do so, after that date, pursuant to a contract that does not lead to a break in the employment relationship. That interpretation takes account of the effect in law of the signing of a new contract while preserving the acquired rights and legitimate expectations of the staff.

In the present case, the Court observes that the new contract signed by the applicant allowed him access to a higher function group, which called into question the functional continuity of the employment relationship which he had with the EU administration under the contract of 2008. Therefore, although the applicant was in service on 31 December 2013 under the original contract of 2008, the new contract of 2014 entailed termination of that employment relationship and the start of a new employment relationship, with the result that the applicant cannot benefit from the transitional provisions concerning the accrual rate of pension rights and retirement age.

6. Psychological harassment

Judgment of 14 July 2021, *AI* v *ECDC* (T-65/19, EU:T:2021:454) [217]

In June 2017, the applicant, AI, an official at the European Centre for Disease Prevention and Control (ECDC), submitted a request for assistance in accordance with Article 24 of the Staff Regulations, concerning alleged acts of psychological harassment by his Head of Unit.

Following that request, the Director of ECDC ('the Director') commissioned an external person to carry out an investigation into the conduct of the Head of Unit denounced by the applicant and another applicant for assistance. That report was finalised at the end of January 2018. The applicant requested access to that report in March and April 2018. Those requests were rejected.

During April and May 2018, meetings took place between the Director and the Head of Unit during which the latter was informed of the outcome of the investigation and of the Director's intention to terminate his contract on the basis of Article 47(c)(i) of the Conditions of Employment of Other Servants of the European Union. In that context, the Head of Unit submitted his resignation. The latter was accepted by the Director. During the 10 month period of notice following his resignation, the Head of Unit was directly entrusted with tasks and supervised by the Director, without having any hierarchical link with the applicant. He performed those tasks by teleworking.

Immediately after accepting the Head of Unit's resignation, the Director sent the applicant a letter concerning his request for assistance ('the first contested decision'). In that letter, the Director informed the applicant of the investigator's conclusion that his complaint could be upheld, without, however, communicating the investigation report to him. On the basis of the investigation report and other evidence available to her, the Director concluded that there were 'elements of harassment', but noted that the investigation report contained

217| See also, concerning a case of psychological harassment by a Member of the European Parliament, the judgment of 3 February 2021, ***Moi* v *Parliament*** (T-17/19, under appeal, EU:T:2021:51), presented under the heading 'II. 2. Disciplinary measures applicable to Members of the European Parliament'.

'several factual errors'. She added that the Head of Unit's approach to certain difficulties and his management style had caused unnecessary stress and anxiety to staff, while taking account of the fact that his role required him to act on certain issues. Finally, the Director indicated that she had considered taking 'appropriate action', but that in the meantime the Head of Unit had resigned from his post and would no longer be coming into the office.

The applicant again requested access to the investigation report and all the documents on the basis of which the Director had taken the first contested decision. The Director rejected that request ('the second contested decision').

Subsequently, the Director granted the applicant access to a non-confidential version of the investigation report on one occasion only and on site.

The applicant's complaint against the two contested decisions, which also included a claim for compensation for non-material damage related to those decisions, was rejected.

The General Court, seised by the applicant, annulled in part the first and second contested decisions and the decision rejecting the complaint, and clarified the scope of the duty to assist in a particular case where the competent authority had not fully endorsed the investigator's conclusions, nor fully established the facts, nor informed the applicant for assistance of all the measures taken following the investigation report. The judgment also clarifies the applicant for assistance's right to be heard and his right of access to the investigation file.

Findings of the General Court

As regards the admissibility of the action, the Court finds that a decision informing an applicant for assistance of the conclusion of an administrative investigation into harassment, assessing the conduct complained of in the light of the Staff Regulations and specifying the action taken, produces legal effects capable of affecting the applicant's interests and, therefore, is of a decision-making nature and constitutes an act adversely affecting him or her. As regards the applicant's interest in bringing proceedings, it is inherent in the requirements of effective judicial review that an applicant for assistance should be able to challenge, in the context of his or her appeal against the decision concerning his or her application, the appropriateness of the measures adopted in response to that application, including where he or she complains that the author of those measures did not initiate disciplinary proceedings against a third party found guilty of psychological harassment, in so far as he or she alleges, in that regard, grievances which are personal to him or her.

As regards the alleged infringement of Articles 24 and 86 of the Staff Regulations, the Court finds that there was no manifest error of assessment on the part of the Director when she accepted the Head of Unit's resignation instead of terminating his contract or initiating disciplinary proceedings against him. Furthermore, there is no provision in the Staff Regulations requiring the opening of disciplinary proceedings in case of a finding of a failure by an official or a member of staff to fulfil his or her obligations. The administration has a wide discretion as to the measures to be taken in a situation falling within the scope of Article 24 of the Staff Regulations.

By contrast, the Court finds that the first contested decision infringes Article 24 of the Staff Regulations in that ECDC failed to establish the facts sufficiently following the investigation report, to take a definitive and unambiguous position on that basis as to the existence or otherwise of psychological harassment within the meaning of Article 12a(3) of the Staff Regulations and to inform the applicant of the action taken on his request for assistance, in particular to inform him of the Director's initial intention to terminate the Head of Unit's contract, before he had submitted his resignation, and of the conditions under which that resignation had been accepted, including the arrangements for giving notice.

As regards the scope of the applicant for assistance's right to be heard, the Court notes that, in so far as the Director decided not to subscribe fully to the conclusions of the investigation report relating to the request for assistance, she should have allowed the applicant, before the adoption of the first contested decision, to state his position on any factor which led her not to subscribe fully to those conclusions. Had that irregularity not occurred, the procedure could have led to a different result. By contrast, the Director was not obliged to hear the applicant's observations on the reasons which led her to accept the Head of Unit's resignation instead of terminating his contract or initiating disciplinary proceedings, since those decisions did not affect the applicant adversely.

The Court also finds that the obligation to state reasons was infringed in that the first contested decision does not explicitly address any of the situations mentioned by the applicant in his request for assistance, but merely refers to the factual elements described in the investigation report, to which the applicant had not, at that time, been given access, and to the information available to the Director, without giving details. That decision also mentions the existence of 'factual errors' in the investigation report, without describing them, and of 'issues' or 'difficulties' on which the Head of Unit 'needed to act', again without detailing them. Finally, the Director mentions, without elaborating, that she was considering 'appropriate measures', which were not taken due to the Head of Unit's resignation.

In the light of all of the foregoing considerations, the Court annuls the first contested decision.

As regards the right of the applicant for assistance to have access to the investigation report, the Court notes that a copy of the reports drawn up at the end of the administrative investigation, if necessary in a non-confidential version, must be made available in the light of the principle of good administration guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union and the duty to assist, which imply that the competent authority must inform the persons concerned of the outcome of their request for assistance, all the more so when the report acknowledges the existence of psychological harassment.

However, the right of access to the file is not absolute. That article of the Charter of Fundamental Rights of the European Union guarantees this right under two conditions.

First, a person's right of access relates only to a file that concerns him or her. In those circumstances, the applicant was not entitled to access the parts of the investigation report that concerned the second applicant for assistance and that described the personal situation of other ECDC members.

Secondly, access must be provided while respecting the legitimate interests of confidentiality and professional and business secrecy. In the present case, in the non-confidential version of the investigation report, ECDC not only concealed the parts relating to the testimonies, but also the entire content of the investigator's analysis, including his conclusions on the applicant's request for assistance, which cannot be justified by the protection of the legitimate interests of witness confidentiality and the proper conduct of investigations.

On that basis, the Court partially annuls the second contested decision.

Finally, the Court rejects the claim for compensation brought by the applicant in the absence of evidence of non-material damage which can be separated from the illegality justifying the annulment and which cannot be fully remedied by that annulment.

7. Time limit for instituting proceedings

Judgment of 3 March 2021, *Barata* v *Parliament* (T-723/18, under appeal, [218] EU:T:2021:113)

On 22 September 2017, the European Parliament published a call for applications ('the notice of competition') for the 2017 certification exercise, in order to select officials in the AST function group who were suitable for appointment to a post in the AD function group pursuant to Article 45a of the Staff Regulations. The applicant, an official of the European Parliament, submitted an application in respect of the procedure in question.

The appointing authority of the Parliament ('the appointing authority') rejected that application as inadmissible on the ground that it was not accompanied by a list of annexes, as required by the notice of competition. The appointing authority confirmed its rejection by two decisions taken following internal review procedures initiated by the applicant.

By decision of 23 July 2018, the appointing authority rejected the applicant's complaints against the decisions rejecting his requests, while confirming its previous decisions. The Parliament communicated that decision by registered letter with acknowledgement of receipt, sent to the applicant's home address. On 25 July 2018, the Belgian postal service delivered that letter to the applicant's home address and, in the applicant's absence, left a notice of attempted delivery. As that letter was not collected by the applicant, the Belgian postal service sent it back to the Parliament on 9 August 2018. In addition, on 28 August 2018, the Parliament sent an email to the applicant to which the decision of 23 July 2018 was annexed, which the applicant confirmed that he had become aware of that day.

On 7 December 2018, the applicant, claiming that the period for bringing an action had started to run from the date on which he became aware of the email, brought an action before the Court seeking annulment of the decisions not to admit his application and annulment of the notice of competition.

The Court, while finding that the action had been brought within the period prescribed for that purpose, nevertheless dismissed it as unfounded. In its judgment, the Court clarifies the case-law of the European Union as regards the determination of the starting point of the periods for bringing proceedings in disputes governed by the Staff Regulations where an individual decision is sent by registered letter with acknowledgment of receipt, but is not collected by the addressee.

Moreover, the judgment supplements the case-law concerning the application of Regulation No 1/58 on the rules on the use of languages [219] where there is a certification procedure, namely an internal competition reserved for certain officials.

218| Case C-305/21 P, ***Barata* v *Parliament***.

219| Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition Series I 1952-1958, p. 59), as amended by Council Regulation (EU) No 517/2013 of 13 May 2013 (OJ 2013 L 158, p. 1).

Findings of the General Court

The Court finds, first of all, that the administration is in principle free to choose the method which it considers most appropriate in the light of the circumstances of the case in order to notify a decision rejecting a complaint, since the Staff Regulations do not impose any order of priority between the various possible methods, such as electronic means or registered letter with acknowledgement of receipt.

The Court notes, in that regard, that a decision is properly notified if it is communicated to the person to whom it is addressed and the latter is put in a position to become acquainted with it. That last condition is satisfied where the addressee is put in a position to become acquainted with the content of the decision and of the grounds on which it is based.

The Court observes, moreover, that no provision in the Staff Regulations or in other EU regulatory instruments specifies that, in the event of unsuccessful notification of a registered letter, the point from which time starts to run for the calculation of the time limit for bringing proceedings is deferred until the expiry of the period for which the postal service is required to retain that letter rather than the date on which the applicant actually became aware of the content of that letter.

The Court concludes that, where the relevant legislation currently in force is silent, legal certainty and the need to avoid any discrimination or arbitrary treatment in the interest of the proper administration of justice preclude the application, in the present case, of the presumption of notification. The Parliament is therefore wrong to claim that only notification by registered letter must be taken into account for the purposes of calculating the time limit for bringing proceedings, even though that letter was not collected within the time period given by the Belgian postal services. Consequently, as it was on 28 August 2018 that the applicant became fully aware of the decision of 23 July 2018, the period for bringing an action started to run from 28 August 2018.

As regards the alleged infringement of the EU rules on the use of languages, in so far as the Parliament failed to use, in the notice of competition and in the decision of 23 July 2018, the applicant's mother tongue, namely Portuguese, the Court notes that a derogation from those rules may be justified in the light of the internal nature of a competition reserved to officials and staff employed in an institution. The fact that documents sent by the administration to one of its officials are drafted in a language other than that official's mother tongue does not constitute any infringement of that official's rights if he or she has a command of the language used by the administration which enables that official to acquaint himself or herself effectively and easily with the content of the documents in question. The Court notes, in that regard, that the applicant indicated in his application form that he had a very good level of the language actually used in the competition notice and in the decision of 23 July 2018 and that he used that language himself to communicate with the administration during the pre-litigation procedure.

The Court concludes that the certification procedure at issue in the present case is not an external competition which has to be published in the *Official Journal of the European Union* in all the official languages and which is open to all citizens of the European Union, but an internal competition reserved for certain officials with more than six years' service. It is therefore without infringing the principles governing the EU rules on the use of languages that the Parliament was able to refrain from publishing the notice of competition in Portuguese. It was also without disregarding those principles that, in that notice, the Parliament requested the applicant to communicate with it in a language other than Portuguese and to have an adequate command of English or French.

XIV. Applications for interim measures

1. Covid-19 pandemic

Order of 29 October 2021, *Abenante and Others* v *Parliament and Council* (T-527/21 R, not published, EU :T :2021:750)

In order to limit the spread of the severe acute respiratory syndrome (SARS-CoV-2), the Member States adopted certain measures which had an impact on the exercise by citizens of the European Union of their right to move and reside freely within the territory of the Member States.

With a view to facilitating the exercise of the right to move and reside freely within the territory of the Member States, the European Parliament and the Council of the European Union adopted, on 14 June 2021, Regulation 2021/953. [220] This regulation was intended to contribute to facilitating the gradual lifting of those restrictions by the Member States in a coordinated manner.

The provisions of that regulation allow, in particular, the cross-border issuance, verification and acceptance of one of the following certificates: (a) a certificate confirming that its holder has received a vaccination against the coronavirus disease 2019 (Covid-19), which is caused by SARS-CoV-2, in the Member State issuing the certificate, called the 'vaccination certificate'; (b) a certificate confirming that its holder has been subject to a test carried out by health professionals or by skilled testing personnel in the Member State issuing the certificate, called the 'test certificate'; (c) a certificate confirming that, following a positive result of a test carried out by health professionals or by skilled testing personnel, the holder has recovered from a SARS-CoV-2, infection, called the 'certificate of recovery'.

On 30 August 2021, a number of Union citizens brought an action before the General Court of the European Union, seeking annulment of the regulation, in whole or in part. On 31 August 2021, those citizens also lodged an application for interim measures seeking, as an immediate interim measure, suspension of the operation of the provisions relating to the cross-border issuance, verification and acceptance of the certificates. In support of that claim, the applicants maintain, in the first place, that the contested regulation creates discrimination between vaccinated persons and those not vaccinated in the exercise of their fundamental rights. They submit that the regulation constitutes a breach of their right to freedom of movement if they do not submit to invasive medical treatment against their will, which constitutes a direct restriction of their personal liberty, provided for in Article 6 of the Charter of Fundamental Rights of the European Union, and also of their freedom to choose an occupation and their right to engage in work, provided for in Article 15 of that charter. In the second place, the applicants claim that the serious breach of their fundamental rights caused by the content of the contested regulation, which clearly disregards any scientific norm, must be brought to an immediate end, in view of the material and, in particular, the non-material harm of which it is the direct and immediate cause, thus depriving them of the possibility of carrying on a normal social life.

The President of the General Court dismisses the application for interim measures.

220| Regulation (EU) 2021/953, on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ 2021 L 211, p. 1).

The President of the General Court points out, at the outset, that Article 276 TFEU establishes the principle that actions do not have suspensory effect, since acts adopted by the institutions of the European Union are presumed to be lawful, and that it is only exceptionally that the judge hearing an application for interim measures may order the suspension of operation of an act challenged before the Court.

The President of the Court observes, next, that a suspension of operation of an act may be ordered if the party seeking it establishes that the grant of such an order is justified, prima facie, in fact and in law (*fumus boni juris*) and that it is urgent in so far as, in order to avoid serious and irreparable damage to the applicant, it must be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, and consequently an application for interim measures must be dismissed if any one of them is not satisfied. The judge hearing an application for interim relief is also to undertake, where necessary, a weighing-up of the competing interests.

Consequently, the President of the General Court examines first of all whether the condition relating to urgency is satisfied, and recalls in that respect that, with regard to the argument that the regulation creates in practice discrimination between citizens of the Union in the exercise of their fundamental rights, he must not apply mechanically and rigidly the condition relating to the irreparable nature of harm, but must take account of the circumstances specific to each case, and that criterion must be disapplied when it cannot be reconciled with the requirements which follow from effective provisional protection.

In that regard, in the first place, the President of the General Court observes that none of the arguments put forward by the applicants show, prima facie, the manifest nature of the alleged infringement, since possession of the certificates provided for by the regulation does not constitute a precondition of the exercise of the right to freedom of movement. In addition, he emphasises that the applicants adduce no evidence to demonstrate that their conditions of movement have been made worse by the regulation by comparison with the situation that existed before it entered into force. The aim of the contested regulation is, on the contrary, to facilitate the exercise of the right to move freely within the European Union during the Covid-19 pandemic, as a result of the establishment of a framework for the issuance, verification and acceptance of European Union digital Covid certificates.

In the second place, the President of the General Court states that the judge hearing an application for interim measures must, in all cases, have solid and precise evidence, supported by detailed documents which demonstrate the financial situation of the party seeking the interim measure and allow that judge to determine the consequences which the absence of the measures applied for would in all likelihood entail. He notes in that regard that the applicants have failed to supply firm and specific indicia, supported by certified documents, with the result that he is unable to assess whether the alleged harm may be classified as serious and irreparable. He further states that neither the material harm nor the non-material harm alleged by the applicants can be regarded as irreparable, since the material harm may be the subject of subsequent financial compensation and that the annulment of the regulation following the main proceedings would constitute sufficient reparation for the non-material harm.

The President finds that the applicants have not established that the condition relating to urgency was satisfied, and the application for interim measures is therefore dismissed, without there being any need to examine the condition relating to the existence of a prima facie case or to weigh up the competing interests.

Orders of 30 November 2021, *Roos and Others* v *Parliament* (T-710/21 R, not published, EU:T:2021:838) and *ID and Others* v *Parliament* (T-711/21 R, not published, EU:T:2021:837) [221]

On 27 October 2021, the Bureau of the European Parliament introduced exceptional health and security rules for access to the Parliament's buildings in its three places of work (Brussels, Strasbourg and Luxembourg). In essence, the purpose of that decision was made access to the Parliament's buildings conditional on presentation of a Covid-19 vaccination, test and recovery certificate or an equivalent certificate. [222] That decision applies to all persons wishing to have access to those buildings.

A number of Members of the European Parliament, officials, accredited parliamentary assistants and other servants of the Parliament brought an action before the General Court of the European Union for annulment of the decision in question. In addition, by way of interim measures, they requested the President of the General Court to order suspension of the operation of the decision in question pending delivery of the judgment on the substance.

By orders of 5 November 2021, [223] the President of the General Court ordered, as a provisional measure, that the applicants could have access to the Parliament's premises on the basis of a negative self-test. Where the result was positive, the test had to be followed by a PCR test. Where the result of the PCR test was positive, the Parliament could refuse the applicants access to its premises.

By the present orders, the President of the General Court revokes his orders of 5 November 2021 and dismisses the applications for suspension of operation of the decision.

The President notes, first of all, that the decision to make access to the Parliament's buildings at its three places of work conditional on presentation of an EU digital Covid certificate or an equivalent certificate does not have the object or the effect of calling in question the exercise of the mandates of the applicants who are elected Members of the Parliament or the exercise of the occupational activities of the applicants who are officials, accredited parliamentary assistants or other servants of the Parliament. The mere fact of being subject to conditions in order to have access to the Parliament's buildings in its three places of work, whether for reasons of safety or public health, does not mean that that obligation causes the applicants serious and irreparable damage requiring the adoption of interim measures. As regards the alleged direct interference with the power of representation of the Members of the European Parliament and on their ability to work properly and effectively in that the contested decision also applies to their assistants and to the staff of the Parliament, the President observes that the applicants do not put forward any specific argument capable of establishing that those persons are not in a position to comply in good time with the conditions of access imposed on them.

Furthermore, no argument demonstrates that the alleged harm linked with the interference with fundamental rights is serious and difficult to repair, or indeed irreparable. In that context, the personal data processed when the QR code on the certificates is read are not used for any other purpose and the security staff are subject to strict obligations to maintain professional secrecy.

221| See also, concerning the same issue, orders of 8 December 2021, ***D'Amato and Others* v *Parliament*** (T-722/21 R, not published, EU:T:2021:874), ***Rooken and Others* v *Parliament*** (T-723/21 R, not published, EU:T:2021:872), and ***IL and Others* v *Parliament*** (T-724/21 R, not published, EU:T:2021:873).

222| Within the meaning of Article 8 of Regulation 2021/953 (Covid-19 certificates and other documentation issued by a third country).

223| Orders of 5 November 2021 ***Roos and Others* v *Parliament*** (T-710/21 R, not published), and ***ID and Others* v *Parliament*** (T-711/21 R, not published)

Last, the President notes that, as regards those among the applicants who are neither vaccinated nor recovered, none of the evidence adduced is capable of establishing that the nasopharyngeal samples necessary in order to obtain a test certificate cause serious risks to their health. Furthermore, he notes that the persons concerned are able to request a derogation and to set out in their request the reasons why, in their individual case, nasopharyngeal samples would cause serious risks to their health.

2. Immunity of Members of the European Parliament

Orders of 30 July 2021, *Puigdemont i Casamajó and Others* v *Parliament* (T-272/21 R, not published, under appeal, [224] EU:T:2021:497) and of 26 November 2021, *Puigdemont i Casamajó and Others* v *Parliament* (T-272/21 RII, not published, under appeal, [225] EU:T:2021:834)

On 13 January and 10 February 2020, the European Parliament received requests to waive the immunity of Mr Carles Puigdemont i Casamajó, Mr Antoni Comín i Oliveres and Ms Clara Ponsatí i Obiols, elected Members of the Parliament. The purpose of those requests, made by the Tribunal Supremo (Supreme Court, Spain) in the course of criminal proceedings concerning, in particular, presumed offences of sedition, was to ensure that the execution of European arrest warrants against the applicants in the context of those proceedings would be pursued.

On 7 January 2021, the Belgian judicial authorities refused to execute a European arrest warrant against Mr Lluís Puig i Gordi, who is also subject to the criminal proceedings at issue and a European arrest warrant but who, unlike the Members of the Parliament, does not enjoy parliamentary immunity; those authorities asserted that the execution of that warrant would jeopardise the fundamental rights of the person concerned. That situation led the Tribunal Supremo, in the context of the criminal proceedings at issue, to submit, on 9 March 2021, a request for a preliminary ruling to the Court of Justice in order, in particular, to ascertain whether the executing judicial authority is authorised to refuse to surrender the person requested by means of a European arrest warrant on the basis of grounds of refusal which are laid down in its national law, but which are not set out, as such, in the Framework Decision on the European arrest warrant. [226]

By decisions of 9 March 2021, the Parliament waived the immunity of the three Members of the Parliament. On 19 May 2021, they brought an action before the General Court of the European Union for annulment of those decisions. On 26 May 2021, the Members of the Parliament lodged an application for interim measures, in which they requested the Vice-President of the General Court to suspend the application of those decisions. They maintained that the Parliament's decision allowed any Member State to arrest them or to restrict their movements and to surrender them to the Spanish authorities. In their submission, the decisions did not preclude their being remanded in custody, should they be surrendered to those authorities. They maintained that that would cause them serious and irreparable damage and would impair their right to exercise their office as Members of the European Parliament. They further maintained that any annulment of the contested decisions would be unenforceable if, at the time when it took effect, that had already been the subject of such a surrender and such detention.

224| Case C-629/21 P(R), ***Puigdemont i Casamajó and Others* v *Parliament and Spain***.

225| Case C-81/22 P(R), ***Puigdemont i Casamajó and Others* v *Parliament*.**

226| Case C-158/21, ***Puig Gordi and Others***

By order of 30 July 2021, the Vice-President of the General Court dismissed that application, taking the view that the Members of the Parliament had not succeeded in demonstrating that the condition relating to urgency was satisfied since, as matters stood, the serious and irreparable damage which they had pleaded did not appear to be capable of being classified as damage which was certain or established with a sufficient degree of probability.

In spite of the dismissal of that application for interim measures, the Vice-President made clear that the Members of the Parliament retained the possibility of submitting a fresh application for interim measures if, after that order had been made, the alleged damage appeared to be sufficiently probable, in particular in the event of arrest by an executing authority of a Member State or the implementation of a procedure for their surrender to the Spanish authorities.

On 23 September 2021, Mr Puigdemont was arrested at Alghero Airport (Italy) in execution of the European arrest warrant relating to him. On 1 October 2021, the Members of the Parliament lodged a second application for interim measures, in which they relied on fresh evidence.

By order of 26 November 2021, the Vice-President of the General Court dismissed that second application for interim measures.

The Vice-President of the General Court declares that the criminal proceedings at issue are suspended until the Court of Justice has ruled on the request for a preliminary ruling and specifies that that suspension follows directly from the submission of that request and does not require any specific decision of the Tribunal Supremo in that regard. He adds that the Spanish court was also aware of that suspensory effect. He also confirms that, since the request relates to the execution of European arrest warrants issued in the criminal proceedings at issue, the suspension of those proceedings necessarily calls for the suspension of the execution of the warrants. He makes clear that that suspension follows directly from the suspension of the criminal proceedings at issue and that its effects are binding on the competent national authorities, including the judicial authorities, and does not require a specific decision on their part.

The Members of the Parliament contend that they may nevertheless be arrested, have their freedom of movement curtailed or even be extradited and imprisoned in Spain, thus exposing themselves to serious and irreparable damage, as demonstrated by the new facts on which they rely.

According to the Vice-President of the General Court, although some of the circumstances referred to by the Members of the Parliament tend to show that it is possible that certain national authorities did not draw all the conclusions from the submission of the request for a preliminary ruling, in particular those relating to the suspension of the criminal proceedings at issue and the execution of the European arrest warrants, the evidence adduced in support of the second application for interim measures does not call into question the assessments made in the first interlocutory order.

The Vice-President of the General Court observes in that regard that the arrest of the Members of the Parliament does not in itself constitute serious and irreparable damage. To do so, it would have to impair their right to exercise freely their parliamentary mandate and the proper functioning of the Parliament. As noted in the first interlocutory order, the members of the Parliament still enjoy their immunity when travelling to attend meetings of the Parliament, so that serious and irreparable damage caused by arrest remains hypothetical.

He points out, drawing the conclusions from the submission of the request for a preliminary ruling, that the executing judicial authorities do not intend to execute the European arrest warrants relating to the Members of the Parliament before the Court gives a ruling on that request and that, accordingly, the applicants are not, at this stage, at risk of surrender to the Spanish authorities. Furthermore, and in any event, in application

of the principle of sincere cooperation, the national authorities must take into account the fact that the criminal proceedings and the execution of the European arrest warrants relating to the Members of the Parliament are suspended.

3. Public procurement by the EU institutions

Order of 26 May 2021, *OHB System* v *Commission* (T-54/21 R, not published, EU :T :2021:292)

On 29 January 2021, the German satellite company OHB System AG ('OHB') brought an action before the General Court of the European Union seeking annulment of two decisions of the European Space Agency (ESA). By those decisions, the ESA, acting on behalf of the Commission, following a public procurement procedure, did not accept OHB's tender and awarded two contracts for the 'Procurement of Galileo transition satellites' to Thales Alenia Space Italia S.p.A ('Thales Alenia') and Airbus Defence & Space GmbH ('Airbus'). As well as bringing its action, OHB also lodged with the General Court an application for interim relief, seeking to obtain, as an interim measure, the suspension of the ESA's decisions providing, in essence, for its exclusion from the contract at issue.

In support of its application, OHB claims, in essence, that its competitor Airbus recruited one of its executives who had played a decisive part in preparing its tender. OHB suspects that that former employee unlawfully obtained sensitive information which was capable of giving the new employer (Airbus) undue advantages in connection with the award of the contract.

In the context of the interlocutory proceedings, the President of the General Court, by order of 31 January 2021, granted – provisionally and without hearing the Commission – OHB's application for suspension of the operation of the ESA's decision informing it that its tender for the public contract at issue had not been accepted. He then specified, by order of 26 February 2021, that the order of 31 January 2021 concerns only Airbus and not Thales Alenia. OHB submitted evidence only in relation to Airbus.

The President of the General Court, as the judge hearing the application for interim relief, after hearing the Commission, sets aside his previous orders and dismisses OHB's application for interim relief.

The President of the General Court observes that, prima facie, OHB's application is not wholly unfounded and that the damage which it alleges is objectively serious. The President of the General Court considers, in particular, that, without prejudging the decision of the Court in the main action, the Commission's possible failure to exercise due care and attention in ensuring that the companies participating in the tendering procedure are treated equally merits a thorough examination. In that regard, the President of the General Court notes that the ESA sent a request for information to Airbus on 29 January 2021, (namely, the day on which OHB brought its action,) relating, in particular, to the contribution of OHB's former employee in preparing the tender in the context of his new functions with Airbus. Airbus supplied, in that respect, a brief, vague response. The President of the General Court concludes that it cannot be precluded that that belated and incomplete verification by the ESA was insufficient for the purpose of assessing OHB's former employee's participation in preparing the tendering procedure in the context of his new functions with Airbus.

The President of the General Court considers, however, that it is necessary to weigh up the risks associated with each of the possible solutions in the context of the interlocutory proceedings (respectively the grant or the dismissal of the application for suspension of operation, as an interim measure).

In that respect, the President of the General Court observes, in the first place, that if OHB were to succeed in the substantive proceedings, the damage associated with the definitive loss of its opportunity to secure the contract at issue (because of the dismissal of its application for interim relief) could be assessed, which would allow for the individual loss actually sustained in that respect to be remedied in full. By contrast, if the interim measures applied for were ordered, the Commission would be unable to enter into a contract with one of the tenderers, which would have considerable technical and financial consequences for the European Union space programme. The rapid conclusion of that contract is therefore an important public interest.

In the second place, the President of the General Court finds that, although the loss in profits expected by OHB and the compensation to be paid to its staff would amount to around EUR 30 million, that sum has to be compared with the value of the European satellite navigation programmes, which is considerable, since the European Union has invested, in the 2014 to 2020 period alone, more that EUR 7 billion in those programmes and, together with the overall value of the satellites to which the procurement procedure at issue relates, represents around EUR 1.47 billion.

In the third place, the President of the General Court notes that the probable merits of OHB's claims are limited to a single aspect: the possibility that the Commission failed to exercise due care and attention in ensuring that the companies taking part in the call for tenders were treated equally. However, it should be noted in that regard not only that no action was taken on the complaint filed by OHB with the German public prosecutor's office but also that the ESA, acting on behalf of the Commission, took the initiative to send a request for information to Airbus in order to examine the risk that any illegalities had been committed.

In the light of those considerations, the President of the General Court concludes that the weighing up of the interests at stake leans towards not granting the interim measures sought.

C.

Activity of the Registry of the General Court in 2021

By **Emmanuel Coulon**, Registrar of the General Court

The mission of the Registry of the General Court is to contribute, under the authority of the President of the General Court, to the administration of justice. Using the resources at its disposal, it manages all the activities designed to enable the judges to carry out their judicial functions in the best possible conditions. These activities consist, in particular, in organising the entire course taken by a case, including all of its components, from the initiation of the action to publication of the decision closing the case, having due regard to the applicable regulations and the objectives pursued by the Court and taking account of the changes in its composition. The Registry must be a modern, dynamic service whose intervention is based on a procedural mechanism adapted to the cases brought before the Court, using efficient computer systems and optimising its administrative organisation and its effectiveness.

Under the direction of the Registrar of the General Court, the Registry carries out its mission with 69 budgetary posts at its disposal (at 31 December 2021). These posts are held by experienced officials and other staff with a variety of profiles, including polyglot lawyers of different nationalities, which allows the service to benefit from a broad language coverage and a wide range of abilities.

One mission:

contributing to the effective administration of justice

Four objectives:

1 amaintaining **communications** between the parties' representatives and the Judges of the General Court in the context of the cases.

2 ensuring **the smooth conduct** of the proceedings and maintaining the case files.

3 providing **active legal and technical assistance** to the Judges of the General Court and their colleagues.

4 ensuring **the administration of the General Court** under the authority of the President of the General Court and with the assistance of the services of the Court of Justice of the European Union.

I. Challenges of the year for the Registry

A number of events marked 2021.

First of all, the Registry was, for the second year running, required to carry out its mission in a **context of health crisis**. The organisational and functional difficulties inherent in a situation characterised by lack of foreseeability were indeed real.and coordination, essential for the performance of the tasks of a registry, were more complicated, owing in particular to the **work largely carried out remotely**. In spite of these obstacles, however, all the activities were carried out without any discontinuity and the Registry always remained a centre of **stability** on which the General Court was able to rely.

Next, the Registry supported a court undergoing numerous changes in its composition owing to the entry into office, departure and replacement of several judges. [1] One of the changes, that which was linked to the death of Judge Berke on 1 August 2021, was the source of profound sadness for the institution. These movements made it necessary to reorganise the judicial panels within the 10 Chambers of the General Court and to reassign cases between the judges. The Registry took part in all of these operations, at both judicial and administrative level, assisted, in the latter respect, by the services of the institution.

In addition, the Registry took action to enable the Court to attain the objectives which it had set itself for the second full year of activity following the reform of the judicial architecture of the European Union. [2] In that respect, the Registry identified a set of internal measures designed to **optimise judicial time**, to favour the **rapid treatment of cases** and to increase information sharing in order to make proactive case management effective. These measures supplement the internal **adaptation of working methods** decided on in 2020 during the general switch to remote working, adjusted or enhanced as experience dictated. Endorsed by the Conference of Presidents of Chambers (the General Court's own body, consisting of, in addition to the President and the Vice-President, the Presidents of the 10 Chambers that comprise the General Court), they fit perfectly within a more extensive set of programmes implemented by the General Court on the basis of the recommendations set out in the report produced by the Court of Justice in 2020. [3]

Last, the Registry adopted provisions to manage a new category of **cases linked with the Covid-19 pandemic**. What these cases, arising from different matters, have in common is that they receive immense media attention and are often accompanied by requests that they be dealt with urgently (either to obtain interlocutory relief by way of interlocutory measure, or to obtain a decision on the substance without delay). Some of these cases were brought by a very large number of applicants and gave rise to numerous requests to intervene.

1| The composition of the General Court is set out in detail on page 404 of this report.

2| The reform was initiated by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14) and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

3| Report provided for in Article 3(1) of Regulation 2015/2422: [https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-12/tra-doc-fr-div-t-0000-2020-202009736-05_01.pdf]. file:///E:/Downloads/tra-doc-en-div-t-0000-2020-202009736-05_02(1).pdf.

II. Responses provided: 2021 in figures

The statistics show that the Registry was able to rise to the challenges of the last year.

In addition to the data commented on by the President in the preface, attention should be given more specifically to certain actions taken by the Registry.

These actions are generally carried out at different stages in the life of a case. Thus, immediately following the lodgement of an action, the Registry carried out, in 2021, a **pre-examination** of 882 applications initiating proceedings, [4] which included identifying connections between cases and identifying actions that should be dismissed on grounds of manifest lack of jurisdiction or manifest inadmissibility. It ensured that the 41% of the applications received, and which failed to comply with procedural requirements, were **regularised**.

Throughout a case, the Registry **enters procedural documents in the Register** (56 827 register entries in 2021 [5]) and prepares **draft procedural orders** in the context of the active assistance provided to the Judges' chambers (371 draft orders in 2021). After analysing the documents lodged by the parties, the Registry sends **communications to the judges' cabinets (in the** form of electronic transmission files) to inform the judges or to invite them to decide on the course which the procedure should take. The number of these communications is rising significantly (14 314 in 2021 against 12 636 in 2020).

Urgent proceedings remained significant, with 45 **applications for interim measures** (38 in 2020), 38 applications for expedited proceedings aimed at obtaining a rapid determination of the substance of the case (22 in 2020) and 1 **expedited procedure decided upon by the Court of its own motion**. The Registry always gives high priority to such cases when dealing with the documents lodged or to be served in these procedures.

In addition, the Court held **240 hearings**, including 1 lasting 5 days. [6] Furthermore, drawing on the experience gained in 2020, the Registry helped to arrange **72 videoconference hearings** when the parties' representatives were unable to travel to Luxembourg for reasons connected with the health crisis (observing certain technical prerequisites and following the success of interpretation tests designed to ensure a high-quality transmission).

In that regard, the joint work of the Registry and the various departments of the institution involved has been recognised by the European Ombudsman, who in June 2021 gave the **Award for good administration** for the design of the remote hearing system used before both courts of the European Union.

Last, the Registry complied with its regulatory obligations and continued to be the **point of contact for citizens**. In fact, alongside the 882 cases brought by parties represented by a lawyer or an agent, the Registry received 988 written applications from citizens (a figure never before reached). Complying with the requirements of the European Code of Good Administrative Behaviour, the Registry replied to each of those applications in the language used by the author.

4| An increase in the number of cases in the field of access to documents (32 in 2021 against 8 in 2020) and in the field of public health (25 in 2021 by comparison with 8 in 2020) should be noted. This development is directly linked with measures to manage the health crisis.

5| 2021 marked the 15th anniversary of the creation of the multilingual electronic register. It is also the year in which the one-millionth entry was placed on the register of the Registry of the General Court.

6| Case ***Google and Alphabet* v *Commission (Google Android)*** (T-604/18, not published, EU:T:2019:743).

The Registry also continued to be a player in the **protection of the environment** by continuing to reduce paper consumption by changing its practices and employing a tailor-made communication.

Last, it continued specific actions and awareness-raising campaigns to **protect personal data** on the basis of Regulation 2018/1725, [7] both in the context of its administrative functions and in that of the judicial functions of the General Court.

III. Partner in digital transformation

Adapting to technological changes and anticipating future developments of the information systems condition the activity of the Registry. This challenge of tomorrow was an everyday feature in 2021.

The service was therefore **restructured** in the course of the year in order to be best placed to meet the expectations of the institutional partners which are piloting the digital transformation. A unit placed under a Head of Unit ensures a coordinated monitoring of all work connected with new technologies.

Actions were also pursued, always in close collaboration with the Information Technology Directorate, to achieve the **digitisation of the judicial process**, notably by improving the data acquisition systems spontaneously put in place in March 2020 and investing in an ambitious project for the electronic signature of the judicial decisions of the Court. The Registry also contributed through its representatives to the work of the task forces in the field of new technologies, with a particular commitment to the future projects consisting in **the integrated case management system** and **artificial intelligence**.

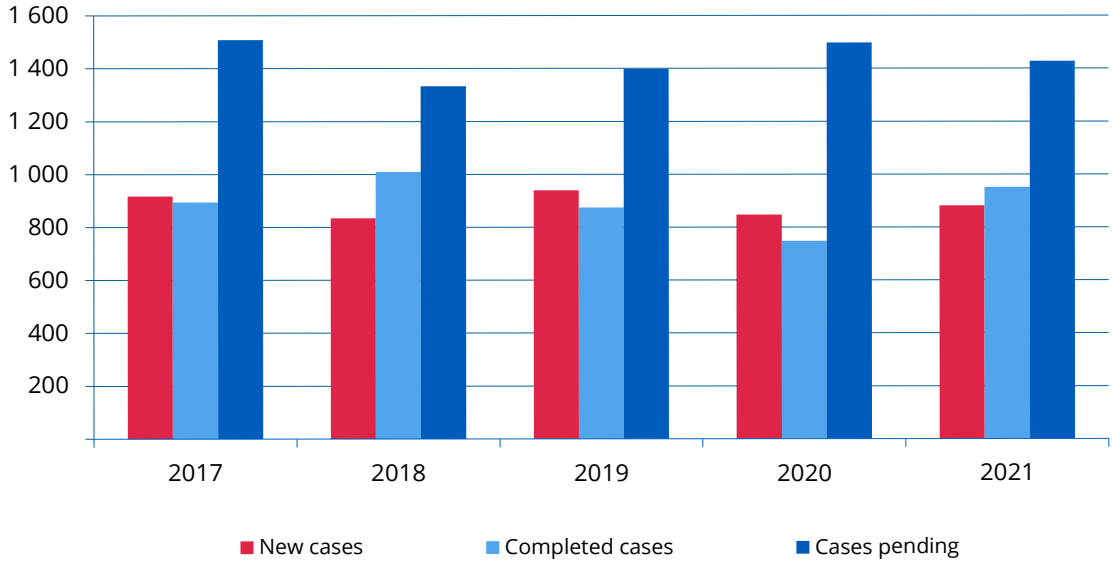
IV. Acknowledgements

This analysis would not be complete without an essential injection of soul. Special tribute must be paid to those who are willing to 'go the extra mile'. It is thanks to the constant efforts of the women and men of the service – efforts which are all the more significant because they were made during a period of health crisis – that the challenges of 2021 were met and that the Registry, which has demonstrated its ability to reinvent itself, has continued to be what it is meant to be: a Registry of proposals and a Registry of solutions.

7| Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) N^{o} 45/2001 and Decision N^{o} 1247/2002/EC (OJ 2018 L 295, p. 39).

D.
Statistics concerning the judicial activity of the General Court

I. General activity of the General Court – New cases, completed cases, cases pending (2017 to 2021) [1] [2]



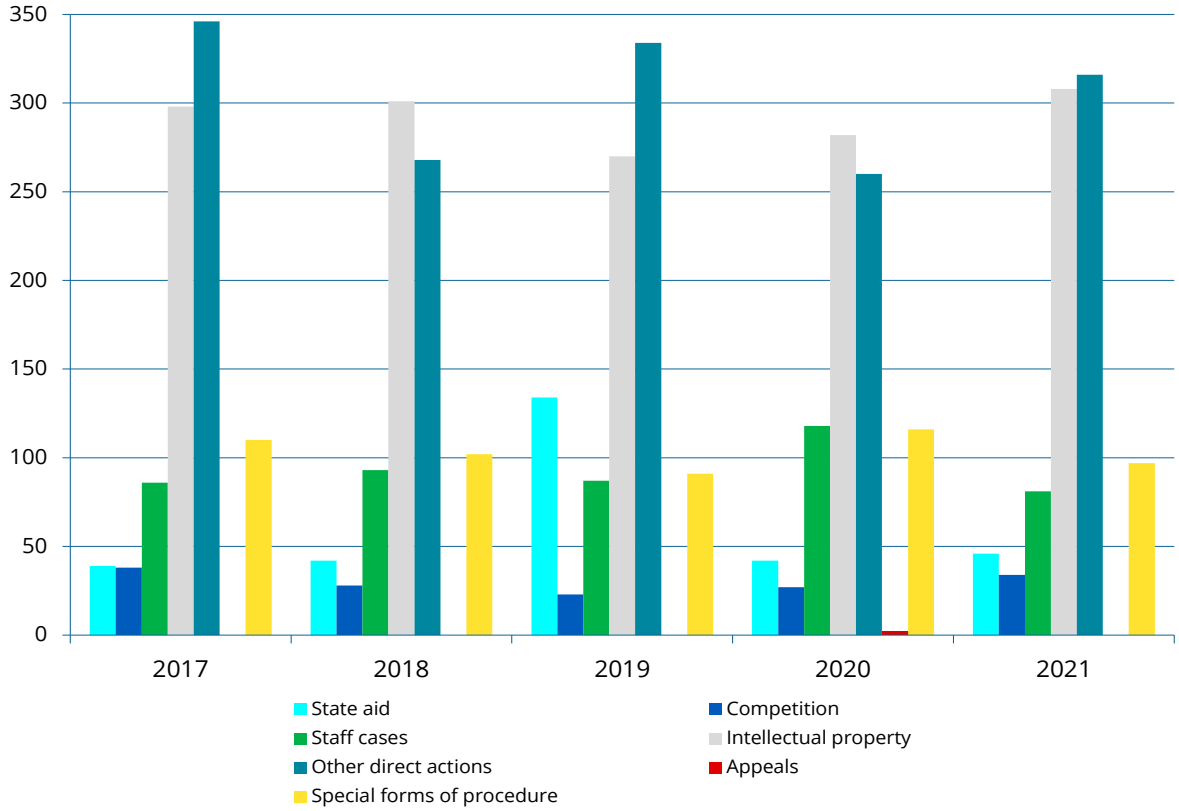
	2017	2018	2019	2020	2021
New cases	917	834	939	847	882
Completed cases	895	1 009	874	748	951
Cases pending	1 508	1 333	1 398	1 497	1 428

1| Unless otherwise indicated, this table and the following tables take account of special forms of procedure.

The following are considered to be 'special forms of procedure': application to set aside a judgment by default (Article 41 of the Statute of the Court of Justice; Article 166 of the Rules of Procedure of the General Court); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 167 of the Rules of Procedure); interpretation (Article 43 of the Statute of the Court of Justice; Article 168 of the Rules of Procedure); revision (Article 44 of the Statute of the Court of Justice; Article 169 of the Rules of Procedure); legal aid (Article 148 of the Rules of Procedure); rectification (Article 164 of the Rules of Procedure); failure to adjudicate (Article 165 of the Rules of Procedure); and dispute concerning the costs to be recovered (Article 170 of the Rules of Procedure).

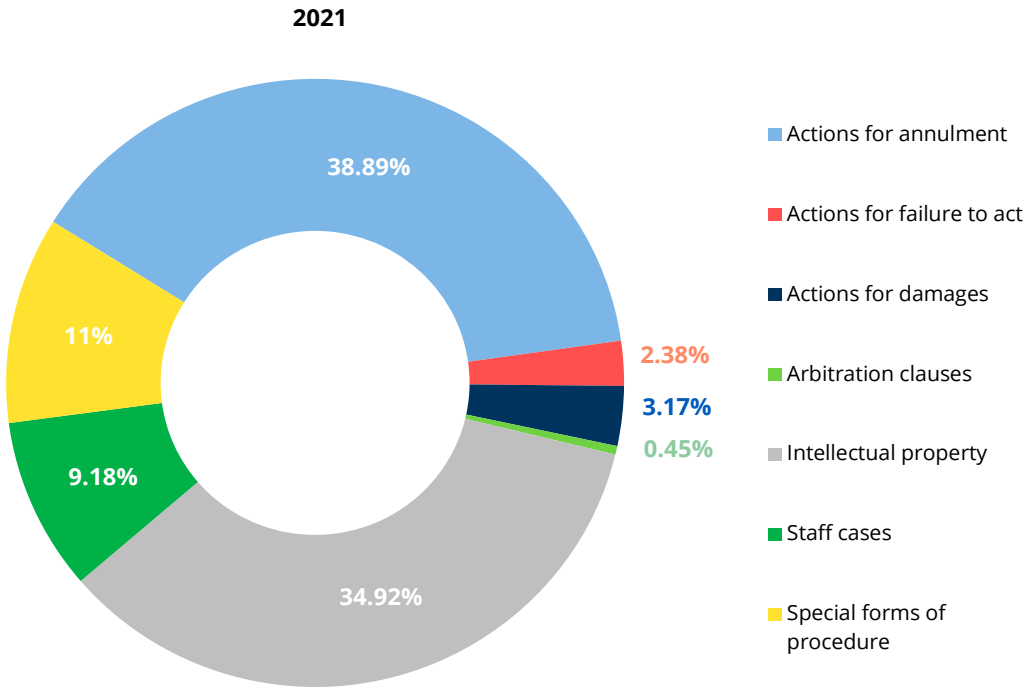
2| Unless otherwise indicated, this table and the following tables do not take account of proceedings concerning interim measures.

II. New cases – Nature of proceedings (2017 to 2021)



	2017	2018	2019	2020	2021
State aid	39	42	134	42	46
Competition	38	28	23	27	34
Staff cases	86	93	87	118	81
Intellectual property	298	301	270	282	308
Other direct actions	346	268	334	260	316
Appeals				2	
Special forms of procedure	110	102	91	116	97
Total	**917**	**834**	**939**	**847**	**882**

III. New cases – Type of action (2017 to 2021)

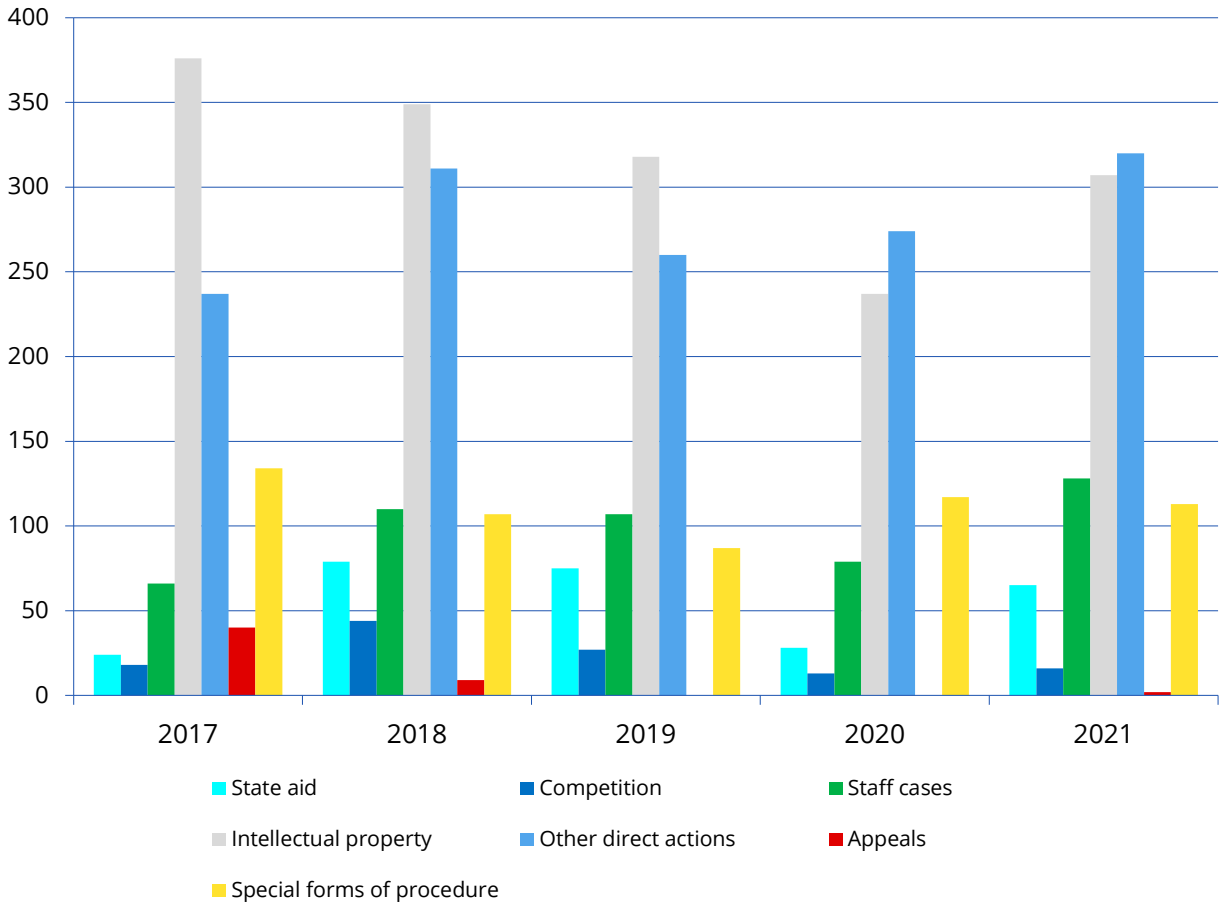


	2017	2018	2019	2020	2021
Actions for annulment	371	288	445	284	343
Actions for failure to act	8	14	14	15	21
Actions for damages	23	29	24	17	28
Arbitration clauses	21	7	8	13	4
Intellectual property	298	301	270	282	308
Staff cases	86	93	87	118	81
Appeals				2	
Special forms of procedure	110	102	91	116	97
Total	**917**	**834**	**939**	**847**	**882**

IV. New cases – Subject matter of the action (2017 to 2021)

	2017	2018	2019	2020	2021
Access to documents	25	21	17	8	32
Agriculture	22	25	12	14	13
Approximation of laws	5	3	2		
Arbitration clause	21	7	8	15	4
Area of freedom, security and justice		2	1		3
Citizenship of the Union			1	1	1
Commercial policy	14	15	13	27	15
Common fisheries policy	2	3			1
Common foreign and security policy			1		
Company law				1	
Competition	38	28	23	27	34
Consumer protection		1	1	3	4
Customs union and Common Customs Tariff	1		2		3
Economic and monetary policy	98	27	24	36	34
Economic, social and territorial cohesion	3		3		2
Education, vocational training, youth and sport		1	1		
Employment					1
Energy	8	1	8	8	9
Environment	8	7	10	8	11
External action by the European Union	2	2	6	3	2
Financial provisions (budget, financial framework, own resources, combating fraud)	5	4	5	4	8
Free movement of capital		1			1
Free movement of goods					1
Freedom of establishment		1			
Freedom of movement for persons	1	1	2		
Freedom to provide services				1	1
Intellectual and industrial property	298	301	270	282	308
Law governing the institutions	65	71	148	65	73
Public health	5	9	5	8	25
Public procurement	19	15	10	13	19
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	10	4	6	7	2
Research and technological development and space	2	1	3	6	
Restrictive measures (external action)	27	40	42	25	42
Social policy		1	1		8
State aid	39	42	134	42	46
Taxation	1	2			
Trans-European networks	2	1	1	1	
Transport		1	1	6	1
Total EC Treaty/TFEU	**721**	**638**	**761**	**611**	**704**
Special forms of procedure	110	102	91	116	97
Staff Regulations	86	94	87	120	81
OVERALL TOTAL	**917**	**834**	**939**	**847**	**882**

V. Completed cases – Nature of proceedings (2017 to 2021)



	2017	2018	2019	2020	2021
State aid	24	79	75	28	65
Competition	18	44	27	13	16
Staff cases	66	110	107	79	128
Intellectual property	376	349	318	237	307
Other direct actions	237	311	260	274	320
Appeals	40	9			2
Special forms of procedure	134	107	87	117	113
Total	**895**	**1 009**	**874**	**748**	**951**

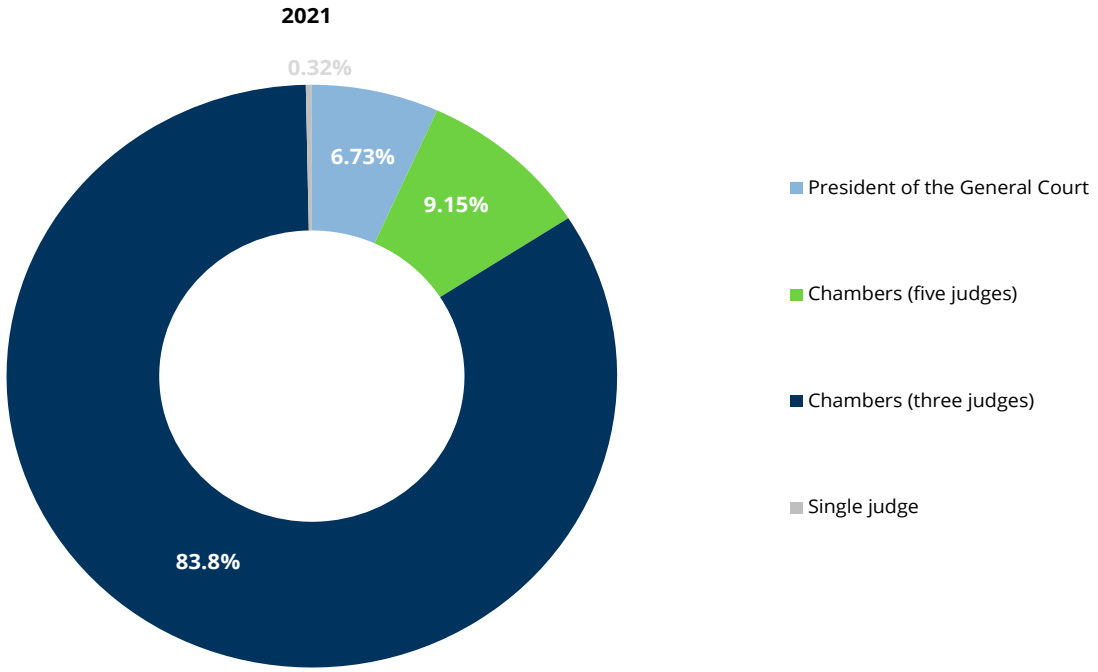
VI. Completed cases – Subject matter of the action (2021)

	Judgments	Orders	Total
Access to documents	9	3	12
Agriculture	8	3	11
Approximation of laws	1		1
Arbitration clause	15	2	17
Area of freedom, security and justice		1	1
Citizenship of the Union		1	1
Commercial policy	8	7	15
Company law		1	1
Competition	10	6	16
Consumer protection	1		1
Economic and monetary policy	4	7	11
Economic, social and territorial cohesion	1		1
Education, vocational training, youth and sport	1		1
Employment		1	1
Energy		4	4
Environment	6	3	9
External action by the European Union	3	2	5
Financial provisions (budget, financial framework, own resources, combating fraud)	2	3	5
Free movement of capital		1	1
Intellectual and industrial property	236	71	307
Law governing the institutions	56	49	105
Public health	1	18	19
Public procurement	8	7	15
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	4	9
Research and technological development and space	2	3	5
Restrictive measures (external action)	55	1	56
Social policy		6	6
State aid	43	22	65
Trans-European networks		1	1
Transport		6	6
Total EC Treaty/TFEU	**475**	**233**	**708**
Special forms of procedure		113	113
Staff Regulations	90	40	130
OVERALL TOTAL	**565**	**386**	**951**

VII. Completed cases – Subject matter of the action (2017 to 2021) (Judgments and Orders)

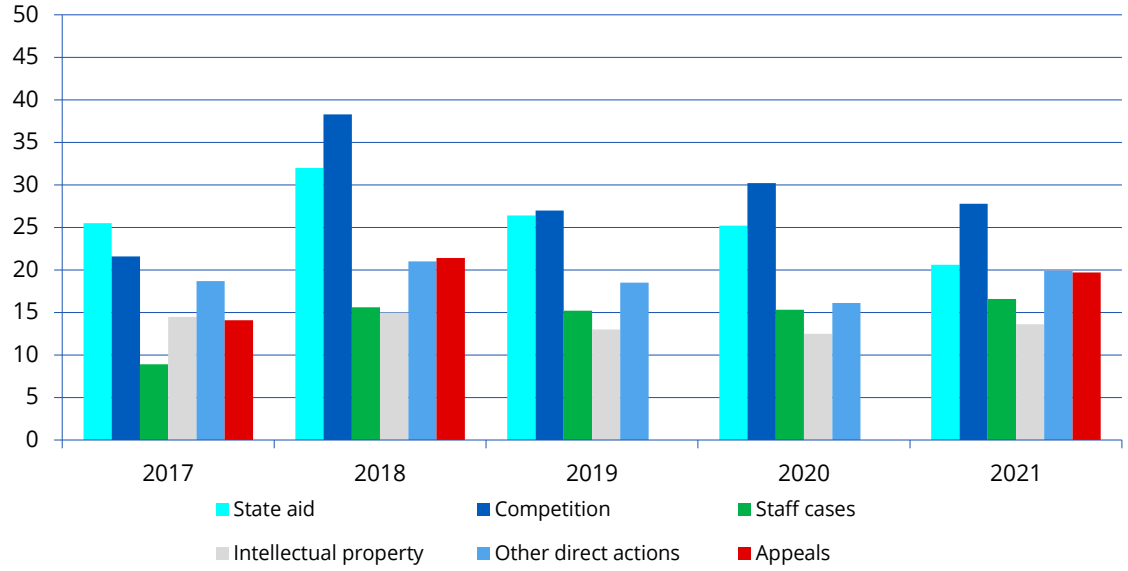
	2017	2018	2019	2020	2021
Access to documents	14	67	17	14	12
Agriculture	21	25	33	15	11
Approximation of laws	2	1	4	3	1
Arbitration clause	17	7	13	6	17
Area of freedom, security and justice	5	3		2	1
Citizenship of the Union			1		1
Commercial policy	15	10	12	5	15
Common fisheries policy	2	2		2	
Common foreign and security policy		1		1	
Company law			1		1
Competition	18	44	27	13	16
Consumer protection	1	1	1	2	1
Culture	1				
Customs union and Common Customs Tariff	5	1		2	
Economic and monetary policy	6	16	13	18	11
Economic, social and territorial cohesion	12	4	2	1	1
Education, vocational training, youth and sport		3		1	1
Employment					1
Energy	3	6	3	5	4
Environment	3	11	6	6	9
External action by the European Union	4	2	3	2	5
Financial provisions (budget, financial framework, own resources, combating fraud)	5	5	4	9	5
Free movement of capital			1		1
Freedom of establishment			1		
Freedom of movement for persons	2	1	1	1	
Intellectual and industrial property	376	349	318	237	307
Law governing the institutions	54	64	71	127	105
Public health	3	5	7	6	19
Public procurement	16	20	17	7	15
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	4	4	10	4	9
Research and technological development and space	12	7	3	2	5
Restrictive measures (external action)	26	42	30	32	56
Social policy		1	1	1	6
State aid	24	79	75	28	65
Taxation	3		2		
Trans-European networks		1	2		1
Transport		1			6
Total EC Treaty/TFEU	**654**	**783**	**679**	**552**	**708**
Special forms of procedure	134	107	87	117	113
Staff Regulations	107	119	108	79	130
OVERALL TOTAL	**895**	**1 009**	**874**	**748**	**951**

VIII. Completed cases – Bench hearing action (2017 to 2021)



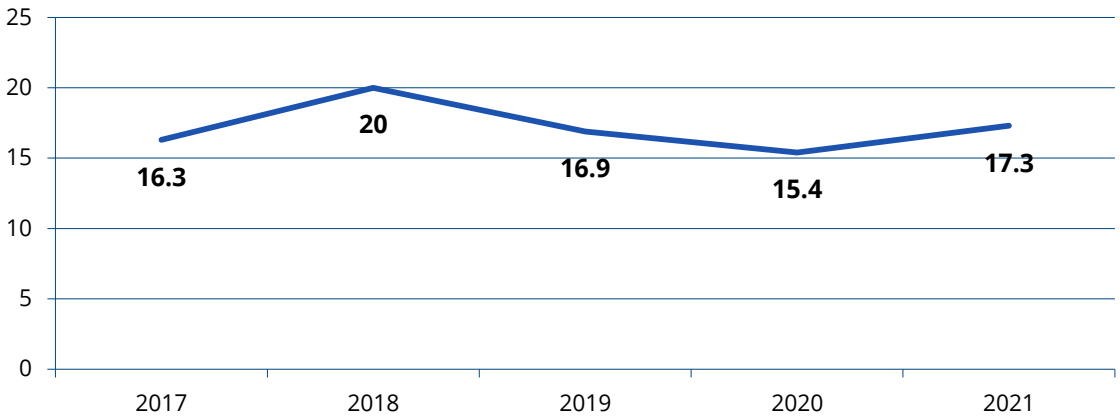
	2017			2018			2019			2020			2021		
	Judgments	Orders	**Total**	Judgments	Orders	**Total**	Judgments	Orders	**Total**	Judgments	Orders	**Total**	Judgments	Orders	**Total**
Grand Chamber								1	**1**						
Appeal Chamber	29	17	**46**	9	2	**11**		2	**2**						
President of the General Court		80	**80**		43	**43**		47	**47**		73	**73**		64	**64**
Chambers (five judges)	13	5	**18**	84	3	**87**	50	9	**59**	104	7	**111**	73	14	**87**
Chambers (three judges)	450	301	**751**	546	317	**863**	499	261	**760**	309	254	**563**	489	308	**797**
Single judge				5		**5**	5		**5**	1		**1**	3		**3**
Total	**492**	**403**	**895**	**644**	**365**	**1 009**	**554**	**320**	**874**	**414**	**334**	**748**	**565**	**386**	**951**

IX. Completed cases – Duration of proceedings in months (2017 to 2021) [1] (Judgments and Orders)



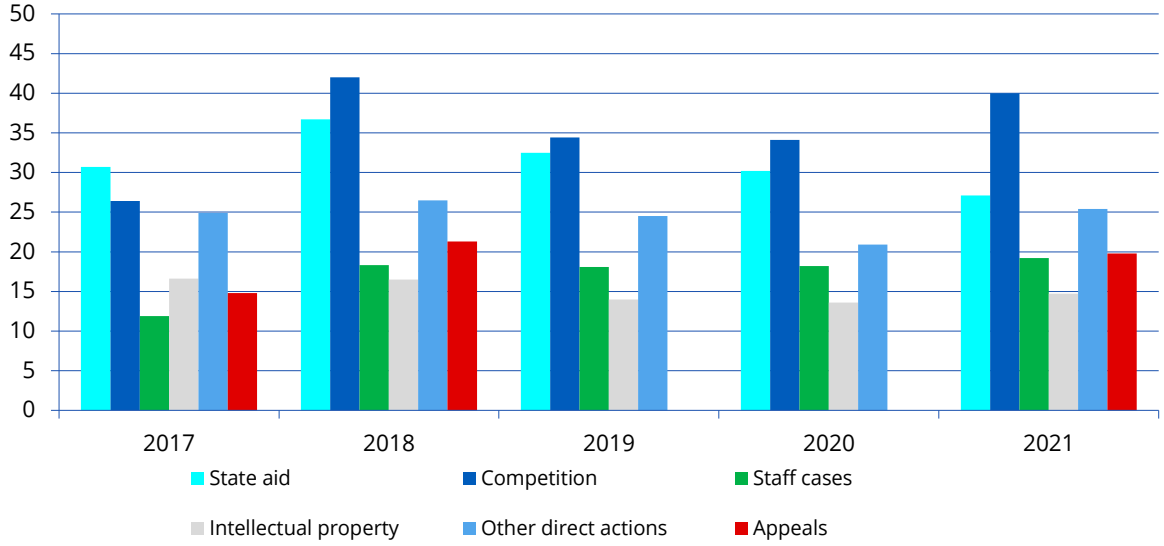
	2017	2018	2019	2020	2021
State aid	25.5	32	26.4	25.2	20.6
Competition	21.6	38.3	27	30.2	27.8
Staff cases	8.9	15.6	15.2	15.3	16.6
Intellectual property	14.5	15	13	12.5	13.6
Other direct actions	18.7	21	18.5	16.1	19.9
Appeals	14.1	21.4			19.7
All cases	**16.3**	**20**	**16.9**	**15.4**	**17.3**

Duration of proceedings (in months)
All cases disposed of by way of judgment or order



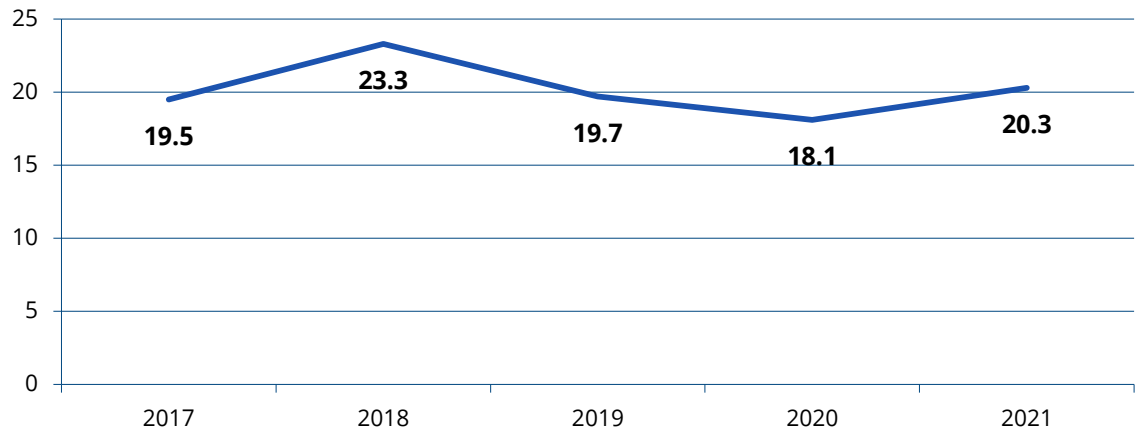
1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment or order is 20.7 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

X. Duration of proceedings in months (2017 to 2021) [1]
(Judgments)



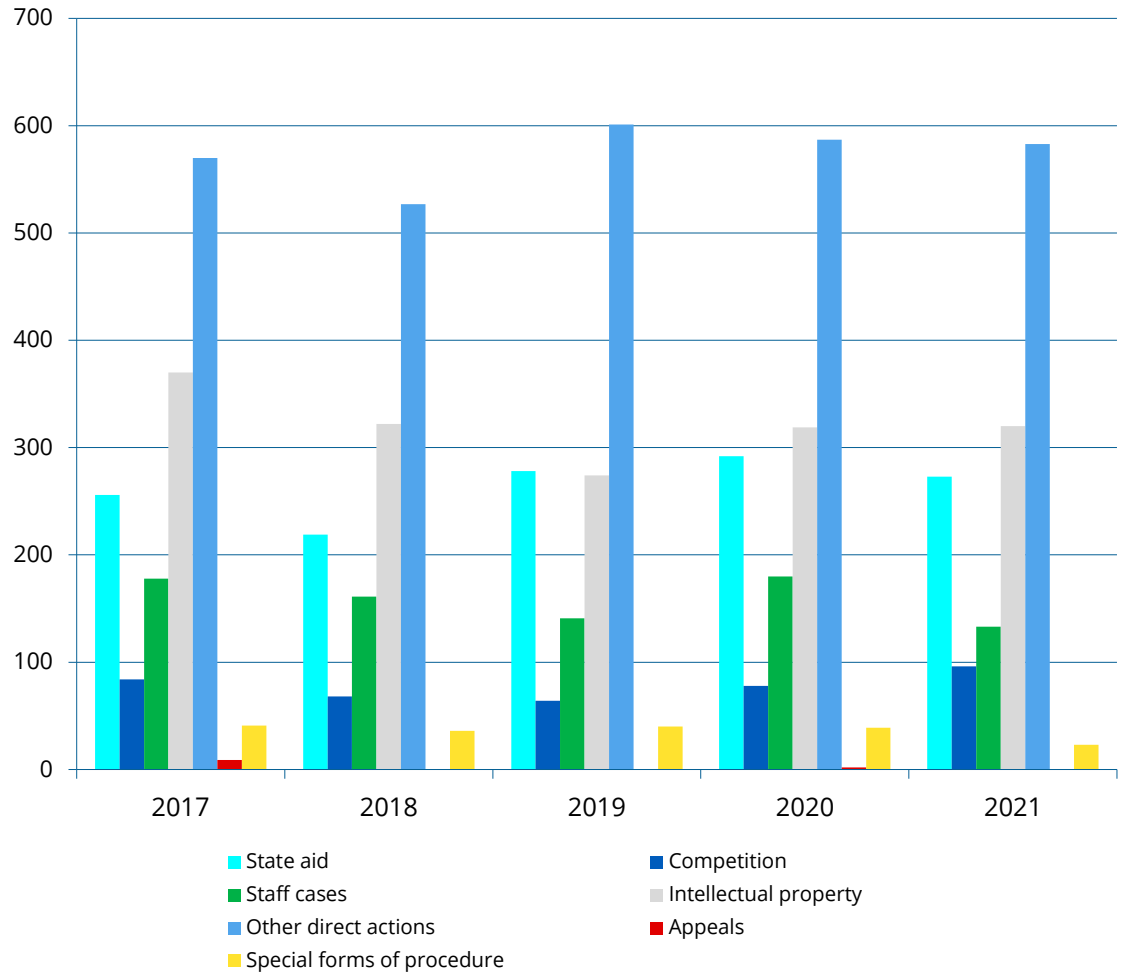
	2017	2018	2019	2020	2021
State aid	30.7	36.7	32.5	30.2	27.1
Competition	26.4	42	34.4	34.1	40
Staff cases	11.9	18.3	18.1	18.2	19.2
Intellectual property	16.6	16.5	14	13.6	14.7
Other direct actions	24.9	26.5	24.5	20.9	25.4
Appeals	14.8	21.3			19.8
All cases	**19.5**	**23.3**	**19.7**	**18.1**	**20.3**

Duration of proceedings (in months)
All cases disposed of by way of judgment



1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment is 24.2 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

XI. Cases pending as at 31 December – Nature of proceedings (2017 to 2021)

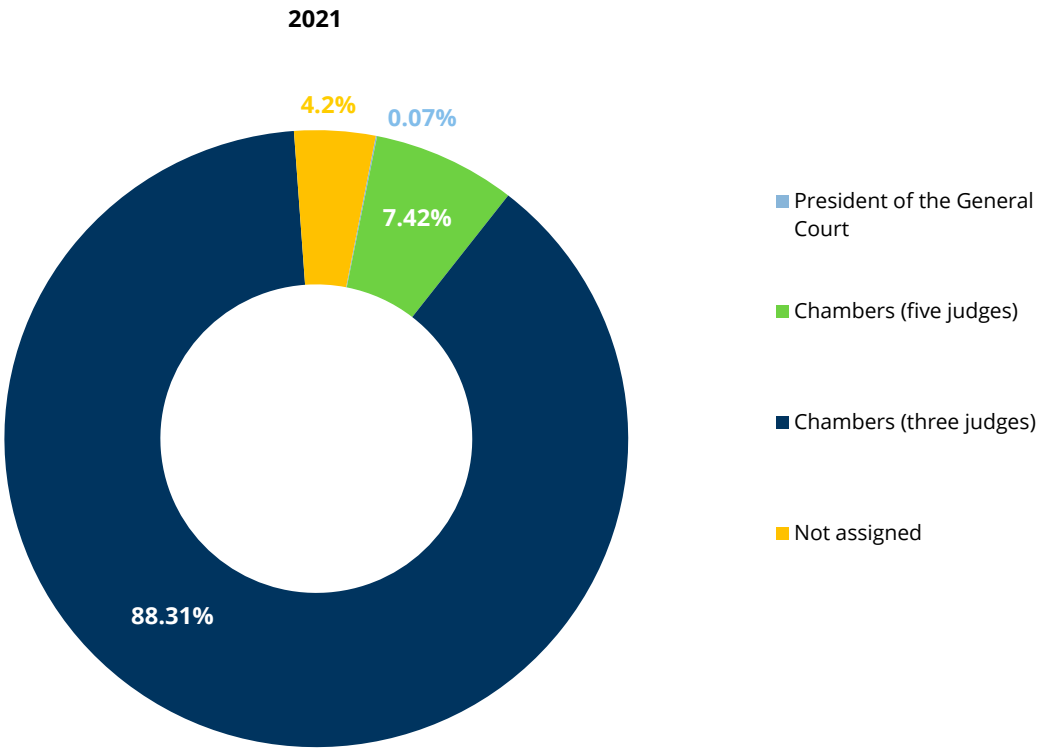


	2017	2018	2019	2020	2021
State aid	256	219	278	292	273
Competition	84	68	64	78	96
Staff cases	178	161	141	180	133
Intellectual property	370	322	274	319	320
Other direct actions	570	527	601	587	583
Appeals	9			2	
Special forms of procedure	41	36	40	39	23
Total	**1 508**	**1 333**	**1 398**	**1 497**	**1 428**

XII. Cases pending as at 31 December – Subject matter of the action (2017 to 2021)

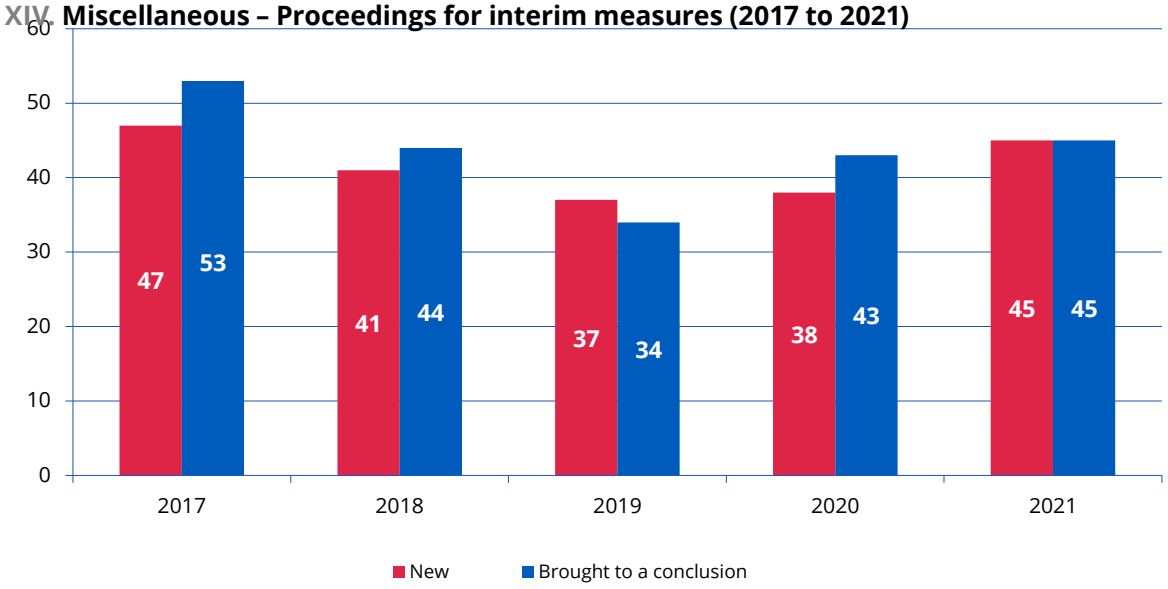
	2017	2018	2019	2020	2021
Access to documents	76	30	30	24	44
Agriculture	43	43	22	21	23
Approximation of laws	4	6	4	1	
Arbitration clause	27	27	22	31	18
Area of freedom, security and justice	2	1	2		2
Citizenship of the Union				1	1
Commercial policy	35	40	41	63	63
Common fisheries policy	1	2	2		1
Common foreign and security policy	1		1		
Company law	1	1		1	
Competition	84	68	64	78	96
Consumer protection	1	1	1	2	5
Customs union and Common Customs Tariff	1		2		3
Economic and monetary policy	116	127	138	156	179
Economic, social and territorial cohesion	6	2	3	2	3
Education, vocational training, youth and sport	3	1	2	1	
Energy	9	4	9	12	17
Environment	12	8	12	14	16
External action by the European Union	2	2	5	6	3
Financial provisions (budget, financial framework, own resources, combating fraud)	10	9	10	5	8
Free movement of capital		1			
Free movement of goods					1
Freedom of establishment		1			
Freedom of movement for persons			1		
Freedom to provide services				1	2
Intellectual and industrial property	370	322	274	319	320
Law governing the institutions	96	103	180	118	86
Public health	9	13	11	13	19
Public procurement	27	22	15	21	25
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	14	14	10	13	6
Research and technological development and space	9	3	3	7	2
Restrictive measures (external action)	62	60	72	65	51
Social policy	1	1	1		2
State aid	256	219	278	292	273
Taxation		2			
Trans-European networks	2	2	1	2	1
Transport			1	7	2
Total EC Treaty/TFEU	**1 280**	**1 135**	**1 217**	**1 276**	**1 272**
Special forms of procedure	41	36	40	39	23
Staff Regulations	187	162	141	182	133
OVERALL TOTAL	**1 508**	**1 333**	**1 398**	**1 497**	**1 428**

XIII. Cases pending as at 31 December – Bench hearing action (2017 to 2021)



	2017	2018	2019	2020	2021
Grand Chamber		1			
Appeal Chamber	11	1			
President of the General Court	1	1	9	4	1
Chambers (five judges)	100	77	88	112	106
Chambers (three judges)	1 323	1 187	1 218	1 271	1 261
Single judge		2			
Not assigned	73	64	83	110	60
Total	**1 508**	**1 333**	**1 398**	**1 497**	**1 428**

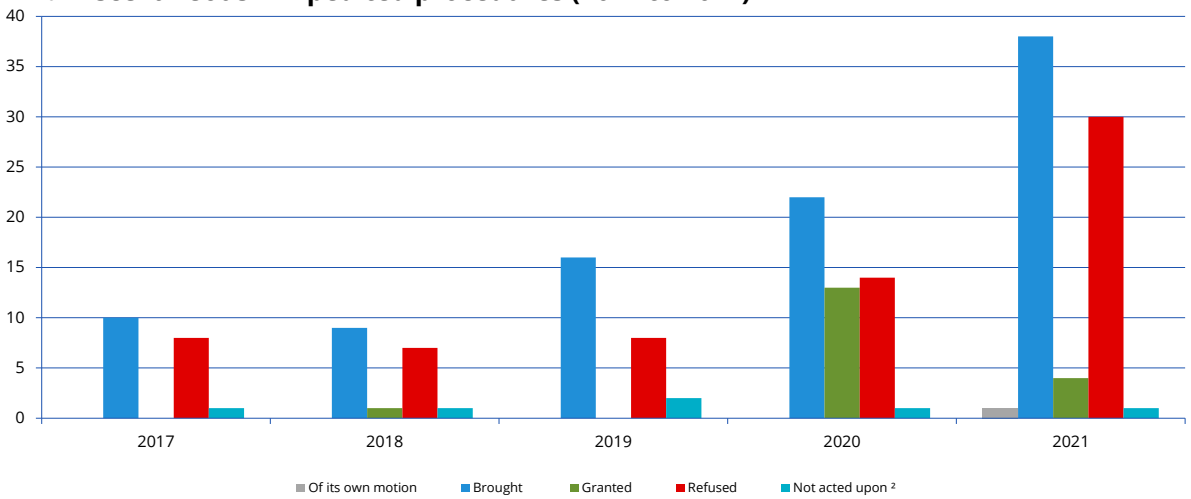
XIV. Miscellaneous – Proceedings for interim measures (2017 to 2021)



2021

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Granted	Removal from the register/no need to adjudicate	Dismissed
Agriculture		1			1
Arbitration clause		1			1
Competition	1	1			1
Consumer protection	1	1			1
Economic and monetary policy		1			1
Environment	2	2			2
Financial provisions (budget, financial framework, own resources, combating fraud)	1				
Law governing the institutions	7	8		3	5
Public health	9	8		3	5
Public procurement	10	5			5
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	4			4
Research and technological development and space		1			1
Restrictive measures (external action)	1	1			1
Social policy	1	1		1	
Staff Regulations	7	7	1	1	5
State aid	3	3			3
Total	**45**	**45**	**1**	**8**	**36**

XV. Miscellaneous – Expedited procedures (2017 to 2021) [1]

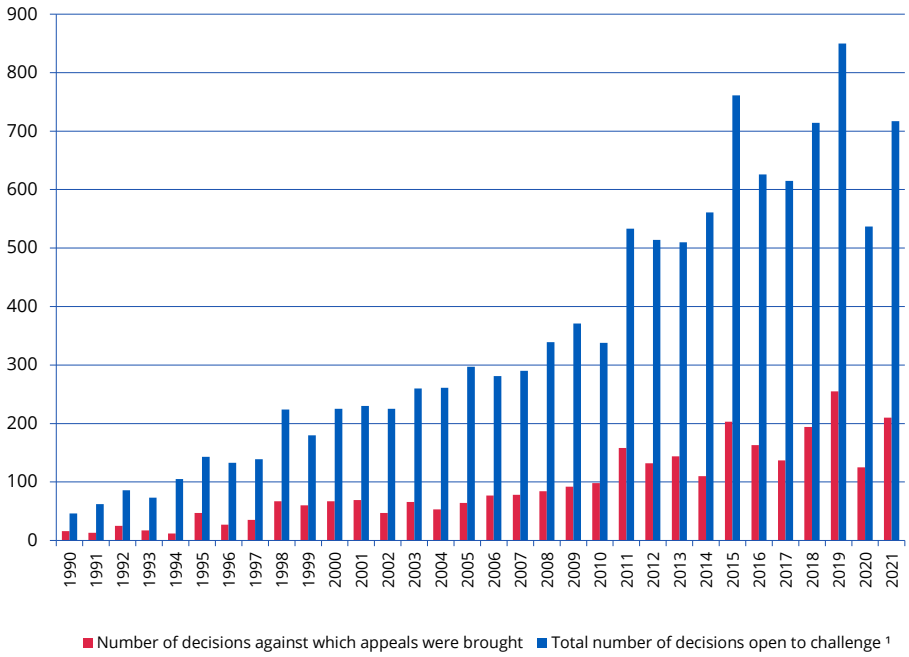


	2017					2018					2019					2020					2021				
	Of its own motion	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome		
			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]
Access to documents		2		1					1			2		2								2		2	
Agriculture							1		1																
Area of freedom, security and justice							1			1															
Commercial policy												1		1								3		3	
Competition		1		1			3	1	2			2		1				1				6	2	4	
Consumer protection							1								1										
Customs union and Common Customs Tariff																						1		1	
Economic and monetary policy							1		1													1			
Financial provisions (budget, financial framework, own resources, combating fraud)												1					1		2						
Intellectual and industrial property												5							5						
Law governing the institutions		5		4	1							2		1	1		5	1	3	1		2		1	1
Public health																	2		2		1	11	2	8	
Public procurement		1		1																		2			
Restrictive measures (external action)												1		1								1		1	
Staff Regulations		1		1			2		2								3	1	1			2		3	
State aid												2		2			11	10	1			7		7	
Total		**10**		**8**	**1**		**9**	**1**	**7**	**1**		**16**		**8**	**2**		**22**	**13**	**14**	**1**	**1**	**38**	**4**	**30**	**1**

1| The General Court may decide to deal with a case before it under an expedited procedure at the request of a main party or, since 1 July 2015, of its own motion.

2| The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

XVI. Miscellaneous – Appeals against decisions of the General Court to the Court of Justice (1990 to 2021)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge [1]	Percentage of decisions against which appeals were brought
1990	16	46	35%
1991	13	62	21%
1992	25	86	29%
1993	17	73	23%
1994	12	105	11%
1995	47	143	33%
1996	27	133	20%
1997	35	139	25%
1998	67	224	30%
1999	60	180	33%
2000	67	225	30%
2001	69	230	30%
2002	47	225	21%
2003	66	260	25%
2004	53	261	20%
2005	64	297	22%
2006	77	281	27%
2007	78	290	27%
2008	84	339	25%
2009	92	371	25%
2010	98	338	29%
2011	158	533	30%
2012	132	514	26%
2013	144	510	28%
2014	110	561	20%
2015	203	761	27%
2016	163	626	26%
2017	137	615	22%
2018	194	714	27%
2019	255	850	30%
2020	125	537	23%
2021	210	717	29%

1| Total number of decisions open to challenge – judgments, orders concerning interim measures or refusing leave to intervene and all orders terminating proceedings other than those removing a case from the register or transferring a case – in respect of which the period for bringing an appeal expired or against which an appeal was brought.

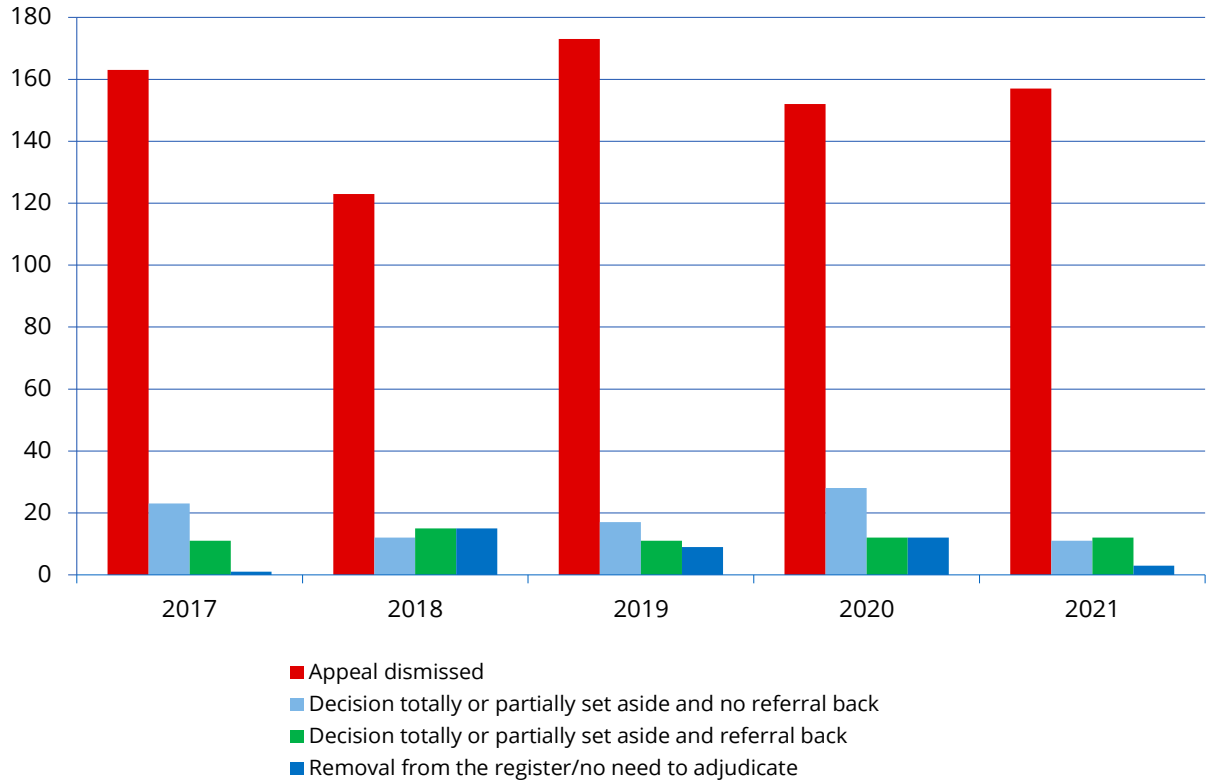
XVII. Miscellaneous – Distribution of appeals before the Court of Justice according to the nature of the proceedings (2017 to 2021)

	2017			2018			2019			2020			2021		
	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**
State aid	8	25	**32%**	20	55	**36%**	38	86	**44%**	9	25	**36%**	28	44	**64%**
Competition	5	17	**29%**	21	35	**60%**	28	39	**72%**	4	18	**22%**	11	19	**58%**
Staff cases	8	37	**22%**	15	79	**19%**	32	110	**29%**	19	71	**27%**	26	94	**28%**
Intellectual property	52	297	**18%**	68	295	**23%**	57	315	**18%**	40	213	**19%**	60	279	**22%**
Other direct actions	61	236	**26%**	69	249	**28%**	97	297	**33%**	52	209	**25%**	83	279	**30%**
Special forms of procedure	3	3	**100%**	1	1	**100%**	3	3	**100%**	1	1	**100%**	2	2	**100%**
Total	137	615	**22%**	194	714	**27%**	255	850	**30%**	125	537	**23%**	210	717	**29%**

XVIII. Miscellaneous – Results of appeals before the Court of Justice (2021) (Judgments and Orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Access to documents			1		1
Agriculture	8				8
Arbitration clause	2				2
Commercial policy	1		2		3
Common foreign and security policy	1	1	2	1	5
Company law	2				2
Competition	14	2		1	17
Customs union and Common Customs Tariff	1				1
Economic and monetary policy	10	2	1		13
Economic, social and territorial cohesion	2				2
Energy	3				3
Financial provisions (budget, financial framework, own resources, combating fraud)	1				1
Intellectual and industrial property	52				52
Law governing the institutions	15		3		18
Procedure	2				2
Public health	1			1	2
Public procurement	1				1
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	5	1			6
Social policy	1				1
Staff Regulations	15	1	2		18
State aid	20	4	1		25
Total	**157**	**11**	**12**	**3**	**183**

XIX. Miscellaneous – Results of appeals before the Court of Justice (2017 to 2021) (Judgments and Orders)



	2017	2018	2019	2020	2021
Appeal dismissed	163	123	173	152	157
Decision totally or partially set aside and no referral back	23	12	17	28	11
Decision totally or partially set aside and referral back	11	15	11	12	12
Removal from the register/no need to adjudicate	1	15	9	12	3
Total	**198**	**165**	**210**	**204**	**183**

XX. Miscellaneous – General trend (1989 to 2021)
New cases, completed cases, cases pending

	New cases [1]	Completed cases [2]	Cases pending on 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
2007	522	397	1 154
2008	629	605	1 178
2009	568	555	1 191
2010	636	527	1 300
2011	722	714	1 308
2012	617	688	1 237
2013	790	702	1 325
2014	912	814	1 423
2015	831	987	1 267
2016	974	755	1 486
2017	917	895	1 508
2018	834	1 009	1 333
2019	939	874	1 398
2020	847	748	1 497
2021	882	951	1 428
Total	**17 876**	**16 448**	

1| 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance (now the General Court).
1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.
1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance.
2004-05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance.
2016: on 1 September 2016, 139 staff cases were transferred to the General Court.

2| 2005-2006: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

XXI. Activity of the Registry of the General Court (2017 to 2021)

Type of act	2017	2018	2019	2020	2021
Procedural documents entered in the register of the Registry [1]	55 069	55 389	54 723	51 399	56 827
Applications initiating proceedings [2]	917	834	939	847	882
Rate of regularisation of the applications initiating proceedings [3]	41.2%	35.85%	35.04%	34.59%	41.2%
Written pleadings (other than applications)	4 449	4 562	4 446	4 122	4 385
Applications to intervene	565	318	288	318	306
Requests for confidential treatment (of data contained in procedural documents) [4]	212	197	251	224	253
Draft orders prepared by the Registry [5] (manifest inadmissibility before service, stay/resumption, joinder of cases, joinder of a plea of inadmissibility with the substance of the case, uncontested intervention, removal from the register, finding of no need to adjudicate in intellectual property cases, reopening of the oral part of the procedure and rectification)	317	285	299	259	371
Chamber conferences	405	381	334	325	338
Minutes of hearings and records of delivery of judgment	812	924	787	589	784

1| This number is an indicator of the volume of work of the Registry, since each incoming or outgoing document is entered in the register. The number of procedural documents entered in the register must be assessed in the light of the nature of the proceedings within the Court's jurisdiction. As the number of parties to proceedings is limited in direct actions (applicant, defendant and, as the case may be, intervener(s)), service is effected only on those parties.

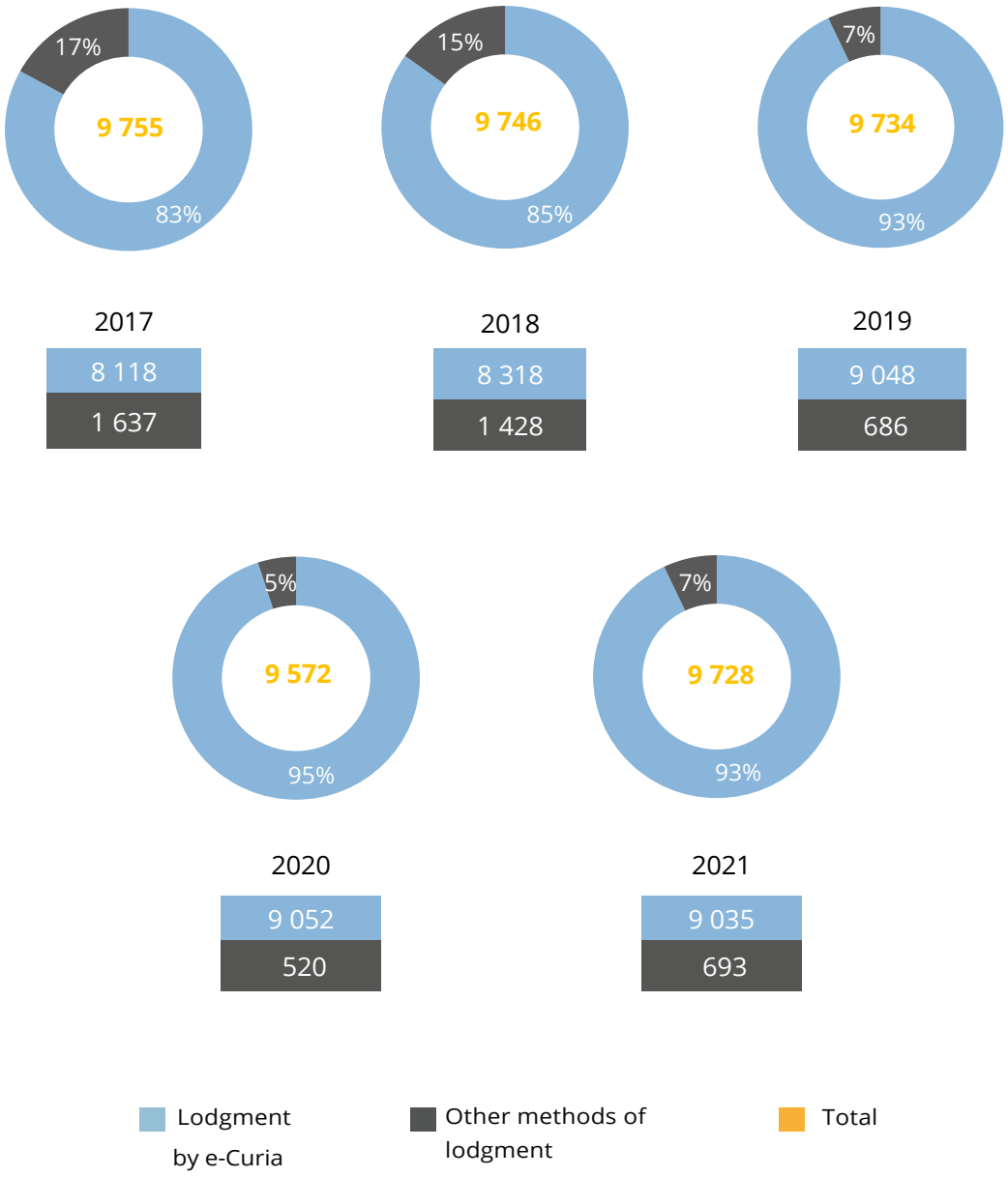
2| Any written pleadings lodged (including applications) must be entered in the register, placed on the case file, put in order where appropriate, communicated to the judges' chambers with a transmission sheet, which is sometimes detailed, then possibly translated and, lastly, served on the parties.

3| Where an application initiating proceedings (or any other written pleading) does not comply with certain requirements, the Registry ensures that it is put in order, as provided in the Rules of Procedure.

4| The number of requests for confidentiality is without prejudice to the amount of data contained in one or more pleadings for which confidential treatment is requested.

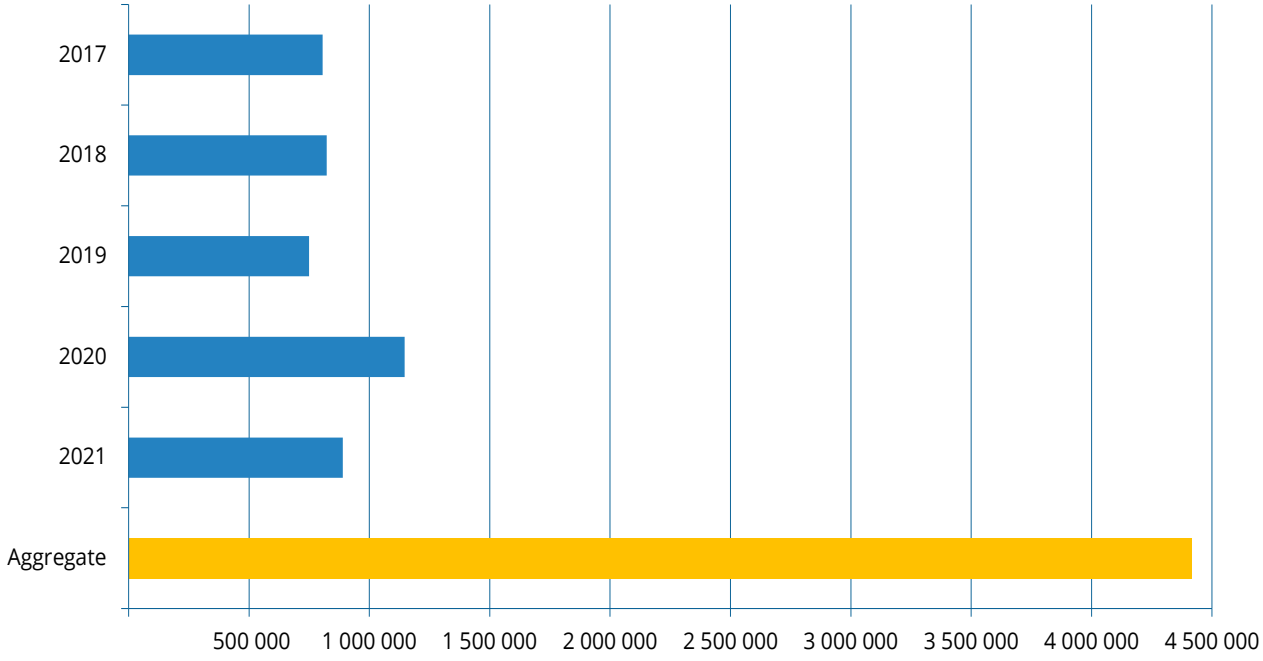
5| Since the entry into force, on 1 July 2015, of the new Rules of Procedure of the General Court, certain decisions that were previously taken in the form of orders (stay/resumption, joinder of cases, intervention by a Member State or an institution where confidentiality is not raised) have been taken in the form of a simple decision added to the case file.

XXII. Methods of lodging procedural documents before the General Court [1]



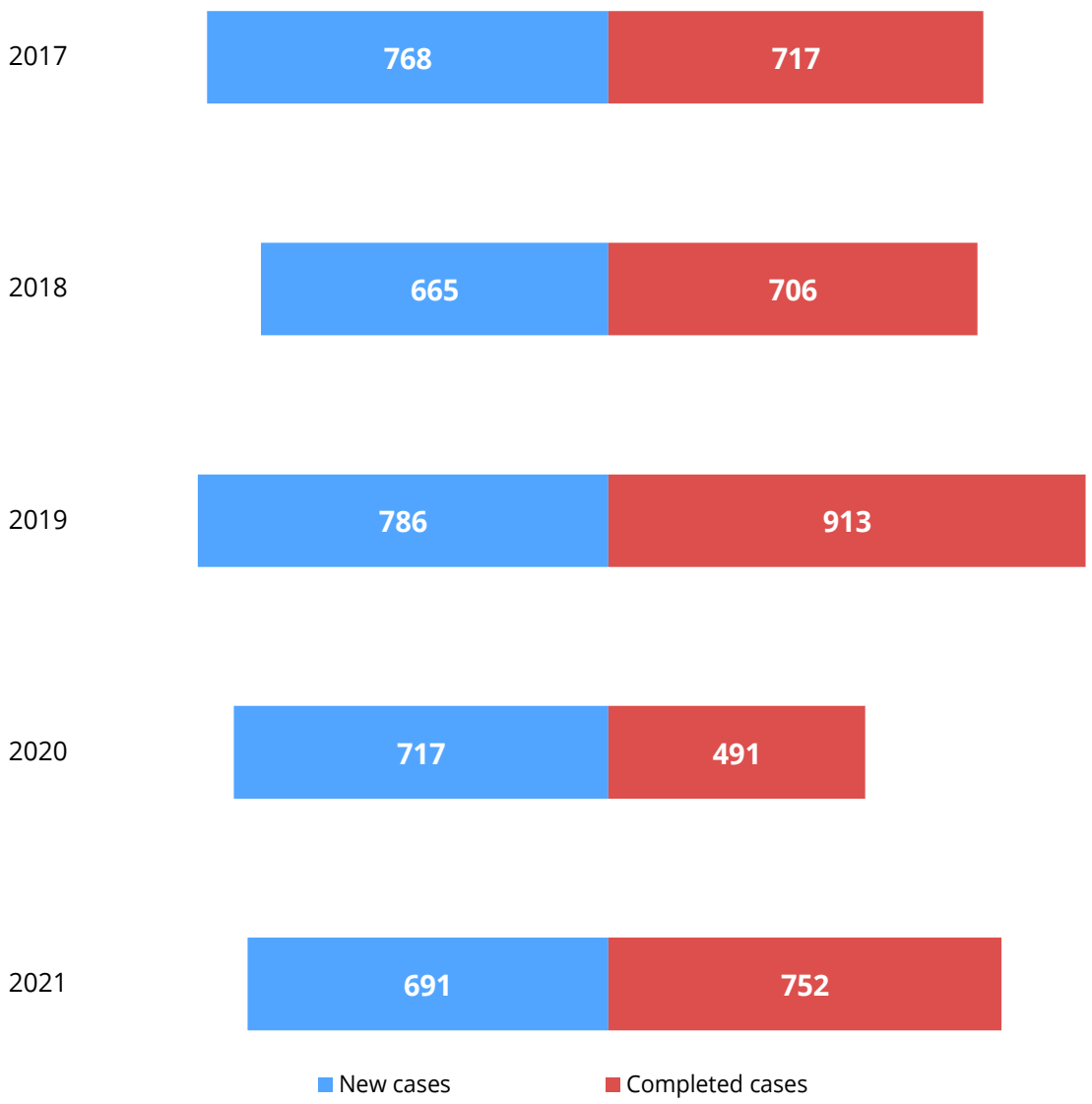
1| Since 1 December 2018, e-Curia has become the mandatory means of exchanging documents with the representatives of the parties in all proceedings before the General Court (without prejudice to the exceptions under the rules).

XXIII. Pages lodged by e-Curia (2017 to 2021)



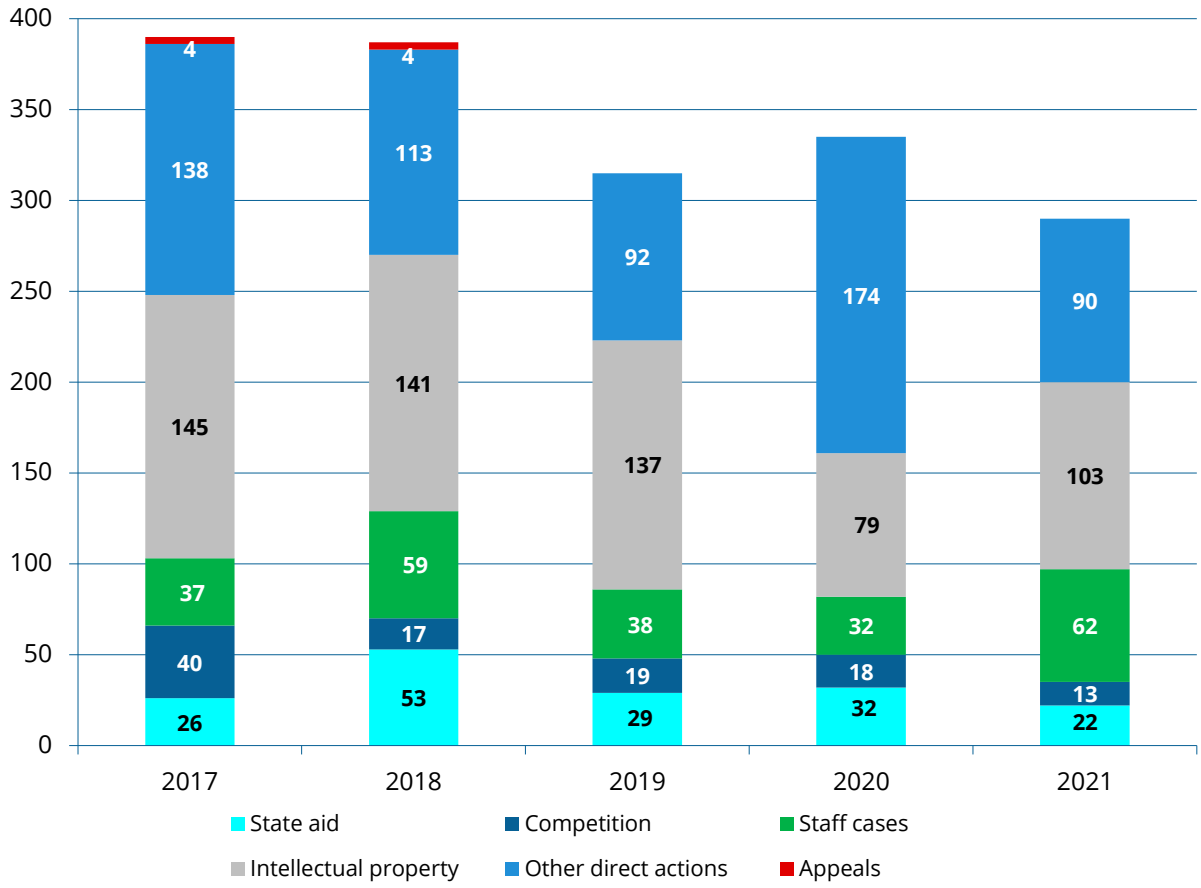
	2017	2018	2019	2020	2021	Aggregate
Pages lodged by e-Curia	805 768	823 076	749 895	1 146 664	889 353	**4 414 756**

XXIV. Notices in the *Official Journal of the European Union* (2017 to 2021) [1]



1| In accordance with the Rules of Procedure (Articles 79 and 122), notices concerning new applications and decisions which close the proceedings must be published in the *Official Journal of the Europe*an *Union.*

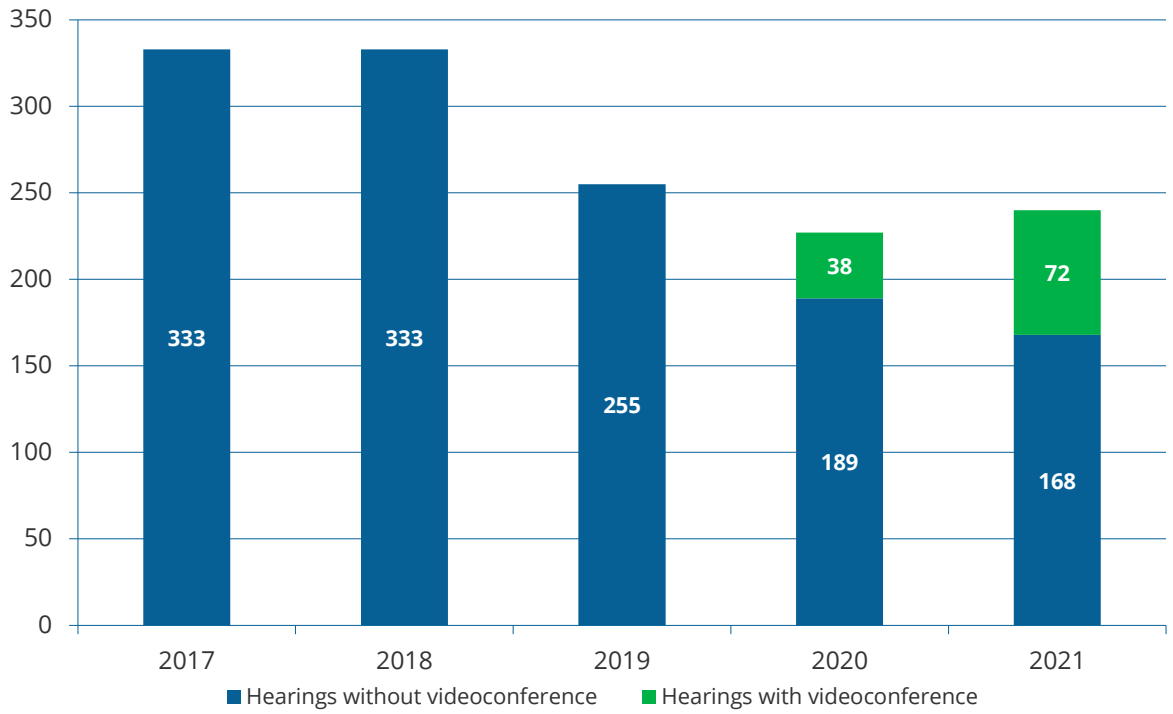
XXV. Cases pleaded (2017 to 2021) [1]



	2017	2018	2019	2020	2021
Total	390	387	315	335	290

1| The number of hearings takes account of the joinder of cases (a set of joined cases = one hearing).

XXVI. Hearings (2017 to 2021) [1]



	2017	2018	2019	2020	2021
Total	333	333	255	227	240

1| The number of hearings takes account of the joinder of cases (a set of joined cases = one hearing).

E.

Composition of the General


M. van der Woude
President


S. Papasavvas
Vice-President


H. Kanninen
President
of Chamber


V. Tomljenović
President
of Chamber


S. Gervasoni
President
of Chamber


D. Spielmann
President
of Chamber


A. Marcoulli
President
of Chamber


R. da Silva Passos
President
of Chamber


J. Svenningsen
President
of Chamber


M. J. Costeira
President
of Chamber


A. Kornezov
President
of Chamber


G. De Baere
President
of Chamber


M. Jaeger
Judge


S. Frimodt Nielsen
Judge


J. Schwarcz
Judge


M. Kancheva
Judge


E. Buttigieg
Judge


V. Kreuschitz
Judge


L. Madise
Judge


C. Iliopoulos
Judge


V. Valančius
Judge


N. Półtorak
Judge


F. Schalin
Judge


I. Reine
Judge


R. Barents
Judge


P. Nihoul
Judge


U. Öberg
Judge


K. Kowalik-Bańczyk
Judge


C. Mac Eochaidh
Judge


R. Frendo
Judge


T. Pynnä
Judge


L. Truchot
Judge


J. Laitenberger
Judge


R. Mastroianni
Judge


J. Martín y Pérez
de Nanclares
Judge


O. Porchia
Judge


G. Hesse
Judge


M. Sampol Pucurull
Judge


M. Stancu
Judge


P. Škvařilová-Pelzl
Judge

I. Nõmm
Judge

G. Steinfatt
Judge

R. Norkus
Judge

T. Perišin
Judge

D. Petrlík
Judge

M. Brkan
Judge

P. Zilgalvis
Judge

K.A. Kecsmár
Judge

I. Gâlea
Judge

E. Coulon
Registrar

I. Composition of the General Court in 2021

Formal sitting of 1 March 2021

By decision of 19 February 2021, the representatives of the Governments of the Member States of the European Union appointed David Petrlík as Judge of the General Court for the period from 25 February 2021 to 31 August 2025, who replaces Jan Passer.

A formal sitting took place at the Court of Justice on 1 March 2021, on the occasion of the taking of the oath and entry into office of David Petrlík.

Formal sitting of 6 July 2021

By decision of 2 June 2021, the representatives of the Governments of the Member States of the European Union appointed Maja Brkan as Judge of the General Court for the period from 10 June 2021 to 31 August 2025.

A formal sitting took place at the Court of Justice on 6 July 2021, on the occasion of the taking of the oath and entry into office of Maja Brkan.

1 August 2021

Death of Barna Berke, Judge of the General Court from 19 September 2016.

Formal sitting of 27 September 2021

By decision of 8 September 2021, the representatives of the Governments of the Member States of the European Union appointed Pēteris Zilgalvis as Judge of the General Court for the period from 10 September 2021 to 31 August 2025.

A formal sitting took place at the Court of Justice on 27 September 2021, on the occasion of the taking of the oath and entry into office of Pēteris Zilgalvis.

7 October 2021

Antony Michael Collins, Judge of the General Court since 16 September 2013, terminated his mandate at the General Court to take up office as Advocate General at the Court of Justice on 8 October 2021.

Dimitrios Gratsias, Judge of the General Court since 25 October 2010, Zoltán Csehi, Judge of the General Court since 13 April 2016 and Octavia Spineanu-Matei, Judge of the General Court since 19 September 2016, left office at the General Court to take up office as Judges at the Court of Justice on 8 October 2021.

8 October 2021

Following Antony Michael Collins leaving office at the General Court, the Judges of the General Court elected Geert De Baere, President of Chamber, for the period from 8 October 2021 to 31 August 2022.

Formal sitting of 27 October 2021

By decision of 13 October 2021, the representatives of the Governments of the Member States of the European Union appointed as Judges of the General Court for the period from 18 October 2021 to 31 August 2022, Krisztián Kecsmár, who replaces Zoltán Csehi and Ion Gâlea, who replaces Octavia Spineanu-Matei.

A formal sitting took place at the Court of Justice on 27 October 2021, on the occasion of the taking of the oath and entry into office of the two new Judges of the General Court.

II. Order of Precedence as at 31 December 2021

M. van der WOUDE, President of the General Court
S. PAPASAVVAS, Vice-President of the General Court
H. KANNINEN, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
S. GERVASONI, President of Chamber
D. SPIELMANN, President of Chamber
A. MARCOULLI, President of Chamber
R. da SILVA PASSOS, President of Chamber
J. SVENNINGSEN, President of Chamber
M.J. COSTEIRA, President of Chamber
A. KORNEZOV, President of Chamber
G. DE BAERE, President of Chamber
M. JAEGER, Judge
S. FRIMODT NIELSEN, Judge
J. SCHWARCZ, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
V. KREUSCHITZ, Judge
L. MADISE, Judge
C. ILIOPOULOS, Judge
V. VALANČIUS, Judge
N. PÓŁTORAK, Judge
F. SCHALIN, Judge
I. REINE, Judge
R. BARENTS, Judge
P. NIHOUL, Judge
U. ÖBERG, Judge
K. KOWALIK-BAŃCZYK, Judge
C. MAC EOCHAIDH, Judge
R. FRENDO, Judge
T. PYNNÄ, Judge
L. TRUCHOT, Judge
J. LAITENBERGER, Judge
R. MASTROIANNI, Judge
J. MARTÍN Y PÉREZ DE NANCLARES, Judge
O. PORCHIA, Judge
G. HESSE, Judge
M. SAMPOL PUCURULL, Judge
M. STANCU, Judge
P. ŠKVAŘILOVÁ-PELZL, Judge
I. NÕMM, Judge
G. STEINFATT, Judge
R. NORKUS, Judge
T. PERIŠIN, Judge
D. PETRLÍK, Judge
M. BRKAN, Judge
P. ZILGALVIS, Judge

K. KECSMÁR, Judge
I. GÂLEA, Judge

E. Coulon, Registrar

COURT OF JUSTICE
OF THE EUROPEAN UNION

Directorate for Communication
Publications and Electronic Media Unit

Printed on eco-friendly paper

PRINT QD-AP-22-001-EN-C ISBN 978-92-829-3931-4 ISSN 2467-0987 doi:10.2862/889621
PDF QD-AP-22-001-EN-N ISBN 978-92-829-3911-6 ISSN 2467-1215 doi:10.2862/017391