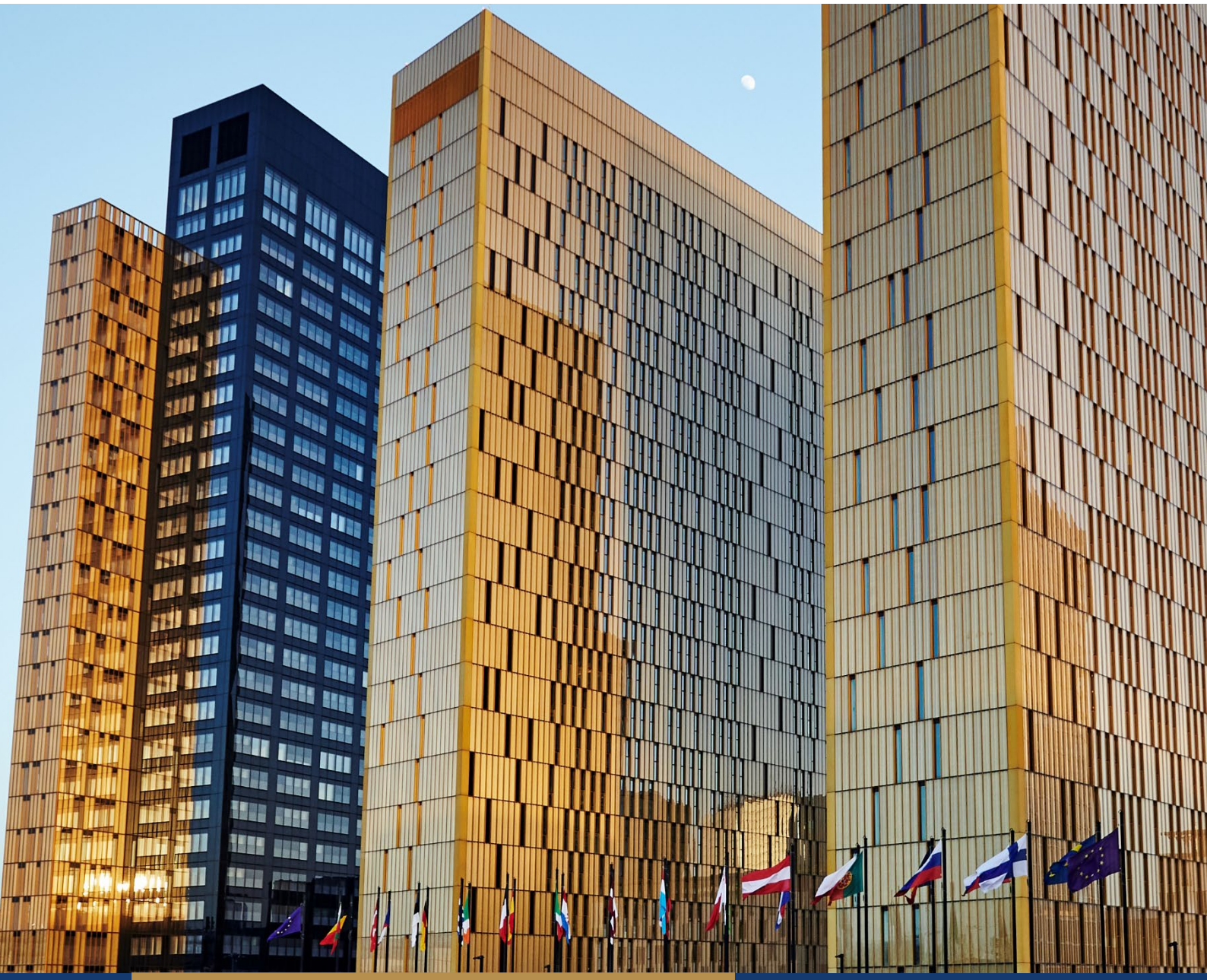
COURT OF JUSTICE
OF THE EUROPEAN UNION

EN



SELECTION OF MAJOR JUDGMENTS
YEAR 2024

COLLECTION OF RÉSUMÉS
BY THE RESEARCH AND DOCUMENTATION DIRECTION

Research and Documentation Directorate

curia.europa.eu

Table of contents

Preface

The Selection of *major judgments* is an annual publication produced by the Research and Documentation Directorate, bringing together in one place the main decisions of the Court of Justice and the General Court of the European Union.

This publication is a compilation of the most significant case-law trends as identified by the two Courts. It therefore provides legal professionals with a summary analysis of the main developments in case-law over the past year.

The *Selection of major judgments* is presented in the form of a collection of résumés, grouped by subject matter and inspired by the structure of the Treaties of the European Union. For each résumé, a hyperlink is provided to the text of the decision, thus allowing immediate access to the content of that decision. As regards the Court of Justice, the publication is a compilation of the decisions delivered by the Grand Chamber and certain judgments of five-judge Chambers, in view of their importance, the matters dealt with, their interest to the public and their innovativeness. A similar approach is taken as regards the selection of General Court decisions.

The *Selection of major judgments*, which is available in its entirety in digital format, is directly accessible, in all the official languages of the European Union, on the institution's website.

Celestina Iannone
Director
Research and documentation

Chapter 1 – The Court of Justice

I. Fundamental rights of the European Union [1]

1. Right to effective judicial protection

Judgment of 11 July 2024 (Grand Chamber), *Hann-Invest and Others* (C-554/21, C-622/21 and C-737/21, EU:C:2024:594)

(References for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Effective legal protection in the fields covered by Union law – Independence of the judiciary – Tribunal previously established by law – Fair hearing – Case-law Registration Service – National legislation providing for a registrations judge to be established in courts of second instance having, in practice, the power to stay the delivery of a judgment, to give instructions to judicial panels and to request that a section meeting be convened – National legislation providing for the power, for meetings of a section or of all judges of a court, to put forward binding 'legal positions', including for cases which have already been deliberated)

---

[1] Reference should also be made under this heading to the following judgments: judgment of 30 April 2024 (Full Court), ***La Quadrature du Net and Others (Personal data and action to combat counterfeiting)*** (C-470/21, EU:C:2024:370), judgment of 30 April 2024 (Grand Chamber), ***Procura della Repubblica presso il Tribunale di Bolzano*** (C-178/22, EU:C:2024:371), judgment of 4 October 2024 (Grand Chamber), ***Bezirkshauptmannschaft Landeck (Attempt to access personal data stored on a mobile telephone)*** (C-548/21, EU:C:2024:830), presented under heading III.1 'Telephone and electronic communications'; judgment of 30 January 2024 (Grand Chamber), ***Direktor na Glavna direktsia 'Natsionalna politsia' pri MVR – Sofia*** (C-118/22, EU:C:2024:97), presented under heading III.2 'Biometric and genetic data'; judgment of 4 October 2024 (Grand Chamber), ***Mirin*** (C-4/23, EU:C:2024:845), presented under heading IV.1 'Right of citizens of the Union to move and reside freely'; judgment of 19 November 2024 (Grand Chamber), ***Commission*** **v** ***Czech Republic (Ability to stand for election and membership of a political party)*** (C-808/21, EU:C:2024:962), judgment of 19 November 2024 (Grand Chamber), ***Commission*** **v** ***Poland (Ability to stand for election and membership of a political party)*** (C-814/21, EU:C:2024:963), presented under heading IV.2 'Right to vote and to stand as a candidate in municipal and European Parliament elections'; judgment of 5 March 2024 (Grand Chamber), ***Public.Resource.Org and Right to Know*** **v** ***Commission and Others*** (C-588/21 P, EU:C:2024:201), presented under heading VI 'Institutional provisions: right of public access to documents'; judgment of 29 July 2024 (Grand Chamber), ***Valančius*** (C-119/23, EU:C:2024:653), presented under heading VII.1 'Composition of the Court'; judgment of 9 January 2024 (Grand Chamber), ***G. and Others (Appointment of judges to the ordinary courts in Poland)*** (C-181/21 and C-269/21, EU:C:2024:1), judgment of 7 May 2024 (Grand Chamber), ***NADA and Others*** (C-115/22, EU:C:2024:384), judgment of 15 October 2024 (Grand Chamber), ***KUBERA*** (C-144/23, EU:C:2024:881), presented under heading VII.2 'Reference for a preliminary ruling'; judgment of 11 June 2024 (Grand Chamber), ***Staatssecretaris van Justitie en Veiligheid (Women identifying with the value of gender equality)*** (C-646/21, EU:C:2024:487), judgment of 18 June 2024 (Grand Chamber), ***Generalstaatsanwaltschaft Hamm (Request for extradition of a refugee to Türkiye)*** (C-352/22, EU:C:2024:521), judgment of 18 June 2024 (Grand Chamber), ***Bundesrepublik Deutschland (Effect of a decision granting refugee status)*** (C-753/22, EU:C:2024:524), presented under heading IX.1 'Asylum policy'; judgment of 30 January 2024 (Grand Chamber), ***Landeshauptmann von Wien (Family reunification with a minor refugee)*** (C-560/20, EU:C:2024:96), judgment of 29 July 2024 (Grand Chamber), ***CU and ND (Social assistance – Indirect discrimination)*** (C-112/22 and C-223/22, EU:C:2024:636), presented under heading IX.2 'Immigration policy'; judgment of 21 March 2024 (Grand Chamber), ***Landeshauptstadt Wiesbaden*** (C-61/22, EU:C:2024:251), presented under heading IX.3 'Border controls'; judgment of 29 July 2024, ***Breian*** (C-318/24 PPU, EU:C:2024:658), presented under heading X.1 'European arrest warrant'; judgment of 30 April 2024, (Grand Chamber), ***M.N. (EncroChat)*** (C-670/22, EU:C:2024:372), presented under heading X.2 'European Investigation Order in criminal matters'; judgment of 4 October 2024 (Grand Chamber), ***Real Madrid Club de Fútbol*** (C-633/22, EU:C:2024:843), presented under heading XI.2 'Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'; judgment of 14 March 2024, ***D & A Pharma*** **v** ***Commission*** (C-291/22 P, EU:C:2024:228), presented under heading XIV.2 'Medicinal products for human use'; judgment of 5 March 2024 (Grand Chamber), ***Défense Active des Amateurs d'Armes and Others*** (C-234/21, EU:C:2024:200), presented under heading XIV.3 'Control of the acquisition and possession of weapons'; judgment of 20 February 2024, (Grand Chamber), ***X (Lack of reasons for termination)*** (C-715/20, EU:C:2024:139), presented under heading XVII.1 'Protection of fixed term workers'; judgment of 25 June 2024 (Grand Chamber), ***Ilva and Others*** (C-626/22, EU:C:2024:542), presented under heading XVIII 'Environment'; judgment of 29 July 2024 (Grand Chamber), ***Alchaster*** (C-202/24, EU:C:2024:649), presented under heading XIX.2 'Content and scope'; judgment of 10 September 2024 (Grand Chamber), ***Neves 77 Solutions*** (C-351/22, EU:C:2024:723), presented under heading XX.1 'Restrictive measures'; judgment of 10 September 2024 (Grand Chamber), ***KS and Others*** **v** ***Council and Others*** (C-29/22 P and C-44/22 P, EU:C:2024:725), presented under heading XX.2 'Action for damages'.

The Grand Chamber of the Court of Justice has found that a mechanism internal to a national court providing for the intervention, in the decision-making process of the judicial panel responsible for a case, of other judges of the court concerned in order to ensure the consistency of its case-law, is incompatible with the requirements inherent in the right to effective legal protection and to a fair hearing.

Questions were referred to the Court on this issue by the Visoki trgovački sud (Commercial Court of Appeal, Croatia), before which three appeals had been brought against orders issued in insolvency proceedings. The referring court, sitting as judicial panels of three judges, examined those three appeals and dismissed them unanimously, thereby upholding the judgments delivered at first instance. The judges of that court signed their judgments and subsequently forwarded them to the Case-law Registration Service. [2]

The judge of the Registration Service ('the registrations judge') refused to register those three judicial decisions and referred them back to the respective judicial panels, together with a letter stating that he was not in agreement with the approaches adopted. In two of those cases (C-554/21 and C-622/21), the registrations judge referred to other decisions of the referring court adopting different approaches from those adopted in the cases in the main proceedings. In the third case (C-727/21), he stated that he was not in agreement with the legal interpretation adopted by the judicial panel, albeit he did not make reference to any other judicial decision.

Thereafter, in Case C-727/21, the judicial panel met to begin fresh deliberations. After reviewing the appeal and the opinion of the registrations judge, it decided not to alter the outcome arrived at previously. It therefore issued a new judicial decision and forwarded it to the Registration Service.

Favouring a different legal approach, the registrations judge transmitted that case in the main proceedings to the referring court's Section for Commercial Litigation and Other Disputes. That section then adopted a 'legal position' in which it accepted the outcome favoured by the registrations judge. The same case in the main proceedings was then referred back to the judicial panel concerned for it to give a ruling in accordance with that 'legal position'.

Harbouring doubts as to the compliance with EU law of a mechanism providing for the intervention, in its decision-making process, of the registrations judge and other judges of a court adopting 'legal positions', the referring court decided to make a reference to the Court of Justice for a preliminary ruling.

Findings of the Court

The Court states, first of all, that any national measure or practice intended to avoid or resolve conflicts in case-law, and thus to ensure the legal certainty inherent in the principle of the rule of law, must comply with the requirements stemming from the second subparagraph of Article 19(1) TEU.

In the first place, it examines, in the light of those requirements, the practice according to which the judicial decision adopted by the judicial panel responsible for the case may be regarded as final and sent to the parties only if its content has been approved by a registrations judge who does not form part of that judicial panel.

In that regard, it points out that, while the registrations judge cannot substitute his or her own assessment for that of the judicial panel responsible for the case, he or she can, in fact, block

---

2 In accordance with Article 177(3) of the Sudski poslovnik (Rules of Procedure of the Courts), which states: 'Before a court of second instance, a case shall be deemed to be closed on the date on which the decision is sent from the office of the judge concerned, after the case has been returned by the Registration Service. The Registration Service shall be required to return the case file to the office of that judge as promptly as possible after receipt thereof. That decision shall then be notified within a further period of eight days.'

registration of the judicial decision adopted and thus hinder the completion of the decision-making process and the notification of that decision to the parties. He or she is thus able to refer the case back to that judicial panel for a re-examination of that decision in the light of his or her own legal observations and, if he or she continues to be in disagreement with that judicial panel, invite the president of the relevant section to convene a section meeting for the purpose of adopting a 'legal position', which will be binding, inter alia, on that judicial panel. The effect of such a practice is to allow the registrations judge to intervene in the case in question, and that intervention may lead to that judge influencing the final outcome in that case.

However, first, the national legislation at issue in the main proceedings does not appear to make provision for such intervention of the registrations judge. Second, that intervention occurs after the judicial panel to which the case concerned has been assigned has, following its deliberations, adopted its judicial decision, even though that judge is not a member of that judicial panel and did not therefore participate in the earlier stages of the proceedings which led to that decision being taken. Third, the power of the registrations judge to intervene does not even appear to be circumscribed by clearly stated objective criteria which reflect a specific justification and are capable of preventing the exercise of discretion.

In view of those circumstances, the Court finds that the registrations judge's intervention is incompatible with the requirements inherent in the right to effective judicial protection.

In the second place, the Court examines the national legislation which allows a section meeting of a national court to compel, by putting forward a 'legal position', the judicial panel responsible for the case to alter the content of the judicial decision which it previously adopted, even though that section meeting also includes judges other than those of that judicial panel and, as the case may be, persons outside of the court concerned before whom the parties do not have the opportunity to put forward their arguments.

In that regard, it states that intervention in the form of the section meeting in fact allows a group of judges participating in that section meeting to intervene in the final resolution of a case that has previously been deliberated and decided upon by the judicial panel having jurisdiction but that has not yet been registered and sent. The prospect that, in the event that that judicial panel maintains a legal view that is contrary to that of the registrations judge, its judicial decision will be subject to review by a section meeting, and the obligation on that judicial panel to respect, after deliberations which have concluded, the 'legal position' set out by that section meeting, are likely to influence the final content of that decision.

First, it is not apparent that the power of the section meeting to intervene at issue in the main proceedings is sufficiently circumscribed by objective criteria that are applied as such. In particular, it is not apparent from the provision governing the convening of a section meeting [3] that that meeting may be convened, as in Case C-727/21, simply on the ground that the registrations judge does not share the legal view of the judicial panel having jurisdiction. Second, the convening of a section meeting and the formulation by that section meeting of a 'legal position' that is binding, inter alia, on the judicial panel responsible for that case, are not at any stage brought to the attention of the parties. The parties do not therefore seem to have the possibility of exercising their procedural rights before such a section meeting.

In the light of the foregoing, the Court finds that the national legislation at issue is incompatible with the requirements inherent in the right to effective judicial protection and to a fair hearing.

---

3 Article 40(1) of the Zakon o sudovima (Law on judicial bodies) provides that a section meeting or a meeting of judges shall be convened where it is found that there are differences in interpretation between sections, chambers or judges regarding questions relating to the application of the law or where a chamber or a judge of a section departs from the legal position previously adopted.

The Court goes on to state that, in order to avoid or resolve conflicts in case-law and thus to ensure the legal certainty inherent in the principle of the rule of law, a procedural mechanism which allows a judge of a national court, who is not a member of the judicial panel with jurisdiction, to refer a case to a panel of that court sitting in extended composition is not contrary to the requirements stemming from the second subparagraph of Article 19(1) TEU, provided that the case has not yet been deliberated by the judicial panel initially designated, that the circumstances in which such a referral may be made are clearly set out in the applicable legislation and that the referral does not deprive the persons concerned of the possibility of participating in the proceedings before the panel sitting in extended composition. In addition, the judicial panel initially designated can always decide to make such a referral.

Judgment of 29 July 2024 (Grand Chamber), *protectus* (C-185/23, EU:C:2024:657)

(Reference for a preliminary ruling – Decision 2013/488/EU – Classified information – Facility Security Clearance – Withdrawal of the clearance – Non-disclosure of classified information on which the withdrawal was based – Article 47 of the Charter of Fundamental Rights of the European Union – Obligation to state reasons – Access to the file – Principle of an adversarial process – Article 51 of the Charter of Fundamental Rights – Implementation of EU law)

Seised of a request for a preliminary ruling from the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) made in a case concerning the withdrawal of a Facility Security Clearance based on classified information, the Court of Justice, sitting as the Grand Chamber, gives further guidance on the balance to be struck between the right to an effective remedy and the interests justifying the non-disclosure of certain classified information.

In September 2018, the National Security Authority of Slovakia ('the NBÚ') issued protectus s.r.o. an industrial security clearance on account of which, under the law of that Member State, it was authorised to have access to information classified under national law. In November 2018, the NBÚ also issued it with an industrial security certificate for 'SECRET UE/EU SECRET' information. As a result of that certificate, it was authorised to have access to classified information of the European Union ('EUCI').

The NBÚ subsequently received non-classified information indicating, inter alia, that protectus or the members of its board were the subject of a criminal investigation, that it had entered into agreements with companies under such and that there were suspicions that the appellant and another company, with which it was under common control, had responded to the same calls for tenders. The NBÚ also received other information, which was designated as 'classified documentary evidence'

The NBÚ offered protectus the possibility to comment on the non-classified information at the NBÚ's disposal. By a decision adopted in August 2020, based, in part, on classified information, that body, first, revoked the appellant's industrial security clearance on the ground that a security risk had been established concerning it and, secondly, as a consequence of the revocation of that industrial security clearance, revoked the appellant's industrial security certificate.

By a decision of the Committee of the National Parliament of the Slovak Republic for the Review of Decisions of the NBÚ adopted in November 2020, the appeal brought by the appellant against that decision of the NBÚ was dismissed. In September 2022, the NBÚ sent the referring court before which the appeal against the decision of that committee had been brought the entirety of the file, including the classified documentary evidence.

In October 2022, the President of the Chamber seised of the appellant's appeal first ruled out consultation of the classified parts of the file, then rejected the request by the appellant's lawyer to consult the classified documentary evidence, while requesting the NBÚ to examine the possibility of

such disclosure. In November 2022, that body granted consent for the disclosure of two pieces of classified documentary evidence, but refused to disclose the other classified documentary evidence at issue, on the ground that to do so would have led to the disclosure of sources of information.

In January 2023, relying inter alia on Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), the appellant's lawyer asked again to be able to consult all the documentary evidence.

In that context, the referring court decided to ask the Court as to the applicability of the Charter to the dispute in the main proceedings. On that matter, it points out, inter alia, that Decision 2013/488 on the protection of EUCI [4] imposes certain specific obligations on the Member States concerning the clearance of individuals or legal entities possessing the legal capacity to undertake contracts, which might imply that the legislation at issue constitutes an implementation of that decision. Secondly, in the event that the Charter is applicable to the dispute, the referring court asks the Court to state to what extent the Slovak legislation and practice on access to classified information in proceedings seeking to challenge the revocation of industrial security clearances or industrial security certificates are compatible with the right to an effective remedy laid down by Article 47 of the Charter.

Findings of the Court

In the first place, as regards the scope of the Charter, the Court examines first the Charter's applicability to the withdrawal of an industrial security clearance allowing access to information classified by a Member State. It observes in that regard that EU law does not contain, at the present stage of its development, any act establishing general rules on decisions taken by the Member States in order to authorise access to information classified under national legislation. In particular, Decision 2013/488, to which the referring court refers as regards EUCI, does not contain any provisions governing such access. Therefore, it does not appear that the national legislation governing the withdrawal of the industrial security clearance at issue in the main proceedings has the object or effect of giving effect to a provision of EU law. Accordingly, the withdrawal of an industrial security clearance such as that at issue in the main proceedings does not entail the implementation of EU law, within the meaning of the Charter.

Next, as regards the applicability of the Charter to the withdrawal of an industrial security certificate authorising access to EUCI, the Court states that the EU institutions have adopted specific acts intended to govern the protection of such information in the context of their operation. In particular, in the light of the rules thus established by Decision 2013/488, which imposes obligations on the Member States, [5] the measures adopted by those States to ensure industrial security, by regulating access to EUCI linked to contracts concluded by the Council through the granting and monitoring of Facility Security Clearances (FSC), must be regarded as implementing EU law. The withdrawal by a national authority of an FSC, within the meaning of that decision, entails, in particular, such implementation. Such a withdrawal calls into question an authorisation, the granting of which and, at least in part, its effects, are provided for by Decision 2013/488. [6]

Consequently, the Court rules that the review by a national court of the lawfulness of a decision withdrawing an industrial security clearance allowing access to information classified by a Member State does not concern an act constituting an implementation of EU law, within the meaning of

---

4 Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (OJ 2013 L 274, p. 1).

5 The Court refers in particular to Article 1(2), to Article 11(2), (5) and (7), to Article 15(3)(c), to Article 16(3)(a)(i) of Decision 2013/488 and to Annex V thereto.

6 Specifically, the Court observes that the granting of that authorisation is provided for by Article 11(5) of that decision, read in conjunction with point 8 of Annex V thereto, its effects for their part being defined, in part, inter alia in Article 11(5) of that decision and in point 11 of Annex V thereto.

Article 51(1) of the Charter. On the other hand, the review, by such a court, of the lawfulness of a decision withdrawing, as a result of the withdrawal of that industrial security clearance, an industrial security certificate authorising access to EUCI, in accordance with Article 11 of Decision 2013/488 and Annex V thereto, concerns an act implementing EU law.

In the second place, as regards the issue of the compatibility of legislation and practice such as that at issue in the main proceedings with Article 47 of the Charter, the Court first examines whether the situation concerned falls within the scope of that provision. It points out in that regard that it follows from Annex V to Decision 2013/488 that access to EUCI by an economic operator for the conclusion or performance of a classified Council contract is subject to the holding of an FSC. The Court also sets out the arrangements applicable, under that decision, to the participation of contractors in classified contracts requiring access to EUCI within their facilities, in the performance of those contracts or during the pre-contractual stage, which pre-supposes that they hold an FSC. Thus, the withdrawal of an FSC has the consequence that the economic operator concerned loses the authorisation to access EUCI for the purposes of the conclusion and performance of a classified contract. Therefore, such a withdrawal means, inter alia, that that operator will be deprived of the option, which it had before that withdrawal, to participate in the pre-contractual stage of a classified contract of the Council and to be awarded such a contract by that institution if its tender is selected. Consequently, such an economic operator must have, in accordance with Article 47 of the Charter, an effective remedy to challenge the withdrawal of its FSC.

Next, as regards the minimum guarantees which such a remedy must satisfy, the Court states that, in a situation where the withdrawal of a FSC is based exclusively on the withdrawal of another security clearance, the judicial review of the withdrawal of that FSC can be effective only in so far as the former holder of that FSC may have access to the grounds relied on to justify the withdrawal of that other security clearance. While overriding considerations concerning, inter alia, the protection of State security or international relations may preclude the disclosure to the former holder of a FSC of the information on which the withdrawal of that FSC is based, it is nonetheless the task of the national court with jurisdiction to apply, in the course of its judicial review, techniques which accommodate those overriding considerations and the need sufficiently to guarantee to an individual respect for his or her procedural rights, such as the right to be heard and the requirement for an adversarial process.

To that end, the Member States are required to provide for effective judicial review both of the existence and validity of the reasons invoked by the competent national authority with regard to State security to justify its refusal to disclose all or part of the information on which the withdrawal of the FSC, for the purposes of Decision 2013/488, was based, and of the lawfulness of that withdrawal. The court with jurisdiction must, in that context, be able to examine all that information.

So far as concerns the requirements to be met by judicial review of the existence and validity of the reasons invoked by the competent national authority with regard to State security of the Member State concerned, it is necessary for a court to be entrusted with carrying out an independent examination of all the matters of fact or law relied on by the competent national authority in order to assess whether overriding considerations actually preclude the disclosure of all or part of the grounds on which the withdrawal at issue is based and of the related evidence. If that court concludes that State security does not preclude the disclosure, at least in part, of such grounds or evidence, it is to give the competent national authority the opportunity to disclose the missing grounds and evidence to the person concerned. If that authority does not authorise that disclosure, that court is to proceed to examine the lawfulness of that withdrawal solely on the basis of the grounds and evidence which have been disclosed. On the contrary, if it turns out that overriding considerations do indeed preclude the disclosure to the person concerned of such grounds or evidence, the judicial review of the lawfulness of that withdrawal must be carried out in the context of a procedure which strikes a balance between the requirements arising from those overriding considerations and those of the right to effective judicial protection, in particular the right to respect for the principle of an adversarial

process. In any event, the person concerned must be informed of the essence of the grounds on which that withdrawal is based.

Consequently, the Court states, first, that Article 47 of the Charter does not preclude national legislation and national practice under which a decision withdrawing an FSC, within the meaning of Decision 2013/488, does not divulge the classified information justifying that withdrawal, on account of overriding considerations relating, for example, to the protection of State security or international relations, while providing that the court with jurisdiction to assess the lawfulness of that withdrawal has access to that information and that the lawyer of the former holder of that FSC may not have access to that information apart from with the consent of the national authorities concerned and on condition that he or she guarantees the information's confidentiality. That court must however ensure that the non-disclosure of information is limited to what is strictly necessary and that the former holder of that FSC is informed, in any event, of the essence of the grounds for that withdrawal in a manner which takes due account of the necessary confidentiality of the evidence.

Secondly, in the event that Article 47 of the Charter does preclude such legislation and practice, it does not require the national court with jurisdiction to disclose of its own motion certain classified information to the former holder of the FSC, as the case may be through the former holder's lawyer, where the failure to disclose that information to that former holder or its lawyer does not appear to be justified. It is for the competent national authority to do so, if necessary. If that authority does not authorise that disclosure, that court is to proceed to examine the lawfulness of the withdrawal of that FSC solely on the basis of the grounds and evidence which have been disclosed.

2. Principle *ne bis in idem*

Judgment of 25 January 2024, *Parchetul de pe lângă Curtea de Apel Craiova* (C-58/22, EU:C:2024:70)

(Reference for a preliminary ruling – Charter of Fundamental Rights of the European Union – Article 50 – Principle ne bis in idem – Criminal proceedings brought in rem – Order that no further action be taken adopted by a public prosecutor – Admissibility of subsequent criminal proceedings brought in personam for the same facts – Conditions that must be satisfied in order for a person to be regarded as having been finally acquitted or convicted – Requirement for a detailed investigation – No interview of a possible witness – No interview of the person concerned in the capacity of 'suspect')

Seised of a request for a preliminary ruling from the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania), the Court of Justice provides clarifications as to the two components, '*bis*' and '*idem*', of the principle *ne bis in idem*, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), [7] in the context of a case in which criminal proceedings commenced against a person in the context of a second set of proceedings were closed owing to an order that no further action be taken adopted by a public prosecutor's office, in the first proceedings, from which it is not apparent, on the basis of evidence, that the legal situation of that person as liable, criminally, for the facts constituting the offence prosecuted was examined.

On 30 April 2015, at a meeting of the cooperative company BX, the president of that company, NR, demanded that some of its employees pay a sum of money which she was required to pay, on pain of

[7] According to that provision, 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law'.

their contracts of employment being terminated. Her demand not having been satisfied, she issued and signed decisions terminating those contracts.

The employees concerned then brought two criminal complaints against NR, which were registered, respectively, with the Parchet de pe lângă Judecătoria Slatina (Public Prosecutor's Office at the Court of First Instance, Slatina, Romania) under the reference 673/P/2016, and the Parchet de pe lângă Tribunalul Olt (Public Prosecutor's Office at the Regional Court of Olt, Romania) under the reference 47/P/2016.

In case 673/P/2016, after having brought criminal proceedings *in rem* for the offence of extortion, the public prosecutor in charge of that case adopted, on the basis of a report of the police force in charge of the investigation, an order that no further action be taken ('the order that no further action be taken in the case'). That order was not challenged by the complainants within the prescribed time limits. In addition, the request to reopen the proceedings made by the Chief Prosecutor was not confirmed by the pre-trial chamber of the court with jurisdiction.

In case 47/P/2016, criminal proceedings were brought in personam against NR for the offence of passive corruption, which resulted in the adoption, by the Tribunalul Olt (Regional Court, Olt, Romania), of a judgment sentencing NR to a suspended term of imprisonment. On an appeal brought by NR, that judgment was set aside by the Court of Appeal, Craiova, the referring court, by the judgment in a criminal matter No 1207/2020, on the ground of a purported infringement of the principle *ne bis in idem* enshrined in Article 50 of the Charter.

Seised of an appeal on a point of law brought by the Parchet de pe lângă Curtea de Apel Craiova (Public Prosecutor's Office at the Court of Appeal, Craiova, Romania) against that latter judgment, the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) considered, in essence, that the referring court was wrong to have concluded that the principle *ne bis in idem* was applicable since the order that no further action be taken in the case had not been preceded by any determination as to the merits of case 673/P/2016 and had not been duly reasoned, with the result that it could not be regarded as having resulted in the barring of any further public prosecution. That court therefore set aside criminal judgment No 1207/2020 and referred the case to the referring court for reconsideration.

In the context of that reconsideration, the referring court decided to refer a question to the Court regarding the applicability of the principle *ne bis in idem* enshrined in Article 50 of the Charter in circumstances such as those at issue in the main proceedings.

Findings of the Court

The Court recalls that the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition).

As regards the '*bis*' condition, for a person to be regarded as someone who has been 'finally acquitted or convicted' in relation to the acts which he or she is alleged to have committed, within the meaning of Article 50 of the Charter, it is necessary, in the first place, that further prosecution has been definitively barred, in accordance with national law. In the present case, to the extent that, first, the order that no further action be taken in the case was not challenged by the complainants in the main proceedings within the prescribed time limits and, secondly, the request for confirmation of the re-opening of criminal proceedings ordered by the Chief Prosecutor of the Court of First Instance of Slatina was rejected, it appears that, in case 673/P/2016, further public prosecution was definitively barred and that the order that no further action be taken in the case has become final, subject to the verifications which it is for the referring court to make.

In the second place, for it to be possible to regard a person as having been 'finally acquitted or convicted' in relation to the acts which he or she is alleged to have committed, within the meaning of Article 50 of the Charter, it is necessary that the order barring further public prosecution was adopted following a determination as to the merits of the case and not on the basis of merely procedural grounds. In the present case, the condition relating to the determination as to the merits of case 673/P/2016 may be regarded as satisfied by the order that no further action be taken in the case only to the extent that that order contains an assessment of the material elements of the offence alleged, such as, inter alia, an analysis of the criminal liability of NR, as the alleged perpetrator of that offence. The failure to interview witnesses present at the meeting of the cooperative company BX on 30 April 2015 could constitute an indication of the lack of such an examination, subject to the verifications which it is for the referring court to carry out.

As regards the '*idem*' condition, it follows from the very wording of Article 50 of the Charter that that provision prohibits the same person from being tried or punished in criminal proceedings more than once for the same offence. In that regard, the Court states that in order to determine whether a person has been 'finally acquitted or convicted', within the meaning of that Article 50, it must be clear from the decision adopted that, during the investigation that preceded that decision, irrespective of whether that investigation was brought *in rem* or *in personam*, his or her legal situation as criminally liable for the acts constituting the offence being prosecuted was examined and, in the case of an order that no further action be taken, rejected. If that is not the case, which it is for the referring court to ascertain, the principle *ne bis in idem* does not apply and, consequently, that person cannot be regarded as having been finally acquitted, within the meaning of Article 50 of the Charter.

II. General principles of EU law: principles of equivalence and effectiveness [8]

Judgment of 9 April 2024 (Grand Chamber), *Profi Credit Polska (Reopening of proceedings concluded with a final judicial decision)* (C-582/21, EU:C:2024:282)

(Reference for a preliminary ruling – Principles of EU law – Article 4(3) TEU – Principle of sincere cooperation – Procedural autonomy – Principles of equivalence and effectiveness – Principle of interpreting national law in conformity with EU law – National legislation providing for an extraordinary remedy allowing the reopening of civil proceedings closed by a final judgment – Grounds – Subsequent decision of a constitutional court declaring that a provision of national law on the basis of which that judgment was given is incompatible with the Constitution – Loss of the opportunity to take action on account of a breach of the law – Broad application of that remedy – Alleged infringement of EU law resulting from a subsequent judgment of the Court of Justice ruling under Article 267 TFEU on the interpretation of EU law – Directive 93/13/EEC – Unfair terms in consumer contracts – Default judgment – Failure of the court hearing the case to ascertain of its own motion whether contractual terms are unfair)

Hearing a reference for a preliminary ruling from the Sąd Okręgowy Warszawa-Praga [9] (Regional Court, Warszawa-Praga, Warsaw, Poland), the Court of Justice, sitting as the Grand Chamber, interprets Article 4(3) TEU, [10] the principle of equivalence and the principle that national law must be interpreted in conformity with EU law, in connection with the protection of consumers against unfair contract terms, in a situation in which a national court which has upheld an application by a seller or supplier based on a contract concluded with a consumer, by a final default judgment, failed to examine of its own motion whether that contract contained unfair terms, in breach of its obligations under Directive 93/13. [11]

In the main proceedings, FY concluded a consumer credit agreement with Profi Credit Polska S.A. w Bielsku Białej ('Profi Credit Polska'), a credit undertaking. The repayment of the loan was secured by the issuance of a blank promissory note, signed by FY, which was subsequently completed by Profi Credit Polska.

Subsequently, Profi Credit Polska brought an action before the court of first instance having jurisdiction seeking payment of the credit balance due, together with interest. The only documents annexed to the application were that promissory note and the notification of the termination of the credit agreement at issue. The agreement itself was not submitted.

---

8 Reference should also be made under this heading to the following judgments: judgment of 19 December 2024 (Grand Chamber), ***Kaduna*** (C-244/24 and C-290/24, EU:C:2024:1038), presented under heading IX.1 'Asylum policy'; judgment of 29 February 2024, ***Raad van bestuur va de Sociale verzekeringsbank (Transfer of survivors' benefits)*** (C-549/22, EU:C:2024:184), presented under heading XIX.2 'Content and scope'; judgment of 4 October 2024 (Grand Chamber), ***Lithuania and Others* v *Parliament and Council (Mobility package)*** (C-541/20 to C-555/20, EU:C:2024:818), presented under heading XII 'Transport'.

9 'The referring court'.

10 That provision enshrines the principle of sincere cooperation, in accordance with which the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

11 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). Article 6(1) of that directive states, inter alia, that Member States are to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier, as provided for under their national law, are not to be binding on the consumer. Article 7(1) of that directive obliges the Member States to provide for adequate and effective means 'to prevent the continued use of unfair terms in contracts concluded with consumers'.

The court of first instance gave a default judgment, ordering FY to pay Profi Credit Polska the amount shown on the promissory note, together with statutory default interest, on the basis solely of that promissory note and the statements in the application.

FY did not lodge an objection against the default judgment, which became final at the end of the period prescribed for that purpose.

Taking the view that the court of first instance had not taken into consideration Directive 93/13, as interpreted by the Court of Justice, [12] by granting Profi Credit Polska's application on the basis of the promissory note which it had issued, without examining whether terms of the credit agreement were unfair, in particular as regards the non-interest cost of the credit, FY submitted to that court an application for the proceedings to be reopened.

After her application was rejected, FY brought an appeal before the referring court.

Considering that, since the court of first instance did not examine the credit agreement or whether terms it contained were unfair, the default judgment is likely to infringe Directive 93/13, as interpreted by the Court of Justice, the referring court asks whether EU law requires it to grant FY's application to reopen the proceedings, irrespective of the fact that she did not lodge an objection against the default judgment.

That court seeks to ascertain, in particular, whether EU law requires it to interpret broadly the national procedural provisions establishing an exceptional remedy allowing an individual to apply for the reopening of proceedings closed by a final judgment. Under national law, such an application may be successful, inter alia, where (i) the national provision relied upon in the judicial proceedings in question was subsequently declared incompatible with the national Constitution or another higher-ranking rule by the constitutional court, or (ii) the party concerned was unlawfully deprived of the opportunity to take action on account of a breach of the law. [13]

The referring court's first question seeks to ascertain whether the obligation of sincere cooperation and the principle of equivalence require the first of those extraordinary remedies to allow a request for the reopening of proceedings closed by a final judgment also where it is apparent from a preliminary ruling on the interpretation of EU law, given by the Court of Justice [14] after such a final judgment, that that judgment is based on a provision of national law that is incompatible with EU law. By its second question, the referring court asks whether the principle that national law must be interpreted in conformity with EU law requires it to interpret a provision of national law that allows a party to apply for the reopening of proceedings closed by a final judgment if that party has been deprived of the opportunity to take action on account of a breach of the law, so as to include within its scope a situation such as that at issue in the main proceedings.

Findings of the Court

The first question

After noting that respect for the right to effective judicial protection does not mean that Member States are obliged to provide for extraordinary remedies allowing the reopening of proceedings closed by a final judgment following a preliminary ruling on interpretation, the Court emphasises the importance, in the EU legal order and in national legal systems, of the principle of *res judicata*. In the absence of EU rules governing the matter, the rules implementing that principle are a matter for the

---

12 Judgment of 13 September 2018, *Profi Credit Polska* (C-176/17, EU:C:2018:711).

13 As provided, in essence, in Article 401[1] and Article 401(2) of the Polish Code of Civil Procedure, respectively.

14 'The preliminary ruling on interpretation'.

national legal order of the Member States, in accordance with the principle of procedural autonomy, but must be consistent with the principles of equivalence and effectiveness.

If the applicable domestic rules of procedure provide for the possibility, under certain conditions, for a national court to go back on a decision having the authority of *res judicata* in order to render the situation compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation at issue is brought back into line with EU law. In particular, it is for the national court to determine, in the light of the detailed procedural rules governing actions applicable under national law, whether that principle is observed, having regard to the subject matter, cause of action and essential elements of the actions concerned.

In the present case, that examination involves examining whether, where national law confers on individuals the right to apply for the reopening of a procedure closed by a final judgment based on a provision of national law, the incompatibility of which has subsequently been established by the Trybunał Konstytucyjny (Constitutional Court, Poland), [15] an equivalent right must be granted to individuals where it follows from a preliminary ruling on interpretation, delivered after such a final judgment, that it is based on a provision of national law that is incompatible with EU law.

Such checking leads to the determination of whether equivalence between those two types of decisions can be established.

In that regard, the Court of Justice notes, in particular, that the decisions of the Constitutional Court contain a finding that the provision of national law at issue is incompatible, which does not require the adoption of a subsequent judicial decision, and which has the effect of depriving that provision of its binding force and disapplying it from the national legal order, with the direct consequence of depriving the final judgment delivered on the basis of that provision of its legal basis.

Preliminary rulings on interpretation differ from decisions of the Constitutional Court in that, in interpreting EU law, the Court of Justice does not rule directly on whether a provision of national law is incompatible with EU law. Although the role of the Court of Justice is to provide a binding interpretation of EU law, the consequences of that interpretation for the specific case are the responsibility of the national courts. Because of the clear separation of functions between the national courts and the Court of Justice, which characterises the preliminary ruling procedure, the national court alone has jurisdiction to interpret and apply national law, and to apply, in the case pending before it, the interpretation provided by the Court of Justice in response to its request for a preliminary ruling.

Therefore, where an extraordinary remedy established by a national procedural provision allows an individual to apply for the reopening of a procedure which led to a final judgment by relying on a subsequent decision of the Constitutional Court of the Member State concerned finding that a provision of national law on the basis of which that judgment was delivered is incompatible with the Constitution of that Member State, Article 4(3) TEU and the principle of equivalence do not require that remedy also to be available on account of reliance on a preliminary ruling on interpretation. [16]

---

15 That court is hereinafter referred to as the 'Constitutional Court'. The decisions whereby the Constitutional Court finds that a provision of national law, or a certain interpretation of such a provision, is not compatible with the Polish Constitution or with any other higher-ranking rule, are hereinafter referred to as 'decisions of the Constitutional Court'.

16 In so far as the specific consequences of such a decision of that Constitutional Court concerning the provision of national law or the interpretation of that provision, on which that final judgment is based, flow directly from that decision.

The second question

The Court points out at the outset that, since the national courts alone have jurisdiction to interpret national law, it is for the referring court to determine whether, in view of the limits on the principle that national law must be interpreted in conformity with EU law, the general principles of EU law, and the fact that it is not possible to provide an interpretation that is *contra legem*, the provision of national law at issue, which allows proceedings closed by a final judgment to be reopened if the party concerned has been deprived of the opportunity to bring proceedings for infringement of the law, may be interpreted broadly so as to bring a situation such as that at issue in the main proceedings within the scope of that ground for reopening the procedure.

However, the Court provides the referring court with some useful guidance in the light of the information contained in the order for reference.

In particular, the Court notes that the proceedings before the court of first instance must be examined as a whole, taking into consideration not only the fact that the default judgment was delivered without that court's examining of its own motion whether the terms of the credit agreement concluded with FY were unfair, but also the detailed procedural rules governing the exercise of the right to lodge an objection to such a judgment.

It is thus for the referring court to determine whether the detailed rules at issue in the main proceedings are capable of '[depriving] a party of the opportunity to take action on account of a breach of the law', within the meaning of the provision of national law at issue, in so far as they do not make it possible to ensure observance of the rights which the consumer derives from Directive 93/13.

Furthermore, the Court states that the recognition of a right to reopen proceedings closed by a final judgment in accordance with the principle that national law must be interpreted in conformity with EU law is not the only means capable of guaranteeing a consumer, in circumstances such as those in the main proceedings, the protection intended by Directive 93/13.

The obligation on the part of the Member States to ensure the effectiveness of the rights which individuals derive from EU law implies a requirement of effective judicial protection, in particular as regards the detailed procedural rules governing actions based on such rights. Thus, although the procedural rules governing the exercise of the right to lodge an objection against the default judgment do not enable observance of the rights that consumers derive from Directive 93/13, that procedure is not consistent with the consumer's right to an effective remedy.

Therefore, if the referring court were to take the view that the broad interpretation which it envisages is unfeasible, a consumer such as FY must have another legal remedy available to him or her in order to ensure that the protection intended by Directive 93/13 is effectively guaranteed.

In such a situation, the principle of effectiveness requires that observance of the rights guaranteed by Directive 93/13 be ensured in the context of enforcement proceedings, or even after those proceedings have come to an end. Where the enforcement proceedings have come to an end, the consumer must be able to rely, in separate subsequent proceedings, on the unfairness of terms of the contract in order to be able to exercise effectively and fully his or her rights under that directive, with a view to obtaining compensation for the financial loss caused by those terms.

III. Protection of personal data [17]

1. Telephone and electronic communications

Judgment of 30 April 2024 (Full Court), *La Quadrature du Net and Others (Personal data and action to combat counterfeiting)* (C-470/21, EU:C:2024:370)

(Reference for a preliminary ruling – Processing of personal data and the protection of privacy in the electronic communications sector – Directive 2002/58/EC – Confidentiality of electronic communications – Protection – Article 5 and Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – National legislation aimed at combating, through action by a public authority, counterfeiting offences committed on the internet – 'Graduated response' procedure – Upstream collection by rightholder organisations of IP addresses used for activities infringing copyright or related rights – Downstream access by the public authority responsible for the protection of copyright and related rights to data relating to the civil identity associated with those IP addresses retained by providers of electronic communications services – Automated processing – Requirement of prior review by a court or an independent administrative body – Substantive and procedural conditions – Safeguards against the risks of abuse and against any unlawful access to or use of those data)

In recent years, the Court of Justice has been called upon, on several occasions, to rule on the retention of and access to personal data in the field of electronic communications and has consequently established an extensive body of case-law in this area. [18] Ruling on a preliminary ruling from the Conseil d'État (Council of State, France), the Court, sitting as the full Court, develops that case-law by providing clarifications concerning (i) the conditions under which the general retention of IP addresses by providers of electronic communications services cannot be regarded as entailing a serious interference with the rights to respect for private life, to the protection of personal data and to freedom of expression guaranteed by the Charter [19] and (ii) the possibility, for a public authority, to access certain personal data retained in accordance with those conditions, in the context of combating infringements of intellectual property rights committed online.

In the present case, four associations submitted a request to the Premier ministre (Prime Minister, France) seeking the repeal of the decree relating to the automated processing of personal data. [20] As that request was not acted upon, those associations brought an action before the Conseil d'État

---

17 Reference should also be made under this heading to the following judgment: judgment of 5 March 2024 (Grand Chamber), ***Kočner* v *Europol*** (C-755/21 P, EU:C:2024:202), presented under heading X.3 'Processing of personal data by Europol'.

18 See, inter alia, judgments of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, EU:C:2016:970); of 2 October 2018, *Ministerio Fiscal* (C-207/16, EU:C:2018:788); of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791); of 2 March 2021, *Prokuratuur (Conditions of access to data relating to electronic communications)* (C-746/18, EU:C:2021:152); of 17 June 2021, *M.I.C.M.* (C-597/19, EU:C:2021:492); and of 5 April 2022, *Commissioner of An Garda Síochána and Others* (C-140/20, EU:C:2022:258).

19 Articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

20 Décret no 2010-236, du 5 mars 2010, relatif au traitement automatisé de données à caractère personnel autorisé par l'article L. 331-29 du code de la propriété intellectuelle dénommé « Système de gestion des mesures pour la protection des œuvres sur internet » (Decree No 2010-236 of 5 March 2010 on the automated personal data processing system authorised by Article L. 331-29 of the code de la propriété intellectuelle (Intellectual Property Code), known as the 'System for the management of measures for the protection of works on the internet' (JORF No 56 of 7 March 2010, text No 19), as amended by décret no 2017-924, du 6 mai 2017, relatif à la gestion des droits d'auteur et des droits voisins par un organisme de gestion de droits et modifiant le code de la propriété intellectuelle (Decree No 2017-924 of 6 May 2017 on the management of copyright and related rights by a rights management organisation and amending the Intellectual Property Code) (JORF No 109 of 10 May 2017, text No 176).

(Council of State) seeking the annulment of that implicit rejection decision. In their view, that decree and the provisions which constitute its legal basis [21] infringe EU law.

Under French law, the Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet (High Authority for the dissemination of works and the protection of rights on the internet) ('Hadopi') is authorised – in order to be able to identify those responsible for infringements of copyright or related rights committed online – to access certain data that providers of electronic communications services are required to retain. Those data relate to the civil identity of a person concerned associated with his or her IP address previously collected by rightholder organisations. Once the holder of the IP address used for activities constituting such infringements is identified, Hadopi follows the 'graduated response' procedure. Specifically, it is empowered to send that person two recommendations, which are similar to warnings, and, if the activities persist, a letter notifying him or her that those activities are subject to criminal prosecution. Finally, it is entitled to refer the matter to the public prosecution service with a view to the prosecution of that person. [22]

In that context, the Conseil d'État (Council of State) referred questions to the Court concerning the interpretation of the ePrivacy Directive, read in the light of the Charter. [23]

Findings of the Court

In the first place, as regards the retention of data relating to civil identity and the associated IP addresses, the Court states that the general and indiscriminate retention of IP addresses does not necessarily constitute, in every case, a serious interference with the rights to respect for private life, protection of personal data and freedom of expression guaranteed by the Charter.

The obligation to ensure such retention may be justified by the objective of combating criminal offences in general, where it is genuinely ruled out that that retention could give rise to serious interferences with the private life of the person concerned due to the possibility of drawing precise conclusions about that person by, inter alia, linking those IP addresses with a set of traffic or location data.

Accordingly, a Member State which intends to impose such an obligation on providers of electronic communications services must ensure that the arrangements for the retention of those data are such as to rule out the possibility that precise conclusions could be drawn about the private lives of the persons concerned.

The Court specifies that, to that end, the retention arrangements must relate to the very manner in which the retention is structured; in essence, that retention must be organised in such a way as to guarantee a genuinely watertight separation of the different categories of data retained. Accordingly, the national rules relating to those arrangements must ensure that each category of data, including data relating to civil identity and IP addresses, is kept completely separate from other categories of retained data and that that separation is genuinely watertight, by means of a secure and reliable computer system. In addition, in so far as those rules provide for the possibility of linking the retained IP addresses with the civil identity of the person concerned for the purpose of combating

21 In particular, the third to fifth paragraphs of Article L. 331-21 of the Intellectual Property Code.

22 With effect from 1 January 2022, Hadopi was merged with the Conseil supérieur de l'audiovisuel (Higher Council for the audiovisual sector) (CSA), another independent public authority, to form the Autorité de régulation de la communication audiovisuelle et numérique (Authority for the Regulation of Audiovisual and Digital Communications) (ARCOM). The graduated response procedure has, however, remained essentially unchanged.

23 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) ('the ePrivacy Directive'), read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter.

infringements, they must permit such linking only through the use of an effective technical process which does not undermine the effectiveness of the watertight separation of those categories of data. The reliability of that separation must be subject to regular review by a third-party public authority. In so far as the applicable national legislation provides for such strict requirements, the interference resulting from that retention of IP addresses cannot be categorised as 'serious'.

Consequently, the Court concludes that, in the presence of a legislative framework ensuring that no combination of data will allow precise conclusions to be drawn about the private life of the persons whose data are retained, the ePrivacy Directive, read in the light of the Charter, does not preclude a Member State from imposing an obligation to retain IP addresses, in a general and indiscriminate manner, for a period not exceeding what is strictly necessary, for the purposes of combating criminal offences in general.

In the second place, as regards access to data relating to the civil identity associated with IP addresses, the Court holds that the ePrivacy Directive, read in the light of the Charter, does not preclude, in principle, national legislation which allows a public authority to access those data retained by providers of electronic communications services separately and in a genuinely watertight manner, for the sole purpose of enabling that authority to identify the holders of those addresses suspected of being responsible for infringements of copyright and related rights on the internet and to take measures against them. In that case, the national legislation must prohibit the officials having such access (i) from disclosing in any form whatsoever information concerning the content of the files consulted by those holders except for the sole purpose of referring the matter to the public prosecution service, (ii) from tracking in any way the clickstream of those holders and (iii) from using those IP addresses for purposes other than the adoption of those measures.

In that context, the Court notes inter alia that, even though the freedom of expression and the confidentiality of personal data are primary considerations, those fundamental rights are nevertheless not absolute. In balancing the rights and interests at issue, those fundamental rights must yield on occasion to other fundamental rights or public-interest imperatives, such as the maintenance of public order and the prevention of crime or the protection of the rights and freedoms of others. This is, in particular, the case where the weight given to those primary considerations is such as to hinder the effectiveness of a criminal investigation, in particular by making it impossible or excessively difficult to identify effectively the perpetrator of a criminal offence and to impose a penalty on him or her.

In the same context, the Court also refers to its case-law according to which, as regards the combating of criminal offences infringing copyright or related rights committed online, the fact that accessing IP addresses may be the only means of investigation enabling the person concerned to be identified tends to show that the retention of and access to those addresses is strictly necessary for the attainment of the objective pursued and therefore meets the requirement of proportionality. Moreover, not to allow such access would carry a real risk of systemic impunity for criminal offences committed online or the commission or preparation of which is facilitated by the specific characteristics of the internet. The existence of such a risk constitutes a relevant factor for the purposes of assessing, when balancing the various rights and interests in question, whether an interference with the rights to respect for private life, protection of personal data and freedom of expression is a proportionate measure in the light of the objective of combating criminal offences.

In the third place, ruling on whether access by the public authority to data relating to the civil identity associated with an IP address must be subject to a prior review by a court or an independent administrative body, the Court considers that the requirement of such prior review applies where, within the framework of national legislation, that access carries the risk of a serious interference with the fundamental rights of the person concerned in that it could allow that public authority to draw precise conclusions about the private life of that person and, as the case may be, to establish a detailed profile of that person. Conversely, that requirement of prior review is not intended to apply where the interference with fundamental rights cannot be classified as serious.

In that regard, the Court states that, where a retention framework which ensures a watertight separation of the various categories of retained data is put in place, access by the public authority to the data relating to the civil identity associated with the IP addresses is not, in principle, subject to the requirement of a prior review. Such access for the sole purpose of identifying the holder of an IP address does not, as a general rule, constitute a serious interference with the abovementioned rights.

However, the Court does not rule out the possibility that, in atypical situations, there is a risk that, in the context of a procedure such as the graduated response procedure at issue in the main proceedings, the public authority may be able to draw precise conclusions about the private life of the person concerned, in particular where that person engages in activities infringing copyright or related rights on peer-to-peer networks repeatedly, or on a large scale, in connection with protected works of particular types, revealing potentially sensitive information about aspects of that person's private life.

In the present case, an IP address holder may be particularly exposed to such a risk when the public authority must decide whether or not to refer the matter to the public prosecution service with a view to the prosecution of that person. The intensity of the infringement of the right to respect for private life is likely to increase as the graduated response procedure, which is a sequential process, progresses through its various stages. The access of the competent authority to all of the data relating to the person concerned collected during the various stages of that procedure may enable precise conclusions to be drawn about the private life of that person. Accordingly, the national legislation must provide for a prior review which must take place before the public authority can link the civil identity data and such a set of data, and before sending a notification letter declaring that that person has engaged in conduct subject to criminal prosecution. That review must, moreover, preserve the effectiveness of the graduated response procedure by making it possible, in particular, to identify cases where the unlawful conduct in question has been again repeated. To that end, that procedure must be organised and structured in such a way that the civil identity data of a person associated with IP addresses previously collected on the internet cannot automatically be linked, by the persons responsible for the examination of the facts within the competent public authority, with information which the latter already has and which could enable precise conclusions to be drawn about the private life of that person.

Furthermore, as regards the object of the prior review, the Court notes that, where the person concerned is suspected of having committed an offence which falls within the scope of criminal offences in general, the court or independent administrative body responsible for that review must refuse access where that access would allow the public authority to draw precise conclusions about the private life of that person. However, even access allowing such precise conclusions to be drawn should be authorised in cases where the person concerned is suspected of having committed an offence considered by the Member State concerned to undermine a fundamental interest of society and which thus constitutes a serious crime.

The Court also states that a prior review may in no case be entirely automated since, in the case of a criminal investigation, such a review requires that a balance be struck between, on the one hand, the legitimate interests relating to combating crime and, on the other hand, respect for private life and protection of personal data. That balancing requires the intervention of a natural person, all the more so where the automatic nature and large scale of the data processing in question poses privacy risks.

Thus, the Court concludes that the possibility, for the persons responsible for examining the facts within that public authority, of linking such data relating to the civil identity of a person associated with an IP address with files containing information that reveals the title of protected works the making available of which on the internet justified the collection of IP addresses by rightholder organisations is subject, in cases where the same person again repeats an activity infringing copyright or related rights, to review by a court or an independent administrative body. That review cannot be entirely automated and must take place before any such linking, as such linking is capable, in such circumstances, of enabling precise conclusions to be drawn about the private life of the person whose IP address has been used for activities that may infringe copyright or related rights.

In the fourth and last place, the Court notes that the data processing system used by the public authority must be subject, at regular intervals, to a review by an independent body acting as a third party in relation to that public authority. The purpose of that control is to verify the integrity of the system, including the effective safeguards against the risks of abusive or unlawful access to or use of those data, and its effectiveness and reliability in detecting potential offending conduct.

In that context, the Court observes that, in the present case, the automated processing of personal data carried out by the public authority on the basis of the information relating to instances of counterfeiting detected by the rightholder organisations is likely to involve a certain number of false positives and, above all, the risk that a potentially very significant amount of personal data may be misused by third parties for unlawful or abusive purposes, which explains the need for such a review.

In addition, it adds that that processing must comply with the specific rules for the protection of personal data laid down by Directive 2016/680. [24] In the present case, even if the public authority does not have decision-making powers of its own in the context of the 'graduated response' procedure, it must be classified as a 'public authority' involved in the prevention and detection of criminal offences and therefore falls within the scope of that directive. Thus, the persons involved in such a procedure must enjoy a set of substantive and procedural safeguards referred to in Directive 2016/680; it is for the referring court to ascertain whether the national legislation provides for those safeguards.

Judgment of 30 April 2024 (Grand Chamber), *Procura della Repubblica presso il Tribunale di Bolzano* (C-178/22, EU:C:2024:371)

(Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Confidentiality of communications – Providers of electronic communications services – Directive 2002/58/EC – Article 15(1) – Articles 7, 8, 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union – Access to those data requested by a national authority having competence to prosecute offences of aggravated theft – Definition of the concept of 'serious offence' the prosecution of which is capable of justifying serious interference with fundamental rights – Competence of the Member States – Principle of proportionality – Scope of prior review by a court of the requests to access the data retained by providers of electronic communications services)

Following a request for a preliminary ruling from the Giudice delle indagini preliminari presso il Tribunale di Bolzano (judge in charge of preliminary investigations at the District Court, Bolzano, Italy), the Grand Chamber of the Court of Justice clarifies who is responsible for defining the concept of 'serious offence' for the purposes of applying Article 15(1) of the 'Privacy and Electronic Communications' Directive. [25] The Court also rules on the scope of the national court's prior review of requests for access to the data retained by providers of electronic communications services.

Following two thefts of mobile telephones, the Procura della Repubblica presso il Tribunale di Bolzano (Public Prosecutor's Office at the District Court, Bolzano, Italy) brought two sets of criminal proceedings against unknown perpetrators for the commission of offences of aggravated theft. In order to identify the perpetrators of those thefts, that public prosecutor's office requested, on the

---

24 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.

25 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) ('the Privacy and Electronic Communications Directive').

basis of a provision of national law, [26] from the referring court, authorisation to obtain from all the telephone companies the telephone records of the stolen telephones.

Since the referring court was uncertain whether that national provision – which provides that the maximum term of imprisonment of at least three years in respect of which an offence is punishable may justify the disclosure of telephone records to the public authorities – is compatible with the 'Privacy and Electronic Communications' Directive, read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), it has referred a question to the Court of Justice on the interpretation of that directive.

Findings of the Court

In the first place, as regards the nature of the interference with the fundamental rights to privacy and the protection of personal data, [27] caused by access to telephone records, the Court finds that that interference is likely to be classified as serious and that, consequently, such access may be granted only in the context of combating serious crime. The Court notes that for the purposes of assessing the existence of a serious interference with those fundamental rights, the fact that the data to which the access was requested may not be the data of the owners of the mobile telephones at issue, but the data of the persons who used those telephones after their alleged theft, is irrelevant. Indeed, it is apparent from the 'Privacy and Electronic Communications' Directive [28] that the obligation of principle to ensure the confidentiality of the electronic communications and the related traffic data effected covers communications made by the users of the public communications network. That directive defines the concept of 'user' as meaning any natural person using a publicly available electronic communications service, without necessarily having subscribed to that service.

In the second place, as regards the definition of the concept of 'serious offence', the Court recalls that, in so far as the European Union has not legislated in that field, criminal legislation and the rules of criminal procedure fall within the competence of the Member States. They must, however, exercise that competence in line with EU law.

In that regard, the Court notes that the definition of criminal offences, mitigating and aggravating circumstances and penalties reflects both social realities and legal traditions, which vary not only between the Member States but also over time. However, those realities and traditions are of undoubted importance in determining serious offences.

Consequently, in view of the division of competences between the European Union and the Member States and the considerable differences between the national legal systems in the area of criminal law, it is for the Member States to define 'serious offences'.

However, the Court points out that that definition of 'serious offences' must comply with the requirements arising from the 'Privacy and Electronic Communications' Directive, [29] read in the light of

---

26 Namely, Article 132(3) of the decreto legislativo n. 196 – Codice in materia di protezione dei dati personali, recante disposizioni per l'adeguamento dell'ordinamento nazionale al regolamento (UE) n. 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE (Legislative Decree No 196 establishing the Personal Data Protection Code, laying down provisions for the adaptation of national law to 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) of 30 June 2003 (Ordinary Supplement to GURI No 174 of 29 July 2003), in the version applicable to the dispute in the main proceedings.

27 Guaranteed in Articles 7 and 8 of the Charter.

28 Article 5(1) of the Privacy and Electronic Communications Directive.

29 Article 15(1) of the Privacy and Electronic Communications Directive.

the Charter. [30] It follows that the Member States cannot distort the concept of 'serious offence' and, by extension, that of 'serious crime', by including within it offences which are manifestly not serious offences, in the light of the societal conditions prevailing in the Member State concerned. It is in particular in order to ascertain that there is no such distortion that it is essential that, where there is the risk of a serious interference with fundamental rights, the national authorities' access to the retained data be subject to a prior review carried out either by a court or by an independent administrative body.

In the third and last place, in order to assess whether the definition of 'serious offences' resulting from the national provision is not too broad, the Court notes, first, that a definition according to which 'serious offences', for the prosecution of which access to data may be granted, are those for which the maximum term of imprisonment is at least equal to a period determined by law, is based on an objective criterion.

Secondly, the Court nonetheless emphasises that the definition given, in national law, of 'serious offences' must not be so broad that access to those data becomes the rule rather than the exception. Thus, that definition cannot cover the vast majority of criminal offences, which would be the case if the minimum period were set at an excessively low level. However, a minimum period fixed by reference to a maximum term of imprisonment of three years does not appear, in that regard, to be excessively low.

That said, since the definition of 'serious offences' is established by reference not to a minimum penalty but to a maximum penalty, the Court does not rule out that access to data, constituting a serious interference with fundamental rights, may be requested for the purposes of prosecuting offences which do not, in actual fact, constitute serious crime.

Nonetheless, setting a minimum period above which the maximum term of imprisonment for an offence justifies the classification of that offence as a serious offence is not necessarily contrary to the principle of proportionality.

This seems to be the case of the national provision at issue, since that provision appears to cover, inter alia, cases in which access cannot be classified as a serious interference, because that access does not relate to a set of data liable to allow precise conclusions to be drawn concerning the private lives of the persons concerned.

In addition, the court or independent administrative body, acting in the context of a prior review, must be entitled to refuse or restrict that access where it finds that the interference with fundamental rights is serious even though it is clear that the offence at issue does not actually constitute serious crime.

Indeed, the court or body entrusted with carrying out the review must be able to strike a fair balance between, on the one hand, the legitimate interests relating to the needs of the criminal investigation and, on the other hand, the rights to privacy and protection of personal data.

In particular, that court or body must be able to exclude such access where it is sought in the context of proceedings for an offence which is manifestly not a serious offence.

The Court concludes from this that the 'Privacy and Electronic Communications' Directive, read in the light of the Charter, does not preclude a national provision which requires a national court to authorise access to a set of traffic or location data, if it is requested for the purposes of investigating criminal offences punishable by a maximum term of imprisonment of at least three years, on condition, however, that that court is entitled to refuse such access if it is requested in the context of

30 Articles 7, 8, 11 and Article 52(1) of the Charter.

an investigation into an offence which is manifestly not a serious offence, in the light of the societal conditions prevailing in the Member State concerned.

Judgment of 4 October 2024 (Grand Chamber), *Bezirkshauptmannschaft Landeck (Attempt to access personal data stored on a mobile* telephone*)* (C-548/21, EU:C:2024:830)

(Reference for a preliminary ruling – 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 – Directive (EU) 2016/680 – Article 3(2) – Concept of 'processing' – Article 4 – Principles relating to processing of personal data – Article 4(1)(c) – Principle of 'data minimisation' – Articles 7, 8 and 47 and Article 52(1) of the Charter of Fundamental Rights of the European Union – Requirement that a limitation on the exercise of a fundamental right must be 'provided for by law' – Proportionality – Assessment of proportionality in the light of all the relevant factors – Prior review by a court or independent administrative authority – Article 13 – Information to be made available or given to the data subject – Limits – Article 54 – Right to an effective judicial remedy against a controller or processor – Police investigation in relation to narcotics trafficking – Attempt, by the police, to unlock a mobile telephone in order to gain access, for the purposes of that investigation, to the personal data stored in that telephone)

In a reference for a preliminary ruling from the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria), the Grand Chamber of the Court of Justice clarifies, first, the conditions under which the competent national authorities can access the data contained in a mobile telephone for the purposes of preventing, investigating, detecting and prosecuting criminal offences in general, in the light of Directive 2016/680. [31] Second, it recognises the right of the data subject to be informed of the grounds on which the authorisation to access such data is based, once the communication of that information is no longer liable to jeopardise the tasks of those authorities.

On 23 February 2021, while carrying out a narcotics check, Austrian customs officers seized a package addressed to CG containing 85 grams of cannabis. That package was sent for examination to the Austrian police. On 6 March 2021, in a police investigation relating to narcotics trafficking, two police officers conducted a search of CG's residence and questioned him regarding the consignor of the package. Following CG's refusal to give access to the police officers to the connection data on his mobile telephone, those officers seized the telephone.

Subsequently, several attempts to unlock CG's mobile telephone were made by various police officers. In the present case, both the seizure of the telephone and the subsequent attempts to make use of it by the police officers were made without the authorisation of the Public Prosecutor's Office or a court.

On 31 March 2021, CG brought an action before the referring court challenging the lawfulness of the seizure of his mobile telephone, which was returned to him on 20 April 2021. CG was not immediately informed of the attempts to make use of his telephone and became aware of them in the proceedings pending before the referring court.

In that context, the referring court seeks to ascertain whether, in the light of the Directive on privacy and electronic communications, [32] full and uncontrolled access to all the data contained in a mobile

---

31 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).

32 And more specifically 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) ('the Directive on privacy and electronic communications').

telephone constitutes so serious an interference with fundamental rights [33] that that access must be limited to fighting serious offences. It also asks whether, first, that directive [34] precludes national legal rules pursuant to which, in the course of a criminal investigation, the criminal investigation police can gain, without the authorisation of a court or independent administrative body, full and uncontrolled access to all data contained in a mobile telephone and, second, whether those national legal rules are compatible with the right to an effective judicial remedy, in so far as they do not require the police authorities to inform the owner of a mobile telephone of the measures for the digital exploitation of that telephone.

Findings of the Court

As a preliminary point, the Court notes that an attempt, by the police, directly to access personal data contained in a mobile telephone without any intervention on the part of a provider of electronic communications services, such as that concerning CG, does not fall within the scope of the Directive on privacy and electronic communications.

In the first place, the Court finds that such an access attempt falls within the scope of Directive 2016/680. In that regard, it states that, in view of the broad scope which the EU legislature intended to give to the concept of 'processing', [35] where the police authorities seize a telephone and handle it for the purpose of extracting and consulting the personal data contained in that telephone, they commence 'processing', even if they did not, for technical reasons, succeed in accessing those data. The effectiveness of the principle of purpose limitation [36] necessarily requires that the purpose of the collection be determined as from when the competent authorities attempt to access personal data since such an attempt, if successful, is such as to enable them, inter alia, to collect, extract or consult the data in question immediately. Should it not be possible to classify such an attempt as 'processing' of data, the high level of protection of personal data of natural persons would be called into question. Similarly, if the applicability of Directive 2016/680 were to depend on the success of the attempt to access personal data contained in a mobile telephone, that would create uncertainty incompatible with the principle of legal certainty for both the competent national authorities and individuals.

In the second place, the Court analyses whether the principle of 'data minimisation', [37] as an expression of the principle of proportionality, precludes national legal rules which afford the competent authorities the possibility of accessing data contained in a mobile telephone, for the purposes of the prevention, investigation, detection and prosecution of criminal offences in general, without making reliance on that possibility subject to prior review by a court or an independent administrative body. Thus, the Court recalls that the limitations on the fundamental rights to private and family life and the protection of personal data [38] must comply with the principle of proportionality and may be introduced only if they are necessary and genuinely meet objectives of general interest recognised by the European Union. To that effect, first, the Court finds that the processing of personal data in the context of a police investigation aimed at the prosecution of a criminal offence – such as an attempt to access the data contained in a mobile telephone – must be regarded, in principle, as genuinely meeting an objective of general interest recognised by the

---

33 Provided for in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter').

34 And more specifically Article 15(1) of the Directive on privacy and electronic communications.

35 Under Article 3(2) of Directive 2016/680, the concept of 'processing' is defined as 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means …'.

36 Article 4(1)(b) of Directive 2016/680.

37 As provided for by Article 4(1)(c) of Directive 2016/680, under which Member States must provide for personal data to be adequate, relevant and not excessive in relation to the purposes for which they are processed.

38 Articles 7 and 8 of the Charter.

European Union. Second, it notes that the proportionate nature of the limitations on the exercise of the fundamental rights to privacy and the protection of personal data, resulting from such processing, involves balancing all the relevant factors in the individual case.

Thus, first, as regards the seriousness of a limitation of those fundamental rights resulting from legal rules allowing the competent police authorities to access, without prior authorisation, the data contained in a mobile telephone, the Court states that such access is liable to relate, depending on the content of the mobile telephone in question and the choices made by those authorities, to a very wide range of data, and could thus allow very precise conclusions to be drawn concerning the private life of the data subject. Therefore, such an interference with the fundamental rights to privacy and the protection of personal data must be regarded as serious, or even particularly serious.

Second, the Court states that the seriousness of the offence under investigation is an essential parameter when examining the proportionality of the serious interference which access to the personal data contained in a mobile telephone constitutes. However, to consider that only combating serious crime may justify access to such data would limit the investigative powers of the competent authorities in relation to criminal offences in general would disregard the specific nature of the tasks performed by those authorities and would undermine the objective of achieving an area of freedom, security and justice within the European Union. That being so, in order to meet the requirement that any limitation on the exercise of a fundamental right must be 'provided for by law', [39] it is for the national legislature to define with sufficient precision the factors, in particular the nature or categories of the offences concerned, which must be taken into account.

Third, the Court notes that, in order to ensure compliance with the principle of proportionality, where access to personal data by the competent national authorities carries the risk of serious, or even particularly serious, interference with the fundamental rights of the data subject, that access must be subject to a prior review carried out by a court or by an independent administrative body. That review must take place prior to any attempt to access the data concerned, except in cases of duly justified urgency, in which case that review must take place within a short time. In the context of that review, the court or independent administrative body must be entitled to refuse or restrict an access request falling within the scope of Directive 2016/680 where it finds that the interference with fundamental rights which that access would constitute would be disproportionate. In the present case, a refusal to authorise the competent police authorities to access the data contained in a mobile telephone, or a restriction on that access, is therefore necessary if, taking into account the seriousness of the offence and the needs of the investigation, access to the content of the communications or to sensitive data does not appear to be justified.

In the light of the foregoing, the Court concludes that the principle of data minimisation, read in the light of the rights to the protection of personal data and to respect for private life, does not preclude national legal rules which afford the competent authorities the possibility of accessing data contained in a mobile telephone, for the purposes of preventing, investigating, detecting and prosecuting criminal offences in general. Such permissibility is, however, subject to compliance with the principles of legality and proportionality and to the existence of a prior review by a court or by an independent administrative body of the exercise of the right of access to such data.

In the third place, the Court rules on whether CG should have been informed of the attempts to access the data contained in his mobile telephone. [40] It notes in that regard that the competent national authorities which have been authorised by a court or an independent administrative body to access stored data must inform the data subjects of the grounds on which that authorisation is based, as soon as such information is no longer liable to jeopardise the investigations carried out by those

39 Article 52(1) of the Charter.

40 Article 47 of the Charter.

authorities. Those authorities must make available to the data subjects all the information provided for by Directive 2016/680 [41] in order for those data subjects to be able to exercise, inter alia, their right to an effective remedy. [42] Accordingly, national legal rules which exclude as a general rule any right to obtain such information are not consistent with EU law. In the present case, the Court finds that CG should have been informed beforehand of the attempts to access the data contained in his mobile telephone. Since CG's mobile telephone had already been seized at the time the police attempted to unlock it, it does not appear that informing him of those access attempts was liable to harm the investigation. Consequently, the Court concludes that the provisions of Directive 2016/680, read in the light of the Charter, [43] preclude national legal rules which authorise the competent authorities to access data contained in a mobile telephone without informing the data subject of the grounds on which the authorisation by a judge or an independent administrative body to access such data is based, once the communication of that information is no longer liable to jeopardise the tasks for which those authorities are responsible.

2. Biometric and genetic data

Judgment of 30 January 2024 (Grand Chamber), *Direktor na Glavna direktsia 'Natsionalna* politsia' *pri MVR – Sofia* (C-118/22, EU:C:2024:97)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data for the purpose of combating crime – Directive (EU) 2016/680 – Article 4(1)(c) and (e) – Data minimisation – Limitation of storage – Article 5 – Appropriate time limits for erasure or for a periodic review of the need for the storage – Article 10 – Processing of biometric and genetic data – Strict necessity – Article 16(2) and (3) – Right to erasure – Restriction of processing – Article 52(1) of the Charter of Fundamental Rights of the European Union – Natural person convicted by final judgment and subsequently legally rehabilitated – Storage of data until death – No right to erasure or restriction of processing – Proportionality)

Following a reference for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), the Grand Chamber of the Court of Justice rules on the time limits for the storage – for the purposes of combating crime – of personal data of persons who have been convicted by final judgment of a criminal offence, in the light of Directive 2016/680. [44]

An entry in the police records was made in respect of NG in the course of a criminal investigation for failing to tell the truth as a witness. Following that investigation, NG was charged with a criminal offence, was subsequently found guilty of that offence and was given a one year suspended sentence. After serving that sentence, NG was legally rehabilitated.

On the basis of that legal rehabilitation, NG applied for the erasure of the entry concerning him in the police records. That application was refused on the ground that a final criminal conviction, even in the event of legal rehabilitation, is not one of the grounds for erasure of an entry in the police records,

41 Set out in Article 13(1) of Directive 2016/680.

42 Article 54 of Directive 2016/680.

43 More specifically, Articles 13 and 54 of Directive 2016/680, read in the light of Article 47 and Article 52(1) of the Charter.

44 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).

which are exhaustively listed in national law. The action brought by NG against that decision having been dismissed, NG brought an appeal before the referring court, arguing that it follows from Directive 2016/680 that the storage of personal data cannot be carried on indefinitely. According to NG, that is de facto the case where the data subject can never obtain the erasure of personal data collected in connection with a criminal offence for which he or she was convicted by final judgment, even after serving his or her sentence and having been legally rehabilitated.

In those circumstances, the Court was asked to give a preliminary ruling on whether Directive 2016/680, [45] read in the light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, [46] precludes national legislation which provides for the storage, by police authorities, for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, of personal data, including biometric and genetic data, concerning persons who have been convicted by final judgment of an intentional criminal offence subject to public prosecution, until the death of the data subject, even in the event of his or her legal rehabilitation, without also granting that person the right to have those data erased or, where appropriate, to have their processing restricted.

In its judgment, the Court answers that question in the affirmative.

Findings of the Court

In the first place, the Court states that Directive 2016/680 establishes a general framework to ensure, inter alia, that the storage of personal data and, more specifically, the period of storage, are limited to what is necessary for the purposes for which those data are stored, while leaving it to the Member States to determine, in compliance with that framework, the specific situations in which the protection of the fundamental rights of the data subject requires the erasure of those data and the time at which those data must be erased. However, that directive does not require the Member States to define absolute time limits for the storage of personal data, beyond which those data must be automatically erased.

More specifically, first of all, Article 4(1)(c) of Directive 2016/680 establishes the principle of 'data minimisation', according to which Member States must provide for personal data to be adequate, relevant and not excessive in relation to the purposes for which they are processed. In addition, under Article 4(1)(e) of that directive, Member States must provide that those data are to be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data are processed. In that context, Article 5 of that directive requires the Member States to provide for, inter alia, the establishment of appropriate time limits for the erasure of personal data or for a periodic review of the need for the storage of those data. The 'appropriate' nature of those periods requires, in any event, that those time limits allow the erasure of the data concerned where their storage is no longer necessary for the purposes which justified the processing.

Next, Article 10 of Directive 2016/680, which governs the processing of special categories of personal data, including biometric and genetic data, authorises the processing of such data 'only where strictly necessary'.

Lastly, Article 16(2) of Directive 2016/680 establishes a right to erasure of personal data where the processing infringes the provisions adopted pursuant to that directive [47] or where those data must be

---

45 More specifically, Article 4(1)(c) and (e) of Directive 2016/680, read in conjunction with Articles 5 and 10, Article 13(2)(b) and Article 16(2) and (3) thereof.

46 Articles 7 and 8 of the Charter of Fundamental Rights of the European Union enshrine, respectively, the right to respect for family and private life, and the right to the protection of personal data.

47 More specifically Article 4, 8 or 10.

erased in order to comply with a legal obligation to which the data controller is subject. [48] It follows that that right to erasure may be exercised, inter alia, where the storage of the personal data in question is not or is no longer necessary for the purposes for which they are processed or where that erasure is required in order to comply with the time limit set, for that purpose, by national law.

In the second place, the Court notes that, in the present case, the personal data entered in the police records concerning persons prosecuted for an intentional offence subject to public prosecution are stored only for operational investigation purposes and, more specifically, for the purpose of comparison with other data collected during investigations into other offences. In that regard, however, the concept of an 'intentional criminal offence subject to public prosecution' is particularly general and is liable to apply to a large number of criminal offences, irrespective of their nature and gravity. However, persons convicted by final judgment of such an offence do not all present the same degree of risk of being involved in other criminal offences, justifying a uniform period of storage of the data relating to them. Thus, in certain cases, in the light of factors such as the nature and seriousness of the offence committed or the absence of recidivism, the risk represented by the convicted person will not necessarily justify maintaining the data relating to him in the national police records provided for that purpose until his death, with the result that there will no longer be a necessary connection between the data stored and the objective pursued. Accordingly, in such cases, the storage of such data will not comply with the principle of data minimisation and will exceed the period necessary for the purposes for which they are processed.

Next, since the personal data stored in the police records at issue includes biometric and genetic data, the Court notes that the storage of the biometric and genetic data of persons who have already been convicted by final judgment, even until the death of those persons, may indeed be strictly necessary, [49] in particular in order to enable the possible involvement of those persons in other criminal offences to be verified and, accordingly, to prosecute and convict the perpetrators of those offences. However, the storage of those data meets that requirement only if it takes into consideration the nature and seriousness of the offence which led to the final criminal conviction, or other circumstances such as the particular context in which that offence was committed, its possible connection with other ongoing proceedings or the background or profile of the convicted person. Accordingly, where, as provided for by national law in the main proceedings, the biometric and genetic data of data subjects entered in the police records is – in the event that those persons are convicted by final judgment – to be stored until the death of those persons, the scope of that storage is excessively broad with regard to the purposes for which those data are processed.

Lastly, as regards, first, the obligation to provide for the establishment of appropriate time limits, [50] a time limit can be regarded as 'appropriate', in particular as regards the storage of the biometric and genetic data of any person convicted by final judgment of an intentional criminal offence subject to public prosecution, only if it takes into consideration the relevant circumstances which might require such a storage period. Consequently, even if the reference to the death of the data subject may constitute a 'time limit' for the erasure of stored data, such a time limit can be regarded as 'appropriate' only in specific circumstances which duly justify it. That is clearly not the case where it is applicable generally and indiscriminately to any person convicted by final judgment. It is true that it is for the Member States to decide whether time limits must be established concerning the erasure of those data or the periodic review of the need for their storage. [51] However, the 'appropriate' nature of

---

48 However, pursuant to Article 16(3) of Directive 2016/680, national law must provide that the data controller is to restrict the processing of those data instead of erasing them where the accuracy of the personal data is contested by the data subject and their accuracy or inaccuracy cannot be ascertained, or where the personal data must be maintained for the purposes of evidence.

49 See Article 10 of Directive 2016/680.

50 See Article 5 of Directive 2016/680.

51 See Article 5 of Directive 2016/680.

the time limits for such a periodic review requires that they allow the erasure of the data at issue, where their storage is no longer necessary. That requirement is not satisfied where such erasure is provided for only in the event of that person's death.

Secondly, the provisions of Directive 2016/680 laying down guarantees concerning the conditions relating to the rights to erasure and to the restriction of processing also preclude national legislation which does not allow a person convicted by final judgment of an intentional criminal offence subject to public prosecution to exercise those rights.

3. General Data Protection Regulation (GDPR)

a. Scope

Judgment of 16 January 2024 (Grand Chamber), *Österreichische Datenschutzbehörde* (C-33/22, EU:C:2024:46)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Article 16 TFEU – Regulation (EU) 2016/679 – Article 2(2)(a) – Scope – Exclusions – Activities which fall outside the scope of Union law – Article 4(2) TEU – Activities concerning national security – Committee of inquiry set up by the parliament of a Member State – Article 23(1)(a) and (h), Articles 51 and 55 of Regulation (EU) 2016/679 – Competence of the supervisory authority responsible for data protection – Article 77 – Right to lodge a complaint with a supervisory authority – Direct effect)

Ruling on a request for a preliminary ruling from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), the Court of Justice, sitting as the Grand Chamber, holds that the activity of a parliamentary committee of inquiry does not fall outside the scope of the GDPR [52]

In order to examine whether there was any political influence over the Bundesamt für Verfassungsschutz und Terrorismusbekämpfung (Federal Office for the Protection of the Constitution and for Counterterrorism, Austria), [53] the Nationalrat (National Council, Austria) set up a committee of inquiry ('the BVT Committee of Inquiry'). That committee heard WK as a witness. Despite his request for anonymisation, the minutes of his hearing, referring to his full family and first names, were published on the website of the Parlament Österreich (Austrian Parliament). Claiming that that disclosure of his identity was contrary to the GDPR and to Austrian legislation, [54] WK lodged a complaint with the Österreichische Datenschutzbehörde (Data Protection Authority, Austria) ('the Datenschutzbehörde'). By a decision of 18 September 2019, the Datenschutzbehörde declared that it lacked competence to decide on the complaint, stating that the principle of the separation of powers precluded it, as a body of the executive, from being able to exercise scrutiny over the BVT Committee of Inquiry, which is a part of the legislature.

Following the decision of the Bundesverwaltungsgericht (Federal Administrative Court, Austria), which had upheld WK's action and annulled the decision of the Datenschutzbehörde, the latter brought an

---

52 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').

53 On 1 December 2021, that entity became the Direktion Staatsschutz und Nachrichtendienst (Directorate State Protection and Intelligence Services, Austria).

54 Namely Paragraph 1 of the Datenschutzgesetz (Law on Data Protection) of 17 August 1999 (BGBl. I, 165/1999).

appeal on a point of law (Revision) before the Verwaltungsgerichtshof (Supreme Administrative Court) against the decision of the Bundesverwaltungsgericht (Federal Administrative Court).

In that context, the referring court asked the Court whether the activities of a committee of inquiry set up by the parliament of a Member State fall within the scope of the GDPR and whether that regulation applies where those activities concern the protection of national security. Furthermore, it asked the Court to rule on whether the GDPR confers on a national supervisory authority such as the Datenschutzbehörde the competence to hear complaints relating to the processing of personal data by a committee of inquiry in the course of its activities.

Findings of the Court

In the first place, the Court recalls that Article 2(2)(a) of the GDPR, which provides that that regulation does not apply to the processing of personal data in the course of an activity which falls outside the scope of EU law, has the sole purpose of excluding from its scope the processing carried out by State authorities in the course of an activity which is intended to safeguard national security or which can be classified in the same category. Thus, the mere fact that an activity is characteristic of the State or of a public authority is not sufficient automatically to preclude the application of the GDPR to such an activity. [55]

That interpretation, which follows from the absence of any distinction depending on the identity of the controller concerned, is borne out by Article 4(7) of the GDPR. [56]

The Court states that the parliamentary nature of the BVT Committee of Inquiry does not mean that its activities fall outside the scope of the GDPR. The exception provided for in Article 2(2)(a) of that regulation refers only to categories of activities which, by their nature, fall outside the scope of EU law, and not to categories of persons. Accordingly, the fact that the processing of personal data is carried out by a committee of inquiry set up by the parliament of a Member State in the exercise of its power of scrutiny over the executive does not make it possible, as such, to establish that that processing is carried out in the course of an activity which falls outside the scope of EU law.

In the second place, the Court states that, although it is for the Member States to define their essential security interests and to take appropriate measures to ensure them, [57] the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from the need to comply with EU law. The exception provided for in Article 2(2)(a) of the GDPR refers only to categories of activities which, by their nature, fall outside the scope of EU law. In that regard, the fact that the controller is a public authority whose main activity is to safeguard national security cannot suffice, as such, to exclude from the scope of the GDPR the processing of personal data that it carries out in the course of its other activities.

In the present case, the political scrutiny exercised by the BVT Committee of Inquiry does not appear to constitute, as such, an activity intended to safeguard national security or falling within the same category. Accordingly, subject to verification by the referring court, that activity does not fall outside the scope of the GDPR.

That said, a parliamentary committee of inquiry can have access to personal data which, for reasons of national security, must enjoy specific protection. In that regard, restrictions on the obligations and rights flowing from the GDPR may be laid down, by way of a legislative measure, to safeguard, inter

---

55 Judgments of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraph 66), and of 20 October 2022, *Koalitsia 'Demokratichna Bulgaria – Obedinenie'* (C-306/21, EU:C:2022:813, paragraph 39).

56 That article defines the concept of 'controller' as 'the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data'.

57 In accordance with Article 4(2) TEU.

alia, national security. [58] Restrictions concerning the collection of personal data, the provision of information to data subjects and their access to those data, or the disclosure of those data, without the consent of the data subjects, to persons other than the controller, could thus be justified on that basis, on the condition that such restrictions respect the essence of the fundamental rights and freedoms of data subjects and are a necessary and proportionate measure in a democratic society.

The Court notes that it is nevertheless not apparent from the information available to it that the BVT Committee of Inquiry alleged that the disclosure of the personal data of the data subject was necessary for the safeguarding of national security and had its basis in a national legislative measure laid down to that end, which it is, as the case may be, for the referring court to ascertain.

In the third and last place, the Court states that the provisions of the GDPR relating to the competence of national supervisory authorities and to the right to lodge a complaint [59] do not require the adoption of national implementing measures and are sufficiently clear, precise and unconditional to have direct effect. It follows that, while the GDPR leaves a margin of discretion to the Member States as regards the number of supervisory authorities to be established, [60] it determines, by contrast, the extent of their competences to monitor the application of the GDPR. Thus, where a Member State decides to establish a single national supervisory authority, that authority necessarily has all the competences provided for by that regulation. Any other interpretation would undermine the effectiveness of those provisions and risk weakening that of all the other provisions of the GDPR that may be the subject of a complaint.

As regards the fact that national constitutional provisions preclude the possibility for a supervisory authority which is part of the executive branch to monitor the application of the GDPR by a body which is part of the legislature, the Court points out that it is precisely with due regard for the constitutional structure of the Member States that the GDPR merely requires Member States to establish at least one supervisory authority, while offering them the possibility of establishing more than one. That regulation thus grants each Member State a margin of discretion enabling it to establish as many supervisory authorities as may be required, in particular, in the light of its constitutional structure.

Furthermore, a Member State's reliance on rules of national law cannot be allowed to undermine the unity and effectiveness of EU law. The effects of the principle of the primacy of EU law are binding on all the bodies of a Member State, without, in particular, provisions of domestic law, including constitutional provisions, being able to prevent that. [61]

Thus, where a Member State has chosen to establish a single supervisory authority, it cannot rely on provisions of national law, be they constitutional in nature, in order to exclude the processing of personal data coming within the scope of the GDPR from the supervision of that authority.

---

58 Pursuant to Article 23 of the GDPR.

59 Article 55(1) and Article 77(1) of the GDPR, respectively.

60 In accordance with Article 51(1) of the GDPR.

61 Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, paragraph 51 and the case-law cited).

b. Concept of 'controller'

Judgment of 11 January 2024, *État belge (Data processed by an official journal)* (C-231/22, EU:C:2024:7)

(Reference for a preliminary ruling – Approximation of laws – Protection of natural persons with regard to the processing of personal data and free movement of such data (General Data Protection Regulation) – Regulation (EU) 2016/679 – Point 7 of Article 4 – Concept of 'controller' – Official journal of a Member State – Obligation to publish as they stand company documents prepared by companies or their legal representatives – Article 5(2) – Successive processing of the personal data contained in such documents by several separate persons or entities – Determination of responsibilities)

Ruling on a request for a preliminary ruling from the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium), the Court of Justice clarifies, first, the scope of the concept of 'controller' and, second, the limits of the responsibilities of a controller, where processing of the same personal data is performed by successive entities.

On 12 February 2019, the *Moniteur belge*, which ensures in Belgium the production and dissemination of a wide range of official and public publications in paper format and electronically, published an extract from a decision of a company concerning a reduction in its capital. That extract, drawn up by the notary of a partner of the company and sent on to the court having jurisdiction, which, in turn, sent it for publication to the Office of that official journal, contained personal data of that partner.

After finding that the passage containing his data had been included in the extract as a result of an error made by the notary, the data subject requested to have that passage deleted on the basis of his right to erasure. [62] However, the service public fédéral Justice (Federal Public Service Justice; 'the FPS Justice'), to which the Office of the *Moniteur belge* is attached, refused to grant his request. Following that refusal, that data subject lodged a complaint against the FPS Justice with the Autorité de protection des données (Data Protection Authority, Belgium; 'the DPA'). By decision of 23 March 2021, the DPA ordered the FPS Justice to comply with the request for erasure as soon as possible. The État belge (Belgian State) then brought an action before the cour d'appel de Bruxelles (Court of Appeal, Brussels) seeking the annulment of the DPA's decision.

In that context, the cour d'appel de Bruxelles (Court of Appeal, Brussels) has asked the Court whether the *Moniteur belge* may be classified as a 'controller' [63] and whether it must be regarded as solely responsible for compliance with the principles relating to processing of data [64] or whether that responsibility is also incumbent cumulatively on the entities that have previously processed the data contained in the passage concerned.

Findings of the Court

In the first place, as regards the question whether the agency or body responsible for the official journal of a Member State such as the *Moniteur belge* may be classified as a 'controller' within the meaning of the GDPR, the Court states that, having regard to the broad definition of that concept, the determination of the purposes and means of the processing and, where appropriate, the nomination of the controller by national law may not only be explicit but also implicit. In the latter case, that

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

63 Within the meaning of point 7 of Article 4 of the GDPR.

64 Under Article 5(2) of the GDPR.

determination must nevertheless be derived with sufficient certainty from the role, task and powers conferred on the agency or body concerned.

The Court finds that, in the present case, Belgian law has determined, at least implicitly, the purposes and means of the processing of personal data performed by the *Moniteur belge*. It follows that the *Moniteur belge* may be considered to be the 'controller'.

The Court emphasises that that conclusion is not called into question by the fact that the *Moniteur belge* does not have legal personality or by the fact that, pursuant to national law, it does not check, prior to their publication, the personal data contained in the acts and documents that it receives.

While it is true that that body must publish the document in question as it stands, it is that body alone that undertakes that task and then disseminates the act or document concerned. The publication of such acts and documents without any possibility of checking or amending their content is intrinsically linked to the purposes and means of processing determined by national law. The role of that official journal is confined to informing the public of the existence of those acts and documents, as they stand when sent to that official journal in the form of copies in accordance with the applicable national law, so as to make them enforceable against third parties. Moreover, it would be contrary to the objective of point 7 of Article 4 of the GDPR to exclude the official journal of a Member State from the concept of 'controller' on the ground that it does not exercise control over the personal data contained in its publications.

In the second place, as regards the question whether a body such as that responsible for the *Moniteur belge* must be regarded as solely responsible for compliance with the principles relating to processing of personal data set out in the GDPR, [65] the Court observes that the processing that was entrusted to that body is both subsequent to the processing performed by the notary and by the registry of the court having jurisdiction and technically different from the processing performed by those two entities in that it is additional to it. The operations performed by that body are entrusted to it by national legislation and involve inter alia the digital transformation of the data contained in the acts or extracts of acts submitted to it and the publication, the making widely available to the public and the storage of those data. Therefore, that body must be considered to be responsible for compliance with all the obligations imposed on the controller by the GDPR.

In addition, the Court recalls that point 7 of Article 4 of the GDPR provides not only that the purposes and means of the processing of personal data may be determined jointly by several persons as controllers, but also that national law may determine those purposes and means and nominate the controller or provide for the specific criteria for its nomination. Thus, in connection with a chain of processing operations that are performed by different persons or entities and relate to the same personal data, national law may determine the purposes and means of all the processing operations performed successively by those different persons or entities in such a way that they are regarded jointly as controllers.

The Court emphasises that, under the GDPR, [66] the joint responsibility of several actors in a processing chain concerning the same personal data may be established by national law provided that the various processing operations are linked by purposes and means determined by national law and that national law determines the respective responsibilities of each of the joint controllers. Such a determination of the purposes and means linking the various processing operations performed by several actors in a chain and of their respective responsibilities may be made not only directly but also indirectly by national law, provided that, in the latter case, it can be inferred in a sufficiently explicit manner from the legal provisions governing the persons or entities concerned and the

65 Principles laid down in the form of obligations in Article 5(1) of the GDPR.

66 Under a combined reading of Article 26(1) and of point 7 of Article 4 of the GDPR.

processing of the personal data that they perform in connection with the processing chain imposed by that law.

Thus, the Court concludes that the agency or body responsible for the official journal of a Member State, classified as a 'controller', is solely responsible for compliance with the principles set out in the GDPR as regards the personal data processing operations that it is required to perform under national law, unless joint responsibility with other entities in respect of those operations arises under that law.

c. Remedies in the case of infringement of the GDPR

Judgment of 4 October 2024 (Grand Chamber), *Lindenapotheke* (C-21/23, EU:C:2024:846)

(Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Chapter VIII – Remedies – Medicinal products marketed by a pharmacist on an online platform – Action brought before the national civil courts by a competitor of that pharmacist on the basis of the prohibition of unfair commercial practices for infringement by the pharmacist of the obligations laid down by that regulation – Standing to bring proceedings – Article 4(15) and Article 9(1) and (2) – Directive 95/46/EC – Article 8(1) and (2) – Concept of 'data concerning health' – Conditions for the processing of those data)

Hearing a request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany), the Grand Chamber of the Court of Justice rules on the nature and scope of the system of remedies with regard to data protection [67] and on the concept of 'data concerning health'. [68]

ND and DR, two natural persons, each operates a pharmacy in Germany. Since 2017, ND has been marketing pharmacy-only medicinal products on the online platform 'Amazon-Marketplace'. When they order online, ND's customers must enter information, such as their name, the delivery address and details required for individualising those medicinal products.

Relying on German law on unfair competition, [69] DR brought an application for injunctive relief against ND before the national civil courts. DR claimed that the marketing of the medicinal products by ND was unfair, on account of the failure to comply with the legal requirement to obtain the customer's prior consent to the processing of his or her data concerning health.

After the lower courts upheld that action, ND brought an appeal on a point of law before the referring court, which, in turn, considered it necessary to make a reference to the Court for a preliminary ruling.

In its judgment, the Court concludes that the system of legal remedies established by the GDPR is non-exhaustive, recognising that that regulation does not preclude Member States from providing, in national law, for the possibility for competitors of the person allegedly responsible for an

---

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

68 Referred to, respectively, in Article 8(1) of 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) and in Article 9(1) of the GDPR.

69 Gesetz gegen den unlauteren Wettbewerb (Law against unfair competition) of 3 July 2004 (BGBl 2004 I, p. 1414), in the version applicable to the main proceedings.

infringement of the substantive provisions of that regulation to challenge that infringement before the courts as an unfair commercial practice. In addition, it provides clarification on the scope of the concept of 'data concerning health'.

Findings of the Court

In the first place, the Court notes that, although Chapter VIII of the GDPR does not specifically provide for an opening clause which would expressly allow Member States to make such a remedy available to competitors, it nevertheless follows from the wording and context of the provisions of Chapter VIII that the EU legislature did not intend to rule out that possibility. That interpretation is confirmed by the objectives pursued by the GDPR.

On the one hand, an application for injunctive relief brought by a competitor against an undertaking on the basis of the prohibition of unfair commercial practices, on account of the alleged infringement of the substantive provisions of the GDPR in no way undermines the system of remedies provided for in that regulation or the objective of ensuring a consistent level of protection for natural persons throughout the European Union and of preventing divergences hampering the free movement of personal data within the internal market.

In that regard, the Court states that it is true that such an application may be based, albeit incidentally, on an infringement of the same provisions of the GDPR as those on which a complaint or action brought by the data subjects or by a body, organisation or association representing those data subjects may be based. [70] However, unlike those remedies provided for by the GDPR, an application for injunctive relief brought by a competitor does not, as such, pursue an objective of protection of the fundamental rights and freedoms of data subjects with regard to the processing of their personal data, but seeks to ensure fair competition, in the interests, inter alia, of that competitor.

In addition, the possibility for a competitor to bring such an action before the civil courts on the basis of the prohibition of unfair commercial practices is in addition to the remedies established by the GDPR, which remain in full and can still be pursued by data subjects and, where appropriate, by associations representing data subjects. In particular, the coexistence of remedies under data protection law and competition law does not create a risk for the uniform application of that regulation.

Moreover, the fact that the substantive provisions of the GDPR may be relied on more widely, by persons other than just data subjects and bodies, organisations and associations, does not undermine the attainment of the objective of ensuring a consistent level of protection of those persons throughout the European Union and of preventing divergences hampering the free movement of personal data within the internal market. Even if the Member States did not provide for such a possibility, this would not result in a fragmentation of the implementation of data protection in the European Union, as the substantive provisions of the GDPR are binding in the same way on all data controllers and compliance with those provisions is ensured by the remedies provided for in that regulation.

On the other hand, as regards the objective of ensuring effective protection of data subjects with regard to the processing of their personal data and the effectiveness of the substantive provisions of the GDPR, the Court notes that, although an application for injunctive relief brought by a competitor of the person allegedly responsible for an infringement of the laws protecting personal data pursues not that objective but that of ensuring fair competition, the fact remains that it undoubtedly contributes to compliance with those provisions and, therefore, to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection. Moreover, such an application for injunctive relief brought by a competitor may prove, like that brought by a consumer protection

70 Articles 77 to 80 of the GDPR.

association, to be particularly effective in ensuring such protection, in so far as it is capable of preventing a large number of infringements of the rights of data subjects by the processing of their personal data. [71]

The Court finds that the provisions of the GDPR must be interpreted as not precluding national legislation which, alongside the powers of intervention of the supervisory authorities responsible for monitoring and enforcing that regulation and the remedies available to data subjects, confers on competitors of the person allegedly responsible for an infringement of the laws protecting personal data standing to bring proceedings against that person, by means of an action before the civil courts, for infringements of that regulation and on the basis of the prohibition of unfair commercial practices.

In the second place, as regards the concept of 'data concerning health', the Court finds that that concept covers data which a customer enters in an online platform when ordering pharmacy-only medicinal products. Those data are capable of revealing, by means of an intellectual operation involving collation or deduction, information on the health status of the data subject, [72] in so far as that order entails establishing a link between a medicinal product, its therapeutic indications or uses, and a natural person identified or identifiable by factors such as that person's name or the delivery address.

Furthermore, the Court holds that it is irrelevant in that regard that the sale of the medicinal products ordered does not require a prescription and that they might therefore be intended not for the customer making the order, but for third parties. Thus, where a user of an online platform communicates personal data when ordering pharmacy-only medicinal products the sale of which does not require a prescription, the processing of those data by the operator of a pharmacy which sells those medicinal products on that online platform must be regarded as processing of data concerning health, [73] given that the processing of those data is capable of revealing information on the health status of a natural person, irrespective of whether that information concerns that user or any other person for whom the user places the order. [74]

An interpretation which would result in a distinction being made according to the type of medicinal product concerned and to whether or not the sale thereof requires a prescription would not be consistent with the objective of ensuring a high level of protection of the fundamental rights and freedoms of natural persons, in particular their private life, with respect to the processing of personal data concerning them. Such an interpretation would, moreover, run counter to the purpose of Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR, namely to ensure enhanced protection as regards processing which, because of the particular sensitivity of the data processed, is liable to constitute a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data. [75] Consequently, the information which customers enter when ordering online pharmacy-only medicinal products the sale of which is does not require a prescription constitutes data concerning health, even where it is only with a certain degree of probability, and not with absolute certainty, that those medicinal products are intended for those customers.

---

71 See, to that effect, judgment of 28 April 2022, *Meta Platforms Ireland* (C-319/20, EU:C:2022:322, paragraphs 74 and 75).

72 Article 4(1) of the GDPR.

73 Article 8(1) of Directive 95/46 and Article 9(1) of the GDPR.

74 See, to that effect, judgment of 4 July 2023, *Meta Platforms and Others (General terms of use of a social network)* (C-252/21, EU:C:2023:537, paragraph 73).

75 See judgment of 1 August 2022, *Vyriausioji tarnybinės etikos komisija* (C-184/20, EU:C:2022:601, paragraph 126 and the case-law cited).

The Court adds that it is not inconceivable that, even if such medicinal products are intended for persons other than the customers, it may be possible to identify those persons and draw conclusions about their health status. That could be the case, for example, where the medicinal products in question are delivered not to the home of the customer who ordered them but to the home of another person, or where, irrespective of the delivery address, the customer referred, in the order or in any communication relating to the order, to another identifiable person, such as a family member.

Lastly, the Court notes that the fact that the information in question constitutes data concerning health does not preclude it from being processed, in particular in the context of the management of healthcare services and systems, if one of the conditions set out in that regard is met. [76] First, this may in particular be the case where the data subject gives explicit consent to one or more processing operations involving those personal data, the specific characteristics and purposes of which have been presented to him or her in an accurate, comprehensive and easily understandable manner. Second, such processing may be permissible where processing is necessary for the purposes of the provision of healthcare on the basis of EU or Member State law or pursuant to a contract with a health professional.

76 Conditions set out in Article 8(2) of Directive 95/46 and Article 9(2) of the GDPR.

IV. Citizenship of the Union [77]

1. Right of citizens of the Union to move and reside freely

Judgment of 4 October 2024 (Grand Chamber), *Mirin* (C-4/23, EU:C:2024:845)

(Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Articles 7 and 45 of the Charter of Fundamental Rights of the European Union – Right to move and reside freely within the territory of the Member States – Union citizen who has lawfully acquired, during the exercise of that right and his residence in another Member State, a change of his first name and gender identity – Obligation on the part of that Member State to recognise and enter in the birth certificate that change of first name and gender identity – National legislation which does not permit such recognition and entry, obliging the party concerned to bring new judicial proceedings for a change of gender identity in the Member State of origin – Effect of the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union)

Hearing a reference for a preliminary ruling from the Judecătoria Sectorului 6 București (Court of First Instance, Sector 6, Bucharest, Romania), the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the obligation on the part of the Member State of origin to recognise and enter on the birth certificate of one of its nationals a change of first name and gender identity lawfully acquired by that citizen of the European Union when exercising his or her freedom of movement and residence in another Member State.

M.-A. A. was born in 1992 in Romania and was registered at birth as female. After moving to the United Kingdom with his parents in 2008, M.-A. A. obtained British nationality by naturalisation.

In February 2017, in the United Kingdom, M.-A. A. changed his first name and title from female to male using the deed poll procedure, [78] and subsequently had certain official documents issued by the United Kingdom authorities changed. In June 2020, M.-A. A. obtained a gender identity certificate, a document confirming his male gender identity, in the United Kingdom.

In May 2021, on the basis of the declaration made under the deed poll procedure and the gender identity certificate, M.-A. A. requested the Romanian competent authorities to record in his birth certificate entries relating to his change of first name, gender and personal identification number so as to reflect the male sex. He also applied for a new birth certificate containing those new particulars. By decision of 21 June 2021, the Romanian authorities rejected M.-A. A.'s request on the ground, inter alia, that, in accordance with the applicable legislation, an entry relating to a person's change of gender identity may be recorded in his or her birth certificate only when it has been approved by a judicial decision that has become final.

Hearing the action brought by M.-A. A. against that decision, the referring court asks, in particular, whether the status of citizen of the Union and the right to move and reside freely within the territory of the Member States preclude national legislation which requires the person concerned to bring new proceedings for a change of gender identity before the national courts, when that person has already successfully completed a procedure to that end in another Member State of which he is also a

---

77 Reference should also be made under this heading to the following judgment: judgment of 21 March 2024 (Grand Chamber), ***Landeshauptstadt Wiesbaden*** (C-61/22, EU:C:2024:251), presented under heading IX.3 'Border controls'.

78 This procedure allows UK citizens to change their first or last name by making a simple declaration.

national. In addition, the referring court is uncertain as to the effect, for the resolution of the dispute in the main proceedings, of the withdrawal of the United Kingdom from the European Union. [79]

Findings of the Court

First, the Court points out that while, as EU law currently stands, a person's status, which is relevant to the rules on changing a first name and gender identity, is a matter that falls within the competence of the Member States, each Member State must comply with EU law in exercising that competence.

In that context, the Court has previously held that a refusal by the authorities of a Member State to recognise the name of a national of that State who exercised his or her right of free movement in the territory of another Member State, as determined in that second Member State, is likely to hinder the exercise of the right, enshrined in Article 21 TFEU, to move and reside freely in the territories of the Member States. [80] Such a hindrance may also result from the refusal by those authorities to recognise the change of gender identity made pursuant to the procedures laid down for that purpose in the Member State in which a Union citizen exercised his or her freedom of movement and residence, whether or not that change is linked to a change of first name, as in the present case. Like a name, gender defines a person's identity and personal status. Consequently, the refusal to amend and recognise the gender identity which a national of one Member State has lawfully acquired in another Member State is liable to cause 'serious inconvenience' for that national at administrative, professional and private levels. Thus, for such a Union citizen, there is a real risk, linked to the fact that he or she bears two different first names and has been attributed two different gender identities, of having to dispel doubts as to his or her identity and the authenticity of the documents which he or she presents or the veracity of their content.

Consequently, the refusal to recognise and enter in the civil registers, a change of first name and gender identity lawfully acquired by a national of that State in another Member State, on the basis of national legislation which does not allow such recognition and entry, with the result that the person concerned is obliged to bring new judicial proceedings for a change of gender identity in the first Member State, which disregard that change already lawfully acquired in that other Member State, is liable to restrict the exercise of the right to move and reside freely within the territory of the Member States.

Next, the Court recalls that national legislation which restricts the exercise of the right enshrined in Article 21 TFEU can be justified only where it is consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter') and, in particular, the right to respect for private life set out in Article 7, which has the same meaning and scope as the right guaranteed in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. [81] [82] The European Court of Human Rights has held that the procedure for recognition of gender identity laid down by the national legislation at issue in the main proceedings is incompatible with Article 8 ECHR, in so far as it does not satisfy the requirements imposed by that provision for the

---

79 Noting that, in the present case, the procedure for a change of gender identity was initiated in the United Kingdom before the withdrawal of that State from the European Union, but was completed after that withdrawal, during the transition period, the referring court asks whether, in such circumstances, Romania is required to recognise the legal effects of that procedure for a change of gender identity conducted in the United Kingdom.

80 See judgment of 8 June 2017, *Freitag* (C-541/15, EU:C:2017:432). In that judgment, the Court in particular held that confusion and inconvenience are liable to arise from a divergence between the two names used for the same person, since many daily actions, both in the public and in the private domains, require a person to provide evidence of his or her own identity (paragraphs 36 and 37).

81 Convention signed in Rome on 4 November 1950 ('the ECHR').

82 In accordance with Article 52(3) of the Charter.

examination of a request for a change of gender identity made for the first time before a national court. [83]

Moreover that procedure cannot constitute an effective means of enabling a Union citizen who, while residing in another Member State and therefore when exercising the right guaranteed in Article 21 TFEU and Article 45 of the Charter, has already lawfully acquired the change of his or her first name and gender identity, effectively to assert his or her rights conferred by those articles, read in the light of Article 7 of the Charter, especially since that procedure exposes that citizen to the risk that it may lead to an outcome contrary to that adopted by the authorities of the other Member State.

In order for national legislation relating to the entry in civil registers of a change of first name and gender identity to be capable of being regarded as compatible with EU law, it is necessary that the provisions or national procedure allowing such a request for such entry to be made do not render impossible or excessively difficult the implementation of the rights conferred by Article 21 TFEU and, in particular, the right to recognition of that change. The exercise of that right may be called into question by the discretion enjoyed by the competent authorities in the context of that procedure, since the existence of such discretion is liable to lead to a divergence between two names and two genders used for the same person as evidence of his or her identity and to serious inconvenience at administrative, professional and private levels. Therefore, national legislation such as that at issue in the main proceedings infringes the requirements under Article 21 TFEU.

Lastly, the Court states that it is irrelevant, in that regard, that the request for recognition and entry of the change of first name and gender identity was made on a date on which the withdrawal from the European Union of the Member State where that change had been lawfully obtained had already taken effect. [84]

---

83 ECtHR, 19 January 2021, *X and Y v. Romania*, CE:ECHR:2021:0119JUD000214516. In that judgment, the European Court of Human Rights held inter alia that, under Article 8 ECHR, States are required to provide for a clear and foreseeable procedure for legal recognition of gender identity which allows for a change of sex and thus of name and digital personal code, on official documents, in a quick, transparent and accessible manner.

84 The Court thus notes that, in so far as M.-A. A., in his capacity as a Union citizen, seeks in his Member State of origin recognition of the change of his first name and of his gender identity acquired, when exercising his freedom of movement and residence in the United Kingdom, before the withdrawal of that Member State from the European Union and before 31 December 2020, the date laid down by the Withdrawal Agreement as marking the end of the transition period, respectively, he may rely, against that Member State of origin, on the rights pertaining to that status, in particular those laid down in Articles 20 and 21 TFEU, including after the end of that period.

2. Right to vote and to stand as a candidate in municipal and European Parliament elections

Judgment of 19 November 2024 (Grand Chamber), *Commission* v *Czech Republic (Ability to stand for election and membership of a political party)* (C-808/21, EU:C:2024:962)

(Failure of a Member State to fulfil obligations – Article 20 TFEU – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely within the territory of the Member States – Article 22 TFEU – Right to vote and to stand as a candidate in municipal and European Parliament elections in the Member State of residence under the same conditions as nationals of that State – Citizens of the Union residing in a Member State of which they are not nationals – No right to become a member of a political party – Articles 2 and 10 TEU – Democratic principle – Article 4(2) TEU – Respect for the national identity of the Member States – Article 12 of the Charter of Fundamental Rights of the European Union – Role of political parties in expressing the will of citizens of the Union)

Hearing an action for failure to fulfil obligations, the Court of Justice, sitting as the Grand Chamber, finds that by denying EU citizens who are not Czech nationals but who reside in the Czech Republic the right to become a member of a political party or political movement, that Member State has failed to fulfil its obligations under Article 22 TFEU.

The Czech Law on political parties and political movements [85] provides that 'citizens' are to have the right of association in political parties and political movements and that 'every citizen aged 18 or over' may join a party or movement. It thus follows that EU citizens who do not have Czech nationality but who reside in the Czech Republic do not enjoy that right.

Taking the view that that legislation is contrary to Article 22 TFEU, the European Commission brought an action for failure to fulfil obligations before the Court. It submits inter alia that, by conferring the right to become a member of a political party or political movement on Czech nationals alone, the Czech Republic prevents EU citizens who reside in that Member State but are not nationals thereof from exercising electoral rights in municipal and European Parliament elections under the same conditions as Czech nationals.

Findings of the Court

In the first place, the Court examines the scope of Article 22 TFEU, taking account of its wording, its context and the objectives it pursues.

Thus, first, according to the wording of that provision, EU citizens residing in a Member State of which they are not nationals are to have the right to vote and to stand as a candidate in municipal and European Parliament elections under the same conditions as nationals of that Member State, and those rights are to be exercised subject to detailed arrangements adopted by the Council of the European Union. That wording contains no reference to the conditions for acquiring membership of a political party or political movement. However, by referring to the conditions governing the right to vote and to stand for election applicable to nationals of the Member State of residence of such an EU citizen, Article 22 TFEU prohibits that Member State from making the exercise of that right by that EU citizen subject to conditions other than those applicable to its own nationals. That provision thus lays down a specific rule of non-discrimination on grounds of nationality and, consequently, applies to any

---

85 Zákon č. 424/1991 Sb., o sdružování v politických stranách a v politických hnutích (Law No 424/1991 on associations in political parties and political movements), as amended by zákon č. 117/1994 Sb. (Law No 117/1994). See Paragraph 1 and Paragraph 2(3) of that law.

national measure giving rise to a difference in treatment liable to undermine the effective exercise of the right to vote and to stand as a candidate in municipal and European Parliament elections.

Furthermore, the detailed arrangements for the exercise of the right to vote and to stand for election were adopted by the Council in Directives 93/109 [86] and 94/80, [87] which, even though they do not contain provisions relating to the conditions for the acquisition, by EU citizens residing in a Member State of which they are not nationals, of membership of a political party, cannot, even implicitly, limit the scope of the rights and obligations arising under Article 22 TFEU. In that regard, in the absence of specific provisions relating to those conditions, the determination of those conditions falls within the competence of the Member States. Nevertheless, when exercising that competence, the Member States are required to comply with their obligations under EU law, including Article 22 TFEU.

Secondly, as regards the context of Article 22 TFEU, the Court refers both to the other provisions of the FEU Treaty and to the provisions of the same rank contained inter alia in the EU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter').

In that connection, first of all, Article 22 TFEU, read in conjunction with Article 20(2) TFEU, links the right to vote and to stand as a candidate in municipal and European Parliament elections to citizenship of the Union. Moreover, under Article 20(2) and Article 21 TFEU, citizenship of the Union confers on each EU citizen a primary and individual right to move and reside freely within the territory of the Member States. There is therefore a connection between, on the one hand, the right to freedom of movement and residence and, on the other, the right of EU citizens residing in a Member State of which they are not nationals to vote and to stand as a candidate in municipal and European Parliament elections.

Next, Article 10 TEU – which confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the European Union – underscores the connection between the principle of representative democracy within the European Union and the right to vote and to stand as a candidate in European Parliament elections attached to citizenship of the Union, guaranteed by Article 22(2) TFEU.

Lastly, Article 12(1) of the Charter enshrines the right of everyone to freedom of association at all levels, in particular in political, trade union and civic matters. That right corresponds to the right guaranteed in Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to contribute to the proper functioning of public life. Article 10(4) TEU and Article 12(2) of the Charter recognise the fundamental role of political parties at European level in expressing the will of EU citizens. Political parties, one of whose functions is to field candidates in elections, thus fulfil an essential function in the system of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU. Therefore, membership of a political party or political movement contributes significantly to the effective exercise of the right to stand for election, as conferred by Article 22 TFEU.

Thirdly, with respect to the objective of Article 22 TFEU, that article seeks, first of all, to confer on EU citizens residing in a Member State of which they are not nationals the right to participate in the democratic electoral process of that Member State through the right to vote and to stand for election

---

86 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34), as amended by Council Directive 2013/1/EU of 20 December 2012 (OJ 2013 L 6, p. 27).

87 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ 1994 L 368, p. 38).

at European and local level. Next, that article aims to ensure equal treatment between EU citizens, which implies equal access to the means available under the domestic legal system to nationals of that Member State for the purpose of exercising that right in municipal and European Parliament elections. Lastly, it follows from the connection between, on the one hand, freedom of movement and residence and, on the other, the right to vote and to stand as a candidate in those elections that the latter is intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State. Article 22 TFEU is thus intended to ensure that EU citizens residing in a Member State of which they are not nationals are represented, as a corollary to their integration in the society of the host Member State.

In the second place, it is in the light of those clarifications on the scope of Article 22 TFEU, read in the light of Articles 20 and 21 TFEU, Article 10 TEU and Article 12 of the Charter, that the Court considers whether the result of the difference in treatment on grounds of nationality established by Czech law, as regards the possibility of becoming a member of a political party or political movement, is that EU citizens who reside in the Czech Republic but are not nationals thereof do not enjoy equal access to the means available to Czech nationals for the purposes of effectively exercising their right to stand for election, in breach of Article 22 TFEU.

In that regard, it is admittedly possible, in the Czech Republic, for a candidate who is not a member of a political party or political movement to be included on a list of candidates submitted by such a party or movement, or by a coalition thereof, in municipal and European Parliament elections. However, first, since it will be for the members of the political party or political movement to choose the candidates to be included on their lists, the fact that an EU citizen who resides in the Czech Republic but is not a national thereof and who wishes to take part in those elections is not able to become a member of a political party or political movement is liable to preclude that person from participating in the decision of that party or movement concerning his or her inclusion on that list of candidates. That circumstance places such EU citizens in a less favourable position than Czech nationals, who are members of a political party or political movement in that Member State, as regards the possibility of standing as a candidate in municipal and European Parliament elections on the list of a such a political party or political movement, or of a coalition thereof.

Secondly, the fact that Czech nationals may choose to stand as candidates either as members of a political party or political movement or as independents, whereas EU citizens who reside in the Czech Republic but are not nationals thereof are only afforded the latter possibility, demonstrates that those EU citizens are unable to exercise their right to stand as a candidate in those elections under the same conditions as Czech nationals.

In the third and last place, the Court examines whether that difference in treatment concerning access to the means enabling the right to vote and to stand as a candidate in municipal and European Parliament elections to be exercised effectively may be justified by reasons relating to respect for the national identity of a Member State, within the meaning of Article 4(2) TEU.

First of all, it is true that the organisation of national political life, to which political parties and political movements contribute, is part of national identity. However, since the right to vote and to stand for election conferred by Article 22 TFEU on EU citizens residing in a Member State of which they are not nationals concerns municipal and European Parliament elections in that Member State, that provision neither requires the Member State concerned to grant those citizens the right to vote and to stand as a candidate in national elections, nor prohibits it from adopting specific rules on decision-making within a political party or political movement regarding the nomination of candidates in national elections, rules which would preclude members of the party or movement who are not nationals of that State from taking part in such decision-making.

Next, Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions. In that regard, the principle of democracy and the principle of equal

treatment are values on which the European Union is founded, in accordance with Article 2 TEU. That provision is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order and are given concrete expression in principles containing legally binding obligations for the Member States. Furthermore, the principle of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU, gives concrete form to the value of democracy referred to in Article 2 TEU.

Lastly, by guaranteeing EU citizens residing in a Member State of which they are not nationals the right to vote and to stand as a candidate in municipal and European Parliament elections in that Member State, under the same conditions as nationals thereof, Article 22 TFEU gives concrete expression to the principles of democracy and of equal treatment of EU citizens, principles which are an integral part of the identity and common values of the European Union, to which the Member States adhere and whose observance they must ensure in their territories. Consequently, allowing such EU citizens to become members of a political party or political movement in their Member State of residence so as to implement in full the principles of democracy and equal treatment cannot be regarded as undermining the national identity of that Member State.

Judgment of 19 November 2024 (Grand Chamber), *Commission* v *Poland (Ability to stand for election and membership of a political party)* (C-814/21, EU:C:2024:963)

(Failure of a Member State to fulfil obligations – Article 20 TFEU – Citizenship of the Union – Article 21 TFEU – Right to move and reside freely within the territory of the Member States – Article 22 TFEU – Right to vote and to stand as a candidate in municipal and European Parliament elections in the Member State of residence under the same conditions as nationals of that State – Citizens of the Union residing in a Member State of which they are not nationals – No right to become a member of a political party – Articles 2 and 10 TEU – Democratic principle – Article 4(2) TEU – Respect for the national identity of the Member States – Article 12 of the Charter of Fundamental Rights of the European Union – Role of political parties in expressing the will of citizens of the Union)

Hearing an action for failure to fulfil obligations, the Court of Justice, sitting as the Grand Chamber, finds that by denying EU citizens who are not Polish nationals but who reside in Poland the right to be a member of a political party, that Member State has failed to fulfil its obligations under Article 22 TFEU.

The Polish Law on political parties [88] provides that nationals of the Republic of Poland aged 18 or over may be members of a political party. It thus follows that EU citizens who do not have Polish nationality but who reside in Poland do not enjoy that right.

Taking the view that that legislation is contrary to Article 22 TFEU, the European Commission brought an action for failure to fulfil obligations before the Court. It submits inter alia that, by allowing only Polish nationals to be members of a political party, Poland prevents EU citizens who reside in that Member State but are not nationals thereof from exercising electoral rights in municipal and European Parliament elections under the same conditions as Polish nationals.

Findings of the Court

In the first place, the Court examines the scope of Article 22 TFEU, taking account of its wording, its context and the objectives it pursues.

---

88 The ustawa o partiach politycznych (Law on political parties) of 27 April 1997 (Dz. U. of 1997, No 98, item 604). See Article 2(1) of that law.

Thus, first, according to the wording of that provision, EU citizens residing in a Member State of which they are not nationals are to have the right to vote and to stand as a candidate in municipal and European Parliament elections under the same conditions as nationals of that Member State, and those rights are to be exercised subject to detailed arrangements adopted by the Council of the European Union. That wording contains no reference to the conditions for acquiring membership of a political party. However, by referring to the conditions governing the right to vote and to stand for election applicable to nationals of the Member State of residence of such an EU citizen, Article 22 TFEU prohibits that Member State from making the exercise of that right by that EU citizen subject to conditions other than those applicable to its own nationals. That provision thus lays down a specific rule of non-discrimination on grounds of nationality and, consequently, applies to any national measure giving rise to a difference in treatment liable to undermine the effective exercise of the right to vote and to stand as a candidate in municipal and European Parliament elections.

Furthermore, the detailed arrangements for the exercise of the right to vote and to stand for election were adopted by the Council in Directives 93/109 [89] and 94/80, [90] which, even though they do not contain provisions relating to the conditions for the acquisition, by EU citizens residing in a Member State of which they are not nationals, of membership of a political party, cannot, even implicitly, limit the scope of the rights and obligations arising under Article 22 TFEU. In that regard, in the absence of specific provisions relating to those conditions, the determination of those conditions falls within the competence of the Member States. Nevertheless, when exercising that competence, the Member States are required to comply with their obligations under EU law, including Article 22 TFEU.

Secondly, as regards the context of Article 22 TFEU, the Court refers both to the other provisions of the FEU Treaty and to the provisions of the same rank contained inter alia in the EU Treaty and the Charter of Fundamental Rights of the European Union ('the Charter').

In that connection, first of all, Article 22 TFEU, read in conjunction with Article 20(2) TFEU, links the right to vote and to stand as a candidate in municipal and European Parliament elections to citizenship of the Union. Moreover, under Article 20(2) and Article 21 TFEU, citizenship of the Union confers on each EU citizen a primary and individual right to move and reside freely within the territory of the Member States. There is therefore a connection between, on the one hand, the right to freedom of movement and residence and, on the other, the right of EU citizens residing in a Member State of which they are not nationals to vote and to stand as a candidate in municipal and European Parliament elections.

Next, Article 10 TEU – which confers on EU citizens the right to be directly represented in the European Parliament and to participate in the democratic life of the European Union – underscores the connection between the principle of representative democracy within the European Union and the right to vote and to stand as a candidate in European Parliament elections attached to citizenship of the Union, guaranteed by Article 22(2) TFEU.

Lastly, Article 12(1) of the Charter enshrines the right of everyone to freedom of association at all levels, in particular in political, trade union and civic matters. That right corresponds to the right guaranteed in Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is one of the essential foundations of a democratic and pluralist society, in that it allows citizens to act collectively in areas of common interest and, in so doing, to

---

89 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (OJ 1993 L 329, p. 34), as amended by Council Directive 2013/1/EU of 20 December 2012 (OJ 2013 L 26, p. 27).

90 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ 1994 L 368, p. 38).

contribute to the proper functioning of public life. Article 10(4) TEU and Article 12(2) of the Charter recognise the fundamental role of political parties at European level in expressing the will of EU citizens. Political parties, one of whose functions is to field candidates in elections, thus fulfil an essential function in the system of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU. Therefore, membership of a political party contributes significantly to the effective exercise of the right to stand for election, as conferred by Article 22 TFEU.

Thirdly, with respect to the objective of Article 22 TFEU, that article seeks, first of all, to confer on EU citizens residing in a Member State of which they are not nationals the right to participate in the democratic electoral process of that Member State through the right to vote and to stand for election at European and local level. Next, that article aims to ensure equal treatment between EU citizens, which implies equal access to the means available under the domestic legal system to nationals of that Member State for the purpose of exercising that right in municipal and European Parliament elections. Lastly, it follows from the connection between, on the one hand, freedom of movement and residence and, on the other, the right to vote and to stand as a candidate in those elections that the latter is intended, amongst other things, to promote the gradual integration of the EU citizen concerned in the society of the host Member State. Article 22 TFEU is thus intended to ensure that EU citizens residing in a Member State of which they are not nationals are represented, as a corollary to their integration in the society of the host Member State.

In the second place, it is in the light of those clarifications on the scope of Article 22 TFEU, read in the light of Articles 20 and 21 TFEU, Article 10 TEU and Article 12 of the Charter, that the Court considers whether the result of the difference in treatment on grounds of nationality established by Polish law, as regards the possibility of becoming a member of a political party, is that EU citizens who reside in Poland but are not nationals thereof do not enjoy equal access to the means available to Polish nationals for the purposes of effectively exercising their right to stand for election, in breach of Article 22 TFEU.

In that regard, it is admittedly possible, in Poland, for an independent candidate who is not a member of a political party to be nominated by an electoral committee of a political party. However, first, since it will be for the members of the political party to choose the candidates to be nominated, the fact of not being a member of a political party in principle precludes an EU citizen who resides in Poland but is not a national thereof from participating in the decision to be taken by that party concerning his or her nomination by its electoral committee. That circumstance places such EU citizens in a less favourable position than Polish nationals, who are members of a political party, as regards the possibility of standing as a candidate in municipal and European Parliament elections on the list of a political party.

Secondly, the fact that Polish nationals may choose to stand as candidates either as members of a political party or as independents, whereas EU citizens who reside in Poland but are not nationals thereof are only afforded the latter possibility, demonstrates that those EU citizens are unable to exercise their right to stand as a candidate in those elections under the same conditions as Polish nationals.

In the third and last place, the Court examines whether that difference in treatment concerning access to the means enabling the right to vote and to stand as a candidate in municipal and European Parliament elections to be exercised effectively may be justified by reasons relating to respect for the national identity of a Member State, within the meaning of Article 4(2) TEU.

First of all, it is true that the organisation of national political life, to which political parties contribute, is part of national identity. However, since the right to vote and to stand for election conferred by Article 22 TFEU on EU citizens residing in a Member State of which they are not nationals concerns municipal and European Parliament elections in that Member State, that provision neither requires the Member State concerned to grant those citizens the right to vote and to stand as a candidate in

national elections, nor prohibits it from adopting specific rules on decision-making within a political party regarding the nomination of candidates in national elections, rules which would preclude members of the party who are not nationals of that State from taking part in such decision-making.

Next, Article 4(2) TEU must be read in the light of provisions of the same rank, in particular Articles 2 and 10 TEU, and cannot exempt Member States from the obligation to comply with the requirements arising from those provisions. In that regard, the principle of democracy and the principle of equal treatment are values on which the European Union is founded, in accordance with Article 2 TEU. That provision is not merely a statement of policy guidelines or intentions, but contains values which are an integral part of the very identity of the European Union as a common legal order and are given concrete expression in principles containing legally binding obligations for the Member States. Furthermore, the principle of representative democracy, on which the functioning of the European Union is founded, in accordance with Article 10(1) TEU, gives concrete form to the value of democracy referred to in Article 2 TEU.

Lastly, by guaranteeing EU citizens residing in a Member State of which they are not nationals the right to vote and to stand as a candidate in municipal and European Parliament elections in that Member State, under the same conditions as nationals thereof, Article 22 TFEU gives concrete expression to the principles of democracy and of equal treatment of EU citizens, principles which are an integral part of the identity and common values of the European Union, to which the Member States adhere and whose observance they must ensure in their territories. Consequently, allowing such EU citizens to become members of a political party in their Member State of residence so as to implement in full the principles of democracy and equal treatment cannot be regarded as undermining the national identity of that Member State.

V. Freedoms of movement within the Union: freedom of establishment [91]

Judgment of 19 December 2024 (Grand Chamber), *Halmer Rechtsanwaltsgesellschaft* (C-295/23, EU:C:2024:1037)

(Reference for a preliminary ruling – Article 49 TFEU – Freedom of establishment – Article 63 TFEU – Free movement of capital – Establishing the applicable freedom – Services in the internal market – Directive 2006/123/EC – Article 15 – Requirements which relate to the shareholding of a company – A purely financial investor's holding in a law firm – Revocation of that law firm's registration with the professional body on account of that holding – Restriction on freedom of establishment and on the free movement of capital – Justifications based on protecting the independence of lawyers and recipients of legal services – Necessity – Proportionality)

Hearing a reference for a preliminary ruling from the Bayerischer Anwaltsgerichtshof (Higher Bavarian Lawyers' Court, Germany), the Court, sitting as the Grand Chamber, gives a ruling on the compatibility with Article 63 TFEU and Directive 2006/123 [92] of national legislation which, under penalty of a law firm having its registration with the bar association revoked, prohibits shares in that firm from being transferred to a purely financial investor which does not intend to exercise, in that firm, a professional activity covered by that legislation.

HR, a law firm located in Germany, was established as a limited liability entrepreneurial company subject to the Law on limited liability companies. Its director and sole member was originally Mr Daniel Halmer, who practised as a lawyer.

HR, which was created by contract in January 2020, was entered in the commercial register and at the Munich Bar Association that same year.

In 2021, Mr Halmer transferred 51 of the 100 shares in HR to SIVE Beratung und Beteiligung GmbH ('SIVE'), a limited liability company governed by Austrian law.

Les statuts de HR ont alors été modifiés afin de permettre la cession de parts sociales à une société de capitaux non inscrite au barreau tout en réservant la gestion de HR aux seuls avocats inscrits au barreau, afin d'en garantir l'indépendance.

HR's articles of association were then amended in order to allow shares to be transferred to a limited liability company which was not registered with the bar association, while reserving the management of HR only to lawyers registered with the bar association, in order to guarantee its independence.

However, the bar association informed HR that the transfer of shares to SIVE was prohibited pursuant to the Bundesrechtsanwaltsordnung (Federal Lawyers' Code) ('the Federal Lawyers' Code'), in the version applicable to the facts in the main proceedings, and that, therefore, HR's registration with the bar association would be revoked if that transfer were not undone. Nonetheless, HR informed the bar association that that transfer would not be undone. The bar association therefore revoked that firm's

---

91 Reference should also be made under this heading to the following judgments: judgment of 4 October 2024 (Grand Chamber), ***Lithuania and Others* v *Parliament and Council (Mobility package)*** (C-541/20 to C-555/20, EU:C:2024:818), presented under heading XII 'Transport'; judgment of 4 October 2024, ***FIFA*** (C-650/22, EU:C:2024:824), presented under heading VIII.1 'Agreements, decisions and concerted practices (Article 101 TFEU)'.

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

registration, on the ground, in essence, that only lawyers and members of the professions listed in the Federal Lawyers' Code, as well as doctors and pharmacists, may be members in a law firm. [93]

HR then brought an action before the Bayerischer Anwaltsgerichtshof (Higher Bavarian Lawyers' Court, Germany) against the decision adopted by the bar association to revoke its registration. In support of its action, HR submits that the Federal Lawyers' Code infringes, inter alia, the right to free movement of capital, guaranteed in Article 63(1) TFEU, and the rights which it derives from Article 15 of Directive 2006/123. It submits that that decision also infringes SIVE's right to freedom of establishment, as guaranteed by, inter alia, Article 49 TFEU.

In that context, the referring court seeks to ascertain whether that national legislation is compatible with Article 49 and Article 63(1) TFEU, as well as Article 15(2)(c) and Article 15(3) of Directive 2006/123.

The Court answers that question in the affirmative.

Findings of the Court

As a preliminary point, the Court examines, in the light of the purpose of the national legislation at issue and the facts of the present case, which fundamental freedom – freedom of establishment or the free movement of capital – applies to the dispute in the main proceedings.

In that regard, it recalls that, according to settled case-law, national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital.

Thus, national legislation which is not intended to apply only to those shareholdings which enable the holder to have a definite influence on a company's decisions and to determine its activities, but which applies irrespective of the extent of the holding which the shareholder has in a company, may fall within the ambit of both freedom of establishment and free movement of capital.

That being the case, in principle, the Court will examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the dispute in the main proceedings, that one of them is entirely secondary in relation to the other and may be considered together with it.

The national legislation at issue in the main proceedings is intended, inter alia, to prevent any holding, regardless of its scale, in a law firm being obtained by persons who are neither lawyers nor members of a profession referred to in the Federal Lawyers' Code applicable in the present case.

In this instance, SIVE acquired 51% of HR's share capital. National provisions which apply to holdings by a company of a Member State in the capital of a company established in another Member State, giving it definite influence on the company's decisions and allowing it to determine its activities, come within the substantive scope of the freedom of establishment.

However, the Court emphasises that HR's articles of association were amended in order to deprive SIVE of any definite influence, so that the acquisition of shares in HR could have had the sole objective of providing HR with capital intended to enable it to finance the development of an innovative legal model based on new technologies.

---

93 Pursuant to Paragraph 59a(1) and (2) of the Federal Lawyers' Code, lawyers may set up a partnership with members of a bar association, industrial property agents, tax advisers, tax representatives, accountants and certified auditors to practise their profession jointly in the framework of their respective areas of professional competence. Lawyers may also practise their profession jointly with members of the legal profession of other States who are authorised to establish themselves in accordance with the Federal Lawyers' Code and have their law firm abroad.

The case in the main proceedings therefore concerns both freedom of establishment and the free movement of capital, and neither of those freedoms can be regarded as secondary in relation to the other.

Regarding the substance, as concerns, in the first place, the freedom of establishment, it is apparent from Directive 2006/123 that, where a restriction of the freedom of establishment falls within the material scope of that directive, which is the case for legal advice services, including those provided by lawyers, there is no need to examine it in the light also of Article 49 TFEU.

Accordingly, the Court examines the compatibility with Directive 2006/123 of the requirements of the Federal Lawyers' Code relating to the limitation of the class of persons able to become members of a law firm and the requirement to cooperate actively within the firm; more specifically, whether those requirements are necessary.

In that regard, it finds that the purpose of those requirements is to ensure the independence and integrity of the profession of practising as a lawyer and to ensure compliance with the principle of transparency and the obligation of legal professional privilege. Those objectives are incontestably linked to the protection of recipients of legal services and the sound administration of justice, which constitute overriding reasons relating to the public interest under Directive 2006/123 and primary law.

As regards whether the requirements at issue in the main proceedings are proportionate, the Court specifies that those requirements appear to be appropriate for ensuring that the objective of protecting the sound administration of justice and the integrity of the profession of practising as a lawyer are attained.

The desire of a purely financial investor to make a return on his or her investment could have an impact on the organisation and activity of a law firm. Whereas the objective pursued by a purely financial investor is limited to seeking to make a profit, lawyers do not exercise their activities purely for an economic purpose but are required to comply with professional conduct rules. In the absence of harmonisation at EU level of the rules of professional conduct applicable to the profession of practising as a lawyer, each Member State remains, in principle, free to regulate the exercise of that profession in its territory. Thus, a Member State is entitled to take the view that there is a risk that the measures laid down in the articles of association of the law firm in order to preserve the independence and professional integrity of lawyers working within that firm may, in practice, be insufficient to ensure that the objectives of protecting the sound administration of justice and the integrity of the profession of practising as a lawyer are met in an effective manner in a situation where a purely financial investor has a holding in the capital of that company.

As concerns, in the second place, the free movement of capital, which is guaranteed in Article 63 TFEU and which covers both the holding of shares conferring the possibility of participating effectively in the management and control of an undertaking and the acquisition of securities solely with the intention of making a financial investment without wishing to influence the management and control of the undertaking, prohibited measures include inter alia those which are likely to discourage non-resident companies from making investments in a Member State, including in the capital of resident companies.

The Court finds that the effect of the national legislation at issue in the main proceedings is to prevent persons other than lawyers and members of the professions referred to in the Federal Lawyers' Code from acquiring shares in a law firm, with the result that it deprives investors from other Member States who are neither lawyers nor members of such professions from acquiring holdings in firms of that kind. Accordingly, that national legislation deprives law firms of access to capital which could assist in their creation or development. It therefore constitutes a restriction on the free movement of capital.

However, on the same grounds as those set out in the context of Directive 2006/123, the Court concludes that those restrictions on the free movement of capital are justified and proportionate in the light of overriding reasons relating to the public interest.

VI. Institutional provisions: right of public access to documents [94]

Judgment of 5 March 2024 (Grand Chamber), *Public.Resource.Org and Right to Know* v *Commission and Others* (C-588/21 P, EU:C:2024:201)

(Appeal – Access to documents of the institutions of the European Union – Regulation (EC) No 1049/2001 – Article 4(2) – Exceptions – Refusal to grant access to a document whose disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property – Overriding public interest in disclosure – Harmonised standards adopted by the European Committee for Standardisation (CEN) – Protection deriving from copyright – Principle of the rule of law – Principle of transparency – Principle of openness – Principle of good governance)

By upholding the appeal of Public.Resource.Org Inc. and Right to Know CLG, the appellants, brought against the judgment of the General Court in *Public.Resource.Org and Right to Know* v *Commission*, [95] the Court, sitting as the Grand Chamber, rules, for the first time, on the existence of an overriding public interest justifying the disclosure of harmonised standards adopted by the European Committee for Standardisation (CEN).

The appellants 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 CEN, three of which concerned the safety of toys, and one the maximum nickel content for certain products. [96]

The Commission refused to grant the request for access on the basis of the first indent of Article 4(2) of Regulation No 1049/2001, [97] 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.

The action, brought by the appellants against the Commission's decision, was dismissed by the General Court in its entirety. They then brought an appeal before the Court of Justice, claiming that the General Court had erred in finding that there was no overriding public interest capable of justifying free access to the requested harmonised standards.

Findings of the Court

As a preliminary point, the Court recalls that the right of access to documents of the institutions of the European Union is wide in scope. [98] Those institutions may, however, rely on an exception based on the protection of commercial interests of a given natural or legal person in order to refuse access to a document where disclosure would undermine the protection of those interests, including intellectual

---

94 Reference should also be made under this heading to the following judgment: judgment of 18 June 2024 (Grand Chamber), ***Commission*** **v** ***SRB*** (C-551/22 P, EU:C:2024:520), presented under heading XV 'Economic and monetary policy'.

95 Judgment of 14 July 2021, *Public.Resource.Org and Right to Know* v *Commission* (T-185/19, EU:T:2021:445).

96 The standards in question were standard EN 71-5:2015, entitled 'Safety of toys – Part 5: Chemical toys (sets) other than experimental sets'; standard EN 71-4:2013, entitled 'Safety of toys – Part 4: Experimental sets for chemistry and related activities'; standard EN 71-12:2013, entitled 'Safety of toys – Part 12: N-Nitrosamines and N-nitrosatable substances'; and standard EN 12472:2005+A 1:2009, entitled 'Method for the simulation of wear and corrosion for the detection of nickel released from coated items' ('the requested harmonised standards').

97 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).

98 That right of access to documents is guaranteed by the first subparagraph of Article 15(3) TFEU and by Article 42 of the Charter of Fundamental Rights of the European Union. It is implemented in particular by Regulation No 1049/2001.

property. However, that exception is not applicable where there is an overriding public interest in disclosure of the document concerned.

In that regard, in the first place, the Court notes that the procedure for drawing up harmonised standards was laid down by Regulation No 1025/2012, [99] pursuant to which the Commission plays a central role in the European standardisation system. Thus, even if the development of those standards is entrusted to a body governed by private law, only the Commission is empowered to request that a harmonised standard be developed in order to implement a directive or a regulation. In that context, it determines the criteria as to the content to be met by the requested harmonised standard, sets a deadline for its adoption, supervises its development, provides financing and decides on the publication of the references to the harmonised standard concerned in the *Official Journal of the European Union*.

Moreover, although compliance with harmonised standards is not compulsory, products which comply with those standards benefit from a presumption of conformity with the essential requirements relating to them laid down in the relevant EU harmonisation legislation. [100] That legal effect, conferred by that legislation, is one of the essential characteristics of those standards and makes them an essential tool for economic operators, for the purposes of exercising the right to free movement of goods or services on the EU market.

The Court notes that, in the present case, three of the four requested harmonised standards which concern the safety of toys refer to Directive 2009/48 [101] and that their references were published in the *Official Journal of the European Union*. In accordance with Article 13 of that directive, toys which have been manufactured in compliance with those standards enjoy a presumption of conformity with the requirements covered by those standards. The fourth standard, which concerns maximum nickel content, refers to Regulation No 1907/2006 [102] and is, in the present case, manifestly mandatory, in so far as paragraph 3 of entry 27 of the table in Annex XVII to that regulation provides that, as regards nickel, the standards adopted by CEN are to be used as test methods for demonstrating the conformity of the products concerned with the requirements set out in that entry.

Consequently, the Court considers that the requested harmonised standards form part of EU law.

In the second place, the Court notes that it follows from Article 2 TEU that the European Union is based on the principle of the rule of law, which requires free access to EU law for all natural or legal persons of the European Union, and that individuals must be able to ascertain unequivocally what their rights and obligations are. [103] That free access must in particular enable any person whom legislation seeks to protect to verify, within the limits permitted by law, that the persons to whom the

---

99 Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council (OJ 2012 L 316, p. 12).

100 Article 2(1) of Regulation No 1025/2012, read in the light of recital 5 thereof.

101 Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ 2009 L 170, p. 1).

102 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), as amended by Commission Regulation (EC) No 552/2009 of 22 June 2009 (OJ 2009 L 164, p. 7).

103 Judgment of 22 February 2022, *Stichting Rookpreventie Jeugd and Others* (C-160/20, EU:C:2022:101, paragraph 41 and the case-law cited).

rules laid down by that law are addressed actually comply with those rules. Accordingly, by the effects conferred on it by EU legislation, a harmonised standard may specify the rights conferred on individuals as well as their obligations and those specifications may be necessary for them to verify whether a given product or service actually complies with the requirements of such legislation.

In those circumstances, the Court finds that there is an overriding public interest in the disclosure of the requested harmonised standards.

VII. Proceedings of the European Union [104]

1. Composition of the Court

Judgment of 29 July 2024 (Grand Chamber), *Valančius* (C-119/23, EU:C:2024:653)

(Reference for a preliminary ruling – Third subparagraph of Article 19(2) TEU – Second paragraph of Article 254 TFEU – Appointment of Judges of the General Court of the European Union – Independence beyond doubt – Ability required for appointment to high judicial office – National procedure for proposing a candidate for the office of Judge of the General Court of the European Union – Group of independent experts responsible for assessing the candidates – Merit list of candidates meeting the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU – Proposal of a candidate named on the merit list other than the top-ranked candidate – Opinion of the panel provided for in Article 255 TFEU on the suitability of candidates)

Further to a request for a preliminary ruling from the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), the Grand Chamber of the Court of Justice rules on the effect of the provisions of the Treaties governing the appointment of Judges of the General Court of the European Union [105] on the national procedure for proposing a candidate for the performance of those duties.

In 2016, Mr Valančius was appointed a Judge of the General Court. After his term of office ended in August 2019, he continued to perform his duties. [106] In 2021, a procedure was adopted for the selection of a candidate for the office of Judge of the General Court. [107] In accordance with that procedure, a working group composed mainly of independent experts drew up a merit list of candidates, in descending order in accordance with the score obtained. Mr Valančius was the best-ranked candidate on that list.

In 2022, the Lithuanian Government decided to propose, as a candidate for the office of Judge of the General Court, the person ranked in second place on that list. Following an unfavourable opinion on that candidate delivered by the panel provided for in Article 255 TFEU, that government decided to propose as a candidate the person ranked in third place on the same list. In 2023, that person was appointed a Judge of the General Court.

Mr Valančius challenged the legality of the decisions adopted by the Lithuanian Government before the referring court, seeking, inter alia, that that government be ordered to reopen the proposal procedure and to submit the name of the best-ranked candidate on the merit list.

It is in that context that the referring court asked the Court of Justice to rule on the interpretation of the provisions of the Treaties governing the appointment of Judges of the General Court.

---

104 Reference should also be made under this heading to the following judgment: judgment of 10 September 2024 (Grand Chamber), ***Neves 77 Solutions*** (C-351/22, EU:C:2024:723), presented under heading XX.1 'Restrictive measures'.

105 Third subparagraph of Article 19(2) TEU and second paragraph of Article 254 TFEU.

106 Under the third paragraph of Article 5 of the Statute of the Court of Justice of the European Union.

107 Pretendento į Europos Sąjungos Bendrojo Teismo teisėjus atrankos tvarkos aprašas (Description of the selection procedure for candidates for the office of Judge of the General Court of the European Union), in the version applicable to the dispute in the main proceedings, adopted by Decree No 1R-65 of the Minister for Justice of the Republic of Lithuania of 9 March 2021.

Findings of the Court

As regards its jurisdiction to rule on the request for a preliminary ruling, the Court of Justice notes that, under EU law, [108] the procedure for appointing a Judge of the General Court consists of three stages. At the first stage, the government of the Member State concerned proposes a candidate for the office of Judge of the General Court and sends that proposal to the General Secretariat of the Council of the European Union. At the second stage, the panel provided for in Article 255 TFEU gives an opinion on that candidate's suitability to perform the duties of a Judge of the General Court, having regard to the requirements laid down in the second paragraph of Article 254 TFEU. At the third stage, following consultation with that panel, the governments of the Member States, through their representatives, appoint that candidate as a Judge of the General Court, by a decision taken by common accord on a proposal from the government of the Member State concerned. Thus, the decision of the government of a Member State to propose a candidate for the office of Judge of the General Court constitutes the first stage of the appointment procedure governed by the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU and therefore falls, on that basis, within the scope of those provisions. In those circumstances, the interpretation of those provisions clearly falls within the Court of Justice's jurisdiction to rule on requests for a preliminary ruling.

As regards the substance of the questions referred for a preliminary ruling, the Court points out that the requirement of judicial independence gives concrete expression to one of the fundamental values of the European Union and its Member States enshrined in Article 2 TEU, which define the very identity of the European Union as a common legal order and which must be complied with both by the European Union and by the Member States. Since that requirement, which has two aspects, independence in the strict sense and impartiality, is inherent in the task of adjudication and Article 19 TEU jointly entrusts the Court of Justice of the European Union and the national courts with the task of ensuring judicial review in the EU legal order, that requirement applies both at EU level, in particular as regards the Judges of the General Court, and at the level of the Member States as regards national courts.

Furthermore, the Court of Justice points out that the requirement of a tribunal previously established by law is closely linked, in particular, to the requirement of independence in that both seek to observe the fundamental principles of the rule of law and the separation of powers, principles which are essential to the rule of law, the value of which is affirmed in Article 2 TEU. The requirement of a tribunal previously established by law encompasses, by its very nature, the process of appointing judges, while the independence of a tribunal may be measured, inter alia, by the way in which its members are appointed.

In that regard, the substantive conditions and procedural rules relating to the appointment of Judges of the General Court must make it possible to rule out any reasonable doubt, in the minds of individuals, as to whether they satisfy the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU, which relate both to 'independence beyond doubt' and to the 'ability required for appointment to high judicial office'. To that end, it is necessary, in particular, to safeguard the integrity of the entire procedure for the appointment of Judges of the General Court and, consequently, the outcome of that procedure at each stage.

Thus, as regards, first of all, the national stage of proposal of a candidate for the office of Judge of the General Court, the Court of Justice notes, on the one hand, that, in the absence of specific provisions to that effect in EU law, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the proposal of such a candidate, provided that those rules cannot give rise, in the minds of individuals, to reasonable doubts as to whether the proposed

108 Inter alia, in accordance with the third subparagraph of Article 19(2) TEU, the second paragraph of Article 254 TFEU and Article 255 TFEU.

candidate meets the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU. In that regard, the fact that representatives of the legislature or executive are involved in the judicial appointment process is not in itself such as to give rise to such reasonable doubts in the minds of individuals. That said, the involvement of independent advisory bodies and the existence, in national law, of an obligation to state reasons may be such as to contribute to rendering the appointment process more objective, by circumscribing the leeway available to the appointing institution.

On the other hand, as regards the substantive conditions laid down for the selection and proposal of candidates for the office of Judge of the General Court, the Court of Justice points out that the Member States, while having a wide discretion in defining those conditions, must nevertheless ensure, irrespective of the procedural rules adopted for that purpose, that the proposed candidates meet the requirements of independence and professional ability laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU.

Next, the Court of Justice emphasises that the verification of the suitability of candidates proposed by the Member States for the performance of the duties of a Judge of the General Court, in the light of those requirements, is also the responsibility of the panel provided for in Article 255 TFEU. For the purposes of the adoption of its opinion on that suitability, that panel must check that the proposed candidate meets the requirements of independence and professional ability which are required by the Treaties in order to perform the duties of a Judge of the General Court.

In that context, the Court of Justice states that, although the existence of an open, transparent and rigorous selection procedure is a relevant factor in checking compliance with those requirements by the proposed candidate, the absence of such a procedure does not, by contrast, constitute, in itself, a ground for casting doubt on such compliance. For the purposes of such verification, the panel provided for in Article 255 TFEU may ask the government making the proposal to send additional information or other material which it considers necessary for its deliberations.

Finally, the Court notes that the task of ensuring observance of the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU is also incumbent on the governments of the Member States, through their representatives, if they decide, having regard to the opinion delivered by the panel provided for in Article 255 TFEU, to appoint as a Judge of the General Court the candidate proposed by one of those governments. Once appointed, that candidate becomes a Judge of the European Union and does not represent the Member State which proposed him or her.

In the light of those considerations, the Court of Justice concludes that, where a Member State has established a procedure for the selection of candidates for the office of Judge of the General Court in the context of which a group composed mainly of independent experts is responsible for evaluating those candidates and drawing up a merit list of those who satisfy the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU, and indicating, by way of recommendation, the best-ranked candidate on that list, the mere fact that the government of that Member State decided to propose a candidate on that merit list other than the best-ranked candidate is not, in itself, sufficient to support the conclusion that that proposal is such as to give rise to reasonable doubts as to whether the candidate proposed meets those requirements. Moreover, the fact that the panel provided for in Article 255 TFEU gave a favourable opinion on the candidate proposed by the national government who was placed third on that merit list is such as to confirm that the decision of the governments of the Member States to appoint that candidate meets the abovementioned requirements.

2. Reference for a preliminary ruling

a. Classification of the referring court as a 'court or tribunal'

Judgment of 9 January 2024 (Grand Chamber), *G. and Others (Appointment of judges to the ordinary courts in Poland)* (C-181/21 and C-269/21, EU:C:2024:1)

(Reference for a preliminary ruling – Article 267 TFEU – Possibility for the referring court to take account of the preliminary ruling of the Court – Interpretation sought by the referring court necessary to enable it to give judgment – Independence of the judiciary – Conditions for the appointment of judges of the ordinary courts – Possibility of challenging an order which has definitively ruled on an application for the grant of interim measures – Possibility of removing a judge from a panel of judges of the court – Inadmissibility of the requests for a preliminary ruling)

The Grand Chamber of the Court rules that two requests for a preliminary ruling submitted by Polish judges, which question whether the composition of the panel of judges, in the cases in the main proceedings, complies with the requirements inherent in an independent and impartial tribunal within the meaning of EU law, are inadmissible.

In the first case (C-181/21), a panel of three judges at the Sąd Okręgowy w Katowicach (Regional Court, Katowice, Poland) was appointed to examine a complaint against an order dismissing a consumer's objection to an order for payment. The Judge-Rapporteur in charge of that case expressed doubts as to the status of that panel of judges as a 'court', in view of the circumstances in which Judge A.Z. was appointed to the Regional Court, Katowice, Judge A.Z. also being part of that panel. The Judge-Rapporteur's concerns related, inter alia, to the status and method of operation of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS' [109]), which is involved in such an appointment procedure.

As regards Case C-269/21, a panel of three judges sitting within the Sąd Okręgowy w Krakowie (Regional Court, Kraków, Poland) examined the complaint lodged by a bank against an order by which a panel consisting of a single judge in that same court had granted an application for interim measures brought by consumers. That formation of three judges varied the order under appeal, rejected that request in its entirety and referred the case back to the panel consisting of a single judge. That panel consisting of a single judge has doubts as to the compatibility with EU law of the composition of the panel of judges which ruled on the bank's complaint and, consequently, as to the validity of its decision. The panel of three judges comprised Judge A.T., appointed to the Regional Court of Krakow in 2021, following a procedure involving the KRS.

In that context, the Judge-Rapporteur, in the first case, and the single-judge formation, in the second case, decided to refer questions to the Court for a preliminary ruling seeking to ascertain, in essence, whether, in the light of the particular circumstances in which the appointments of Judges A.Z. and A.T. were made, the panels in which those judges sit meet the requirements inherent in an independent and impartial tribunal previously established by law, within the meaning of EU law, and whether EU law [110] requires such judges to be excluded of the court's own motion from the examination of the cases in question.

---

109 In its composition after 2018.

110 See Article 2 and Article 19(1) TEU, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union.

Findings of the Court

At the outset, the Court recalls that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless, inter alia, a case is pending before that national court in which the latter is called upon to give a decision which is capable of taking account of the preliminary ruling. [111]

The Court then notes that, although it is true that every court is obliged to verify whether, in its composition, it constitutes an independent and impartial tribunal previously established by law, within the meaning, in particular, of the second subparagraph of Article 19(1) TEU, where a serious doubt arises on that point, the fact remains that the necessity, within the meaning of Article 267 TFEU, of the interpretation sought from the Court for a preliminary ruling means that the referring judge must be able, alone, to infer the consequences of that interpretation by assessing, in the light of that interpretation, the lawfulness of the appointment of another judge to the same panel and, where appropriate, by recusal of the latter.

That is not the case, in that respect, of the referring judge in Case C-181/21 since it is not apparent from the order for reference or from the documents before the Court that, under the rules of national law, the judge which made the reference for a preliminary ruling in that case could, alone, act in that way. The interpretation of the provisions of EU law sought in Case C-181/21 does not therefore meet an objective need linked to a decision which the referring judge might take, alone, in the case in the main proceedings.

As regards Case C-269/21, the Court notes that the referring court itself points out that the order made by the panel of three judges which varied its own decision and rejected the application for interim measures made by the consumers concerned is no longer subject to appeal and must therefore be regarded as final under Polish law. Although it relies on the legal uncertainty which surrounds that order due to doubts as to the lawfulness of the composition of the panel which issued it, the referring court does not, however, put forward any provision of Polish procedural law which would confer on it the competence to carry out, moreover in a formation of one sole judge, an examination of the conformity, in particular with EU law, of a final order given on such a request by a panel of three judges. It is also apparent from the file before the Court that the order made by the panel of three judges is binding on the referring judge and that the latter does not have jurisdiction to 'recuse' a judge forming part of the panel of judges which made that order or to call that order into question.

Thus, the Court finds that the referring court in Case C-269/21 does not have jurisdiction, under the rules of national law, to assess the legality, in the light, in particular, of EU law, of the panel of three judges which made the order definitively ruling on the application for interim measures and, in particular, the conditions for the appointment of Judge A.T., and to call into question, where appropriate, that order.

Since the request for the grant of interim measures by the applicants in the main proceedings was rejected in its entirety, that request was definitively dealt with by the panel of three judges. The questions referred in Case C-269/21 therefore relate intrinsically to a stage in the procedure in the main proceedings which has been definitively closed and is separate from the main proceedings, which remains the only stage pending before the referring court. The questions referred do not therefore correspond to an objective need inherent in the resolution of that dispute, but seek to obtain from the Court a general assessment, disconnected from the needs of that dispute, of the procedure for the appointment of ordinary judges in Poland.

---

111 Judgment of 22 March 2022, *Prokurator Generalny (Disciplinary Chamber of the Supreme Court – Appointment)* (C-508/19, EU:C:2022:201, paragraph 62 and the case-law cited).

Judgment of 7 May 2024 (Grand Chamber), *NADA and Others* (C-115/22, EU:C:2024:384)

(Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Concept of 'court or tribunal' – National arbitration committee competent to combat doping in sport – Criteria – Independence of the body making the reference – Principle of effective judicial protection – Inadmissibility of the request for a preliminary ruling)

The Court of Justice, sitting as the Grand Chamber, dismisses as inadmissible the request for a preliminary ruling made by the Unabhängige Schiedskommission Wien (Independent Arbitration Committee, Vienna, Austria; 'the USK'), on the ground that that body does not fulfil the criterion of independence required in order to be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

The applicant in the main proceedings was a competitive athlete from 1998 to 2015. In 2021, the Nationale Anti-Doping Agentur Austria GmbH (NADA) (National Anti-Doping Agency) submitted a request for the examination of the applicant's case to the Österreichische Anti-Doping Rechtskommission (Austrian Anti-Doping Legal Committee; 'the ÖADR'), since it considered that the applicant had infringed the anti-doping rules. [112]

By a decision of 31 May 2021, the ÖADR found that the applicant had infringed those rules. It declared invalid all the results achieved by the applicant during the period in question and revoked all her entry fees and/or prize money. Furthermore, it banned the applicant from participating in sporting competitions of any kind for a period of four years. In the procedure, the applicant requested that that decision not be communicated to the general public, in particular that her name or other individual characteristics not be disclosed or published. The ÖADR rejected that request.

The applicant applied for a review to the USK, the referring body in the present case, requesting that that decision be amended so that the general public would not be informed, by way of publication of her full name on a freely accessible website, of the anti-doping violations committed by her and of the penalties imposed. By a decision of 21 December 2021, the USK confirmed those penalties. However, it decided to issue a separate decision on the request that it refrain from publishing the anti-doping violations committed by the applicant and the ensuing penalties, reserving its decision in that regard.

Since it has doubts as regards the conformity of that publication with the GDPR, [113] the USK made a reference to the Court for a preliminary ruling.

Findings of the Court

As a preliminary point, the Court ascertains, in the light of the latest developments in its case-law, [114] whether the referring body may be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

---

112 The International Association of Athletics Federations adopted competition rules for 2014-2015 and anti-doping rules in 2017.

113 More specifically with Article 5(1)(a) and (c), Article 6(3) and Articles 9 and 10 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, and corrigendum OJ 2018 L 127, p. 2; 'the GDPR').

114 In its assessment, the Court referred, in particular, to the judgments of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17), and of 3 May 2022, *CityRail* (C-453/20, EU:C:2022:341).

At the outset, the Court recalls its settled case-law in this area, pursuant to which, in order to determine whether the body in question is a 'court or tribunal' within the meaning of Article 267 TFEU, which is a question governed by EU law alone, it takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature. Accordingly, it is appropriate to determine whether a body may refer a case to the Court on the basis of criteria relating both to the constitution of that body and to its function.

As regards those criteria relating to a body's constitution, the Court states that it is apparent from the information in the file submitted to it, and in particular the provisions of the 2021 Federal Law on Anti-Doping, [115] that the USK fulfils the criteria relating to whether it is established by law, whether it is permanent, whether its jurisdiction is compulsory and whether the proceedings before it are *inter partes*. However, the question arises as to whether the USK fulfils the criterion of independence.

As regards that criterion, the Court points out that the independence of the national courts, which is essential to effective judicial protection, is inherent in the task of adjudication. It is thus essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU in that, in accordance with its settled case-law, that mechanism may be activated only by a body which satisfies, inter alia, that criterion of independence. Thus, the Court recalls that the concept of 'independence' has two aspects.

The first aspect, which is external, requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, being thus protected against external interventions or pressure liable to impair the independent judgement of its members and to influence their decisions. In that regard, the irremovability of the members of the body concerned constitutes a guarantee that is essential to judicial independence in that it serves to protect the person of those who have the task of adjudicating in a dispute.

More specifically, the principle of irremovability, the cardinal importance of which is to be emphasised, requires, in particular, that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term. While it is not absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Thus it is widely accepted that judges may be dismissed if they are deemed unfit for the purposes of carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed. The guarantee of irremovability of the members of a court or tribunal thus requires that dismissals of members of the body concerned should be determined by specific rules, by means of express legislative provisions offering safeguards that go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal.

The second aspect of the concept of 'independence', which is internal, is linked to 'impartiality' and seeks to ensure a level playing field for the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Thus, the concept of 'independence' implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to

115 Anti-Doping-Bundesgesetz 2021 (2021 Federal Law on Anti-Doping) of 23 December 2020 (BGBl. I, 152/2020; 'the ADBG').

dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.

In that respect, as regards the USK, the Court finds that the rules of procedure of that committee concerning the ADBG state that its members are independent in the performance of their duties and that they are subject to the principle of impartiality. Nevertheless, under the ADBG, [116] the members of the USK are appointed by the Federal Minister for Arts, Culture, Civil Service and Sport for a renewable term of four years, which may be revoked early 'on serious grounds', without that concept being defined in the national legislation. In particular, the irremovability of USK members is not guaranteed by any specific rule. Furthermore, the decision to remove the members of the USK is a matter solely for the Federal Minister for Arts, Culture, Civil Service and Sport, namely a member of the executive, without precise criteria or precise guarantees having been established in advance.

The Court infers from this that the applicable national legislation does not ensure that the members of the USK are protected from external pressure, be it direct or indirect, that is liable to cast doubt on their independence, with the result that that body does not satisfy the external aspect of the requirement for a court or tribunal to be independent. Thus, the USK cannot be classified as a 'court or tribunal' within the meaning of Article 267 TFEU.

However, the Court states that that fact does not relieve the USK of the obligation to ensure that EU law is applied when adopting its decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities.

Furthermore, the Court notes that it is apparent from the file before it that the applicant in the main proceedings lodged a complaint with the Österreichische Datenschutzbehörde (Austrian Data Protection Authority) concerning a breach of that protection, pursuant to Article 77(1) of the GDPR. That body adopted a rejection decision, which is the subject of a challenge before the Bundesverwaltungsgericht (Federal Administrative Court, Austria) pursuant to Article 78(1) of the GDPR. [117] Those proceedings were stayed pending an answer from the Court to the questions referred in the present case.

116 Pursuant to Paragraph 8(3) of the ADBG.

117 See, in that regard, judgment of 7 December 2023, *SCHUFA Holding (Discharge from remaining debts)* (C-26/22 and C-64/22, EU:C:2023:958, paragraphs 52 and 70).

b. Obligation on courts or tribunals of last instance to make a reference for a preliminary ruling

Judgment of 15 October 2024 (Grand Chamber), *KUBERA* (C-144/23, EU:C:2024:881)

(Reference for a preliminary ruling – Article 267 TFEU – Scope of the obligation on national courts or tribunals of last instance to make a reference for a preliminary ruling – Proceedings relating to the grant of leave to appeal on a point of law to the supreme court of a Member State – Request by the party seeking leave to appeal on a point of law that a question concerning the interpretation of EU law be referred to the Court of Justice – National legislation under which leave to appeal on a point of law is to be granted if the appeal raises a question of law that is important for ensuring legal certainty, the uniform application of the law or its development – Obligation for the national supreme court to consider, in proceedings relating to the grant of leave to appeal on a point of law, whether a reference for a preliminary ruling should be made – Statement of reasons for the decision refusing leave to appeal on a point of law)

In a reference for a preliminary ruling from the Vrhovno sodišče (Supreme Court, Slovenia), the Grand Chamber of the Court of Justice rules that in proceedings relating to the grant of leave to appeal on a point of law to a national supreme court, that court is not relieved of its obligation to consider, in the context of those proceedings, whether a question of EU law raised in support of that application for leave to appeal should be referred to the Court of Justice for a preliminary ruling.

KUBERA, a company, purchased cans of Red Bull in Türkiye that had been manufactured in Austria and transported them by ship to the port of Koper (Slovenia) for importation. By two decisions of 5 October 2021, the Slovenian financial administration decided to detain those cans, pursuant to Regulation No 608/2013, [118] pending the outcome of judicial proceedings initiated by the company Red Bull to protect its intellectual property rights relating to those cans. Having exhausted the administrative appeals available, KUBERA brought actions against those decisions before the Upravno sodišče (Administrative Court, Slovenia), which delivered two judgments dismissing the actions.

KUBERA then submitted two applications to the referring court for leave to appeal on a point of law against those judgments, claiming that the dispute in the main proceedings raises a question of interpretation of Regulation No 608/2013 [119] which, according to KUBERA, is an important legal question that justifies granting leave to bring appeals on a point of law. It also asked that, should the referring court not agree with its preferred interpretation of that regulation, the matter be referred to the Court of Justice for a preliminary ruling.

According to the national legislation applicable, leave to appeal on a point of law is to be granted if the case brought before the Supreme Court raises a question of law that is important for ensuring legal certainty, the uniform application of the law or its development. That legislation sets out the particular situations that correspond to those scenarios. While the referring court considers that, in this instance, the applications of KUBERA for leave to appeal on a point of law do not satisfy those conditions, it is nevertheless uncertain as to whether the third paragraph of Article 267 TFEU [120] places it under an obligation, for the purposes of deciding on those applications for leave to appeal,

---

118 Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ 2013 L 181, p. 15). See Article 17 of that regulation.

119 In this case, the question as to whether that regulation applies to a situation in which the imported goods are manufactured by the holder of intellectual property rights relating to those goods.

120 In accordance with that provision, where any question concerning the interpretation or validity of EU law is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is to bring the matter before the Court of Justice.

to examine KUBERA's request that the question of EU law raised by that company be referred to the Court of Justice for a preliminary ruling. It also seeks to establish whether, should it decide that it is not necessary to submit a request for a preliminary ruling to the Court of Justice, it is required, under Article 47 of the Charter of Fundamental Rights of the European Union, to state the reasons for its decision refusing the application for leave to appeal on a point of law.

Findings of the Court

In the first place, the Court rules that the third paragraph of Article 267 TFEU precludes a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law from deciding – in proceedings relating to the examination of an application for leave to appeal on a point of law the outcome of which depends on the significance of the legal issue raised by one of the parties to the dispute with respect to legal certainty, the uniform application of the law or its development – to refuse such an application for leave without having assessed whether it was obliged to submit to the Court for a preliminary ruling a question concerning the interpretation or validity of a provision of EU law raised in support of that application.

The Court recalls, first of all, that although the organisation of justice in the Member States falls within the competence of those Member States, they are required, when exercising that competence, to comply with their obligations deriving from EU law. Accordingly, although EU law does not, in principle, preclude the Member States from establishing procedures for granting leave to appeal or other selection or 'filtering' systems for bringing matters before the national supreme courts, the implementation of such procedures or systems must meet the requirements deriving from EU law, particularly from Article 267 TFEU.

In that regard, the obligation on courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law to refer a question to the Court of Justice for a preliminary ruling is based on cooperation between national courts and tribunals and the Court, and is intended in particular to prevent a body of national case-law that is not in accordance with the rules of EU law from being established in any of the Member States. Such a court or tribunal can be relieved of that obligation in only three situations: where it has established that the question raised is irrelevant or that the EU law provision in question has already been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. [121] If it is in one of those situations, [122] that court or tribunal is not, therefore, required to bring the matter before the Court, even when the question concerning the interpretation or validity of a provision of EU law is raised by a party to the proceedings before it.

Moreover, the Court notes that the existence of a procedure for granting leave to appeal on a point of law cannot transform the lower court or tribunal whose decision may be challenged in such an appeal into a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law and which is, as a result, under an obligation to make a reference to the Court as provided for in the third paragraph of Article 267 TFEU. However, a national supreme court, such as the referring court, is under such an obligation.

The referring court nevertheless explains that, according to its own interpretation of the national legislation applicable, it is not required to determine, at the stage of the examination of the application for leave to appeal on a point of law, whether or not it is necessary, in the context of the procedure relating to appeals on a point of law, to submit to the Court for a preliminary ruling the question of EU law raised in support of that application. Where leave to appeal on a point of law is not

---

121 Judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 21), and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 33).

122 Those 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 are referred to below as 'exceptions to the duty to refer'.

granted, the decision refusing leave definitively brings the procedure to an end. In that case, the lower court's interpretation of EU law could prevail in the national legal order concerned, even though the question raised in support of the application for leave to appeal on a point of law would have warranted a reference for a preliminary ruling being made to the Court.

The Court notes that such legislation or national practices can lead to a situation in which a question concerning the interpretation or validity of a provision of EU law, despite being raised before the Supreme Court, would not be submitted to the Court of Justice, contrary to the obligation imposed on that national court by the third paragraph of Article 267 TFEU. Such a situation is capable of undermining the effectiveness of the system of cooperation between the national courts and tribunals and the Court, and, in particular, the achievement of the objective of preventing a body of national case-law that is not in accordance with EU law from being established in any of the Member States. [123]

The Court nevertheless invites the referring court to ascertain whether it is possible to interpret the national legislation applicable in accordance with the requirements of Article 267 TFEU. [124] In fact, that legislation does not seem to prohibit the referring court from assessing, in the context of the procedure for examining an application for leave to appeal on a point of law, whether the question concerning the interpretation or validity of a provision of EU law raised in support of that application requires that a reference for a preliminary ruling be made to the Court of Justice or, instead, falls within one of the exceptions to the duty to refer. In particular, the situations which are set out in that legislation and which exclusively involve situations characterised, in essence, by variations in domestic case-law or by the absence of case-law from the national supreme court do not appear to be exhaustive.

In those circumstances, that legislation appears to be capable of being interpreted as meaning that the criterion of the significance of the legal issue raised with respect to legal certainty, the uniform application of the law or its development includes the situation in which the party to the dispute who is seeking leave to appeal on a point of law raises a question concerning the interpretation or validity of a provision of EU law which does not fall within any of the exceptions to the duty to refer and which requires, therefore, that a reference be made to the Court of Justice for a preliminary ruling.

The Court also points out that it is for a national supreme court to which an application for such leave to appeal has been made, and which is under an obligation to make a reference for a preliminary ruling to the Court, to decide whether it is appropriate to do so at the stage of the examination of that application for leave or at a later stage. If it decides to bring the matter before the Court of Justice for a preliminary ruling at the stage of the examination of that application, it must suspend further processing of that application pending the preliminary ruling and subsequently apply that ruling in its assessment as to whether leave to appeal on a point of law should be granted.

---

123 That interpretation is not called into question by the case-law deriving from the judgments of 15 March 2017, *Aquino* (C-3/16, EU:C:2017:209, paragraph 56), and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, cited above, paragraph 61), according to which a national court or tribunal against whose decisions there is no judicial remedy under national law may decline to refer a question to the Court of Justice for a preliminary ruling on grounds of inadmissibility specific to the procedure before that national court or tribunal, subject to compliance with the principles of equivalence and effectiveness. Unlike those grounds, a criterion of leave to appeal on a point of law such as that provided for in the national legislation applicable requires the supreme court to examine the significance of the legal issue raised in support of the application for leave to appeal with respect to legal certainty, the uniform application of the law or its development.

124 The Court refers, in that regard, to the information provided in the order for reference concerning the development of the case-law of the Ustavno sodišče (Constitutional Court, Slovenia). In particular, according to the referring court, it follows from a decision of that constitutional court of 31 March 2022 that where one of the parties to a dispute requests, in the context of an application for leave to appeal on a point of law, that a matter be referred to the Court of Justice for a preliminary ruling under Article 267 TFEU, that party's request must be dealt with at the stage of the examination of that application for leave.

In the second place, the Court recalls that it follows from the system established by Article 267 TFEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights, that if a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law takes the view, because the case before it involves one of the three exceptions to the duty to refer, that it is relieved of that duty, the statement of reasons for its decision must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on the Court's case-law, or, in the absence of such case-law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance as to leave no scope for any reasonable doubt. The Court infers from this that, given that, without prejudice to the application of a purely procedural ground of inadmissibility, such a court or tribunal of a Member State cannot refuse an application for leave to appeal on a point of law that raises a question concerning the interpretation or validity of a provision of EU law without first assessing whether it is required to refer that question to the Court of Justice for a preliminary ruling or whether that question falls within one of the three exceptions to the duty to refer, that court or tribunal must, when refusing such an application for leave to appeal on the basis of one of those exceptions, set out the reasons why that reference was not made.

VIII. Agriculture and fisheries [125]

Judgment of 4 October 2024 (Grand Chamber), *Herbaria Kräuterparadies II* (C-240/23, EU:C:2024:852)

(Reference for a preliminary ruling – Agriculture and fisheries – Organic products – Regulation (EU) 2018/848 – Organic production rules – Article 16 – Labelling – Article 30 – Terms referring to organic production – Article 33 – Organic production logo of the European Union – Conditions of use – Compliance of the product with Regulation 2018/848 – Articles 45 and 48 – Import of products from a third country for the purpose of placing them on the market within the European Union as organic products – Equivalence of the production rules of that third country with the rules of Regulation 2018/848 – Use of the third country's organic production logo)

In a reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the Court of Justice clarifies the conditions for the use of the organic production logo of the European Union in the case of imports of products containing, in addition to organic products, vitamins and minerals not coming from organic farming.

Herbaria produces a beverage called 'Blutquick', comprising a mixture of fruit juice and organically produced herbs. Non-plant vitamins and ferrous gluconate are added to that beverage, which is marketed as a food supplement. The packaging shows the organic production logo of the European Union, the national organic label and a reference to the fact that the ingredients come from 'controlled organic agriculture'.

Since the Bayerische Landesanstalt für Landwirtschaft (Bavarian Regional Office for Agriculture, Germany) took the view that that beverage did not comply with Article 27(1)(f) of Regulation No 889/2008 [126] in that it contains non-plant vitamins and minerals whereas this was not legally required, [127] it ordered Herbaria to remove from the labelling, advertising and marketing of Blutquick the reference to organic production protected under Article 23 of Regulation No 834/2007. [128]

Herbaria challenged that decision before the referring court. Before that court, Herbaria no longer denies that its product does not comply with EU law [129] and therefore no longer challenges the prohibition on the use by that product of the organic production logo of the European Union, the national organic label and terms referring to organic production. However, Herbaria submits that, under Regulation 2018/848, [130] a product competing with Blutquick, imported from the United States

---

125 Reference should also be made under this heading to the following judgments: judgment of 9 April 2024, ***Commission* v *Council (Signing of international agreements)*** (C-551/21, EU:C:2024:281), presented under heading XIX.1 'Negotiation and conclusion'; judgment of 4 October 2024 (Grand Chamber), ***Confédération paysanne (Melons and tomatoes from Western Sahara)*** (C-399/22, EU:C:2024:839), judgment of 4 October 2024 (Grand Chamber), ***Commission and Council* v *Front Polisario*** (C-778/21 P and C-798/21 P, EU:C:2024:833), judgment of 4 October 2024 (Grand Chamber), ***Commission and Council* v *Front Polisario*** (C-779/21 P and C-799/21 P, EU:C:2024:835), presented under heading XIX.2 'Content and scope'.

126 Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ 2008 L 250, p. 1).

127 The addition of vitamins and minerals to processed products bearing the term 'organic' is permitted, under the applicable regulations, only if their use is legally required.

128 Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1).

129 In the present case, Article 16(1) of Regulation 2018/848, read in conjunction with point 2.2.2(f)(i) of Part IV of Annex II thereto, which, in essence, replaced Article 27(1)(f) of Regulation No 889/2008.

130 Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Council Regulation (EC) No 834/2007 (OJ 2018 L 150, p. 1).

of America, is not subject to such a prohibition, even though it does not comply with EU rules of production, which would constitute unequal treatment in breach of Article 20 of the Charter of Fundamental Rights of the European Union.

In those circumstances, the referring court asked the Court, inter alia, whether Regulation 2018/848 allows a product imported from a third country under the conditions laid down by that regulation to bear the organic production logo of the European Union and terms referring to organic production, even though it does not comply in every respect with the requirements laid down by that regulation.

In its Grand Chamber judgment, the Court interprets Regulation 2018/848 [131] as meaning that a product imported from a third country, whose production rules have been recognised as equivalent to those laid down by that regulation for the placing on the market of a product in the European Union as an organic product, may not use for its labelling either the organic production logo of the European Union or, in principle, terms referring to organic production, where it contains minerals and vitamins of non-plant origin, which are not legally required, and does not therefore meet the requirements of Article 16(1) of that regulation. The organic production logo of that third country may, however, be used in the European Union for such a product, even where that logo contains terms referring to organic production, within the meaning of Regulation 2018/848.

Findings of the Court

The Court considers that the wording of Article 30(2) and Article 33(1) of Regulation 2018/848 tends to indicate that the organic production logo of the European Union and terms referring to organic production may be used for organic products, whether they are manufactured in the European Union or imported from a third country for the purpose of being placed on the market in the European Union as organic products, only in so far as they comply with the requirements laid down in that regulation.

That literal interpretation is supported by the context in which those provisions are to be found. Indeed, Regulation 2018/848 introduces a distinction between products manufactured in the European Union [132] and those imported from a third country for the purposes of their being placed on the market in the European Union as organic products, which must meet the conditions set out in Article 45 of Regulation 2018/848 and, in particular, one of the three conditions laid down in Article 45(1)(b)(i) to (iii) of that regulation. Those three conditions relate, respectively, to the situation in which the imported products comply with Chapters II, III and IV of that regulation (the situation referred to in point (i)), that in which they are governed by equivalent rules in their country of origin, recognised as such under a trade agreement (situation referred to in point (ii)), and, lastly, the situation in which those rules are recognised as equivalent under a unilateral EU measure (situation referred to in point (iii)).

Of those three conditions, only that referred to in point (i) requires the imported product to comply with the provisions of Chapters II, III and IV of that regulation. Consequently, a product corresponding to the situation referred to in Article 45(1)(b)(iii) of Regulation 2018/848, [133] although not complying with all the production rules laid down in Chapter III of that regulation, may be placed on the market in the European Union as an organic product, provided that it is a product from a third country whose production rules in force have been considered by the European Union to be equivalent to those set out in Chapter III, and it complies with those rules. The Court states that the concept of 'equivalence' of the production rules of the third country concerned presupposes that they pursue the same

131 In the present case, Article 30(2) and Article 33(1) of Regulation 2018/848.

132 Which must comply with the detailed production rules set out in Part IV of Annex II to Regulation 2018/848 and in any implementing act referred to in Article 16(3) thereof.

133 That is the situation referred to by the referring court.

objectives and observe the same principles, by applying rules which ensure the same level of assurance of conformity as that required by the EU legislation in respect of products manufactured in the European Union. [134]

By contrast, no provision of Regulation 2018/848 permits the use of the organic production logo of the European Union and terms referring to organic production for products from third countries recognised for the purposes of equivalence, in so far as, although they may be imported into the European Union pursuant to Article 45(1)(b)(iii) of that regulation, those products do not, however, comply with the production rules laid down in that regulation.

That interpretation is moreover confirmed by the objectives of Regulation 2018/848, which aims in particular, at maintaining consumer confidence in products labelled as organic products, by ensuring that consumers are informed, in a clear and unambiguous manner, of the fact that the product on which the organic production logo of the European Union or terms referring to organic production appear is fully compliant with all the requirements laid down by Regulation 2018/848, and not merely with rules equivalent to that regulation.

However, the possibility of using the organic production logo of the European Union or terms referring to organic production, both for products which have been manufactured in the European Union or in third countries in compliance with the production rules laid down in Regulation 2018/848 and for products which have been manufactured in third countries according to standards merely equivalent to those production rules, does not enable the consumer to know whether an imported product complies with all the production rules of Regulation 2018/848 or whether it complies merely with production rules of the third country from which it is imported that are equivalent to the production rules of that regulation.

In that regard, the fact that, under Article 32(2) of Regulation 2018/848, where the organic production logo of the European Union is used on a product, an indication must be added specifying the place where the agricultural raw materials of which the product is composed have been farmed, is not sufficient to dispel any ambiguity for the consumer.

That said, in order to facilitate trade with third countries and to ensure the effectiveness of Article 45(1)(b)(iii) of Regulation 2018/848, which confers on the European Commission the power to recognise that rules of a third country are equivalent to the rules of that regulation, products imported under that provision, which have access to the EU market as organic products, must be able to use the organic production logo of the third country from which they come, even where that logo contains terms identical to those referring to organic production, within the meaning of Article 30(1) of that regulation and Annex IV thereto.

134 Article 3(64) of Regulation 2018/848.

IX. Border controls, asylum and immigration

1. Asylum policy

a. Conditions for the granting of international protection

Judgment of 16 January 2024 (Grand Chamber), *Intervyuirasht organ na DAB pri MS (Women victims of domestic violence)* (C-621/21, EU:C:2024:47)

(Reference for a preliminary ruling – Area of freedom, security and justice – Common asylum policy – Directive 2011/95/EU – Qualification for refugee status – Article 2(d) – Reasons for persecution – 'Membership of a particular social group' – Article 10(1)(d) – Acts of persecution – Article 9(1) and (2) – Link between the reasons for and acts of persecution or between the reasons for persecution and the absence of protection against such acts – Article 9(3) – Non-State actors – Article 6(c) – Qualification for subsidiary protection – Article 2(f) – 'Serious harm' – Article 15(a) and (b) – Assessment of applications for international protection for the purpose of granting refugee status or subsidiary protection status – Article 4 – Gender-based violence against women – Domestic violence – Threat of 'honour killing')

Ruling on a request for a preliminary ruling, the Court, sitting as the Grand Chamber, has provided clarification on one of the reasons for persecution capable of leading to the recognition of refugee status, namely 'membership of a particular social group', [135] where the applicant for international protection is a woman who claims a fear, if she were to return to her country of origin, of being killed or subjected to acts of violence inflicted by a member of her family or community due to the alleged transgression of cultural, religious or traditional norms.

WS is a Turkish national of Kurdish origin. She arrived legally in Bulgaria in June 2018 and thereafter joined a family member in Germany, where she lodged an application for international protection. Following a request from the German authorities, WS was taken back by the Bulgarian authorities for the purpose of examining her application for international protection, pursuant to a decision adopted in February 2019 by the National Agency for Refugees [136] ('the DAB').

During interviews conducted in October 2019, WS stated that she had been forcibly married at the age of sixteen and subjected to domestic violence. WS fled the marital home in September 2016. In 2017, she entered into a religious marriage and, in May 2018, had a son from that marriage. After she left Türkiye, she officially divorced her first husband in September 2018, despite his objections. She states that, for those reasons, she fears that his family would kill her if she were to return to Türkiye.

By a decision adopted in May 2020, the President of the DAB rejected WS's application for international protection, taking the view, first, that the conditions for granting refugee status had not been satisfied. The reasons relied on by WS, in particular the acts of domestic violence or death threats made against her were not relevant because they could not be linked to any of the reasons for persecution set out in the Law on Asylum and Refugees, which transposes Directive 2011/95 into Bulgarian law. Furthermore, WS did not claim to have been persecuted based on her gender.

Second, WS was refused subsidiary protection status. It was considered that she did not satisfy the conditions required for that purpose since, in the first place, neither the official authorities nor certain non-State entities had taken action against her that the State is not in a position to control. In the

---

135 Under Article 2(d) of Directive 2011/95 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).

136 Darzhavna agentsia za bezhantsite (State Agency for Refugees, Bulgaria).

second place, WS had not informed the police that she had been subject to criminal assaults, had not lodged a complaint and had left Türkiye legally.

The action brought by WS against that decision was dismissed.

In April 2021, based on new evidence, WS made a subsequent application for international protection, claiming a well-founded fear of persecution on account of her membership of a particular social group, namely women who are victims of domestic violence and women who are potential victims of honour killings, by non-State actors against whom the Turkish State is not able to defend her. Objecting to her being sent back to Türkiye, she states that she fears being the victim of an honour killing or being forced to marry again.

In May 2021, the DAB refused to reopen the procedure for granting international protection, taking the view, inter alia, that WS had not submitted any significant new evidence relating to her personal situation or her country of origin.

Hearing an appeal against that decision, the referring court decided to seek a ruling from the Court on the interpretation of Directive 2011/95, inviting it to clarify the substantive preconditions governing the grant of international protection and the type of international protection to be granted in such circumstances.

Findings of the Court

First, the Court examines whether, under Directive 2011/95, depending on the circumstances in the country of origin, women in that country may be regarded, as a whole, as belonging to 'a particular social group' as a 'reason for persecution' capable of leading to the recognition of refugee status, or whether the women concerned must share an additional common characteristic in order to be regarded as belonging to such a group.

In that regard, the Court states, first of all, that the Istanbul Convention [137] lays down obligations coming within the scope of Article 78(2) TFEU, which empowers the EU legislature to adopt measures relating to a common European asylum system, such as Directive 2011/95. Thus, that convention, in so far as it relates to asylum and non-refoulement, is one of the treaties in the light of which that directive is to be interpreted, [138] even though some Member States, including the Republic of Bulgaria, have not ratified it.

Next, the Court points out that it is apparent from Article 10(1)(d) of Directive 2011/95 that a group is to be considered a 'particular social group' where two cumulative conditions are satisfied. In the first place, the members of the relevant group must share at least one of the three identifying features referred to by that provision. [139] In the second place, that group must have a 'distinct identity' in the country of origin.

As regards the first condition for identifying a 'particular social group', the Court states that the fact of being female constitutes an innate characteristic and therefore suffices to satisfy that condition. That does not rule out the possibility that women who share an additional common feature such as, for

---

137 Council of Europe Convention on preventing and combating violence against women and domestic violence, which was concluded in Istanbul on 11 May 2011, signed by the European Union on 13 June 2017 and approved on behalf of the European Union by Council Decision (EU) 2023/1076 of 1 June 2023 (OJ 2023 L 143 I, p. 4) ('the Istanbul Convention'). That convention has been binding on the European Union since 1October 2023.

138 Under Article 78(1) TFEU.

139 Namely an 'innate characteristic', a 'common background that cannot be changed' or a 'characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it'.

example, a common background that cannot be changed, [140] may also belong to that category for the purposes of that provision.

As regards the second condition for identifying a 'particular social group', the Court states that women, whether or not they share an additional common characteristic, may be perceived as being different by the surrounding society and recognised as having their own identity in that society, in particular because of social, moral or legal norms in their country of origin.

Lastly, the Court states that membership of a 'particular social group' is to be established independently of the acts of persecution [141] of which the members of that group may be victims in the country of origin. Nevertheless, discrimination or persecution suffered by persons sharing a common characteristic may constitute a relevant factor where, in order to ascertain whether the second condition for identifying a social group is satisfied, it is necessary to assess whether the group in question appears to be distinct in the light of the social, moral or legal norms of the country of origin in question.

Consequently, women, as a whole, may be regarded as belonging to a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95, where it is established that, depending on the circumstances in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence. Furthermore, more restricted groups of women who share an additional common characteristic [142] may be regarded as belonging to a social group with a distinct identity in their country of origin if, on account of that characteristic, they are stigmatised and exposed to the disapproval of their surrounding society resulting in their social exclusion or acts of violence.

Second, the Court examines whether, where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, Directive 2011/95 requires a link to be established between the acts of persecution and at least one of the reasons for persecution referred to in Article 10(1) of Directive 2011/95. It states that, under Article 9(3) of that directive, read in conjunction with other provisions, [143] recognition of refugee status presupposes that a link be established between, on the one hand, the aforementioned reasons for persecution [144] and, on the other, either the acts of persecution or the absence of protection, by the 'actors of protection', [145] against acts of persecution perpetrated by 'non-State actors'. Thus, in the case of an act of persecution perpetrated by a non-State actor, the condition laid down in Article 9(3), referred to above, [146] is satisfied where that act is based on one of the reasons for persecution mentioned in Article 10(1) of that directive, even if the absence of protection is not based on those reasons. That condition must also be regarded as being satisfied where the absence of protection is based on one of the reasons for persecution set out in the latter provision, even if the act of persecution perpetrated by a non-State actor is not based on those reasons. Consequently, where an applicant claims a fear of being persecuted in his or her country of origin by non-State actors, it is not necessary to establish a link between one of the reasons

---

140 The Court notes in particular that the fact that women have escaped from a forced marriage or left the marital home may, inter alia, be regarded as a common background that cannot be changed, within the meaning of that provision.

141 Within the meaning of Article 9 of Directive 2011/95.

142 As an example of an additional common characteristic, the Court refers to the situation of women who refuse forced marriages, where such a practice may be regarded as a social norm within their society, or who transgress such a norm by ending that marriage.

143 In this instance, read in conjunction with Article 6(c) and Article 7(1), in the light of recital 29 of Directive 2011/95.

144 Within the meaning of Article 9(1) and (2) of Directive 2011/95.

145 Those 'actors of protection' are defined in Article 7 of Directive 2011/95.

146 This condition is provided for in Article 9(3) of Directive 2011/95.

for persecution referred to in Article 10(1) of Directive 2011/95 and acts of persecution, if such a link can be established between one of those reasons for persecution and the absence of protection from those acts by the actors of protection. [147]

Third, the Court holds that the concept of 'serious harm', [148] capable of leading to the recognition of subsidiary protection status, [149] covers the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms. To reach that conclusion, it states that Article 15(a) and (b) of Directive 2011/95 [150] defines 'serious harm' as 'the death penalty or execution' or 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. In view of the objective of Article 15(a) of Directive 2011/95 of ensuring protection for persons whose right to life would be threatened if they were to return to their country of origin, the term 'execution' in that provision cannot be interpreted as excluding harm to a person's life solely on the ground that it is caused by non-State actors. Thus, where a woman runs a real risk of being killed or subjected to acts of violence inflicted by a member of her family or community because of the alleged transgression of cultural, religious or traditional norms, such serious harm must be classified as 'execution' within the meaning of that provision.

Judgment of 11 June 2024 (Grand Chamber), *Staatssecretaris van Justitie en Veiligheid (Women identifying with the value of gender equality)* (C-646/21, EU:C:2024:487)

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

Hearing a reference for a preliminary ruling from the rechtbank Den Haag, zittingsplaats's-Hertogenbosch (District Court, The Hague, sitting at 's-Hertogenbosch, Netherlands), the Court, sitting as the Grand Chamber, rules on the question whether third-country nationals who are minors identifying with the fundamental value of equality between women and men due to their stay in a Member State may be regarded as belonging to 'a particular social group', [151] constituting a 'reason for persecution' capable of leading to the recognition of refugee status.

---

147 Within the meaning of Article 7(1) of that directive.

148 Laid down in Article 15(a) and (b) of Directive 2011/95.

149 Within the meaning of Article 2(g) of Directive 2011/95.

150 Read in the light of recital 34 of Directive 2011/95.

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

K and L are sisters of Iraqi nationality, born in 2003 and 2005, respectively. They arrived in the Netherlands in 2015 and have stayed there continuously since. Their applications for asylum, submitted in November 2015, were rejected in February 2017. In April 2019, they submitted subsequent applications, [152] which were rejected as manifestly unfounded in December 2020. In challenging those rejection decisions, K and L are arguing before the referring court that, due to their long stay in the Netherlands, they have become 'westernised'. They fear persecution if they were to return to Iraq because of the identity they have formed in the Netherlands, characterised by the adoption of norms, values and conduct that are different from those of their country of origin, which have become so fundamental to their identity and conscience that they cannot renounce them. They submit that they are therefore members of a 'particular social group', within the meaning of Article 10(1)(d) of Directive 2011/95.

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

Findings of the Court

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

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

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

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

---

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

In that regard, the Court points out that the fact that a third-country national genuinely comes to identify with that fundamental value during her stay in a Member State cannot be regarded as circumstances which that national has created by her own decision since leaving her country of origin, [153] or as an activity the sole or main purpose of which was to create the necessary conditions for applying for international protection. [154] Where such identification has been established to the requisite legal standard, it can in no way be equated with the abusive intent and abuse of the procedure which Article 5(3) of Directive 2011/95 is intended to combat.

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

On that issue, the Court states, first, that, pursuant to Article 51(1) of the Charter of Fundamental Rights, Member States are to comply with Article 24(2) thereof when they are implementing Union law and therefore also when they are examining a 'subsequent application'. Second, since Article 40(2) of Directive 2013/32 does not draw any distinction between a first application for international protection and a 'subsequent application' as regards the nature of the elements or findings capable of demonstrating that the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95, the assessment of the facts and circumstances in support of those applications must, in both cases, be carried out in accordance with Article 4 of that latter directive.

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

Judgment of 4 October 2024 (Grand Chamber), *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22, EU:C:2024:841)

(Reference for a preliminary ruling – Asylum policy – International protection – Directive 2013/32/EU – Common procedures for granting and withdrawing international protection – Articles 36 and 37 – Concept of 'safe country of origin' – Designation – Annex I – Criteria – Article 46 – Right to an effective remedy – Examination by the court of the designation of a third country as a safe country of origin)

In the context of a reference for a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, rules on the limits of the option, given to the Member States in Directive 2013/32, [155] to designate third countries as safe countries of origin and on the scope of the review of such designation by the court hearing an action against a decision rejecting an application for international protection brought by a national from a third country designated as such.

On 9 February 2022, CV, a Moldovan national, lodged an application for international protection in the Czech Republic. In support of that application, he relied, first, on the threats made to him in Moldova by individuals whom the police authorities had failed to identify and, second, on the Russian Federation's invasion of Ukraine. By decision of 8 March 2022, the Ministerstvo vnitra České republiky

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

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

155 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). Under Article 37(1) of that directive, Member States may retain or introduce legislation that allows, in accordance with Annex I thereto, for the national designation of safe countries of origin for the purposes of examining applications for international protection.

(Ministry of the Interior of the Czech Republic) rejected that application as manifestly unfounded on the ground, inter alia, that the Czech Republic considers the Republic of Moldova, with the exception of Transnistria, to be a safe country of origin, and CV failed to demonstrate that that would not apply in his particular case. [156]

CV challenged that decision before the Krajský soud v Brně (Regional Court, Brno, Czech Republic). First, that court has doubts as to whether a third country ceases to be able to be designated as a safe country of origin when it decides, as the Republic of Moldova did, initially because of the energy crisis it was experiencing and then because of the Russian Federation's invasion of Ukraine, to invoke the right to derogate from the obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms. [157] Second, it asks whether EU law precludes a Member State from designating a third country as a safe country of origin, with the exception of certain parts of its territory. Third, the referring court raises the question of the extent of the review which it is to carry out in respect of such a designation, having regard, in particular, to the possibility of processing applications for international protection lodged by nationals from third countries designated as safe countries of origin under an accelerated procedure and of declaring them as manifestly unfounded.

Findings of the Court

In the first place, the Court considers that a third country does not cease to fulfil the criteria enabling it to be designated as a safe country of origin, within the meaning of Article 37 of Directive 2013/32, on the sole ground that it invokes the right of derogation provided for in Article 15 ECHR. Apart from the safeguards surrounding the exercise of that right, it cannot be inferred from the fact that the third country invokes such a right either that it has actually taken measures that have the effect of derogating from the obligations laid down in that convention or, if so, what the nature and extent of the derogating measures adopted are.

The Court nevertheless observes that invoking that right must lead the competent authorities of the Member State which designated the third country concerned as a safe country of origin to assess whether such designation should be maintained. Article 37(2) of Directive 2013/32 requires Member States to review regularly the situation in third countries designated as safe countries of origin, since the circumstances giving rise to a presumption of the safety of applicants for international protection in a given country of origin are, by their very nature, subject to variation. That requirement for regular review also covers the occurrence of significant events, in that, because of their importance, they may affect the possibility for a third country, designated as a safe country of origin, to continue to fulfil the criteria set out for that purpose in Annex I to that directive, and thus to be presumed to be capable of guaranteeing the safety of applicants. Invoking the right of derogation provided for in Article 15 ECHR constitutes such an event, given that it cannot be ruled out that derogating measures affecting fundamental rights may be incompatible with the criteria laid down in Annex I to Directive 2013/32. Moreover, invoking that right reveals, in any event, an appreciable risk of a significant change in the manner in which the rules on rights and freedoms are applied in the third country concerned.

In the second place, the Court states that Article 37 of Directive 2013/32 precludes a third country from being designated as a safe country of origin where certain parts of its territory do not satisfy the material conditions for such designation, set out in Annex I to that directive.

---

156 In accordance with Article 31(8)(b) and Article 32(2) of Directive 2013/32, where the applicant comes from a safe country of origin, Member States may decide to accelerate an examination procedure and/or conduct that procedure at the border or in transit zones, and consider the application to be manifestly unfounded.

157 Signed in Rome on 4 November 1950 ('the ECHR'). Article 15 ECHR, headed 'Derogation in time of emergency', provides in paragraph 1: 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.'

That is, in particular, confirmed by the legislative history of that provision. The option for Member States to designate, for the purpose of examining applications for international protection, a portion of the territory of a third country as safe was granted to Member States by Directive 2005/85, [158] in particular by Article 30 thereof. That option no longer appears in the article which replaced it, that is to say, in Article 37 of Directive 2013/32. The intention to remove that option is apparent from the actual wording of the European Commission's proposal that gave rise to Directive 2013/32, [159] that option having been expressly crossed out. Furthermore, such an intention is confirmed by the detailed explanation of that proposal, [160] which expressly mentions the intention to remove the option concerned and the consequence thereof, that is to say, that it is now required that the material conditions for such designation be met for the entire territory of the third country concerned.

Moreover, the objectives pursued by Directive 2013/32 – which seeks to ensure that applications for international protection are dealt with 'as soon as possible, without prejudice to an adequate and complete examination being carried out' [161] – do not preclude that consequence. In so far as the EU legislature seeks to ensure, through that directive, an examination of applications for international protection that is both rapid and exhaustive, it is for that legislature, when exercising the discretion it enjoys, to strike a balance between those two objectives when determining the conditions under which Member States may designate a third country as a safe country of origin. The fact that Member States do not have the option to exclude part of the territory of a third country for the purposes of such designation reflects that balancing exercise and the choice of the legislature to favour an exhaustive examination of applications for international protection lodged by applicants whose country of origin does not satisfy, for the whole of its territory, the material conditions set out in Annex I to that directive. Although Regulation 2024/1348, [162] which repeals Directive 2013/32 with effect from 12 June 2026, reintroduces such an option, [163] it is the prerogative of the EU legislature to reconsider that choice by striking a fresh balance. Furthermore, the fact that the legal system introduced, for that purpose, by that regulation differs from the one that had been laid down by Directive 2005/85 supports the interpretation that the EU legislature did not make provision for that option in Directive 2013/32.

Lastly, in the third place, the Court holds that, where an action is brought before a court or tribunal against a decision rejecting an application for international protection, examined in the context of the special scheme applicable to applications lodged by applicants from third countries designated as safe countries of origin, that court or tribunal must raise, on the basis of the information in the file and the information brought to its attention during the proceedings before it, a failure to have regard to the material conditions for such designation, set out in Annex I to Directive 2013/32, even if that failure is not expressly relied on in support of that action.

Article 46(3) of Directive 2013/32 stipulates that the court or tribunal before which the decision relating to the application for international protection concerned is contested is to carry out 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of

---

158 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13). That directive was repealed by Directive 2013/32.

159 Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection COM(2009) 554 final, p. 60.

160 COM(2009) 554 final, Annex, 14959/09 ADD 1, p. 15.

161 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 109).

162 Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32 (OJ L 2024/1348).

163 Article 61(2) of Regulation 2024/1348 provides that the designation of a third country as a safe country of origin both at European Union and at national level may be made with exceptions for specific parts of its territory or clearly identifiable categories of persons.

the international protection needs'. The words 'where applicable' in that sentence underline the fact that the full and *ex nunc* examination to be carried out by the court may concern the procedural aspects of an application for international protection. The designation of a third country as a safe country of origin falls within those procedural aspects in that it is liable to have an impact on the examination procedure relating to such applications.

In the present case, the rejection decision was based on the fact that CV comes from the Republic of Moldova, the Czech Republic having designated that third country as a safe country of origin, with the exception of Transnistria. Thus, the designation of that third country as a safe country of origin is one of the elements on file brought to the attention of the referring court and which it is called upon to hear and determine in the action against that decision. It must therefore be concluded that, in such circumstances, even though the applicant in the main proceedings has not expressly relied on a possible failure to have regard to the rules laid down by Directive 2013/32 for the purposes of such a designation with a view to subjecting the procedure for examining an application for international protection to the special scheme, that failure constitutes a point of law which the referring court must consider as part of the full and *ex nunc* examination required by Article 46(3) of that directive.

b. Procedures for examining applications for international protection where a new application for asylum is made

Judgment of 8 February 2024 (Grand Chamber), *Bundesrepublik Deutschland (Admissibility of a subsequent application)* (C-216/22, EU:C:2024:122)

(Reference for a preliminary ruling – Common procedures for granting and withdrawing international protection – Directive 2013/32/EU – Article 33(2)(d) and Article 40(2) and (3) – Subsequent application – Conditions for rejecting such an application as inadmissible – Concept of 'new elements or findings' – Judgment of the Court on a question of interpretation of EU law – Article 46 – Right to an effective remedy – Jurisdiction of the national court or tribunal to rule on such an application on the merits in the event of illegality of the decision rejecting an application as inadmissible – Procedural safeguards – Article 14(2))

Ruling on a reference for a preliminary ruling from the Verwaltungsgericht Sigmaringen (Administrative Court, Sigmaringen, Germany), the Court of Justice, sitting as the Grand Chamber, rules, inter alia, on the question of whether a preliminary ruling of the Court constitutes a new element implying that a subsequent asylum application must be examined on the merits and not rejected as inadmissible.

On 26 July 2017, a Syrian national lodged an asylum application in Germany. During his interview before the competent German authority, he explained that he had performed his military service in Syria between 2003 and 2005 and that he had left that country for fear of being recalled to serve in the armed forces or of being arrested if he refused to fulfil his military obligations.

By decision of 16 August 2017, the competent German authority granted the applicant subsidiary protection, but refused to grant him refugee status. It found, inter alia, that it could not be assumed that, having left Syria before being called up to join the Syrian army, the applicant would be regarded in his country as a deserter or an opponent of the regime. Moreover, he had not established that conscription was the reason for his departure. He relied, in general terms, only on the dangerous situation due to the war in Syria.

The applicant did not lodge an appeal against that decision, which therefore became final. On 15 January 2021, however, he lodged a further asylum application ('subsequent asylum application') in which he relied on the judgment of the Court of 19 November 2020, *Bundesamt für Migration und*

Flüchtlinge (Military service and asylum). [164] He argued that, in that judgment, the Court had indicated that, in certain circumstances, there is a 'strong presumption' that refusal to perform military service relates to one of the reasons for persecution listed in Article 10 of Directive 2011/95. [165]

By decision of 22 March 2021, the competent German authority rejected as inadmissible the applicant's subsequent asylum application on the ground that the Court judgment relied on did not mean that it had to examine that application on the merits.

Ruling on an appeal brought by the applicant against that decision, the Administrative Court, Sigmaringen, which is the referring court, has doubts as to the question of whether a judgment of the Court, which is limited to interpreting a provision of EU law already in force at the time of the adoption of the decision on a previous application, is capable of constituting a 'new element or finding', which excludes the possibility of rejecting a subsequent asylum application as inadmissible.

Findings of the Court

The Court recalls, first of all, that it is apparent from the wording and purpose of Article 33(2) of Directive 2013/32 as well as from the scheme of that directive that the possibility of rejecting an application for international protection as inadmissible as referred to in that provision derogates from the obligation to examine the substance of such an application. The Court has thus already held that it follows both from the exhaustiveness of the list in the said provision and from the fact that the grounds of inadmissibility set out in that list are exemptions that those grounds must be interpreted strictly. [166] Accordingly, the situations in which Directive 2013/32 requires a subsequent application to be considered admissible must, conversely, be interpreted broadly.

Furthermore, it is apparent from the very wording of Article 33(2)(d) of Directive 2013/32 and, in particular, from the use of the expression 'new elements or findings' that that provision refers not only to a factual change in the personal circumstances of an applicant or that of his or her country of origin, but also to new legal elements.

It follows, in particular, from the case-law that a subsequent application cannot be declared inadmissible, pursuant to Article 33(2)(d) of Directive 2013/32, [167] where the determining authority, within the meaning of that directive, [168] finds that the definitive rejection of the earlier application is contrary to EU law. Such a finding must necessarily be made by that determining authority when that

---

164 Judgment of 19 November 2020, *Bundesamt für Migration und Flüchtlinge (Military service and asylum)* (C-238/19, EU:C:2020:945).

165 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). Article 10 of that directive, contained in the chapter entitled 'Qualification for being a refugee', contains a list of elements which the Member States must take into account when assessing the reasons for persecution.

166 See, to that effect, judgment of 1 August 2022, *Bundesrepublik Deutschland (Child of refugees, born outside the host State)* (C-720/20, EU:C:2022:603, paragraphs 49 and 51).

167 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). Under Article 33(2)(d) of that directive, Member States may consider as inadmissible an application for international protection where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95 have arisen or have been presented by the applicant.

168 Article 2(f) of Directive 2013/32 defines 'determining authority' as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases'.

incompatibility arises from a judgment of the Court or was established, as an ancillary finding, by a national court or tribunal. [169]

It follows that, in the specific context of Directive 2013/32, any judgment of the Court is liable to come within the concept of 'new element', within the meaning of Article 33(2)(d) and Article 40(2) and (3) of that directive. [170] That finding is irrespective of whether that judgment was delivered before or after the adoption of the decision on the previous application or whether it finds that a national provision on which that decision was based is incompatible with EU law or is limited to the interpretation of EU law, including that already in force at the time when the said decision was adopted.

However, in order for a subsequent application to be admissible, it is necessary, moreover, in accordance with Article 40(3) of Directive 2013/32, that the new elements or findings 'significantly add to the likelihood of the applicant qualifying as a beneficiary of international protection by virtue of Directive [2011/95]'.

It follows that any judgment of the Court, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection.

Judgment of 18 June 2024 (Grand Chamber), *Bundesrepublik Deutschland (Effect of a decision granting refugee status)* (C-753/22, EU:C:2024:524)

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

In a reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), the Court of Justice, sitting as the Grand Chamber, rules on whether the authorities of a Member State must carry out a new examination of an application for asylum despite the grant of refugee status in another Member State, where they cannot exercise the option provided by Directive 2013/32 [171] to reject that application as inadmissible.

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

---

169 See, to that effect, 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 198 and 203).

170 Article 40 of Directive 2013/32 contains provisions relating to the examination of subsequent applications.

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

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

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

Findings of the Court

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

The EU legislature has not yet fully achieved the objective pursued by Article 78(2)(a) TFEU, namely a uniform status of asylum. In particular, it has not, at this stage, established a principle that Member States are obliged to recognise automatically the decisions granting refugee status that have been adopted by another Member State, nor has it specified the detailed arrangements for implementing such a principle. Although the Member States are thus, as EU law currently stands, free to make recognition of all of the rights relating to refugee status on their territory subject to the adoption, by their competent authorities, of a new decision granting that status, it is open to them to provide for automatic recognition of such decisions adopted by another Member State, by way of a more favourable provision. [172] However, it is common ground that Germany has not exercised that option.

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

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

In that regard, although that authority is not required to grant refugee status to that applicant on the sole ground that that status was previously granted to him or her by decision of another Member

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

State, it must nevertheless take full account of that decision and of the elements supporting it. The Common European Asylum System, which includes common criteria for the identification of persons genuinely in need of international protection, is based on the principle of mutual trust, [173] in accordance with which it must be presumed, save in exceptional circumstances, that the treatment of applicants for international protection in each Member State complies with the requirements of EU law, including those of the Charter, the Convention relating to the Status of Refugees, [174] and the European Convention on Human Rights. [175]

Furthermore, having regard to the principle of sincere cooperation [176] and in order to ensure, as far as possible, the consistency of the decisions taken by the competent authorities of two Member States, on the need for international protection of the same third-country national or stateless person, it must be held that the competent authority of the Member State called upon to decide on the new application must, as soon as possible, initiate an exchange of information with the competent authority of the Member State which previously granted refugee status to the same applicant. In that regard, it is for the first of those authorities to inform the second of the new application, to send it its opinion on that new application and to obtain from it, within a reasonable time, the information in its possession that led to refugee status being granted. That exchange of information is intended to ensure that the authority of the Member State to which the new application has been made is in a position to proceed on a fully informed basis with the checks which it is required to carry out under the international protection procedure.

c. Effect of the decision granting refugee status in the event of an extradition request from a third State

Judgment of 18 June 2024 (Grand Chamber), *Generalstaatsanwaltschaft Hamm (Request for extradition of a refugee to Türkiye)* (C-352/22, EU:C:2024:521)

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

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

---

173 See recital 12 of Directive 2011/95.

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

175 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

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

In 2010, the Italian authorities granted refugee status, valid until 2030, to A., a Turkish national of Kurdish origin, on the ground that he was at risk of political persecution by the Turkish authorities because of his support for the Kurdistan Workers' Party (PKK). A. has resided in Germany since July 2019.

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

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

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

Findings of the Court

By its judgment, the Court finds, first of all, that, since the decision of a Member State to allow a request for extradition issued by the State of origin in respect of a third-country national who has been granted refugee status in another Member State would have the effect of depriving that person of the rights and benefits laid down in Directive 2011/95, [177] the extradition procedure conducted in the first Member State must be regarded as implementing EU law, for the purposes of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Therefore, the competent authority of the requested Member State cannot authorise the extradition to a third country of a national of that third country who has been granted refugee status by another Member State if that extradition would be contrary to the principle of non-refoulement, laid down in Article 21(1) of Directive 2011/95, read in conjunction with Article 18 and Article 19(2) of the Charter. [178]

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

For the purpose of assessing the risk of infringement of Article 21(1) of Directive 2011/95 and of Article 18 and Article 19(2) of the Charter, the fact that another Member State granted the requested individual refugee status is a particularly substantial piece of evidence which the competent authority of the requested Member State must take into account, so that a decision granting refugee status

---

177 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).

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

must lead that authority to refuse extradition, in accordance with those provisions, provided that that refugee status has not been revoked or withdrawn by the Member State that granted it. The Common European Asylum System is based on the principle of mutual trust, in accordance with which it must be presumed, save in exceptional circumstances, that the treatment of applicants for international protection in each Member State complies with the requirements of EU law, the Geneva Convention [179] and the Convention for the Protection of Human Rights and Fundamental Freedoms. [180]

In addition, the provisions of Directives 2011/95 and 2013/32 [181] relating to the revocation and withdrawal of refugee status and the procedure they lay down would be circumvented if the requested Member State could extradite a third-country national who had been granted refugee status by another Member State to his or her country of origin. Such an extradition would, de facto, effectively end that status and deprive the person concerned of the effective enjoyment of the protection afforded by Article 18 of the Charter, of the rights and benefits provided for, as regards the content of international protection, by Chapter VII of Directive 2011/95, and of the procedural guarantees set out in Article 45 of Directive 2013/32.

Accordingly, on the basis of the principle of sincere cooperation, [182] the competent extradition authority of the requested Member State must initiate, as soon as possible, an exchange of information with the authority of the other Member State which granted the requested individual refugee status. On that basis, it is required to inform the latter authority of the request for extradition relating to that individual, to send it its opinion on that request and to obtain from it, within a reasonable period, both the information in its possession that led to refugee status being granted and its decision as to whether or not it is necessary to revoke or withdraw that individual's refugee status.

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

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

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

Consequently, under Article 21(1) of Directive 2011/95, read in conjunction with Article 18 and Article 19(2) of the Charter, where a third-country national who has been granted refugee status in one Member State is the subject, in another Member State, on whose territory he or she resides, of an

---

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

180 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

181 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).

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

extradition request from his or her country of origin, the requested Member State cannot authorise extradition unless it has initiated an exchange of information with the authority that granted the requested individual refugee status and where that status has not been revoked by that authority.

d. Temporary protection in the event of a mass influx of displaced persons

Judgment of 19 December 2024 (Grand Chamber), *Kaduna* (C-244/24 and C-290/24, EU:C:2024:1038)

(Reference for a preliminary ruling – Asylum policy – Temporary protection in the event of a mass influx of displaced persons – Directive 2001/55/EC – Articles 4 and 7 – Invasion of Ukraine by Russian armed forces – Implementing Decision (EU) 2022/382 – Article 2(3) – Option for a Member State to grant temporary protection to displaced persons who are not referred to in that decision – Point in time when a Member State that has granted such persons temporary protection may terminate that protection – Return of illegally staying third-country nationals – Directive 2008/115/EC – Article 6 – Return decision – Point in time when a Member State may issue a return decision – Illegal stay)

Ruling on two references for a preliminary ruling, the Grand Chamber of the Court of Justice specifies at what point in time a Member State may end the optional temporary protection which it has granted, on the basis of Directive 2001/55 [183] and Implementing Decision 2022/382, [184] to certain categories of displaced persons other than those referred to in that implementing decision and at what point in time a Member State may issue a return decision, in accordance with Directive 2008/115, [185] with respect to persons no longer enjoying such protection.

P, AI, ZY and BG are third-country nationals who held temporary residence permits valid in Ukraine on 24 February 2022. After the Russian armed forces invaded Ukraine, they fled to the Netherlands, where they were granted temporary protection under Directive 2001/55, in accordance with the Netherlands legislation applicable at that time. [186] Under that legislation, the benefit of optional temporary protection was granted to all holders of Ukrainian residence permits, including temporary

---

183 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12). Article 7(1) of Directive 2001/55 allows the Member States to extend the temporary protection provided for by that directive to categories of individuals other than those designated by the Council in the decision to which Article 5 of the directive refers and which implements the temporary protection, provided that such persons have been displaced for the same reasons and from the same country or region of origin.

184 By Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection (OJ 2022 L 71, p. 1; 'the Implementing Decision'), the Council decided to activate the temporary protection mechanism provided for in Directive 2001/55. Under Article 2(3) of the Implementing Decision, the Member States may also apply that decision to persons other than those referred to in Article 2(1) and (2), including stateless persons and nationals of third countries other than Ukraine who were residing legally in Ukraine and who were unable to return in safe and durable conditions to their country or region of origin.

185 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).

186 Article 3.9a(1)(c) of the Voorschrift Vreemdelingen 2000 (2000 Regulation on foreign nationals), in the version in force between 4 March and 18 July 2022.

permits, valid on 23 February 2022 who were likely to have left Ukraine after 26 November 2021. [187] The Netherlands legislation did not require any assessment to be made of whether or not such persons were able to return in safe and durable conditions to their country or region of origin.

By a judgment of 17 January 2024, the Raad van State (Council of State, Netherlands) held that the temporary protection afforded to third-country nationals in the situation in which P, AI, ZY and BG found themselves would end automatically on 4 March 2024, that being the date [188] on which the temporary protection would have ceased had the Council not adopted a decision in accordance with Article 4(2) of Directive 2001/55. [189] Consequently, by four return decisions under Directive 2008/115, issued on 7 February 2024, the State Secretary [190] ordered P, AI, ZY and BG to leave the territory of the European Union within a period of four weeks commencing on 4 March 2024.

P brought an appeal before the Rechtbank Den Haag, zittingsplaats Amsterdam (District Court, the Hague, sitting in Amsterdam, Netherlands), disputing the legality of the decision concerning him.

The appeals brought by AI and BG against the decisions concerning them were upheld at first instance by judgments of 19 March and 27 March 2024. The State Secretary has brought appeals against those judgments before the Council of State. The appeal brought by ZY against the decision concerning him was, on the other hand, dismissed at first instance as unfounded, by a judgment of 27 March 2024, and ZY has brought an appeal against that judgment before the Council of State.

In the course of these disputes, the two referring courts have made references to the Court of Justice for a preliminary ruling. First, while it is necessary, in order to resolve the disputes, to determine the date on which the optional temporary protection granted by the Netherlands authorities in accordance with Directive 2001/55 ceases, those authorities harbour doubts as to whether the benefit of that protection may be withdrawn before mandatory temporary protection [191] comes to an end. Secondly, they are in doubt as to the lawfulness of the return decisions issued with respect to the appellants in the main proceedings, because those decisions were issued on a date when they were still staying legally in the Netherlands.

Findings of the Court

In the first place, the Court examines whether Articles 4 and 7 of Directive 2001/55 preclude a Member State that has granted temporary protection to categories of persons other than those referred to in Article 2(1) and (2) of the Implementing Decision from withdrawing the benefit of that optional temporary protection from those categories of persons before the mandatory temporary protection decided on by the Council under Article 4(2) of Directive 2001/55 comes to an end.

The Court begins by holding that a Member State which makes use of the option afforded by Article 7(1) of Directive 2001/55 is implementing EU law and consequently may not grant optional

---

187 90 days before the invasion of Ukraine by Russian armed forces.

188 This date being determined by Article 4(1) of Directive 2001/55, which provides that, '[w]ithout prejudice to Article 6, the duration of temporary protection shall be one year. Unless terminated under the terms of Article 6(1)(b), it may be extended automatically by six monthly periods for a maximum of one year.'

189 Article 4(2) of Directive 2001/55 provides that, '[w]here reasons for temporary protection persist, the Council may decide by qualified majority, on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council, to extend that temporary protection by up to one year.'

190 The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands; 'the State Secretary').

191 Mandatory temporary protection arises from the Council's adoption of a decision under Article 5 of Directive 2001/55 establishing the existence of a mass influx of displaced persons. The effect of such a decision is to introduce temporary protection in all the Member States bound by Directive 2001/55 for the specific groups of persons described in the Council's decision, as from the date specified that decision.

temporary protection to persons who have not been displaced for the same reasons and from the same country or region of origin as persons who enjoy mandatory temporary protection.

In that context, the Court notes that Article 7(1) of Directive 2001/55 and Article 2(3) of the Implementing Decision allow Member States to grant optional temporary protection to third-country nationals and stateless persons holding a temporary residence permit valid in Ukraine on 23 February 2022 who are likely to have left that country after 26 November 2021, without assessing whether or not such persons are able to return in safe and durable conditions to their country or region of origin. First, the reason for introducing mandatory temporary protection, identified by the Council in the Implementing Decision, is the invasion of Ukraine by Russian armed forces launched on 24 February 2022. Third-country nationals and stateless persons who, because of the very limited duration of their right of residence on the territory of the European Union, would have been obliged to return to Ukraine only shortly after that invasion was launched, are in a comparable situation to persons displaced as a result of the invasion. Secondly, although Article 2(3) of the Implementing Decision expressly refers, among the potential beneficiaries of optional temporary protection, to stateless persons and third-country nationals who were residing legally in Ukraine and who are unable to return in safe and durable conditions to their country or region of origin, that category of persons is mentioned merely by way of example.

Next, noting that the optional temporary protection granted by the Netherlands authorities to third-country nationals such as the appellants in the main proceedings ceased before the end of mandatory temporary protection, the Court considers whether Articles 4 and 7 of Directive 2001/55 require the benefit of that optional temporary protection to continue for as long as the mandatory temporary protection, introduced by the Council under Article 5 of that directive, continues in effect, or at least until the end of the automatic extension of the initial duration of that mandatory temporary protection, referred to in Article 4(1) of that directive.

In that regard, the Court holds that, under Article 7(1) of Directive 2001/55, the Member States can make an autonomous decision to terminate the optional temporary protection that they have granted before the mandatory temporary protection, provided for at EU level, ends. [192]

First, Article 7(1) of Directive 2001/55 leaves the Member States free to set the date from which they wish to grant optional temporary protection, provided that that date is not before the date on which mandatory temporary protection comes into effect or after the date on which it ends. Secondly, the Member States retain control over the duration of the optional temporary protection they wish to grant, provided that that duration falls within the time frame for implementation of the temporary protection mechanism defined at EU level. Since such protection does not arise from an obligation laid down in EU law, but from the autonomous decision of a Member State to enlarge the circle of beneficiaries of that protection, that Member State should be able to make an autonomous decision also to withdraw that protection.

Moreover, that interpretation of Article 7(1) of Directive 2001/55 is supported both by the objective pursued by that provision, which is to encourage the Member States to extend the categories of displaced persons who can benefit from temporary protection, and by the more general objective of that directive, which is to prevent congestion in the system for granting international protection. Indeed, prohibiting a Member State from withdrawing, for reasons of its own, optional temporary protection before mandatory temporary protection, provided for at EU level, comes to an end would have the effect of discouraging the Member States from implementing the option provided for in Article 7 of Directive 2001/55 and would therefore thwart the objectives pursued by that provision and by that directive.

---

192 The Court adds that the Member States are therefore not obliged to align the duration of that optional temporary protection with the initial duration of the mandatory temporary protection or with the automatic extension period provided for in Article 4(1) of Directive 2001/55 or, where applicable, with the optional extension period provided for in Article 4(2) of that directive.

Nevertheless, any such decision to withdraw must not undermine either the objectives or the effectiveness of Directive 2001/55 and must comply with the general principles of EU law, in particular, the principle of the protection of legitimate expectations.

As regards, first of all, safeguarding the objectives and effectiveness of Directive 2001/55, that directive is intended, inter alia, to ensure that third-country nationals and stateless persons enjoying temporary protection continue to have a real opportunity to obtain international protection once their individual situation has been examined appropriately, while at the same time immediately ensuring that they enjoy protection on a lesser scale. It would therefore run counter to that objective and to the effectiveness of that directive if the examination of any application for international protection that such third-country nationals or stateless persons may have made, and on which no decision has yet been reached, were not completed after optional temporary protection has come to an end. Moreover, once optional temporary protection has ended, such persons cannot be prevented from effectively exercising their right to make an application for international protection, which is an essential step in the procedure for granting international protection. Accordingly, the mere fact that a beneficiary of temporary protection has not responded positively to an inquiry from the authorities of the Member State concerned as to whether he or she wishes his or her application for international protection to continue to be examined cannot have the consequence that any application for international protection he or she may make thereafter be classified as a subsequent application within the meaning of Article 2(q) of Directive 2013/32. [193]

Secondly, as regards the principle of the protection of legitimate expectations, individuals cannot have a legitimate expectation that an existing situation which is capable of being altered by the EU institutions in the exercise of their discretionary power will be maintained. In this case, the Council can bring mandatory temporary protection to an end at any time [194] and the Member States cannot make any optional temporary protection that they may have introduced continue in effect after the date on which mandatory temporary protection ends. [195] It follows that the Netherlands authorities could not have given the beneficiaries of optional temporary protection any precise assurances in accordance with EU law regarding the minimum duration of that protection other than the assurance that they had undertaken not to terminate the optional temporary protection before mandatory temporary protection comes to an end. Nevertheless, it does not appear that the Netherlands authorities gave the third-country nationals in the cases in the main proceedings any such assurance, although that is a point for the referring courts to check.

The Court concludes that Articles 4 and 7 of Directive 2001/55 do not preclude a Member State, which has granted temporary protection to categories of persons other than those referred to in the Implementing Decision, from withdrawing from those categories of persons the benefit of that optional temporary protection before the mandatory temporary protection, decided on by the Council in accordance with Article 4(2) of that directive, comes to an end. [196]

In the second place, the Court holds that Article 6 of Directive 2008/115 precludes the issuing of a return decision in respect of a third-country national who is legally staying in the territory of a Member State by virtue of the option exercised by that Member State to grant optional temporary protection, as provided for in Article 7 of Directive 2001/55, to that third-country national before the

---

193 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).

194 See Article 6(1)(b) of Directive 2001/55.

195 See Article 7 of Directive 2001/55.

196 That Member State may withdraw the benefit of the temporary protection which it has granted to such categories of persons on a date preceding that on which the temporary protection decided on by the Council comes to an end, provided, in particular, that that Member State does not undermine either the objectives or the effectiveness of Directive 2001/55 and observes the general principles of EU law.

date on which that protection ends, including where it appears that that protection will cease to have effect on a date in the near future and the effects of the return decision are suspended until that date.

First, Directive 2008/115 precludes the issuing by a Member State of a return decision in respect of a third-country national who is staying legally in its territory, even if the competent authorities expressly state in the return decision that it will not take effect as long as the stay of the person concerned continues to be legal. Indeed, as soon as a Member State has issued a return decision, it must without delay enter an alert in the Schengen Information System, for the purposes of 'verifying that the obligation to return has been complied with and of supporting the enforcement of … return decisions', [197] including if the return decision does not take immediate effect. In such latter case, however, on the date when the alert is entered, the person concerned will still be staying legally in the territory of the Member State concerned and may have the right to travel to other Member States. Moreover, if a return decision were to be issued prematurely, no account could be taken of possible changes in circumstances in the period between the decision being issued and the end of the legal stay of the person concerned that could be of significance in the assessment of his or her situation.

Secondly, for as long as third-country nationals enjoy optional temporary protection, their stay in the Member State concerned is legal and therefore no return decision may be issued in respect of them. Indeed, the beneficiaries of such protection must enjoy all of the rights that are conferred by Directive 2001/55 on beneficiaries of mandatory temporary protection. [198] Accordingly, since the beneficiaries of mandatory temporary protection must be issued by the Member State concerned with a residence permit allowing him or her to reside on the territory of that Member State, [199] residence permits must also be issued to beneficiaries of optional temporary protection.

Thirdly, while there is a risk that, when optional temporary protection comes to an end, the national authorities responsible for issuing return decisions will be faced with a significant number of individuals whose situations must be examined simultaneously, that risk is not in itself sufficient to permit any derogation from the abovementioned principle. Furthermore, while the removal of illegally staying third-country nationals is, in principle, a matter of priority for the Member States, the Member States must also observe the substantive and procedural requirements imposed on them by EU law, so that such third-country nationals are returned in a humane manner and with full respect for their fundamental rights and dignity. Accordingly, where the authorities of a Member State responsible for issuing return decisions are faced with a very significant number of individuals whose cases must be examined simultaneously, because optional temporary protection has come to an end, Directive 2008/115 merely precludes such authorities from delaying for longer than is reasonable in such circumstances the issuing of the necessary return decisions in respect of the third-country nationals and stateless persons who have enjoyed such protection.

---

197 See Article 3(1) of Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals (OJ 2018 L 312, p. 1).

198 See Article 7 of Directive 2001/55.

199 See Article 8 of Directive 2001/55, read in conjunction with Article 2(g) thereof.

2. Immigration policy

Judgment of 30 January 2024 (Grand Chamber), *Landeshauptmann von Wien (Family reunification with a minor refugee)* (C-560/20, EU:C:2024:96)

(Reference for a preliminary ruling – Area of freedom, security and justice – Immigration policy – Right to family reunification – Directive 2003/86/EC – Article 10(3)(a) – Family reunification of an unaccompanied minor refugee with his or her first-degree relatives in the direct ascending line – Article 2(f) – Concept of 'unaccompanied minor' – Minor sponsor at the time of submission of the application but who attained majority during the family reunification procedure – Relevant date for assessing minor status – Period for submitting an application for family reunification – Adult sister of the sponsor requiring the permanent assistance of her parents on account of a serious illness – Effectiveness of the right to family reunification of an unaccompanied minor refugee – Article 7(1) – Article 12(1), first and third subparagraphs – Possibility of making family reunification subject to additional conditions)

Ruling on questions referred for a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, specifies the conditions of eligibility for family reunification, pursuant to Directive 2003/86, [200] of the parents and seriously ill sister of an unaccompanied minor refugee who reached majority during the family reunification procedure.

Having arrived in Austria in 2015 as an unaccompanied minor, RI was granted refugee status there in January 2017. Three months and one day after notification of that decision, when RI was still a minor, CR and GF, his parents, and TY, his adult sister suffering from cerebral palsy, submitted, for the first time, to the Embassy of the Republic of Austria in Syria, applications for entry and residence for the purposes of family reunification with RI. Those applications were rejected by a final decision on the ground that RI had become an adult during the family reunification procedure.

In July 2018, CR, GF and TY again submitted, to the Landeshauptmann von Wien (Governor of the Province of Vienna, Austria), applications for entry and residence for the purposes of family reunification with RI. Those were, once again, rejected on the ground that they had not been submitted within three months of the date on which RI's refugee status had been recognised.

Hearing a challenge by CR, GF and TY against that rejection, the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) decided to refer questions to the Court of Justice on the interpretation of Directive 2003/86. In particular, the referring court asks whether the submission of an application for family reunification with an unaccompanied minor refugee can be subject to a specified period where the refugee reaches majority during the family reunification procedure. It also questions the scope of the possibility of the Member States to require the refugee to have, for him or herself and the members of his or her family, accommodation, sickness insurance and sufficient resources, as is provided for by Directive 2003/86 [201] and transposed into Austrian law. In addition, that court notes that Austrian law does not provide for a right to family reunification for the sponsor's sister. However, TY being totally and permanently dependent on the assistance of her parents, they cannot join their son in Austria without taking TY with them.

Findings of the Court

In the first place, as regards the requirement laid down in the judgment in *A and S* [202] that an application for family reunification of an unaccompanied minor refugee with his or her parents, [203]

---

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

201 See Article 7(1) and the third subparagraph of Article 12(1) of Directive 2003/86.

202 Judgment of 12 April 2018, *A and S* (C-550/16, EU:C:2018:248, paragraph 61).

pursuant to Article 10(3)(a) of Directive 2003/86, must be submitted within three months of the grant of refugee status to the minor, the Court emphasises that that period is intended to avoid the risk that the right to family reunification may be relied on without any time limit in the situation where the refugee has already reached majority during the asylum procedure and thus even before the application for family reunification has been submitted.

However, there is no such risk where the refugee reaches majority during the family reunification procedure. Moreover, in the light of the objective of Article 10(3)(a) of Directive 2003/86, which is to promote the reunification of unaccompanied minor refugees with their parents and guarantee them an additional protection, an application for family reunification under that provision cannot be regarded as being out of time if it was submitted when the refugee concerned was still a minor. Thus, a period for the submission of such an application cannot begin to run before the refugee has reached the age of majority. Consequently, as long as the refugee is a minor, his or her parents may submit an application for entry and residence for the purposes of family reunification with that refugee, without being required to comply with a specified period.

In the second place, the Court notes that it is apparent from the order for reference that, on account of her illness, TY is totally and permanently dependent on the material assistance of her parents, who cannot therefore leave her alone in Syria. In those circumstances, if TY were not approved for family reunification with RI at the same time as her parents, RI would, de facto, be deprived of his right to family reunification with his parents. Such an outcome would be incompatible with the unconditional nature of that right and would undermine its effectiveness, disregarding both the objective of Article 10(3)(a) of Directive 2003/86 and the requirements arising from Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, and from Article 24(2) and (3) of the Charter, [204] relating to the rights of the child, which that directive is obliged to guarantee.

It follows that, in the light of the exceptional circumstances of the case in the main proceedings, the effectiveness of RI's right to family reunification with his parents and compliance with the said provisions of the Charter require that an entry and residence permit be granted in Austria also to RI's adult sister, who requires the permanent assistance of her parents on account of a serious illness.

In the last place, in the light of Directive 2003/86 and of the aforementioned fundamental rights, the Court concludes that a Member State cannot require that, in order to be able to benefit from the right to family reunification with his or her parents under Article 10(3)(a) of Directive 2003/86, an unaccompanied minor refugee or his or her parents must have, within the meaning of Article 7(1) of that directive, accommodation, sickness insurance and stable, regular and sufficient resources, irrespective of whether the application for family reunification has been submitted within three months of the grant of refugee status. [205]

It is practically impossible for an unaccompanied minor refugee to meet those conditions. Likewise, it is extremely difficult for the parents of such a minor to meet them before even having joined their child in the Member State concerned. Thus, to make the possibility of family reunification of unaccompanied minor refugees with their parents dependent on compliance with those conditions would, in reality, be tantamount to depriving those minors of their right to such reunification.

---

203 In the wording of Article 10(3)(a) of Directive 2003/86, 'first-degree relatives in the direct ascending line'.

204 Obligation to have regard to the child's best interests and recognition of the need for the child to maintain on a regular basis a personal relationship with both parents.

205 In accordance with the third subparagraph of Article 12(1) of Directive 2003/86, Member States may require the refugee to meet the conditions referred to in Article 7(1) if the application for family reunification is not submitted within that period.

Furthermore, in so far as the effectiveness of RI's right to family reunification with his parents requires, in the light of TY's situation, an entry and residence permit to be granted also to her, the Member State concerned also cannot require RI or his parents to meet the conditions laid down in Article 7(1) of that directive with regard to the seriously ill sister of that minor refugee.

Judgment of 29 July 2024 (Grand Chamber), *CU and ND (Social assistance – Indirect discrimination)* (C-112/22 and C-223/22, EU:C:2024:636)

(Reference for a preliminary ruling – Status of third-country nationals who are long-term residents – Directive 2003/109/EC – Article 11(1)(d) – Equal treatment – Social security, social assistance and social protection measures – Residency condition of 10 years, the final 2 years of which must be consecutive – Indirect discrimination)

The Court of Justice, to which the Tribunale di Napoli (District Court, Naples, Italy) referred a request for a preliminary ruling, rules on the principle of equal treatment between third-country nationals who are long-term residents and nationals laid down in Article 11 of Directive 2003/109 [206] and, more specifically, on whether access to a social security, social assistance or social protection measure within the meaning of Article 11(1)(d) may be made subject to the condition of having resided in the Member State concerned for at least 10 years, the final 2 years of which must be uninterrupted.

In 2020, CU and ND, third-country nationals who are long-term residents in Italy, applied for 'basic income', a social benefit intended to ensure a minimum level of subsistence. They were subsequently prosecuted for having falsely declared, in their applications, that they satisfied the eligibility criteria for that benefit, including the condition of having resided in Italy for a minimum period of 10 years, the final 2 years of which must be consecutive.

In those circumstances, the District Court, Naples, was uncertain as to whether that condition for granting the benefit, which also applies to Italian nationals, was consistent with EU law. That court considers that that requirement establishes less favourable treatment of third-country nationals, including those who hold long-term residence permits, compared to that accorded to nationals.

Findings of the Court

The Court begins by recalling that, where a provision of EU law, such as Article 11(1)(d) of Directive 2003/109, makes an express reference to national law, it is not for the Court to give the terms concerned an autonomous and uniform definition under EU law. However, the absence of any autonomous and uniform definition under EU law of the concepts of 'social security', 'social assistance' and 'social protection' and the reference to national law, in that provision, relating to those concepts do not mean that the Member States may undermine the effectiveness of Directive 2003/109 when applying the principle of equal treatment provided for in that provision In addition, when determining the social security, social assistance and social protection measures defined by their national law, the Member States must comply with the rights and observe the principles provided for by the Charter of Fundamental Rights of the European Union ('the Charter'), including those laid down in Article 34 thereof.

Given that both Article 34 of the Charter and Article 11(1)(d) of Directive 2003/109 refer to national law, it is for the referring court to determine whether the 'basic income' in question in the main proceedings constitutes a social benefit covered by the directive.

The Court goes on to emphasise that the system put in place by Directive 2003/109 makes acquisition of long-term resident status conferred by that directive subject to a specific procedure and, in

206 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

addition, to fulfilment of certain conditions, including a condition of legal and continuous residence of five years in national territory. In so far as that status corresponds to the highest level of integration for third-country nationals, it justifies them being guaranteed equal treatment with nationals of the host Member State, as regards, in particular, social security, social assistance and social protection.

Next, regarding the residency condition at issue in the main proceedings, the Court considers that a residency condition of 10 years, the final 2 years of which must be consecutive, is contrary to Article 11(1)(d) of Directive 2003/109.

In the first place, the difference in treatment between third-country nationals who are long-term residents and nationals, which results from national legislation laying down such a residency condition, constitutes indirect discrimination. That condition affects primarily non-nationals, including third-country nationals, but also the interests of Italian nationals who return to Italy after a period of residence in another Member State. That being said, a measure may be regarded as indirectly discriminatory without there being any need for it to have the effect of placing all nationals at an advantage or placing only third-country nationals who are long-term residents at a disadvantage, but not nationals of the State in question.

In the second place, such discrimination is, in principle, prohibited, unless it is justified objectively.

However, Article 11(2) of Directive 2003/109 provides an exhaustive list of the situations in which Member States may derogate, as regards residence, from equal treatment between third-country nationals who are long-term residents and nationals. Accordingly, outside those situations, a difference in treatment between those two categories of nationals is, in itself, an infringement of Article 11(1)(d) of that directive.

In particular, a difference in treatment between third-country nationals who are long-term residents and nationals of the Member State concerned cannot be justified by the fact that they are in a different situation on account of their respective links with that Member State.

The five-year legal and continuous residence period provided for by Directive 2003/109 in order to obtain long-term resident status shows that the person has ‘put down roots in the country’. Accordingly, it must be regarded as sufficient for that person to be entitled, after acquiring long-term resident status, to equal treatment compared with nationals, in particular as regards social security, social assistance and social protection, in accordance with Article 11(1)(d) of that directive.

As a result, a Member State cannot extend unilaterally the required period of residence for such a long-term resident to enjoy the right guaranteed by that provision.

Last, regarding the criminal penalty provided for by national legislation in the event of a false declaration regarding the conditions for accessing the social benefit in question, the Court recalls that a national penalty mechanism is not compatible with the provisions of Directive 2003/109 where it is imposed in order to ensure compliance with an obligation which itself does not comply with those provisions.

Having regard to the foregoing, the Court rules that Article 11(1)(d) of Directive 2003/109, read in the light of Article 34 of the Charter, precludes legislation of a Member State which makes access for third-country nationals who are long-term residents to a social security, social assistance or social protection measure conditional on the requirement, which also applies to nationals of that Member State, of having resided in that Member State for at least 10 years, the final 2 years of which must be consecutive, and which provides for a criminal penalty for any false declaration regarding that residency condition.

3. Border control

Judgment of 21 March 2024 (Grand Chamber), *Landeshauptstadt Wiesbaden* (C-61/22, EU:C:2024:251)

(Reference for a preliminary ruling – Regulation (EU) 2019/1157 – Strengthening the security of identity cards of EU citizens – Validity – Legal basis – Article 21(2) TFEU – Article 77(3) TFEU – Regulation (EU) 2019/1157 – Article 3(5) – Obligation for Member States to include two fingerprints in interoperable digital formats in the storage medium of identity cards – Article 7 of the Charter of Fundamental Rights of the European Union – Respect for private and family life – Article 8 of the Charter of Fundamental Rights – Protection of personal data – Regulation (EU) 2016/679 – Article 35 – Obligation to carry out a data protection impact assessment – Maintaining the effects for a certain time of a regulation which has been declared invalid)

Having received a reference for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany), the Court of Justice, sitting in Grand Chamber formation, declares invalid Regulation 2019/1157 [207] on strengthening the security of identity cards of Union citizens, in so far as it was adopted on an incorrect legal basis. It notes, however, that the mandatory insertion in identity cards of two fingerprints, provided for by that regulation, is compatible, inter alia, with the fundamental rights to respect for private life and to the protection of personal data. The Court is therefore maintaining its effects until the entry into force of a new regulation, based on the appropriate specific legal basis, and intended to replace it.

In November 2021, the applicant in the main proceedings applied to the City of Wiesbaden [208] for a new identity card to be issued, requesting that it should not contain his fingerprints. The City of Wiesbaden rejected that application on the ground, inter alia, that, since 2 August 2021, the inclusion of two fingerprints in the storage medium of identity cards had been mandatory under the provision of national law which transposes, in essence, Article 3(5) of Regulation 2019/1157.

On 21 December 2021, the applicant in the main proceedings brought an action before the referring court against the decision of the City of Wiesbaden, seeking an order requiring the City of Wiesbaden to issue him with an identity card with no fingerprints being collected.

Since it had doubts as to the lawfulness of the grounds of the contested decision owing to the fact that the validity of Regulation 2019/1157 could itself be disputed, the referring court stayed the proceedings and asked the Court whether that regulation is invalid on the grounds that, first, it had been incorrectly been adopted on the basis of Article 21(2) TFEU instead of Article 77(3) TFEU, second, it infringed the General Data Protection Regulation, [209] and, third, it infringed Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. [210]

---

207 Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ 2019 L 188, p. 67).

208 Landeshauptstadt Wiesbaden (City of Wiesbaden, Land capital, Germany).

209 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').

210 'The Charter'. Those provisions concern respect for private and family life and the protection of personal data, respectively.

Findings of the Court

The first ground of invalidity: incorrect legal basis

As regards the respective scopes of Article 21(2) TFEU and Article 77(3) TFEU, the Court notes that the competence conferred on the European Union by the first of those two provisions to adopt the provisions necessary to facilitate the exercise of the right of citizens of the European Union to move and reside freely within the territory of the Member States [211] is subject to the powers laid down to that effect by the Treaties. Article 77(3) TFEU [212] expressly lays down such powers in relation to the adoption of provisions concerning passports, identity cards, residence permits or any other such document issued to citizens of the European Union for the purpose of facilitating the exercise of the right to move and reside freely.

It is true that Article 77(3) TFEU falls within the title of the TFEU which concerns the area of freedom, security and justice and the chapter entitled 'Policies on border checks, asylum and immigration'. However, it follows from Article 77(1) TFEU that the European Union is to develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders, to carrying out checks on persons and efficient monitoring of the crossing of external borders, and to the gradual introduction of an integrated management system for such borders. The provisions [213] referred to in Article 77(3) TFEU form an integral part of any such EU policy. As regards EU citizens, those documents enable them, inter alia, to certify that they benefit from the right to move and reside freely, and therefore to exercise that right. Consequently, Article 77(3) TFEU is capable of providing the basis for the adoption of measures relating to those documents if such action appears necessary to facilitate the exercise of the right to move and reside freely.

That interpretation of the scope of Article 77(3) TFEU cannot be invalidated either by the historical development of the Treaties in relation to the European Union's competence to adopt measures relating to, inter alia, passports and identity cards, or by the fact that that provision states that it is to apply 'if the Treaties have not provided the necessary powers'.

In that regard, the Court notes, first, that it is true that the Treaty of Lisbon removed the provision [214] which expressly excluded the EU legislature from having recourse to Article 18(2) EC (now Article 21(2) TFEU) as the legal basis for the adoption of, inter alia, 'provisions concerning passports [and] identity cards'. However, at the same time, that treaty expressly conferred on the European Union a power to take action in that field, in Article 77(3) TFEU, making the adoption of measures in that field subject to a special legislative procedure and, in particular, to unanimity in the Council.

In those circumstances, that removal cannot mean that it would from then on be possible to adopt provisions concerning passports and identity cards on the basis of Article 21(2) TFEU. On the contrary, it follows from the historical treaty development that, by means of Article 77(3) TFEU, the authors of the Treaties intended to confer on the European Union a competence for the adoption of such provisions intended to facilitate the exercise of the right to move and reside freely, which is more specific than the more general competence laid down in Article 21(2) TFEU.

---

211 Right referred to in Article 20(2)(a) TFEU ('the right to move and reside freely').

212 That provision states that 'if action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.'

213 Namely, the provisions concerning passports and identity cards, residence permits or any other such document ('the provisions concerning passports and identity cards').

214 Previously set out in Article 18(3) EC.

Second, the Court interprets the statement that Article 77(3) TFEU is to apply 'if the Treaties have not provided the necessary powers', as meaning that the powers referred to are conferred not by a provision with a more general scope, such as Article 21(2) TFEU, but by a provision which is even more specific.

From that, the Court infers that Regulation 2019/1157 could be adopted on the basis of Article 21(2) TFEU only if the purpose or the main or predominant component of that regulation were to fall outside the specific scope of Article 77(3) TFEU, which concerns, for the purposes of facilitating the exercise of the right to move and reside freely, the issuing of passports, identity cards, residence permits or any other such document.

It follows from the purpose and main components of Regulation 2019/1157 that that regulation falls within the specific scope of Article 77(3) TFEU. Consequently, by adopting that regulation on the basis of Article 21(2) TFEU, and having done so in accordance with the ordinary legislative procedure, the EU legislature had recourse to an incorrect legal basis, which is such as to result in the invalidity of that regulation.

The second ground of invalidity: infringement of Article 35(10) of the GDPR

Noting that Regulation 2019/1157 does not undertake any operation applied to personal data, but merely provides for Member States to carry out certain processing operations where an application for an identity card is made, the Court finds that Article 35(1) of the GDPR [215] did not apply when Regulation 2019/1157 was adopted. Since Article 35(10) of the GDPR establishes a derogation to Article 35(1) thereof, it was not possible therefore for the adoption of Regulation 2019/1157 to infringe Article 35(10).

The third ground of invalidity: infringement of Articles 7 and 8 of the Charter

In the first place, the Court states that the obligation to include two complete fingerprints in the storage medium of identity cards issued by Member States, laid down in Article 3(5) of Regulation 2019/1157, constitutes a limitation both of the right to respect for private life and of the right to the protection of personal data, enshrined in Articles 7 and 8 of the Charter respectively. [216] In addition, that obligation involves carrying out, in advance, two successive personal data processing operations, namely the collection of those fingerprints from the data subject, then the temporary storage of those fingerprints for the purposes of personalisation of identity cards, which also constitute limitations of the rights enshrined in Articles 7 and 8 of the Charter.

In the second place, the Court examines whether the limitations in question are justified and proportionate.

In that regard, it considers, first, that the limitations in question comply with the principle of legality and do not adversely affect the essence of the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Second, as regards the principle of proportionality, the Court states, first, that the measure in question pursues a number of objectives of general interest recognised by the European Union, namely combating the production of false identity cards and identity theft, and the interoperability of verification systems, and that it is appropriate for attaining those objectives. The inclusion of

---

215 That provision lays down the obligation, for the [person responsible/controller] for processing personal data which is likely to result in a high risk to the rights and freedoms of natural persons, prior to the processing, to carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

216 Those limitations on the exercise of the fundamental rights guaranteed in Articles 7 and 8 of the Charter, on the one hand, and the obligation to include two complete fingerprints in the storage medium for identity cards, on the other, are referred to below as 'the limitations in question' and 'the measure in question' respectively.

fingerprints in identity cards makes it more difficult to produce false identity cards. It also makes it possible reliably to verify the authenticity of the identity card and the identity of the cardholder, thereby reducing the risk of fraud. As regards the objective of interoperability of identification document verification systems, the use of complete fingerprints makes it possible to ensure compatibility with all automated systems for the identification of fingerprints used by the Member States, even though such systems do not necessarily use the same identification mechanism.

Second, the Court considers that the limitations in question comply with what is strictly necessary in order to attain the objectives pursued.

As regards the very principle of including fingerprints in the storage medium of identity cards, it is a reliable and effective means of establishing, with certainty, a person's identity. In particular, simply inserting a facial image is a less effective means of identification than inserting two fingerprints in addition to that image, since various factors may alter the anatomical characteristics of the face. The process used to collect those fingerprints is, in addition, simple to implement.

As regards the inclusion of two complete fingerprints rather than just some of the characteristics of those fingerprints, apart from the fact that the second option does not offer the same guarantees as a complete fingerprint, the inclusion of a complete fingerprint is also necessary for identification document verification systems to be interoperable. Member States use different fingerprints identification technologies. The inclusion in the storage medium of the identity card of only certain fingerprint characteristics would therefore compromise the attainment of the interoperability objective.

Third, the Court considers that, having regard to the nature of the data at issue, the nature of the processing operations and the manner in which they are carried out and the safeguards laid down, the limitations thereby placed on the fundamental rights enshrined in Articles 7 and 8 of the Charter are not of a seriousness which is disproportionate when compared with the significance of the objectives pursued, but that, on the contrary, the measure in question is based on a fair balance between, on the one hand, the objectives it pursues and, on the other, the fundamental rights involved.

X. Judicial cooperation in criminal matters

1. European arrest warrant [217]

Judgment of 29 July 2024, *Breian* (C-318/24 PPU, EU:C:2024:658)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Surrender of requested persons to issuing judicial authorities – Respect for fundamental rights – Systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State – Deficiencies concerning the absence of proof of the taking of an oath by judges – Prohibition of inhuman or degrading treatment – Detention conditions in the issuing Member State – Assessment undertaken by the executing judicial authority – Refusal by the executing judicial authority to execute the European arrest warrant – Effects of that refusal for the executing judicial authority of another Member State)

Hearing a request for a preliminary ruling from the Curtea de Apel Braşov (Court of Appeal, Braşov, Romania), the Court clarifies, in the context of an urgent reference for a preliminary ruling, its case-law on the ground for non-execution of a European arrest warrant (EAW) relating to the risk of infringement of the fundamental rights of the person concerned in the event of being surrendered to the Romanian authorities.

On 17 December 2020, the Court of Appeal, Braşov, issued an EAW against P.P.R., with a view to executing a custodial sentence. P.P.R. was arrested in France in 2020, but was not surrendered to the Romanian authorities. By judgment of 29 November 2023, the cour d'appel de Paris (Court of Appeal, Paris, France) refused to execute the EAW on the ground of a risk of infringement of the fundamental right to a fair trial by an independent and impartial tribunal previously established by law. [218] According to that court, there are systemic and generalised deficiencies in the Romanian judicial system, in so far as the place where the records of the oath of office taken by judges are kept is uncertain, which gives rise to doubts regarding the proper composition of the courts in that Member State. Furthermore, in the present case, the record of the oath taken by one of the judges of the formation which imposed the custodial sentence cannot be found, while another judge of that formation took an oath only as a public prosecutor. Moreover, by a decision of the Requests Chamber of Interpol's Commission for the Control of Files (CCF), the international wanted persons notice in respect of P.P.R. was deleted from the Interpol database on the ground that the data concerning P.P.R. did not comply with Interpol's rules on the processing of personal data. That raised serious concerns, inter alia, regarding respect for fundamental rights in the proceedings against P.P.R. in Romania.

On 29 April 2024, P.P.R. was arrested in Malta on the basis of the EAW. On the same day, the Maltese executing judicial authority requested further information from the referring court, stating that P.P.R had relied on the judgment of the cour d'appel de Paris (Court of Appeal, Paris) of 29 November 2023.

Then, on 20 May 2024 the Maltese court decided not to surrender P.P.R. to the Romanian authorities, considering that it was unable to conclude, on the basis of the information on the detention conditions in Romania available to it, that the prohibition of inhuman and degrading treatment or

---

217 Reference should also be made under this heading to the following judgment: judgment of 29 July 2024 (Grand Chamber), ***Alchaster*** (C-202/24, EU:C:2024:649), presented under heading XIX.2 'Content and scope'.

218 That right is enshrined in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

punishment, provided for in Article 4 of the Charter, would be complied with if P.P.R. were to be surrendered to the Romanian authorities.

In those circumstances, the referring court decided to refer to the Court for a preliminary ruling a number of questions concerning, in essence: first of all, the effects produced, for other executing authorities and for the issuing authority, by an executing authority's refusal to execute an EAW; secondly, the reasons underlying the French and Maltese executing authorities' refusals to execute the EAW issued by the issuing authority; and, lastly, its own obligation to make a reference to the Court for a preliminary ruling following such a refusal, and its right to participate in the proceedings for the execution of the EAW before the executing authority.

Findings of the Court

In the first place, as regards the effects that a refusal to execute an EAW has for other executing authorities, the Court observes that the Framework Decision on the EAW [219] does not provide for the possibility, or obligation, for an executing authority of a Member State to refuse to execute an EAW solely on the ground that the executing authority of another Member State has refused to execute it, without examining itself whether there are any grounds for non-execution of that EAW. Thus, the executing authority of a Member State is not obliged to refuse to execute an EAW where the executing authority of another Member State has previously refused to execute it on the ground that the surrender of the person concerned may infringe the fundamental right to a fair trial. Nevertheless, within the framework of its own examination of the existence of a ground for non-execution, that authority must give due consideration to the reasons underlying the refusal decision adopted by the first executing authority.

As regards the effects of that decision on the issuing authority, the Court notes that Framework Decision 2002/584 does not preclude the possibility for that authority to maintain its request for surrender under an EAW despite the refusal to execute it. If the issuing authority is not required, following such a refusal, to withdraw its EAW, a decision to refuse its execution must nevertheless encourage it to exercise vigilance. It cannot, especially in the absence of a change in circumstances, maintain an EAW where an executing judicial authority has legitimately refused [220] to give effect to that EAW on the ground of a real risk of infringement of the fundamental right to a fair trial. By contrast, in the absence of such a risk, following, inter alia, a change in circumstances, the mere fact that the executing authority has refused to execute the EAW cannot prevent the issuing judicial authority from retaining it. Furthermore, it is for that authority to examine whether, in the light of the particular circumstances of the case, the maintenance of the EAW is proportionate.

In the second place, as regards the reasons underlying the decisions of the French and Maltese executing authorities to refuse to execute the EAW at issue, the Court recalls, first, that, in order to determine whether there is a real risk of breach of the fundamental right to a fair trial on account of systemic or generalised deficiencies in the functioning of the judicial system of the issuing Member State, the executing authority must base its examination both on information that is objective, reliable, specific and properly updated relating to the functioning of that system and on a concrete and precise analysis of the individual situation of the requested person. Therefore, a decision of the CCF concerning the situation of the person in respect of whom an EAW has been issued [221] cannot

---

219 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) ('Framework Decision 2002/584').

220 In accordance with Article 1(3) of Framework Decision 2002/584, which provides: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

221 In the present case, by its decision, the CCF ordered the deletion of the international wanted persons notice in respect of P.P.R. on the ground of an infringement of Interpol's rules on the processing of personal data.

suffice to justify a refusal to execute that EAW. However, such a decision may be taken into account by the executing judicial authority in order to decide whether it is appropriate to refuse to execute the EAW.

Secondly, the Court holds that a judicial authority executing an EAW issued for the purpose of executing a custodial sentence cannot refuse to execute that EAW on the ground that the record of the oath taken by one of the judges who imposed that sentence cannot be found, or that another judge of the same formation has taken an oath only as a public prosecutor. Not every error that takes place during the procedure for the appointment of a judge, or when a judge takes up office, is of such a nature as to cast doubts on the independence and impartiality of that judge and, accordingly, on whether a formation which includes that judge can be considered to be an 'independent and impartial tribunal previously established by law' within the meaning of EU law. In particular, the fact that the domestic law of a Member State may provide that a public prosecutor who has taken the oath on taking up office does not have to re-take the oath in the event of subsequently taking up the office of judge cannot constitute a systemic or generalised deficiency as regards the independence of the judiciary. In addition, uncertainty as to the place where the records of the oath taken by the judges of a Member State are kept or the fact that those records cannot be located, in particular if several years have elapsed since the judge concerned took the oath, are not, in themselves and in the absence of other relevant evidence, capable of showing that the judges concerned were performing their duties without ever having taken the required oath. In any event, uncertainty as to whether the judges of a Member State have, before taking up office, taken the oath provided for by national law cannot be regarded as constituting a systemic or generalised deficiency as regards the independence of the judiciary in that Member State, if national law provides effective legal remedies which make it possible to invoke a possible failure to take the oath by the judges who have delivered a particular judgment, and thus to obtain the annulment of that judgment. It will be for the referring court to ascertain whether such remedies exist under Romanian law.

Thirdly, the Court rules that, when examining detention conditions in the issuing Member State, the executing judicial authority cannot refuse to execute an EAW on the basis of information concerning the detention conditions in prisons in the issuing Member State which it has obtained itself, and in respect of which it has not requested supplementary information from the issuing judicial authority. Furthermore, the executing judicial authority cannot apply a higher standard as regards detention conditions than that guaranteed by Article 4 of the Charter. In that regard, the mere absence of a 'precise plan for execution of the sentence' or 'precise criteria for determining a particular regime of execution' does not fall within the concept of 'inhuman or degrading treatment' within the meaning of Article 4 of the Charter.

Even if the drawing up of such a plan or establishment of such criteria were required in the executing Member State, the Member States may be required, in accordance with the principle of mutual trust, to presume that fundamental rights have been observed by the other Member States, so that they may not, in particular, demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law. Therefore, the executing judicial authority cannot refuse to surrender the requested person solely on the ground that the issuing judicial authority has not communicated to it a 'precise plan for execution of the sentence' or 'precise criteria for determining a particular regime of execution'.

In the third and last place, as regards the obligations and rights of the issuing judicial authority, the Court explains, first, that that authority is not obliged to make a reference to it for a preliminary ruling before deciding, in the light of the grounds on the basis of which the executing judicial authority refused to execute an EAW, whether to withdraw or maintain it, unless there is no judicial remedy under national law against the decision it will be called upon to make, in which case it is, in principle, obliged to make a reference to the Court. It cannot be relieved of that obligation unless it has established that the question raised is irrelevant or that the EU law provision in question has been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. Furthermore, the Court considers that the judicial authority issuing an EAW

does not have the right to participate, as a party, in the proceedings for the execution of that EAW before the executing judicial authority. Such participation is not essential in order to ensure compliance with the principles of mutual recognition and sincere cooperation which underpin the operation of the EAW mechanism.

2. European investigation order in criminal matters

Judgment of 30 April 2024 (Grand Chamber), *M.N. (EncroChat)* (C-670/22, EU:C:2024:372)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive 2014/41/EU – European Investigation Order (EIO) in criminal matters – Obtaining of evidence already in the possession of the competent authorities of the executing State – Conditions for issuing an EIO – Encrypted telecommunications service – EncroChat – Need for the decision of a judge – Use of evidence obtained in breach of EU law)

In a reference from the Landgericht Berlin (Regional Court, Berlin, Germany) for a preliminary ruling, the Grand Chamber of the Court of Justice rules on the conditions under which a public prosecutor may issue a European Investigation Order (EIO) in criminal matters where the issuing authority of a Member State wishes to secure the transmission of intercepted telecommunications data already in the possession of another Member State. It also clarifies the consequences, so far as the use of the data is concerned, of a breach of the relevant EU legislation.

In the context of an investigation carried out by the French authorities, it appeared that accused persons were using mobile phones encrypted through the 'EncroChat' service in order to commit offences primarily related to drug trafficking. That service enabled encrypted communication, via a server in France, that could not be intercepted by conventional investigative means.

In the spring of 2020, with the authorisation of a French court, a piece of Trojan software developed by a French-Dutch investigation team was uploaded to that server and, from there, installed on the mobile phones of users in 122 countries, including approximately 4 600 users in Germany.

At a conference organised by Eurojust [222] in March 2020, the representatives of the French and Netherlands authorities informed the authorities of other Member States of their planned interception of data, including data from mobile phones located outside French territory. The representatives of the Bundeskriminalamt (Federal Criminal Police Office, Germany; 'the BKA') and of the Generalstaatsanwaltschaft Frankfurt am Main (Public Prosecutor's Office, Frankfurt am Main, Germany; 'the Frankfurt Public Prosecutor's Office') signalled their interest in the data of the German users.

Between June 2020 and July 2021, in proceedings brought against X, the Frankfurt Public Prosecutor's Office issued EIOs for the purpose of requesting authorisation from the French authorities to use the data collected by them without restriction in criminal proceedings. It justified its request by explaining that the BKA had been informed by Europol that a large number of very serious criminal offences were being committed in Germany with the aid of mobile phones equipped with the 'EncroChat' service, and that as yet unidentified persons were suspected of planning and committing such offences in Germany using encrypted communications. A French court authorised the transmission and use in judicial proceedings of the data intercepted from German users.

222 European Union Agency for Criminal Justice Cooperation.

The Frankfurt Public Prosecutor's Office subsequently reassigned the investigations, inter alia, in respect of M.N., to local public prosecutor's offices. In one of the criminal proceedings brought before it, the referring court queries the lawfulness of those EIOs in the light of Directive 2014/41 [223] and the consequences of a possible infringement of EU law for the use, in those proceedings, of the intercepted data. It therefore decided to refer questions to the Court of Justice for a preliminary ruling.

Findings of the Court

In the first place, the Court notes that the concept of 'issuing authority', within the meaning of Directive 2014/41, is not limited to judges. In fact the public prosecutor is included, in Article 2(c)(i) of that directive, among the authorities which are understood to be an 'issuing authority', subject to the sole condition that they should have competence in the case concerned. Accordingly, in so far as, under the law of the issuing State, a public prosecutor is competent, in a purely domestic situation in that State, to order an investigative measure for the transmission of evidence already in the possession of the competent national authorities, that public prosecutor is covered by the concept of 'issuing authority' for the purposes of issuing an EIO for the transmission of evidence that is already in the possession of the competent authorities of the executing State.

In the second place, it follows from Article 6(1) of Directive 2014/41 that an EIO for the transmission of evidence acquired, such as that at issue in the main proceedings, which is already in the possession of the competent authorities of the executing State, must satisfy all the conditions that may be laid down by the national law of the issuing State for the transmission of such evidence in a purely domestic situation in that State.

However, while Article 6(1)(b) of Directive 2014/41 seeks to ensure that the rules and guarantees provided for by the national law of the issuing State are not circumvented, it does not require – including in a situation such as that at issue in the main proceedings, where the data in question were gathered by the competent authorities of the executing State on the territory of the issuing State and in its interest – that the issuing of an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State should be subject to the same substantive conditions as those that apply, in the issuing State, in relation to the gathering of that evidence.

Moreover, in the light of the principle of mutual recognition of judgments and judicial decisions underpinning judicial cooperation in criminal matters, to which Directive 2014/41 relates, the issuing authority is not authorised to review the lawfulness of the separate procedure by which the executing Member State gathered the evidence already in the possession of that Member State and whose transmission is sought by the issuing authority.

The Court also makes clear that, first, Article 6(1)(a) of Directive 2014/41 does not require that the issuing of such an EIO is necessarily subject to the existence, at the time when that EIO is issued, of a suspicion, based on specific facts, of a serious offence in respect of each person concerned, if no such requirement arises under the national law of the issuing State for the transmission of evidence between national public prosecutor's offices. Secondly, that provision does not, moreover, preclude an EIO from being issued where the integrity of the intercepted data cannot be verified at that stage because of the confidentiality of the technology underpinning the interception, provided that the right to a fair trial is guaranteed in the subsequent criminal proceedings. Indeed, the integrity of the evidence transmitted can, in principle, be assessed only when the competent authorities actually have the evidence in question at their disposal.

---

223 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).

In the third place, the Court notes that the infiltration of terminal devices for the purpose of gathering traffic, location and communication data of an internet-based communication service constitutes an 'interception of telecommunications', within the meaning of Article 31(1) of Directive 2014/41, which must be notified to the authority designated for that purpose by the Member State on whose territory the subject of the interception is located. Should the intercepting Member State not be in a position to identify the competent authority of the notified Member State, that notification may be submitted to any authority of the notified Member State that the intercepting Member State considers appropriate for that purpose.

Under Article 31(3) of Directive 2014/41, the competent authority of the notified Member State may then, if the interception would not be authorised in a similar domestic case, indicate that the interception may not be carried out or is to be terminated, or that any material already intercepted may not be used, or may only be used under conditions which it is to specify. Article 31 of Directive 2014/41 is thus intended not only to guarantee respect for the sovereignty of the notified Member State but also to protect the rights of persons affected by such an interception of telecommunications.

Finally, the Court points out that it is, in principle, for national law alone to determine the rules relating to the admissibility and assessment in criminal proceedings of information and evidence obtained in a manner contrary to EU law.

However, Article 14(7) of Directive 2014/41 requires Member States to ensure, without prejudice to the application of national procedural rules, that in criminal proceedings in the issuing State, the rights of the defence and the fairness of the proceedings are respected when assessing evidence obtained through the EIO. Consequently, if a court takes the view that a party is not in a position to comment effectively on such a piece of evidence that is likely to have a preponderant influence on the findings of fact, that court must find an infringement of the right to a fair trial and disregard that evidence.

3. Processing of personal data by Europol

Judgment of 5 March 2024 (Grand Chamber), *Kočner* v *Europol* (C-755/21 P, EU:C:2024:202)

(Appeal – Law enforcement cooperation – Regulation (EU) 2016/794 – Article 49(3) and Article 50 – Protection of personal data – Unlawful data processing – Criminal proceedings brought in Slovakia against the appellant – Expert's report drawn up by the European Union Agency for Law Enforcement Cooperation (Europol) for the purposes of the investigation – Retrieval of data from a mobile phone and a USB storage device belonging to the appellant – Disclosure of those data – Non-material damage – Actions for damages – Nature of non-contractual liability)

Hearing an appeal brought by Mr Kočner, the appellant, against the judgment of the General Court in *Kočner* v *Europol*, [224] the Grand Chamber of the Court of Justice upholds that appeal in part and provides details on the nature of the non-contractual liability of the European Union Agency for Law Enforcement Cooperation ('Europol') under Article 50 of Regulation 2016/794, [225] interpreted in the light of recital 57 of that regulation.

---

224 Judgment of 29 September 2021, *Kočner* v *Europol* (T-528/20, EU:T:2021:631; 'the judgment under appeal').

225 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ 2016 L 135, p. 53; 'the Europol Regulation').

In the course of an investigation carried out by the Slovak authorities following the murder of a journalist and his fiancée in Slovakia in 2018, Europol supported those authorities at the request of the Národná kriminálna agentúra (National Crime Agency, Slovakia; 'NAKA'). In particular, it extracted the data stored on two mobile telephones allegedly belonging to the appellant. On 23 October 2018, it delivered to NAKA a hard drive containing the encrypted data it had extracted and the password protecting those data. Furthermore, on 13 January 2019, it sent a report to NAKA ('the Europol report') which stated, inter alia, that the appellant's name is directly linked to the 'so-called mafia lists'.

On 1 April 2019, the Slovak criminal authorities allegedly made use of that information in a criminal prosecution brought against the appellant. In 2019 and 2020, various press articles and websites referred to a very large amount of information relating to the appellant, some of which came from the mobile telephones at issue. In particular, a website and the Slovak press published transcripts of intimate communications stored on those telephones, which had been exchanged between the appellant and his girlfriend by means of an encrypted messaging service.

After having sent a complaint to Europol, the appellant brought an action for damages before the General Court under Articles 268 and 340 TFEU and Article 50(1) of the Europol Regulation, which establishes rules on liability for the incorrect processing of personal data. [226] In that action he sought compensation for the non-material damage he claimed he suffered as a result of Europol's actions. When that action was dismissed by the General Court, the appellant brought an appeal against the judgment under appeal. That appeal was directed against the rejection, first, of the first head of claim, which sought compensation for the non-material damage allegedly suffered by the appellant as a result of the disclosure to the public of personal data from the mobile telephones at issue, and, second, of the second head of claim, which sought compensation for the non-material damage which he claims to have suffered as a result of the inclusion of his name on the 'mafia lists'.

Findings of the Court

First, the Court examines the grounds of appeal raised against the judgment under appeal.

As regards the non-material damage resulting from the disclosure to the public of personal data from the mobile telephones at issue, it specifies the nature of the rules on liability established by Article 50(1) of the Europol Regulation.

In the first place, the Court holds that it is apparent from an analysis of the wording of that provision and of the objective pursued by that regulation that the latter, read in the light of its preamble, [227] establishes, in accordance with the EU legislature's intention to favour an individual who has suffered damage, a set of rules under which Europol and the Member State concerned are jointly and severally liable. That interpretation is supported by the context of that provision. Article 50 of the Europol Regulation seeks to establish special rules regarding non-contractual liability concerning unlawful data processing operations, which derogate from the general liability rules laid down in Article 49 of that regulation.

The Court concludes from this that Article 50 of the Europol Regulation establishes rules on liability under which Europol and the Member State in which the damage resulting from the unlawful processing of data occurred are jointly and severally liable.

In the second place, as regards the conditions under which liability may be incurred under Article 50 of the Europol Regulation, the Court recalls that, in accordance with the rules on the non-contractual liability of the European Union set out in Article 340 TFEU, to which Article 50 of the Europol Regulation refers, such liability requires a number of conditions to be satisfied.

---

226 Article 50(1) of the Europol Regulation.

227 Recital 57 of the preamble.

In that regard, it observes that, in the specific context of the Europol Regulation, it is apparent from the wording of Article 50(1) of that regulation that an individual who intends to assert his or her right to compensation need establish only that unlawful data processing took place in the context of cooperation involving Europol and a Member State under that regulation.

That literal interpretation is borne out by the objective pursued by Article 50 of the Europol Regulation, which, according to the preamble to that regulation, is to address the difficulties which the individual concerned may experience in determining whether the damage suffered as a result of unlawful data processing which has occurred in the context of such cooperation is a consequence of an action by Europol or the Member State concerned. In order not to deprive Article 50, read in the light of recital 57 of the Europol Regulation, of its effectiveness, that individual cannot be required to establish to whom, out of Europol or the Member State concerned, that damage is attributable or to bring proceedings against both of those entities in order to obtain full compensation for the damage suffered.

The Court also notes that the EU legislature has made provision, as regards compensation for damage caused by unlawful data processing in the context of cooperation under the Europol Regulation, for a two-stage liability mechanism, precisely in order to take account of those evidential difficulties. That mechanism relieves the individual concerned, at the first stage, of the burden of establishing the identity of the entity whose conduct gave rise to the alleged damage and provides, in the second stage, that, after that individual has been compensated, the 'ultimate responsibility' for that damage must, where appropriate, be definitively settled in proceedings involving only Europol and the Member State concerned before the Management Board of Europol.

The Court infers from this that the Europol Regulation does not require the individual concerned to identify which of the entities involved in cooperation between Europol and a Member State undertook the conduct constituting unlawful data processing. It is sufficient, in order for Europol or the Member State concerned to incur joint and several liability, that that individual show that unlawful data processing which caused him or her to suffer damage has been carried out.

However, the Court notes that it remains open to the defendant entity to establish by any legal means that the alleged damage did not arise in connection with an alleged unlawful processing of data occurring in the context of such cooperation, for example where that damage occurred before the relevant processing.

The Court of Justice concludes that the General Court erred in law in that it incorrectly held that Article 50(1) of the Europol Regulation, read in the light of its preamble, did not relieve the individual concerned of the obligation to establish to which of the two entities involved the processing of unlawful data is attributable. Consequently, it sets aside the judgment under appeal in so far as the General Court rejected the first head of claim.

As regards the non-material damage that is the subject of the second head of claim resulting from the inclusion of the appellant's name on the 'mafia lists', the Court notes that it is apparent from the judgment under appeal that the Europol report was subsequent to and, on that ground alone, unrelated to the event that gave rise to the damage alleged by the appellant in the context of the second head of claim The appellant has not demonstrated that the findings on which the judgment under appeal is based in that regard are vitiated by a distortion of the evidence or an error of law. The Court concludes that it cannot be accepted that the damage on which the appellant relies in the second head of claim may be linked to any unlawful data processing in the context of cooperation between Europol and the Slovak authorities.

The Court of Justice therefore holds that, notwithstanding the error made by the General Court in rejecting the principle itself of the joint and several liability of Europol in the context of the Europol Regulation, the requirement that the appellant must prove the existence of unlawful data processing which caused him damage has not been met in the present case, with the result that Europol cannot,

in any event, be held liable under that second head of claim. It concludes from this that the ground of appeal seeking the rejection of that head of claim must be rejected as ineffective.

Second, having regard to the fact that the judgment under appeal has been set aside in part, the Court of Justice, finding that the state of the proceedings so permits, decides to give final judgment in the matter before the General Court and, on that basis, examines whether the conditions for the European Union to incur non-contractual liability under Article 50 of the Europol Regulation are satisfied in the present case.

As regards the requirement of a breach of a rule of EU law intended to confer rights on individuals, the Court notes that the Europol Regulation imposes on that EU agency and on the competent authorities of the Member States called upon to cooperate in criminal proceedings an obligation to protect individuals against the unlawful processing of their personal data. [228]

The Court infers from a combined reading of a series of provisions of the Europol Regulation that any disclosure of personal data processed in the context of cooperation between Europol and the national competent authorities to persons who are not authorised to receive them constitutes a breach of a rule of EU law intended to confer rights on individuals. That is the case here with the unauthorised disclosure of personal data in the form of the appellant's intimate conversations.

As regards the requirement of a sufficiently serious breach of a rule of EU law, the Court recalls that the decisive criterion in that regard is whether there has been a manifest and grave disregard for the limits of the discretion laid down by the rule infringed. In addition, the assessment to be carried out requires account to be taken of the field, the circumstances and context in which the obligation in question falls on the authority concerned. Account must also be taken, in particular, of the degree of clarity and precision of the rule infringed and of the measure of discretion left by that rule to the authority concerned, the complexity of the situation to be regulated and the difficulties in the application or interpretation of the legislation.

In the present case, the Court concludes that there is such a sufficiently serious breach. First, the provisions of the Europol Regulation do not leave the entities involved in cooperation between Europol and a Member State under that regulation any discretion as to the need to protect data subjects against unlawful processing of personal data concerning them. Second, that obligation forms part of the sensitive context of cooperation for the purposes of criminal prosecution, in which such data are processed without any intervention by the data subjects, most often without their knowledge, and therefore without them being able to intervene in any way in order to prevent any unlawful processing of their data.

As regards the conditions relating to whether the damage actually occurred and whether there was a causal link, the Court notes that the European Union can incur non-contractual liability only if the applicant has genuinely suffered actual and certain damage and the damage must flow sufficiently directly from the alleged breach of a rule of EU law. In the present case, it finds that the disclosure to unauthorised persons of data relating to intimate conversations between the appellant and his girlfriend infringed the appellant's right to respect for his private and family life and for his communications and that that disclosure adversely affected his honour and reputation, which caused him non-material damage.

In those circumstances, the Court sets aside the judgment under appeal in part and orders Europol to pay the appellant EUR 2 000 by way of compensation for the non-material damage suffered.

228 Combined reading of Article 2(h), (i) and (k), Article 28(1)(a) and (f), Article 38(4) and Article 50(1) of the Europol Regulation.

XI. Judicial cooperation in civil matters

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

Judgment of 20 June 2024, *Greislzel* (C-35/23, EU:C:2024:532)

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

Ruling on a reference for a preliminary ruling from the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany), the Court of Justice clarifies the scope of certain procedural rules applicable under Regulation No 2201/2003 [229] in the case of international abduction of a child in connection with a third country.

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

In July 2017, the father lodged an application for the return of the child to Switzerland through the Swiss Central Authority [230] under the 1980 Hague Convention. [231] A Polish court dismissed that application on the ground that the father had given his consent for an indefinite period to the mother's move with L to Poland. The appeal brought by the father against that decision was dismissed.

Although he did not pursue a second application for return lodged in Germany, in July 2018 the father brought an application for custody before a German court seeking sole custody of the child, the right to determine the child's residence and the return of the child to the father's home in Switzerland. The court before which the application was brought dismissed it on the ground that it lacked international jurisdiction. The father brought an appeal against that decision before the referring court, claiming that the jurisdiction of the German courts derives from Articles 10 and 11 of Regulation No 2201/2003.

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

---

229 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).

230 Federal Office of Justice in Bern (Switzerland).

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

Findings of the Court

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

As regards the concept of 'wrongful removal or retention of the child', on which Article 10 of Regulation No 2201/2003 is based, the Court holds, first, that the definition of that concept [232] does not depend on the holder of rights of custody initiating proceedings, which, as the case may be, would have to take place subsequently, for the return of the child under the 1980 Hague Convention.

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

Finally, it cannot be accepted, given that Regulation No 2201/2003 is silent on the matter, that the application of Article 10 of that regulation is subject to the application of procedural rules, such as those set out in Article 11(6) and (7) of that regulation, [233] the main purpose of which is to govern the transmission and notification of information. [234]

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

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

---

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

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

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

2. Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Judgment of 4 October 2024 (Grand Chamber), *Real Madrid Club de Fútbol* (C-633/22, EU:C:2024:843)

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil matters – Jurisdiction and the enforcement of judgments in civil and commercial matters – Regulation (EC) No 44/2001 – Articles 34 and 45 – Recognition and enforcement of judgments – Revocation of a declaration of enforceability of judgments – Grounds for refusal – Public policy in the State in which recognition is sought – Penalty imposed on a newspaper and one of its journalists for harm caused to the reputation of a sports club – Damages – Article 11 of the Charter of Fundamental Rights of the European Union – Freedom of the press)

In a reference for a preliminary ruling from the Cour de cassation (Court of Cassation, France), the Court of Justice, sitting as the Grand Chamber, rules on the use of the public policy clause to refuse enforcement of a judgment delivered by a court of a Member State which gives rise to infringement of the freedom of the press.

In December 2006, the newspaper *Le Monde* published an article in which the author, EE, a journalist employed by that newspaper, claimed that Real Madrid Club de Fútbol ('Real Madrid') and Fútbol Club Barcelona had retained the services of the head of a doping ring in the cycling world. Many media outlets, Spanish media outlets in particular, shared that article. In that same month, *Le Monde* published a letter of denial it had received from Real Madrid, but made no comment on it.

In May 2007, Real Madrid and AE, a member of its medical team, brought an action for damages before a Spanish court, based on harm done to their honour, against the newspaper company Société Éditrice du Monde and EE. That court ordered the latter to pay EUR 300 000 to Real Madrid and EUR 30 000 to AE by way of compensation for non-material damage and ordered that its decision be published in the newspaper *Le Monde* and in a Spanish newspaper. That judgment was upheld on appeal and the appeal against that judgment was dismissed by the Tribunal Supremo (Supreme Court, Spain).

In 2014, by two orders, the Spanish court of first instance ordered the enforcement of that judgment of the Tribunal Supremo (Supreme Court) and the payment of the abovementioned principal amounts plus EUR 90 000 by way of interest and costs to Real Madrid and EUR 3 000 by way of interest and costs to AE.

The tribunal de grande instance de Paris (Regional Court, Paris, France) issued two declarations of enforceability relating to that judgment and those orders, but the cour d'appel de Paris (Court of Appeal, Paris, France) overturned those declarations on the ground that the penalties were manifestly contrary to French international public policy inasmuch as they infringed the freedom of expression.

Hearing the appeal lodged by Real Madrid and AE, the Cour de cassation (Court of Cassation) seeks to ascertain in which circumstances the enforcement of a judgment ordering, as in the present case, a newspaper publishing house and one of its journalists to pay damages by way of compensation for non-material damage must be refused under the Brussels I Regulation, [235] on the ground that it constitutes a manifest infringement of the freedom of the press, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

---

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

Findings of the Court

As a preliminary point, the Court recalls the exceptional nature of the public-policy exception provided for by Article 34(1) of the Brussels I Regulation, which can be envisaged only where recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the Member State in which enforcement is sought inasmuch as it would infringe a fundamental principle, either of the national law of that Member State or of EU law. In that regard, it is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by EU law.

This is so inter alia with respect to the fundamental rights guaranteed by the Charter, with which a national court must comply when applying the Brussels I Regulation and, in so doing, when implementing EU law. [236] However, given the fundamental importance of the principle of mutual trust in that implementation, the Member States may be required to presume that fundamental rights have been observed by the other Member States, save in exceptional circumstances. Therefore, it is only if the enforcement of a judgment in the Member State in which enforcement is sought would give rise to a manifest breach of a fundamental right as enshrined in the Charter that enforcement of that judgment may be refused or, as the case may be, the declaration of enforceability pertaining to that judgment revoked.

As regards the freedom of expression in particular, the Court states that that constitutes one of the essential foundations of a pluralist, democratic society, and is one of the values on which, under Article 2 TEU, the European Union is founded. Interferences with the freedom of expression, such as those concerning journalists and also publishers and press organisations, must therefore be limited to what is strictly necessary.

Similarly, it is apparent from the settled case-law of the European Court of Human Rights that the European Convention on Human Rights (ECHR) [237] leaves little scope for restrictions on freedom of expression in, inter alia, the fields of political speech and matters of public interest, [238] which includes matters relating to professional sports. In that context, considerable weight must be attached to the interest of a democratic society in ensuring and maintaining a free press in the determination of whether the interference in question is proportionate to the legitimate aim pursued. Thus, any judgment awarding damages for harm to reputation must comprise a reasonable relationship of proportionality between the amount awarded and the harm in question.

In that regard, there is a difference between a sanction in favour of a legal entity and one in favour of an individual, since harm to an individual's reputation may have repercussions on the individual's dignity, whereas the reputation of a legal entity is devoid of that moral dimension. As regards the proportionality of a sanction, any undue restriction on freedom of expression entails a risk of obstructing or paralysing future media coverage of similar questions. In particular, according to the case-law of the European Court of Human Rights, the most careful scrutiny is called for when the measures taken or the sanctions imposed are capable of discouraging the participation of the press in debates over matters of legitimate public concern and, therefore, have a deterrent effect on the exercise of the freedom of the press in respect of such matters.

On the basis of those considerations, the Court of Justice finds that the enforcement of a judgment ordering a newspaper publishing house and one of its journalists to pay damages by way of compensation for the non-material damage suffered by a sports club and one of the members of its

236 Under Article 51(1) of the Charter.

237 The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR').

238 See Article 10(2) ECHR.

medical team due to harm caused to their reputation by the publication of information about them must be refused where it would give rise to a manifest infringement of the freedom of the press, as enshrined in Article 11 of the Charter. Such a manifest infringement comes within public policy in the Member State in which enforcement is sought and therefore constitutes the ground for refusal laid down in Article 34(1) of the Brussels I Regulation, read in conjunction with Article 45 thereof. [239]

It is for the referring court to determine, taking account of all of the circumstances of the case, including not only the resources of the persons against whom judgment is given but also the seriousness of their wrong and the extent of the harm as found in the judgments at issue in the main proceedings, whether the enforcement of those judgments would give rise to such a manifest infringement. To that end, it is for that court to ascertain whether the damages awarded in those judgments are manifestly disproportionate to the reputational harm in question and thus risk having a deterrent effect on future media coverage of similar matters in the Member State in which enforcement is sought or, more generally, on the exercise of the freedom of the press, as enshrined in Article 11 of the Charter.

In the context of that verification, it may take account of the amounts awarded for similar harm in the Member State in which enforcement is sought. However, any discrepancy between those amounts and the amount of damages awarded in the judgments at issue in the main proceedings is not in itself sufficient for a finding that those damages are, automatically and without subsequent verification, manifestly disproportionate to the reputational harm in question. Moreover, that verification cannot involve a review of the substantive assessments carried out by the court in the Member State of origin, as that would amount to a review of the merits, which is expressly prohibited by Article 36 and Article 45(2) of the Brussels I Regulation. Lastly, should that court find that there is a manifest infringement of the freedom of the press, it should limit the refusal to enforce those judgments to the manifestly disproportionate portion, in the Member State in which enforcement is sought, of the damages awarded.

239 For an action such as the one in the present case, concerning a judgment given in an action brought against a declaration of enforceability, Article 45 of the Brussels I Regulation refers to the listed grounds of refusal, including Article 34 of that regulation.

XII. Transport

Judgment of 4 October 2024 (Grand Chamber), *Lithuania and Others* v *Parliament and Council (Mobility Package)* (C-541/20 to C-555/20, EU:C:2024:818)

(Action for annulment – First package of mobility measures ('Mobility Package') – Regulation (EU) 2020/1054 – Maximum daily and weekly driving times – Minimum breaks and daily and weekly rest periods – Organisation of the work of the drivers in such a way that the drivers are able to return every three or four weeks, depending on the case, to their place of residence or to the operational centre of their employer to begin and spend their regular or compensatory weekly rest period – Prohibition on taking regular or compensatory weekly rest in the vehicle – Time limit for the installation of second generation (V2) smart tachographs – Date of entry into force – Regulation (EU) 2020/1055 – Conditions relating to the requirement of establishment – Obligation to return the vehicle to the operational centre in the Member State of establishment – Obligation concerning the number of vehicles and drivers normally based at the operational centre of the Member State of establishment – Cabotage – Cooling-off period of four days for cabotage – Derogation for cabotage as part of combined transport operations – Directive (EU) 2020/1057 – Specific rules for posting drivers in the road transport sector – Transposition period – Internal market – Specific regime applicable to the freedom to provide transport services – Common transport policy – Articles 91 and 94 TFEU – Fundamental freedoms – Principle of proportionality – Impact assessment – Principles of equal treatment and non-discrimination – Principles of legal certainty and protection of legitimate expectations – Protection of the environment – Article 11 TFEU – Consultation of the European Economic and Social Committee and the European Committee of the Regions)

The Grand Chamber of the Court of Justice dismissed 15 actions brought by the Republic of Lithuania, the Republic of Bulgaria, Romania, the Republic of Cyprus, Hungary, the Republic of Malta and the Republic of Poland seeking annulment of certain provisions or, in some cases in the alternative, of the entirety of three legislative acts [240] forming part of a 'package of mobility measures', also referred to as the 'Mobility Package', except in so far as they seek annulment of point 3 of Article 1 of Regulation 2020/1055, in so far as it inserts paragraph 1(b) in Article 5 of Regulation No 1071/2009. [241]

Those three legislative acts were adopted in order to adapt the rules in force until then to developments in the road transport sector. They relate, in particular, first, to maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods, and positioning by means of tachographs (Regulation 2020/1054); secondly, to the common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and the common rules for access to the international road haulage market (Regulation 2020/1055); and, thirdly, to the specific rules for posting drivers in the road transport sector (Directive 2020/1057).

---

240 Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs (OJ 2020 L 249, p. 1).

Regulation (EU) 2020/1055 of the European Parliament and of the Council of 15 July 2020 amending Regulations (EC) No 1071/2009, (EC) No 1072/2009 and (EU) No 1024/2012 with a view to adapting them to developments in the road transport sector (OJ 2020 L 249, p. 17).

Directive (EU) 2020/1057 of the European Parliament and of the Council of 15 July 2020 laying down specific rules with respect to Directive 96/71/EC and Directive 2014/67/EU for posting drivers in the road transport sector and amending Directive 2006/22/EC as regards enforcement requirements and Regulation (EU) No 1024/2012 (OJ 2020 L 249, p. 49).

241 Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC (OJ 2009 L 300, p. 51).

Findings of the Court

The Court's review of legality in relation to various provisions of the legislative acts at issue is underpinned by a number of overarching principles and findings.

Thus, the Court notes, first, that the principle of freedom to provide services in the area of transport is governed by Article 58(1) TFEU, according to which that principle must be applied by implementing the common transport policy, which falls within the scope of the provisions adopted by the European Parliament and the Council of the European Union, on the basis, in particular, of Article 91(1) TFEU. It follows that the EU legislature is entitled to alter the conditions in which freedom to provide services in the field of road transport is exercised, since, under Article 58(1) TFEU, the degree of liberalisation in this area is determined by the legislature itself in the context of the implementation of the common transport policy. Since the latter policy must enable the objectives of the Treaties to be pursued, [242] the measures adopted by the EU legislature in relation to the freedom to provide transport services may therefore have the objective not only of facilitating the exercise of that freedom, but also of ensuring, where appropriate, the protection of other fundamental interests of the European Union recognised by the FEU Treaty, such as the improvement of conditions of employment, [243] the guarantee of adequate social protection [244] and the maintenance of a level playing field.

Secondly, the Court points out that, according to settled case-law, where a legislative act has already coordinated the legislation of the Member States in a given EU policy area, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or any development in knowledge having regard to its task of safeguarding the general interests and of taking into account the overarching objectives of the European Union recognised by the FEU Treaty, including the requirements relating to the promotion of a high level of employment, the proper functioning of the internal market and the guarantee of adequate social protection. The EU legislature can, in such a situation, properly carry out its task of ensuring that those general interests and overarching objectives are protected only if it is free, in the light of the significant developments which have affected the internal market, to amend a legislative act in order to rebalance the interests involved.

Thirdly, the Court emphasises, in the context of the examination of pleas of illegality alleging infringement of the principle of proportionality or of the principle of non-discrimination, that it cannot be ruled out that the impact of the contested legislative acts may be greater for transport undertakings, regardless of the Member State in which they are established, which have opted for a certain business model, such as the decision to provide the essential part, if not all, of their services to recipients established in Member States which are distant from the first Member State and whose drivers thus carry out their transport operations away from their place of residence or as part of cabotage operations carried out permanently or continuously within the territory of the same host Member State. However, assuming that this business model is mainly adopted by transport undertakings established in certain Member States, if the EU measure concerned has an impact in all Member States and requires that a balance between the different interests involved should be ensured, the attempt to strike such a balance, taking into account the situation of all EU Member States, cannot, in itself, be regarded as contrary to the principles of proportionality and non-discrimination.

As regards Regulation 2020/1054, the actions sought the annulment, in particular, of the following provisions:

---

242 Pursuant to Article 90 TFEU.

243 Referred to in the preamble to the FEU Treaty and in the first paragraph of Article 151 TFEU.

244 Within the meaning of Article 9 TFEU and the first paragraph of Article 151 TFEU.

– point 6(c) of Article 1 of that regulation, according to which regular or compensatory weekly rest periods may not be taken by drivers in a vehicle but must be taken, at the expense of the employer, in accommodation suitable for both women and men, including adequate sleeping and sanitary facilities.

– point 6(d) of Article 1 of that regulation, which lays down, first, the obligation for transport undertakings to organise the work of drivers in such a way that they are able to return every three or four weeks, depending on whether or not they have previously taken two consecutive reduced weekly rest periods, to the operational centre of that employer or to their place of residence, respectively, in order to start or spend there at least one regular or compensatory weekly rest period, and, secondly, an obligation on those transport undertakings to document the manner in which they fulfil that obligation.

– point 2 of Article 2 of that regulation, which establishes a new timetable for equipping for various categories of vehicles with a new type of second generation (V2) smart tachograph.

The pleas of illegality raised against point 6(d) of Article 1 of Regulation 2020/1054, which the Court examines first and which it rejects in their entirety, alleged infringement of the principle of proportionality, the principles of equal treatment and non-discrimination, the principle of legal certainty, the free movement of EU citizens, the functioning of the internal market, the free movement of workers, freedom of establishment, the rules of EU law on the common transport policy and the rules of EU law on environmental protection.

The objective of that provision is to improve [245] working conditions and road safety of drivers within the European Union, by ensuring that they can reach their place of residence at regular intervals in order to take their regular or compensatory weekly rest period, so that the period spent by drivers engaged in international transport operations away from that place of residence is not excessively long. The purpose of that provision is thus to remedy the absence of clear rules relating to the weekly rest period and the return of drivers to their place of residence and, therefore, the unfair conditions of competition for transport undertakings which the different national interpretations and practices had previously been able to encourage.

In the first place, the Court rejects several of those heads of illegality, on the ground that they are based on two incorrect premisses.

First, some of the applicant Member States were wrong to argue that point 6(d) of Article 1 of Regulation 2020/1054 requires drivers to return exclusively to the operational centre of their employer or their place of residence by means of heavy goods vehicles which are often empty.

First of all, drivers, including those from third countries, are free to choose to take their regular or compensatory weekly rest period at the place where they so wish, whether it be the operational centre of their employer, their place of residence or any other place of their choice. The contested provision does not require transport undertakings to compel drivers actually to take their regular or compensatory weekly rest period at their own place of residence. Rather, transport undertakings are obliged to organise the work of drivers so that they can return to the place they have chosen in order, respectively, to start or spend that rest period there.

Next, the EU legislature wanted to take account of the pressures that drivers were likely to face in the past. Since the worker must be regarded as the weaker party in the employment relationship, it is necessary to prevent the employer from being able to impose on him or her a restriction of his or her rights or from dissuading the worker from explicitly claiming his or her rights vis-à-vis his or her employer. Thus, an employer cannot be exempted from the obligation to organise the work of its

245 See, in particular, recitals 1, 2, 6, 8, 13 and 36 of Regulation 2020/1054.

drivers in order to make it possible for them to return on the ground that they have waived, in advance and in general, the right conferred on them by the contested provision.

Lastly, the EU legislature intended to allow transport undertakings flexibility, in their capacity as employer, on the one hand, to decide on the specific arrangements for exercising the corresponding rights conferred on drivers, depending on each particular situation, and, on the other hand, to prove, by having recourse to any relevant documentation to that effect, both compliance with the obligation laid down in point 6(d) of Article 1 of Regulation 2020/1054 and the manner in which that obligation has, where appropriate, been reconciled with the driver's freely expressed choice to take his or her weekly rest period outside his or her place of residence.

Secondly, some of the applicant Member States wrongly maintained that the obligation on transport undertakings to organise the work of drivers in such a way that they can return to the operational centre of their employer or to their place of residence is the cause of a significant increase in traffic. That premiss presupposes that, before the adoption of that measure, only a reduced number of drivers returned to one or other of those places and that that return must necessarily be made using the vehicle used by the driver.

First, already before the adoption of that measure, most drivers returned to their place of residence at regular intervals of less than four weeks. Secondly, transport undertakings may, in order to ensure compliance with the obligation laid down in point 6(d) of Article 1 of Regulation 2020/1054, have recourse to other means of transport, such as public transport, and it is conceivable that the return to one of the two places referred to in that provision may be coupled with a return of the vehicles of the transport undertaking to its operational centre as part of its usual transport activities.

In the second place, the Court rules on a number of questions of law raised, in particular those referred to below.

First, as regards the right of the EU legislature to adapt a legislative act, that right was specifically intended, by amending EU rules on the working time of drivers, to strike a new balance which took into account, on the one hand, the interest of drivers in better working conditions and increased road safety and, on the other hand, the interest of employers in carrying out their transport activities under fair commercial conditions.

In the present case, in balancing the various interests at stake, the EU legislature was entitled to take the view, in the context of its broad discretion in relation to the common transport policy, that the significant increase in periods spent by drivers employed in the European Union away from their place of residence made it necessary to introduce a specific measure to improve their working conditions and that the negative effects on their health of long periods spent away from their place of residence were more serious than the negative consequences for a number of undertakings providing services on a more or less permanent basis in Member States other than those in which they are established. Such rebalancing is consistent with the social ambitions of the European Union.

Secondly, the rule laid down in point 6(d) of Article 1 of Regulation 2020/1054 applies without distinction to all transport undertakings concerned, irrespective of the Member State in which they are established, to all drivers, irrespective of their nationality and the Member State in which their employer is established, and to all Member States, so that it does not involve direct discrimination prohibited by EU law. In addition, the Court holds that that rule does not constitute indirect discrimination prohibited by EU law, in so far as it is, by its very nature, liable to have a greater effect on transport undertakings established in Member States situated, in their view, on the 'periphery of the European Union', the drivers employed by those undertakings and that group of Member States. A provision of EU law cannot be regarded as being, in itself, contrary to the principles of equal treatment and non-discrimination on the sole ground that it has different consequences for certain economic operators, where that situation is the consequence of different operating conditions in

which they are placed, in particular by reason of their geographical location, and not an inequality in law inherent in the contested provision.

As regards the pleas of illegality raised against point 6(c) of Article 1 of Regulation 2020/1054, which the Court rejects in their entirety, they alleged infringement of the principle of proportionality, of the principles of equal treatment and non-discrimination, of the provisions of the FEU Treaty relating to the freedom to provide services and of Article 91(2) and Article 94 TFEU.

The objective of that provision is to improve [246] working conditions and road safety of drivers within the European Union, by ensuring that drivers have high-quality accommodation for taking their regular or compensatory weekly rest period, in order to protect, in particular, drivers engaged in international transport operations over long distances who spend long periods away from their place of residence. The purpose of that provision is to address the absence of clear rules on weekly rest periods and, more specifically, the unequal treatment which may have previously resulted, on account of the different interpretations and applications of Article 8(8) of Regulation No 561/2006 [247] by the competent national authorities, from the application of diverging national rules on penalties in the Member States. It is for the purpose of ensuring, by means of a clearer harmonisation provision, the uniform application of the prohibition on taking the regular or compensatory weekly rest period in the vehicle that the EU legislature codified the interpretation of that Article 8(8) given by the Court in the judgment in *Vaditrans*. [248]

That prohibition, which applies exclusively to regular or compensatory weekly rest periods, and not to other types of rest, respects both the principle of proportionality and the principle of non-discrimination, whether between drivers, between undertakings or between Member States. Furthermore, that prohibition does not require drivers to take regular or compensatory weekly rest periods as a matter of course outside their place of residence by parking their vehicle in safe and secure areas or in accommodation adjacent to a parking area.

The pleas of illegality raised against point 2 of Article 2 of Regulation 2020/1054, which the Court also rejects in their entirety, alleged infringement of the principle of proportionality, of the principles of legal certainty and the protection of legitimate expectations and of the second paragraph of Article 151 TFEU.

The Court considers that the mere fact that the installation of smart tachographs may have been provided for, in a legislative act applicable before the entry into force of Regulation 2020/1054, on a date different from that which was ultimately adopted by the latter regulation, is not sufficient to establish a breach of legal certainty or of legitimate expectations. That is even less the case as regards a legislative act which concerns, as in the present case, the introduction of equipment likely to be affected by the rapid development of new technologies and which may therefore require constant adjustment to reflect such a development.

As regards Regulation 2020/1055, the actions sought the annulment, in particular, of the following provisions:

– point 3 of Article 1 of that regulation, in so far as it inserts paragraph 1(b) in Article 5 of Regulation No 1071/2009, according to which vehicles used for international transport must return to an operational centre in the Member State of establishment of the transport undertaking concerned every eight weeks,

246 See, in particular, recitals 1, 2, 6, 8, 13 and 36 of Regulation 2020/1054.

247 Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85 (OJ 2006 L 102, p. 1).

248 Judgment of 20 December 2017, *Vaditrans* (C-102/16, EU:C:2017:1012).

– point 4(a) of Article 2 of Regulation 2020/1055, according to which hauliers are not allowed to carry out cabotage operations with the same vehicle in the same host Member State within four days from the end of a cabotage period carried out in that Member State.

First, as regards the pleas of illegality raised against point 3 of Article 1 of that regulation, in so far as it inserts paragraph 1(b) in Article 5 of Regulation No 1071/2009, the Court annuls that provision on the basis of an infringement of the principle of proportionality, on the ground that the EU legislature has not sufficiently established that it had examined the proportionality of the obligation for vehicles to return laid down in that provision.

In that regard, the Court finds that, admittedly, the EU legislature is not required to have at its disposal an impact assessment in every circumstance and that such an impact assessment is not binding on it. However, it must base its choice on objective criteria and examine whether the aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators. It follows that that legislature must, when the act at issue is the subject of judicial review, at the very least be able to produce and set out clearly and unequivocally the basic facts that had to be taken into account as the basis of the contested measures of that act and on which the exercise of its discretion depended.

The Court considers that, although the obligation relating to the return of vehicles has not been the subject of an impact assessment, reliance on the data contained in the Impact assessment – establishment section, in that they describe the market concerned and its particular difficulties or in relation to the assessment of the consequences of obligations other than that relating to the return of vehicles – does not amount to producing and setting out clearly and unequivocally the basic facts on the basis of which point 3 of Article 1 of Regulation 2020/1055, in so far as it inserts paragraph 1(b) in Article 5 of Regulation No 1071/2009, was adopted and on which the effective exercise by that legislature of its discretion depended. The same is true of the other basic data relied on before the Court by the European Parliament and the Council, since they do not relate to the obligation concerning the return of vehicles or were presented in an excessively succinct manner. The same applies to the mere reliance on information allegedly provided by the applicant Member States and to which that legislature could have had access.

Secondly, as regards the pleas of illegality raised against point 4(a) of Article 2 of Regulation 2020/1055, which the Court rejects in their entirety, those pleas alleged infringement of the principle of proportionality, the principles of equal treatment and non-discrimination, the rules of EU law on the common transport policy, the functioning of the internal market, the freedom to provide services, the free movement of goods and the rules of EU law and the international commitments of the European Union relating to environmental protection.

As regards the complaint alleging infringement of the principle of proportionality, the Court notes in particular that the waiting period provided for in point 4(a) of Article 2 of Regulation 2020/1055, during which, following a cabotage cycle carried out in a host Member State, hauliers are no longer allowed to carry out cabotage operations in that Member State, is intended to address the unexpected consequences created, under Regulation No 1072/2009, [249] by the emergence of systematic cabotage practices and to achieve the initial objective pursued by the EU legislature, by ensuring the temporary nature of cabotage, in accordance with the level of liberalisation laid down by that legislature in order to contribute to the smooth operation of the internal transport market.

The Court also points out that compliance with the waiting period after a cabotage cycle in a host Member State does not require the transport undertaking concerned to suspend all transport activity. It is therefore wrong to argue that the vehicle is immobilised during that period, and cannot be

249 Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

engaged in transport operations other than cabotage operations in the same host Member State or that the transport undertaking is required to return the vehicle, which is, moreover, empty, to its operational centre during that same period.

As regards the complaint alleging infringement of the rules of EU law and of the EU's international commitments on environmental protection, the Court notes, in particular, that the waiting period laid down in point 4(a) of Article 2 of Regulation 2020/1055 will not give rise to significant adverse effects on the environment, given, first, the absence of an obligation to return the empty vehicle to the operational centre of the transport undertaking during that period and, secondly, the absence of environmental impact from any immobilisation of the vehicle during that period.

As regards Directive 2020/1057, the actions sought, in essence, the annulment of the provisions of Article 1 of that directive, in so far as they distinguish between different types of road transport operations and exempt some of those types of operations from the application of the rules on the posting of workers laid down in Directive 96/71. [250]

In essence, Directive 2020/1057 lays down specific rules for posting drivers in the road transport sector, which distinguish, in order to facilitate their enforcement, between different types of transport operations depending on the degree of connection of the driver and of the service provided with the territory of the host Member State.

In particular, Article 1 of Directive 2020/1057 provides in that regard that, where a driver carries out bilateral transport operations consisting of transport operations from the Member State in which the transport undertaking is established to the territory of another Member State or a third country or, conversely, in transport operations from a Member State or a third country to the Member State where the transport undertaking is established, or transit operations, which consist of transport operations in which the driver crosses the territory of a Member State without loading or unloading goods, he or she is not to be regarded as posted for the purposes of Directive 96/71.

By contrast, where a driver carries out cross trade operations, which consist of transport operations carried out from a Member State other than the Member State of establishment of that undertaking or from a third country to the territory of another Member State which is also different from that Member State of establishment or to the territory of a third country, or cabotage operations, defined as the provision of services by a haulier in a Member State in which he or she is not established, that driver must be regarded as being posted for the purposes of Directive 96/71.

As regards combined transport operations, which consist of the carriage of goods between Member States in which the lorry or other means of transport of the goods connected with the lorry uses the road for the initial or final leg of the journey and, for the other leg, a rail, inland waterway or maritime route, the driver is not considered to be posted when he or she makes the initial or final road journey of a combined transport operation if that road journey, taken in isolation, consists of bilateral transport operations.

The pleas of illegality raised against the provisions of Article 1 of Directive 2020/1057, which the Court rejects in their entirety, alleged infringement of Article 1(3)(a) of Directive 96/71, the principles of equal treatment and non-discrimination, the principle of proportionality, the rules of EU law on the common transport policy, the free movement of goods, the freedom to provide services and the rules of EU law on environmental protection.

As regards, in particular, the alleged infringement of the principles of equal treatment and non-discrimination, the Court notes that, by adopting sectoral rules on the posting of workers intended to be implemented throughout the European Union in order to ensure the proper functioning of the

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

internal market, the EU legislature sought to achieve [251] a balance between, on the one hand, the improvement of the social and working conditions of drivers and, on the other hand, facilitating the exercise of the freedom to provide road transport services based on fair competition between transport undertakings. In that context, the approach consisting of distinguishing between different types of transport operations for the purposes of applying the rules on posting, far from undermining equality between Member States, is intended, on the contrary, to address the inequalities of treatment which had arisen previously, as a result of discrepancies identified between Member States in the interpretation, application and implementation of the provisions applicable before the entry into force of that directive, discrepancies that placed a heavy administrative burden on drivers and transport undertakings.

In the light of that approach, in order to assess the existence of alleged discrimination between transport undertakings and drivers employed by them according to whether they carry out cross trade operations or bilateral transport operations, the Court rejects the premiss that the assessment of the comparability of the respective situations of those drivers in order to determine the application of the rules on posting must be carried out solely on the basis of the nature of their work, whereas it is the link between the driver concerned and the service provided to the Member State of establishment or the host Member State which, in the light of the objective pursued by the contested provisions of Article 1 of Directive 2020/1057, is relevant for the purposes of that assessment.

The Court also considers incorrect the premiss that a combined transport operation, taken as a whole, is comparable to a bilateral transport operation, having regard to the objective pursued by the rules laid down in Article 1 of Directive 2020/1057. The purpose of that directive is to establish specific rules for the posting of drivers in the road transport sector only. By not assimilating combined transport operations, where the same driver accompanies the vehicle and its cargo, with bilateral transport operations, the EU legislature did not therefore infringe the principles of equal treatment and non-discrimination.

251 As is apparent from recitals 3, 7 and 9 of Directive 2020/1057.

XIII. Competition

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

Judgment of 27 June 2024, *Commission* v *Servier and Others* (C-176/19, EU:C:2024:549)

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

Judgment of 27 June 2024, *Commission* v *KRKA* (C-151/19 P, EU:C:2024:546)

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

The Court of Justice upholds the appeals brought by the European Commission against two judgments of the General Court [252] which annulled in part the decision by which the Commission found the existence of agreements and an abuse of a dominant position on the market for the pharmaceutical product perindopril and imposed fines on the manufacturers of medicines involved. [253] In so doing, the Court of Justice clarifies the dividing line between legitimate action by manufacturers of medicines which consists in settling actual patent disputes in the pharmaceutical sector, on the one hand, and agreements which unlawfully share the market for a pharmaceutical product under the guise of a patent dispute settlement agreement, on the other.

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

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

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

---

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

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

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

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

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

By decision of 9 July 2014, [254] the Commission found that the agreements concluded by Servier with Krka and the other generic manufacturers constituted restrictions of competition prohibited by Article 101 TFEU. It also considered that Servier had infringed Article 102 TFEU by drawing up and implementing an exclusionary strategy covering the market for perindopril and the technology market relating to the active ingredient of that medicinal product in France, the Netherlands, Poland and the United Kingdom.

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

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

Consequently, by two judgments delivered on 12 December 2018, [255] the General Court annulled the decision at issue in so far as it finds an infringement of Article 101 TFEU in relation to the Krka agreements and an infringement of Article 102 TFEU, and cancelled the fines imposed respectively on Servier and Krka in respect of those infringements.

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

254 See footnote 255.

255 See footnote 254.

Findings of the Court

1. The infringement of Article 101 TFEU

(a) Existence of potential competition between Servier and Krka

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

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

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

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

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

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

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

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

(b) Characterisation of the Krka agreements as restriction of competition by object

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

In the judgments under appeal, the General Court held that, where there is a genuine dispute relating to a patent, an agreement settling that dispute containing competition-restricting clauses and which is linked to a licence agreement concerning that patent can be characterised as a restriction of competition by object only if the Commission can demonstrate that that licence agreement does not constitute a transaction concluded at arm's length and thus masks a reverse payment.

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

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

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

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

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

Moreover, the General Court infringed the principle that evidence may be freely adduced by holding that there is a distinction in law, as regards the taking into account of fragmentary and sparse evidence in order to establish the existence of an infringement, between situations in which the content of anticompetitive agreements, as in the present case, is available to the Commission and those in which that content is not available to it. Moreover, the General Court infringed the principle that evidence may be freely adduced by holding that there is a distinction in law, as regards the taking into account of fragmentary and sparse evidence in order to establish the existence of an infringement, between situations in which the content of anticompetitive agreements, as in the present case, is available to the Commission and those in which that content is not available to it.

Lastly, the Court of Justice recalls that the possibility that a patent licence may have pro-competitive effects in certain geographical markets is entirely irrelevant for the purpose of assessing whether it should be characterised as a restriction of competition by object under Article 101(1) TFEU. By taking into account the positive effects of the Krka licence agreement in Krka's core markets, the General

Court therefore erred in its interpretation and application of Article 101(1) TFEU, especially since Krka's core markets do not fall within the geographical scope of the infringement of Article 101 TFEU.

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

(c) Characterisation of the Krka agreements as a restriction of competition by effect

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

In that regard, the Court recalls that, in order to assess the existence of anticompetitive effects caused by an agreement between undertakings, it is necessary to compare the competitive situation resulting from that agreement and the situation that would exist in its absence. That 'counterfactual' method requires taking into consideration the actual context in which that agreement is situated. Thus, the counterfactual scenario, envisaged on the basis of the absence of that agreement, must be realistic and credible.

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

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

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

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

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

2. The infringement of Article 102 TFEU

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

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

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

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

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

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

3. The actions for annulment brought by Servier and Krka

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

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

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

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

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

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

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

In that regard, the Court emphasises that the fact that patent litigation settlement agreements, as well as licensing agreements associated with such agreements, may be concluded for a purpose which is likely to be legitimate cannot make them escape the application of Article 101 TFEU if it turns out that those agreements are intended to restrict competition. In the present case, it is also clear from the wording of the Krka settlement and licence agreements and the circumstances surrounding their conclusion that they are economically connected and cannot be examined separately.

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

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

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

In the light of those clarifications, the Court finds that the Commission was entitled to consider that Krka represented one of the most immediate threats for Servier, on account of the fact that it had real

and concrete possibilities of entering the markets in France, the Netherlands and the United Kingdom. In the absence of the Krka agreements, that possibility of entry by Krka, by means of its perindopril, would not have been eliminated. Consequently, the Commission established that the elimination, through the implementation of those agreements, of that source of potential competition had the effect of appreciably restricting competition. That effect, which is neither hypothetical nor potential, but real, is such as to justify the characterisation as a restriction of competition by effect adopted in the decision at issue.

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

Judgment of 4 October 2024, *FIFA* (C-650/22, EU:C:2024:824)

(Reference for a preliminary ruling – Internal market – Competition – Rules introduced by an international sports association and implemented by that association with the assistance of its members – Professional football – Private law entities vested with regulatory and control powers, and the power to impose sanctions – Regulations on the Status and Transfer of Players – Regulations relating to the employment contracts concluded between clubs and players – Early termination of an employment contract by the player – Player required to pay compensation – Joint and several liability of the new club – Sanctions – Prohibition on issuing and registering the player's International Transfer Certificate while a dispute relating to the early termination of the employment contract is pending – Prohibition of registration of other players – Article 45 TFEU – Restriction on the freedom of movement of workers – Justification – Article 101 TFEU – Decision by an association of undertakings having as its object the prevention or restriction of competition – Employment market – Recruitment of players by clubs – Market for interclub football competitions – Participation of clubs and players in sporting competitions – Restriction of competition by object – Exemption)

On a reference for a preliminary ruling from the cour d'appel de Mons (Court of Appeal, Mons (Belgium)), the Court again rules on the application of EU economic law to the rules introduced by an international sports federation. [256] By the present judgment, it clarifies the way in which the articles of the FEU Treaty establishing the principle of freedom of movement of workers and the prohibition of agreements, decisions and concerted practices [257] apply to the rules adopted by an international sports federation relating to the status and transfer of players.

The Fédération internationale de football association (FIFA) is an association governed by Swiss law whose objectives are, inter alia, to draw up regulations governing the game of football and related matters at world level. It is made up of national football associations which are required, inter alia, to ensure that their own members or affiliates comply with all the rules which it lays down.

In March 2014, FIFA adopted the 'Regulations on the Status and Transfer of Players' ('the RSTP'). The RSTP provide, inter alia, that every new professional football club which signs a player following the

256 See judgments of 21 December 2023, *Royal Antwerp Football Club* (C-680/21, EU:C:2023:1010); of 21 December 2023, *European Superleague Company* (C-333/21, EU:C:2023:1011); and of 21 December 2023, *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012).

257 Article 45 and Article 101 TFEU, respectively.

termination of an employment contract without just cause is to be jointly and severally liable for payment of the compensation which that player may be required to pay to his or her former club, such compensation being set on the basis of various criteria set out in those regulations. [258] The RSTP also provide that the new club is to be presumed to have induced the player to terminate the employment contract with his or her former club and may, in certain cases, expose that new club to a sporting sanction consisting in a ban on registering any new players during a specified period. [259] Lastly, the RSTP provide that the national football association to which the former club belongs cannot issue an International Transfer Certificate (ITC) for the player where there is a dispute pending between that former club and that player arising from the early termination of the employment contract where there is no mutual agreement. [260]

BZ is a former professional footballer residing in Paris (France). In August 2013, he signed a four-year employment contract with a Russian professional football club. The following year, the club terminated that contract on grounds of alleged misconduct by BZ and applied to the FIFA Dispute Resolution Chamber for an order that BZ pay compensation of EUR 20 million, alleging 'termination of contract without just cause' within the meaning of the RSTP.

In May 2015, the FIFA Dispute Resolution Chamber upheld the club's claim in part and ordered BZ to pay it compensation of EUR 10.5 million. It also ruled that the RSTP, in so far as they provide that any new professional football club signing the player is to be jointly and severally liable for payment of such compensation, would not apply to BZ in future. In May 2016, the Court of Arbitration for Sport upheld that decision on appeal.

In December 2015, BZ brought proceedings before the tribunal de commerce du Hainaut (division de Charleroi) (Commercial Court, Hainaut (Charleroi Division), Belgium), seeking an order that FIFA and the Union royale belge des sociétés de football association ASBL (URBSFA) pay him compensation of EUR 6 million for the loss which he claimed to have sustained by not being able to be employed in 2015 by the Belgian club Sporting du Pays de Charleroi SA, by reason of the requirements imposed by the RSTP. In January 2017, that court found that claim to be well founded in principle and ordered the two associations to pay a provisional sum.

On appeal by FIFA, the referring court asks the Court whether, having regard to the specificity of sport, in particular as it relates to the proper conduct of sporting competitions, the rules at issue must be considered to constitute a restriction on the freedom of movement of workers and on competition.

Findings of the Court

As a preliminary point, the Court states that the rules at issue in the main proceedings have a direct impact on players' working conditions and, therefore, on their economic activity. In addition, since the composition of the teams is one of the essential parameters of competitions, the rules at issue must be considered to have a direct impact on the conditions of pursuit of the economic activity to which those competitions give rise and on competition between the clubs pursuing that activity. The rules at issue therefore come within the scope of Articles 45 and 101 TFEU, which the Court, in the light of the differences in sphere attaching to those two provisions, interprets in turn.

In the first place, as regards Article 45 TFEU, the Court finds that there is a restriction on the freedom of movement of workers. In that regard, it observes that the rules at issue in the main proceedings

258 See Article 17, paragraphs 1 and 2 of the RSTP.

259 See Article 17, paragraph 4 of the RSTP.

260 As the International Transfer Certificate is necessary in order for the player to be registered with the new club, the player cannot therefore participate in football competitions for that new club. See Article 9, paragraph 1 of the RSTP and Article 8.2.7 of Annex 3 to those regulations.

are likely to discriminate against players who wish to pursue their economic activity on behalf of a new club established on the territory of a Member State other than that of their residence or of their current place of work by unilaterally terminating their employment contract with their former club for what the former club may or may not claim is not just cause. The existence and combination of those rules have the consequence that those clubs bear significant legal risks, unpredictable and potentially very high financial risks and major sporting risks which, taken together, are clearly such as to dissuade them from signing such players.

As regards the existence of possible justification, the Court points out that the objective of ensuring the regularity of sporting competitions constitutes a legitimate interest of general interest that can be pursued by a sports association. That objective is also of particular importance in the case of football, given the essential role afforded to sporting merit in the conduct of competitions. In addition, the Court observes that, since the composition of teams is one of the essential parameters of competitions, maintaining a certain degree of stability in the player rosters of clubs, and therefore a certain continuity in the related contracts, may thus be regarded as one of the means capable of contributing to the pursuit of that objective.

However, the Court considers that, subject to the verifications which it will be for the referring court to carry out, the various RSTP rules at issue in the main proceedings seem to go beyond what is necessary to achieve that objective, a fortiori because they are intended to apply, to a large extent, in combination and, for some of them, for a significant period of time, to players whose careers are relatively short. That is the case, inter alia, of the criteria for the calculation of the compensation payable where the unilateral breach of the employment contract by the player takes place 'without just cause'. It appears that such criteria for compensation seem to be intended more to protect the clubs' financial interests in the economic context specific to the transfers of players than to ensure what is alleged to be the proper conduct of sporting competitions. That also seems to hold true for the rule which provides, as a matter of principle and therefore without taking account of the particular circumstances of each case, in particular of the actual conduct of the new club which signs that player, that a club is to be jointly and severally liable for payment of the compensation payable by the freshly signed player to his or her former club in the event of the unilateral breach of the contract without just case. That also holds true for the possibility of adopting, virtually automatically, a sporting sanction against the new club on the basis of a presumption that it induced that player to breach his or her contract, as well as a general prohibition on the issuance of an ICT as long as a dispute relating to that breach is pending, irrespective of the circumstances in which that breach of contract occurred.

Consequently, the Court rules that Article 45 TFEU precludes rules such as those at issue in the main proceedings, unless it is established that those rules, as interpreted and applied on the territory of the European Union, do not go beyond what is necessary to pursue the objective consisting in ensuring the regularity of interclub football competitions, by maintaining a certain degree of stability in the player rosters of professional football clubs.

In the second place, that Court recalls that, in order for a decision by an association of undertakings to be regarded as being caught by the prohibition laid down in Article 101(1) TFEU, it is necessary to show either that it has as its object the prevention, restriction or distortion of competition or that it has such an effect. As regards the existence of an anticompetitive object, which, as it recalls, refers exclusively to certain types of coordination between undertakings that reveal a sufficient degree of harm to competition, the Court observes that the collusive conduct of the undertakings may consist, for example, in limiting or controlling the essential parameter of competition consisting, in certain sectors or on certain markets, in the recruitment of highly skilled workers, such as players who have already been trained in the professional football sector.

In the present case, it is clear on a combined reading of the rules of the RSTP at issue in the main proceedings, first, that they are such as to constitute a generalised and drastic restriction, from a substantive viewpoint, of the competition which, in their absence, could pit any professional football

club established in a Member State against any other professional football club established in another Member State as regards the recruitment of players already employed by a given club. Second, that restriction of cross-border competition between clubs in the form of the unilateral recruitment of players who are already employed extends to the entire territory of the European Union and is permanent, in that it covers the entire duration of each of the employment contracts which a player may conclude successively with one club, then, in the event of a negotiated transfer to another club, with the latter club.

Indeed, since the conduct of interclub professional football competitions is based, in the European Union, on matches between and gradual elimination of the participating teams and since it is essentially based on sporting merit, it may be legitimate for an association such as FIFA to seek to ensure the stability of the composition of the player rosters that serve as a pool for the teams which are put together by those clubs during a given season or year. However, the specificity of football and the actual conditions of the functioning of the market constituted by the organisation and marketing of interclub professional football competitions cannot mean that it must be accepted that any possibility for clubs to engage in cross-border competition by unilaterally recruiting players already employed by a club established in another Member State or players whose employment contract with such a club has purportedly been terminated without just cause should be restricted in a generalised, drastic and permanent manner. Ultimately, such rules, even if they are presented as being intended to prevent player-poaching practices by clubs with greater financial means, can be treated as being equivalent to a general, absolute and permanent ban on the unilateral recruitment of players who are already employed, imposed by decision by an association of undertakings on all the undertakings which the professional football clubs are and borne by all the workers which the players are. On that basis, they constitute a manifest restriction of the competition in which those clubs would be able to engage in their absence.

Ainsi, par leur nature même, les règles en cause au principal présentent un degré élevé de nocivité à l'égard de la concurrence à laquelle pourraient se livrer les clubs de football professionnel. Dans ces conditions, ces règles doivent être considérées comme ayant pour objet de restreindre, voire d'empêcher, cette concurrence, et cela sur l'intégralité du territoire de l'Union. Partant, il n'est pas nécessaire d'en examiner les effets.

Lastly, clarifying the conditions in which conduct having an anticompetitive object may be exempted under Article 101(3) TFEU, the Court states that, in order to determine whether the condition requiring the conduct at issue to be indispensable or necessary is satisfied in the present case, the referring court will have to take into consideration the fact that the RSTP rules in question are characterised by a combination of factors, a significant number of which are discretionary or disproportionate. It will also have to take account of the fact that those rules provide for a generalised, drastic and permanent restriction of the cross-border competition in which professional football clubs could engage by unilaterally recruiting highly trained players. Each of those two circumstances, taken on its own, prima facie precludes those rules from being considered indispensable or necessary to enable efficiency gains to be made, if such gains were proven to exist.

Consequently, the Court rules that, on the wording of Article 101 TFEU, the abovementioned rules of the RSTP constitute a decision by an association of undertakings which is prohibited and which cannot be exempted under that provision unless it is demonstrated, through convincing arguments and evidence, that all of the conditions required for that purpose are satisfied.

2. Abuse of a dominant position (Article 102 TFEU) [261]

Judgment of 18 April 2024 (Grand Chamber), *Heureka Group (Online price comparison services)* (C-605/21, EU:C:2024:324)

(Reference for a preliminary ruling – Article 102 TFEU – Principle of effectiveness – Actions for damages under national law for infringements of competition law provisions – Directive 2014/104/EU – Late transposition of the directive – Temporal application – Article 10 – Limitation period – Detailed rules for the dies a quo *– Cessation of the infringement – Knowledge of the information necessary for bringing an action for damages – Publication in the* Official Journal of the European Union *of the summary of the European Commission's decision finding an infringement of the competition rules – Binding effect of a Commission decision that is not yet final – Suspension or interruption of the limitation period for the duration of the Commission's investigation or until the date when its decision becomes final)*

Having received a reference for a preliminary ruling, the Grand Chamber of the Court of Justice rules on the requirements to be met by the national rules on limitation applicable to actions for damages brought before national courts for infringements of EU competition law. That clarification is provided in the context of an action for damages brought by a Czech undertaking against Google LLC for abuse of a dominant position allegedly committed in the Czech Republic by Google and its parent company, Alphabet Inc.

By decision of 27 June 2017, [262] the European Commission found that, since February 2013, Google had infringed Article 102 TFEU by abusing its dominant position in 13 national markets for general search services, including that of the Czech Republic, by decreasing traffic from its general search results pages to competing comparison shopping services and increasing that traffic to its own comparison shopping service. A summary of the decision was published on 12 January 2018 in the *Official Journal of the European Union*. [263]

Google and Alphabet brought an action against that decision before the General Court, which was essentially dismissed. [264] However, since the appeal against that judgment of the General Court, at the time of the present reference for a preliminary ruling, was still pending before the Court of Justice, the Commission's decision was not yet final.[265]

In June 2020, Heureka Group a.s. ('Heureka'), a Czech company active on the market for sales price comparison services, brought an action before the Městský soud v Praze (Prague City Court, Czech Republic) seeking an order that Google pay compensation for the harm resulting from the infringement of Article 102 TFEU found in the Commission's decision and committed in the Czech Republic during the period from February 2013 to 27 June 2017. In Heureka's submission, Google's anticompetitive conduct reduced the number of visits to its portal, Heureka.cz.

In its defence, Google claimed that Heureka's right to compensation was, at least in part, time-barred.

---

261 Reference should also be made under this heading to the following judgments: judgment of 27 June 2024, ***Commission* v *Servier and Others*** (C-176/19, EU:C:2024:549), and judgment of 27 June 2024, ***Commission* v *KRKA*** (C-151/19 P, EU:C:2024:546), presented under heading XIII.1 'Agreements, decisions and concerted practices'.

262 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)).

263 OJ 2018 C 9, p. 11.

264 Judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)* (T-612/17, EU:T:2021:763).

265 The Court of Justice subsequently dismissed that appeal by judgment of 10 September 2024, ***Google and Alphabet* v *Commission (Google Shopping)*** (C-48/22 P, EU:C:2024:726), with the result that the Commission's decision is now final.

In that regard, the Prague City Court states that the national rules applicable to Heureka's action provide for a limitation period of three years which starts to run, independently and separately for each partial occurrence of harm resulting from an infringement of the competition rules, from the moment when the injured party knew, or is deemed to have known, of the fact that it suffered such partial harm and the identity of the party liable to pay compensation for that harm. However, in order for that period to start to run, the injured party is not required to know of the fact that the behaviour concerned constitutes an infringement of competition law or that that infringement has come to an end. Moreover, the applicable national rules do not require the suspension or interruption of that period during the Commission's investigation into the infringement. That limitation period may not be suspended, at the very least, until one year after the date on which the Commission's decision finding that infringement becomes final.

According to the Prague City Court, it follows that, in the present case, every general search on Google's web page which led to a positioning and display of results more favourable to Google's price comparison service would have set a new and separate limitation period running.

Furthermore, since Directive 2014/104 [266] was transposed belatedly into Czech law, the Prague City Court notes that the infringement alleged against Google ceased after the expiry of the period for transposition of that directive, namely 27 December 2016, but apparently before the date of entry into force of the transposing legislation on 1 September 2017.

In the light of the foregoing, the Prague City Court referred a number of questions to the Court for a preliminary ruling seeking to ascertain, in essence, whether Article 10 of Directive 2014/104 and/or Article 102 TFEU and the principle of effectiveness preclude national legislation on limitation such as that at issue in the main proceedings for actions for damages relating to continuing infringements of EU competition law rules.

Findings of the Court

In order to answer the questions referred for a preliminary ruling, the Court examines first of all the temporal applicability of Article 10 of Directive 2014/104, which determines the minimum duration of the limitation period applicable to actions for damages for infringements of competition law and the earliest point in time at which it may begin to run, and the circumstances in which that limitation period must be suspended or interrupted.

In that regard, the Court recalls that Article 10 of Directive 2014/104 is a substantive provision, so that, in accordance with Article 22(1) of that directive, Member States must ensure that the measures transposing that article do not apply retroactively. However, as from the expiry of the period prescribed for transposition of that directive, namely 27 December 2016, national law must be interpreted in conformity with any provision of that directive.

In that context, in order to determine the temporal applicability of Article 10 of Directive 2014/104 in the present case, the Court ascertains whether the legal situation at issue in the main proceedings arose before 27 December 2016 or whether it continued to produce effects thereafter.

To that end, it is necessary to examine whether, on 27 December 2016, the national limitation period applicable to the situation at issue in the main proceedings had elapsed. In that context, however, account must be taken of the fact that, even before the expiry of the time limit for transposition of Directive 2014/104, the applicable national limitation rules had to comply with the principles of equivalence and effectiveness, and cannot undermine completely the full effectiveness of Article 102 TFEU.

---

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

The full effectiveness of Article 102 TFEU and, in particular, the effectiveness of the prohibition laid down therein require that the national limitation periods applicable to actions for damages for infringements of that article do not begin to run before the infringement has come to an end and the injured party does not know, or cannot reasonably be expected to know, the information necessary for bringing its action for damages.

As regards the first condition relating to the cessation of the infringement, the Court considers that, in view of the fact that disputes concerning infringements of the rules on competition law are characterised, in principle, by information asymmetry to the detriment of the injured party and that it is often particularly difficult for such a party to establish the existence and scope of such an infringement and the harm resulting from that infringement before it comes to an end, the requirement that the limitation period cannot begin to run before the infringement concerned has come to an end is necessary in order to enable the injured party to be effectively able to exercise its right to claim full compensation under Article 102 TFEU. Moreover, since it is generally difficult for the injured party to adduce evidence of an infringement of that article in the absence of a decision by the Commission or by a national authority finding that infringement, rules on limitation which could have the consequence that the limitation period expires well before the adoption of such a decision would render the exercise of that party's right to seek full compensation excessively difficult.

As regards the second condition relating to knowledge of the information necessary for bringing an action for damages, the Court recalls that the existence of an infringement of competition law, the existence of harm, the causal link between that harm and that infringement and the identity of the infringer form part of that information.

Although it is for the referring court to determine, in the present case, the date on which Heureka knew that information, the Court nevertheless considers it appropriate to point out that, in principle, the moment when that information is known coincides with the date of publication in the *Official Journal of the European Union* of the summary of the Commission's decision finding the infringement, irrespective of whether or not that decision has become final.

The Court also states that Article 102 TFEU and the principle of effectiveness require the suspension or interruption of the limitation period for the duration of an investigation conducted by the Commission. However, that article and that principle do not require the limitation period to continue to be suspended until the moment the Commission's decision becomes final. An injured party may, in order to substantiate its action for damages, rely on the findings in a Commission decision which has not become final, where that decision has binding effect for as long as it has not been annulled.

In view of the foregoing, the Court finds that national rules on limitation, such as those at issue in the main proceedings, under which, first, the three-year limitation period begins to run independently and separately for each partial occurrence of harm resulting from an infringement of Article 102 TFEU from the moment when the injured party knows, or can reasonably be expected to know, of the fact that it suffered partial harm and the identity of the party who is liable to pay compensation for that harm, without it being necessary for the infringement to have come to an end and for that person to have knowledge of the fact that the behaviour concerned constitutes an infringement of the competition rules, and, second, that period may not be suspended or interrupted during the Commission's investigation into such an infringement are incompatible with Article 102 TFEU and the principle of effectiveness, in that they make the exercise of the right to claim compensation for the harm suffered as a result of that infringement practically impossible or excessively difficult.

Consequently, it is by disregarding the elements of those rules on limitation which are incompatible with Article 102 TFEU and the principle of effectiveness that it is necessary to examine whether, on the date the period for transposing Directive 2014/104 expired, namely 27 December 2016, the limitation period laid down by national law, applicable to the situation at issue in the main proceedings until that date, had expired.

In that regard, it is apparent from the Commission's decision finding Google's abuse of a dominant position that that infringement had not yet come to an end on the date that decision was adopted, namely 27 June 2017. It follows that, on the date on which the period for transposing Directive 2014/104 expired, not only had the limitation period not expired but it had not even started to run.

Since the situation at issue in the main proceedings had not arisen before the expiry of the period for transposing Directive 2014/104, Article 10 of that directive is applicable *ratione temporis* in the present case. However, the Court holds that it follows from the clear wording of Article 10(2) and (4) of that directive that the national rules on limitation at issue are also incompatible with that provision. It states, in particular, that Article 10(4) of that directive now requires that the suspension of the limitation period following action taken by a competition authority for the purpose of the investigation or proceedings in respect of an infringement of competition law to which the action for damages relates is to end at the earliest one year after the date on which the decision finding that infringement became final or after the proceedings are otherwise terminated. In that respect, that provision therefore exceeds the requirements under Article 102 TFEU and the principle of effectiveness.

Lastly, the Court points out that, although an untransposed directive cannot be relied on directly in a dispute between individuals, the national court hearing such a dispute is nevertheless required to interpret national law in conformity with that directive as soon as the time limit for its transposition expires, without however interpreting national law *contra legem*.

Judgment of 10 September 2024 (Grand Chamber), *Google and Alphabet* v *Commission (Google Shopping)* (C-48/22 P, EU:C:2024:726)

(Appeal – Competition – Abuse of dominant position – Markets for online general search services and specialised product search services – Decision finding an infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA) – Leveraging abuse – Competition on the merits or anticompetitive practice – Dominant undertaking favouring the display of results from its own specialised search service – Potential anticompetitive effects – Causal link between abuse and effects – Burden of proof – Counterfactual scenario – Capability of foreclosing – 'As-efficient competitor' test)

The Court of Justice, sitting as the Grand Chamber, dismisses the appeal brought by Google LLC and its parent company Alphabet Inc. against the judgment of the General Court upholding the fine imposed on them by the European Commission for abuse of a dominant position in several national online search markets. On this occasion, the Court provides clarification concerning its case-law on abuse of a dominant position consisting in a refusal to grant access to an essential facility and concerning the criteria for assessing whether the conduct of an undertaking in a dominant position departs from competition on the merits.

By decision of 27 June 2017, [267] the Commission found that Google had abused its dominant position in 13 national markets for online general search services within the European Economic Area (EEA).

The conduct identified as the source of the abuse was, in essence, the fact that Google displayed its comparison shopping service on its general results pages selected by its search engine in a prominent and eye-catching manner in dedicated 'boxes', without that comparison service being subject to its adjustment algorithms, whereas, at the same time, competing comparison shopping services could appear on those pages only as general search results, and never in rich format, while being prone to being demoted within the ranking of generic results by those adjustment algorithms. Google had,

267 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)) ('the decision at issue').

thus, reduced the traffic from its general results pages to competing comparison shopping services while increasing that traffic to its own.

According to the Commission, those practices had produced anticompetitive effects both on the national markets for specialised comparison shopping search services and on the national markets for online 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 in the 13 countries under examination, the Commission imposed a fine on Google of EUR 2 424 495 000, of which EUR 523 518 000 jointly and severally with Alphabet.

The General Court largely dismissed the action brought by Google and Alphabet against that decision and confirmed the Commission's analysis concerning the market for specialised comparison shopping search services. [268] In the exercise of its unlimited jurisdiction, it furthermore maintained in full the fine imposed by the Commission.

Google and Alphabet brought an appeal before the Court of Justice seeking, principally, to have that judgment set aside and annulment of the Commission's decision.

Findings of the Court

In support of their appeal, the appellants claimed, inter alia, that, by refusing to apply to the present case the conditions laid down by the Court of Justice in the judgment in *Bronner* [269] relating to abuse of a dominant position consisting in a refusal to grant access to an essential facility, the General Court applied an incorrect legal test in order to assess whether there was an abuse of a dominant position by Google.

As regards that point, the Court of Justice recalls that Article 102 TFEU penalises conduct of undertakings in a dominant position which restricts competition on the merits and which is thus likely to cause direct harm to individual undertakings and consumers, or which hinder or distort competition and are thus likely to cause them indirect harm. That conduct covers any practice which has the effect of hindering, through means other than competition on the merits, the maintenance or growth of competition in a market in which the degree of competition is already weakened, precisely because of the presence of one or more undertakings in a dominant position.

In that context, the Court of Justice held, in the judgment in *Bronner*, that a refusal to grant access to an infrastructure developed and owned by a dominant undertaking for the purposes of its own business may constitute an abuse of a dominant position provided not only that that refusal is likely to eliminate all competition in the market in question on the part of the entity applying for access and is incapable of being objectively justified, but also that the infrastructure, in itself, is indispensable to carrying on that undertaking's business, inasmuch as there is no actual or potential substitute for that infrastructure. In that regard, the Court of Justice stresses that the imposition of that condition was justified by the specific circumstances of the *Bronner* case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct. A finding that a dominant undertaking abused its position due to a refusal to conclude a contract with a competitor has the consequence of forcing that undertaking to conclude a contract with that competitor. Such an obligation is especially detrimental to the freedom of contract and the right to property of the dominant undertaking, which

268 Judgment of the General Court of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)* (T-612/17, EU:T:2021:763, 'the judgment under appeal').

269 Judgment of 26 November 1998, *Bronner* (C-7/97, EU:C: 1998:569).

remains, in principle, free to refuse to conclude contracts and to use the infrastructure it has developed for its own needs.

By contrast, the present case differs from the *Bronner* case in so far as Google, of its own volition, gives its competitors access to its infrastructure, namely its general search service and the general results pages. It follows that a finding of abuse of a dominant position committed by Google on account of unfair conditions of access to that infrastructure is not capable of giving rise to measures as detrimental to its freedom of contract and its right to property as those at issue in the *Bronner* case.

In the light of that clarification, the Court of Justice notes that, where a dominant undertaking such as Google gives access to its infrastructure but makes that access subject to unfair conditions, the conditions laid down in the judgment in *Bronner* do not apply.

Consequently, the General Court was right to find that the Commission had not erred in law by failing to assess whether the practices in which Google was found to have engaged satisfied the conditions laid down in the judgment in *Bronner* for the purposes of their classification under Article 102 TFEU.

Next, the Court of Justice rejects the ground of appeal alleging that the General Court erred in law in upholding the decision at issue despite the fact that it failed to identify conduct that deviated from competition on the merits.

The appellants complained, inter alia, that the General Court had confirmed that three specific circumstances relied on by the Commission in the decision at issue were relevant for assessing whether Google competed on the merits. Those circumstances were (i) the importance of traffic generated by Google's general search engine for comparison shopping services, (ii) the behaviour of users when searching online and (iii) the fact that diverted traffic from Google's general results pages accounted for a large proportion of traffic to competing comparison shopping services and could not be effectively replaced by other sources.

The Court of Justice first of all rejects the plea of inadmissibility alleging that that argument was raised for the first time at the appeal stage, noting that it constitutes an amplification of a plea relied on by the applicants at first instance and that that line of argument also arose from the judgment under appeal itself.

As regards the substance, the Court of Justice recalls that Article 102 TFEU does not sanction the existence per se of a dominant position, but only the abusive exploitation thereof. That provision neither seeks to prevent the creation of a dominant position nor to ensure that less efficient undertakings remain on the market. On the contrary, competition on the merits may, by definition, lead to their disappearance or marginalisation.

In order to find that there has been an 'abuse of a dominant position' within the meaning of Article 102 TFEU, it is necessary, as a general rule, to demonstrate that, through recourse to methods different from those governing competition on the merits, the conduct in question has the actual or potential effect of restricting competition on the market or markets concerned, which may be either the dominated markets or related or neighbouring markets.

That may entail the use of different analytical templates depending on the particular case. It must however still take into account all the relevant factual circumstances, irrespective of whether they concern the conduct itself, the market(s) in question or the functioning of competition on that or those market(s). In that regard, an 'abuse of a dominant position' may result not only from conduct capable of producing an exclusionary effect, but also from conduct which either has the actual or potential effect, or even the object, of preventing the access of potential competitors to the market by using other blocking measures or other means different from those which govern competition on the merits.

It follows that the relevant factual circumstances to assess whether an undertaking in a dominant position is abusing that position include those concerning not only the conduct itself but also the market(s) in question or the functioning of competition on that or those market(s). Thus, circumstances relating to the context in which the conduct of that undertaking is implemented, such as the characteristics of the sector concerned, must be regarded as relevant in order to find that there has been abuse of a dominant position within the meaning of Article 102 TFEU.

In the light of those clarifications, the Court of Justice notes that the three specific circumstances set out in decision at issue constituted elements of the context in which Google's general search engine and comparison shopping services functioned, and in the context of which the conduct in question was implemented. Since they enabled Google's practices to be placed in the context of the two relevant markets and the functioning of competition on those markets, those circumstances were relevant to clarify whether those practices were consistent with competition on the merits.

Similarly, the Court of Justice rejects the appellants' argument that the General Court erred in law in finding that Google had discriminated between Google's own comparison shopping service and competing comparison shopping services on its general search pages, without establishing arbitrary different treatment.

In that regard, the Court of Justice states that it is true that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case. However, in the present case, the General Court correctly established that, in the light of the characteristic of the upstream market and the abovementioned specific circumstances of the case, Google's conduct was discriminatory and did not fall within the scope of competition on the merits.

The Court of Justice observes, moreover, that the General Court neither reversed the burden of proof nor ruled out the usefulness of a counterfactual analysis by finding, first, that the Commission was not required to carry out such an analysis for the purposes of assessing the causal link between the practices at issue and their actual or potential effects, while noting, secondly, that Google could put forward a counterfactual analysis in order to challenge the Commission's findings on that point. In so doing, the General Court merely correctly found that it is permissible for the Commission to rely on a range of evidence, without being required systematically to use any single tool, in order to establish a causal link between the practices examined and their anticompetitive effects on the market.

Lastly, the Court of Justice holds that the General Court did not err in law in finding that, in the context of the analysis of the anticompetitive effects of the practices alleged against Google, the Commission was not required to examine whether those practices were capable of foreclosing competitors as efficient as Google.

Although the objective of Article 102 TFEU is not to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market, it does not follow that any finding of an infringement under that provision is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor.

In the present case, the General Court stated, without that finding being invalidated by the appellants, that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google's competitors in the light of the specific conditions of the market in question. Accordingly, it was justified in finding, first, that the as-efficient competitor test was not mandatory in the context of the application of Article 102 TFEU and, secondly, that, in the circumstances of the present case, that test was not relevant.

Since none of the grounds of appeal were successful, the Court of Justice dismisses the appeal in its entirety.

3. Concentrations

Judgment of 3 September 2024 (Grand Chamber), *Illumina and Grail* v *Commission* (C-611/22 P and C-625/22 P, EU:C:2024:677)

(Appeal – Competition – Concentrations – Pharmaceutical industry market – Genetic sequencing systems – Acquisition by Illumina Inc. of sole control over Grail LLC – Regulation (EC) No 139/2004 – Article 22 – Referral request from a national competition authority not having competence under national law to examine the concentration – Decision of the European Commission to examine that concentration – Commission decisions accepting requests from other national competition authorities to join the referral request – Competence of the Commission – Legal certainty)

Setting aside the judgment of the General Court in *Illumina* v *Commission*, [270] the Court of Justice, sitting as the Grand Chamber, clarifies the extent of the power to review proposed concentrations conferred on the European Commission by the Merger Regulation. [271] The Court of Justice thus states that the Commission is not authorised to encourage or accept, on the basis of Article 22 of that regulation, referrals of proposed concentrations without a European dimension from national competition authorities where those authorities are not competent to examine those proposed concentrations under their own national law, in particular where the proposed concentration does not reach the thresholds determining competence provided for by that law.

On 20 September 2020, the US company Illumina Inc, which supplies sequencing- and array-based solutions for genetic and genomic analysis, entered into an agreement and plan of merger to acquire sole control of the company Grail LLC, also established in the United States. A press release announcing that concentration was issued by Illumina and Grail on 21 September 2020.

Since turnover did not exceed the relevant thresholds, the announced concentration did not have a European dimension, within the meaning of Article 1 of the Merger Regulation, and was accordingly not notified to the Commission. Nor was it notified in the EU Member States or in other States party to the Agreement on the European Economic Area ('the EEA Agreement'), since it did not fall within the scope of their national merger control rules.

That being so, after receiving, on 7 December 2020, a complaint concerning the concentration between Illumina and Grail, the Commission reached the preliminary conclusion that that concentration appeared to satisfy the necessary conditions in order to be the subject of a referral by a national competition authority pursuant to Article 22 of the Merger Regulation. Therefore, the Commission sent, pursuant to Article 22(5) of that regulation, a letter to the Member States and to the other States party to the EEA Agreement in order, first, to inform them of that concentration and, second, to invite them to send it a referral request under Article 22(1) of that regulation for it to examine that concentration.

Under that provision, 'one or more Member States may request the Commission to examine any concentration … that does not have a [European] dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.'

---

270 Judgment of 13 July 2022, *Illumina* v *Commission* (T-227/21, EU:T:2022:447).

271 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; 'the Merger Regulation').

On 9 March 2021, the French national competition authority submitted to the Commission a referral request pursuant to that provision, which the Icelandic, Norwegian, Belgian, Dutch and Greek competition authorities subsequently requested, each in its own right, to join.

After informing Illumina and Grail of the referral request submitted by the French national competition authority ('the information letter'), the Commission accepted that request and the requests to join it ('the decisions at issue').

Illumina, supported by Grail, brought an action for the annulment of those decisions and of the information letter, which was dismissed by the General Court by judgment of 13 July 2022. [272]

The Court of Justice, hearing two appeals brought, respectively, by Illumina and by Grail, sets aside that judgment of the General Court and, itself giving final judgment in the dispute, annuls the decisions at issue.

Findings of the Court

In the judgment under appeal, the General Court held, in essence, that it was apparent from the literal, historical, contextual and teleological interpretations of the first subparagraph of Article 22(1) of the Merger Regulation that the Commission could, as it had found in the decisions at issue, accept the referral of a concentration under that article in a situation where the Member State requesting that referral is not entitled, under its national merger control rules, to examine that concentration. That is typically the case where the proposed concentration does not reach the thresholds set by national law to allow the national authority to review it.

Since Illumina and Grail challenged that assessment, the Court of Justice examines whether the General Court's interpretation was well founded.

The relationship between the different methods of interpretation applied by the General Court

For the purposes of the interpretation of the first subparagraph of Article 22(1) of the Merger Regulation, the General Court started from the finding that, without giving a definitive conclusion, a literal interpretation of that provision makes it clear that a Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules. Next, the General Court engaged in a historical, contextual and teleological interpretation of that provision.

On that point, the Court of Justice finds that that approach on the part of the General Court, consisting in combining various methods of interpretation, is not vitiated by error.

Although it follows from settled case-law that an interpretation of a provision of EU law cannot have the result of depriving the clear and precise wording of that provision of all effectiveness, the Courts of the European Union are not deprived of the possibility of having recourse in certain situations to methods of interpretation which they consider appropriate in order to clarify the exact scope of a provision of EU law that appears to be clear.

In the circumstances of the present case, where it appears that numerous factors were brought to the attention of the General Court with a view to clarifying the scope of the allegedly clear wording of the first subparagraph of Article 22(1) of the Merger Regulation, the General Court was fully entitled to hold that it could not confine itself to an isolated reading of the – both concise and general – wording of that provision and refrain from a contextual and teleological interpretation, as informed by the legislative history of that provision.

272 See footnote 272.

The historical interpretation

With a view to challenging the General Court's historical interpretation of the first subparagraph of Article 22(1) of the Merger Regulation, Grail referred, inter alia, to documents drawn up in the context of the *travaux préparatoires* for the adoption of Regulations No 4064/89 [273] and No 1310/97 [274] and of the Merger Regulation that were not aired before the General Court.

Since the Commission disputed the admissibility of that evidence, the Court of Justice notes that, where, as in the present cases, the interpretation of a provision of secondary law is called into question, the EU judicature must be able to examine, whether of its own motion or on the basis of evidence that has been properly submitted for its assessment, the documents drawn up in the context of the *travaux préparatoires* that led to its adoption. The legislative history of a provision of EU law may provide indications as regards the intention of the EU legislature.

As regards the substance, the Court of Justice finds that, contrary to what the General Court held, the historical interpretation does not lead to the conclusion that the first subparagraph of Article 22(1) of the Merger Regulation confers on the Commission the competence to examine a concentration without a European dimension within the meaning of Article 1 of that regulation irrespective of the scope of the rules of the Member State that has made a request in the field of merger control.

In that regard, the Court of Justice considers that the arguments of the General Court concerning the legislative history of Article 22 of the Merger Regulation do not show that the EU legislature intended to empower Member States which have national merger control rules to refer to the Commission transactions that do not fall within the scope of those rules.

Similarly, the historical documents relating to the adoption of Regulation No 4064/89 and of the Merger Regulation do not demonstrate intention on the part of the EU legislature to use the referral mechanisms provided for, respectively, in Article 22(3) of Regulation No 4064/89 and in Article 22 of the Merger Regulation to remedy alleged deficiencies stemming from the rigidity of the quantitative thresholds laid down in Article 1 of each of those regulations for the purpose of identifying concentrations with a European dimension.

The contextual interpretation

As regards the contextual interpretation of Article 22 of the Merger Regulation, the Court of Justice finds that the contextual elements examined by the General Court are also not conclusive for the purpose of determining whether the Commission was competent to adopt the decisions at issue.

In addition, the Court of Justice notes that the General Court disregarded other contextual factors capable of contradicting the interpretation adopted in the judgment under appeal, related:

– first, to the conditions for the application of the referral mechanism that are set out in the first subparagraph of Article 22(1) of the Merger Regulation;

– second, to the differences between that referral mechanism and another referral mechanism, provided for in Article 4(5) of that regulation; and

– third, to the simplified procedure provided for by that regulation for revising the thresholds and criteria which define its scope.

---

273 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1).

274 Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation No 4064/89 (OJ 1997 L 180, p. 1).

In the light of those considerations, the Court of Justice concludes that the General Court erred in holding that it followed from the contextual interpretation of Article 22 of the Merger Regulation that a request under that provision could be submitted irrespective of the existence or scope of national rules on the *ex ante* control of concentrations.

The teleological interpretation

The Court of Justice finds, furthermore, that the General Court's conclusion that the teleological interpretation of Article 22 of the Merger Regulation confirms that that article is a corrective mechanism for the effective control of all concentrations with significant effects on the structure of competition in the European Union, irrespective of the existence or scope of national rules on the *ex ante* control of concentrations, is incorrect.

On that point, the Court of Justice emphasises, in particular, that only two primary objectives are pursued by the referral mechanism provided for in Article 22 of that regulation. The first objective is to permit the scrutiny of concentrations that could distort competition locally, where the Member State in question does not have any national merger control rules. The second objective is to extend the 'one-stop shop' principle so as to enable the Commission to examine a concentration that is notified or notifiable in several Member States, in order to avoid multiple notifications at national level and thereby to enhance legal certainty for undertakings.

By contrast, it has not been established that that mechanism was intended to remedy deficiencies in the control system inherent in a scheme based principally on turnover thresholds, which cannot, by definition, cover all potentially problematic concentrations.

The General Court's interpretation that Article 22 of the Merger Regulation is aimed at the effective control of all concentrations with significant effects on the structure of competition in the European Union is, moreover, liable to upset the balance between the various objectives pursued by that regulation. In particular, that interpretation undermines the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration.

Moreover, it is apparent that the broad interpretation of the first subparagraph of Article 22(1) of the Merger Regulation adopted by the General Court, which potentially entails an extension of the scope of that regulation and of the Commission's competence to review concentrations, is at odds with the principle of institutional balance, characteristic of the institutional structure of the European Union, deriving from Article 13(2) TEU, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions.

In that regard, the Court of Justice points out, first, that the Merger Regulation provides for a simplified procedure with a view to revising the thresholds which define its scope. Therefore, even if the effectiveness of the thresholds determining competence on the basis of turnover provided for by that regulation were to prove insufficient to scrutinise some transactions capable of significantly affecting competition, it is for the EU legislature alone to review those thresholds or to provide for a safeguard mechanism enabling the Commission to scrutinise such a transaction.

Second, where the Member States consider it necessary to extend the sphere of transactions that merit prior examination under merger legislation, it is open to them to revise downwards their own thresholds determining competence based on turnover as laid down by national legislation.

Setting aside of the judgment under appeal and annulment of the decisions at issue

In the light of the foregoing, the Court of Justice concludes that, by holding that the Member States may, under the conditions set out therein, make a request under the first subparagraph of Article 22(1) of the Merger Regulation irrespective of the scope of their national rules on the *ex ante* control of concentrations, the General Court erred in law in interpreting that provision. The General Court

therefore erred in holding that the Commission had been right, by the decisions at issue, to accept the referral request submitted by the French national competition authority and the requests to join submitted by the other national competition authorities pursuant to Article 22 of that regulation.

Consequently, the Court of Justice sets aside the judgment of the General Court. Giving final judgment itself in the matter, it also annuls the decisions at issue.

4. State aid

Judgment of 10 September 2024 (Grand Chamber), *Commission* v *Ireland and Others* (C-465/20 P, EU:C:2024:724)

(Appeal – State aid – Article 107(1) TFEU – Tax rulings issued by a Member State – Selective tax advantages – Allocation of profits generated by intellectual property licences to branches of non-resident companies – Arm's length principle)

In setting aside the judgment of the General Court in *Ireland and Others* v *Commission* [275] by which the General Court annulled the decision of the European Commission on State aid implemented by Ireland to Apple, [276] and then itself giving final judgment on the remaining elements of the dispute, the Grand Chamber of the Court of Justice rules, in the light of the analysis set out in the decision at issue and of the findings of the General Court that remained unchallenged, that the Commission correctly established the selective nature of the advantage conferred on two Apple Group companies, incorporated in Ireland, by two tax rulings issued by the Irish tax authorities in relation to the determination of the tax base of the Irish branches of the companies concerned. In that regard, the Court of Justice places its analysis within the framework set out by the recently consolidated principles of case-law [277] concerning the definition and analysis of the reference framework in the light of which the selectivity of tax measures must be assessed for the purposes of Article 107(1) TFEU. It notes in that regard that the appropriate definition of the relevant reference framework, and, by extension, the correct interpretation of the constituent provisions of national law, is a question of law that falls within the scope of the review to be carried out by the Court of Justice on appeal, within the limits of the subject matter of that appeal.

Within the Apple Group, Apple Inc., established in Cupertino (United States), controls various companies incorporated in Ireland through its wholly owned subsidiary, Apple Operations International. The latter fully owns the subsidiary Apple Operations Europe (AOE), which in turn fully owns the subsidiary Apple Sales International (ASI). ASI and AOE are both companies incorporated in Ireland, but are not tax resident in Ireland. They each have a branch in Ireland, which does not have a separate legal personality. [278]

---

275 Judgment of 15 July 2020, *Ireland and Others* v *Commission* (T-778/16 and T-892/16, EU:T:2020:338).

276 Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (OJ 2017 L 187, p. 1; 'the decision at issue').

277 See, in particular, judgment of 5 December 2023, *Luxembourg and Others* v *Commission* (C-451/21 P and C-454/21 P, EU:C:2023:948).

278 ASI's Irish branch is, inter alia, responsible for carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the regions covering Europe, the Middle East, India, Africa and the Asia-Pacific. AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland, such as iMac desktops, MacBook laptops and other computer accessories, which it supplies to related parties for Europe, the Middle East, India and Africa.

ASI and AOE were bound to Apple Inc. by a cost-sharing agreement under which they were in particular granted royalty-free licences enabling them to use the Apple Group's intellectual property rights. That use consisted, inter alia, in the manufacture and sale of the products concerned in all territories apart from North and South America.

Under the provisions of Irish law governing taxation of companies in force during the period under consideration ('the reference provisions'), non-resident companies were liable to tax in respect of trading income arising directly or indirectly through an active branch in Ireland. In the present case, in 1990, the Irish tax authorities received requests from the predecessors of ASI and AOE for determination of their chargeable profits to be clarified. It is against that background that the Irish tax authorities issued a first tax ruling in 1991, subsequently revised at the request of ASI and AOE, and a second ruling in 2007 (together, 'the contested tax rulings').

At the end of a formal investigation procedure initiated in 2014, the Commission adopted the decision at issue concerning the contested tax rulings. In that decision, the Commission found, in particular, that, in so far as the contested tax rulings had led to a reduction in ASI's and AOE's tax base, for the purpose of establishing corporation tax in Ireland, they had conferred an advantage on those two companies. In order to prove the existence of a selective advantage in the present case, the Commission examined whether there was a selective advantage arising from a derogation from the reference framework. On the basis of primary, subsidiary and alternative lines of reasoning, the Commission considered, in essence, that the contested tax rulings had enabled ASI and AOE to reduce the amount of tax for which they were liable in Ireland during the period when those rulings were in force, namely from 1991 to 2014, and that that reduction in the amount of tax represented an advantage as compared to other companies in a comparable situation. More specifically, primarily, the Commission contended that the fact that the Irish tax authorities had accepted, in the contested tax rulings, the premiss that the Apple Group's intellectual property ('IP') licences held by ASI and AOE had to be allocated outside Ireland had led to ASI's and AOE's annual chargeable profits in Ireland departing from a reliable approximation of a market-based outcome in line with the arm's length principle.

Ruling on the actions brought by Ireland and by ASI and AOE, respectively, for annulment of the decision at issue, the General Court found that the Commission had not succeeded in showing to the requisite legal standard that there was an advantage for the purposes of Article 107(1) TFEU and annulled the decision at issue in its entirety.

In its judgment, the General Court recalled as a preliminary point that, in the context of State aid control, in order to assess whether the contested tax rulings constituted such aid, the Commission was required to demonstrate in particular that those tax rulings had conferred a selective advantage.

In that regard, the General Court rejected the Commission's primary line of reasoning in relation to the existence of an advantage on two grounds, relating, first, to the Commission's assessments of normal taxation under the Irish tax law applicable in the present case, and, secondly, to the Commission's assessments of the activities within the Apple Group.

Having also rejected the subsidiary and alternative lines of reasoning in that respect, the General Court annulled the decision at issue in its entirety without examining the other pleas in law and complaints raised by Ireland and by ASI and AOE.

The Commission relies, in support of its appeal, on two grounds of appeal, relating, respectively, to the grounds of the judgment under appeal concerning the assessment of the primary line of reasoning and those concerning the assessment of the subsidiary line of reasoning.

Findings of the Court

As a preliminary point, the Court of Justice recalls that, in order to classify a national tax measure as 'selective' for the purposes of Article 107(1) TFEU, the Commission must begin by identifying the reference system, that is, the 'normal' tax system applicable in the Member State concerned, and demonstrate, as a second step, that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation.

The Court states that the determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation.

On that point, the Court also observes that, outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime. This includes, in particular, the determination of the basis of assessment, the taxable event and any exemptions to which the tax is subject. It follows that only the national law applicable in the Member State concerned must be taken into account in order to identify that reference system. That conclusion is, however, without prejudice to the possibility of finding that the reference framework itself, as it results from national law, is incompatible with EU law on State aid, since the tax system at issue has been configured according to manifestly discriminatory parameters intended to circumvent that law.

The Court examined the appeal in the light of those principles.

In that regard, the Court states at the outset that the Commission's primary line of reasoning is based on the premiss that, in order to allocate the profits correctly in accordance with the separate entity approach and the arm's length principle laid down by the applicable provisions of national law, [279] the competent Irish authorities were required to verify whether the profits derived from the use of the Apple Group's IP licences held by ASI and AOE did not, wholly or in part, have to be attributed to their Irish branches. The failure to verify as required by those provisions resulted, according to the Commission, in a lowering of the tax burden for those companies, conferring a selective advantage on them.

Having made that point, the Court of Justice rules that the Commission is permitted to challenge the General Court's findings in respect of the reference framework derived from Irish law. The question whether the General Court adequately defined the reference system under Irish law and, by extension, correctly interpreted the national provisions which that system comprises is a question of law which can be reviewed by the Court of Justice on appeal. Thus, the Commission's arguments aimed at calling into question the choice of reference framework or its meaning in the first step of the analysis of the existence of a selective advantage are admissible, since that analysis derives from a legal classification of national law on the basis of a provision of EU law. In the present case, the same applies both to the complaint that the General Court misinterpreted the decision by finding that the Commission had confined itself to an 'exclusion' approach in its primary line of reasoning, and to the complaint by which the Commission argues that the General Court relied on the functions performed by Apple Inc.

The Court of Justice thus examines, in the first place, the complaint alleging that the decision at issue was misinterpreted, in so far as the General Court found that the Commission's primary line of reasoning relied solely on the lack of employees and physical presence in the head offices of ASI and AOE and, accordingly, on an 'exclusion' approach.

---

279 That is, in particular, those to which section 25 of the Taxes Consolidation Act 1997 ('TCA 97') relates).

In that regard, the Court of Justice finds, first of all, that the Commission's reasoning is based on the premiss that the application of the reference provisions required the prior determination of a profit allocation method, which is not defined in those provisions, and, moreover, that that method had to lead to an outcome consistent with the arm's length principle. As it is, that premiss was not called into question by the General Court, which added that 'normal' taxation is to be determined according to the national tax rules and that those rules must be used as a reference point when establishing the very existence of an advantage, but nevertheless went on to make clear that if those national rules provide that the branches of non-resident companies, as concerns the profits derived from those branches' trading activity in Ireland, and resident companies are subject to the same conditions of taxation, Article 107(1) TFEU gives the Commission the right to check whether the level of profit allocated to such branches, which has been accepted by the national authorities for the purpose of determining the chargeable profits of those non-resident companies, corresponds to the level of profit that would have been obtained if that activity had been carried on under market conditions.

According to the Court of Justice, it may be inferred from this that the application of the arm's length principle in the present case is based on Irish tax rules on the taxation of companies and, accordingly, on the reference system identified by the Commission and confirmed by the General Court. In the present case, the General Court explicitly acknowledged that, contrary to Ireland's contention, the application of the reference provisions, as described by Ireland, corresponded in essence to the functional and factual analysis conducted as part of the first step of the approach authorised by the Organisation for Economic Co-operation and Development (OECD) for profit allocation to a permanent establishment. Those findings of the General Court caused it in particular to rule that the Commission had not erred when it relied on the arm's length principle in order to check whether, in the application of the reference provisions by the Irish tax authorities, the level of profit allocated to the branches of ASI and AOE for their trading activity in Ireland, as accepted in the contested tax rulings, corresponded to the level of profit that would have been obtained by carrying on that trading activity under market conditions, and when it relied, in essence, on the Authorised OECD Approach for the purposes of applying those provisions, while taking into account the allocation of assets, functions and risks between those branches and the other parts of those companies. Those findings must be taken as read, in so far as they have not been validly called into question by the other parties in the context of the present appeal.

It follows from the steps in the reasoning set out in the decision at issue that the Commission first of all found that, in order to determine, in accordance with the relevant provisions of national law, ASI's and AOE's taxable profit in Ireland under the arm's length principle, it was appropriate to compare the functions performed, respectively, by the head offices and by the Irish branches of those companies in relation to the IP licences. Next, in applying that test, it carried out a separate examination of the role assumed by each of those head offices and each of those branches in relation to those licences. Following that examination, it found, on the one hand, an absence of functions in relation to the IP licences in the case of the head offices and, on the other, an active role by the Irish branches resulting from the assumption of a series of functions and risks associated with the management and use of those licences. Furthermore, the finding of the absence of 'active or critical' functions performed by the head offices is based on the lack of evidence to the contrary from Apple, in conjunction with the finding that those head offices lacked the actual capacity to perform those functions. Thus, the Commission's primary line of reasoning is based not only on the lack of functions performed by the head offices in relation to the IP licences, but also on the analysis of functions actually performed by the branches in relation to those licences.

Therefore, it was not the finding that the head offices had neither employees nor physical presence outside the Irish branches that led the Commission to conclude that the IP licences and related profits had to be allocated to those branches. The Commission drew that conclusion after linking two separate findings, that is to say, first, the absence of active or critical functions performed and risks assumed by the head offices and, secondly, the multiplicity and centrality of the functions performed and risks assumed by those branches, applying the legal test set out in the decision at issue.

In those circumstances, the Court of Justice holds that the General Court erred in law when it found that the Commission had confined itself to an 'exclusion' approach in its primary line of reasoning, which was a misinterpretation of the decision at issue.

In the second place, as regards the grounds covered by the appeal on which the General Court relied when it found that ASI's and AOE's branches in Ireland did not control the Apple Group's IP licences and did not generate the profits which the Commission claimed they achieved, the Court of Justice holds, first of all, that the Commission is justified in arguing that the General Court committed a breach of procedure by taking into account, for the purposes of its analysis, evidence which had not been produced during the administrative procedure and which, therefore, had to be considered inadmissible. Furthermore, as regards the method for allocating chargeable profits required under Irish law, the Court of Justice observes that the test for determining the profits of a non-resident company held by the General Court to be applicable under section 25 of the TCA 97 requires the allocation of assets, functions and risks between the Irish branches and the other parts of the companies concerned, excluding any role played by separate entities, such as, in this instance, Apple Inc. In that regard, the Court of Justice finds that, in the grounds that are being challenged, the General Court relied explicitly or implicitly on the functions performed by Apple Inc. in relation to the Apple Group's IP to support its finding of an error vitiating the analysis set out by the Commission. Consequently, the Court of Justice rules that the Commission is justified in arguing that, in order to rule that the evidence to support the allocation of profits from the exploitation of the IP licences to the branches of ASI and AOE was insufficient, the General Court wrongly compared the functions performed by those branches in relation to those licences to the functions performed by Apple Inc. in relation to the Apple Group's IP, rather than to those actually performed by the head offices in connection with those licences.

In the third place, the Court of Justice examines the finding that the agreements and activities of ASI and AOE outside Ireland show that those companies were in a position to develop and manage the Apple Group's IP and to generate profits outside Ireland and that those profits were, consequently, not subject to tax in Ireland. It considers in that regard that, while the assessment of the probative value of a document in the file is in principle for the General Court alone to make, it is nevertheless incumbent on the Court of Justice to examine a complaint that the burden of proof has been determined incorrectly. In the present case, by finding that the Commission was required to demonstrate the existence of important business decisions not mentioned in the board minutes of the companies concerned, the General Court imposed an excessive burden of proof on the Commission.

In the light of the foregoing considerations, the Court of Justice sets aside the judgment under appeal in so far as the complaints against the primary line of reasoning relating to the existence of a selective advantage are upheld and, in consequence, the decision at issue is annulled.

Next, the Court of Justice considers the state of the proceedings to be such that it may give final judgment and examines the actions for annulment of the decision at issue brought by Ireland and by ASI and AOE.

On that basis, the Court rules, first of all, that all of the pleas directed against the Commission's findings that relate to its primary line of reasoning and deal, on the one hand, with the identification of the reference framework and, on the other, with normal taxation under the Irish law applicable in the present case must be rejected, in so far as the General Court rejected the complaints raised in that respect on grounds that remained unchallenged at the appeal stage. In the absence of a cross-appeal, such grounds have the force of *res judicata*.

The Court of Justice goes on to find that, contrary to what was held by the General Court, the Commission succeeded in showing that, in the light of the activities and functions actually performed by the Irish branches of ASI and AOE and, moreover, of the absence of consistent evidence establishing that strategic decisions were taken and implemented by the head offices of those

companies outside Ireland, the profits generated by the exploitation of the Apple Group's IP licences should have been allocated to those Irish branches when determining the annual chargeable profits of ASI and AOE in Ireland. The Commission also demonstrated to the requisite standard that the contested tax rulings have the effect that ASI and AOE enjoy favourable tax treatment as compared to resident companies taxed in Ireland which are not capable of benefiting from such advance rulings by the tax administration, that is, in particular, non-integrated standalone companies, integrated group companies that carry out transactions with third parties or integrated group companies that carry out transactions with group companies with which they are linked by fixing the price of those transactions at arm's length, even though those companies are in a comparable factual and legal situation as regards the objective of that reference system, which is to tax profits generated in Ireland. Lastly, the Commission was right to find, in the decision at issue, that the different tax treatment of ASI's and AOE's profits as a result of the contested tax rulings was not justified by the nature or by the general scheme of the Irish tax system. In those circumstances, the complaints put forward by the applicants in respect of the examination of the selectivity of those tax rulings in the decision at issue must be rejected.

Furthermore, the Commission did not err when it found that Ireland had renounced tax revenue from ASI and AOE since the contested tax rulings endorse methods for allocating profits which produce an outcome that separate and standalone undertakings operating under normal market conditions would not have accepted. Those tax rulings reduce the chargeable profits of ASI and AOE for the purposes of applying the reference provisions and, therefore, the amount of corporation tax which they are required to pay in Ireland, as compared to other companies taxed in Ireland whose chargeable profits reflect prices determined on the market in line with the arm's length principle. Such measures therefore mitigate the charges which are generally included in the budget of an undertaking, and thus do involve an advantage granted 'through State resources'.

Lastly, the Court of Justice rejects as unfounded the pleas in law alleging, in particular, infringement of the right to be heard in the context of the procedure leading to the adoption of the decision at issue, breach of the principles of legal certainty and the protection of legitimate expectations, and that the Commission exceeded its competences and encroached on the competences of the Member States in breach of the principle of their fiscal autonomy.

In the light of the foregoing, the Court of Justice dismisses in their entirety the actions for annulment brought before the General Court.

5. Repayment of a fine

Judgment of 11 June 2024 (Grand Chamber), *Commission* v *Deutsche Telekom* (C-221/22 P, EU:C:2024:488)

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

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

On 15 October 2014, [280] the Commission imposed on Deutsche Telekom a fine of approximately EUR 31 070 000 for abuse of a dominant position on the Slovak market for broadband telecommunications services.

Deutsche Telekom brought an action for annulment of that decision, while provisionally paying that fine on 16 January 2015. By judgment of 13 December 2018, [281] the General Court upheld that action in part and reduced the amount of the fine by EUR 12 039 019. On 19 February 2019, the Commission repaid that amount to Deutsche Telekom.

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

Following an action brought by Deutsche Telekom, the General Court [282] held, inter alia, that the Commission's refusal to pay interest constitutes a sufficiently serious infringement of the first paragraph of Article 266 TFEU, [283] capable of giving rise to non-contractual liability on the part of the European Union. Given the direct causal link between that infringement and the harm consisting in the loss, during the relevant period, of default interest on the amount of the fine that had been unduly collected, the Court awarded Deutsche Telekom compensation in the amount of EUR 1 750 522 calculated on the basis of an application, by analogy, of the interest rate provided for in Article 83(2)(b) of Delegated Regulation No 1268/2012, [284] namely the ECB refinancing rate in force in January 2015, that being 0.05%, increased by 3.5 percentage points.

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

Findings of the Court

First of all, the Court of Justice rejects the plea of inadmissibility raised by Deutsche Telekom, alleging that the appeal is, in actual fact, directed not against the judgment under appeal, but against the judgment of the Court of Justice in *Printeos* [285] on which the General Court relied in its judgment.

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

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

---

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

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

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

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

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

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

grounds on which that judgment is, in its view, vitiated by errors of law, the Court of Justice declares the appeal admissible.

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

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

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

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

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

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

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

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

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

The Court of Justice notes that the rate laid down in Article 83(2)(b), applied by analogy by the General Court in the present case, does not fix the rate of interest corresponding to compensation at a standard rate such as that at issue in the present case, but the separate situation of late payment. That is precisely the reason why the General Court applied that provision by analogy In applying, by analogy, the ECB refinancing rate increased by 3.5 percentage points, which does not appear unreasonable or disproportionate in the light of the purpose of the interest concerned, the General Court did not err in law in the exercise of the jurisdiction conferred on it in proceedings seeking to establish the non-contractual liability of the European Union.

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

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

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

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

XIV. Approximation of laws

1. Community designs

Judgment of 27 February 2024 (Grand Chamber), *EUIPO* v *The KaiKai Company Jaeger Wichmann* (C-382/21 P, EU:C:2024:172)

(Appeal – Intellectual property – Community designs – Patent Cooperation Treaty (PCT) – Agreement on Trade-Related Aspects of Intellectual Property Rights – Paris Convention for the Protection of Industrial Property – Article 4 – Regulation (EC) No 6/2002 – Article 41 – Application for registration of a Community design – Right of priority – Priority claim based on an international application filed under the PCT – Time period – Interpretation consistent with Article 4 of that convention – Limits)

In upholding the appeal brought by the European Union Intellectual Property Office (EUIPO) against the judgment of the General Court in *The KaiKai Company Jaeger Wichmann* v *EUIPO (Gymnastic and sports apparatus and equipment)*, [286] the Grand Chamber of the Court of Justice provides clarifications as to the distinction between the direct effect of international agreements and the interpretation of secondary legislative acts in conformity with such agreements, and rules on the limits of such consistent interpretation.

On 24 October 2018, the applicant at first instance, The KaiKai Company Jaeger Wichmann GbR, applied to EUIPO for the registration of 12 Community designs, claiming a right of priority on the basis of an international patent application filed under the Patent Cooperation Treaty (PCT) on 26 October 2017. [287]

EUIPO granted the application for registration but refused the right of priority, on the ground that the date of the earlier filing was more than six months prior to the date of the application for registration. Article 41(1) of Regulation No 6/2002/2002 [288] in fact provides that a person who has duly filed an earlier application for a design right or for a utility model is to enjoy, for the purpose of filing a subsequent application for a registered Community design, a right of priority of six months from the date of filing of the first application. EUIPO found that, even though an international application filed under the PCT could, in principle, form the basis for a right of priority under Article 41(1) of Regulation No 6/2002, given that the broad definition of the concept of 'patent' in Article 2 of the PCT also included the utility models referred to in Article 41(1) of that regulation, the claim of such a right of priority was also subject to a period of six months, which had not been complied with in the present case.

By its judgment of 14 April 2021, the General Court annulled the EUIPO decision. It ruled that there was a gap in Article 41(1) of Regulation No 6/2002, in that it did not fix the time period for claiming priority for an 'international patent application' in the context of a subsequent design application. The General Court considered that the purpose of that provision was to ensure the consistency of that regulation with the obligations stemming from Article 4 of the Paris Convention [289] and, therefore, it was necessary to fill that gap by applying that Article 4. The General Court found, in essence, that,

---

286 Judgment of 14 April 2021, *The KaiKai Company Jaeger Wichmann* v *EUIPO (Gymnastic and sports apparatus and equipment)* (T-579/19, EU:T:2021:186).

287 The PCT was concluded in Washington on 19 June 1970 and last amended on 3 October 2001 (*United Nations Treaties Series*, Vol. 1160, No 18336, p. 231).

288 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

289 Paris Convention for the Protection of Industrial Property, signed in Paris on 20 March 1883, last revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, Vol. 828, No 11851, p. 305).

pursuant to Article 4, it was the nature of the earlier right that determined the duration of such a priority period, with the result that that period was 12 months. It therefore concluded that EUIPO had erred in law by finding that the period applicable to the claim for priority at issue was six months.

On 23 June 2021, EUIPO brought an appeal against that judgment, raising a single ground of appeal alleging infringement of Article 41(1) of Regulation No 6/2002. By way of that ground of appeal, EUIPO takes issue, in essence, with the General Court for having directly applied Article 4 of the Paris Convention, disapplying the clear and exhaustive provisions of Article 41(1) of the regulation, in order to replace them with a misinterpretation of Article 4 of that convention.

By document lodged on the same date, EUIPO requested that its appeal be allowed to proceed, in accordance with the third paragraph of Article 58a of the Statute of the Court of Justice. By order of 10 December 2021, [290] the Court of Justice decided to allow the appeal to proceed.

Findings of the Court

In the first place, as regards the effects of the Paris Convention in the legal order of the European Union, first of all, the Court recalls that, although that convention was not concluded by the European Union, the rules set out in certain articles thereof, including Article 4, have been incorporated into the TRIPs Agreement, [291] which was itself concluded by the European Union. Consequently, those rules must be regarded as producing the same effects as those produced by the TRIPs Agreement.

Next, the Court states that, having regard to their nature and structure, the provisions of the TRIPs Agreement do not have direct effect. Nor does Article 4 of the Paris Convention fall within the two exceptional situations in which individuals may rely directly on the provisions of WTO agreements before the EU courts. On the one hand, Article 41 of Regulation No 6/2002 in fact makes no express reference to Article 4 of the Paris Convention. On the other hand, Article 41 does not seek to implement, in the legal order of the European Union, a specific obligation entered into in the context of the WTO Agreements. On the contrary, that regulation is in fact the expression of the EU legislature's intention to adopt, in respect of one of the industrial property rights covered by that convention, an approach specific to the legal order of the European Union, by establishing a specific system of unitary and indivisible protection for Community designs on the territory of the European Union, of which the right of priority provided for in that Article 41 forms an integral part.

The Court infers that the rules set out in Article 4 of the Paris Convention do not have direct effect and, accordingly, are not such as to create, for individuals, rights on which they may directly rely by virtue of EU law. Consequently, the right of priority to file an application for a Community design is governed by Article 41 of Regulation No 6/2002, without economic operators being able to rely directly on Article 4 of the Paris Convention.

Finally, the Court nevertheless points out that, since the TRIPs Agreement is binding on the European Union and, accordingly, takes precedence over EU secondary legislation, the latter must be interpreted, as far as is possible, in accordance with the provisions of that agreement. It follows that Regulation No 6/2002 must be interpreted, as far as is possible, in accordance with the rules set out by the articles of the Paris Convention, including Article 4 thereof, which are incorporated into the TRIPs Agreement.

---

290 Order of 10 December 2021, *EUIPO* v *The KaiKai Company Jaeger Wichmann* (C-382/21 P, EU:C:2021:1050).

291 The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organization (WTO), was signed in Marrakesh (Morocco) on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

In the second place, the Court of Justice finds that the General Court erred in law, in that it manifestly exceeded the limits of a consistent interpretation of Article 41(1) of Regulation No 6/2002 and proceeded, in fact, to apply directly Article 4 of the Paris Convention, as interpreted by that court, to the detriment of the clear wording of Article 41(1) of that regulation and in disregard of the exhaustive nature of the latter provision.

It in fact follows unequivocally from the clear and exhaustive wording of Article 41(1) that, first, an international application filed under the PCT can form the basis of a right of priority, pursuant to that provision, only in so far as the subject of the international application in question is a utility model and, second, the period for claiming that right of priority on the basis of such an application is six months, expressly set in that provision.

In the third place, as regards the General Court's interpretation of Article 4 of the Paris Convention, under which that provision allows the priority of an earlier 'international patent application' to be claimed when filing a later design application within a period of 12 months, the Court of Justice holds that that interpretation is also vitiated by errors of law.

It follows from a combined reading of sections A, C and E of Article 4 that the latter does not allow priority to be claimed, and therefore, a fortiori, does not lay down any rules on the time period prescribed to the applicant to that end. Thus, only an international application filed under the PCT relating to a utility model can give rise to a right of priority for a design application by virtue of that Article 4, within the period of six months referred to in section E, paragraph 1, thereof.

In the light of all of those considerations, the Court upholds the single ground of appeal, sets aside the judgment of the General Court, and rules on the action at first instance by dismissing it.

2. Medicinal products for human use

Judgment of 14 March 2024, *D & A Pharma* v *Commission* (C-291/22 P, EU:C:2024:228)

(Appeal – Medicinal products for human use – Application for marketing authorisation – Independence of experts consulted by the Committee for Medicinal Products for Human Use (CHMP) of the European Medicines Agency (EMA) – Article 41 of the Charter of Fundamental Rights of the European Union – Right to good administration – Requirement of objective impartiality – Criteria for verifying the absence of conflict of interest – EMA's policy on competing interests – Activities as principal investigator, consultant or strategic adviser for the pharmaceutical industry – Rival products – Re-examination procedure – Regulation (EC) No 726/2004 – Articles 56, 62 and 63 – EMA Guidelines – Consultation of a scientific advisory group (SAG) or an ad hoc expert group)

The Court of Justice upholds the appeal brought by Debrégeas et associés Pharma SAS (D & A Pharma) ('D & A Pharma') against the judgment of the General Court in D & A Pharma v Commission and EMA ('the judgment under appeal'). [292] In doing so, it clarifies the scope of the principles to be respected in the procedure conducted by the European Medicines Agency (EMA) for the evaluation of medicinal products.

292 Judgment of 2 March 2022, *D & A Pharma* v *Commission and EMA* (T-556/20, EU:T:2022:111).

The applicant submitted an application for a conditional marketing authorisation ('MA') to the EMA, under Regulation No 507/2006, [293] for the medicinal product Hopveus. The Committee for Medicinal Products for Human Use ('the CHMP') issued an unfavourable opinion on that application. Following a request for re-examination of that opinion submitted under Regulation No 726/2004, [294] the CHMP convened an ad hoc expert group, in which, inter alia, an expert who was simultaneously a principal investigator for the medicinal product AD 04 participated. Since that expert group also delivered an unfavourable opinion, the Commission refused the application for a conditional MA on 6 July 2020 ('the contested decision').

Following the dismissal by the General Court of its action against the contested decision, the appellant brought the present appeal against the judgment under appeal.

Findings of the Court

The claim to set aside the judgment under appeal

The Court of Justice recalls that the objective impartiality of the CHMP, and therefore of the EMA, is compromised where a conflict of interest on the part of one of the members of the CHMP is likely to result from an overlap of functions, irrespective of the personal conduct of that member. Such a failure to fulfil obligations is liable to render unlawful the decision adopted by the Commission at the end of the procedure. The objective impartiality of the CHMP is also compromised where an expert who is in a situation of conflict of interest is part of the expert group which is consulted by that committee in the context of the re-examination leading to the opinion of the EMA and the Commission's decision on the MA application.

The opinion expressed by the expert group convened by the CHMP has a potentially decisive influence on the EMA's opinion and, through that opinion, on the Commission's decision. Each member of that group may, where appropriate, significantly influence the discussions and deliberations that take place on a confidential basis within that group.

Therefore, contrary to what the General Court held, a conflict of interest on the part of a member of the expert group consulted by the CHMP substantially vitiates the procedure. The fact that, at the end of its discussions and deliberations, that group of experts expresses its opinion collegially does not remove such a defect.

Persons whose affairs are handled by an EU institution, body, office or agency cannot be required to prove specific indications of bias. Objective impartiality is assessed on the basis of criteria that are independent of the specific conduct of the experts concerned.

As regards those criteria, which must make it possible to ensure the impartiality and independence of persons contributing to the preparation of the EMA's scientific opinions, the Court of Justice notes, first, that, in order to enable the EMA to pursue effectively the objective assigned to it, and in view of the complex technical assessments that it has to make, its broad discretion is reflected in the definition of those criteria.

However, notwithstanding the existence of that broad discretion and the importance of the public interest pursued, the EMA is, in the exercise of its powers, bound by the requirements of the Charter of Fundamental Rights of the European Union, which states that any limitation on the exercise of

---

293 Commission Regulation (EC) No 507/2006 of 29 March 2006 on the conditional marketing authorisation for medicinal products for human use falling within the scope of Regulation (EC) No 726/2004 of the European Parliament and of the Council (OJ 2006 L 92, p. 6).

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

rights and freedoms must respect the essence of those rights and freedoms and the principle of proportionality.

It follows that, even though the objective of general interest relating to the need for the best possible scientific advice may justify a mitigation of the requirement of objective impartiality of persons, a requirement that stems from the fundamental right to sound administration, the EMA must respect the essence of that fundamental right and the principle of proportionality. In particular, it cannot be accepted that that agency, on the pretext of wishing to maximise the number of experts available, lays down restrictions on the exercise of their mandate that appear insufficient to guarantee an impartial procedure. That would be the case if experts whose activities revealed a current interest in relation to a rival product of the product concerned were allowed to be members of the expert group convened by the CHMP for the purposes of re-examining the MA application for that product.

Secondly, the Court finds that the EMA's policy on competing interests defines the concept of 'rival product' as a 'medicinal product that targets a similar patient population with the same clinical purpose (i.e. to treat, prevent or diagnose a particular condition) and constituting potential commercial competition'.

That definition reflects the criterion used in the case-law of the Court of Justice to assess whether two pharmaceutical products are in competition on a given market. According to that case-law, that is the case where, for the same therapeutic indication, those products are interchangeable or substitutable.

It is therefore on the basis of an examination to determine whether, in the event that AD 04 and Hopveus are marketed, those products, both of which have been developed for the purpose of treating alcohol dependence, would present such a degree of interchangeability or substitutability that it would be necessary to determine the existence or absence of potential commercial competition between those two products.

That assessment of interchangeability or substitutability need not be carried out solely in relation to the objective characteristics of those products. The examination of potential commercial competition between the products at issue must be based on an overall assessment of the factors that may be taken into account in order to assess whether patients and their prescribing doctors will be able to view one product as a valid alternative to the other.

By excluding the possibility of commercial competition on the ground that AD 04 and Hopveus have different clinical objectives and target different groups of patients, namely, as regards the former, those who intend to limit their alcohol consumption and, as regards the latter, those who intend to stop that consumption altogether, the General Court did not carry out such an overall assessment.

In that regard, the Court of Justice considers that the mere difference in intensity in the scope of the therapeutic action between two products intended to treat the same pathology is precisely likely to encourage certain patients suffering from that pathology to replace, in the course of their treatment, one of those products with the other depending on changes in their symptoms or considerations of therapeutic expediency and efficacy from their prescribing doctors.

Consequently, the General Court failed to examine whether those products were likely to compete with each other in the light, in particular, of the fact that changes in the treatment of the same patient may lead his or her doctor to prescribe those two products alternately during that treatment, depending on the symptoms and considerations of therapeutic appropriateness and efficacy.

Thirdly, the Court of Justice observes that the EMA must, in any event, interpret and apply its policy on competing interests in a manner consistent with the Charter of Fundamental Rights of the European Union.

In the present case, the policy relating to competing interests imposes on experts who have a current competing interest as principal investigator a mitigating measure, according to which they may, in procedures relating to the 'medicinal product concerned', be involved 'only in the discussions', without participating in the 'final deliberations and voting'. That mitigation measure cannot, without disproportionately limiting the protection of objective impartiality, be interpreted or applied as meaning that an expert who is at the same time the principal investigator for a rival product of the product concerned may participate in the work of an expert group that is consulted by the CHMP in the procedure for re-examination of an MA application for the product concerned.

Such participation, by its very nature, would be inappropriate in order to ensure that the re-examination procedure in question is conducted impartially. A refusal to grant an MA for the rival product under re-examination is likely to be of considerable commercial interest to the company at the instigation and/or under the sponsorship of which such an expert carries out his or her activity as principal investigator.

It follows that the judgment under appeal is vitiated by an error of law, in that the General Court's interpretation of the policy relating to competing interests is incompatible with the principle of objective impartiality.

Similarly, the restrictions – within the meaning of the policy on competing interests – imposed on experts cannot, contrary to what the General Court held, be interpreted and applied as meaning that a consultant or strategic adviser for individual medicinal products of a pharmaceutical company may be a member of the ad hoc expert group convened by the CHMP for the purpose of re-examining the MA application submitted for a rival product of one of those individual medicinal products. Such an interpretation is also incompatible with the principle of objective impartiality.

Accordingly, the plea alleging failure to observe the principle of objective impartiality is well founded and justifies the setting aside of the judgment under appeal.

The action before the General Court

The Court of Justice observes, first of all, that it follows from the guidelines on the re-examination procedure that the EMA undertakes that the CHMP will systematically consult a scientific advisory group ('SAG') when the applicant for re-examination requests such consultation, in good time and on a duly motivated basis. It is also apparent from this that the SAG referred to for that purpose must be the one established in the therapeutic area to which the product in question belongs, and that an ad hoc expert group will be convened if no SAG is established in that area.

The CHMP must, in its capacity as the competent committee of the EMA, apply the rules of conduct laid down by that agency, which include the guidelines on the re-examination procedure. It is settled case-law that, in adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, an EU institution, body, office or agency imposes a limit on the exercise of its discretion.

In view of the self-imposed limitation on the EMA's discretion, the Court finds that the CHMP manifestly exceeds the limits of that discretion where it decides to convene an ad hoc expert group, even though it has established that the therapeutic indication of the product at issue falls, at least predominantly, within a therapeutic area for which a SAG has been established, or where it decides to convene an ad hoc expert group on the basis of elements that already relate to the substantive treatment, by the CHMP, of the request for re-examination or on hypothetical considerations.

The Court notes, in that regard, that consultation of the SAG enables the CHMP to receive an opinion drawn up by the permanent experts of that SAG. Furthermore, that 'core' group of the SAG may be supplemented by additional experts who are specialised in dealing with specific issues raised by the questions that the CHMP intends to ask. Consultation of such an expert group comprising, on the one

hand, a group which ensures, by its permanent nature and its balanced composition, continuity and consistency in the treatment of dossiers and, on the other hand, additional experts specialised in dealing with specific issues raised in the context of the re-examination, ensures that the 'best possible scientific opinion' is drawn up, and thus enables the EMA to comply with the task entrusted to it.

In those circumstances, the convening, in a therapeutic area for which a SAG is established, of an ad hoc expert group cannot be accepted on the basis of the CHMP's consideration that an ad hoc expert group would be better able to answer its questions than the SAG established, where appropriate reinforced by additional experts.

The Court infers from this that the decision to convene an ad hoc expert group instead of the SAG on Psychiatry constitutes a defect vitiating the procedure for adopting the opinion of the EMA. Consequently, the procedure for adopting the contested decision is itself vitiated by a formal defect.

Consequently, the Court annuls the contested decision.

3. Control of the acquisition and possession of weapons

Judgment of 5 March 2024 (Grand Chamber), *Défense Active des Amateurs d'Armes and Others* (C-234/21, EU:C:2024:200)

(Reference for a preliminary ruling – Approximation of laws – Directive 91/477/EEC – Control of the acquisition and possession of weapons – Firearms prohibited or subject to authorisation – Semi-automatic firearms – Directive 91/477, as amended by Directive (EU) 2017/853 – Article 7(4a) – Power of Member States to confirm, renew or prolong authorisations – Presumed impossibility of using that power in respect of semi-automatic firearms converted to fire blanks or into salute or acoustic weapons – Validity – Article 17(1) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union – Principle of the protection of legitimate expectations)

Ruling on a request for a preliminary ruling from the Cour constitutionnelle (Constitutional Court, Belgium), the Court of Justice, sitting as the Grand Chamber, confirms the validity of Article 7(4a) of Directive 91/477 on control of the acquisition and possession of weapons, [295] as amended by Directive 2017/853, in the light of the right to property [296] and the principles of equality before the law [297] non-discrimination [298] and the protection of legitimate expectations. According to the Court, that provision, contrary to the interpretative premiss adopted by the referring court, allows Member States to exercise the power to provide for transitional arrangements for all semi-automatic firearms lawfully acquired and registered before the entry into force of Directive 2017/853, on 13 June 2017,

---

295 Under Article 7(4a) of Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (OJ 1991 L 256, p. 51), as amended by Directive (EU) 2017/853 of the European Parliament and of the Council of 17 May 2017 (OJ 2017 L 137, p. 22) ('Directive 91/477'), 'Member States may decide to confirm, renew or prolong authorisations for semi-automatic firearms classified in point 6, 7 or 8 of category A in respect of a firearm which was classified in category B, and lawfully acquired and registered, before 13 June 2017, subject to the other conditions laid down in this Directive. Furthermore, Member States may allow such firearms to be acquired by other persons authorised by Member States in accordance with this Directive …'.

296 Laid down in Article 17(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

297 Laid down in Article 20 of the Charter.

298 Laid down in Article 21 of the Charter.

whether they are semi-automatic firearms capable of expelling bullets [299] or firearms that have been converted to fire blanks, irritants, other active substances or pyrotechnic rounds or into a salute or acoustic weapon ('converted semi-automatic firearms'). [300]

Défense Active des Amateurs d'Armes ASBL, NG and WL brought an action before the Cour constitutionnelle (Constitutional Court) for annulment of a provision of a Belgian law which did not provide for the possibility, as a transitional measure, of continuing to possess converted semi-automatic firearms acquired before 13 June 2017, unlike in the case of semi-automatic firearms capable of expelling bullets. [301] The Cour constitutionnelle (Constitutional Court) considered that Article 153(5) of the Law of 5 May 2019, read in conjunction with Article 163 of that law, establishes in that regard a difference in treatment between, on the one hand, persons who, before 13 June 2017, had lawfully acquired and registered a semi-automatic weapon capable of expelling bullets and, on the other hand, persons who, before that date, had lawfully acquired and registered a semi-automatic firearm converted for the sole use of firing blanks, in so far as only the former benefit from transitional arrangements allowing them to continue, subject to conditions, to possess their semi-automatic firearms, which are currently prohibited. According to the referring court, that difference in treatment arises from Article 7(4a) of Directive 91/477, since that provision did not allow a Member State to extend such transitional arrangements to the latter category of semi-automatic weapons. Accordingly, it decided to refer a question to the Court for a preliminary ruling concerning the validity of that article.

Findings of the Court

At the outset, the Court ascertains the accuracy of the premiss on which the question before it is based, according to which Article 7(4a) of Directive 91/477 allows Member States to provide for transitional arrangements only for semi-automatic firearms capable of expelling bullets, in categories A.6 to A.8., and not for converted semi-automatic firearms, in category A.9.

In that regard, in the first place, it observes that, in the light of the wording of that provision, the power afforded to Member States to confirm, renew or prolong authorisations applies only to semi-automatic firearms in categories A.6 to A.8 which were, before the entry into force of Directive 2017/853, classified in 'Category B – Firearms subject to authorisation' [302] and which had been lawfully acquired and registered before 13 June 2017, [303] subject to compliance with the other conditions laid down in Directive 91/477.

In the second place, as regards the context of Article 7(4a) of Directive 91/477, the Court examines, first, whether converted semi-automatic firearms in category A.9, lawfully acquired and registered before 13 June 2017, were classified in 'Category B – Firearms subject to authorisation'. In that regard, it stresses that those weapons satisfy, despite their conversion, the criteria defining the concept of

299 Referred to in points 6 to 8 of 'Category A – Prohibited firearms', contained in point A of Part II of Annex I to Directive 91/477 ('categories A.6 to A.8').

300 Referred to in point 9 of 'Category A – Prohibited firearms', contained in point A of Part II of Annex I to Directive 91/477 ('category A.9').

301 Loi du 5 mai 2019 portant des dispositions diverses en matière pénale et en matière de cultes (Law of 5 May 2019 laying down various provisions on criminal and religious matters (Moniteur belge of 24 May 2019, p. 50023) ('the law of 5 May 2019'). Articles 151 to 163 of that law partially transpose Directive 2017/853 into Belgian law.

302 Contained in Point A of Part II of Annex I to Directive 91/477, as applicable before the entry into force of Directive 2017/853.

303 Contained in point A of Part II of Annex I to Directive 91/477, as amended by Directive 2008/51, under 'Category B – Firearms subject to authorisation' ('category B').

'firearm', laid down by Directive 91/477. [304] In addition, as stated in recital 20 of Directive 2017/853, [305] there is a significant risk that such semi-automatic firearms converted to fire blanks can return to their previous level of danger by being reconverted to expel a shot, bullet or projectile by the action of a combustible propellant.

Thus, as regards those converted semi-automatic firearms, the Court observes that the EU legislature did not expressly exclude them from the definition of a firearm. Moreover, the clarification in Directive 2017/853, according to which it is essential to address the issue raised by such weapons by including them in the scope of Directive 91/477, [306] cannot be understood as meaning that those firearms fall within the scope of that directive only since the entry into force of Directive 2017/853. It rather intends to confirm that converted semi-automatic firearms fall within the scope of Directive 91/477, as amended by Directive 2017/853. Accordingly, semi-automatic firearms in category A.9, lawfully acquired and registered before 13 June 2017, must be regarded as having been classified in category B of Directive 91/477, applicable before the entry into force of Directive 2017/853.

Secondly, the Court confirms whether converted firearms may fall both within category A.9 and within one of categories A.6 to A.8. In that regard, according to the wording of category A.9, it includes 'any firearm in this category' which has been converted. Accordingly, for a firearm to fall within that category, it must not only have been converted to fire blanks, irritants, other active substances or pyrotechnic rounds or into a salute or acoustic weapon, but must also satisfy the criteria set out in point 2, 3, 6, 7 or 8 of 'Category A – Prohibited firearms'. [307] That wording thus tends to indicate that the fact that such a conversion took place on a weapon, involving its inclusion in category A.9, does not have the effect of removing it from its classification in category A.2, A.3, A.6, A.7 or A.8. First, weapons in category A.9 satisfy the criteria defining the concept of a 'firearm' and, secondly, those categories A.2, A.3, A.6, A.7 and A.8 make no distinction between whether the firearms they cover have been converted or not.

As regards, in the third place, the objectives pursued by Directives 91/477 and 2017/853, the Court finds, first, that the addition of category A.9 during the legislative procedure leading to the adoption of Directive 2017/853 sought to clarify that converted firearms fell within the scope of Directive 91/477. By contrast, there is no element indicating that the EU legislature intended, by that addition, to exclude converted firearms from categories A.2, A.3, A.6, A.7 or A.8 or from the scope of Article 7(4a) of Directive 91/477.

Secondly, since Directive 2017/853 respects fundamental rights and observes the principles recognised in particular by the Charter, [308] the Court holds that Article 7(4a) of Directive 91/477 seeks to ensure respect for acquired rights and, in particular, that of the right to property. [309] In that regard, that article allows, in essence, Member States to retain authorisations already granted for semi-automatic firearms in categories A.6 to A.8, which, before the entry into force of that directive, were classified in Category B and had been lawfully acquired and registered before 13 June 2017. Accordingly, Directive 91/477 cannot be understood as requiring the expropriation of the holders of such weapons. Thus, in the light of the objective to ensure observance of the rights to personal possessions which have been acquired, Article 7(4a), while it provides for an exception to the principle

---

304 See Article 1(1) of Directive 91/477, in the version prior to the entry into force of Directive 2017/853, and Article 1(1)(1) of Directive 91/477, in the version amended by Directive 2017/853.

305 See, inter alia, recital 20 of Directive 2017/853.

306 See recital 20 of Directive 2017/853.

307 Contained in point A of Part II of Annex I to Directive 91/477 ('categories A.2, A.3, A.6, A.7 or A.8').

308 See recital 31 of Directive 2017/853.

309 Laid down in Article 17(1) of the Charter.

of prohibition of possession of firearms classified in categories A.6 to A.8, cannot be interpreted as excluding from its scope such weapons where they also satisfy the additional criteria set out in category A.9.

Thirdly, the Court points out that the objective of Directive 91/477 is to strengthen mutual trust between the Member States in the field of safeguarding the safety of persons and ensuring public security for Union citizens. None of those objectives precludes the holders of firearms falling within both categories A.6 to A.8 and category A.9 from benefiting from the transitional arrangements provided for in Article 7(4a) of Directive 91/477.

First, such an interpretation is capable of contributing to the objective of facilitating the functioning of the internal market. Secondly, as regards the objective of ensuring the public safety and security of Union citizens, first of all, firearms satisfying the criteria in category A.9 appear to present a less immediate danger than those falling exclusively within categories A.6 to A.8. Next, it is apparent from the wording of Article 7(4a) of Directive 91/477 that the power provided for in that provision applies only to firearms which were lawfully acquired and registered before 13 June 2017. That means, inter alia, that the requirements, in particular those relating to safety, laid down in that regard by Directive 91/477, in the version applicable before the entry into force of Directive 2017/853, have been complied with. Lastly, that wording implies that, at the time when a Member State intends, pursuant to that provision, to confirm, renew or prolong an authorisation for a semi-automatic firearm classified in categories A.6 to A.8, the other conditions, in particular those relating to safety, laid down in Directive 91/477, are satisfied.

The Court concludes that the objective of ensuring the public safety and security of Union citizens cannot be compromised by the fact that the holders of firearms classified in both categories A.6 to A.8 and category A.9 may benefit from maintaining, under Article 7(4a) of Directive 91/477, authorisations already granted for weapons falling within categories A.6 to A.8.

In the fourth place, the Court considers that such an interpretation of Article 7(4a), which is consistent with its wording and its context and with the scheme and objectives of the legislation of which it forms part, likewise does not deprive that provision or the addition, by Directive 2017/853, of category A.9 of all effectiveness.

On the contrary, that interpretation ensures the effectiveness of Article 7(4a), in that it seeks to ensure respect for acquired rights and, in particular, that of the right to property. Moreover, it in no way affects the objective of clarification that the EU legislature sought to achieve by way of the addition of category A.9. In addition, that category covers not only firearms in both categories A.6 to A.8 and category A.9, but also those in categories A.2 and A.3 that have undergone such conversions, which were not covered by the power afforded to Member States by Article 7(4a) of Directive 91/477.

In the light of the interpretation thus adopted of Article 7(4a) of Directive 91/477, the Court concludes that the premiss on which the question from the Cour constitutionnelle (Constitutional Court) is based is incorrect and that, in those circumstances, the consideration of that question has not revealed any factor capable of affecting the validity of that article in the light of the right to property and the principles of equality before the law, non-discrimination and the protection of legitimate expectations.

XV. Economic and monetary policy

Judgment of 18 June 2024 (Grand Chamber), *Commission* v *SRB* (C-551/22 P, EU:C:2024:520)

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

Hearing an appeal brought by the European Commission against the judgment of the General Court of 1 June 2022 in *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB*, [310] the Grand Chamber of the Court of Justice upholds that appeal and, giving final judgment on the substance, dismisses as inadmissible the action brought before the General Court by Fundación and Stiftung für Forschung und Lehre against the decision of the Single Resolution Board (SRB) of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español SA [311] ('the resolution scheme at issue'), adopted on the basis of Regulation (EU) No 806/2014. [312]

At the end of its analysis, the Court rules that the resolution scheme at issue does not constitute a challengeable act for the purposes of the fourth paragraph of Article 263 TFEU and, consequently, sets aside the judgment under appeal in so far as it declared admissible the action for annulment of that scheme. The Court bases that analysis, in particular, on the principles of delegation of powers to agencies identified in the judgment of 13 June 1958, *Meroni* v *High Authority*, [313] and recalled in the judgment of 22 January 2014, *United Kingdom* v *Parliament and Council*. [314]

Findings of the Court

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

As regards, in the first place, the content of the resolution scheme at issue, the Court finds that that scheme had not yet been endorsed at the time of its adoption during the Executive Session of the SRB

---

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

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

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

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

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

on 7 June 2017, since it was then notified to the Commission for endorsement, on which its entry into force depended and, in so doing, the production by that scheme of binding legal effects.

As regards, in the second place, the context in which the resolution scheme at issue was adopted, the Court notes that, as stated in its preamble, its legal basis is the SRM Regulation. [315] The scheme put in place by that regulation is based on the finding [316] that the exercise of the resolution powers provided for therein falls within the EU policy for the resolution of banking institutions, which only EU institutions may establish, and that there remains a margin of discretion in the adoption of each resolution scheme, given inter alia the considerable impact of the resolution decisions on the financial stability of the Member States and on the European Union as such, as well as on the fiscal sovereignty of the Member States. For those reasons, the EU legislature considered it necessary to provide for the adequate involvement of the Council of the European Union and the Commission, namely involvement that strengthens the necessary operational independence of the SRB while respecting the principles of delegation of powers to agencies.

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

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

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

The scheme put in place by the SRM Regulation [317] is intended to give concrete expression to the principles identified in the judgment in *Meroni* v *High Authority* and recalled in the judgment in *United Kingdom* v *Parliament and Council*.

---

315 Article 18 in particular.

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

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

Admittedly, the SRB is responsible for adopting all resolution decisions relating to, inter alia, financial institutions and groups which are considered to be significant for financial stability in the European Union, and for other cross-border groups. [318] In that respect, it is to adopt a resolution scheme in relation to those entities and groups only when it assesses, on receiving the communication of the ECB's assessment that the entity concerned is failing or is likely to fail, or on its own initiative, [319] that the conditions for resolution, [320] which relate to whether the entity is failing or is likely to fail, the absence of alternative measures with regard to resolution and whether a resolution action is necessary in the public interest, are met. In that case, the SRB adopts [321] resolution scheme which places the entity concerned under resolution and determines the application to that entity of the resolution tools [322] and the use of the Single Resolution Fund.

However, regardless of the wide margin of discretion conferred on the SRB concerning whether and by what means the entity concerned is to be the subject of a resolution procedure, that discretion is circumscribed by objective criteria and conditions delimiting the SRB's scope of action and relating both to the resolution tools and conditions. [323] In addition, the SRM Regulation provides for the participation of the Commission and of the Council in the procedure leading to the adoption of a resolution scheme, which, in order to enter into force, must be endorsed by the Commission and, where relevant, the Councill.

Therefore, the SRB is to inform the Commission of any action it takes in order to prepare for resolution and exchanges, with the Commission and the Council, all information necessary for the performance of their tasks. [324] Moreover, the Commission is to designate a representative entitled to participate in the meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that representative is entitled to participate in the debates and is to have access to all documents. [325] In addition, the SRB is required to transmit the resolution scheme to the Commission immediately after its adoption, and within 24 hours from the transmission, the Commission either endorses that scheme or objects to it with regard to the discretionary aspects of that scheme, excluding those relating to compliance with the criterion of public interest and the amount earmarked for the use of the Single Resolution Fund. [326] As regards the latter discretionary aspects, the Commission may, within 12 hours from the transmission, propose to the Council to object. [327] Lastly, the resolution scheme may enter into force only if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the SRB. [328] Once that scheme has been endorsed, the Commission must then fully assume the responsibilities conferred on it by the Treaties.

---

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

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

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

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

322 Referred to in Article 22(2)(a) to (c) of the SRM Regulation.

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

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

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

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

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

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

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

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

While the SRM provides [329] that the SRB is responsible for drawing up and adopting a resolution scheme, it does not confer on it the power to adopt an act producing independent legal effects. In the resolution procedure, the endorsement by the Commission is an essential element for the entry into force of the resolution scheme.

That endorsement is also decisive for the content of the resolution scheme at issue. On the one hand, while the SRM Regulation allows the Commission to endorse such a scheme without having raised any objections with regard to its discretionary aspects or proposed to the Council to do so, it also allows the Commission and the Council to substitute their own assessment for that of the SRB as regards those discretionary aspects by objecting thereto, [330] in which case the SRB is required to modify that scheme, within eight hours, in accordance with the reasons expressed by the Commission or the Council, so that that scheme may enter into force. [331] On the other hand, an objection by the Council on the ground that the public interest criterion is not fulfilled has the effect of ultimately preventing the resolution under that regulation of the entity concerned, that entity then having to be wound up in an orderly manner in accordance with the applicable national law. [332]

In the present case, as it expressly stressed in the decision endorsing the resolution scheme at issue, [333] the Commission expressed its 'agreement' with the content thereof and with 'the reasons provided by the SRB of why resolution is necessary in the public interest'. The discretionary aspects of a resolution scheme, which relate both to the establishment of the resolution conditions and to the determination of the resolution tools, are inextricably linked to the more technical aspects of resolution. Contrary to what the General Court held, a distinction, therefore, cannot be drawn between those discretionary aspects and those technical aspects, for the purposes of determining the act against which an action may be brought in the context of a resolution scheme endorsed in its entirety by the Commission.

---

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

330 Article 18(7) of the SRM Regulation.

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

332 Article 18(8) of the SRM Regulation.

333 Commission Decision (EU) 2017/1246 of 7 June 2017 approving the resolution package in respect of Banco Popular Español SA (OJ 2017 L 178, p. 15), recital 4, as corrected on 6 December 2017 (OJ 2017 L 320, p. 31).

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

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

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

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

It is true that the Court notes that, in the judgment of 6 May 2021, *ABLV Bank and Others* v *ECB*, [334] it held, in essence, that a resolution scheme may, as the outcome of a complex resolution procedure, be subject to judicial review before the EU judicature. However, in the case which gave rise to that judgment, the Court of Justice was called upon to assess the legality of a decision of the General Court holding as inadmissible actions for annulment brought not against such a scheme but against preparatory measures of the European Central Bank which had found that entities were failing or were likely to fail. [335] The considerations set out in that judgment must therefore be read in the light of the Court's settled case-law on complex procedures from which it is apparent that, in a procedure of that sort, acts adopted during the preparatory stages leading to the adoption of the definitive act cannot, where they do not produce independent legal effects, form the subject matter of an action for annulment.

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

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

---

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

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

XVI. Public procurement

Judgment of 22 October 2024 (Grand Chamber), *Kolin Inşaat Turizm Sanayi ve Ticaret* (C-652/22, EU:C:2024:910)

(Reference for a preliminary ruling – Public procurement in the European Union – Directive 2014/25/EU – Article 43 – Economic operators of a third country which has not concluded an international agreement with the European Union which guarantees access to public procurement in a reciprocal and equal manner – No right on the part of those economic operators to 'no less favourable' treatment – Participation of such an economic operator in a public procurement procedure – Inapplicability of Directive 2014/25 – Inadmissibility in the context of an action brought by that economic operator seeking a request for a preliminary ruling concerning the interpretation of provisions of that directive)

Ruling as the Grand Chamber, the Court of Justice declares inadmissible the request for a preliminary ruling made by the Visoki upravni sud (High Administrative Court, Croatia), on the ground that the provisions of Directive 2014/25, [336] the interpretation of which was sought by that national court, do not apply to economic operators from third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement. In addition, the Court considers that the national provisions transposing that directive cannot be made applicable to those economic operators by the authorities of a Member State, as otherwise the exclusive competence of the European Union in the field of the common commercial policy would be disregarded.

In September 2020, HŽ Infrastruktura d.o.o., a company governed by Croatian law ('the contracting entity'), opened a procedure for the award of a public contract for the construction of railway infrastructure connecting two localities in Croatia, to be awarded on the basis of the criterion of the most economically advantageous tender. According to the instructions sent to tenderers by the contracting entity, they were to demonstrate their technical and professional abilities by providing a document showing that, during the 10 years preceding the opening of that procedure, construction work on railway or road infrastructure had been carried out by those tenderers.

In January 2022, the contracting entity decided to award the public contract concerned to the Strabag group, made up of three companies governed by Austrian law, Croatian law and Czech law respectively. Kolin Inşaat Turizm Sanayi ve Ticaret AŞ ('Kolin'), a company governed by Turkish law which is one of the tenderers, filed a complaint against the award decision with the Državna komisija za kontrolu postupaka javne nabave (State Commission for Supervision of Public Procurement Procedures, Croatia; 'the supervisory commission'). Taking the view that it had not been duly established that the Strabag group had the required technical and professional capacity, the supervisory commission set aside the decision awarding the public contract in question.

Following the setting aside of that decision, the contracting entity requested the Strabag group to provide an expanded list of the works carried out, accompanied by a certificate attesting to the proper execution and completion of those works. The Strabag group submitted such a list, accompanied by the relevant certificate, which contained a new reference to other works carried out. Following a review and re-evaluation of the tenders, the contracting entity adopted a new decision in April 2022 to award the contract at issue in the main proceedings to the Strabag group. It took the view that the new reference was sufficient in itself to establish that that group had the required technical and professional capacity.

---

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

Claiming that the contracting entity's choice to invite the Strabag group to supplement its list of works was unlawful, Kolin filed a complaint against the new award decision with the supervisory commission. The supervisory commission rejected that complaint on the ground that there was no provision of national law which prevented the Strabag group from supplementing the list of works by indicating other work it had carried out in addition to that initially included, since the Croatian Law on Public Procurement allowed the contracting authority to invite a tenderer to supplement or provide an explanation for the evidence provided. [337]

Kolin therefore brought an action for annulment of the decision of the supervisory commission before the Croatian High Administrative Court, which is the referring court. In the light of Articles 36 and 76 of Directive 2014/25, that court has doubts as to whether the contracting entity is entitled to take into account, after its initial decision awarding the contract concerned was set aside, additional documents relating to the technical and professional capacity of the group, which were not included in the initial tender submitted by that group and which were presented by it at the request of that contracting entity. The referring court therefore decided to refer several questions to the Court of Justice for a preliminary ruling concerning the interpretation of those provisions.

Findings of the Court

In so far as the questions referred by the national court concern the interpretation of a provision of EU law, the Court is, in principle, bound to give a ruling. Nevertheless, the Court must examine the circumstances in which cases are referred to it by the national court, in order to assess whether it has jurisdiction or whether the request submitted to it is admissible. The Court may, in particular, find it necessary to examine whether the provisions of EU law to which the questions referred relate are applicable to the dispute in the main proceedings. If that is not the case, those provisions are irrelevant in resolving that dispute and the questions referred for a preliminary ruling are not necessary to enable the referring court to give judgment, with the result that those questions must be held to be inadmissible.

First, the Court aims to assess whether the action brought before a court of a Member State by an economic operator of a third country, in this case the Republic of Türkiye, in order to challenge the decision to award a public contract made in a Member State, may be examined in the light of the public procurement rules established by the EU legislature, such as Articles 36 and 76 of Directive 2014/25, which are the subject of the questions referred for a preliminary ruling.

In that regard, the Court notes at the outset that the European Union is bound, with respect to certain third countries, by international agreements, in particular the World Trade Organization Agreement on Government Procurement (GPA), [338] which guarantee, on a reciprocal and equal basis, access for EU economic operators to public procurement in those third countries and for economic operators of those third countries to public procurement in the European Union. Article 43 of Directive 2014/25 reflects those international commitments of the European Union by providing that, in so far the GPA or other international agreements by which the European Union is bound so provide, contracting entities of the Member States must accord to economic operators of third countries which are parties to such an agreement treatment no less favourable than that accorded to EU economic operators. That right to no less favourable treatment enjoyed by economic operators of those third countries means that those economic operators may rely on the provisions of that directive.

---

337 Article 263(2) of the Zakon o javnoj nabavi (Law on Public Procurement) in the version applicable to the dispute in the main proceedings.

338 Agreement approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) (OJ 1994 L 336, p. 1).

Other third countries, including the Republic of Türkiye, have not, to date, concluded with the European Union an international agreement such as those referred to in Article 43 of Directive 2014/25. As regards economic operators of those third countries, the Court notes that, although EU law does not preclude those economic operators, in the absence of exclusion measures adopted by the European Union, from being allowed to participate in a public procurement procedure governed by Directive 2014/25, it does, however, preclude those operators from being able, in the context of their participation in such a procedure, to rely on the directive and thus to require that their tender be treated equally to those submitted by tenderers from Member States and by tenderers from third countries which have concluded an international agreement with the European Union referred to in Article 43 of that directive. The inclusion of economic operators of third countries which have not concluded such an international agreement with the European Union within the scope of Directive 2014/25 would have the effect of conferring on them a right to no less favourable treatment, contrary to Article 43 of that directive, which limits the benefit of that right to economic operators from third countries which have concluded an international agreement with the European Union within the meaning of that provision.

Therefore, the right conferred by Article 45(1) of Directive 2014/25 on 'any interested economic operator' to submit a tender in response to a call for competition in the context of an open public procurement procedure in the European Union does not extend to economic operators of third countries which have not concluded such an international agreement with the European Union. Nor does it imply that those operators, where they are admitted to participate in such a procedure, are entitled to rely on that directive. Therefore, in a situation such as that at issue in the main proceedings, involving the participation, as accepted by the contracting entity, of a Turkish economic operator in a public procurement procedure governed by Directive 2014/25, that operator cannot rely on Articles 36 and 76 of that directive in order to challenge the decision awarding the contract concerned.

Secondly, the Court examines whether the questions referred, which concern the interpretation of those provisions of Directive 2014/25, are nevertheless admissible in the light of the fact that the provisions of the Croatian legislation transposing those provisions are interpreted as applying without distinction to all tenderers from the European Union and third countries and as, consequently, being capable of being relied on by the Turkish economic operator concerned.

In that regard, the Court recalls that, according to the case-law, it is true that requests for a preliminary ruling concerning the interpretation of EU law in situations which fall outside the scope of EU law are admissible where those provisions, without amendment of their purpose or scope, have been rendered applicable on account of a direct and unconditional reference made by national law. In those situations, it is in the clear interest of the EU legal order that provisions taken from EU law should be interpreted uniformly.

However, that case-law cannot apply where the provisions of national law transposing a directive are rendered applicable by the authorities of a Member State in disregard of an exclusive competence of the European Union. That is the case here as regards the participation in public procurement procedures of economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to those procedures.

The common commercial policy, referred to in Article 207 TFEU, for which the European Union has exclusive competence by virtue of Article 3(1)(e) TFEU, concerns trade with third countries and encompasses any EU act which is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it. Any act of general application specifically intended to determine the arrangements under which economic operators from a third country may participate in public procurement procedures in the European Union is such as to have direct and immediate

effects on trade in goods and services between the European Union and that third country, with the result that it falls within the exclusive competence of the European Union under that provision. [339]

The Court adds that, although the common commercial policy does not cover the negotiation and conclusion of international agreements in the field of transport [340] and cannot therefore entirely cover the issue of access of economic operators from third countries to the sectoral public procurement covered by Directive 2014/25, the fact remains that the conclusion of an agreement guaranteeing such access also falls within an exclusive competence of the European Union, namely that referred to in Article 3(2) TFEU.

Thus, only the European Union has competence to legislate and, therefore, to adopt a legally binding act of general application concerning access to public procurement procedures for economic operators of third countries which have not concluded an international agreement with the European Union guaranteeing equal and reciprocal access to public procurement.

Accordingly, the Court considers that national authorities are not competent to render applicable, to those economic operators from third countries who have been allowed, by a contracting entity, to participate in a procedure for the award of a public contract in the Member State concerned, national provisions transposing the rules contained in Directive 2014/25, as otherwise the exclusive nature of the European Union's competence would be disregarded. Consequently, the Court considers that the interpretation of Articles 36 and 76 of Directive 2014/25 cannot in any way be relevant to the outcome of the dispute in the main proceedings and declares the request for a preliminary ruling to be inadmissible.

339 That exclusive competence is illustrated by Article 86 of Directive 2014/25, which confers on the European Union, and not on the Member States, the power to suspend or restrict the participation of undertakings of a third country in public procurement procedures in the European Union.

340 As is apparent from Article 207(5) TFEU.

XVII. Social policy [341]

1. Protection of fixed-term workers

Judgment of 20 February 2024 (Grand Chamber), *X (Lack of reasons for termination)* (C-715/20, EU:C:2024:139)

(Reference for a preliminary ruling – Social policy – Directive 1999/70/EC – Framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP – Clause 4 – Principle of non-discrimination – Difference in treatment in the event of dismissal – Termination of a fixed-term employment contract – No obligation to state the reasons for termination – Judicial review – Article 47 of the Charter of Fundamental Rights of the European Union)

Ruling on a request for a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the principle of non-discrimination against fixed-term workers in the light of the obligation to state reasons for the termination of an employment contract, as well as the obligations resting on national courts in the event of a breach of that principle in a dispute between individuals.

K.L., a worker, and X sp. z o.o., a company governed by Polish law, entered into a fixed-term part-time employment contract for the period from 1 November 2019 to 31 July 2022. On 15 July 2020, X notified K.L. of a statement of termination of that employment contract with a notice period, without stating the reasons for that termination. Under Article 30(4) of the Polish Labour Code, [342] an employer is required to state the reason for termination only in the case of termination of contracts of indefinite duration with a notice period. [343]

K.L. brought proceedings before the Sąd Rejonowy dla Krakowa – Nowej Huty w Krakowie (District Court for Kraków-Nowa Huta, Kraków, Poland), the referring court, seeking compensation on account of the unlawful nature of his dismissal. In particular, he alleged infringement of the principle of non-discrimination of fixed-term workers, laid down in clause 4 of the framework agreement on fixed-term work. [344]

According to the order for reference, even though the Trybunał Konstytucyjny (Constitutional Court, Poland) had already held that Article 30(4) of the Labour Code was consistent with the constitutional principles of the democratic rule of law and equality before the law, the Sąd Najwyższy (Supreme Court, Poland) had expressed doubts as to the compatibility of that national provision with EU law. However, the latter court could not have ruled out the application of the provision at issue, on the ground that the principle of non-discrimination against fixed-term workers does not have direct effect in a dispute between individuals.

---

341 Reference should also be made under this heading to the following judgment: judgment of 4 October 2024 (Grand Chamber), ***Lithuania and Others* v *Parliament and Council (Mobility Package)*** (C-541/20 to C-555/20, EU:C:2024:818), presented under Heading XII. 'Transport'.

342 Ustawa – Kodeks pracy (Law establishing the Labour Code) of 26 June 1974 (Dz. U. No 24, item 141), in the version applicable to the dispute in the main proceedings (Dz. U. of 2020, item 1320, as amended) ('the Labour Code').

343 Or where an employment contract is terminated without a notice period, whether the contract is entered into for a fixed or indefinite term.

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

It is in that context that the referring court asked the Court, in essence, whether clause 4 of the framework agreement precludes national legislation such as that at issue in the main proceedings and whether that clause may be relied on in a dispute between individuals.

Findings of the Court

After stating that the rules on termination of an employment contract at issue fall within the concept of 'employment conditions', within the meaning of clause 4(1) of the framework agreement, relating to the principle of non-discrimination, the Court examines whether those rules establish a difference in treatment which constitutes less favourable treatment of fixed-term workers as compared with permanent workers in a comparable situation, before assessing, if relevant, whether such a difference in treatment can be justified on 'objective grounds'.

In the first place, as regards the comparability of the situations in question, the Court recalls that it is for the referring court to assess whether the persons concerned are engaged in the same or similar work, within the meaning of the framework agreement, [345] in the light of a number of factors, such as the nature of the work, training requirements and employment conditions.

In the second place, the Court finds that, subject to verifications carried out by the referring court, the existence of less favourable treatment of fixed-term workers as opposed to permanent workers arises from the fact that the latter are not subject to the limitation in question concerning the provision of information on the reasons justifying the dismissal. Even assuming that, in response to legal proceedings brought by a fixed-term worker against the termination of his or her employment contract, the judicial review of the validity of the reasons for the termination of that contract is guaranteed and that effective judicial protection of the person concerned is ensured – that worker is not provided, beforehand, with information which may be decisive for the purposes of deciding whether or not to bring such legal proceedings.

In the third place, as regards the existence of 'objective grounds', within the meaning of clause 4(1) of the framework agreement, the Polish Government invoked, on the basis of the abovementioned judgment of the Constitutional Court, the pursuit of a policy of full employment requiring a great degree of flexibility in the labour market to which fixed-term employment contracts contribute.

According to the Court, those factors rather are similar to a criterion which, in a general and abstract manner, refers exclusively to the duration itself of the employment; therefore they do not make it possible to ensure that the difference in treatment at issue responds to a genuine need. It does not appear to be necessary in the light of the objective relied on by the Polish Government. The employment condition concerned does not relate to the right itself of an employer to terminate a fixed-term employment contract with a notice period, but to the provision of information to the worker, in writing, relating to the reason or reasons justifying his or her dismissal. Accordingly, even if employers were obliged to state the reasons for the early termination of a fixed-term contract, they would not, on that basis, be deprived of the flexibility inherent in that kind of employment contract.

In those circumstances, it will be for the referring court to ascertain whether Article 30(4) of the Labour Code lends itself to an interpretation consistent with clause 4 of the framework agreement. In the absence thereof, that court is not, in principle, required, solely on the basis of EU law, to disapply the provision of its domestic law that is contrary to clause 4 of the framework agreement, which does not have direct effect between individuals.

That being said, when adopting legislation specifying and giving specific expression to the employment conditions which are governed, inter alia, by clause 4 of the framework agreement, a

345 See clause 3(2) and clause 4(1) of the framework agreement.

Member State implements EU law [346] and must therefore ensure compliance, inter alia, with the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. The latter provision has direct effect. The Court holds that the difference in treatment introduced by the national provision at issue undermines that right since a fixed-term worker is deprived of the possibility, which is however available to a permanent worker, of assessing beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract and, where appropriate, to bring an action challenging in a precise manner the reasons for such a termination.

Therefore, in a dispute between individuals, the national court is required, where it is not possible for it to interpret the applicable national law in a way which is consistent with clause 4 of the framework agreement, to guarantee the full effectiveness of Article 47 of the Charter of Fundamental Rights by disapplying, in so far as necessary, any contrary provision of national law.

2. Protection of part-time workers

Judgment of 29 July 2024, *KfH Kuratorium für Dialyse und Nierentransplantation* (C-184/22 and C-185/22, EU:C:2024:637)

(Reference for a preliminary ruling – Social policy – Article 157 TFEU – Equal treatment between men and women in matters of employment and occupation – Directive 2006/54/EC – Article 2(1)(b) and Article 4, first paragraph – Prohibition of indirect discrimination on grounds of sex – Part-time work – Directive 97/81/EC – Framework Agreement on part-time work – Clause 4 – Prohibition on treating part-time workers less favourably than comparable full-time workers – Payment of additional pay only for overtime worked by part-time workers in excess of the normal working hours set for full-time workers)

Following a reference for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany), the Court of Justice has clarified the conditions under which the payment of additional pay for overtime, which, in the case of part-time workers, is provided for only in respect of hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes 'less favourable' treatment and indirect discrimination on grounds of sex.

IK (Case C-184/22) and CM (Case C-185/22) are employed as part-time care assistants by KfH Kuratorium für Dialyse und Nierentransplantation eV, a provider of out-patient dialysis services operating throughout the Federal Republic of Germany. Under their employment contracts, they are required to work 40% and 80% respectively of the normal working week for a full-time employee, which is set at 38.5 hours by the general collective agreement applicable in the sector concerned.

The applicants in the main proceedings brought an action before the Arbeitsgericht (Labour Court, Germany), seeking to obtain a time credit corresponding to the additional pay payable for overtime worked in excess of the working hours agreed in their employment contract, as well as compensation. They claimed that they were treated less favourably than full-time employees because they worked part-time and they suffered indirect discrimination on grounds of sex in so far as the defendant in the main proceedings predominantly employs women on a part-time basis.

Those actions having been dismissed, IK and CM brought an appeal before the Landesarbeitsgericht Hessen (Higher Labour Court of Hesse, Germany), which ordered the employer to credit their time-savings accounts, but dismissed the claim for payment of compensation.

346 Within the meaning of Article 51(1) of the Charter of Fundamental Rights.

Hearing an appeal on a point of law, the referring court decided to ask the Court whether IK and CM had been subject to 'less favourable' treatment as part-time workers within the meaning of Clause 4(1) of the Framework Agreement on part-time work [347] and indirect discrimination on grounds of sex, within the meaning of Directive 2006/54. [348]

Findings of the Court

In the first place, the Court finds that national legislation under which additional pay for overtime is payable to part-time workers only in respect of hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation constitutes 'less favourable' treatment of part-time workers within the meaning of Clause 4(1) of the Framework Agreement.

In this respect, it emphasises first of all that that clause must not be interpreted restrictively and that its purpose is to apply the principle of non-discrimination to part-time workers.

Since the fact that the services performed by the applicants in the main proceedings are comparable to those performed by full-time workers does not appear to be disputed in the present case, the Court then turns to the question whether there is a difference in treatment between persons working as part-time care assistants and those working as full-time care assistants.

In that regard, it is apparent from the orders for reference that a person working as a part-time care assistant must work the same number of hours as a person working as a full-time care assistant in order to receive additional pay for overtime, regardless of the normal working hours agreed individually in that person's employment contract. Thus, persons working as full-time care assistants receive additional pay for overtime from the very first hour worked in excess of their normal working hours, i.e. 38.5 hours per week, while persons working as part-time care assistants do not receive additional pay for hours worked in excess of the normal working hours agreed in their employment contracts but below the normal working hours set for persons working as full-time care assistants.

As a result, it appears that persons working as part-time care assistants are subject to 'less favourable' treatment than persons working as full-time care assistants.

Finally, the Court provides the referring court with the necessary information to enable it to assess whether that difference in treatment may be regarded as justified on 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement.

In this respect, it points out that that concept of 'objective grounds' requires the difference in treatment found to exist to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that difference in treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

As regards the question whether the objective of deterring employers from requiring workers to work overtime in excess of the individually agreed working hours for those workers is capable of constituting 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement, setting a uniform threshold for part-time workers and full-time workers as regards the grant of

---

347 Framework Agreement on part-time work, concluded on 6 June 1997 ('the Framework Agreement'), which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

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

additional pay for overtime is not, in the case of part-time workers, capable of achieving that objective.

Furthermore, with regard to the objective of avoiding unfavourable treatment of full-time workers compared to part-time workers, full-time workers would be treated in the same way as part-time workers with regard to overtime, subject to the application of the principle *pro rata temporis*. Thus, that second objective is also incapable of justifying the difference in treatment between part-time workers and full-time workers.

In the second place, the Court concludes that the national legislation at issue also constitutes indirect discrimination on grounds of sex within the meaning of Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54.

Although this is an apparently neutral measure, it is apparent from the orders for reference that that measure places a significantly greater proportion of women at a disadvantage compared with male persons without it also being necessary for the group of workers who are not disadvantaged by that legislation, namely full-time workers, to be made up of a considerably higher number of men than women. It is for the referring court to assess to what extent the information available to it concerning the situation of the workforce is valid and whether that information may be taken into account. The national court must also examine all the relevant factors of a qualitative nature in order to determine whether such a disadvantage exists by taking into consideration all the workers subject to the national legislation on which the difference in treatment in question is based.

Moreover, that indirect discrimination is not likely, any more than 'less favourable' treatment of part-time workers compared with full-time workers is, and for the same reasons, to be justified by the pursuit, first, of the objective of deterring employers from requiring workers to work overtime in excess of the working time agreed individually in their employment contracts and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

XVIII. Environment

Judgment of 25 June 2024 (Grand Chamber), *Ilva and Others* (C-626/22, EU:C:2024:542)

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

Seised by a request for a preliminary ruling from the Tribunale di Milano (District Court, Milan, Italy), the Court of Justice, sitting as the Grand Chamber, has specified the conditions for a permit to operate an installation under Directive 2010/75 on industrial emissions. [349]

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

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

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

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

Findings of the Court

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

---

349 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, and corrigendum OJ 2012 L 158, p. 25).

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

In that regard, the Court observes that the concept of 'pollution', referred to in Directive 2010/75, includes the harm caused, or which may be caused, both to the environment and to human health. That close link between the protection of the quality of the environment and that of human health is, moreover, borne out by, in addition to the provisions of primary EU law, several provisions of Directive 2010/75 and the case-law of the European Court of Human Rights. As regards specifically the pollution caused by the Ilva plant, the latter court has found an infringement of the applicants' right to respect for private and family life on the basis of the pollutant effects of the emissions from that plant both on the environment and on human health [350]

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

Likewise, it is for the competent national authorities to provide that such an assessment forms an integral part of the procedures for the grant and reconsideration of an operating permit and constitutes a prerequisite to the grant or reconsideration of that permit. Where that assessment reveals results showing the unacceptable nature of the danger to the health of a large population exposed to polluting emissions, the permit concerned must be reconsidered in a short time frame. In the present case, the effects on the environment and on human health of polluting substances from the Ilva plant, namely fine PM2.5 and PM10 particulate matter, copper, mercury and naphthalene from diffuse sources, was not assessed in connection with the environmental permits at issue.

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

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

The procedure for reconsideration of a permit cannot be restricted, for its part, to setting limit values only for the polluting substances whose emission was foreseeable and was taken into consideration in the initial authorisation procedure. In that regard, it is necessary to take into account the experience gained from operation of the installation concerned and, therefore, the emissions actually

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

established. If compliance with environmental quality standards requires that stricter emission limit values be imposed on the installation concerned, additional measures must then be included in the permit, without prejudice to other measures which may be taken to comply with those standards.

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

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

XIX. International agreements

1. Negotiation and conclusion

Judgment of 9 April 2024, *Commission* v *Council (Signature of international agreements)* (C-551/21, EU:C:2024:281)

(Action for annulment – Decision (EU) 2021/1117 – Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021--2026) – Signing on behalf of the European Union – Institution competent to designate the person empowered to sign – Article 13(2) TEU – Observance by each institution of the limits of the powers conferred on it – Mutual sincere cooperation between the EU institutions – Article 16(1) and (6) TEU – Power of the Council of the European Union to make policies and plan the EU's external action – Article 17(1) TEU – Power of the European Commission to ensure the external representation of the European Union – Article 218 TFEU)

Hearing an application brought by the European Commission for the annulment of Article 2 of Decision 2021/1117 on the signing, on behalf of the European Union, and provisional application of the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community, [351] and of the designation by the Council of the European Union of the person empowered to sign that protocol, the Court of Justice, sitting as a Grand Chamber, annuls both that provision and the designation made on the basis of it. The Court finds that Article 218(5) TFEU refers to a Council power to authorise the signing and provisional application of an international agreement but not to designate the signatory thereof, as the Commission is competent to ensure the signing of that agreement, pursuant to the sixth sentence of Article 17(1) TEU. [352]

On 22 October 2015, on a proposal from the Commission, the Council adopted a decision authorising the Commission to conduct, on behalf of the European Union, negotiations with the Gabonese Republic in order to renew, for the period 2021-2026, the Implementing Protocol to the Fisheries Partnership Agreement between the European Union and the Gabonese Republic. It was specified in Article 2 of the proposal for a Council Decision on the signing and provisional application of the Implementing Protocol to the Agreement, submitted by the Commission, that the Secretariat General of the Council was to establish 'the instrument of full powers to sign the aforementioned Protocol, subject to its conclusion, for the person indicated by the Commission'. Article 2 of Decision 2021/1117 provides that 'the President of the Council is hereby authorised to designate the person(s) empowered to sign the Protocol on behalf of the Union'. As the Republic of Portugal exercised at that time the rotating Presidency of the Council, the latter designated the Permanent Representative of that Member State to the European Union as the person empowered to sign the Protocol on behalf of the European Union. [353]

---

351 Council Decision (EU) 2021/1117 of 28 June 2021 on the signing, on behalf of the European Union, and provisional application of the Implementing Protocol to the Fisheries Partnership Agreement between the Gabonese Republic and the European Community (2021-2026) (OJ 2021 L 242, p. 3).

352 Article 17(1) TEU provides: 'The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.'

353 On 29 June 2021, that Permanent Representative signed the Protocol on behalf of the European Union. On 30 June 2021, the Commission and the Member States were informed of that signing and of the provisional application of the Protocol with effect from 29 June 2021.

The Commission asked the Court to annul Article 2 of Decision 2021/1117 on the ground, inter alia, of an infringement of Article 17(1) TEU, read in combination with Article 13(1) and (2) TEU. [354]

Findings of the Court

The Court recalls, in the first place, that, in accordance with the allocation of powers provided for in Article 17(1) TEU and in Article 218(2) and (5) TFEU, it is for the Council, on a proposal by the negotiator, to authorise the signing of an international agreement on behalf of the European Union, which is an act that is one of the measures by which the European Union's policy is made and its external action planned for the purpose of the second sentence of Article 16(1) and the third subparagraph of Article 16(6) TEU. However, the decision authorising the signing of an international agreement does not include the later act of the signing itself of that agreement. That signing must, following the authorisation, be done after all the necessary steps have been taken to that end, including in respect of the third country concerned. Those steps include the issuing of full powers designating the person empowered to sign the agreement on behalf of the European Union. In that regard, the Court emphasises that that designation does not require a determination that falls within the scope of the 'policy-making' of the European Union or of the functions of 'coordinating' or of '[elaborating its] external action', within the meaning of Article 16(1) and (6) TEU and it is not therefore part of the policy assessment leading to that decision, at the end of which that institution has consented to the legal effects which, by the signing, will be produced in accordance with the relevant rules of international law.

In the second place, as to whether the designation of the signatory is an act that '[ensures] the Union's external representation', within the meaning of the sixth sentence of Article 17(1) TEU, the Court finds that, according to its usual meaning, the legal concept of 'representation' implies an action taken on behalf of a subject towards a third party and such an action may be a declaration of the intent of that subject with regard to that third party. The signing, by the person designated for that purpose, of an international agreement on behalf of the European Union properly expresses the declaration of the European Union's intention, as defined by the Council, with regard to the third party with which that agreement has been negotiated. Thus, the wording of the sixth sentence of Article 17(1) TEU, according to which the Commission is to 'ensure the Union's external representation', tends to establish that that provision confers on the Commission the power to take, outside of the common foreign and security policy (CFSP) and unless the Treaties provide for a different allocation of powers on that point, any action that, following a decision of the Council authorising the signing of an international agreement on behalf of the European Union, ensures that that signature is given.

The Court holds, in the third place, that that literal interpretation of the sixth sentence of Article 17(1) TEU is in line with customary international law, [355] according to which any person designated in a document emanating from the competent authority of a State or the competent body of an international organisation for the act of signing must be regarded, pursuant to those full powers, as representing that State or that international organisation. Accordingly, the signing, by such a person, of an international agreement on behalf of the European Union falls within the scope, from the perspective of the rules of customary international law, of the latter's 'representation'. Therefore, having regard to the sixth sentence of Article 17(1) TEU, it must be held that the steps necessary for the purpose of the signing of an international agreement after that signing has been authorised by the Council, including the step of designating the signatory, outside the CFSP, fall within the scope of the Commission's power to 'ensure the Union's external

354 Article 13(2) TEU provides: 'Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.'

355 As codified in Article 2(1)(c) and Article 7(1)(a) of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations, Treaty Series*, Vol. 1155, p. 331).

representation', unless the EU Treaty or the FEU Treaty allocate the power to organise that signing to another institution of the European Union.

In that regard, the Court points out that, unlike Article 218(3) TFEU, which, as regards the negotiation of international agreements, confers on the Council the power not only to authorise the opening of negotiations but also to designate the negotiator or the head of the European Union's negotiating team, Article 218(5) TFEU refers to the Council's power to authorise the signing and provisional application of an international agreement but not the power to designate the signatory thereof, with the result that that provision does not contain a derogation from the sixth sentence of Article 17(1) TEU. It follows that, in a situation where the Council has authorised the signing of an international agreement which is not within the scope of the CFSP or of 'other cases provided for in the Treaties' it is for the Commission, pursuant to the sixth sentence of Article 17(1) TEU, to ensure the actual signing of that agreement. The Court observes on that matter that notwithstanding the fact that the Council has continued, since the entry into force of the EU and FEU Treaties, to designate the signatories of international agreements, a practice, however consistent, cannot alter the rules of the Treaties that the institutions are obliged to respect.

In the fourth and last place, the Court recalls that the Commission must also, in accordance with the first sentence of Article 17(1) TEU, exercise its competence relating to the signing of international agreements in the general interest of the European Union and is required to comply with the duty of mutual sincere cooperation provided for in Article 13(2) TEU.

2. Content and scope [356]

a. EC-Algeria Association Agreement

Judgment of 29 February 2024, *Raad van bestuur van de Sociale verzekeringsbank (Transfer of survivors' benefits)* (C-549/22, EU:C:2024:184)

(Reference for a preliminary ruling – EC-Algeria Association Agreement – Social security for Algerian migrant workers and their survivors – Transfer of benefits to Algeria at the rates applied by virtue of the legislation of the debtor Member State – Survivors' benefit – National legislation applying the country-of-residence principle – Residence clause involving a reduction in the amount of survivors' benefit for recipients residing in Algeria)

[356] Reference should also be made under this heading to the following judgment: judgment of 27 February 2024 (Grand Chamber), ***EUIPO* v *The KaiKai Company Jaeger Wichmann*** (C-382/21 P, EU:C:2024:172), presented under Heading XIV.1 'Community designs'.

Ruling on a request for a preliminary ruling from the Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands; 'the referring court'), the Court of Justice holds that Article 68(4) [357] of the EC-Algeria Association Agreement, [358] concerning the right to transfer freely social security benefits, has direct effect and does not preclude a reduction in the amount of survivors' benefits on the ground that their recipients reside in Algeria, where those benefits are intended to guarantee a basic income calculated on the basis of the cost of living in the debtor Member State and where that reduction respects the substance of that right.

X resides in Algeria. As the survivor of her spouse who worked in the Netherlands and was insured under the Algemene nabestaandenwet (General law on survivors' insurance; 'the ANW') at the time of his death, she has been entitled to a survivors' benefit since 1 January 1999. After reinstating X's survivors' benefit retroactively in 2018, which it had terminated in 2012, the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands) informed X that that benefit would be reduced with effect from 1 January 2013 on the ground that it should have been paid in accordance with the country-of-residence principle, namely, in the present case, on the basis of a percentage reflecting the level of the cost of living in Algeria in relation to the cost of living in the Netherlands. [359]

After several actions against that decision had been dismissed, X brought an appeal before the referring court, which decided to refer a number of questions to the Court of Justice for a preliminary ruling on the interpretation of Article 68(4) of the EC-Algeria Association Agreement in order to ascertain whether that agreement precludes the reduction, based on the country-of-residence principle, in the amount of X's survivors' benefit.

Findings of the Court

The Court answers, first of all, the question whether, having regard to the wording, purpose and nature of the EC-Algeria Association Agreement, Article 68(4) of that agreement has direct effect.

It notes, in that regard, that that provision establishes in clear, precise and unconditional terms the right to transfer freely to Algeria the pensions and annuities referred to in that provision, at the rates applied by virtue of the legislation of the debtor Member State. Thus, that provision imposes on the Member States a clear and precise obligation as to the result to be achieved, consisting of enabling

---

357 Article 68 of that agreement reads as follows:

'1. Subject to the provisions of the following paragraphs, workers of Algerian nationality and any members of their families living with them shall enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. The term "social security" shall cover the branches of social security dealing with sickness and maternity benefits, invalidity, old-age and survivors' benefits, industrial accident and occupational disease benefits and death, unemployment and family benefits.

These provisions shall not, however, cause the other coordination rules provided for in Community legislation based on Article 42 of the Treaty establishing the European Community to apply, except under the conditions set out in Article 70 of this Agreement.

...

4. The workers in question shall be able to transfer freely to Algeria, at the rates applied by virtue of the legislation of the debtor Member State or States, any pensions or annuities in respect of old age, survivor status, industrial accident or occupational disease, or of invalidity resulting from industrial accident or occupational disease, except in the case of special non-contributory benefits. ...'

358 Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, approved on behalf of the European Community by Council Decision 2005/690/EC of 18 July 2005 (OJ 2005 L 265, p. 1; 'the EC-Algeria Association Agreement').

359 That percentage is fixed in accordance with the provisions of the Regeling woonlandbeginsel in de sociale zekerheid 2012 (Regulation of 2012 on the country-of-residence principle in social security), adopted on the basis of Article 17(3) of the ANW, as amended by the Wet woonlandbeginsel in de sociale zekerheid (Law on the country-of-residence principle in social security). For Algeria, that percentage was 60% of the maximum survivors' benefit as from 1 January 2013 and has been 40% of that maximum amount since 1 January 2016.

the persons concerned to make such a free transfer, an obligation which is not, as such, subject, in its implementation or effects, to the adoption of any subsequent measure.

Although the Court notes that that right to transfer freely is not absolute, since its actual effects in each individual case depend on the 'rates applied by virtue of the legislation of the debtor Member State or States', that cannot be interpreted as allowing the Member States to make that right to transfer freely subject to discretionary limitations and to render that right meaningless. It also notes that the implementation or effects of the right provided for in that provision are not subject to the adoption of another measure and, in particular, to the adoption, by the Association Council, of the provisions referred to in Article 70(1) of the EC-Algeria Association Agreement, which may not therefore be regarded as rendering conditional the immediate application of that right. The Court concludes in that regard that Article 68(4) of the EC-Algeria Association Agreement has direct effect, so that the persons to whom that provision applies are entitled to rely on it directly before the Member States' courts to have rules of national law which are contrary to it disapplied.

The Court then answers the question concerning the personal scope of Article 68(4) of the EC-Algeria Association Agreement.

While observing that Article 68(4) refers expressly only to 'the workers in question', which refers back to 'workers of Algerian nationality' mentioned in paragraph 1 of that article, the Court finds that the benefits which may be transferred freely to Algeria include pensions and annuities in respect of survivor status, the recipients of which can, by definition, only be the survivors of those workers. Article 68(4) of the EC-Algeria Association Agreement would therefore be deprived of its useful effect if those survivors were excluded from its personal scope. The Court also observes that it would run counter to the logic underlying the very principle of the free transfer of benefits to Algeria to require that the recipient be obliged to reside in the debtor Member State, in this case the Netherlands. The Court concludes in that regard that Article 68(4) of the EC-Algeria Association Agreement applies to the survivors of a worker who, wishing to transfer their survivors' benefit to Algeria, are not themselves workers and who reside in Algeria.

Lastly, as regards the compatibility of the reduction in the amount of a survivors' benefit by reason of the fact that the recipient of that benefit resides in Algeria with Article 68(4) of the EC-Algeria Association Agreement, the Court points out that that provision provides for the right to transfer freely the benefits at issue to Algeria 'at the rates applied by virtue of the legislation of the debtor Member State or States'. Thus, the debtor Member State has a discretion in establishing rules for calculating the amount of the benefits referred to in that provision, and that Member State may therefore lay down rules designed to adjust the amount of those benefits on the occasion of that transfer, such as the rule based on the country-of-residence principle.

The Court notes, however, that such rules must respect the substance of the right to transfer freely benefits, without depriving that right of its practical effect, and examines, to that end, the factors characterising the survivors' benefit at issue in the main proceedings. It notes that the amount of that benefit is fixed on the basis of the cost of living in the Netherlands and that, consequently, that benefit is intended to ensure that survivors have a basic income calculated on the basis of the cost of living in that Member State. Therefore, the fact of adjusting the amount of the benefit transferred to take account of the cost of living in Algeria does not appear, in the Court's view, to be liable to render meaningless the right to transfer freely, provided that the determination of the rate used for the purposes of that adjustment is based on objective factors, which it is for the referring court to ascertain.

b. Trade and Cooperation Agreement between the Union and Euratom and the United Kingdom

Judgment of 29 July 2024 (Grand Chamber), *Alchaster* (C-202/24, EU:C:2024:649)

(Reference for a preliminary ruling – 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 – Surrender of a person to the United Kingdom for criminal prosecution – Competence of the executing judicial authority – Risk of breach of a fundamental right – Article 49(1) and Article 52(3) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Changes, to the detriment of that person, to the licence regime)

In a reference for a preliminary ruling from the Supreme Court (Ireland), the Court of Justice, sitting as the Grand Chamber, specifies the obligations of the executing judicial authority where a person who is the subject of an arrest warrant issued on the basis of the Trade and Cooperation Agreement concluded with the United Kingdom of Great Britain and Northern Ireland ('the TCA') [360] claims that there is a risk of breach of a fundamental right in the event of surrender to the United Kingdom.

The District Judge of the Magistrates' Courts of Northern Ireland (United Kingdom) issued four arrest warrants against MA for terrorist offences allegedly committed in July 2020, some of which may justify the imposition of a life prison sentence.

In autumn 2022, the High Court (Ireland) ordered MA to be surrendered to the United Kingdom. MA brought an appeal against that decision before the referring court. He submits that his surrender to the United Kingdom is incompatible with the principle that offences and penalties must be defined by law, enshrined, inter alia, in Article 7 ECHR. [361]

The referring court states that, in the event of MA being surrendered to, and sentenced in, the United Kingdom, his possible release on licence will be governed by United Kingdom legislation adopted after the suspected commission of the offences at issue. The release on licence of a person sentenced for offences such as those of which MA is accused must now be approved by a specialised authority and may take place only after that person has served two thirds of his or her sentence. That was not the case under the old system, which provided for automatic release on licence after the convicted person had served half of his or her sentence.

In that context, in the light, in particular, of the guarantees provided by the United Kingdom judicial system as regards the application of the ECHR, the failure to demonstrate the existence of a systemic deficiency that would suggest a probable and flagrant violation of the rights guaranteed by the ECHR in the event of MA being surrendered and his ability to bring an action before the European Court of Human Rights, the referring court rejected MA's argument alleging a risk of a breach of Article 7 ECHR.

That court, however, asks whether it is possible to reach a similar conclusion as regards a risk of a breach of Article 49(1) of the Charter, [362] which states, inter alia, that no heavier penalty is to be imposed than that which was applicable at the time the criminal offence was committed. Furthermore, it questions whether that executing State is competent to rule on an argument alleging

---

360 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).

361 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

362 Charter of Fundamental Rights of the European Union ('the Charter').

that provisions relating to sentences that may be imposed in the issuing State are incompatible with Article 49(1) of the Charter, where the latter State is not required to comply with the Charter and the Court has laid down stringent requirements relating to consideration of a risk of a breach of fundamental rights in the issuing Member State.

Findings of the Court

In the first place, the Court, after ruling out the applicability of Framework Decision 2002/584 [363] to the execution of the arrest warrants at issue in the main proceedings, notes that it follows from the structure of Title VII of Part Three of the TCA, which concerns cooperation in criminal matters, and in particular from the respective functions of Articles 600 to 604 of that agreement, [364] that a Member State may refuse to execute an arrest warrant issued by the United Kingdom only for reasons arising from the TCA.

In that context, as stated in Article 524(2) of the TCA, Member States are obliged to comply with the Charter, given that a surrender decision constitutes an implementation of Union law within the meaning of Article 51(1) of the Charter. The executing judicial authorities of the Member States are therefore required to ensure respect for the fundamental rights afforded, inter alia, by Article 49(1) of the Charter to the person who is the subject of an arrest warrant issued on the basis of the TCA, without the fact that the Charter is not applicable to the United Kingdom being relevant in that regard.

In the second place, the Court points out that the requirement to undertake a two-step examination, which stems from the case-law relating to Framework Decision 2002/584, [365] cannot be transposed to the TCA. The simplified and effective surrender system established by that framework decision is based on the principle of mutual trust which specifically characterises relations between the Member States and from which stems the presumption of respect for fundamental rights by the issuing Member State. It is true that it cannot be ruled out that an international agreement may establish a high level of confidence between the Member States and certain third countries, such as certain Member States of the European Economic Area. That consideration cannot, however, be extended to all third countries and, in particular, to the United Kingdom.

First of all, the TCA does not establish, between the European Union and the United Kingdom, a special relationship capable of justifying that high level of trust. In particular, the United Kingdom is not part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust. Next, although it is apparent from the TCA that cooperation between the United Kingdom and the Member States is based on long-standing respect for the protection of the fundamental rights and freedoms of individuals, [366] that cooperation is not presented as being based on the preservation of mutual trust between the States concerned which existed before the United Kingdom left the European Union on 31 January 2020. Finally, there are

---

363 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).

364 Those articles concern, inter alia, cases of refusal to execute an arrest warrant issued on the basis of the TCA and the guarantees which must be provided by the issuing State in particular cases.

365 As regards the execution of a European arrest warrant, the executing judicial authority must, as a first step, determine whether there is evidence indicating that there is a real risk of a breach, in the issuing Member State, of a relevant fundamental right on account of either systemic or generalised deficiencies, or deficiencies affecting more specifically an objectively identifiable group of persons. In the context of a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact on the person who is the subject of a European arrest warrant and whether, having regard to his or her personal situation, there are substantial grounds for believing that that person will run a real risk of a breach of a relevant fundamental right if surrendered to the issuing Member State.

366 Article 524(1) of the TCA.

substantial differences between the provisions of the TCA relating to the surrender mechanism and the corresponding provisions of Framework Decision 2002/584.

In the third place, the Court specifies, in those circumstances, the examination which the executing judicial authority is required to undertake where the person concerned invokes before it the existence of a risk of breach of Article 49(1) of the Charter in the event of surrender to the United Kingdom. It points out that the obligation to respect fundamental rights requires that executing judicial authority to determine specifically, following an appropriate examination, whether there are valid reasons to believe that that person is exposed to a real risk of such a breach. To that end, the executing judicial authority must examine all the relevant factors in order to assess the foreseeable situation of the requested person if he or she is surrendered to the United Kingdom, which, unlike the two-step examination referred to above, assumes that both the rules and practices that are generally in place in that country and the specific features of that person's individual situation are to be taken into account simultaneously. It may refuse to give effect to an arrest warrant issued on the basis of the TCA only if it has, in the light of the individual situation of the requested person, objective, reliable, specific and properly updated information establishing substantial grounds for believing that there is a real risk of a breach of Article 49(1) of the Charter.

In addition, before being able to refuse to execute an arrest warrant, the executing judicial authority must, in accordance with the obligation of mutual assistance in good faith laid down in Article 3(1) of the TCA, first request from the issuing judicial authority information concerning the rules of law of the issuing State and the manner in which those rules may be applied to the individual situation of the requested person and, where appropriate, additional guarantees to rule out the risk of breach of Article 49(1) of the Charter.

Lastly, as regards the scope of the latter provision, the Court states that a measure relating to the execution of a sentence will be incompatible with that provision only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty. That is not the case where that measure merely delays the eligibility threshold for release on licence. However, the position may be different, in particular if that measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for.

c. International agreements concluded by the Union with the Kingdom of Morocco

Judgment of 4 October 2024 (Grand Chamber), *Confédération paysanne (Melons and tomatoes from Western Sahara)* (C-399/22, EU:C:2024:839)

(Reference for a preliminary ruling – Common commercial policy – International agreements – Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part – Amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement – Regulation (EU) No 169/2011 – Article 9 – Article 26(2) – Implementing Regulation (EU) No 543/2011 – Article 3(1) and (2) – Article 5(1) and (2) – Article 8 – Article 15(1) and (4) – Annex I – Annex V – Regulation (EU) No 1308/2013 – Article 76 – Provision of food information to consumers – Mandatory indication of the country of origin or place of provenance of foods – Fruit and vegetables harvested in Western Sahara – Request for a Member State unilaterally to ban imports of those goods in its territory – Mandatory indication of Western Sahara as the place of provenance of tomatoes and melons harvested in that territory)

Hearing a request for a preliminary ruling brought by the Conseil d'État (Council of State, France), the Court of Justice, sitting as the Grand Chamber, rules that Article 207 TFEU, Regulation 2015/478 [367] and Regulation No 1308/2013 [368] do not permit a Member State unilaterally to adopt a measure banning the import of agricultural goods the labelling of which systematically fails to comply with the EU legislation concerning the indication of the country or territory of origin. It also emphasises that Article 76 of Regulation No 1308/2013, read in conjunction with Article 3(1) of Implementing Regulation No 543/2011, [369] must be interpreted as meaning that, at the stages of import and sale to the consumer, the labelling of Charentais melons and cherry tomatoes harvested in the territory of Western Sahara must indicate Western Sahara alone as the country of origin of those goods.

The request has been made in proceedings between, on the one hand, the Confédération paysanne, a French agricultural union, and, on the other, the ministre de l'Agriculture et de la Souveraineté alimentaire (Minister for Agriculture and Food Sovereignty, France) and the ministre de l'Économie, des Finances et de la Souveraineté industrielle et numérique (Minister for Economic Affairs, Finance, and Industrial and Digital Sovereignty, France) concerning the legality of an implicit decision made by those ministers rejecting the Confédération paysanne's request that they issue a decree banning the import of cherry tomatoes and Charentais melons harvested in the territory of Western Sahara ('the goods at issue in the main proceedings').

On 2 October 2020, the Confédération paysanne brought an action before the Conseil d'État – the referring court – seeking first, annulment of the implicit decision of those ministers to reject its request, and, second, an order that those ministers issue that decree. It argues that the territory of Western Sahara is not part of the territory of the Kingdom of Morocco and that the labelling indicating that the goods at issue in the main proceedings originate from Morocco is therefore in breach of the provisions of EU law relating to the provision of information to consumers regarding the origin of fruit and vegetables offered for sale.

The referring court questions, inter alia, whether the relevant rules of EU law authorise a Member State to adopt a national measure banning imports, originating in a third country, of goods the labelling of which does not correctly indicate the country or territory from which the goods originate and whether those rules permit, at the stage of the import of the goods at issue in the main proceedings and the stage of the sale of those goods to consumers, the labelling of the goods to refer to the Kingdom of Morocco as the country of origin or whether that labelling must refer only to the territory of Western Sahara.

Findings of the Court

In the first place, regarding the question whether Article 207 TFEU, the Basic Safeguard Regulation and Regulation No 1308/2013 are to be interpreted as permitting a Member State unilaterally to adopt a measure banning the import of agricultural goods the labelling of which systematically fails to comply with the EU legislation concerning the indication of the country or territory of origin, the Court recalls, first, that Article 3(1)(e) TFEU confers exclusive competence on the Union in the area of common commercial policy, which, according to Article 207(1) TFEU, is to be based on uniform principles and conducted in the context of the principles and objectives of the Union's external action.

---

367 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (OJ 2015 L 83, p. 16) ('the Basic Safeguard Regulation').

368 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

369 Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ 2011 L 157, p. 1), as amended by Commission Implementing Regulation (EU) No 594/2013 of 21 June 2013 (OJ 2013 L 170, p. 43).

Second, the Court states that, when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts. [370] The Member States may legislate and adopt legally binding acts themselves in such an area only if so empowered by the Union or for the implementation of Union acts. Accordingly, if they are not so empowered, the Member States may not unilaterally adopt a measure banning the import of a category of goods originating in a third territory or country, such import being, moreover, permitted and regulated by a trade agreement concluded by the European Union.

It is true that Article 24(2)(a) of the Basic Safeguard Regulation provides that that regulation does not preclude the adoption or application by Member States of prohibitions, quantitative restrictions or surveillance measures on certain specific grounds. The Court nevertheless notes that that provision is without prejudice to other relevant provisions of EU law. Thus, in the area of the import of agricultural goods, Article 194 of Regulation No 1308/2013 reserves to the European Commission the competence to take safeguard measures with regard to imports into the Union of goods falling within the scope of Regulation No 1308/2013. Article 24(2)(a) of the Basic Safeguard Regulation cannot, consequently, be understood as enabling the Member States unilaterally to adopt safeguard measures with regard to the import of agricultural goods.

In that regard, the Court emphasises that, in the event of widespread disregard by exporters for the provisions of EU law relating to the provision of information to consumers regarding the origin of fruit and vegetables offered for sale, it would in that case be not for a Member State but for the Commission to intervene, within the framework set by the cooperation mechanisms provided for by the Association Agreement.

In the second place, the Court examines the question whether Article 76 of Regulation No 1308/2013, read in conjunction with Article 3(1) of Implementing Regulation No 543/2011, is to be interpreted as meaning that, at the stages of import and sale to the consumer, the labelling of the goods at issue in the main proceedings must indicate Western Sahara – and may not refer to the Kingdom of Morocco – as the country of origin of those goods.

The Court recalls, in that regard, that recital 8 of Implementing Regulation No 543/2011, in the light of which the requirements laid down in Article 3(1) of that implementing regulation are to be read, states, in essence, that the information particulars required by marketing standards must be clearly displayed on the packaging and/or label of the goods concerned, in particular to avoid cases of misleading consumers. Thus, the indication of the country of origin which must necessarily appear on goods such as the goods at issue in the main proceedings must not be deceptive.

Having regard to Article 60 of Regulation No 952/2013, [371] the obligation to indicate the country of origin of the goods at issue in the main proceedings which stems, first, from the general marketing standards laid down in Part A of Annex I to Implementing Regulation No 543/2011 and the specific marketing standards set out in Part 10 of Part B of Annex I to that implementing regulation, and, second, from Article 76(1) of Regulation No 1308/2013, is applicable not only to goods which originate from 'countries', but also to those which originate from 'territories', which may include geographical areas which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless have a separate and distinct status from that State under international law.

The goods at issue in the main proceedings having been harvested in the territory of Western Sahara, the Court recalls that that territory constitutes a territory distinct from that of the Kingdom of

370 Article 2(1) TFEU.

371 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1).

Morocco. [372] Annex I to Implementing Regulation 2020/1470 [373] moreover lays down separate codes and texts for Western Sahara and the Kingdom of Morocco.

In those circumstances, the Court concludes that the territory of Western Sahara must be regarded as a customs territory for the purposes of Article 60 of Regulation No 952/2013 and, consequently, of Regulation No 1308/2013 and Implementing Regulation No 543/2011. Accordingly, the indication of the country of origin which must appear on the goods at issue in the main proceedings may designate only Western Sahara as such, because those goods are harvested in that territory. The Court explains that any other indication would be deceptive, as it could mislead consumers as to the true origin of the goods at issue in the main proceedings, inasmuch as it would be likely to suggest that those goods originate from a place other than the territory in which they were harvested.

Judgment of 4 October 2024 (Grand Chamber), *Commission and Council* v *Front Polisario* (C-778/21 P and C-798/21 P, EU:C:2024:833)

(Appeals – External action – International agreements – Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco – Decision on the conclusion of that agreement and the implementation protocol thereto – Allegations of infringements of international law resulting from the applicability of that agreement to the waters adjacent to Western Sahara – Action for annulment – Admissibility – Capacity to be a party to legal proceedings – Locus standi – Condition that an applicant must, in certain cases, be directly and individually concerned by the measure in question – Principle of the relative effect of treaties – Principle of self-determination – Non-self-governing territories – Article 73 of the Charter of the United Nations – Discretion of the Council of the European Union – Customary international law – General principles of EU law – Consent of the people of a non-self-governing territory which holds a right to self-determination as a third party to an international agreement)

Judgment of 4 October 2024 (Grand Chamber), *Commission and Council* v *Front Polisario* (C-779/21 P and C-799/21 P, EU:C:2024:835)

(Appeals – External action – International agreements – Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part – Agreement on the amendment of Protocols 1 and 4 to that agreement – Concluding act – Allegations of infringements of international law resulting from the applicability of that second agreement to the territory of Western Sahara – Action for annulment – Admissibility – Capacity to be a party to legal proceedings – Locus standi – Condition that an applicant must, in certain cases, be directly and individually concerned by the measure in question – Principle of the relative effect of treaties – Principle of self-determination – Non-self-governing territories – Article 73 of the Charter of the United Nations – Discretion of the Council of the European Union – Customary international law – General principles of EU law – Consent of the people of a non-self-governing territory which holds a right to self-determination as a third party to an international agreement)

The Court of Justice, sitting as the Grand Chamber, dismisses, by two judgments joining (i) Cases C-778/21 P and C-798/21 P and (ii) Cases C-779/21 P and C-799/21 P, the appeals brought by the European Commission and the Council of the European Union against two judgments of the General Court which had annulled the decisions of the Council approving the conclusion of agreements between the European Union and the Kingdom of Morocco, following actions for annulment brought

[372] See judgments of 21 December 2016 in *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraph 92), and of 27 February 2018 in *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraph 62).

[373] Commission Implementing Regulation (EU) 2020/1470 of 12 October 2020 on the nomenclature of countries and territories for the European statistics on international trade in goods and on the geographical breakdown for other business statistics (OJ 2020 L 334, p. 2).

by the Front populaire pour la libération de la Saguia-el-Hamra et du Rio de oro (Front Polisario) against those decisions.

By Decision 2019/217, [374] the Council had approved the conclusion of an agreement between the European Union and the Kingdom of Morocco on the amendment of certain protocols to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. [375] The Council had also approved, by Decision 2019/441, [376] the conclusion of a fisheries partnership agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto, as well as the Exchange of Letters accompanying the Agreement, and, by Regulation 2019/440, the allocation of fishing opportunities under that agreement and the Implementation Protocol thereto. [377]. Those two decisions were taken in response to the judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973), whereby the Court of Justice had, inter alia, explained that the Euro-Mediterranean Association Agreement covered only the territory of the Kingdom of Morocco and not the non-self-governing territory of Western Sahara, and the judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118), in which the Court had followed a broadly similar line of reasoning with regard to fisheries agreements with the Kingdom of Morocco concerning the waters adjacent to Western Sahara.

The agreement approved by Decision 2019/217 amended the protocols to the Euro-Mediterranean Association Agreement relating to the arrangements applying to (i) imports into the European Union of agricultural products, fish and fishery products originating in Morocco and (ii) the definition of 'originating products', extending to products originating in Western Sahara and exported subject to controls by the Moroccan customs authorities the tariff preferences given to products of Moroccan origin exported to the European Union. The fisheries agreement between the European Communities and Morocco, [378] for its part, was amended to include the waters adjacent to the territory of Western Sahara within its scope.

By applications lodged in 2019 contesting those measures in three *Front Polisario* v *Council* cases (T-279/19, T-344/19 and T-356/19), Front Polisario had sought the annulment of the decisions at issue and the contested regulation.

The General Court, in the case which gave rise to the judgment in *Front Polisario* v *Council* (T-279/19), [379] on the one hand, and in the joined cases which gave rise to the judgment in *Front Polisario* v *Council* (T-344/19 and T-356/19), [380] on the other, annulled the decisions at issue and the contested regulation on the ground that the requirement relating to the consent of the people of

---

374 Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2019 L 34, p. 1).

375 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed in Brussels on 26 February 1996 (OJ 2000 L 70, p. 2).

376 Council Decision (EU) 2019/441 of 4 March 2019 on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement (OJ 2019 L 77, p. 4).

377 Council Regulation (EU) 2019/440 of 29 November 2018 on the allocation of fishing opportunities under the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco and the Implementation Protocol thereto (OJ 2019 L 77, p. 1) ('the contested regulation').

378 Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco (OJ 2006 L 141, p. 4).

379 Judgment of 29 September 2021, *Front Polisario* v *Council* (T-279/19, EU:T:2021:639).

380 Judgment of 29 September 2021, *Front Polisario* v *Council* (T-344/19 and T-356/19, EU:T:2021:640).

Western Sahara had not been met. It held that the Council had not taken sufficient account of all the relevant factors concerning the situation in Western Sahara and had wrongly taken the view that it had a margin of appreciation with regard to compliance with the requirement that the people of that territory had to consent to the application of the agreements at issue in that territory, as a third party to those agreements in accordance with the principle of the relative effect of treaties in relation to the principle of self-determination.

The Council and the Commission have each brought an appeal against those judgments before the Court of Justice.

Findings of the Court

1. The admissibility of the actions for annulment brought before the General Court by Front Polisario

a) Capacity of Front Polisario to be a party to legal proceedings

In the first place, the Court of Justice recalls that any natural or legal person may, under certain conditions, 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. However, the Court has previously recognised the capacity of entities to be parties to legal proceedings before the Courts of the European Union irrespective of whether they are constituted as legal persons under national law.

Front Polisario is a self-proclaimed liberation movement which was created for the purpose of fighting for the independence, with regard to the Kingdom of Morocco, of the non-self-governing territory of Western Sahara, and for the creation of a sovereign Sahrawi State. In so far as that movement seeks precisely, relying on the exercise of the people of Western Sahara's right to self-determination, to establish a state legal order for that territory, it cannot be required, in order to be recognised as having capacity to be a party to legal proceedings before the Courts of the European Union, to be constituted as a legal person under a particular national legal order. Furthermore, Front Polisario is one of the legitimate interlocutors in the process conducted, with a view to determining the future of Western Sahara, under the auspices of the United Nations Security Council, the decisions of which are binding on all the EU Member States and institutions. Accordingly, Front Polisario, which also maintains bilateral legal relations at international level, has sufficient legal existence to be able to be a party to legal proceedings before the Courts of the European Union. [381] Consequently, the Court of Justice considers that the General Court could, without erring in law, conclude that Front Polisario had the capacity to be a party to legal proceedings before the Courts of the European Union, within the meaning of the fourth paragraph of Article 263 TFEU.

b) Locus standi of Front Polisario

In the second place, the Court of Justice examines the *locus standi* of Front Polisario. As regards the question whether Front Polisario is directly concerned by the decisions at issue and the contested regulation, the Court recalls, first of all, the two cumulative conditions which must be satisfied in that regard, namely that the measure being contested, first, directly affects the legal situation of the person in question and, second, that it leaves no discretion to the addressees who are entrusted with the task of implementing it.

The Court of Justice states, in that regard, that, by its actions for annulment before the General Court, Front Polisario was seeking to protect the people of Western Sahara's right to self-determination [382]

---

381 The Court specifies in that regard that the question whether that entity may legitimately represent the interests of the people of Western Sahara concerns its *locus standi* in the context of an action for annulment concerning the decision at issue, and not its capacity to be a party to legal proceedings before the EU judicature.

382 See judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraphs 88, 91 and 105).

and that it is therefore in the light of the effects of the contested acts and, accordingly, of the agreements at issue on the legal situation of that people, that it is necessary to examine whether Front Polisario is directly concerned by the contested acts.

The Court of Justice recalls that, although it has not been officially recognised as being the exclusive representative of the people of Western Sahara, Front Polisario is, according to the resolutions of the highest bodies of the United Nations, a privileged interlocutor with a view to determining the future status of Western Sahara. Those particular circumstances allow the finding that Front Polisario is entitled to contest, before the EU judicature, the legality of an act of the Union which directly affects the legal situation of that people. In that regard, the contested acts and, by extension, the agreements at issue, satisfy, through their impact on the people of Western Sahara's right to self-determination, the legal condition that a natural or legal person must be directly concerned by the decision which that person is contesting. Taking into account Article 73 of the Charter of the United Nations and the principle of effective judicial protection, that condition must be assessed, in this instance, in relation to the legal situation of the people of Western Sahara, which is represented for the purposes of the present cases by Front Polisario.

Furthermore, the decision concluding an international agreement constitutes a definitive act in the internal legal order of the European Union, expressing the will of the Union to be bound by that agreement. The Court, which does not have jurisdiction to annul an international agreement, recalls that such a decision constitutes an act which is open to challenge. By contrast, contrary to the assertions of some parties, the act of notifying the other contracting party of the approval of such an agreement constitutes an implementing measure which, in principle, must be regarded as an act which is not open to challenge.

The Court of Justice concludes from this that Front Polisario was directly concerned by the decisions at issue and that the General Court did not err in law in that regard.

As regards whether Front Polisario is individually concerned, the Court of Justice also confirms the approach adopted by the General Court, according to which, in view of the circumstances which led to the finding that Front Polisario was directly concerned, it had to be regarded as being individually concerned by the decisions at issue. The Court of Justice holds, in that regard, that the people of Western Sahara, represented by Front Polisario, is individually concerned by the decision at issue, in so far as the express inclusion of the territory of Western Sahara in the scope of the agreements at issue, which is binding on the European Union by virtue of the decisions at issue, changes the legal situation of that people because of its status as holder of the right to self-determination with regard to that territory, with that status differentiating it from all other persons or entities, including any other subject of international law.

2. The consent of the people of Western Sahara to the agreements at issue, and the extent of the judicial review carried out by the General Court

According to the decisions at issue, the agreements in question were approved by the Union after the Commission, in liaison with the European External Action Service, took 'all reasonable and feasible steps to adequately involve the people concerned in order to ascertain their consent to the [agreements]'. [383] However, the Court of Justice notes, in that regard, that the majority of the current population of Western Sahara is not part of the people holding the right to self-determination, namely the people of Western Sahara, which for the most part has been displaced. It adds that there is a difference between the concept of the 'population' of a non-self-governing territory and that of the 'people' of that territory. The latter refers to a political unit which holds the right to self-determination, whereas the concept of 'population' refers to the inhabitants of a territory.

383 Recital 10 of Decision 2019/217 and recital 11 of Decision 2019/441.

Next, the Court recalls that, according to the general international law principle of the relative effect of treaties, treaties do not impose any obligations, or confer any rights, on third States. A third party may, in that regard, be affected by the implementation of an agreement in the event that a territory with regard to which that third party has sovereignty or holds the right to self-determination is included in the scope of that agreement. The implementation of an international agreement between the European Union and the Kingdom of Morocco in the territory of Western Sahara must therefore receive the consent of the people of Western Sahara. [384] Given that the Union's action on the international scene must contribute, in particular, to the strict observance of international law, and to respect for the principles of the Charter of the United Nations, [385] the Court emphasises that a lack of consent by the people of Western Sahara to such agreements, the implementation of which extends to the territory of Western Sahara or to the waters adjacent thereto, is capable of affecting the validity of the acts of the Union concluding those agreements.

3. The need for the consent of the people of Western Sahara and the identification of Front Polisario as the entity to which that consent is to be expressed

The Court of Justice notes, first of all, that the General Court erred in law when it found that the agreements at issue, by granting the Moroccan authorities certain powers, to be exercised in the territory of Western Sahara, imposed an obligation on the people of Western Sahara. [386] Indeed, although the implementation of the agreements at issue means that the acts of the Moroccan authorities carried out in the territory of Western Sahara have legal effects changing the legal situation of the people of that territory, this does not however allow the finding that those agreements create legal obligations for that people as a subject of international law. In that regard, the agreements at issue do not mean that the European Union recognises the alleged sovereignty of Morocco over Western Sahara. Similarly, the people of Western Sahara is not, for example, the addressee of the fishing authorisations or other administrative acts drawn up by the Moroccan authorities in connection with the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, which it would be required to recognise; nor is it the addressee of the measures taken by the EU authorities and by the authorities of the Member States with regard to them. The Court of Justice therefore considers that the General Court relied on an incorrect premiss when it found that the expression of the people of Western Sahara's consent to the agreement at issue had to be explicit.

However, the Court of Justice notes that customary international law does not provide that the consent of a third party that is subject to an agreement which confers a right on that third party is to be expressed in a particular form [387] and does not exclude the possibility that such consent may be granted implicitly in certain circumstances. Thus, the consent of a people of a non-self-governing territory to an international agreement in respect of which it has the status of a third party and which is to be applied in the territory to which its right to self-determination relates may be presumed so long as two conditions are satisfied. First, the agreement in question must not give rise to an obligation for that people. Second, the agreement must provide that the people itself receives a specific, tangible, substantial and verifiable benefit from the exploitation of that territory's natural resources which is proportional to the degree of that exploitation. The agreement in question must also provide for a regular control mechanism enabling it to be verified whether the benefit granted to the people in question is in fact received by that people. Fulfilment of those conditions is necessary in

---

384 See judgment of 21 December 2016, *Council* v *Front Polisario* (C-104/16 P, EU:C:2016:973, paragraph 106).

385 Article 3(5) and Article 21(1) TEU.

386 Judgments of 29 September 2021, *Front Polisario* v *Council* (T-279/19, EU:T:2021:639, paragraphs 322 and 323), and of 29 September 2021, *Front Polisario* v *Council* (T-344/19 and T-356/19, EU:T:2021:640, paragraph 318).

387 See judgment of the Permanent Court of International Justice of 7 June 1932, *'Free Zones of Upper Savoy and the District of Gex'* (PCIJ Reports 1927, Series A/B, No 46, p. 148).

order to ensure that such an agreement is compatible with the principle, derived from Article 73 of the Charter of the United Nations and enshrined in customary international law, that the interests of the peoples of non-self-governing territories are paramount.

Where those two conditions are satisfied, the consent of the people concerned must be held to have been obtained. Accordingly, the fact that a movement which presents itself as the legitimate representative of that people objects to that agreement cannot, as such, be sufficient to call in question the existence of such consent. That presumption may nonetheless be reversed so long as legitimate representatives of that people establish that the system of benefits conferred on that people by the agreement in question, or the regular control mechanism which must accompany it, does not satisfy those conditions.

In this instance, the Court finds that the agreements at issue, although they change the legal situation of the people of Western Sahara in EU law with regard to the right to self-determination which that people holds, do not give rise to legal obligations for that people as a subject of international law. The first of those two conditions is therefore satisfied.

Regarding the second condition, the Court finds that any benefit for the people of Western Sahara which displays the characteristics previously listed is manifestly absent from the agreements at issue. It also states that, while an agreement should, in the future, benefit the people of Western Sahara in accordance with those requirements, the possibility that that agreement might also benefit the inhabitants of that territory in general is not such as to prevent a finding of presumed consent on the part of that people.

4. Whether international law can be relied upon

The Court recalls that the European Union is bound, when exercising its powers, to observe international law, and that the Court therefore has jurisdiction, in the context of an action for annulment, to assess the compatibility with the rules of international law of an international agreement concluded by the European Union. In accordance with the Treaties, those rules are binding on the Union, and the review by the Court of the validity of the act by which the European Union has concluded such an international agreement is capable of encompassing the legality of that act in the light of the actual content of the international agreement in question. [388] Thus, the General Court could correctly consider that the principle of self-determination and the principle of the relative effect of treaties could be relied upon in connection with the review of the validity of the decisions at issue.

Conclusion

As none of the grounds raised in support of the appeals brought by the Council and the Commission have been accepted by the Court of Justice, that court dismisses those appeals in their entirety.

5. Maintaining the effects of the decisions at issue in the event that the appeals submitted by the Council and the Commission are dismissed

In Joined Cases C-778/21 P and C-798/21 P, the judgment under appeal had maintained the effects of the decision at issue in those cases pending the delivery of the present judgment. However, as the implementation protocol to the agreement at issue in those cases expired on 17 July 2023 and the fisheries agreement does not itself authorise access by Union vessels to the ‘fishing zone’ concerned, the Court rules that the claims submitted in the alternative by the Commission and the Council, requesting that the effects of that decision be maintained, have become devoid of purpose.

388 Judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118, paragraphs 47 to 51).

In Joined Cases C-779/21 P and C-799/21 P, the agreement concluded by the decision at issue in those cases entered into force on 19 July 2019. As the annulment of that decision, without its effects being maintained for a limited period, would be liable to give rise to serious negative consequences for the external action of the European Union and to call in question the legal certainty of the international commitments to which it has agreed and which are binding on the institutions and the Member States, the Court decides that the effects of that decision are to be maintained for a period of 12 months from the date of delivery of the judgment.

XX. Common foreign and security policy

1. Restrictive measures

Judgment of 5 September 2024, *Jemerak* (C-109/23, EU:C:2024:681)

(Reference for a preliminary ruling – Common foreign and security policy – Restrictive measures taken in view of Russia's actions destabilising the situation in Ukraine – Regulation (EU) No 833/2014 – Article 5n(2) and (6) – Prohibition on the direct or indirect provision of legal advisory services to the Russian Government or to legal persons, entities or bodies established in Russia – Exemption concerning the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitration proceedings in a Member State – Authentication and execution, by a notary, of a contract for the sale of immovable property – Assistance provided by an interpreter during such authentication)

In a reference for a preliminary ruling from the Landgericht Berlin (Regional Court, Berlin, Germany), the Court rules on the scope of the prohibition on the provision of legal advisory services to legal persons established in Russia laid down in Article 5n(2) of Regulation No 833/2014, [389] as amended by Regulation 2022/1904, [390] which concerns restrictive measures adopted by the Council of the European Union in view of Russia's actions destabilising the situation in Ukraine.

GM and ON, German nationals, were preparing to purchase an apartment located in Berlin (Germany) and owned by Visit Moscow Ltd, a legal person established in Russia. For the purposes of that transaction, GM, ON and Visit-Moscow approached PR, a notary practising in Germany, asking him to draw up a contract of sale in the form of a notarial act and to arrange subsequently for that contract to be executed. In 2022, PR however refused to authenticate the contract of sale on the ground that it could not rule out the possibility that authentication would infringe the prohibition laid down in Article 5n(2) of Regulation No 833/2014. Since he did not accede to the request to reconsider that refusal made by GM, ON and Visit-Moscow, PR forwarded the appeal brought by them against that refusal to the Berlin Regional Court, which referred various questions to the Court for a preliminary ruling in that regard.

Findings of the Court

In the first place, the Court notes that, according to its ordinary meaning in everyday language, the term 'legal advice' generally refers to an opinion on a question of law. The term 'legal advice' used in combination with the term 'services', expressed as 'legal advisory services' in Article 5n(2) of Regulation No 833/2014, refers to the pursuit of an activity of an economic nature, based on a relationship between a service provider and his or her client, the purpose of which is the provision of legal advice, and by which a provider delivers advice on questions of law to persons seeking that advice.

That meaning of the term 'legal advisory services' is confirmed by recital 19 of Regulation 2022/1904. First, that recital refers to a relationship between a service provider and his or her 'customers' or 'clients' and describes the role of that service provider as the provision of assistance and advice to them, in their interest, as regards the legal aspects of their transactions with third parties. Second, it refers to ancillary activities consisting of 'the preparation, execution and verification of legal documents'.

---

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

390 Council Regulation (EU) 2022/1904 of 6 October 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 259 I, p. 3).

Thus, the activities covered by the concept of 'legal advisory services', within the meaning of Article 5n(2) of Regulation No 833/2014, are clearly different from those which public authorities may be required to perform. Those public authorities do not have the task of providing services consisting in giving opinions on questions of law to persons in order to promote or defend the individual interests of those persons.

In the present case, the Court notes that, in the context of the authentication of a contract for the sale of immovable property, it appears that a notary does not act with the aim of promoting the specific interests of one or the other of the parties concerned, or both, but acts impartially, maintaining an equal distance from those parties and their respective interests, solely in the interests of the law and legal certainty. Therefore, in the light of the specific rules governing the procedure for the notarial authentication of acts and the legal effects deriving from authentic acts in the German legal system, the authentication by a notary – such as that governed by German law – of a contract for the sale of immovable property owned by a legal person established in Russia is not covered by the concept of 'legal advisory services' referred to in Article 5n(2) of Regulation No 833/2014 and, consequently, does not fall within the scope of the prohibition on the provision of such services to such a legal person, laid down in subparagraph (b) of that provision.

The Court observes in that regard that, if Article 5n(2) of that regulation were to be interpreted to the contrary, that would lead to inconsistencies, on the one hand, in the application of that regulation and, on the other, between that regulation and Regulation No 269/2014. [391]

Transactions concerning immovable property situated within the territory of the European Union and owned by legal persons established in Russia remain authorised under Regulation No 833/2014. In practice, however, those transactions could be hindered in certain Member States in which the notarial authentication of a contract for the sale of immovable property constitutes an essential condition for the disposal of such property, irrespective of whether or not those legal persons are subject to a prohibition on disposing of their assets in accordance with Regulation No 269/2014.

Such variability in the effects of the prohibition laid down in Article 5n(2) of Regulation No 833/2014 from one Member State to another, depending on the existing notarial system, could not have been the aim of the EU legislature.

Moreover, the interpretation adopted is not contrary to the aim of Regulation No 833/2014 or that of Regulation No 269/2014.

First of all, it is not apparent from either Decision 2022/1909, [392] Regulation No 833/2014 or Regulation 2022/1904 that, by imposing a prohibition on the provision of legal advisory services, the Council intended to ensure that legal persons established in Russia would be unable, in certain Member States, to dispose of their immovable property.

Next, the objective underlying the prohibition laid down in Article 5n(2) of Regulation No 833/2014 was to make it more difficult for Russian legal persons operating in the territory of the European Union to continue their commercial activities in that territory, and, thereby, to have an impact on the Russian economy. The notarial authentication of a contract for the sale of immovable property owned by a legal person established in Russia is not contrary to such an objective.

---

391 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6).

392 Council Decision (CFSP) 2022/1909 of 6 October 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 259 I, p. 122).

Lastly, it is not apparent how notarial authentication of a contract for the sale of immovable property owned by a legal person established in Russia could, a priori and generally, contribute to circumventing the restrictive measures adopted.

In the second place, the Court points out that it will be for the referring court to assess, for each of the tasks which a notary carries out to execute an authenticated contract for the sale of immovable property, whether they involve the provision of legal advice to the parties by the notary, in accordance with the interpretation of the concept of 'legal advisory services' set out above.

In the last place, as regards the question whether translation services provided by an interpreter during notarial authentication constitute legal advisory services, within the meaning of Article 5n(2) of Regulation No 833/2014, the Court states that, given that the profession of interpreter is not legal in nature, those services cannot include an element of 'legal advice', even where the provision of services concerned consists of providing assistance to a legal professional acting in a legal field. Moreover, it does not appear that the authentication, by a German notary, of a contract for the sale of immovable property situated in Germany and owned by a legal person established in Russia falls within the scope of the prohibition on the provision of legal advisory services laid down in Article 5n(2) of Regulation No 833/2014. It follows that, by providing translation services in the context of the notarial authentication of such an instrument, in order to assist the representative of that legal person who does not have a command of the language of the authentication procedure, the interpreter does not provide 'legal advisory services', within the meaning of that provision, to such a legal person.

Judgment of 10 September 2024 (Grand Chamber), *Neves 77 Solutions* (C-351/22, EU:C:2024:723)

(Reference for a preliminary ruling – Common Foreign and Security Policy (CFSP) – Restrictive measures adopted in view of the actions of the Russian Federation destabilising the situation in Ukraine – Decision 2014/512/CFSP – Article 2(2)(a) – Jurisdiction of the Court – Final sentence of the second subparagraph of Article 24(1) TEU – Article 275 TFEU – Article 215 TFEU – Article 17 of the Charter of Fundamental Rights of the European Union – Right to property – Principle of legal certainty and principle that penalties must be defined by law – Brokering services in relation to military equipment – Prohibition on providing such services – Failure to notify the competent national authorities – Administrative offence – Fine – Automatic confiscation of the amounts received in consideration for the prohibited transaction)

The Tribunalul București (Regional Court, Bucharest, Romania) made a reference for a preliminary ruling to the Court, which specifies the scope of the limitations of its jurisdiction in Common Foreign and Security Policy (CFSP) matters. [393] Moreover, it rules on the scope of the prohibition on providing brokering services in relation to military equipment laid down in Article 2(2)(a) of Decision 2014/512/CFSP [394] concerning restrictive measures adopted by the Council of the European Union in view of Russia's actions destabilising the situation in Ukraine.

The main activity of the Romanian company Neves 77 Solutions SRL ('Neves') is brokering in the sale of products in the field of aviation.

In 2019, Neves entered into a contract with the Ukrainian company SFTE Spetstechnoexport ('SFTE') to transfer the property rights of 32 radio sets to be delivered to the United Arab Emirates. After having purchased those radio sets, 20 of which were manufactured in Russia and exported to the United

[393] Those limitations are imposed by Article 24(1) TEU and Article 275(1) TFEU.

[394] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13), as amended by Council Decision 2014/659/CFSP of 8 September 2014 (OJ 2014 L 271, p. 54).

Arab Emirates, from a Portuguese company, Neves transferred them, at SFTE's request, to an Indian company.

Considering, inter alia, that that brokering transaction infringed Article 2(2)(a) of Decision 2014/512, the Romanian tax authority drew up, in 2020, an infringement notice imposing on Neves a penalty and the confiscation of the amounts received in consideration for that transaction.

Neves brought an action for annulment of that notice before the Judecătoria Sectorului 1 București (Court of First Instance, Sector 1, Bucharest, Romania), which dismissed the action. Neves then appealed against that judgment before the Regional Court, Bucharest, the referring court.

Findings of the Court

Regarding the Court's jurisdiction to interpret Article 2(2)(a) of Decision 2014/512, the Court finds, first of all, that that provision establishes a restrictive measure of general scope forming the basis for a national sanction. Although the Court's jurisdiction is not in any way limited regarding a regulation adopted on the basis of Article 215 TFEU, which gives effect to EU positions taken in CFSP matters, the prohibition on providing brokering services laid down in Article 2(2)(a) had not been implemented in a regulation at the time of the facts in the main proceedings.

However, in the first place, in monitoring compliance with the first paragraph of Article 40 TEU, [395] the Court must ensure, in particular, that, regarding the implementation of Article 215 TFEU, the Council cannot circumvent the Court's jurisdiction regarding a regulation under that article. In that regard, it is apparent from the clear wording of Article 215(1) TFEU that it falls to the Council to adopt the necessary measures to give effect to a CFSP decision setting out the European Union's position regarding the interruption or reduction of economic and financial relations with a third country. That institution therefore has, in the situation covered by that paragraph 1, circumscribed powers.

In the second place, the possibility provided for by the Treaties of making a reference to the Court for a preliminary ruling regarding a regulation adopted on the basis of Article 215(1) TFEU must be available in respect of all the provisions that the Council should have included in such a regulation and which form the basis for a national sanction adopted against third parties. That interpretation makes it possible to ensure the uniform application of EU law by the national courts and tribunals and the necessary consistency of the system of judicial protection provided for by EU law. The preliminary ruling procedure, [396] which is the keystone of the judicial system within the European Union, is essential to preserving the values of the rule of law on which the European Union is founded. [397]

The Court thus has jurisdiction to interpret a restrictive measure of general scope where it fell to the Council to implement that measure, which serves as a basis for national sanctions, by a regulation adopted under Article 215 TFEU. In the present case, the prohibition on providing brokering services in question is intended to restrict the ability of economic operators to carry out transactions falling within the scope of the FEU Treaty. [398] It can be implemented at EU level only if it is followed by the adoption of such a regulation and is one of the measures necessary to give effect to Decision 2014/512 at EU level, which the Council was required to implement in Regulation No 833/2014.

The Court therefore has jurisdiction to answer the questions referred for a preliminary ruling.

---

395 Under the first paragraph of Article 40 TEU, the implementation of the CFSP does not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the competences of the European Union referred to in Articles 3 to 6 of the FEU Treaty.

396 The preliminary ruling procedure is laid down in Article 19(3)(b) TEU and Article 267 TFEU.

397 See Article 2 TEU and Article 21 TEU, to which Article 23 TEU relating to the CFSP refers.

398 Trade in weapons, military equipment and services covered by Article 2(2)(a) of Decision 2014/512 does indeed come within that scope, under Articles 114 and 207 TFEU.

On the substance, the Court considers, in the first place, that the prohibition on providing brokering services laid down in Article 2(2)(a) of Decision 2014/512 is applicable even where the military equipment that was the subject of the brokering transaction concerned was never imported into the territory of a Member State.

In the second place, the Court emphasises that that provision, read in the light of the right to property enshrined in Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter') and of the principle of legal certainty and the principle that penalties must be defined by law, does not preclude a national measure confiscating the entire proceeds of a brokering transaction referred to in Article 2(2)(a), which is implemented automatically following a finding by the competent national authorities of an infringement of the prohibition on carrying out that transaction and of the obligation to notify that transaction.

Regarding the right to property, the Court begins by recalling the case-law of the European Court of Human Rights ('ECtHR'), according to which confiscation measures relating to the proceeds of an infringement or unlawful activity or an instrument having been used to commit an infringement which does not belong to a third party in good faith constitute, as a general rule, regulation of the use of property, even if they deprive, by their very nature, a person of his or her property. [399]

In the present case, that limitation on the exercise of the right to property appears to comply with the principle of proportionality and, as a result, to be justified in the light of the conditions laid down in Article 52(1) of the Charter, which it is, however, for the referring court to verify. That limitation is provided for by law [400] and respects the essence of the right to property, since it relates to how the use of property is governed for the purposes of the third sentence of Article 17(1) of the Charter and does not constitute deprivation of property for the purposes of the second sentence of Article 17(1). In addition, that measure corresponds to an objective of general interest recognised by the European Union.

As for the principle of proportionality, the confiscation of all the proceeds of the prohibited brokering transaction thus appears necessary in order to dissuade effectively and efficiently economic operators from infringing the prohibition on providing brokering services in relation to military equipment. Similarly, the automatic imposition of a confiscation measure is necessary to ensure the full effectiveness of the sanction. Nevertheless, where a confiscation sanction is imposed separately from a criminal penalty, the procedure as a whole must, according to the case-law of the ECtHR, give the party concerned the opportunity to put his or her case to the national authorities which have imposed that sanction and to the courts hearing the action against the decisions of those authorities, so that they may carry out an overall examination of the interests at stake. [401]

---

399 See, inter alia, ECtHR, 24 October 1986, *Agosi v. the United Kingdom*, CE ECHR:1986:1024JUD000911880, § 51; ECtHR, 12 May 2015, *Gogitidze and Others v. Georgia*, CE ECHR:2015:0512JUD003686205, § 94; and ECtHR, 15 October 2020, *Karapetyan v. Georgia*, CE ECHR:2020:1015JUD006123312, § 32.

400 The measure is based on the Ordonanța de urgență a Guvernului nr. 202/2008 privind punerea în aplicare a sancțiunilor internaționale (Government Emergency Order No 202/2008 on the implementation of international sanctions) of 4 December 2008 (Monitorul Oficial al României, Part I, No 825 of 8 December 2008) and on the national military technology and equipment list referred to in Article 12 of Common Position 2008/944 and established, as regards Romania, by Decrees No 156/2018 and No 901/2019.

401 See, to that effect, ECtHR, 15 October 2020, *Karapetyan v. Georgia*, CE ECHR:2020:1015JUD006123312, § 35.

2. Action for damages

Judgment of 10 September 2024 (Grand Chamber), *KS and Others* v *Council and Others* (C-29/22 P and C-44/22 P, EU:C:2024:725)

(Appeal – Common foreign and security policy (CFSP) – Joint Action 2008/124/CFSP – European Union Rule of Law Mission in Kosovo (Eulex Kosovo) – Action for damages – Damage allegedly suffered as a result of various acts and omissions by the Council of the European Union, the European Commission and the European External Action Service (EEAS) in the implementation of that joint action – Insufficient investigation of the torture, disappearance and killing of persons – Jurisdiction of the Court of Justice of the European Union to rule on that action – Last sentence of the second subparagraph of Article 24(1) TEU – Article 275 TFEU)

By setting aside the order in *KS and KD* v *Council and Others* of the General Court [402] ('the order under appeal'), in so far as that court declared that it manifestly lacked jurisdiction to hear and determine the action brought by KS and KD on the ground that it related to political or strategic choices made in the context of the common foreign and security policy (CFSP), [403] the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the limitation of the jurisdiction of the Courts of the European Union in relation to the CFSP, laid down in the last sentence of the second subparagraph of Article 24(1) TEU [404] and the first paragraph of Article 275 TFEU. [405] KS and KD are close family members of persons tortured, disappeared or killed in Kosovo in 1999, during the conflict that took place in that country. In 2008, by Joint Action 2008/124, [406] the European Union established a Rule of Law Mission in that third country, known as Eulex Kosovo, responsible, inter alia, for investigating such crimes. In 2009, on the basis of that joint action, the European Union established the Human Rights Review Panel ('the review panel'), with responsibility, for its part, for examining complaints of human rights breaches committed by Eulex Kosovo in the implementation of its mandate.

Following complaints lodged by KS and KD, the review panel concluded, in November 2015 and October 2016, that several fundamental rights protected by the European Convention on Human Rights ('ECHR') had been infringed. [407] In March 2017, the review panel decided to close the cases concerned, while noting, in each case, only partial implementation, by the Head of Eulex Kosovo, of the recommendations which it had addressed to him.

In December 2017, by the order in *KS* v *Council and Others*, [408] the General Court dismissed, on the ground that it manifestly lacked jurisdiction to hear and determine it, the action brought by KS against the Council of the European Union, the European Commission and the European External Action

---

402 Order of 10 November 2021, *KS and KD* v *Council and Others* (T-771/20, EU:T:2021:798).

403 The abovementioned order is set aside in so far as the action brought by KS and KD concerned, inter alia, the breach of several fundamental rights and the misuse or abuse of executive power by a body and institutions of the European Union. The appeals are dismissed as to the remainder.

404 Under that provision, 'the Court of Justice of the European Union shall not have jurisdiction with respect to [CFSP provisions], with the exception of its jurisdiction to monitor compliance with Article 40 [TEU] and to review the legality of certain decisions as provided for by the second paragraph of Article 275 [TFEU].'

405 As provided in Article 275 TFEU, 'the Court of Justice of the European Union shall not have jurisdiction with respect to [CFSP] provisions nor with respect to acts adopted on the basis of those provisions. However, the Court shall have jurisdiction to monitor compliance with Article 40 [TEU] and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 [TFEU], reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V [TEU].'

406 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (OJ 2008 L 42, p. 92).

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

408 Order of 14 December 2017, *KS* v *Council and Others* (T-840/16, EU:T:2017:938).

Service (EEAS), seeking in particular 'annulment/amendment to the Joint Action 2008/124' and to establish non-contractual liability for the breach of several provisions of the ECHR.

In November 2021, by the order under appeal, the General Court dismissed, on the same ground, the action brought by KS and KD seeking compensation for the damage they claim to have suffered as a result of various acts and omissions by the Council, the Commission and the EEAS, relating, in particular, to investigations carried out, during the Eulex Kosovo mission, into the torture, disappearance and killing of members of their families. KS and KD had in the meantime applied, in June 2021, for measures of inquiry, seeking the production of the full version of Eulex Kosovo's Operation Plan (OPLAN), beginning from the creation of that mission in 2008.

In the order under appeal, the General Court found, inter alia, that the action brought by KS and KD arose from acts or conduct which fell within the scope of political or strategic issues connected with defining the activities, priorities and resources of Eulex Kosovo and with the decision to set up a review panel as part of that mission and that, in accordance with Joint Action 2008/124, the establishment and activities of the Eulex Kosovo mission came within the CFSP provisions of the EU Treaty. In addition, the General Court held, in essence, that, pursuant to the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU, the Court of Justice of the European Union did not, as a rule, have jurisdiction with respect to the provisions relating to the CFSP and acts adopted on the basis of those provisions, and that the exceptions to that principle, provided for in that first provision and in the second paragraph of Article 275 TFEU, were not applicable in the present case, on the ground that the action concerned neither restrictive measures against natural or legal persons, within the meaning of the latter provision, nor compliance with Article 40 TEU. [409]

Hearing two appeals brought by KS and KD (Case C-29/22 P) and by the Commission (Case C-44/22 P), respectively, the Court of Justice sets aside in part that order of the General Court and refers the case back to it for a ruling on the admissibility and, if necessary, the merits of that action.

Findings of the Court

Since KS and KD and the Commission have challenged the General Court's lack of jurisdiction to hear and determine the action by KS and KD, the Court of Justice examines the merits of the General Court's interpretation regarding those aspects.

The interpretation of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU

In order to interpret the provisions of the Treaties providing for the limitation of the jurisdiction of the Courts of the European Union as regards the CFSP, the Court notes, first of all, that the inclusion of that policy in the EU constitutional framework means that the basic principles of the EU legal order also apply to it. Those include, in particular, respect for the rule of law and fundamental rights, values which require, inter alia, that EU authorities be subject to judicial review.

However, in the first place, the Court notes that, in accordance with the first sentence of the second subparagraph of Article 24(1) TEU, 'the [CFSP] is subject to specific rules and procedures', including those limiting the jurisdiction of the Court of Justice of the European Union with respect to the provisions relating to the CFSP and the acts adopted on the basis of those provisions. Nonetheless, such a limitation of jurisdiction can be reconciled both with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and with Articles 6 and 13 ECHR.

---

409 That article provides: 'The implementation of the [CFSP] shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 [TFEU]. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.'

In that regard, first, the Court has already held that Article 47 of the Charter cannot confer jurisdiction on the Court where the Treaties exclude it, nor change the system of judicial review laid down by the Treaties, to which the rules relating to the admissibility of direct actions belong. Furthermore, the principles of conferral and of institutional balance also apply in the area of the CFSP. Accordingly, the claim that the acts or omissions which are the subject of an action brought by an individual infringe that individual's fundamental rights is not in itself sufficient for the Court of Justice of the European Union to declare that it has jurisdiction to hear and determine that action. Second, the Court must indeed ensure that the interpretation which it gives to Article 47 of the Charter, the first and second paragraphs of which correspond to Article 6(1) and Article 13 ECHR, safeguards a level of protection which does not fall below the level of protection established in those provisions of the ECHR, as interpreted by the European Court of Human Rights. However, on the one hand, the right guaranteed in Article 6(1) ECHR is not absolute and may be subject to legitimate restrictions. Nor, on the other hand, can the protection afforded by Article 13 ECHR, which guarantees the availability at national level of a remedy to enforce the substance of the ECHR rights and freedoms, be regarded as being absolute, since the context in which an alleged violation – or category of violations – occurs is capable of justifying a limitation on the conceivable remedy.

Consequently, the General Court did not err in law in holding, in essence, that neither the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, on the one hand,[410] nor the pleading of breaches of fundamental rights, on the other hand, justified, in themselves, a finding by that court that it had jurisdiction to hear the action brought by KS and KD. In addition, Article 6(2) TEU, which provides for the accession of the European Union to the ECHR, cannot be interpreted as having the effect of extending the jurisdiction of the Court of Justice of the European Union in relation to the CFSP, the rules applicable to that accession providing that the accession agreement is not to affect the competences of the European Union or the powers of its institutions.

In the second place, as regards more specifically the application of the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU to actions to establish non-contractual liability of the European Union, governed by Articles 268 and 340 TFEU, the Court notes that neither the exclusive nature of the jurisdiction conferred on the Court of Justice of the European Union to rule on such actions nor the independent nature of that category of actions can have the effect of extending the limits of the jurisdiction conferred on that institution by the Treaties. The last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU, which limit the jurisdiction of the Courts of the European Union as regards the CFSP, must, so far as actions relating to the CFSP are concerned, be regarded as *leges speciales* in relation to Articles 268 and 340 TFEU. Accordingly, it cannot be accepted that the last sentence of the second subparagraph of Article 24(1) TEU and Article 275 TFEU do not apply to actions seeking to establish the non-contractual liability of the European Union.

In the third and last place, the Court of Justice, relying on the judgment in *Carvalho and Others* v *Parliament and Council*, [411] which expresses a principle of interpretation applicable to all the legal remedies provided for by the Treaties, also confirms the General Court's interpretation of the provisions of the Treaties relating to the jurisdiction of the Courts of the European Union in the light of the fundamental right to effective judicial protection, to the effect that that fundamental right cannot have the effect of setting aside the conditions expressly laid down in the FEU Treaty.

Relation of the acts and omissions at issue to the political or strategic choices made in the context of the CFSP and concerning the definition and implementation of the CFSP

The Court recalls that, in examining the jurisdiction of the Court of Justice of the European Union to hear and determine an action concerning acts or omissions falling within the scope of the CFSP, it is

---

410 Read in the light of Article 47 of the Charter, Article 6(1) and Article 13 ECHR and Article 2, Article 3(5) and Articles 6, 19, 21 and 23 TEU.

411 Judgment of 25 March 2021, *Carvalho and Others* v *Parliament and Council* (C-565/19 P, EU:C:2021:252, paragraphs 69 and 78).

necessary to ascertain, first, whether the situation at issue falls within one of the situations provided for in the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU, in which that jurisdiction is expressly allowed. [412] If that is not the case, it is necessary, second, to assess whether the jurisdiction of the Court of Justice of the European Union may be based on the fact that the acts and omissions at issue are not directly related to the political or strategic choices made by the institutions, bodies, offices and agencies of the Union in the context of the CFSP, and in particular the Common Security and Defence Policy (CSDP). [413] Thus, while the Court of Justice of the European Union has jurisdiction to assess the legality of acts or omissions not directly related to those political or strategic choices or to interpret them, it does not have jurisdiction if those acts or omissions are directly related to those political or strategic choices. [414]

In that regard, the Court of Justice examines the General Court's assessment, [415] carrying out a specific analysis of each of the acts and omissions falling within the CFSP, and in particular the CSDP, which are the subject of the action brought by KS and KD. [416]

In the present case, in the first place, it is apparent from the order under appeal that the General Court found that that action did not fall within the possible situations in which the provisions of the Treaties expressly provide that the Court of Justice of the European Union has jurisdiction in CFSP matters, which indeed is not in dispute in the present appeals. In the second place, the General Court held, in essence, that the acts and omissions referred to in that action [417] were directly related to that policy, having regard to their political and strategic nature and to their link with the definition and implementation of the CFSP, which is why it declared that it had no jurisdiction to hear and determine that same action.

---

412 Judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 60), and of 6 October 2020, *Bank Refah Kargaran* v *Council* (C-134/19 P, EU:C:2020:793, paragraph 27).

413 This is apparent from the case-law of the Court arising from paragraph 49 of the judgment of 12 November 2015, *Elitaliana* v *Eulex Kosovo* (C-439/13 P, EU:C:2015:753); paragraph 55 of the judgment of 19 July 2016, *H* v *Council and Others* (C-455/14 P, EU:C:2016:569); and paragraph 66 of the judgment of 25 June 2020, *SatCen* v *KF* (C-14/19 P, EU:C:2020:492).

414 Consequently, the Court of Justice of the European Union does not have jurisdiction to assess the legality of, or interpret, acts or omissions directly related to the definition, conduct and implementation of the CFSP, and especially the CSDP, that is to say, in particular the identification of the European Union's strategic interests and the definition of both the actions to be taken and the positions to be adopted by the European Union as well as of the general guidelines of the CFSP, within the meaning of Articles 24 to 26, 28, 29, 37, 38, 42 and 43 TEU.

415 That assessment is to be found in paragraphs 28 to 39 of the order under appeal.

416 In order to do so, the Court takes account of the fact that the aim of legal certainty does not require that the Courts of the European Union have to consider the substance of the case in order to establish whether they have jurisdiction.

417 Those acts and omissions are referred to in paragraph 20 of the judgment. In essence, they are:

- the insufficient investigation of the disappearance and killing of KS and KD's family members, owing to Eulex Kosovo's lack of the necessary resources and appropriate personnel to perform its executive mandate;
- the absence of provisions for legal aid for qualifying applicants in proceedings before the review panel and the establishment of that panel without the power to enforce its decisions or to provide a remedy for breaches found to have been committed;
- the failure to take remedial action to remedy some or all of the breaches referred to in the first and second indents, despite the fact that the findings of the review panel were brought to the European Union's attention by the Head of Eulex Kosovo;
- the misuse or abuse of executive power by the Council and the EEAS, in particular by their assertions that Eulex Kosovo had done the best that it could to investigate the abduction and probable murder of the husband of KS and the murder of the husband and the son of KD;
- the misuse of or failure to use executive power properly as a result of the removal of Eulex Kosovo's executive mandate by Council Decision (CFSP) 2018/856 of 8 June 2018 amending Joint Action 2008/124 on the European Union Rule of Law Mission in Kosovo (OJ 2018 L 146, p. 5), while the breaches referred to in the first and second indents remained extant;
- and the misuse or abuse of executive or public power for failing to ensure that the case of KD, a prima facie well-founded war crimes case, be subject to a legally sound review by Eulex Kosovo and/or the Specialist Prosecutor's Office for investigation and prosecution before the Kosovo Specialist Chamber.

In that regard, the Court of Justice finds, first, that the resources made available to a CFSP mission, and in particular a CSDP mission, are, as the General Court was fully entitled to hold, directly related to the political or strategic choices made within the framework of the CFSP.

By contrast, the General Court erred in law inasmuch as it held that the alleged lack of appropriate personnel fell within political or strategic issues which concern the definition and implementation of the CFSP. Indeed, the capacity of the Eulex Kosovo mission to employ staff [418] constitutes an act of day-to-day management forming part of the performance of that mission's mandate. Thus, the decisions taken by Eulex Kosovo as to the choice of personnel employed by that mission are not directly linked to the political or strategic choices made by it in the context of the CFSP.

Second, the Court of Justice reaches the same conclusion of an error of law on the part of the General Court as regards the absence of provisions for legal aid in proceedings before the review panel. Indeed, that part of the action brought by KS and KD concerns the procedural rules of that panel, which are not directly related to the political or strategic choices made in the context of the CFSP.

Similarly, as regards the lack of enforcement powers conferred on the review panel or of remedies for breaches found by it to have been committed, the Court, relying on the objectives underlying the establishment of the Eulex Kosovo mission, [419] states that the decision whether or not to make the acts and omissions of that mission subject to a review mechanism meeting internationally recognised standards does not directly relate to the political or strategic choices concerning that mission, but only to an aspect of its administrative management.

Third, the Court states that the absence of both remedial action to remedy the breaches of fundamental rights found by the review panel and a legally sound review of the case of KD concern the failure to adopt individual measures relating to the particular situations of KS and KD and are, therefore, not directly related to the political or strategic choices made in the context of the CFSP. The same is true of the assertion of the Council and the EEAS that the Eulex Kosovo mission had done the best that it could to investigate the crimes at issue. The General Court therefore also erred in law with regard to those aspects of the action.

By contrast, fourth, the decision to remove the executive mandate of a CFSP mission, and in particular of a CSDP mission, is directly related to such political or strategic choices made in the context of the CFSP, for the purposes of Article 28(1) and Article 43(2) TEU. Accordingly, the General Court did not err in law in so far as it declared that it lacked jurisdiction to rule on the complaints concerning the removal of Eulex Kosovo's executive mandate by Decision 2018/856. [420]

The action before the General Court

The Court of Justice, finding that it does not have the necessary information in order to give final judgment on the pleas of inadmissibility raised by the Council, the Commission and the EEAS or on the merits of the action brought by KS and KD, refers the case back to the General Court for a ruling on the admissibility and, if necessary, the merits of that action, as well as on the application for access to Eulex Kosovo's OPLAN.

---

418 That capacity is apparent from the wording of Article 15a of Joint Action 2008/124, as amended by Council Decision 2014/349/CFSP of 12 June 2014 (OJ 2014 L 174, p. 42).

419 See Articles 1 and 2 of Joint Action 2008/124.

420 That decision terminated the obligation of that mission, enshrined in Article 3(d) of Joint Action 2008/124, to ensure that certain crimes 'are properly investigated, prosecuted, adjudicated and enforced'.

Chapter 2 – The General Court

I. Proceedings of the European Union

1. Actions for annulment

Order of 4 June 2024 (Grand Chamber), *Medel and Others* v *Council* (Joined Cases T-530/22 to T-533/22, EU:T:2024:363)

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

Sitting as the Grand Chamber, the General Court dismisses as inadmissible actions brought by four associations of judges [421] seeking annulment of the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for the Republic of Poland. [422]

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

On 12 February 2021, the European Parliament and the Council of the European Union adopted Regulation 2021/241 establishing the Recovery and Resilience Facility ('the Facility'). [423] Under the Facility, funds may be granted to the Member States, in the form of a financial contribution, which consists in non-repayable financial support or is in the form of a loan.

By the contested decision, the Council approved the assessment of the recovery and resilience plan for the Republic of Poland and specified, in the annex, the milestones and targets to be achieved by that Member State in order for the financial contribution made available to it in the contested decision to be released. The first part of that annex includes, inter alia, the measures regarding the reform of justice in Poland which are set out in milestones F1G, F2G and F3G. [424] The applicants disputed the contested decision in so far as the milestones are incompatible with EU law.

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

---

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

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

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

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

Findings of the Court

As a preliminary point, the Court observes that, in so far as the contested decision is addressed to the Republic of Poland, the admissibility of the actions must be examined in the light of the second and third limbs of the fourth paragraph of Article 263 TFEU, in which the condition of direct concern is laid down. [425]

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

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

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

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

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

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

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

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

In that regard, milestone F2G merely imposes a condition to be satisfied by the Republic of Poland in order to be eligible for funding. The contested decision did not have the effect of making the judges

---

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

affected by decisions of the Disciplinary Chamber subject to the conditions laid down in the contested decision, nor did the latter render a specific rule directly applicable to those judges. Therefore, by providing for milestone F2G, it did not definitively impose specific obligations on the Republic of Poland's relations with the judges affected by decisions of the Disciplinary Chamber and there is no direct link.

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

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

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

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

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

2. Actions to establish non-contractual liability

Judgment of 23 October 2024, *Keserű Mbuch vek* v *European Union* (T-519/23, EU:T:2024:733)

(Non-contractual liability – Control of the acquisition and possession of weapons – Implementing Directive (EU) 2019/69 – Causal link – Concept of 'firearm' – Concept 'alarm and signal weapons')

Hearing an action for non-contractual liability based on Article 268 TFEU and the second paragraph of Article 340 TFEU, which it dismisses, since it does not satisfy the condition relating to the existence of a causal link, the General Court rules on the novel question whether weapons using a combustible propellant to expel rubber bullets belong to the category of firearms, within the meaning of EU law, and whether their holders must therefore be subject to an authorisation or declaration regime.

The applicant, Keserű Művek Fegyvergyár Kft., is a company established in Hungary which manufactures and sells weapons. It states that it has exclusive rights for the manufacturing and

marketing of a weapon model that is capable of shooting rubber bullets ('the Keserű weapon'). Further to Hungary's transposition of Implementing Directive 2019/69, [426] taking the view that that directive caused it damage, in so far as it had the effect of restricting the sale of the Keserű weapon only to persons in possession of a firearm licence, the applicant brought the present action.

Findings of the Court

After pointing out that, according to settled case-law, the European Union may incur non-contractual liability only if a number of cumulative conditions are satisfied, namely the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals, the fact of damage and the existence of a causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties, the Court first examines the condition relating to the existence of a causal link.

In that regard, it points out that the purpose of Implementing Directive 2019/69 is to lay down technical specifications relating to the marking of alarm and signal weapons. [427] Therefore, the Court verifies first of all, whether a weapon with the characteristics of the Keserű weapon may be classified as an 'alarm and signal weapon' within the meaning of Directive 2021/555 and whether, consequently, Implementing Directive 2019/69, which, according to the applicant, is the cause of its damage, should have provided for an exception for the type of weapons with characteristics similar to those of the Keserű weapon.

The concept of a 'firearm' [428] means any portable barrelled weapon that expels a shot, bullet or projectile by the action of a combustible propellant. Objects which correspond to that definition [429] but which are designed for alarm, signalling, life-saving, animal slaughter or harpoon fishing or for industrial or technical purposes are not included in the definition of a 'firearm', provided that they can be used only for that specific purpose.

The concept of 'alarm and signal weapons [430] is defined as referring to 'devices with a cartridge holder which are designed to fire only blanks, irritants, other active substances or pyrotechnic signalling rounds and which are not capable of being converted to expel a shot, bullet or projectile by the action of a combustible propellant'.

In the present case, the Court finds that it follows that the Keserű weapon is a portable barrelled weapon which expels 'bullets', in this case rubber ones, by the action of a combustible propellant and that, therefore, it must be classified as a 'firearm'. Thus, the mere fact that that weapon is designed to shoot rubber bullets by the action of a combustible propellant is sufficient to classify it as a 'firearm'.

Furthermore, the Keserű weapon equally does not fall within the category of weapons referred to in point III(a) of Annex I to Directive 2021/555, which are not included in the definition of a 'firearm'. In fact, that weapon is not designed for alarm or signalling purposes and therefore does not satisfy the condition that it may be used only for that specific use, as required by point III(a) of Annex I to Directive 2021/555. In any event, even assuming that that weapon was designed for the purposes of

---

426 Commission Implementing Directive (EU) 2019/69 of 16 January 2019 laying down technical specifications for alarm and signal weapons under Council Directive 91/477/EEC on control of the acquisition and possession of weapons (OJ 2019 L 15, p. 22).

427 Under Council Directive 91/477/EEC of 18 June 1991 on control of the acquisition and possession of weapons (OJ 1991 L 256, p. 51), which was repealed by Directive (EU) 2021/555 of the European Parliament and of the Council of 24 March 2021 on control of the acquisition and possession of weapons (OJ 2021 L 115, p. 1).

428 Pursuant to Article 1(1)(1) of Directive 2021/555.

429 In accordance with point III(a) of Annex I to Directive 2021/555.

430 Pursuant to Article 1(1)(4) of Directive 2021/555.

alarm, the fact remains that it can also shoot rubber bullets, and such use cannot be classified as use solely for the purposes of alarm. Lastly, the fact that that weapon is designed as a non-lethal weapon is not a relevant criterion for determining whether it is a 'firearm'.

It follows that the Keserű weapon cannot be categorised as an 'alarm and signal weapon' within the meaning of Directive 2021/555 and that, consequently, it does not fall within the scope of Implementing Directive 2019/69. Therefore, Implementing Directive 2019/69 could not have caused the damage alleged by the applicant.

The Court concludes that the condition relating to the existence of a causal link between the conduct complained of and the damage alleged is not satisfied.

II. Institutional law: activity incompatible with duties

Judgment of 11 September 2024, *CQ* v *Court of Auditors* (T-386/19, EU:T:2024:613)

(Law governing the institutions – Member of the Court of Auditors – Activity incompatible with the duties of a Member of the Court of Auditors – Expenses considered undue – Recovery decision – Decision of the Court ruling on the breach of the obligations arising from the office of Member of the Court of Auditors – Lawfulness of OLAF's investigation and final report – Duty to state reasons – Limitation period – Article 98(2) of Regulation (EU, Euratom) 2018/1046 – Legitimate expectations – Error of assessment – Non-contractual liability – Non-material damage)

Ruling in the extended five-judge composition, the General Court rules for the first time on the financial consequences of alleged irregularities ascribed to an individual holding a senior position within an EU institution in the performance of the obligations arising from his office, following a judgment of the Court of Justice finding that the individual in question had not complied with those obligations.

The applicant, CQ, was a Member of the European Court of Auditors, where he completed two terms of office. In that capacity, CQ enjoyed the benefit of, amongst other things, the reimbursement of various expenses, an official car and the services of a driver.

While CQ was in office, the Court of Auditors received information concerning a number of serious irregularities imputed to him.

Subsequently, the Secretary-General of the Court of Auditors forwarded a file to the European Anti-Fraud Office (OLAF) relating to the activities of CQ which had led to possible undue expenditure from the budget of the European Union.

After carrying out an investigation, OLAF sent the Court of Auditors its final report, in which it found, inter alia, that CQ had misused the resources of the Court of Auditors in the context of activities unrelated to his duties.

After receiving OLAF's report, the Court of Auditors established an amount receivable from the applicant, claiming that he had unduly received the sum of EUR 153 407.58 in mission expenses and daily subsistence allowances, representation expenses and drivers' services. Accordingly, it ordered the recovery of that sum ('the contested decision').

By the action which he brought on 24 June 2019, the applicant sought the annulment of the contested decision and damages for the non-material loss he alleges he has suffered. [431].

Independently of the present action for annulment, the Court of Auditors had brought before the Court of Justice an action alleging that CQ had breached the obligations arising from his office at the Court of Auditors. [432] The Court of Justice held that the applicant had indeed breached those obligations and ordered that he be deprived of two thirds of his pension entitlement.

Findings of the Court

As regards the merits of the contested decision, in the first place, the General Court examines the argument that the Court of Auditors was not entitled to send the applicant a debit note more than

431 On the basis of Articles 263 and 268 TFEU.

432 For the purposes of Article 286(6) TFEU.

five years after establishing an amount receivable on account of the time limit provided for by Article 98 of Regulation 2018/1046. [433]

The General Court observes that the starting point of that period, which is to say the time when the institution concerned is, in normal circumstances, in a position to claim its debt, is not necessarily the same as the time when a person such as the applicant requests an institution to pay a sum of money. Where other circumstances prevail, it could be the time when OLAF delivers a report to that institution.

Accordingly, the Court finds that the majority of the claims concerning amounts receivable, moneys which the Court of Auditors considered CQ to have received unduly, are not time-barred, since the Court of Auditors was not in a position to claim its debt until after OLAF's investigation. On the other hand, a very limited number of claims, amounting to a total of EUR 3 170.19, are held to be time-barred because, if it had acted with due diligence, the Court of Auditors would have been in a position to claim the debt once the claims for reimbursement in question had been lodged.

In the second place, the Court examines the plea alleging, in substance, breach of the principle of the protection of legitimate expectations and the existence of 'manifest errors' in the contested decision in the Court of Auditors' determination of the sums for which the applicant was liable.

As regards the scope of its review, the Court emphasises at the outset that, in the judgment in *Court of Auditors* v *Pinxten*, [434] the Court of Justice stated that its findings regarding the alleged irregularities ascribed to the applicant did not pertain to the determination of the sums for which he might be liable and were therefore without prejudice to the assessment of the contested decision that the General Court would have to make in any action for annulment.

The Court points out, first, that the subject matter of the action brought on the basis of Article 286(6) TFEU, in which the Court of Justice adopted its position regarding the applicant, is distinct from the present action. The earlier action concerned the establishment of a breach of the obligations arising from the office of Member of the Court of Auditors and the possible imposition of a penalty. By contrast, the subject matter of the present action, brought pursuant to the fourth paragraph of Article 263 TFEU, is the issue of the recovery of sums unduly paid and the annulment of the contested decision.

Secondly, the burden of proof in the proceedings before the General Court is different from that in the proceedings before the Court of Justice. In the present action, the burden of proof lies with the applicant, who has to demonstrate, for each claim for reimbursement, that he incurred the expenses in question in compliance with the applicable rules.

In addition, the Court observes that, in the judgment in *Court of Auditors* v *Pinxten*, the Court of Justice carried out a legal assessment of each of the applicant's activities that the Court of Auditors considered to be irregular. It concluded that some of those activities were regular or not manifestly irregular and that others were irregular or manifestly irregular.

---

433 More specifically, pursuant to the second subparagraph of Article 98(2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), 'the authorising officer shall send the debit note immediately after establishing the amount receivable and at the latest within a period of five years from the time when the Union institution was, in normal circumstances, in a position to claim its debt. Such period shall not apply where the authorising officer responsible establishes that, despite the efforts which the Union institution has made, the delay in acting was caused by the debtor's conduct.'

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

Nevertheless, given the different subject matter of the two actions, the different burden of proof, and the fact that, in the present case, some of the pleadings were not lodged until after the judgment in *Court of Auditors* v *Pinxten* was delivered, the parties have been able, in the present proceedings, to provide additional clarifications and to put forward new arguments and evidence.

Accordingly, the Court carries out an assessment of each of the applicant's activities associated with the claims for reimbursement at issue, in the light of the arguments and explanations put to it by the parties, in order to determine whether or not it is appropriate to reach the same finding as in the judgment in *Court of Auditors* v *Pinxten*.

More specifically, the Court finds that the expenses relating to meetings with politicians who were members of a national political party bear no connection with the performance of the applicant's duties as a Member of the Court of Auditors. It concludes that they were irregular, in particular, because of the specific context of those meetings that became apparent from the OLAF report. Consequently, the Court dismisses the action in so far as it concerns those expenses.

By contrast, the Court annuls the contested decision in so far as it orders the recovery of certain expenses for which reimbursement was claimed, amounting to a total of EUR 16 084.01. It concludes that those expenses are not vitiated by any irregularity.

In view of all those considerations, and after dismissing the other pleas in the action, alleging the unlawfulness of the investigation carried out by OLAF and breach of the duty to state reasons, the General Court annuls the contested decision to the extent that it relates to the sum of EUR 19 254.20 and determines the default interest payable on that sum. In addition, the Court dismisses the claim for compensation for the non-material damage allegedly suffered by the applicant.

III. Competition

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

Judgment of 2 October 2024, *Crown Holdings and Crown Cork & Seal Deutschland* v *Commission* (T-587/22, EU:T:2024:661)

(Competition – Agreements, decisions and concerted practices – Metal packaging market – Decision finding an infringement of Article 101 TFEU – Cooperation between the Commission and the national competition authorities – Initiation of an investigation procedure by the Commission at the request of a national competition authority – Period for re-allocation – Obligation to state reasons – Legitimate expectations – Principle of subsidiarity – Rights of the defence – Proportionality – Principle of good administration – Counterclaim for re-evaluation of the amount of the fine following a settlement procedure)

By its judgment, the General Court dismisses the action for annulment brought by Crown Holdings, Inc. and Crown Cork & Seal Deutschland Holdings GmbH against a decision of the European Commission imposing a fine on them for having infringed Article 101 TFEU, [435] as well as the Commission's counterclaim seeking an increase in the amount of the fine imposed. In that regard, the Court clarifies the division of competences between the Commission and the national competition authorities in the context of the re-allocation of a case in favour of the Commission at the request of national competition authorities. It takes the opportunity to clarify that the Notice on cooperation within the Network of Competition Authorities [436] cannot give rise to a legitimate expectation on the part of the undertakings concerned that any re-allocation of a case must take place within two months. In addition, in the exercise of its unlimited jurisdiction, the Court gives a ruling on the Commission's counterclaim seeking the withdrawal of the reduction granted to the applicants for their cooperation in the settlement procedure on the ground that, by the present action, they called into question, for the first time before the Court, the Commission's competence to deal with the case in the place of a national competition authority.

In 2015, the Bundeskartellamt (Federal Cartel Office, Germany) opened an investigation into a number of companies in the metal packaging sector, including the applicants. In 2018, believing that the suspected anticompetitive behaviour may have extended to other markets outside the Federal Republic of Germany and that the German law applicable at the time did not allow it to impose penalties on the undertakings belonging to the applicants which had been dissolved or reorganised before its investigation concluded, the Federal Cartel Office requested to have its investigation re-allocated to the Commission, which initiated a proceeding under Article 101 TFEU in respect of the applicants.

At the end of that procedure, the Commission adopted the contested decision, by which it found that the applicants had participated in a single and continuous infringement of Article 101 TFEU in the metal packaging sector in Germany and imposed a fine on them of EUR 7 670 000. That amount took account of a 50% reduction in the fine granted to the applicants for their cooperation under the 2006 Leniency Notice [437] and of a 10% reduction for their cooperation under the settlement procedure. [438]

---

435 Commission Decision C(2022) 4761 final of 12 July 2022 relating to a proceeding under Article 101 TFEU (Case AT.40522 – Metal packaging) ('the contested decision').

436 Commission Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43) ('the cooperation notice').

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

438 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

In that context, the applicants brought an action against the contested decision, not in order to challenge its content which they had already accepted in relation to the settlement procedure, but on the basis of a number of procedural irregularities which led to the case being re-allocated to the Commission and ultimately to the contested decision being adopted.

Findings of the Court

In the action for annulment, the applicants maintained, inter alia, that, since the case was re-allocated from the national competition authority to the Commission after the initial period laid down in the cooperation notice, the Commission infringed the principles set out in that notice and the applicants' legitimate expectations.

In that regard, the Court recalls that where the Commission adopts such rules of conduct and announces by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and must not depart from those rules on pain of being found, where appropriate, to be in breach of the fundamental principles of law, such as the protection of legitimate expectations.

That case-law also applies to the cooperation notice, the Court having previously held in *Sped-Pro* v *Commission* [439] that, in adopting that notice, which contains guidance for determining the competition authority which is best placed to examine a complaint, the Commission imposed a limit on the exercise of its discretion in dealing with complaints in competition matters.

Accordingly, the Commission's argument that that judgment is not applicable in so far as it relates to a case brought following a complaint whereas, in the present case, the Commission acted on its own initiative following a request from a national competition authority cannot succeed. The cooperation notice deals with both situations and makes no distinction, in particular as regards re-allocation, according to whether a case is an own initiative investigation or follows a complaint. Therefore, despite the fact that exchanges within the network are a matter between competition authorities acting in the public interest which do not in any way alter the rights or obligations of the undertakings involved, by adopting that notice the Commission did not restrict itself solely with regard to complainants, but also with regard to undertakings whose activities are the subject of an investigation.

That having been stated, the Court considers whether paragraphs 18 and 19 of the cooperation notice, which relate to matters of reallocation, could have given rise to a legitimate expectation on the part of the applicants that any re-allocation of the case would have to take place within the initial period of two months.

In that regard, it is apparent from settled case-law that, in order for an infringement of the principle of the protection of legitimate expectations by the Commission to be established, the Commission must have given the person concerned precise assurances which have led that person to entertain justified expectations. However, the cooperation notice provides no precise assurance that the period for re-allocation would not exceed a period of two months.

First, the re-allocation of cases, provided for in paragraph 18 of that notice, must 'normally' take place within a period of two months, with the result that that time limit is not mandatory. In any event, that time-period relates to cases where case re-allocation issues arise between competition authorities, which is not so in the present case, given that the Commission initiated investigation proceedings at the request of the Federal Cartel Office.

Second, as regards paragraph 19 of the cooperation notice, according to which re-allocation of a case after the initial allocation period of two months should only occur where the facts known about the

439 Judgment of 9 February 2022, ***Sped-Pro* v *Commission*** (T-791/19, EU:T:2022:67).

case change materially during the course of the proceedings, the Court clarifies that the expression 'facts known about the case' cannot be interpreted as covering only the facts which are relevant for assessing whether an infringement of the competition rules has taken place. It follows from the context in which that paragraph occurs [440] that, at the end of the initial allocation period of two months, the Commission may justify initiating investigation proceedings in various situations which go beyond the facts which are relevant for assessing whether an infringement has taken place. Consequently, that expression must be interpreted as covering any relevant fact which comes to light during the proceedings.

Continuing its analysis, the Court also rejects the plea alleging an infringement of the principle of subsidiarity. Thus, while Regulation No 1/2003 [441] establishes, in accordance with that principle, a wider association of national competition authorities, the Commission retains a leading role in investigating and taking action against infringements. Accordingly, Article 11(6) of Regulation No 1/2003 provides that, subject only to consultation of the national authority concerned, the Commission retains the option of initiating investigation proceedings, even where a national authority is already acting on the case. It follows that the Commission, which initiated investigation proceedings at the request of the German national competition authority itself, did indeed comply with the condition laid down by that provision and did not therefore undermine the prerogatives of the Member State concerned.

As regards the Commission's counterclaim, the Court begins by dismissing the plea of inadmissibility raised by the applicants, pointing out that although the exercise of its unlimited jurisdiction to cancel, reduce or increase the amount of a fine imposed by the Commission is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from applying to have that amount increased.

As regards the substance of that counterclaim, the Court notes, in the first place, that the Commission failed to demonstrate that during the settlement procedure the applicants had acknowledged its competence in place of the national competition authority's competence, or even that it could reasonably suppose that the applicants would not challenge that competence.

The Commission has not provided any evidence which would establish the alleged recognition of its competence by the applicants. It was only at the hearing that the Commission stated that it was prepared to provide, in the context of a measure of inquiry ordered by the Court, the settlement submission which contained indications that that competence was acknowledged. The Commission has provided no valid justification for its delay in taking its action, nor has it explained why such a measure of inquiry was necessary in the present case, confining itself to a general reference to alleged reasons of confidentiality or sensitivity, whereas the documents it offered to produce came from the applicants themselves.

Furthermore, it cannot be inferred from the information contained in the settlement submission, in particular the applicants' acknowledgement of their liability and the indication of the maximum amount of the fine that they would be prepared to accept, that they had acknowledged the Commission's competence to deal with the case, since the acknowledgement of that competence was not provided for in the settlement notice, unlike the factors mentioned above. In addition, the Court of Justice has previously held, in circumstances similar to those of the present case, [442] that the

---

440 See, to that effect, paragraph 54 of the cooperation notice.

441 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

442 Order of 29 January 2020, ***Silgan Closures and Silgan Holdings*** **v** ***Commission*** (C-418/19 P, EU:C:2020:43, paragraphs 63 and 64).

competence of the authority which adopted the measure is subject to review by the EU Courts, which are to assess whether anything unlawful occurred.

In the second place, the increase in the fine cannot be justified either by the alleged loss of procedural gains or by the alleged additional administrative burden caused by the present action having been brought. The procedural gains which the Commission derived from the settlement procedure remain vested, irrespective of the present action being brought. The mobilisation of Commission resources for the purposes of defending the contested decision before the Court is an integral feature of any judicial proceedings and does not undermine those gains.

Judgment of 6 November 2024, *Crédit agricole and Others* v *Commission* (Joined Cases T-386/21 and T-406/21, EU:T:2024:776)

(Competition – Agreements, decisions and concerted practices – Suprasovereign bond, sovereign bond and agency bond sector denominated in United States dollars – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Coordination of prices and bond-trading activities – Exchanges of commercially sensitive information – Single and continuous infringement – Restriction of competition by object – Calculation of the amount of the fine – Basic amount – Proxy for the value of sales – Action for annulment – Unlimited jurisdiction)

The General Court, sitting in extended composition, has essentially confirmed the decision of the European Commission [443] finding that the banks Crédit agricole SA and Crédit agricole Corporate and Investment Bank ('Crédit agricole') and Credit Suisse Group AG and Credit Suisse Securities (Europe) Ltd ('Credit Suisse') had participated in a cartel in the sector of suprasovereign bonds, sovereign bonds and public agency bonds denominated in United States dollars ('SSA bonds'). The Court therefore upholds the fines imposed on those banks for infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA).

In 2015, Deutsche Bank submitted a leniency application to the Commission, informing it of the existence of a cartel on the secondary market for SSA bonds. SSA bonds are debt securities that enable their issuer to raise funds to finance certain expenses or investments. They are offered for sale for the first time by, or on behalf of, their issuer on the primary market. They are then traded 'over the counter' between investors on the secondary market, without a central exchange.

On that secondary market, the banks try to generate income by capturing the difference between the bid price and the ask price of the SSA bonds.

Having opened an investigation into the practices denounced by Deutsche Bank, the Commission found that traders from several banks, including Crédit agricole and Credit Suisse, had collaborated and exchanged information in order to obtain a competitive advantage on the secondary market for SSA bonds. Taking the view, moreover, that that conduct formed part of an overall plan pursuing the same anticompetitive objective, the Commission considered that the banks concerned had committed a single and continuous infringement of Article 101(1) TFEU by entering into agreements or concerted practices with the object of restricting or distorting competition in the SSA bond sector in the EEA. As a result, fines of EUR 3 993 000 and EUR 11 859 000 were imposed on Crédit agricole and Credit Suisse respectively.

UBS Group AG, as successor in title to Credit Suisse, and Crédit agricole brought two actions before the Court for annulment of the Commission's decision in so far as it concerns them. Crédit agricole also asked the Court to reduce the amount of the fine imposed on it, in the exercise of its unlimited jurisdiction under Article 261 TFEU and Article 31 of Regulation No 1/2003.

---

443 Commission Decision C(2021) 2871 final of 28 April 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40346 – SSA Bonds) ('the contested decision').

Findings of the Court

As a preliminary point, the Court notes that, in the contested decision, the Commission found the existence of a single and continuous infringement committed by Crédit agricole. Accordingly, it dismisses Crédit agricole's arguments that the Commission found the existence of five autonomous infringements classified as 'restrictions by object' as being based on an erroneous reading of the contested decision.

Next, the Court states that the applicants' pleas for annulment are based, in essence, on three categories of criticism alleging:

– first, errors in the classification of the conduct in question as a 'single and continuous infringement' of Article 101(1) TFEU and the extent of their participation in that infringement;

– secondly, errors in the classification of that infringement as a 'restriction by object'; and

– thirdly, errors in determining the amount of the fines imposed.

Before addressing those three sets of pleas in law common to both actions, the Court first examines Crédit agricole's plea in law alleging breach of the principle of the presumption of innocence.

Respect for the presumption of innocence

With regard to respect for the presumption of innocence, Crédit agricole argued that the Commission had wrongly assumed that the traders involved, and in particular its own trader, were aware of all the information exchanged on the permanent chat rooms to which they were connected, regardless of their active participation in those exchanges.

That complaint is rejected by the Court, which emphasises that the forums in question were characterised by the real-time delivery of messages to all those connected. In view of that particularity, the Commission was entitled to consider that Crédit agricole had been aware of the discussions held on those forums as soon as its trader had logged on, even if the trader had not actively participated in those discussions or even if he had had access to numerous other concomitant sources of information. That could only have been the case if Crédit agricole had demonstrated, by means of certain and precisely time-stamped evidence, that its trader had not in fact become aware of the offending message(s). Crédit agricole had not provided such proof. In that respect, the terms of the discussions in question differ from those which gave rise to the judgment in *Eturas and Others*. [444]

By contrast, the Court finds that the Commission breached the principle of the presumption of innocence by fixing the starting point of Crédit agricole's participation in the breach at the date of its trader's first connection to the chat room in question using that bank's identifiers, which occurred on 10 January 2013.

In order to accept that first connection as evidence of anticompetitive conduct marking the beginning of Crédit agricole's participation in the breach, it was for the Commission to show that, on the very day of that first connection, the Crédit agricole trader had at least passively participated in an anticompetitive discussion. In the present case, neither the contested decision nor the documents before the Court show that messages of an anticompetitive nature were exchanged on the chat room at issue on 10 January 2013 after the Crédit agricole trader had logged on for the first time.

444 Judgment of 21 January 2016, ***Eturas and Others*** (C-74/14, EU:C:2016:42).

The participation of the applicants in a single and continuous infringement

As regards the pleas challenging the classification of the conduct at issue as a 'single and continuous infringement' attributable to the applicants, the Court observes, as a first step, that only conduct forming part of an 'overall plan' pursuing a single anticompetitive objective may be classified as a single and continuous infringement.

As regards the single nature of the infringement, the Court considers that the Commission correctly considered that the sole anticompetitive objective pursued by the traders of the banks concerned was to maximise the latter's income while limiting the losses which could result from the uncertainty linked to the conduct of other traders.

Since the Commission has demonstrated to the requisite legal standard that the conduct adopted by the traders of the banks concerned between January 2010 and February 2013 formed part of an overall plan pursuing that single anticompetitive objective, the Court also considers that the prohibition imposed by Deutsche Bank in February 2013 on its traders to use permanent multilateral chat rooms did not prevent the traders of the banks concerned from achieving that objective. On that point, the Court states that the unique nature of an infringement results from the uniqueness of the objective pursued by the participants in the cartel. It was not disputed that the traders of the banks concerned had circumvented the prohibition addressed to the Deutsche Bank traders in February 2013 by means of a network of bilateral discussions, which functioned in the same way as the permanent multilateral chat rooms.

As regards the continuous nature of the infringement, the Court confirms that the context in which the cartel found operated supports the Commission's conclusion that the banks concerned participated in a continuous infringement between January 2010 and March 2015. Although the exchanges between the traders of those banks became less frequent after February 2013, the fact remains that they continued their discussions of an anticompetitive nature on a recurring basis, freely exchanging information on their ongoing trading activities.

Crédit agricole's argument that it did not participate in the infringement during certain periods is not such as to call into question the continuing nature of the infringement as a whole, since the interruptions relied on by Crédit agricole do not take account of the conduct of the other participants.

As regards imputability to the applicants of the single and continuous infringement, the Court points out, secondly, that that imputability must be assessed in the light of two factors, namely, first, their intentional contribution to the common objectives pursued by all the banks concerned and, secondly, their knowledge of the infringing conduct envisaged or implemented by those banks in pursuit of the same objectives or the fact that they could reasonably have foreseen it and had been prepared to accept the risk.

Having made that clarification, the Court rejects all the arguments put forward by the applicants in order to contest both their intentional contribution to the overall plan identified by the Commission and their knowledge of all the infringing conduct in question or, as the case may be, their ability to foresee it.

In that context, the Court notes that the Commission's conclusion that Crédit agricole could, at the very least, reasonably have foreseen all of the infringing conduct of the other banks is corroborated in particular by the fact that, before taking up his duties at Crédit agricole, its trader had, as a trader at another bank, participated directly in the infringing conduct at issue.

On that point, the Court emphasises that knowledge acquired by an employee prior to his or her arrival in the service of a new undertaking and which he or she in fact makes available to that new employer may be regarded as knowledge shared by his or her new employer. Moreover, it is settled case-law that the Commission may rely on contacts prior to or subsequent to the period of the

infringement in order to build up an overall picture and to show the preparatory stages of the cartel as well as to corroborate the interpretation of certain items of evidence.

In the light of the foregoing, the Court rejects all of the applicants' complaints challenging, first, the classification of the conduct at issue as a 'single and continuous infringement' and, secondly, the imputability of that infringement to the applicants.

Classification of the conduct at issue as a 'restriction by object'

Referring to the case-law of the Court of Justice, the General Court points out that, for the purposes of classifying the conduct at issue as a 'restriction by object', it was for the Commission to show that that conduct did not present an extremely high threshold of harm to competition, as Crédit agricole argued, but only a sufficient degree of harm to competition.

The Court also states that the assessment of the degree to which conduct is harmful to competition must be made in the light of the objective characteristics of that conduct and without regard to the particular situation of each undertaking that participated in it. Thus, the minor role played by one undertaking in a cartel is not such as to influence the classification of that cartel as a 'restriction by object' in respect of all of the undertakings that participated in it. For the same reasons, Crédit agricole cannot usefully rely on the fact that it did not take part in certain discussions to contest the classification of the conduct in question as a 'restriction by object'.

In the light of those clarifications, the Court then rejects the applicants' complaints alleging errors made by the Commission, first, in assessing the economic context of the conduct at issue, secondly, in assessing whether it was harmful to competition and, thirdly, in assessing whether it was justified by reason of its pro-competitive effects.

As regards, in the first place, the assessment of the economic context of the conduct at issue, the Court finds that, while in a complex market such as the present one the Commission cannot limit its analysis of that context to what is strictly necessary in order to conclude that there is a restriction of competition by object, the applicants have failed to demonstrate any inadequacy in the Commission's analysis of the economic and legal context.

As regards, in the second place, the assessment of whether the conduct at issue was harmful to competition, the Court endorses the Commission's conclusion that, on the secondary market in SSA bonds, the exchanges of commercially sensitive information between the banks concerned, all of which were 'market makers', [445] were sufficiently harmful to competition to contribute to the classification of the conduct examined, as a whole, as a 'restriction by object'.

That conclusion cannot be called into question by Crédit agricole's allegation that the secondary market in SSA bonds is a market in which there is a significant asymmetry of information between market makers, so that the increase in that pre-existing asymmetry as a result of the exchanges of information in question would not be sufficiently harmful to competition. Even supposing that such asymmetry of information existed, Crédit agricole's argument comes up against the useful effect that must be guaranteed by the concept of 'restriction by object' and, more generally, by Article 101 TFEU.

As regards, in the third place, the applicants' arguments that the conduct at issue is justified in the light of its pro-competitive effects, the Court points out that the pro-competitive effects alleged by the applicants need not, as such, be taken into consideration when classifying the conduct at issue as a 'restriction by object'.

---

445 'Market makers' are institutions or individuals willing to buy or sell financial products on the secondary market for SSA bonds on a general and continuous basis rather than on a transaction-by-transaction basis, at prices determined by them.

In any event, even supposing that the alleged 'favourable' effects of the conduct at issue could or should be taken into account, in one way or another, for the purposes of classifying it as a 'restriction by object', the applicants have not demonstrated the existence of any favourable implications such as to call into question the classification of that conduct as a 'restriction by object'.

In so far as the applicants also presented the conduct at issue as 'ancillary restraints' on the performance of their function as market makers in SSA bonds, the Court observes that the case-law relating to the exception of ancillary restraints on legitimate agreements is, in any event, not applicable in the present case, since the applicants had not shown that their activity as market makers would have been impossible in the absence of the infringing conduct.

In addition, the Court rejected the arguments that market makers in SSA bonds were systematically at an informational disadvantage compared with counterparties that did not have a permanent presence on the market, so that they had to compensate for that information deficit by seeking information from a number of sources.

It cannot be accepted that undertakings try to offset the effects of factual situations which they consider to be excessively unfavourable, such as possible asymmetries of risk existing between operators on a market, by collusive practices designed to correct those disadvantages. Such factual situations cannot justify an infringement of Article 101 TFEU, especially as the applicants were not acting on the secondary market in SSA bonds solely as market makers and were carrying on that activity voluntarily.

Determination of the amount of the fines imposed on the applicants

In determining the amount of the fines imposed on the applicants, the Commission essentially followed the method set out in the 2006 Guidelines. [446] However, as regards the calculation of the basic amounts, the Commission decided to use a proxy value instead of the value of sales provided for in point 13 of those guidelines. As a starting point for the calculation of that proxy value, the Commission has taken the annualised notional volumes and values of SSA bonds ('the annualised notional amounts') that the banks concerned traded during their individual periods of participation in the infringement at issue. Those annualised notional amounts were then multiplied by an adjustment factor that the Commission constructed using 33 representative categories of SSA bond issued by eight issuers.

In that context, the applicants complained in particular that the Commission had infringed the 2006 Guidelines by relying on a set of representative SSA bonds and not on data from their own transactions to calculate the adjustment factor and by using public data from the Bloomberg platform, which inflated the adjustment factor ('the BGN data').

Credit Suisse also criticised the Commission for overstating the proxy value by including hedging transactions in the notional amounts applied to it.

As a preliminary point, the Court finds that, although, by adopting the 2006 Guidelines, the Commission has limited itself in the exercise of the wide discretion it enjoys as regards the method of calculating fines, it is entitled to depart from them, provided that it gives reasons and justifies its choice to the requisite legal standard.

However, where the Commission departs from the 2006 Guidelines not in their entirety – as point 37 authorises it to do – but only, as in the present case, from point 13, it cannot depart from the guiding principles and underlying logic of those guidelines. Thus, in implementing the methodology it defines,

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

it must, in particular, ensure that it takes account of the best available data, subject to the thorough review, in law and in fact, of the EU judicature.

In the light of those clarifications, the Court notes, in the first place, that, in the contested decision, the Commission stated its reasons and justified to the requisite legal standard its decision to depart from the methodology set out in point 13 of the 2006 Guidelines and to base its calculation of the basic amount on a proxy value for the value of sales which was arrived at by multiplying the annualised notional amounts of each of the banks concerned by an adjustment factor calculated on the basis of the sample of 33 categories of SSA bond.

In that context, the Court rejects the applicants' arguments that the Commission should have adopted a methodology for calculating the adjustment factor based on their own transactions.

In that regard, the Court points out that a methodology based on the transaction data of the banks concerned would entail carrying out calculations of a much greater complexity than those already complex calculations carried out in the present case, even though the representative nature of the SSA bonds retained precisely guarantees that the data taken into consideration remain relevant for the calculation of the fine and make it possible to reflect the economic importance of the infringement at issue with the degree of precision required by the case-law. Such an alternative methodology would place a disproportionate administrative burden on the Commission.

In the second place, the Court rejects the applicants' arguments that the BGN data used by the Commission were inadequate for the purposes of calculating the proxy value in that they inflated the adjustment factor.

After pointing out that it was for the Commission to ensure that it took account of the best available data, the Court noted that, in the contested decision, the Commission had set aside, with reasons, the arguments relied on by the banks concerned during the administrative procedure to contest the use of the BGN data. It follows that the applicants cannot confine themselves to arguing before the Court that the data used by the Commission suffer from one or more shortcomings but, on the contrary, must demonstrate that, within the framework of the methodology which that institution lawfully determined, there are in fact data better than those used by that institution and that those data are in fact available.

In finding that the applicants were unable to submit data better than those used by the Commission, the Court also rejects Credit Suisse's criticism that the method of compiling the BGN data was unknown. On that point, the Court emphasises that the BGN data constituted reference data among traders, which are compiled by a third party to the proceedings on the basis of the prices of several traders. Accordingly, it cannot validly be argued that, on the ground that the manner in which they are compiled is partly unknown, such reference data cannot be used by the Commission, particularly where Credit Suisse has in no way referred to market platforms providing more accurate or more relevant information than the Bloomberg platform.

According to the Court, the Commission could not be criticised for having used data which did not reflect Credit Suisse's situation in all respects, when Credit Suisse itself did not have accurate and sufficiently representative data and was therefore obliged to use a methodology based on alternative data which were necessarily less accurate, in order to reconstitute a proxy value.

In the third place, the Court rejects Credit Suisse's complaint that the Commission overestimated the proxy value of the value of sales by including transactions relating to the purchase of liquid assets in the notional amounts applied to Credit Suisse.

On that point, the Court states that, in the context of the 2006 Guidelines, the concept of 'proxy value', like that of 'value of sales', is intended to take as the starting point for calculating the fine imposed on an undertaking an amount which reflects the economic importance of the infringement at issue and

the weight of that undertaking in it. It follows that the determination of the proxy value involves taking into account all of the transactions carried out on the market affected by the infringement, for each of the undertakings that took part in the infringement at issue.

While the methodology adopted by the Commission admittedly results in the notional amount exchanged on a given cash-purchase transaction being taken into account both for the seller of the SSA bond concerned and for its purchaser where they both took part in the infringement at issue, that twofold taking into account stems from the very principles governing the determination of fines under the 2006 Guidelines in the specific context of the present case. Moreover, to exclude from the calculation of the proxy value part of the transactions that indisputably fall within the scope of the alleged cartel would have the effect of artificially minimising the economic importance of the infringement at issue, thereby undermining the objective of effectively prosecuting and punishing infringements of Article 101 TFEU.

Having thus validated the proxy values adopted in respect of the applicants, the Court finally rejected their arguments challenging the gravity multiplier that the Commission had applied to those values in accordance with points 20 to 23 of the 2006 Guidelines.

In view of the fact that this gravity multiplier had been set at 16% for all of the banks concerned, Crédit agricole argued in particular that the Commission should have used a lower individualised multiplier for it.

Since Crédit agricole referred, in support of that argument, to judgments of the Court of Justice prior to the date of publication of the 2006 Guidelines, the General Court began by noting that those judgments could not require the Commission to take into consideration factors other than the intrinsic seriousness of the infringement at issue when determining the gravity multiplier under the 2006 Guidelines.

In addition, while the Commission cannot disregard the principle of equal treatment when calculating fines imposed on the basis of Article 101 TFEU, it is clear both from point 22 of the 2006 Guidelines and from the relevant case-law that the gravity multiplier reflects, in principle, the gravity of the infringement at issue and not the relative gravity of the participation in that infringement of each of the undertakings concerned. It is in that sense that points 19 to 22 of the 2006 Guidelines envisage the determination of the gravity multiplier for the infringement at issue and not for each undertaking that took part in it. Thus, the assessment of individual circumstances is, in principle, not carried out as part of the assessment of the gravity of the infringement, namely when setting the basic amount of the fine, but as part of the adjustment of the basic amount according to attenuating and aggravating circumstances.

In noting, moreover, that a gravity multiplier of 16% for an infringement such as that found in the contested decision cannot be regarded as inappropriate or disproportionate, the Court dismisses the arguments put forward in that regard by Crédit agricole.

In the light of all of the foregoing, the Court dismisses Crédit Suisse's action in its entirety. By contrast, it annuls the contested decision in relation to Crédit agricole in so far as, first, it finds that Crédit agricole participated in the infringement from 10 January 2013 to 24 March 2015, and not from 11 January 2013 to 24 March 2015, and, secondly, it sets the amount of the fine imposed on Crédit agricole at EUR 3 993 000. However, in the exercise of its unlimited jurisdiction, the Court maintains the amount of the fine imposed on Crédit agricole.

2. Concentrations [447]

Judgment of 13 November 2024, *NetCologne* v *Commission* (T-58/20, EU:T:2024:813)

(Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal, vertical and conglomerate effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment)

Judgment of 13 November 2024, *Deutsche Telekom* v *Commission* (T-64/20, EU:T:2024:815)

(Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal, vertical and conglomerate effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment)

Judgment of 13 November 2024, *Tele Columbus* v *Commission* (T-69/20, EU:T:2024:816)

(Competition – Concentrations – German markets for TV services and telecommunications services – Decision declaring the concentration compatible with the internal market and the EEA Agreement – Commitments – Assessment of the horizontal, vertical and conglomerate effects of the transaction on competition – Competitive relationship between the parties to the concentration – Merger-specific change – Manifest error of assessment)

By judgments delivered on the same day, the General Court dismisses three actions lodged for the purpose of seeking the annulment of the European Commission decision authorising, as compatible with the internal market, a concentration in the TV services and telecommunications services sector involving the acquisition by Vodafone Group plc of certain assets of Liberty Global plc. [448] In so doing, the Court ruled that the Commission cannot be criticised for having given priority, in its examination of the compatibility of that concentration with the internal market pursuant to Article 2(2) of Regulation No 139/2004, [449] to the significant impediment to effective competition test over the dominance test.

Vodafone and Liberty Global are two operators active in the TV and telecommunications services sector in a number of EU countries, including Germany. In that country, Liberty Global is present via its subsidiary Unitymedia GmbH.

In 2018, Vodafone notified to the Commission, pursuant to the EC Merger Regulation, a proposed concentration to enable it to acquire sole control of Liberty Global's telecommunications businesses

---

447 Joint résumé for cases ***NetCologne* v *Commission*** (T-58/20), ***Deutsche Telekom* v *Commission*** (T-64/20) and ***Tele Columbus* v *Commission*** (T-69/20).

448 Commission Decision C(2019) 5187 final of 18 July 2019 declaring the concentration involving the acquisition by Vodafone Group plc of certain assets of Liberty Global plc to be compatible with the internal market and the EEA Agreement (Case COMP/M.8864 – Vodafone/Certain Liberty Global Assets) ('the contested decision').

449 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).

in a number of Member States, including Germany. The transaction consisted of a sale and purchase agreement under which Vodafone envisaged acquiring 100% of the shares in Unitymedia ('the concentration at issue').

Taking the view that the transaction raised serious doubts as to its compatibility with the internal market, the Commission decided to initiate an in-depth investigation. Upon the conclusion of that investigation, the concentration was declared compatible with the internal market and with the Agreement on the European Economic Area (EEA), subject to Vodafone's compliance with certain commitments. [450]

In the contested decision, the Commission, first of all, assessed the horizontal, vertical and conglomerate effects of the concentration, particularly in Germany. Upon conclusion of its analysis, while it found that there was no significant impediment to effective competition ('SIEC') on the market for the retail supply of TV signal transmission services, the market for the retail supply of multiple play services and the market for the retail supply of TV services, it found that there was a SIEC on the market for fixed internet access and on the market for wholesale TV signal transmission.

Next, it examined whether the commitments proposed by Vodafone were capable of rendering the transaction compatible with the internal market, in particular having regard to the two markets in which competition concerns had been identified.

The applicants, Deutsche Telekom AG, Tele Columbus AG and NetCologne Gesellschaft für Telekommunikation mbH, are companies established in Germany which offer TV, internet and telephony services. They each brought an action before the Court for the annulment of the contested decision in so far as it concerned each of them.

By their respective actions, they submit, first, that the Commission made an error of assessment concerning the horizontal effects of the concentration at issue, in particular on the market for the retail supply of TV signal transmission services and on the market for wholesale TV signal transmission, and concerning the vertical effects on the intermediary market for TV signal transmission. Second, they challenge the sufficiency and appropriateness of the commitments made binding by the contested decision in order to render the concentration compatible with the internal market.

Findings of the Court

As a preliminary point, the Court recalls the applicable case-law principles, both as regards the standard of the judicial review incumbent on it and as regards proof that there is no significant impediment to effective competition which it is for the Commission to establish.

In that regard, it states that, in the field of merger control, the EC Merger Regulation confers on the Commission a certain discretion, especially with regard to assessments of an economic nature. In that context, while it is not for the Court to substitute its own economic assessment for that of the Commission, the Court must, inter alia, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data which must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

---

450 Those commitments include in particular: the WCBA ('Wholesale Cable Broadband Access') commitment which provided for open access to the merged entity's cable infrastructure by a third-party operator in order to enable that operator to offer, on a retail basis, fixed internet access services, as well as its own OTT (over the top) TV services or those of third parties; the OTT commitment, which prevented the merged entity from limiting the possibility for broadcasters which are carried on its platform of distributing their content via an OTT service and which guaranteed them, in order to do so, sufficient direct interconnection capacity; the HbbTV (Hybrid Broadcast Broadband TV) commitment, which required the merged entity to continue to transmit the HbbTV signal of free-to-air broadcasters; and the feed-in fees commitment, which prevented the merged entity from increasing the feed-in fees paid to it by free-to-air broadcasters.

As regards the standard of proof imposed on the Commission in order to demonstrate that a notified concentration would or would not significantly impede effective competition and must therefore be declared incompatible or compatible with the internal market, the Court emphasises that, in view of the prospective nature of the economic analysis required, it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that that concentration would or would not significantly impede effective competition in the internal market or in a substantial part of it.

It is in the light of those considerations that the Court analyses, first of all, the effects of the concentration on the German market and, subsequently, the commitments made binding by the contested decision.

1. Analysis of the effects of the concentration

a) The horizontal non-coordinated effects of the concentration on the market for the retail supply of TV signal transmission services to customers living in multi-dwelling units

First of all, the Court examines the manifest errors of assessment and of law allegedly committed by the Commission in its analysis of the horizontal effects on the market for the retail supply of TV signal transmission services to customers living in multi-dwelling units ('the MDU market').

As regards the reciprocal competitive constraints exerted by the merging parties, the Court considers, in the first place, that, given the absence of any meaningful overlap between their activities, the Commission did not make a manifest error of assessment in finding that they were not direct competitors before the concentration, notwithstanding the exceptional overlap situations taken into account by the Commission, the negligible nature of which has not been challenged by evidence. It follows that the products marketed by the merging parties did not, in practice, compete.

In the second place, the Commission did not make a manifest error of assessment in concluding that there was no indirect competition between the parties to the concentration. In that regard, the Court recalls that undertakings are in indirect competition, in particular, where they are subject to similar competitive pressures from other undertakings with which each of them competes directly, or where other factors, such as requirements imposed by customers, comparably limit their ability to set their prices and commercial conditions.

In the present case, the Court finds that, as regards the fact that the parties to the concentration monitored their respective activities and compared their product offers, those instances of benchmarking did not exceed simple benchmarking aimed at monitoring and possibly imitating best practices in the industry. That form of comparison, which consists of an analysis of market performance or best practices in the industry, including in other Member States or in third countries, cannot be classified as an indirect competitive constraint. Furthermore, it is apparent from the contested decision that the contracts concluded with owners of MDUs ('MDU customers') are the result of negotiations, bids or formal tender procedures. Consequently, they are not standard contracts which could have been the subject of benchmarking simply based on observing industry practices.

In addition, as regards infrastructure competition between the parties to the concentration, the Commission found that the investment and network innovation activities implemented by each of the parties to the concentration had not had a direct competitive impact on the other party's network investment and innovation strategy and that each party's monitoring of the other party's activities in that context was simple commercial benchmarking, which is not a type of indirect competitive constraint.

In the third place, the applicants also failed to demonstrate that there was potential competition between the merging parties, with the result that they cannot successfully criticise the Commission

for having found that it was unlikely that, absent the concentration at issue, those parties would have expanded their activities into the cable footprint of the other party, so as to eliminate potential competition, thereby giving rise to a SIEC.

In the fourth place, as regards whether there was a collective dominant position prior to the concentration at issue resulting from tacit collusion between the parties to the concentration, explaining the absence of actual or potential competition between them on the MDU market, the Court notes that, if that argument is seeking to draw attention to a cartel, that complaint is ineffective, since that argument does not relate to the subject matter of the contested decision, but rather to practices which potentially fall within the scope of Article 101 or 102 TFEU. In any event, it is irrelevant, for the purposes of merger control, to investigate the causes of an absence of competition between the merging parties, relating, as appropriate, to an infringement of the EU competition rules.

On the other hand, although that argument seeks to draw attention to the existence of a collectively dominant position, those allegations were not confirmed by a review of the parties' internal documents and were contradicted by the reasons, which are potentially contrary to EU competition law, why the merging parties did not seek to compete with each other prior to the merger.

In the fifth place, as regards the complaint alleging that the Commission failed to take account of the increase in resources resulting from the concentration, which would enable the merging parties to foreclose their competitors by, inter alia, predatory pricing, the Court notes that such an increase, even if proven, is not in itself sufficient for that transaction to be declared incompatible with the internal market. The Commission may declare a concentration incompatible with the internal market only if it finds a SIEC which is the direct and immediate consequence of the concentration. Such a SIEC, which would stem from future decisions by the merged entity, may only be regarded as a direct and immediate consequence of the concentration if that future conduct is made possible and economically rational by the alteration of the characteristics and the structure of the market caused by the concentration. In the present case, the merging parties already had the power to behave, to an appreciable extent, independently of their competitors and their MDU customers, irrespective of any increase in resources resulting from the concentration.

For the same reasons, the Court rejects the argument that the concentration at issue would significantly reduce the competitive constraint exerted by competitors on the MDU market, which could give rise to a SIEC. More specifically, the financial strength of the merged entity in relation to its competitors enabled it to prevent those competitors from developing. While it is true that the reduction of the competitive constraint exerted by competitors as a result of a merger may give rise to a SIEC, the finding of an increase in the financial strength of the merged entity does not, consequently, in itself make it possible to find such an impediment. The Commission must take account of a number of factors when assessing the compatibility of a concentration with the internal market, such as the structure of the relevant markets, actual or potential competition from undertakings, the position of the undertakings concerned and their economic and financial power, possible options available to suppliers and users, any barriers to entry and trends in supply and demand.

As regards the complaint alleging that the Commission failed to take into account the creation of Vodafone's dominant position on the MDU market, which would give rise to a SIEC, the Court recalls that, in accordance with the EC Merger Regulation, [451] when reviewing concentrations, the Commission must assess whether a concentration is such as to significantly impede effective competition in the internal market or in a substantial part of it, since the fact that a concentration would create or strengthen a dominant position is not, in itself, sufficient for that concentration to be regarded as incompatible with the internal market. Such a prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a

451 Article 2(2) and (3) of the EC Merger Regulation.

given market. Consequently, the Commission cannot be criticised for having carried out, in the present case, a prospective analysis relating in particular to the horizontal non-coordinated effects of the concentration on the MDU market. In the context of that analysis, since the Commission concluded that there was no SIEC, in that the concentration at issue would not eliminate competitive constraints between the parties and would not weaken further the competitive constraints exerted by the remaining competitors, it was not required to examine whether that transaction would create or strengthen a dominant position, in particular on account of the national coverage of the merging parties' combined cable networks post-transaction.

Furthermore, the extent of the merging parties' cable infrastructure cannot be regarded as a factor determining the state of competition on the MDU market, the alteration of which would give rise to a SIEC. It follows that the mere geographical extension of the merged entity's cable network, whether merger-specific or not, does not necessarily give rise to an alteration of a factor determining the state of competition on the MDU market and, therefore, to a SIEC.

b) The vertical effects of the concentration

Next, as regards the analysis of the vertical effects of the concentration at issue, which led the Commission to examine, in particular, the likelihood of foreclosure of retail providers of TV signal transmission services to MDU customers, the Court observes that, in assessing the likelihood of an anticompetitive input foreclosure scenario, the Commission examines, in accordance with the Guidelines on non-horizontal mergers, [452] first, whether the merged entity could, post-merger, have the ability to substantially foreclose access to inputs, second, whether it could have an incentive to do so and, third, whether a foreclosure strategy could have a significant detrimental effect on competition downstream. Those three conditions are cumulative, so that the absence of any of them is sufficient to rule out the likelihood of input foreclosure.

As regards, more specifically, the third condition, the Commission had concluded that any market foreclosure strategy put in place by the merged entity would not, in any event, have a significant detrimental effect on downstream competition, since the concentration at issue would not lead to any merger-specific change in the structure of the markets concerned, whether upstream or downstream. More specifically, the concentration at issue would not lead to any change in the parties' ability and incentive to foreclose retail providers of TV signal transmission services, in particular, Tele Columbus, to MDU customers in Germany. Since the applicants failed to demonstrate that the Commission's assessment is vitiated by a manifest error, the third condition not being satisfied is sufficient to rule out the likelihood of anticompetitive input foreclosure.

c) Horizontal non-coordinated effects on the market for wholesale TV signal transmission

Lastly, the Court considers that Tele Columbus is unsuccessful in its argument that, in its examination, the Commission manifestly erred in its assessment of the horizontal non-coordinated effects on the market for wholesale TV signal transmission, resulting from the merged entity concluding exclusivity agreements with broadcasters.

First, in so far as the Commission is criticised for not having carried out all the examinations which the applicant wished for or felt to be useful, such as certain technical functionalities and commercial aspects, the applicant provides no explanation whatsoever of how they could be affected by the concentration, and in particular why, and how, the merged entity would have the ability, and above all the incentive, to deteriorate those functionalities and commercial terms in its negotiations with broadcasters, and how, having regard in particular to their importance, that could have the effect of significantly impeding effective competition on the wholesale market for TV signal transmission and

452 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6).

how such a likely deterioration of those functionalities and commercial terms would be merger-specific.

Second, as regards the allegation that the Commission failed to take account of the fact that the merged entity would have the ability and the incentive to implement partial exclusivity in order to prohibit the broadcasting of content via some of its competitors, such as itself, the applicant fails to demonstrate that such a strategy would have a significant detrimental impact on downstream competition. In addition, it was unlikely that the merged entity would have an incentive to conclude total or partial exclusivity agreements with a broadcaster, given the potentially unlawful nature of the conduct in question, contrary to competition law.

Third, as regards the allegation that the merged entity could, on the MDU market, exploit the advantages it would have on the wholesale market for TV signal transmission, namely the collection of feed-in fees and the acquisition of content on more advantageous terms than the smaller cable operators, it should be noted, first, that if those advantages made it possible to offer more advantageous prices to MDU customers, that would be indicative of positive effects for consumers, since it was likely that such a price reduction would be reflected in the amount of the monthly rent paid by the tenants of the buildings concerned, rather than of a SIEC. Second, the applicant has failed to demonstrate that those advantages were merger-specific.

2. The commitments made binding by the contested decision

In the contested decision, since the Commission concluded that there was a SIEC on the market for fixed internet access and on the market for wholesale TV signal transmission, it examined the commitments proposed by Vodafone and concluded that the concentration at issue, as modified by those commitments, would not significantly impede effective competition on those markets.

The Court considers that the Commission's analysis on that point can in no way be criticised as regards the commitments relating to the market for wholesale TV signal transmission allegedly being insufficient and inappropriate [453] and the commitment relating to the fixed internet access market (the WCBA commitment) offered by Vodafone allegedly being ineffective.

In that regard, it rejects the complaint that those commitments are purely behavioural and, consequently, insufficient to remedy competition concerns of a horizontal nature. Although, in the Notice on remedies, the Commission has a preference for structural commitments, in particular on account of the simplicity of implementing them, the acceptance of the commitments is governed principally by whether the commitments are appropriate and sufficient to resolve the competition problem identified, as well as the certainty that those commitments will be able to be implemented.

As regards, more specifically, the commitments relating to the market for wholesale TV signal transmission, the allegation that the wording used by the Commission in the contested decision demonstrates that the Commission was not certain that those commitments would be sufficient and effective to remedy the SIEC identified on the market for wholesale TV signal transmission cannot succeed. While the Commission must be certain that the proposed commitments will be able to be implemented and that they will be sufficiently workable and lasting, it may declare a concentration to be compatible if it is sufficiently likely that those commitments will be sufficient and effective to eliminate the SIEC identified.

In addition, as regards the feed-in fees commitment having been submitted out of time, the Commission may accept commitments submitted out of time, first, where those commitments clearly and without the need for further investigation resolve the competition concerns previously identified and, second, where there is sufficient time to consult the Member States on those commitments.

453 Those commitments include the OTT commitment, the feed-in fees commitment and the HbbTV commitment.

Given that those two cumulative conditions were satisfied in the present case, the Commission was entitled to take account of the feed-in fees commitment despite it having been submitted out of time.

As regards the WCBA commitment, the Court rejects the complaint alleging ineffectiveness based on the fact that that commitment did not compensate for the loss of competitive pressure from the infrastructures and innovations which Unitymedia exerted prior to the transaction.

The objective of that commitment, which provides for a third-party operator to enter the market, namely Telefónica, is to address the competition concern arising from the loss of an operator (Vodafone) in Unitymedia's cable footprint, and is not to compensate for the loss of competitive pressure from the infrastructures and innovations which Unitymedia exerted prior to the transaction. Moreover, and in any event, it has not been demonstrated that the merged entity would cease to invest and innovate in Unitymedia's former cable footprint, with the result that the transaction would lead to the loss of the competitive pressure resulting from such investments and innovations.

As regards Telefónica's alleged inability to exert significant competitive pressure on the market for fixed internet access, it must be stated that that allegation follows from certain findings made by the Commission in the contested decision on Telefónica's situation in the absence of the commitment in question and that those findings do not, therefore, take account of all the obligations entered into by Vodafone in the context of that commitment. Therefore, those findings do not allow any conclusion to be drawn as to Telefónica's ability and incentive to operate as a viable and active competitive force following implementation of that commitment.

As regards the argument that the WCBA commitment would adversely affect the market and strengthen its oligopolistic structure by granting wholesale access on preferred terms to Telefónica, the Commission explained that that remedy would strengthen that operator, but that it would not give rise to competition concerns since Telefónica was not a strong competitor, in particular, on the markets for fixed internet access.

The Court also rejects the complaint alleging that the Commission's examination of the WCBA commitment was inadequate and that the statement of reasons in the contested decision with regard to that commitment was inadequate, since the Commission did indeed verify that that commitment would eliminate entirely the competition concerns identified and that it would not have negative effects, including on investments in fibre optics or on the retail market for multiple play. It also set out in detail the reasons why it concluded that that would not be the case.

In the light of the foregoing, the Court dismisses the action in its entirety.

3. State aid

Judgment of 24 January 2024, *Germany* v *Commission* (T-409/21, EU:T:2024:34)

(State aid – Aid granted by certain provisions of the amended German Law on combined heat and power generation – Reform of the arrangements for support for cogeneration – Decision declaring the aid compatible with the internal market – Concept of 'State aid' – State resources)

In an action for annulment brought by the Federal Republic of Germany, the General Court annuls the decision of the European Commission classifying as State aid various measures adopted by that Member State in support of electricity production by combined heat and power ('CHP') plants. [454] In

[454] Commission Decision C(2021) 3918 final of 3 June 2021 concerning State aid SA.56826 (2020/N) – Germany – 2020 reform of support for cogeneration and State aid SA.53308 (2019/N) – Germany – Change of support to existing CHP plants

doing so, the Court clarifies the condition, laid down in Article 107(1) TFEU, that only interventions by the State or through State resources can be classified as State aid within the meaning of that provision.

Between 2019 and 2021, the Federal Republic of Germany notified the Commission of certain legislative amendments providing, first, for measures of financial support for the operators of CHP plants and other installations connected with the cogeneration of heat and electricity (together, 'the CHP operators') and, secondly, for capping a surcharge that could be imposed, in that context, on hydrogen producers.

In the contested decision, the Commission concluded that those measures constituted State aid within the meaning of Article 107(1) TFEU that were nonetheless compatible with the internal market under Article 107(3)(c) TFEU.

In support of its classification of the notified measures as State aid, the Commission considered, in particular, that those measures were granted through State resources. By its action for annulment, the Federal Republic of Germany challenges the Commission's conclusion.

Findings of the Court

The Court observes that the classification of a measure as State aid, within the meaning of Article 107(1) TFEU, requires that a number of conditions be satisfied, including that there be intervention by the State or through State resources.

According to the case-law, funds financed by a levy or other compulsory surcharges under the national legislation and managed and apportioned in accordance with that legislation (first criterion) and sums that constantly remain under public control, and therefore available to the competent national authorities (second criterion), may be categorised as State resources. Those two criteria are alternative criteria of the concept of 'State resources' within the meaning of Article 107(1) TFEU.

First, as regards the measures of financial support for the CHP operators, the Commission considered in the contested decision that those measures were financed from the proceeds of a *de jure* mandatory levy imposed by the State, managed and apportioned in accordance with the provisions of the legislation (first criterion).

In that regard, the Court observes that the measures of support for the CHP operators notified by the Federal Republic of Germany are characterised by the existence of 'two levels' in the electricity supply chain, the 'first level' corresponding to the relationship between the CHP operators and the network operators, and the 'second level' to the relationship between those network operators and their customers.

In the context of the 'first level' of the supply chain, the notified measures establish a legal obligation for the network operators, which are private entities, to pay financial support to the CHP operators. In the context of the 'second level', those network operators may, without being required to do so by law, pass on the financial burden resulting from that obligation to their customers by means of a surcharge.

In the light of those clarifications, the Court finds that the Commission erred in law in considering that the obligation imposed on the network operators to pay sums to the CHP operators, at the 'first level' of the supply chain, was sufficient to substantiate the finding of a levy or other mandatory surcharge of such a kind as to establish the involvement of State resources, without it being necessary to

(Paragraph 13 of the Gesetz zur Neuregelung des Kraft-Wärme-Kopplungsgesetzes (Law introducing new rules for the Law on combined heat and power generation) of 21 December 2015 (BGBl. 2015 I, p. 2498)) ('the contested decision').

identify a further mandatory contribution at another 'level' of the supply chain, as the surcharge at the 'second level' of the supply chain is not a *de jure* mandatory surcharge.

The existence of a levy or of another *de jure* mandatory surcharge concerns the origin of the funds used in order to grant an advantage, in that it permits the finding that State funds were used to finance that advantage. It is not to be confused with the allocation of those funds in accordance with the law. The *de jure* obligation imposed on the network operators at the 'first level' of the supply chain concerns only the allocation of the funds in accordance with the law, but gives no indication of the origin of the funds used by the network operators in order to comply with that obligation.

In that context, the Commission cannot claim that the State takes ownership of the network operators' resources, since the latter are not necessarily the ultimate debtors of the financial burden occasioned by the measures to support the CHP operators.

In addition, the fact that the German law sets out in detail the procedure for the allocation of the financial support to the CHP operators is not capable of establishing a transfer of State resources, only the imputability of those support measures to the State.

Consequently, the Court finds that the Commission was wrong to rely on the first criterion set out above, relating to the existence of a levy or of other mandatory surcharges, to conclude that the measures of financial support to the CHP operators were financed through State resources.

The Court also finds that the Commission erred in law in precluding the application of the case-law resulting from the judgment of 13 March 2001, *PreussenElektra*. [455]

In the contested decision, the Commission had precluded the application of that case-law on the ground that the measures to support the CHP operators did not constitute a measure of 'mere price regulation'. Contrary to the Commission's conclusion, however, the decisive factor for precluding the existence of a transfer of State resources, according to the case-law resulting from the judgment in *PreussenElektra*, is not whether the measures at issue constitute a measure of 'mere price regulation', but the fact that the private entities in question were appointed by the State to manage a State resource.

Thus, in order to preclude the application of the case-law resulting from the judgment in *PreussenElektra*, the Commission ought to have established that the advantage for the CHP operators was not granted by the network operators from their own financial resources, but that they were appointed by the State to manage a State resource, which the Commission failed to demonstrate.

Nor could the Commission properly rely on the practical effect of Article 107(1) TFEU to restrict the application of the case-law resulting from the judgment in *PreussenElektra* to cases of 'mere price regulation', since that article cannot be applied to State conduct which is not covered by that article, such as, in the present case, a measure decided upon by the State but financed by private undertakings.

Secondly, as regards capping the surcharge that can be imposed on hydrogen producers by the network operators, the Commission considered that it constituted a renouncement of State resources that could be characterised as a transfer of State resources.

However, the Court notes that the surcharge in question does not constitute a State resource according to the first criterion set out above, as it is not *de jure* mandatory. It follows that the reduction of that surcharge for hydrogen producers is also incapable of constituting a renouncement of State resources.

---

455 Judgment of 13 March 2001, ***PreussenElektra*** (C-379/98, EU:C:2001:160).

In the light of the foregoing, the Court upholds the action for annulment in so far as the Commission incorrectly found that the set of measures notified by the Federal Republic of Germany constituted State aid financed through State resources.

Judgment of 28 February 2024, *Scandlines Danmark and Scandlines Deutschland* v *Commission* (T-390/20, EU:T:2024:126)

((State aid – Public financing of the Fehmarn Belt fixed rail-road link – Aid granted by Denmark to Femern – Decision declaring the aid compatible with the internal market – Individual aid – Important project of common European interest – Necessity of the aid – Proportionality – Weighing the beneficial effects of the aid against its adverse effects on trading conditions and on the maintenance of undistorted competition – Communication on the criteria for the analysis of the compatibility with the internal market of State aid to promote the implementation of important projects of common European interest)»

The General Court dismisses the action for annulment brought by the shipping companies Scandlines Danmark ApS and Scandlines Deutschland GmbH against the Commission Decision of 20 March 2020 [456] by which the European Commission found that the support measures granted by Denmark to the public undertaking Femern A/S for the planning, construction and operation of a Fehmarn Belt fixed rail-road link between Denmark and Germany constitute State aid that is compatible with the internal market. In that context, the Court provides clarification as to the Commission's procedures for monitoring aid measures that are paid in several tranches. The Court is also called upon to review the Commission's application of certain paragraphs of its communication on the execution of important projects of common European interest [457] ('the IPCEI Communication').

In 2008, Denmark and Germany signed a treaty regarding a Fehmarn Belt fixed link project consisting of, on the one hand, a railway and road tunnel under the Baltic Sea between Denmark and Germany ('the Fixed Link') and, on the other, road and rail hinterland connections in Denmark.

The Danish public undertaking Femern was entrusted with the financing, construction and operation of the Fixed Link. Having received capital injections, loans guaranteed by the State and loans granted by Denmark, Femern will receive fees from users as from when the Fixed Link is put into service, in order to repay its debt.

At the end of 2014, the Danish authorities notified the Commission of the financing model for the Fehmarn Belt Fixed Link project. Without initiating the formal investigation procedure, the Commission decided not to raise any objections to the notified measures [458]

By judgments of 13 December 2018, [459] the Court partially annulled that decision. As regards the public financing granted to Femern, the Court held that the Commission had failed to fulfil its obligation under Article 108(3) TFEU to initiate the formal investigation procedure due to the existence of serious difficulties.

Having initiated the formal investigation procedure following those judgments, the Commission found, by its decision of 20 March 2020, that the measures consisting of capital injections and a

---

456 Decision C(2020) 1683 final of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (OJ 2020 L 339, p. 1).

457 Communication from the Commission of 20 June 2014 on the criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest (OJ 2014 C 188, p. 4).

458 Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt Fixed Link project (OJ 2015 C 325, p. 5).

459 Judgments of 13 December 2018, ***Scandlines Danmark and Scandlines Deutschland*** **v** ***Commission*** (T-630/15, EU:T:2018:942), and of 13 December 2018, ***Stena Line Scandinavia*** **v** ***Commission*** (T-631/15, EU:T:2018:944).

combination of State loans and State guarantees granted to Femern for the planning, construction and operation of the Fixed Link constituted State aid that was compatible with the internal market on the basis of Article 107(3)(b) TFEU, [460] in that those measures were intended to promote the execution of an important project of common European interest in observance of the principle of proportionality.

The shipping companies Scandlines Danmark and Scandlines Deutschland brought an action before the Court for annulment of that decision.

Findings of the Court

In the light of the fact that the State guarantees and State loans in favour of Femern had been granted by way of successive tranches paid according to the progress of the Fixed Link project, the applicants complained that the Commission had erred in finding, in the contested decision, that the various financial support measures could be grouped into three individual aid measures, namely a first aid in the form of a capital injection in 2005, a second aid in the form of a capital injection, State guarantees and State loans granted under a law adopted in 2009, [461] and a third aid in the form of State loans and State guarantees granted under a law adopted in 2015. [462]

On that point, the Court states that several consecutive measures of State intervention may be regarded as a single intervention where those measures, having regard in particular to their chronology, their purpose and the undertaking's situation at the time of those interventions, are so closely linked to each other that they are inseparable from one another. Since that condition was satisfied in respect of all the financing granted under the law adopted in 2009 and as regards the financing granted under the law adopted in 2015, the Commission did not err in classifying them as individual aids. It follows that the Commission was also not obliged to require the Danish authorities to notify it separately of each State loan and each State guarantee granted to Femern under those laws.

Moreover, since the three individual aids granted to Femern in 2005, 2009 and 2015 were to finance one and the same project, the Commission did not exceed the limits of its discretion by jointly examining their compatibility with the internal market. It is precisely by taking account of all those aids that the Commission is in a position to assess their effect on competition in the context of the examination of one of the derogations provided for in Article 107(3) TFEU, in particular for an important project of common European interest, the implementation of which involves the payment of public financing over a long period.

The Court also rejects the plea for annulment alleging infringement of Article 107(3)(b) TFEU, resulting from the fact that the Commission allegedly incorrectly classified the project at issue as a project of common European interest and wrongly concluded that the aid was necessary and proportionate.

First, as regards the classification of the Fixed Link project as a project of common European interest within the meaning of Article 107(3)(b) TFEU, the Court states that the concept of 'common European interest' laid down in that provision must be interpreted strictly and that an initiative is classified as a project of common European interest only where it forms part of a transnational European programme jointly supported by various Member State governments or where it is part of concerted action by various Member States in order to combat a common threat.

---

460 Under that provision, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

461 Law No 285 on the planning of the Fehmarn Belt Fixed Link and Danish hinterland connections of 15 April 2009.

462 Law No 575 on the construction and operation of the Fehmarn Belt Fixed Link and Danish hinterland connections of 4 May 2015.

The concept of 'common European interest' was also clarified by the Commission in the IPCEI Communication, which sets out the general cumulative criteria to be satisfied in order for a project to fall within that concept, as well as positive indicators justifying a more favourable approach by the Commission for the purposes of classification as a project of common European interest, including that of co-financing of the project by way of an EU fund.

Since the Fixed Link project met the general cumulative criteria set out in the IPCEI Communication and that project had, moreover, received EU financing, the Commission was entitled to conclude, on the basis of only those criteria and indicators, that the Fixed Link project was of common European interest.

Second, as regards the necessity of the aid, the Court states that, in the context of Article 107(3)(b) TFEU, aid to promote the execution of an important project of common European interest must, in order to be compatible with the internal market, have an incentive effect on the recipient undertakings. To that end, it must be demonstrated that, in the absence of the planned aid, the investment intended to implement the project at issue would not take place. In that regard, the Court states that a finding that an aid measure is not necessary can arise in particular from the fact that the aided project has already been started, or even completed, by the undertaking concerned prior to the application for aid being submitted to the competent authorities, which means that the aid concerned cannot operate as an incentive (criterion that the application for aid must be submitted prior to the start of the works).

On the latter point, the Court endorses the Commission's line of argument that, in the present case, the criterion that the application for aid must be submitted prior the start of the works was satisfied because the application for aid was inherent in the establishment of Femern. In that regard, the Court states that, as a specific-purpose company set up by the public authorities to carry out the Fixed Link project, Femern is dependent on public financing until the Fixed Link is brought into operation. Moreover, since the Commission could jointly examine the compatibility with the internal market of all the financing granted to Femern since it was established, the criterion that the application for aid must be submitted prior to the start of the works did not have to be verified for each of the three individual aids.

Nor did the Commission err in finding that the counterfactual scenario taken into account, in accordance with the IPCEI Communication, for the purposes of assessing the necessity of the notified aid, consisted in the absence of an alternative project. More specifically, the applicants and the interveners have not demonstrated that there was an alternative project that was feasible without aid and that was of a comparable size or scope or that would provide benefits equivalent to those expected from the Fixed Link project.

The Court also rejects the complaint that the Commission made manifest errors of assessment in relying on a lifetime of 40 years in order to calculate both the internal rate of return of the Fixed Link project (necessity of the aid) and the calculation of the funding gap (proportionality of the aid), whereas the Fixed Link project has a lifetime of 120 years.

In that regard, the Court states, on the one hand, that, in accordance with paragraph 30 of the IPCEI Communication, in the absence of an alternative project, the Commission must verify that the amount of aid does not exceed the minimum necessary for the aided project to be sufficiently profitable, and that all the expected costs and benefits concerned must be considered over the lifetime of the project. Since that reference to the lifetime must be understood as referring to the economic lifetime of the investment project and not of the infrastructure from a technical perspective, the Commission did not err in referring to the conduct of investors on the relevant market in order to calculate the internal rate of return on the basis of an economic lifetime of the investment of 40 years.

On the other hand, in accordance with paragraph 31 of the IPCEI Communication, the maximum amount of aid is determined by reference to the funding gap, which corresponds to the difference

between the positive and negative cash flows over the lifetime of the investment. Since the aim of the funding gap analysis is to determine the extent to which the project could be financed under market conditions, the Commission cannot be criticised for having taken into account, in order to carry out that analysis, the period which a reasonable investor in that project would have taken into account, estimated at 40 years.

Third, as regards the proportionality of the aid, the Court notes, first of all, that the applicants cannot complain that the Commission disregarded the requirement that aid in the form of a guarantee or loan be limited in time, as set out in the IPCEI Communication, since the contested decision states that (i) at the latest 16 years after the opening of the Fixed Link, all loans with a guarantee must have been terminated and all State loans must have been repaid and (ii) the Danish authorities are not authorised to grant Femern such loans and guarantees for an amount that exceeds the maximum guaranteed amount of 69.3 billion Danish kroner (approximately EUR 9.3 billion).

Next, the Commission did not underestimate Femern's revenues in order to increase the funding gap artificially. On the one hand, the IPCEI Communication does not require that the revenues cover the entire costs of the project. On the other hand, the applicants and the interveners have not adduced evidence that a price structure for road traffic differing from that adopted by the Commission would automatically lead to an increase in revenues because of the elasticity of demand and competition on the market.

Lastly, the Commission did not disregard the IPCEI Communication by including operating costs of the Fixed Link in the eligible costs for the calculation of the funding gap. The inclusion of those costs in the negative cash flows of the Fixed Link project does not result in operating aid being granted, since the operating revenues of that fixed link, which should also be taken into account under positive cash flows, largely exceed the operating costs. Moreover, no evidence has been adduced that could call into question the Commission's explanations in support of the inclusion of those costs in the funding gap analysis.

In the light of all those considerations, the Court dismisses the action for annulment of the contested decision.

Judgment of 28 February 2024, *Denmark* v *Commission* (T-364/20, EU:T:2024:125)

(State aid – Public financing of Fehmarn Belt fixed rail-road link – Aid granted by Denmark to Femern – Decision declaring the aid compatible with the internal market – Action for annulment – Whether separable – Admissibility – Concept of 'undertaking' – Concept of 'economic activity' – Activities involving the construction and operation of a fixed rail-road link – Effect on trade between Member States and distortion of competition)

The General Court dismisses the action for partial annulment brought by the Kingdom of Denmark against the decision of the European Commission of 20 March 2020 [463] by which the Commission found that the support measures granted by Denmark to the public undertaking Femern A/S for the planning, construction and operation of a Fehmarn Belt fixed rail-road link between Denmark and Germany constitute State aid that is compatible with the internal market. In doing so, the Court clarifies aspects relating to the concept of 'activity of an economic nature' that is subject to EU competition law.

463 Decision C(2020) 1683 final of 20 March 2020 on the State aid SA.39078 – 2019/C (ex 2014/N) which Denmark implemented for Femern A/S (OJ 2020 L 339, p. 1).

In 2008, Denmark and Germany signed a treaty regarding a Fehmarn Belt fixed link project consisting of, on the one hand, a railway and road tunnel under the Baltic Sea between Denmark and Germany ('the Fixed Link') and, on the other, road and rail hinterland connections in Denmark.

The Danish public undertaking Femern was entrusted with the financing, construction and operation of the Fixed Link. Having received capital injections, loans guaranteed by the State and loans granted by Denmark, Femern will receive fees from users as from when the Fixed Link is put into service, in order to repay its debt.

At the end of 2014, the Danish authorities notified the Commission of the financing model for the Fehmarn Belt Fixed Link project. Without initiating the formal investigation procedure, the Commission decided not to raise any objections to the notified measures. [464]

By judgments of 13 December 2018, [465] the Court partially annulled that decision. As regards the public financing granted to Femern, the Court held that the Commission had failed to fulfil its obligation under Article 108(3) TFEU to initiate the formal investigation procedure due to the existence of serious difficulties.

Having initiated the formal investigation procedure following those judgments, the Commission found, by its decision of 20 March 2020, that the measures consisting of capital injections and a combination of State loans and State guarantees granted to Femern for the planning, construction and operation of the Fixed Link constituted State aid that was compatible with the internal market on the basis of Article 107(3)(b) TFEU. [466]

Denmark brought an action before the Court, seeking annulment of that decision in so far as it classifies the public financing granted to Femern as State aid within the meaning of Article 107(1) TFEU.

Findings of the Court

In the first place, the Court rejects Denmark's argument that the Commission erred in law in subjecting Femern's activities to EU competition rules when its activities are connected with the exercise of public powers.

According to the case-law, public power activities or activities connected with the exercise of public powers are not economic in nature and do not justify the application of the competition rules laid down in the FEU Treaty.

In that regard, the Court begins by stating that the Commission did not err in law in considering, in the contested decision, that an entity exercises public powers when its activity is connected with the essential functions of the State by its nature, its aim and the rules to which it is subject.

Having made that clear, the Court observes that the information submitted to the Commission by the Danish authorities during the formal investigation procedure did not constitute factors which, taken individually or together, might lead to a finding that the construction and operation of the Fixed Link by Femern were connected with the exercise of public powers.

---

464 Decision C(2015) 5023 final on State aid SA.39078 (2014/N) (Denmark) for the financing of the Fehmarn Belt Fixed Link project (OJ 2015 C 325, p.5).

465 Judgments of 13 December 2018, ***Scandlines Danmark and Scandlines Deutschland* v *Commission*** (T-630/15, EU:T:2018:942), and of 13 December 2018, ***Stena Line Scandinavia* v *Commission*** (T-631/15, EU:T:2018:944).

466 Under that provision, aid to promote the execution of an important project of common European interest may be considered to be compatible with the internal market.

More particularly, the fact that Femern is placed under the close supervision of the public authorities and is required to comply with certain public law obligations applicable to public administrations is not sufficient to find that its activities are connected with the exercise of public powers. Furthermore, although the purpose of Femern's activities is to implement an international agreement, the fact nonetheless remains that the Fehmarn Belt Treaty contains no provision to support the finding that, as such, the activities involving the construction and operation of the Fixed Link are connected with the exercise of such powers. In addition, the fact that a sector of activity has not been liberalised does not constitute conclusive evidence that, as a matter of principle, an activity is connected with the exercise of public powers.

Nor can the Commission be criticised for not having examined in detail whether the functions delegated to Femern as road authority and rail infrastructure manager and also for preparing the safety plans of the Fixed Link are connected with the exercise of public powers, since Denmark had not explicitly relied on that argument during the formal investigation procedure.

The Court rejects, in the second place, the various complaints alleging that the Commission made an error of assessment in finding that the operation of the Fixed Link constitutes an economic activity that is subject to EU competition law.

In accordance with settled case-law, for the purposes of the application of the provisions of EU competition law, any entity engaged in an economic activity consisting in offering goods or services on a given market is an undertaking. In order to determine whether an entity is engaged in an economic activity, the Commission must therefore establish that the entity offers goods or services on a market in competition with operators seeking to make a profit.

In the light of that case-law, the Court rejects, first of all, Denmark's criticisms of the finding in the contested decision that the services that will be offered by Femern after the Fixed Link is put into service will be in direct competition with those offered by the private ferry operator which already operates, with the aim of making a profit, in the Fehmarn Belt. Although Femern and that private ferry operator offer services the characteristics of which differ in certain respects, they operate on the same market, namely the market for transport services for crossing the Fehmarn Belt, on which consumers will have the choice between the services offered by the ferry operator and those offered by Femern in the context of the operation of the Fixed Link. Furthermore, the Commission had also identified a market for transport services on other links which constitute an alternative for crossing the Fehmarn Belt.

Next, the Court observes that the Commission did not make an error of assessment in finding that the fact that users of the Fixed Link are required to pay is a relevant factor for the classification of the operation of that link as an economic activity. Where a Member State decides, as in this instance, to make access to an infrastructure conditional upon payment of a fee in order to generate revenues allocated, inter alia, to the repayment of the debt incurred in financing the planning and construction of that infrastructure, it must be considered that that infrastructure is the subject of an economic operation.

Lastly, the Court approves the Commission's finding that the activity involving the construction of the Fixed Link is economic in nature on the ground that it is inseparably linked with the economic operation of that infrastructure.

In that regard, the Court observes that the commercial operation and the construction of transport infrastructures with a view to such commercial operation are capable of constituting economic activities. In that context, it has been held, [467] inter alia, that the Commission could properly conclude

---

467 Judgments of 19 December 2012, ***Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*** (C-288/11 P, EU:C:2012:821), and of 24 March 2011, ***Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*** (T-443/08 and T-455/08, EU:T:2011:117).

that it was not possible to separate the activity involving the operation of a commercial airport and the activity involving the construction of a new runway at that airport, since the airport fees are the major source of revenue for financing the new runway and the operation of that runway will form part of the economic activity of the airport. The principles established in those judgments cannot be limited solely to a situation involving the extension of a pre-existing transport infrastructure that is the subject of economic operation, but may also apply to the construction of a new infrastructure intended to be the subject of future economic operation, such as the infrastructure at issue in the present case.

As regards Denmark's argument that, in essence, Femern would not be present on any market during the construction stage, the Court points out that the revenue from the operation of the Fixed Link will be used by Femern, inter alia, to repay the loans which it has taken out for the planning and construction of the Fixed Link. If the construction activity were considered to be separable from the operation of the Fixed Link and therefore non-economic, the preferential financing obtained for the construction of the Fixed Link could not be classified as State aid. It would follow that, at the stage of the operation of the Fixed Link, Femern would have the advantage of being able to operate a subsidised infrastructure, which would secure for it an economic advantage which it would not have obtained on normal market conditions. Thus, the Court concludes that the effectiveness of the State aid rules also precludes the activities involving the construction and operation of the Fixed Link from being separated on the ground that the Fixed Link will be put into service only when its construction has been completed.

Moreover, the fact that Danish law attributes the construction and operation of the Fixed Link solely to Femern also does not preclude those activities from being classified as economic activities, since the operation of the Fixed Link will consist in offering transport services on a market which is liberalised and open to competition. Were that not the case, it would be sufficient for a Member State to grant exclusive rights to an entity called upon to offer services on a liberalised market in order to circumvent the application of the competition rules.

Having regard to all of those considerations, the Court dismisses the action for partial annulment of the contested decision.

Judgment of 10 April 2024, *Danske Slagtermestre* v *Commission* (T-486/18 RENV, EU:T:2024:217)

(State aid – Contributions scheme for the collection of waste water – Complaint from a competitor – Decision finding no State aid at the end of the preliminary examination stage – Requirement of impartiality – Objective impartiality – Concept of 'advantage' – Market economy operator principle – Ex ante incremental profitability analysis – Commission Notice on the notion of State aid)

The General Court, hearing the case on referral back from the Court of Justice, annuls the decision of the European Commission [468] by which the latter found that the Danish legislation regarding fees payable to waste water treatment operators did not give rise to State aid in favour of large slaughterhouses. In that context, the General Court provides clarification regarding, first, the requirement of impartiality on the part of the Commission and, second, the application of the market economy operator principle in a context such as that of the present case. On the second point, the Court draws attention, in addition, to the obligation on the Commission to comply with the criteria laid down in its Notice on the notion of 'State aid'. [469]

468 Commission Decision C(2018) 2259 final of 19 April 2018 relating to State aid SA.37433 (2017/FC) – Denmark ('the contested decision').

469 Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1).

By a law adopted in 2013 [470] ('the 2013 law'), Denmark replaced the system under which there was a single charge per cubic metre of water for all water consumers connected to the same waste water treatment plant with a degressive 'staircase' model providing for a rate on the basis of the volume of waste water discharged ('the staircase pricing model'). This new pricing model provides, in essence, for a reduction in the rate per cubic metre from a certain volume of waste water discharged, which has the effect of reducing the charges payable by the biggest water consumers.

Danske Slagtermestre, a trade association which claims to represent small butcher's shops, slaughterhouses, wholesalers and processing undertakings in Denmark, brought a complaint before the Commission alleging that the 2013 law had granted State aid to large slaughterhouses in the form of a reduction in contributions for the treatment of waste water.

By decision of 19 April 2018, the Commission held that the staircase pricing model introduced by the 2013 law did not confer any special advantage on specific undertakings and did not therefore constitute State aid within the meaning of Article 107(1) TFEU. In support of that conclusion, the Commission, referring to its Notice on 'State aid', took the view that a market economy operator would also have implemented the staircase model

Danske Slagtermestre brought an action for the annulment of that decision before the General Court.

By order of 1 December 2020, [471] the General Court dismissed the action as inadmissible on the ground that Danske Slagtermestre lacked standing to bring proceedings. On appeal, the Court of Justice held that that professional association did have standing to bring proceedings; it annulled the abovementioned order and referred the case back to the General Court for it to examine it as to the substance. [472]

Findings of the Court

In the first place, the General Court examines the plea for annulment alleging that the Commission infringed the requirement of impartiality laid down in Article 41(1) of the Charter of Fundamental Rights of the European Union. According to the applicant, that requirement was infringed when the contested decision was adopted, since the Commissioner responsible for competition, who signed it, had also cooperated, as a minister of the Danish Government, in the adoption of the 2013 law.

In that regard, the Court recalls that it is for the institutions, bodies, offices and agencies of the European Union to comply with the requirement of impartiality, in particular as regards its component relating to objective impartiality, according to which there must be sufficient guarantees to exclude any legitimate doubt as to possible bias on the part of the institution concerned, appearances possibly also being of importance.

Having clarified that matter, the Court notes, first, that at the time of the submission of the draft giving rise to the 2013 law and at the time of its adoption, the Commissioner responsible for competition who signed the contested decision was Minister for the Economy and the Interior and Deputy Prime Minister of the Kingdom of Denmark. Second, since the staircase pricing model was expected to have an impact on the expenditure of individuals and undertakings, it is reasonable to consider that it could have been proposed in agreement with that minister. Third, the Commissioner in question had taken a position at national level, publicly and explicitly, in favour of the staircase pricing model.

---

470 Law No 902/2013 amending the law establishing the rules relating to contributions payable to waste water treatment operators (structure of the contributions for the drainage of waste water, authorising special contributions for the treatment of particularly polluted waste water, etc.).

471 Order of 1 December 2020, ***Danske Slagtermestre*** **v** ***Commission*** (T-486/18, EU:T:2020:576).

472 Judgment of 30 June 2022, ***Danske Slagtermestre*** **v** ***Commission*** (C-99/21 P, EU:C:2022:510).

In the light of those factors, the Court takes the view that it may legitimately be considered that the Commissioner in question had an interest in the contribution for the treatment of waste water provided for by the 2013 law not being called into question on the ground that it was unlawful under the rules of EU law concerning State aid.

The Court examines, next, whether the procedure for the adoption of the contested decision offered sufficient guarantees to prevent such an interest from vitiating that procedure by an infringement of the requirement of impartiality.

Regarding that matter, the Court points out that, despite the collegiate nature of the method of adopting decisions within the Commission, the Commissioner in question was not only responsible for the preparation of the contested decision but was also the sole signatory of that decision.

Such a situation is such as to give rise, in the eyes of third parties, to a legitimate doubt with respect to possible bias on the part of that Commissioner, irrespective of her conduct. Therefore, the procedure leading to the adoption of the contested decision did not offer sufficient guarantees of objective impartiality.

In the second place, the Court examines, for the sake of completeness, the plea for annulment alleging that the Commission infringed Article 107(1) TFEU by wrongly concluding that there was no advantage conferred on certain undertakings by the introduction of the staircase pricing model.

After confirming that the Commission was right to have examined the existence of an advantage in the light of the market economy operator test, the Court observes, first of all, that it was thus for the Commission to determine whether the undertakings that benefited from reduced tariffs for the treatment of waste water would have obtained a comparable advantage from a normally prudent and diligent private operator, particularly taking account of its prospects for profitability.

Since the Commission applied, for the purposes of that examination, the *ex ante* profitability analysis method set out in paragraph 228 of its Notice on the notion of 'State aid', the Court points out, furthermore, that, in adopting that notice, the Commission imposed a limit on the exercise of its own discretion as regards the clarifications it provided in that notice on the concepts linked to the notion of 'State aid'. In accordance with paragraph 228 of that notice, the Commission was therefore required to examine, for each undertaking connected to a waste water treatment plant, whether the contribution paid under the staircase pricing model was capable of covering the costs arising from its use of the infrastructure in question.

Given that the Commission based its examination solely on average data on total costs and revenues of 6 out of the 98 Danish municipalities, it failed to have regard to paragraph 228 of its Notice on the notion of 'State aid' and, consequently, to the limits which it imposed on its discretion in adopting that notice.

In any event, even if the Commission could have applied the *ex ante* profitability analysis method without carrying out an examination of each user, it should at the very least have been able to verify that the staircase pricing model in all probability made it possible to allocate to users the marginal costs, that is to say, the costs directly incurred by their use of a waste water treatment plant.

Yet, in the contested decision, all the costs which were not linked to the quantity of water consumed were considered to be fixed costs and, therefore, were shared among all the various users, even if such costs existed merely because of the presence of a specific user on the network. The Commission could not therefore assert that it had verified that the contribution for the treatment of waste water, determined on the basis of the staircase model, enabled the plants to cover the incremental costs in the medium term.

Consequently, the Commission disregarded the limits that it had imposed on its discretion in adopting the Notice on the notion of 'State aid' when it considered that the contribution for the treatment of waste water was consistent with the market economy operator principle.

Next, the Court recalls that, where an intervention by a public operator disregards any prospect of profitability, even in the long term, it cannot be regarded as complying with the market economy operator principle. Despite this, in the contested decision, the Commission found that the discounts introduced by the staircase pricing model could comply with the market economy operator principle on the sole condition that the contribution for the treatment of waste water covered the costs incurred by the operators of waste water treatment plants.

Moreover, by failing to examine whether the application of the staircase pricing model enabled the operators of waste water treatment plants to retain a profit margin, even though it was common ground that that new pricing system leads, on the whole, to a reduction in the amount of the contribution for the treatment of waste water compared with the unitary fee system which it replaced, the Commission, for a second time, disregarded the requirement of profitability and, therefore, misapplied the market economy operator principle. Thus, the Court notes that the *ex ante* profitability analysis defined in paragraph 228 of the Notice on the notion of 'State aid' involves the national measure under examination by the Commission contributing 'incrementally' to the profitability of the operator of an infrastructure, so that, in order to comply with the market economy operator principle, that measure must increase such profitability, even in the long term, and not decrease it.

Lastly, the Commission was wrong to take the view, in the contested decision, that a market economy operator would have taken account of the fact that the maintenance of high charges for water treatment entailed a risk that the largest water consumers would choose to disconnect from the centralised waste water treatment network, since the risk of such disconnection was hypothetical and not sufficiently substantiated.

Therefore, the Court concludes that the Commission infringed Article 107(1) TFEU and paragraph 228 of the Notice on the notion of 'State aid' by finding that the contribution for the treatment of waste water did not confer any advantage on the ground that it would have been decided upon by a market economy operator.

In the light of all the foregoing, the Court annuls the contested decision.

Judgment of 2 October 2024, *European Food and Others* v *Commission* (Joined Cases T-624/15 RENV, T-694/15 RENV and T-704/15 RENV, EU:T:2024:659)

(State aid – Articles 107 and 108 TFEU – Bilateral investment treaty – Arbitration clause – Romania – Accession to the European Union – Repeal of a tax incentives scheme prior to accession – Arbitral award granting payment of damages after accession – Decision declaring the aid incompatible with the internal market and ordering its recovery – First paragraph of Article 351 TFEU – Obligation to state reasons – Concept of 'State aid' – Advantage – Selective nature – Whether imputable to the State – Whether compatible with the internal market – Aid facilitating the economic development of disadvantaged regions – Recovery – Concept of 'economic unit' – Legitimate expectations – Right to be heard)

The General Court, hearing the cases on referral back from the Court of Justice, dismisses the actions brought against the Commission decision [473] classifying as State aid that is incompatible with the internal market the payment by Romania of damages to Swedish investors pursuant to an arbitral award. In that context, it clarifies the scope of the first paragraph of Article 351 TFEU, according to

473 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (OJ 2015 L 232, p. 43; 'the contested decision').

which the rights and obligations arising from agreements concluded between a Member State before its accession to the European Union and one or more third countries are not affected by the provisions of the Treaties. The General Court also analyses the issue of identifying the beneficiaries of an aid measure in the case of a single economic unit.

On 29 May 2002, the Kingdom of Sweden and Romania concluded a Bilateral Investment Treaty on the Promotion and Reciprocal Protection of Investments ('the BIT'), providing for protections when the investors of one country invested in the other country, including for investments entered into prior to the entry into force of the BIT. The BIT provided also that any dispute between investors and the signatory countries would be settled by an arbitral tribunal under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), in accordance with the ICSID Convention. [474]

In 2005, in the context of the negotiations for Romania's accession to the European Union, the Romanian Government repealed a national tax incentives scheme established in 1998 for the benefit of certain investors in disadvantaged regions ('the tax incentives scheme').

Several companies belonging to the European Food and Drinks Group (EFDG), whose majority shareholders are the Swedish citizens Mr Ioan Micula and Mr Viorel Micula, had previously made investments in a disadvantaged area covered by the tax incentives scheme. Claiming that, by repealing that scheme, Romania had breached its obligation to ensure fair and equitable treatment of their investments in accordance with the BIT, Mr Ioan Micula and Mr Viorel Micula as well as three of those companies (together, 'the arbitration applicants') requested the establishment of an arbitral tribunal, with a view to obtaining compensation for the damage caused. By an arbitral award of 11 December 2013, that tribunal ordered Romania to pay the arbitration applicants damages in the amount of approximately EUR 178 million.

On 1 October 2014, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU in respect of the partial execution of the arbitral award by Romania that took place in early 2014 as well as in respect of any further implementation or execution of that award.

By the contested decision, adopted on 30 March 2015, the Commission found that the abovementioned compensation had been paid for the benefit of the single economic unit comprising Mr Ioan Micula and Mr Viorel Micula and the group of companies owned by them. It classified that compensation as State aid incompatible with the internal market, prohibited its implementation and ordered the recovery of sums already paid.

Hearing several actions, the General Court annulled that decision [475] on the ground, in essence, that the Commission had retroactively exercised its powers in respect of facts predating Romania's accession to the European Union on 1 January 2007.

On appeal, the Court of Justice, sitting as the Grand Chamber, set aside that judgment and referred the case back to the General Court [476] for it to adjudicate on the pleas and arguments raised before it on which the Court of Justice had not given a ruling.

---

474 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded on 18 March 1965.

475 Judgment of 18 June 2019, ***European Food and Others* v *Commission*** (T-624/15, T-694/15 and T-704/15, EU:T:2019:423).

476 Judgment of 25 January 2022, ***Commission* v *European Food and Others*** (C-638/19 P, EU:C:2022:50; 'the judgment on appeal').

Findings of the Court

As regards the merits of the actions, the General Court rules, in the first place, that the contested decision did not infringe Article 351 TFEU, pursuant to which the rights and obligations arising from an agreement concluded between a Member State prior to its accession and third countries are not affected by the provisions of the Treaties.

Article 351 TFEU is not applicable to bilateral treaties concluded between Member States. In the present case, the General Court states that, since Romania's accession to the European Union, the BIT must be regarded as a treaty concerning two Member States. In those circumstances, on the date on which the aid was granted, namely the day of delivery of the arbitral award, the BIT cannot be regarded as an agreement giving rise, within the meaning of Article 351 TFEU, to rights in favour of third countries and obligations on the part of that Member State liable to be affected by the application, pursuant to the contested decision, of Articles 107 and 108 TFEU. The fact that the repeal of the tax incentives scheme or the facts giving rise to Romania's liability took place before its accession to the European Union does not call that interpretation into question, since the right to receive the compensation at issue was granted by the arbitral award, after Romania's accession to the European Union.

The General Court states, furthermore, that the system of judicial remedies provided for by the EU and FEU Treaties replaced the arbitration procedure provided for by the BIT with effect from Romania's accession to the European Union on 1 January 2007. The arbitral tribunal in question in the present case does not form part of the EU judicial system, with the result that the arbitral award at issue, which it adopted after Romania's accession to the European Union, cannot therefore produce any effects or be executed with a view to paying the compensation granted by that award.

It follows that the ICSID Convention, which provides for the obligation of the parties to an award to abide by it and for the obligation of each Contracting State to recognise its binding force, created neither obligations on the part of Romania falling within the scope of Article 351 TFEU nor corresponding rights in favour of third counties.

The General Court adds that, in so far as the ICSID Convention is intended to govern bilateral relations between the contracting parties in an analogous way to a bilateral treaty, it cannot be interpreted as having created rights, within the meaning of the first paragraph of Article 351, in favour of third States signatory to that convention that correspond to obligations on the part of Romania to execute the arbitral award.

In the second place, the General Court rejects the plea in law alleging that the Commission infringed Article 107(1) TFEU by finding that the conditions for the existence of incompatible State aid were met.

As regards, first, the existence of an economic advantage, the General Court considers that the Commission did not err in identifying the aid measure at issue as consisting in the payment of the compensation of approximately EUR 178 million and not in the arbitral award granting that compensation. That finding is not called into question by the fact that, in the judgment on appeal, the Court of Justice observed that the right to compensation was granted to the arbitration applicants only by the arbitral award. In so doing, the Court of Justice ruled only on the Commission's competence *ratione temporis* to adopt the contested decision under Article 108 TFEU and not on the classification as State aid within the meaning of Article 107(1) TFEU of the payment of the sums at issue.

After noting that the arbitral award compensated the arbitration applicants for the financial consequences of the repeal of the tax incentives scheme and not, as those applicants maintained, for

a failure on the part of Romania to ensure fair and equitable treatment of their investments, in breach of the BIT, the General Court rejects also the argument that compensation for indirect consequences of the repeal of the tax incentives scheme cannot be classified as an advantage for the purposes of Article 107(1) TFEU.

The General Court considers that the case-law relied on by the applicants, according to which the recovery of unlawful aid with a view to re-establishing the status quo ante does not imply the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage procured by that aid, does not apply in the present case. The contested decision orders the recovery of the compensation granted pursuant to the arbitral award, and not the recovery of a hypothetical advantage resulting from the recipient exploiting it. Moreover, an action for damages cannot lead to circumvention of the effective application of the rules on State aid. Thus, damages paid on account of the repeal of an aid scheme cannot escape classification as State aid where those damages meet the definition of an economic advantage for the purposes of those rules.

Lastly, contrary to what the applicants have argued, the case-law arising from the judgment in *Asteris*, [477] according to which State aid is fundamentally different in its legal nature from damages, does not preclude the compensation obtained by the applicants in the present case from being classified as an advantage for the purposes of Article 107(1) TFEU. Since the arbitral award could not have produced effects vis-à-vis the applicants in the EU judicial system as from Romania's accession to the European Union, the Commission was entitled to analyse the existence of State aid irrespective of the legal classification adopted by the arbitral tribunal. It concluded, without being refuted by the applicants, that the measure at issue constituted an economic advantage conferred as compensation for the consequences of the repeal of the tax incentives scheme. Since the payment of the sums at issue did not have the effect of compensating for damage resulting from allegedly wrongful conduct on the part of Romania, the judgment in *Asteris* did not preclude that measure from being classified as State aid.

As regards, second, the imputability of the aid measure at issue, the General Court rejects the applicants' argument that that measure was not imputable to Romania on the ground that that State was under an obligation, vis-à-vis the other signatories of the ICSID Convention, to execute the arbitral award. On that point, the General Court reiterates that, since Romania is subject to the judicial system of the European Union with effect from its accession to the European Union, it was required to set aside the arbitral award, and the applicants cannot rely on an alleged obligation on the part of Romania to execute that award.

In the third place, the General Court holds that the Commission was entitled to designate as the beneficiary of the aid measure the single economic unit comprising Mr Ioan Micula and Mr Viorel Micula and the group of companies owned by them.

In that regard, it recalls, first of all, that where legally distinct natural or legal persons constitute an economic unit, they should be treated as a single undertaking, in particular where the beneficiary of State aid needs to be identified.

In that respect, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking, and must therefore itself, in that respect, be regarded as an undertaking within the meaning of Article 107(1) TFEU.

---

477 Judgment of 27 September 1988, ***Asteris and Others*** (106/87 to 120/87, EU:C:1988:457).

In the present case, the General Court observes that Mr Ioan Micula and Mr Viorel Micula were involved in the economic activities of the arbitration applicant undertakings, intervening directly or indirectly in their management. The fact that the arbitral tribunal granted collective compensation to the arbitration applicants also supports the finding that there was no functional and organisational autonomy on the part of those undertakings vis-à-vis Mr Ioan Micula and Mr Viorel Micula. Moreover, it is apparent from the arbitral award that those brothers were not compensated solely in their capacity as shareholders of the undertakings in question.

Furthermore, the fact that the Commission did not consider that Mr Ioan Micula and Mr Viorel Micula should each also be regarded as undertakings has no bearing on the classification of the beneficiaries of the aid measure at issue. The contested decision finds that they formed, together with all of the applicant undertakings, a single economic unit, which constituted the undertaking in question for the purposes of the application of the State aid rules.

The General Court finds that the Commission also did not err in designating certain undertakings which were not parties to the arbitration proceedings, and which had not therefore received any compensation, as beneficiaries of the aid measure, since those undertakings were controlled by Mr Ioan Micula and Mr Viorel Micula and all the undertakings controlled by those shareholders form a single group which constitutes a coherent whole, from both a financial and industrial point of view.

Moreover, in view of the functions relating to direction and financial support exercised by Mr Ioan Micula and Mr Viorel Micula, the sums paid to the arbitration applicants could benefit, directly or indirectly, undertakings which were not parties to the arbitration proceedings.

In the last place, the General Court considers that the Commission did not err in law in recovering the aid.

On that point, the applicants claimed, inter alia, that, in accordance with the case-law, [478] the sums at issue could not be recovered from the abovementioned single economic unit, but only from the undertakings which had actually benefited from those sums.

The General Court finds, first, that the judgments cited by the applicants did not concern recovery in respect of an aid measure from undertakings forming part of a single economic unit, as in the present case. It recalls, second, that the decisive criterion for the application of EU competition law is the existence of unity in conduct on the market. By their functions relating to direction and financial support, Mr Ioan Micula and Mr Viorel Micula may extend the benefit of the aid measure at issue to all the undertakings in the EFDG. Recovery in respect of that aid measure from the abovementioned single economic unit thus enables the situation prior to the payment of the aid to be restored by eliminating the ensuing competitive advantage for that unit.

Having rejected all the applicants' pleas in law on the merits, the General Court dismisses the actions in their entirety.

---

478 Judgments of 11 May 2005, ***Saxonia Edelmetalle and ZEMAG* v *Commission*** (T-111/01 and T-133/01, EU:T:2005:166, paragraph 113), and of 19 October 2005, ***Freistaat Thüringen* v *Commission*** (T-318/00, EU:T:2005:363, paragraph 324).

IV. Intellectual Property

1. European Union trade mark

Order of 8 February 2024, *Fly Persia and Barmodeh* v *EUIPO – Dubai Aviation (flyPersia)* (T-30/23, EU:T:2024:86)

(EU trade mark – Opposition proceedings – Intervention – Article 173(1) and Article 179 of the Rules of Procedure – Response lodged out of time – Articles 142 to 145 of the Rules of Procedure – Inapplicability – Rejection)

The General Court, ruling in the extended five-judge composition, has not granted Dubai Aviation Corp. – a party to the proceedings before the Board of Appeal of the European Union Intellectual Property Office (EUIPO) – leave to participate as intervener in the proceedings before the Court, after it had exceeded the time limit for lodging its response in accordance with Articles 173 and 179 of the Rules of Procedure of the General Court. Those provisions lay down specific rules in intellectual property matters concerning the intervention before the Court of a party to the proceedings before the Board of Appeal other than the applicant. [479] According to the order, the general provisions on intervention, namely Articles 142 to 145 of those rules, do not apply to such a party where it has lost the opportunity of becoming a party to the proceedings before the Court in accordance with Article 173 of those rules.

In the present case, the applicants, Fly Persia IKE and Mr Ali Barmodeh, applied to EUIPO for registration of an EU trade mark. Dubai Aviation Corp. filed a notice of opposition to that registration. The Opposition Division of EUIPO upheld the opposition in part. The appeal against that decision was dismissed by the Board of Appeal of EUIPO ('the contested decision').

By application lodged at the Court Registry, the applicants brought an action seeking the annulment of the contested decision. On 13 February 2023, the application was served on Dubai Aviation Corp. as a party before the Board of Appeal. On 26 April 2023, that company lodged a document entitled 'Response' at the Registry, thereby exceeding the time limit prescribed under Article 179 of the Rules of Procedure. [480]

Findings of the Court

In the first place, the Court points out that the status before the General Court of a party to the proceedings before the Board of Appeal other than the applicant before the General Court is governed by Article 173 of the Rules of Procedure. When such a party to the proceedings before the Board of Appeal has failed to submit a response to the application within the time limit prescribed in that regard by Article 179 of the Rules of Procedure, it does not have the status of party before the Court. Beyond that time limit, that party cannot therefore submit observations in the course of the proceedings before the Court.

---

479 Pursuant to Article 173(1) and (2) of the Rules of Procedure, 'a party to the proceedings before the Board of Appeal other than the applicant may participate, as intervener, in the proceedings before the General Court by responding to the application in the manner and within the time limit prescribed'. 'Before the expiry of the time limit prescribed for the lodging of a response, [that party] shall become a party to the proceedings before the General Court, as intervener, on lodging a procedural document. He shall lose the status of intervener before the General Court if he fails to respond to the application in the manner and within the time limit prescribed'. According to Article 179 of the Rules of Procedure, the parties to the proceedings before the Board of Appeal other than the applicant are to submit their responses to the application within a time limit of two months from the service of the application.

480 Read in conjunction with Article 60 of those Rules.

In the present case, Dubai Aviation Corp. did not lodge any procedural documents before the expiry of the time limit for the lodging of the response and lodged its response outside that time limit. In addition, it did not plead the existence of exceptional circumstances constituting unforeseeable circumstances or *force majeure*. Accordingly, Dubai Aviation Corp. did not become a party to the proceedings before the Court as an intervener in accordance with Article 173(1) and (2) of the Rules of Procedure.

In the second place, the Court examines whether Dubai Aviation Corp. is to be granted leave to intervene on the basis of Articles 142 to 145 of the Rules of Procedure, which lay down the general rules governing the submission and the examination of applications to intervene before the Court. This would allow Dubai Aviation Corp. to rely on a general time limit. [481]

However, the Court observes that those provisions, which form part of Title III of those rules relating to direct actions, apply to the proceedings referred to in Title IV concerning litigation relating to intellectual property rights, subject to the special provisions of that Title IV. Since Title IV, in Articles 173 and 179 of the Rules of Procedure, lays down specific rules concerning the intervention before the Court of a party to the proceedings before the Board of Appeal other than the applicant, Articles 142 to 145 of those rules do not apply to that party.

Accordingly, the Court finds that it cannot be accepted that, having lost the opportunity of becoming a party to the proceedings as an intervener in accordance with Article 173 of the Rules of Procedure, Dubai Aviation Corp. would be allowed to intervene pursuant to Articles 142 to 145 of those rules. It is also therefore excluded from being entitled to rely on the time limit laid down by Article 143(1) of those rules.

Judgment of 13 November 2024, *Administration of the State Border Guard Service of Ukraine* v *EUIPO (RUSSIAN WARSHIP, GO F**K YOURSELF)* (T-82/24, EU:T:2024:821)

*(EU trade mark – Application for EU figurative mark RUSSIAN WARSHIP, GO F**K YOURSELF – Absolute ground for refusal – No distinctive character – Article 7(1)(b) of Regulation (EU) 2017/1001 – Political slogan – Equal treatment – Principle of sound administration – Article 71(1) of Regulation 2017/1001)*

By its judgment, the General Court addresses, for the first time, the question of the possibility of registering a 'political slogan' as a trade mark.

A Ukrainian border guard, the predecessor-in-title to the applicant, Administration of the State Border Guard Service of Ukraine, filed with the European Union Intellectual Property Office (EUIPO) an application for registration of the figurative sign 'RUSSIAN WARSHIP, GO F**K YOURSELF' as an EU trade mark for various goods and services. [482] The examiner rejected that application for registration in its entirety on the basis of Article 7(1)(f) of Regulation 2017/1001, [483] according to which trade marks which are contrary to public policy or to accepted principles of morality must not be registered. The applicant filed a notice of appeal with EUIPO against the examiner's decision. By the contested

481 According to Article 143(1) of the Rules of Procedure, an application to intervene must be submitted within six weeks of the publication of the notice in the *Official Journal of the European Union* on the related application to initiate proceedings.

482 More specifically, the mark applied for covers the goods and services in Classes 9, 14, 16, 18, 25, 28 and 41 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

483 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).

decision, [484] the Board of Appeal dismissed the appeal on the ground that the mark applied for was devoid of any distinctive character in respect of the goods and services at issue and therefore had to be refused registration pursuant to Article 7(1)(b) of Regulation 2017/1001.

Findings of the Court

The Court notes that the applicant submits unsuccessfully that the Board of Appeal erred in classifying the mark applied for as a 'political slogan'.

The phrase in the mark applied for had been widely used, immediately after its first use, in order to rally support for Ukraine and had thus become, very quickly, a symbol of Ukraine's fight against the aggression of the Russian Federation. Accordingly, that phrase was used in a political context, repetitively and with the aim of expressing and promoting support to Ukraine. That situation corresponds perfectly to the definition of the expression 'political slogan' put forward by the applicant itself in its application, namely, an expression, used in a political or social context, repetitive of an idea or purpose, with the goal of persuading the public or a target group within it.

The phrase used in the mark applied for has been used very intensively in a non-commercial context and will necessarily be associated very closely with that context by the relevant public. The phrase used in the mark applied for very quickly became one of the symbols of Ukraine's fight against Russian aggression, associated with a soldier of the Ukrainian army and, thus, with Ukraine. Given the extent of the media coverage of that event, that phrase will be associated with that recent historical moment, well known to the average EU consumer.

In that regard, the Court considers that the Board of Appeal did not err in law in finding that the general principle that the relevant public is not very attentive with regard to a sign which does not immediately indicate the origin of the goods and services concerned, given that they would not perceive it or mentally register it as a trade mark, also applied to signs whose main message was of a political nature.

In view of the essential function of a trade mark, namely that of identifying the origin of the goods or services covered by it, a sign is incapable of fulfilling that function if the average consumer does not perceive, in its presence, the indication of the origin of the goods or services, but only a political message.

As regards the obligation to state reasons, the Court points out that, where the same ground for refusal is given for a category or group of goods or services, the competent authority may use only general reasoning for all of the goods or services concerned. The case-law has indeed made clear that such a power extends only to goods and services which are interlinked in a sufficiently direct and specific way, to the point where they form a sufficiently homogeneous category or group of goods or services. Nevertheless, it has stated that it is necessary to take into account, in order to determine whether the goods and services are interlinked in a sufficiently direct and specific way and can be placed in sufficiently homogenous categories and groups, the fact that the objective of that exercise is to enable and facilitate the assessment *in concreto* of the question whether or not the mark concerned by the application for registration comes under one of the absolute grounds for refusal. In addition, the placement of the goods and services at issue in one or more groups or categories must be carried out in particular on the basis of the characteristics which are common to them and which are relevant for the analysis of whether or not a specific absolute ground for refusal may apply to the mark applied for in respect of those goods and services. It follows that such an assessment must be carried out *in concreto* for the examination of each application for registration and, as the case may be, for each of the different absolute grounds for refusal which may apply.

---

484 Decision of the First Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 1 December 2023 (Case R 438/2023-1).

In the present case, the Board of Appeal found, in the contested decision, that the mark applied for would not be perceived by the relevant public as indicating a commercial origin. Furthermore, it stated that the phrase in the mark applied for would first and foremost be interpreted as a political message and that that perception would be identical for all the goods or services covered by that mark. It follows that the Board of Appeal found that the goods and services covered by the mark applied for form a sufficiently homogeneous group, having regard to the absolute ground for refusal which, in its view, has caught registration of that mark.

Given that the Board of Appeal was right in finding that the mark applied for would not be perceived by the relevant public as indicating a commercial origin, but as a political message promoting support for Ukraine's fight against the military aggression of the Russian Federation, it could validly group all the goods and services covered by the mark applied for in a single category, despite having different inherent characteristics.

Therefore, in view of the specific nature of the mark applied for and its identical perception by the relevant public with regard to all the goods and services covered by the application for registration, the Court held that it was without committing an error of assessment that the Board of Appeal found that those goods and services form part of a single group to which the ground for refusal, which it upheld, applies in the same way and that it was right to find that the mark applied for is devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation 2017/1001.

2. Designs

Judgment of 23 October 2024, *Orgatex* v *EUIPO – Longton (Floor markings)* (T-25/23, EU:T:2024:725)

(Community design – Invalidity proceedings – Registered Community design representing floor markings – Articles 3(a) and 25(1)(a) of Regulation (EC) No 6/2002 – Unicity of the design – Consistency of views)

Hearing an application for a declaration of invalidity, which it rejects, the General Court rules on the novel issue of the consistency of views in the light of the requirement of unicity of a design. It also clarifies the absence of a principle of interpretation favourable to the registration of a Community design in invalidity proceedings.

Orgatex GmbH & Co. KG, the applicant, is the holder of a Community design representing floor markings. Mr L. Longton applied to the European Union Intellectual Property Office (EUIPO) for a declaration of invalidity of that design, which was rejected by the Cancellation Division.

However, the Board of Appeal annulled the decision of the Cancellation Division and declared the contested design invalid, holding that it had been registered in breach of Article 3(a) of Regulation No 6/2002, [485] as the four views filed were inconclusive and presented at least two different designs.

Findings of the Court

In the first place, the Court points out that the examination of a design under Article 3(a) of Regulation No 6/2002 must be carried out on the basis of the representation entered in the register, which determines the subject matter and scope of protection. Observations made by the applicant or holder during the proceedings can therefore only be taken into account if they are apparent from the representation of the design. Therefore, it will examine whether the views that make up the

485 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

representation as a whole show the appearance of a single or unitary product, namely whether there is unicity in the design.

In that regard, the Court notes that the requirement that the views be consistent implies that all the views show the appearance of one and the same product, so that they enable one and the same design to be clearly identified. Inconsistencies or contradictions between the views filed may lead to the conclusion that the representation shows different products. That is particularly the case where the views constitute different embodiments or versions of the same concept, or where the use of lines to identify the design or the use of exclusions of certain features is not consistent overall. Indeed, there can be no unicity of design if the views are insolubly inconsistent or insurmountably contradictory, because the appearance of a single product cannot be determined and, consequently, the representation does not allow a single design to be clearly identified. Conversely, the unicity of the design may be established despite minor discrepancies between the views, strictly to the extent that those views can be reconciled in the sense of a unitary design. That being the case, the Court points out that the EUIPO authorities are not obliged to consider all the possible combinations between the views provided by the applicant in the application for registration, but only those combinations which seem logical and plausible in the light of common experience.

In the second place, the Court observes that there is nothing in Regulation No 6/2002 which requires a principle of interpretation favourable to the applicant for, or holder of, a Community design and infers from that that there is no such principle in invalidity proceedings.

In the third place, the Court notes that the assumption that views 1.1 and 1.2 of the contested design show the front face and views 1.3 and 1.4 the rear face, each with a top view and a perspective view, seems logical and plausible in the light of common experience. Those views are insolubly inconsistent and do not show a unitary design, with the result that the contested design has been entered in the EUIPO register in breach of Article 3(a) of Regulation No 6/2002.

Lastly, the Court examined the hypothesis put forward by the applicant as being more favourable to it, according to which view 1.1 shows the front face and views 1.2, 1.3 and 1.4 the rear face of the contested design. First, it states that EUIPO was not obliged to consider such a hypothesis. Such a hypothesis is hardly logical or plausible in the light of common experience, since, unless there are special circumstances which have not been demonstrated and are not present in the present case, it seems illogical and implausible to show a single view of the front face and three views of the rear face. Secondly, it notes that that hypothesis also leads to insoluble inconsistencies between the views and stresses that those inconsistencies cannot be overcome by a comparison with products allegedly on the market. While the products marketed corresponding to a design may be taken into account in assessing the overall impression, in the present case it is not a question of assessing whether two conflicting designs produce the same overall impression on the informed user, but of determining whether a design is unique on the basis of the representation recorded in the register.

In the light of those considerations, the Court concludes that, even assuming the hypothesis put forward by the applicant, there are insurmountable contradictions or insoluble inconsistencies between the views and that, consequently, they do not represent a unitary design.

V. Common foreign and security policy – Restrictive measures

1. Belarus

Judgment of 20 March 2024, *Belshyna* v *Council* (T-115/22, EU:T:2024:187)

(Common foreign and security policy – Restrictive measures taken because of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine – Freezing of funds – Lists of persons, entities and bodies to whom the freezing of funds and economic resources applies – Registering and maintaining the applicant's name on the lists – Support for Lukashenko's regime – Financial support – State-owned business – Repression of civil society – Error of assessment)

In its judgment, the General Court upholds the action for annulment brought by Belshyna AAT against the acts by which it was included, and then retained for a second time, by the Council of the European Union, on the list of persons and entities subject to restrictive measures on account of the situation in Belarus. This case gives the Court the opportunity to clarify the admissibility, under Article 86(1) of the Rules of Procedure of the General Court, of an application for modification of the application in proceedings concerning restrictive measures.

This judgment forms part of the restrictive measures adopted by the European Union since 2004 in view of the situation in Belarus with regard to democracy, the rule of law and human rights. Those measures provide for, inter alia, the freezing of funds and economic resources belonging to persons, entities or bodies responsible for serious violations of human rights or the repression of civil society and democratic opposition, or whose activities seriously undermine democracy or the rule of law in Belarus, as well as persons, entities or bodies supporting the Lukashenko regime. [486] The applicant, an undertaking established in Belarus that manufactures tyres, was placed on that list in 2021 [487] by the Council, and then retained on the list in 2022 [488] and 2023, [489] on the grounds that it represented a major source of revenue for the Lukashenko regime and that it had dismissed employees who had gone on strike in the wake of the 2020 presidential elections. After requesting the annulment of the initial acts, the applicant modified its application to also request the annulment of the 2023 maintaining acts, without however having made such a request for the 2022 maintaining acts.

---

486 Article 4(1)(a) and (b) of Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus (OJ 2012 L 285, p. 1) and Article 2(4) of Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus (OJ 2006 L 134, p. 1), as amended by Council Regulation (EU) No 1014/2012 of 6 November 2012 (OJ 2012 L 307, p. 1).

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

488 Council Decision (CFSP) 2022/307 of 24 February 2022 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 97) and Council Implementing Regulation (EU) 2022/300 of 24 February 2022 implementing Article 8a of Regulation (EC) No 765/2006 concerning restrictive measures in view of the situation in Belarus (OJ 2022 L 46, p. 3) ('the 2022 acts').

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

Findings of the Court

With regard to the examination of the admissibility of the modification of the application, which is a matter of public policy, the Court points out that, where a measure the annulment of which is sought is replaced or amended by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed, or before the decision of the Court to rule without an oral part of the procedure, modify the application to take account of that new factor. [490]

In the present case, the Court observes, first of all, that both the initial acts and the maintaining acts, in so far as they concern the applicant, have as their subject matter the imposition on it of individual restrictive measures consisting of a freezing of all its funds and economic resources. [491]

The Court then notes that those individual restrictive measures take the form of the inclusion of the names of the targeted persons, entities or bodies on the lists at issue set out in the annexes to Decision 2012/642 and Regulation No 765/2006.

In that context, the initial acts amended the annexes to Decision 2012/642 and Regulation No 765/2006 to include, in particular, the applicant's name on the lists at issue. As regards the maintaining acts, the Court notes, first, that Decision 2023/421 extended until 28 February 2024 the applicability of Decision 2012/642, Annex I to which, as amended by Implementing Decision 2021/2125, mentioned the applicant's name. Secondly, Implementing Regulation 2023/419 amended Annex I to Regulation No 765/2006, while maintaining, at least implicitly, the inclusion of the applicant's name in that annex. Consequently, the maintaining acts must be regarded as having amended the initial acts within the meaning of Article 86(1) of the Rules of Procedure.

In the light of the foregoing, the Court concludes that the applicant, having sought annulment of the initial acts in the application, was entitled to modify the application in order to seek annulment of the 2023 maintaining acts, even though it had not previously modified the application in order to seek annulment of the 2022 acts.

2. Ukraine

Judgment of 11 September 2024 (Grand Chamber), *Timchenko and Timchenko* v *Council* (T-644/22, EU:T:2024:621)

(Common foreign and security policy – Restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicants' names on the list – Obligation to report funds or economic resources belonging to or owned, held or controlled by the applicants – Obligation to cooperate with the competent national authority – Participation in activities the object or effect of which is to circumvent restrictive measures – Article 9(2) and (3) of Regulation (EU) No 269/2014 – Action for annulment – Locus standi – Direct concern – Regulatory act not entailing implementing measures – Interest in bringing proceedings – Admissibility – Misuse of powers – Power of the Council – Proportionality – Legal certainty)

In its judgment, the General Court, sitting as the Grand Chamber, confirms that the Council of the European Union has the power (i) to impose obligations to report funds and cooperate with the competent national authorities on persons subject to restrictive measures, and (ii) to treat non-compliance with those obligations as a circumvention of fund-freezing measures.

---

490 Article 86(1) of the Rules of Procedure.

491 Pursuant to Article 4(1)(a) and (b) of Decision 2012/642 and Article 2(4) and (5) of Regulation No 765/2006.

That judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the war operations that the Russian Federation has been conducting against Ukraine since March 2014. In 2022, Mr Timchenko, a businessman with Russian and Finnish nationality, and his wife were included on the lists of persons, entities and bodies subject to restrictive measures set out in the annex to Decision 2014/145 [492] and Annex I to Regulation No 269/2014. [493]

In the present case, they ask the Court to annul Article 9(2) and (3) of Regulation No 269/2014, as amended by Article 1, point 4, of Regulation 2022/1273. [494] Those paragraphs, respectively, lay down obligations to report funds and to cooperate with the competent national authorities and provide that failure to comply with those obligations is to be treated as participation in the circumvention of fund-freezing measures.

According to the applicants, by adopting those provisions, the Council exceeded the powers conferred on it by Article 215(2) TFEU and acted in the stead of the Member States in deciding how the restrictive measures should be implemented and what penalties should apply in the territory of the Member States. They also claim that the reporting obligation infringes the principle of legal certainty in so far as it is based on concepts that are imprecise.

The Court dismisses the action.

Findings of the Court

In the first place, concerning the Council's power to adopt the contested provisions on the basis of Article 215(2) TFEU, the Court recalls, first, that, under Articles 24 and 29 TEU, the Council has a broad discretion in determining, in decisions taken unanimously in the field of the CFSP, the persons and entities that are to be subject to the restrictive measures that the European Union adopts in that field. Article 215 TFEU allows the Council to adopt regulations in order to implement or give effect to restrictive measures and to ensure their uniform application in all Member States. Such measures are not limited to obligations not to act.

Thus, decisions adopted under Article 29 TEU declare the position of the European Union with respect to the restrictive measures to be adopted, while regulations adopted on the basis of Article 215 TFEU relate to those decisions and constitute the instrument giving effect to them at EU level.

In the present case, the reporting and cooperation obligations laid down in Article 9(2) of Regulation No 269/2014, as amended, were established in order to ensure the uniform application of that regulation in the territory of the European Union and to thwart strategies to circumvent restrictive measures, strategies made possible, in particular, by recourse to complex legal and financial arrangements. Consequently, those obligations are such as to ensure the effective and uniform implementation of the restrictive measures for the freezing of funds provided for in Decision 2014/145, to which they relate.

---

492 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16), as amended by Council Decision (CFSP) 2022/337 of 28 February 2022 (OJ 2022 L 59, p. 1) and by Council Decision (CFSP) 2022/582 of 8 April 2022 (OJ 2022 L 110, p. 55).

493 Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6), as amended by Council Implementing Regulation (EU) 2022/336 of 28 February 2022 (OJ 2022 L 58, p. 1) and by Council Implementing Regulation (EU) 2022/581 of 8 April 2022 (OJ 2022 L 110, p. 3).

494 Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 194, p. 1).

For those reasons, the Council was entitled, on the basis of Article 215(2) TFEU and without infringing Article 29 TEU, to adopt such obligations by means of an EU regulation, irrespective of the fact that those obligations were not expressly provided for in the related decision.

Secondly, the Court takes the view that both Article 9(3) of Regulation No 269/2014, as amended, and Article 15(1) thereof, as amended by Regulation 2022/880, [495] could be adopted by the Council under Article 215(2) TFEU and that the Council cannot thus be accused of having improperly acted in the stead of the Member States in the exercise of their legislative powers. Those provisions cannot be regarded as constituting an offence of a criminal nature and, therefore, as having been adopted in breach of Article 83 TFEU.

The characterisation of participation in circumvention activities cannot, as such, be considered to constitute an offence of a criminal nature. Furthermore, it follows from the wording of Article 15(1) of Regulation No 269/2014, as amended, and from the last sentence of recital 5 of Regulation 2022/880 that the decision as to whether the applicable penalties for infringing Regulation No 269/2014 are to be of a civil, administrative or criminal nature falls within the power conferred on the Member States, including where the penalty of confiscation of the proceeds of an infringement is imposed.

Since the legal rules governing the reporting and cooperation obligations and the penalties provided for in the event of infringement of those obligations do not fall within the scope of criminal law, with the result that Article 83 TFEU has not been infringed, the Council has also not infringed Article 40 TEU.

In the second place, the Court clarifies the concept of 'restrictive measures' by distinguishing it from the 'penalty of confiscation' of the proceeds of infringements in the event of failure to comply with the reporting and cooperation obligations laid down in Article 15(1) of Regulation No 269/2014. Such a penalty applies only to 'the proceeds of infringements', whereas the subject matter of the restrictive measures, which retain their precautionary and temporary nature, is concerned with funds and economic resources as determined by Article 2(1) of Regulation No 269/2014. Accordingly, the penalties attached to the circumvention referred to in Article 9(3) of Regulation No 269/2014, as amended, do not alter the nature of the restrictive measures.

In the third place, concerning the precision of the concepts used as the basis for the reporting obligation at issue, the Court recalls that the principle of legal certainty requires that EU legislation be clear and precise and that its application be foreseeable for all interested parties.

In the present case, the wording used in Article 9(2) of Regulation No 269/2014, as amended, refers to the concepts of 'belonging to, owned, held or controlled', which are autonomous concepts of EU law and, as such, must be interpreted in a uniform manner throughout the territory of the European Union, taking into account the wording of that provision and the context in which it occurs and also the objectives pursued by the rules of which it is part.

In that regard, at the time of the adoption of Article 9(2) of Regulation No 269/2014, as amended, the Council's objective was to exert pressure on the persons and entities subject to restrictive measures, pressure that has a knock-on effect on the Russian authorities and is intended, in particular, to increase the costs of the Russian Federation's actions to undermine Ukraine's territorial integrity, sovereignty and independence. Against that background, it must be held that, by employing the

---

495 Council Regulation (EU) 2022/880 of 3 June 2022 amending Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 153, p. 75). Article 15(1) of Regulation No 269/2014 now provides that 'Member States shall lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented'. It adds that 'Member States shall also provide for appropriate measures of confiscation of the proceeds of such infringements.'

concepts of 'belonging to, owned, held or controlled', the Council was referring to the right to dispose of or to use funds or economic resources, as defined in Article 1(d) and (g) of Regulation No 269/2014.

Those concepts do not therefore display any ambiguity capable of establishing the existence of legal uncertainty as to their scope or meaning for the persons subject to fund-freezing measures. In that regard, the fact that the Council organised a conference or had recourse to a best practice guide aimed at national authorities, with a view to clarifying the concepts used in the field of restrictive measures, is not in itself capable of establishing the existence of such legal uncertainty.

Judgment of 11 September 2024 (Grand Chamber), *Fridman and Others* v *Council* (T-635/22, EU:T:2024:620)

(Common foreign and security policy – Restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – List of persons, entities and bodies subject to the freezing of funds and economic resources – Inclusion of the applicants' names on the list – Obligation to report funds or economic resources belonging to or owned, held or controlled by the applicants – Obligation to cooperate with the competent national authority – Participation in activities the object or effect of which is to circumvent restrictive measures – Article 9(2) and (3) of Regulation (EU) No 269/2014 – Action for annulment – Locus standi – Direct concern – Regulatory act not entailing implementing measures – Interest in bringing proceedings – Admissibility – Misuse of powers – Power of the Council – Proportionality – Legal certainty)

In its judgment, the General Court, sitting as the Grand Chamber, confirms that the Council of the European Union has the power (i) to impose obligations to report funds and cooperate with the competent national authorities on persons subject to restrictive measures, and (ii) to treat non-compliance with those obligations as a circumvention of fund-freezing measures.

That judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the war operations that the Russian Federation has been conducting against Ukraine since March 2014. In 2022, the names of Mr Fridman and Mr Khan, who have Russian and Israeli nationality, and of Mr Aven, who has Russian and Latvian nationality, were added to the lists of persons, entities and bodies subject to restrictive measures set out in the annex to Decision 2014/145 [496] and Annex I to Regulation No 269/2014. [497]

In the present case, Mr Fridman, Mr Khan and Mr Aven ask the Court to annul Article 9(2) and (3) of Regulation No 269/2014, as amended by Article 1, point 4, of Regulation 2022/1273, [498] provisions which, respectively, lay down obligations to report funds and to cooperate with the competent authorities in that regard, and treat failure to comply with those obligations as a circumvention of fund-freezing measures.

---

496 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16). The names of Mr Aven and Mr Fridman were added to the annex of that decision on the basis of Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145 (OJ 2022 L 59, p. 1), and Mr Khan's name was added on the basis of Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145 (OJ 2022 L 87 I, p. 44).

497 Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 6). The names of Mr Aven and Mr Fridman were added to the annex of that regulation on the basis of Council Implementing Regulation (EU) 2022/336 of 28 February 2022 implementing Regulation No 269/2014 (OJ 2022 L 58, p. 1), and Mr Khan's name was added on the basis of Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation No 269/2014 (OJ 2022 L 87 I, p. 1).

498 Council Regulation (EU) 2022/1273 of 21 July 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 194, p. 1).

According to the applicants, the Council cannot impose positive obligations on persons subject to sanctions on the basis of Article 215 TFEU. Furthermore, the obligation to disclose their financial position is a form of sanction and not a 'restrictive measure' within the meaning of that provision. In addition, those obligations are invasive of privacy, excessive and uncertain, as the terms on which they are based are vague and undefined. They argue that those obligations are also extraterritorial in scope. Moreover, by adopting the contested provisions when it was aware that the circumvention of sanctions was a criminal offence in 25 of the 27 Member States, the Council acted as a legislative authority in criminal matters, although that competence lies with the Member States.

The Court dismisses the action.

Findings of the Court

As a preliminary point, the Court examines the admissibility of the action and, more particularly, the applicants' standing to bring proceedings and their interest in having the contested act annulled.

In that context, first, the Court holds that the contested provisions are of direct concern to the applicants since they directly affect the applicants' legal situation. The reporting and cooperation obligations and the effects of failing to comply with them apply to the applicants as persons included on the list set out in Annex I to Regulation No 269/2014 when those provisions came into force. Moreover, the application of the provisions in question vis-à-vis the applicants does not require any implementing measure to be adopted and leaves no discretion to the addressees who are entrusted with the task of implementing those provisions, with the result that they affect the applicants' legal situation in a purely automatic fashion.

Secondly, the Court states that, irrespective of whether or not the applicants or other persons have reported or frozen the funds or economic resources in question and, as the case may be, cooperated with the competent authorities, or of whether or not those funds or economic resources have been frozen, the applicants retain an interest in securing the annulment of the contested provisions, which impose on them reporting and cooperation obligations non-compliance with which may have serious consequences. An applicant's interest in bringing proceedings does not disappear because he or she has performed the obligations which he or she is challenging. Consequently, the applicants' interest in bringing proceedings persists without them having to demonstrate that they infringed their obligations.

Furthermore, compliance with the reporting obligation does not entail the discharge of all the obligations laid down in the contested provisions. Once funds or economic resources have been reported to the competent national authority, Article 9(2) of Regulation No 269/2014 requires the persons who have reported them to cooperate with that national authority in any verification. It follows that the applicants retain a vested and current interest in bringing proceedings against that provision.

As to the substance, in the first place, as regards the Council's power to adopt the contested provisions on the basis of Article 215(2) TFEU, the Court notes, first of all, that the contested provisions were established in order to ensure the uniform application of Regulation No 269/2014 throughout the European Union and to thwart strategies to circumvent restrictive measures, strategies made possible, in particular, by recourse to complex legal and financial arrangements. They are, therefore, not restrictive measures as such, but measures that ensure the effective and uniform implementation of the restrictive measures provided for in Decision 2014/145. Therefore, the contested provisions were correctly adopted on the basis of Article 215(2) TFEU.

Next, as regards the alleged breach of the right to privacy, the Court states, first, that the obligations at issue are 'provided for by law', since they are set out in Regulation 2022/1273, have a clear legal basis in EU law, namely Article 215 TFEU, and are sufficiently foreseeable. Secondly, those obligations do not interfere with the essence of the right to privacy in so far as they are limited to funds or

economic resources within the jurisdiction of a Member State and are imposed on the applicants because their names appear in Annex I to Regulation No 269/2014. Thirdly, the objective of those obligations is to enable the funds and economic resources owned, held or controlled by the persons and entities subject to restrictive measures to be identified, and thereby to implement those measures effectively and uniformly, that being part of the broader objective of the restrictive measures. As it is, the importance of the objectives thus pursued is such as to justify the adverse consequences relating to the interference with the right to privacy alleged by the applicants. Fourthly, as to the appropriateness and necessity of the obligations at issue, new arrangements for implementing restrictive measures were warranted by the need to ensure the effectiveness and uniform application of the restrictive measures regime concerning the situation in Ukraine, notably in the light of the circumvention of restrictive measures as a result of the establishment of increasingly complex schemes.

Lastly, as regards the claim that the contested obligations breach the principle of legal certainty because the terms on which they are based are vague and undefined, the Court considers that the reference in Article 9(2) of Regulation No 269/2014 to the concepts of 'belonging to, owned, held or controlled' in relation to funds or economic resources is sufficiently clear and comprehensible as regards what is covered by those concepts, thus enabling the persons targeted to comply with the reporting obligation. Moreover, it follows from that provision that assets which are not within the jurisdiction of a Member State are not covered by those obligations. Furthermore, in the case of persons outside the European Union, only their assets in the territory of the European Union are covered, which constitutes a sufficient link to the European Union. Consequently, the argument relating to the extraterritorial scope of the obligations at issue must be rejected.

In the second place, the Court rules on the applicants' arguments to the effect that, by adopting the contested provisions, the Council acted as a legislative authority in criminal matters. In that regard, it states that, even if the Council was aware that the circumvention of sanctions was a criminal offence in all but two of the Member States, it cannot be inferred from this that, by adopting the contested provisions, the Council obliged the Member States to make the circumvention of the freezing of funds a criminal offence. The fact that, in the Member States in which the circumvention of restrictive measures is already a criminal offence, the penalties for breach of the two obligations at issue are, in consequence, also criminal stems not from the contested provisions but from the Member States' choice of penalties.

That finding is not altered by a combined reading of Articles 9 and 15 of Regulation No 269/2014. It is clear from Article 15(1) of that regulation that it is the Member States that are to lay down the rules on penalties applicable to infringements of the provisions of that regulation. Therefore, in the event of a failure to comply with the obligations at issue, treated as a circumvention of restrictive measures, the power to decide on the rules on penalties, including whether they are to be criminal penalties or not, still rests with the Member States.

Lastly, that finding is not altered by the adoption, on 28 November 2022, of Decision 2022/2332 or by the Commission's adoption, on 2 December 2022, of a proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures. The Court notes in that respect that those legislative steps towards harmonisation of the criminal law of the Member States are precisely distinguishable from the approach taken in Regulation 2022/1273, based on Article 215(2) TFEU, which is merely intended to ensure the effective and uniform implementation of Regulation No 269/2014. Unlike a directive, defining criminal offences and criminal penalties in respect of the circumvention of restrictive measures and adopted on the basis of Article 83(1) TFEU, which would bind the Member States to which it is addressed as to the outcome to be achieved in criminal matters, the rules on penalties laid down in Article 15(1) of Regulation No 269/2014 leave the Member States free to choose the nature – whether criminal, administrative or civil – of the penalties to be adopted in the event of any breach of the prohibition on circumvention of restrictive measures.

3. Russia

Judgment of 2 October 2024 (Grand Chamber), *Ordre néerlandais des avocats du barreau de Bruxelles and Others* v *Council* (T-797/22, EU:T:2024:670)

(Common foreign and security policy – Restrictive measures adopted in view of Russia's actions destabilising the situation in Ukraine – Prohibition on the provision of legal advisory services to the Russian Government and entities established in Russia – Fundamental role of lawyers in a democratic society – Right of lawyers to provide legal advisory services – Right to be advised by a lawyer – Articles 7 and 47 and Article 52(2) of the Charter of Fundamental Rights – Independence of lawyers – Rule of law – Proportionality – Legal certainty)

The General Court, sitting as the Grand Chamber, confirms the lawfulness of the prohibition, set out in Article 5n(2) of Regulation No 833/2014, [499] on the direct or indirect provision of legal advisory services to the Russian Government or to legal persons, entities or bodies established in Russia ('the prohibition at issue'). The case concerns whether there is a fundamental right of access to a lawyer, including in situations where there is no link with judicial proceedings. The Court clarifies, inter alia, the scope of the right to an effective remedy guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and of the right to professional secrecy guaranteed in Article 7 of the Charter. The Court dismisses the action on the merits, without ruling on the pleas of inadmissibility alleging, in particular, that the applicants lack standing to bring proceedings.

This judgment arises in the context of a package of restrictive measures adopted by the European Union in response to the military aggression perpetrated by the Russian Federation against Ukraine on 24 February 2022. In support of their action seeking annulment of the acts which introduced, and then maintained, [500] the prohibition at issue, the applicants, including the Ordre néerlandais des avocats du barreau de Bruxelles, argued, in particular, that that prohibition entailed a breach of the right of access to legal advice from a lawyer, and interference with the professional secrecy and the independence of lawyers.

Findings of the Court

In the first place, the Court rejects the plea in law alleging infringement of the right to consult a lawyer in order to obtain legal advice.

First, the Court holds that a person must only be recognised as having the possibility of being advised, defended and represented by a lawyer, which is provided for, by way of the right to an effective remedy and the right to a fair trial, by Article 47 of the Charter, where there is a link with judicial proceedings. In that regard, it recalls that the Court of Justice has recognised the fundamental role of lawyers in a State governed by the rule of law only in so far as they contribute to the proper administration of justice and ensure that clients' interests are protected. Second, the General Court notes that professional secrecy is afforded the protection enshrined in Article 7 of the Charter where there is no link with judicial proceedings. However, that protection is not intended to guarantee a fundamental right of access to a lawyer and to legal advice from a lawyer irrespective of any link with

---

499 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1), as amended by Council Regulation (EU) 2022/1904 of 6 October 2022 (OJ 2022 L 259 I, p. 3).

500 Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation No 833/2014 (OJ 2022 L 322 I, p. 1), and Council Regulation (EU) 2023/427 of 25 February 2023 amending Regulation No 833/2014 (OJ 2023 L 59 I, p. 6).

judicial proceedings, but rather its sole purpose, in the light of the right to respect for private life, is to preserve the confidentiality of correspondence between a lawyer and his or her client.

Consequently, the protection guaranteed in Article 7 of the Charter and that guaranteed in Article 47, considered in isolation or together, are not such as to form the basis of a fundamental right for all persons to have access to and be advised by a lawyer other than in the context of existing or probable litigation. The fundamental right of access to a lawyer and to advice from him or her must therefore be recognised solely if there is a link with judicial proceedings, whether such proceedings have already been commenced or can be pre-empted or anticipated, on the basis of tangible elements, at the stage at which the lawyer assesses his or her client's legal situation.

In the present case, Article 5n(5) and (6) of Regulation No 833/2014 permits a lawyer to carry out a prior assessment of the legal situation of legal persons, entities or bodies established in Russia that consult him or her, in order to determine whether the advice sought from him or her is strictly necessary in order to ensure access, in particular, to judicial proceedings, with a view to pre-empting or anticipating such proceedings or to ensuring that they are properly conducted if they have already been commenced.

First, the Court infers from the foregoing that the prohibition at issue does not infringe the right to be advised, defended and represented by a lawyer protected by Article 47 of the Charter. Second, since Article 7 of the Charter does not guarantee a right of access to a lawyer, be it in judicial proceedings or in a non-contentious context, the prohibition at issue cannot constitute interference with a right deriving from that article.

In the second place, as regards the professional secrecy of lawyers, the Court notes that the disclosure by a lawyer of, in particular, his or her identity or the fact that he or she has been consulted, where that disclosure is compulsory and takes place without the consent of the lawyer's client, constitutes interference with the client's right to respect for private and family life, home and communications guaranteed by Article 7 of the Charter.

In the present case, the Court finds that, whilst the exemption provisions enable the competent authorities to lift the prohibition at issue in certain specifically identified situations, they nevertheless grant the competent authorities discretion as to the manner in which an application for exemption must be set out, lodged and processed. Accordingly, for example, the exemption provisions do not govern who may submit the application to the competent national authorities. Similarly, the provisions at issue do not suggest that a lawyer is required to share with the competent authorities, without his or her client's consent, information that is covered by the professional secrecy guaranteed by Article 7 of the Charter. As regards the information necessary for processing applications for exemption, the exemption provisions likewise do not mention the material which the competent authority must have available to it in order to carry out its examination.

Nevertheless, when defining the arrangements for implementing the exemption procedures, the Member States are implementing EU law within the meaning of Article 51(1) of the Charter, and must therefore ensure respect for Article 7 of the Charter, in compliance with the conditions laid down in Article 52(1) thereof. Consequently, the Court holds that the exemption provisions do not, in themselves, entail interference with the right guaranteed in Article 7 of the Charter.

In any event, even assuming that the exemption provisions do give rise to interference with the professional secrecy of lawyers guaranteed in Article 7 of the Charter, the Court recalls that limitations on the exercise of that right are permitted, in accordance with Article 52(1) of the Charter, provided that they are provided for by law, respect the essence of that right and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union.

In the present case, the Court notes that the prohibition at issue is provided for by law and respects the essence of the right to respect for communications between lawyers and their clients enshrined in Article 7 of the Charter. Moreover, that prohibition corresponds in an appropriate and consistent manner to the objective of further increasing the pressure on the Russian Federation to end its war of aggression against Ukraine. The exemption provisions, in so far as they allow the prohibition at issue to be lifted in specifically identified situations, themselves pursue that objective of general interest, in accordance with the objectives of the Union's external action, set out in Article 21 TEU, and appear to be proportionate in the light of those objectives. The Court makes clear in that regard that the exemption provisions intended to lift the provision at issue are themselves limited to what is necessary to achieve the aims pursued by the contested regulations.

Finally, as regards the complaint alleging interference with the independence of lawyers as the result of the prohibition at issue, the Court recalls that a person's right to legal advice given in full independence by a lawyer is inherent in the right to an effective remedy. Since the prohibition at issue does not entail any interference with the right to an effective remedy guaranteed by Article 47 of the Charter, the Court finds that it has not been established that the prohibition at issue is capable of giving rise to interference with the independence of lawyers.

In that regard, notwithstanding the absence of a rule of primary law enshrining and defining the independence of lawyers, the Court of Justice has recognised the importance of such independence for the purpose of guaranteeing the right of all persons subject to the law to an effective remedy, in contexts where there is a link with judicial proceedings. Whilst it is clear from the Code of Conduct for European lawyers that independence may also extend to legal advisory activities unconnected with judicial proceedings, the provisions of the Code of Conduct for European lawyers are not, however, rules of EU law and therefore cannot constitute a legal basis for the recognition of the independence of lawyers at EU level.

Even if the independence of lawyers, in the same way as the protection of professional secrecy under Article 7 of the Charter, were also to be recognised outside a contentious context, and that there were found to be interference with that independence, the General Court also recalls that the independence of lawyers does not mean that the profession of lawyer cannot be subject to limitations. That independence may be subject to restrictions justified by objectives of general interest pursued by the European Union, provided that such restrictions do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very essence of the independence of lawyers.

In the present case, the Court finds that, even if there were interference with the independence of lawyers, it would be justified and proportionate. First, the Court notes that the provision at issue, as delimited, inter alia, by the exemption provisions, pursues objectives of general interest. Second, although the exemption provisions afford the competent authorities the possibility of lifting the prohibition at issue in relation to certain legal advisory services, those provisions do not enable the competent authorities to influence the actual content of any advice that might be provided by the lawyer to the Russian Government or to an entity established in Russia. The same applies to the prohibition at issue itself. The prohibition at issue and, in particular, the exemption provisions therefore do not constitute disproportionate and intolerable interference impairing the very essence of the independence of lawyers.

VI. Digital services

Judgment of 17 July 2024, *Bytedance* v *Commission* (T-1077/23, EU:T:2024:478)

(Digital services – Regulation (EU) 2022/1925 – Designation of gatekeepers – Online social networking service – Article 3(1), (2) and (5) of Regulation 2022/1925 – Requirements – Presumptions – Rebuttal of the presumptions – Rights of the defence – Equal treatment)

Interpreting for the first time the Digital Markets Regulation [501] ('the DMA'), the General Court dismisses the action for annulment brought by Bytedance Ltd against the decision of the European Commission [502] designating that undertaking and the companies which it controls directly or indirectly (together, 'ByteDance') as a gatekeeper within the meaning of that regulation.

Since certain digital services, called 'core platform services' ('CPS' or 'CPSs'), often have characteristics which, combined with unfair practices on the part of the undertakings providing those services, can have the effect of substantially undermining the contestability of the CPSs, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their business users and end users, the EU legislature decided to adopt the DMA.

Therefore, the DMA seeks to contribute to the proper functioning of the internal market by laying down rules to ensure the contestability and fairness of markets in the digital sector in general, and for business users and end users of CPSs provided by undertakings designated as 'gatekeepers' in particular. To that end, the DMA provides for a targeted set of obligations that undertakings which have been designated, by the Commission, as gatekeepers must comply with in respect of each of the CPSs listed in the designation decision.

In accordance with Article 3(1) of the DMA, the Commission designates an undertaking as a gatekeeper where it meets the following three cumulative requirements:

(a) it has a significant impact on the internal market;

(b) it provides a CPS which is an important gateway for business users to reach end users ('important gateway'); and

(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

Under Article 3(2) of the DMA, an undertaking is presumed to satisfy those requirements where it meets certain quantitative thresholds, based in particular on the Union turnover of the undertaking concerned or its global market value, the number of end users and business users of the CPS concerned which are established or located in the European Union, and the number of years during which the latter threshold relating to the number of users has been met.

Under the first subparagraph of Article 3(5) of the DMA, the undertaking concerned may present, with its notification under the first subparagraph of Article 3(3) of the DMA, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in Article 3(2) of the DMA, due to the circumstances in which the relevant CPS operates, it does not satisfy the requirements listed in paragraph 1 of that article. Where the undertaking does present such

---

501 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1).

502 Commission Decision C(2023) 6102 final of 5 September 2023 designating ByteDance as a gatekeeper in accordance with Article 3 of the DMA.

sufficiently substantiated arguments manifestly calling into question the presumptions laid down in Article 3(2) of the DMA, the Commission may open a market investigation pursuant to Article 17(3) of the DMA.

Bytedance Ltd, which was established in China in 2012 and incorporated under the law of the Cayman Islands, operates, together with the companies which it controls directly or indirectly, inter alia, the digital platform TikTok. That digital platform which was launched in the European Union, in its current version, in August 2018, allows its users to search for, view and distribute videos, as well as to interact, communicate and share content with other users.

Having received a notification from Bytedance Ltd pursuant to the first subparagraph of Article 3(3) of the DMA, the Commission considered, first, that TikTok was an online social networking service within the meaning of the DMA and, consequently, a CPS. Secondly, the Commission found that ByteDance met the thresholds laid down in Article 3(2) of the DMA, as regards TikTok, so that it could be presumed that the conditions laid down in Article 3(1) of the DMA, relating to its designation as a gatekeeper, were satisfied. Thirdly, the Commission considered that the arguments put forward by Bytedance Ltd to rebut the presumptions laid down in Article 3(2) of the DMA were not sufficiently substantiated so as manifestly to call them into question. Accordingly, the Commission designated ByteDance as a gatekeeper, without opening a market investigation, and considered that the online social networking service TikTok was an important gateway within the meaning of the DMA. [503]

Bytedance Ltd brought an action for the annulment of that decision before the Court. At the request of Bytedance Ltd, the Court decided to adjudicate on the action under the expedited procedure.

Findings of the Court

In support of its action, the applicant raises three pleas in law alleging (i) infringement of Article 3(1) and (5) of the DMA, (ii) infringement of the rights of the defence and (iii) infringement of the principle of equal treatment.

1) The plea in law alleging infringement of Article 3(1) and (5) of the DMA

As a preliminary point, the Court notes that the applicant does not dispute that TikTok is an online social networking service within the meaning of the DMA. It does not dispute either that the thresholds laid down in Article 3(2)(a) to (c) of the DMA were met and that, consequently, ByteDance was presumed to satisfy the respective requirements of Article 3(1) of the DMA for the purpose of its designation as a gatekeeper.

By contrast, the applicant takes the view that the Commission erred in finding that the arguments it had presented, in accordance with the first subparagraph of Article 3(5) of the DMA, were not sufficiently substantiated so as manifestly to call into question the presumptions laid down in Article 3(2) of the DMA as regards TikTok.

a) The legal standard applied by the Commission when assessing the arguments presented to rebut the presumptions laid down in Article 3(2) of the DMA

First of all, the Court dismisses the complaints that the Commission applied the wrong legal standard in its assessment of the arguments and evidence submitted by the applicant in order to rebut the presumptions laid down in Article 3(2) of the DMA

In that context, the Court notes, first, that while Article 3(5) of the DMA allows the undertaking concerned to submit, in order to rebut the presumptions laid down in Article 3(2) of the DMA, arguments and evidence, whether or not they are expressed in figures, those arguments and that

503 Decision of 5 September 2023. See footnote 504.

evidence must nevertheless relate directly to one or more of those presumptions, which take the form of quantitative thresholds. In the present case, the Commission was entitled to reject certain of the applicant's arguments consisting, inter alia, of general assertions concerning the objectives pursued by the DMA and the subject matter and effectiveness of Article 3(5) of the DMA, since they were not intended to rebut concretely and specifically one of the three presumptions laid down in Article 3(2) of the DMA and, therefore, were not directly related to them.

Second, the Court states that the standard of proof required to call into question those presumptions derives directly from Article 3(5) of the DMA, which requires that the undertaking concerned – on which the burden of proof lies – submit sufficiently substantiated arguments, manifestly calling into question those presumptions. It follows that the arguments presented by that undertaking must be capable of showing, with a high degree of plausibility, that the presumptions laid down in Article 3(2) of the DMA are called into question. The Court adds that, in the present case, the Commission had asserted that it had applied the standard of proof set out in Article 3(5) of the DMA and that there was nothing in its analysis to suggest that the standard of proof which it had actually applied was higher than that set out in that provision.

b) The presumption that ByteDance had a significant impact on the internal market

Next, in the light of that information, the Court examines the applicant's claims that the Commission infringed Article 3(1)(a) and (5) of the DMA by rejecting its arguments seeking to show that ByteDance did not have a significant impact on the internal market. The applicant claimed, in essence, that ByteDance's impact on the internal market was not significant, as demonstrated, inter alia, by the fact that its Union turnover was low and that ByteDance's global market value was mainly attributable to its activities in China, with the result that that value is not representative of its impact on the internal market.

In that context, the Commission had, inter alia, rejected as irrelevant the argument that ByteDance's revenue in the European Union was below the Union turnover threshold laid down in Article 3(2)(a) of the DMA.

On that point, the Court recalls that it can be presumed from Article 3(2)(a) of the DMA that an undertaking has a significant impact on the internal market, within the meaning of paragraph 1(a) of that article, where the undertaking provides the CPS in question in at least three Member States and either its annual Union turnover is equal to or greater than EUR 7.5 billion in each of the last three financial years, or its average market capitalisation or its equivalent fair market value amounts to at least EUR 75 billion in the last financial year.

The Court observes, moreover, that it was not disputed that ByteDance did not meet the Union turnover threshold. On the other hand, it was accepted that ByteDance met the global market value threshold and that, as a result, it was deemed to have a significant impact on the internal market.

As regards the relationship between the two thresholds referred to above, the Court states that they reflect similar, but distinct, situations. While a high Union turnover tends to show that the undertaking in question already has the ability to monetise its users in the internal market, a high global market capitalisation or fair market value rather tends to indicate that that undertaking has the potential to monetise its users in the internal market in the near future. In addition, the Union turnover of the undertaking in question was specifically chosen by the EU legislature as an indicator of its impact on the internal market.

Accordingly, it cannot be ruled out that the undertaking concerned may demonstrate, on the basis of a number of sufficiently substantiated arguments, including its low Union turnover, that, despite its very significant global market value, it has only a limited presence on the internal market, so that that market value does not reflect a potential to monetise its users in the Union in the near future and

that, therefore, it does not have a significant impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

In the light of the foregoing, the Court finds that the Commission erred in rejecting as irrelevant, for the purpose of calling into question the presumption relating to ByteDance's significant impact on the internal market, the applicant's argument relating to ByteDance's low Union turnover.

That being so, in accordance with the case-law, that error leads to the annulment of the contested decision only if it could have had a decisive effect, in the particular circumstances of the present case, on the Commission's rejection of the arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(a) of the DMA.

However, that is not so since all the other elements taken into account by the Commission in order to conclude that ByteDance had significant potential to monetise its users in the Union in the near future remain valid. In support of that conclusion, the Commission also recalled that ByteDance's Union turnover, although it did not reach the threshold laid down in Article 3(2)(a) of the DMA, had nonetheless not ceased increasing, that ByteDance's fair market value was significantly above the EUR 75-billion threshold and that the number of TikTok end users and business users in the Union had continued to increase in the last three financial years, far exceeding the thresholds laid down in Article 3(2)(b) of the DMA.

c) The presumption that TikTok is an important gateway

The Court also rejects the applicant's complaints that the Commission infringed Article 3(1)(b) and (5) of the DMA by classifying TikTok as an important gateway pursuant to the presumption laid down in Article 3(2)(b) of the DMA, despite the arguments to the contrary put forward by the applicant.

In accordance with Article 3(2)(b) of the DMA, an undertaking is deemed to provide a CPS constituting an important gateway if it provides a CPS which, in the last financial year, has had at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union.

(i) The alleged lack of an ecosystem and of significant network effects

In order to challenge TikTok's classification as an important gateway pursuant to the presumption laid down in Article 3(2)(b) of the DMA, the applicant claimed, in the first place, that, unlike other undertakings operating in the digital sector, ByteDance does not have an ecosystem and does not benefit from significant network effects.

First of all, the Court states that a digital platform ecosystem may consist of one or more CPSs and other services connected to them, for example by means of technological links or interoperability; this is liable to exacerbate entry barriers for competitors of those undertakings and increase the cost of switching providers for end users, making it more difficult for existing or new market operators to compete with those undertakings or contest their position.

Next, the Court finds that the applicant has not substantiated its argument that ByteDance did not have an ecosystem of which TikTok formed part.

Lastly, according to the Court, even if ByteDance does not have an ecosystem, the Commission's conclusion regarding TikTok's classification as an important gateway remains valid, since it is apparent from the contested decision that, since the launch of its current version, in 2018, in the European Union, TikTok has succeeded, in a short time, in attracting a very large number of end users and business users, thereby far exceeding the thresholds laid down in that regard in Article 3(2)(b) of the DMA and reaching half of the size of Facebook and of Instagram.

Moreover, contrary to the applicant's claims, there is nothing in the DMA to suggest that a CPS can produce significant network effects only if it is part of an ecosystem. Similarly, the applicant did not put forward any independent argument which may suggest that TikTok lacks significant network effects

(ii) The existence of multi-homing and the alleged absence of lock-in effects

In the second place, the Court upholds the Commission's conclusion that the existence of a certain degree of multi-homing [504] by end users and business users in relation to TikTok and other online social networks was insufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

In this respect, the Court notes that, while the existence or absence of multi-homing and lock-in effects can constitute, depending on the case, relevant elements to assess whether that presumption may be manifestly called into question, it is necessary to take into account the specific and concrete characteristics of that multi-homing and of the lock-in effects as they arise in the circumstances in which the relevant CPS operates.

Since the prevalence of multi-homing among users of online social networks is illustrated by the data produced by the applicant itself, the Court finds that, in view of the characteristics of the CPS concerned, the mere existence of multi-homing, even to a significant degree, is not in itself sufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA in the present case.

What is more, the arguments and evidence submitted by the applicant – on which the burden of proof lies – during the administrative procedure concerned only the existence of multi-homing in general, and not the intensity of use of the various online social networking platforms, bearing in mind that TikTok enjoyed a higher engagement rate than other social networks since end users, in particular young people, spend more time on TikTok than on other social networks.

As regards the applicant's arguments based on the fact that approximately 82% and 77% of TikTok end users also use Instagram and Facebook, respectively, while only 38% of Facebook end users and 48% of Instagram end users also use TikTok, the Court finds that the applicant has not, in any event, demonstrated that the asymmetric nature of multi-homing as practised by TikTok users, on the one hand, and Facebook and Instagram users, on the other, was due not to the economic and historical context in which online social networks operate in the Union, but to the absence of network effects and lock-in effects on TikTok.

(iii) The smaller scale of TikTok compared with other platforms and the large number of competitors

In the third place, the Court finds that the Commission was correct to consider that the arguments presented by the applicant relating to TikTok's small scale compared to that of certain other online social networking platforms, and to the existence of a large number of competitors, were also not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

Among the elements which the Commission may take into account in its assessment of the arguments seeking to rebut the presumption laid down in Article 3(2)(b) of the DMA features, according to recital 23 thereof, the 'importance of the [CPS of the undertaking concerned] considering the overall scale of activities of the respective [CPS]'. However, that recital does not specify the parameters on the basis of which the importance and scale of the CPS at issue must be measured.

---

504 In the context of digital services in general and online platforms in particular, the concept of 'multi-homing' describes the situation in which users use several competing digital services in parallel; in the present case, those services are online social networking services.

In that context, the applicant submitted that TikTok is not an important gateway, within the meaning of Article 3(1)(b) of the DMA, on the ground that TikTok is smaller in size than other well-established platforms, such as Facebook and Instagram, inter alia, in terms of number of end users.

However, since the applicant put forward arguments and figures which it had not submitted during the administrative procedure, in order to demonstrate TikTok's alleged small scale, the Court declares them inadmissible.

It rejects those new arguments as unfounded and, in that context, confirms inter alia that TikTok's size in terms of number of end users cannot be assessed in a static manner, but must take account of the rapid and significant growth in the number of end users in the Union, which has reached approximately half the size of Facebook and of Instagram in a few years.

(iv) Advertising revenue and the level of engagement of business users registered on TikTok

By contrast, as regards the applicant's arguments alleging that ByteDance's advertising revenue, its average revenue per user or the level of engagement of advertisers and business users registered on TikTok are minimal and lower than those of certain other platforms, the Court finds, in the fourth place, that the Commission erred in rejecting those arguments as irrelevant for the purpose of rebutting the presumption laid down in Article 3(2)(b) of the DMA.

In that regard, the Court points out, first, that although the Commission classified TikTok as an online social networking service and not as an online advertising service within the meaning of the DMA, the fact remains that TikTok is a single platform, on which users interact primarily by sharing and viewing videos, while advertisers pay for advertisements to appear, generally between videos viewed by those users.

Second, it cannot be denied that the advertising revenue or the average revenue per user generated by TikTok could, in principle, constitute an indication among others of the importance which that platform represents for its business users in order to reach end users, in so far as advertising is one of the means commonly used by those business users to reach their customers.

That being so, since the Commission had, in any event, also established that the applicant's arguments and evidence relating to online advertising were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA, the Court finds that the error committed by the Commission has no bearing on the lawfulness of the contested decision. On that point, the Court notes in particular that the Commission was right to find that the arguments and evidence put forward by the applicant were not sufficiently representative of all TikTok business users.

d) The presumption that ByteDance has an entrenched and durable position

Lastly, the Court rejects the applicant's complaints that the Commission infringed Article 3(1)(c) and (5) of the DMA by rejecting its arguments seeking to challenge the finding that, in the light of the presumption laid down in Article 3(2)(c) of the DMA, TikTok enjoys an entrenched and durable position in its operations. The applicant claimed, in essence, that it was a 'challenger' on the market and that its market position had been successfully contested by competitors such as Meta and Alphabet, which had launched new services, such as Reels and Shorts, which, by imitating the main features of TikTok, had enjoyed rapid growth.

After noting, first, that the concept of an 'entrenched and durable position' within the meaning of Article 3(1)(c) of the DMA is intended to capture the low contestability of the position of the undertaking in question and the stability over time of that position and, second, that that concept does not necessarily overlap with that of a 'dominant position' within the meaning of Article 102 TFEU,

the Court observes that an undertaking's entrenched and durable position in its operations does not preclude the existence of a certain degree of contestability.

In response to the applicant's arguments based on the fact that other gatekeepers in the same CPS category, namely Meta and Alphabet, have contested ByteDance's position, the Court also finds that the purpose of the DMA is to ensure the contestability of the position of gatekeepers not only by other gatekeepers but also, or even especially, by other operators which are not gatekeepers for a given CPS. It follows that mere references to the activities of Meta and Alphabet do not make it possible to conclude that ByteDance's position is not entrenched and durable within the meaning of the DMA.

Moreover, there is nothing to prevent an undertaking such as ByteDance, which in 2018 was a challenger seeking to contest the position of gatekeepers, from becoming a gatekeeper itself within a few years.

2. The plea in law alleging infringement of the rights of the defence

In support of its action, the applicant also submits that the Commission infringed Article 41 of the Charter of Fundamental Rights of the European Union on the ground that, in the contested decision, it relied on matters of fact and law in relation to which the applicant had not had the opportunity to submit its observations during the administrative procedure.

In that regard, the Court observes that Article 41 of the Charter of Fundamental Rights guarantees to every person the possibility of making known, in a useful and effective manner, their point of view during the administrative procedure and before the adoption of any decision likely to affect their interests adversely.

In the light of those clarifications, the Court finds that, despite the numerous exchanges between the applicant and the Commission prior to the adoption of the contested decision, the applicant did not have the opportunity to submit its observations, during the administrative procedure, on certain evidence relied on against it by the Commission.

However, according to settled case-law, an infringement of the right to be heard does not automatically imply the annulment of the contested act. It is also necessary for the applicant to show that it cannot be entirely ruled out that the Commission's decision would have been different in the absence of the procedural irregularity in question, since that party would have been better able to defend itself had there been no irregularity. The applicant having failed to show that this was so in the present case, the Court dismisses the applicant's plea alleging infringement of its rights of defence.

3. The plea in law alleging infringement of the principle of equal treatment

According to the applicant, the Commission also infringed the principle of equal treatment by rejecting, in the contested decision, certain of its arguments, whereas, in other decisions, the Commission had accepted that kind of argument.

On that point, the Court recalls that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings or other CPSs and that, in any event, 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 unless such treatment is objectively justified.

Since the recitals of the Commission's decisions cited by the applicant in its application concern other CPS categories and not online social networking services and the applicant does not explain why the circumstances in which those other CPS categories operate are comparable to those in which an

online social networking service such as TikTok operates, the Court dismisses as unfounded the plea alleging infringement of the principle of equal treatment.

In the light of all of the foregoing, the Court dismisses the action in its entirety.

VII. Economic, social and territorial cohesion

Judgment of 7 February 2024, *Austria* v *Commission* (T-501/22, EU:T:2024:71)

(EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Austria – Reduction coefficient – Article 24(6) of Regulation (EU) No 1307/2013 – Article 30(7)(b) of Regulation No 1307/2013 – Article 52(4)(a) of Regulation (EU) No 1306/2013 – Obligation to state reasons)

Ruling on an action for annulment brought by the Republic of Austria, the General Court annuls in part Decision 2022/908 [505] of the European Commission, in so far as it excludes from EU financing expenditure incurred by that Member State under the European Agricultural Guarantee Fund (EAGF) prior to 27 November 2016. In that context, it rules, for the first time, on the interpretation of Article 24(6) of Regulation No 1307/2013 [506] and on the concept of 'specific disadvantages' within the meaning of Article 30(7)(b) of that regulation.

In the context of the basic payment scheme, the Republic of Austria decided to apply a reduction coefficient to parcels classified, under Austrian law, as 'pastures' and as 'alpine pastures'. In 2016, the Commission opened an investigation against the Republic of Austria so as to verify whether, for the years 2015 and 2016, the management and control of area-related schemes as regards aid paid to farmers under the EAGF had been carried out in accordance with EU law. Taking the view, at the end of that investigation, that the Austrian authorities had incorrectly applied Article 24(6) of Regulation No 1307/2013 as regards 'pastures', the Commission imposed a financial correction [507] on the Republic of Austria. Consequently, the Republic of Austria, by way of a corrective measure, allocated to the farmers concerned additional payment entitlements for each eligible hectare of 'pastures', doing so from the national reserve which it is for the Member States to establish pursuant to that regulation, [508] with effect from 2017.

In 2018, the Commission opened a new investigation against the Republic of Austria. It is apparent from its summary report, first, that the Austrian authorities had, as regards 'alpine pastures', applied Article 24(6) of Regulation No 1307/2013 incorrectly, which, according to the Commission, had led to unjustified differences in treatment in so far as, within the same area, the reduction coefficient had not been applied to all parcels subject to the same climate conditions. Second, that report finds that the Republic of Austria unlawfully used the national reserve to finance the corrective measure relating to 'pastures'. Consequently, by the contested decision, the Commission excluded from EU financing, in respect of the two instances of alleged non-compliance on the part of the Republic of Austria, expenditure declared under the EAGF by that Member State in the amount of EUR 68 146 449.98.

---

505 Commission Implementing Decision (EU) 2022/908 of 8 June 2022 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2022 L 157, p. 15).

506 Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608).

507 Commission Implementing Decision (EU) 2019/265 of 12 February 2019 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2019 L 44, p. 14).

508 Article 30(1) of Regulation (EU) No°1307/2013.

Findings of the Court

In the first place, the Court rejects the plea in law alleging infringement of Article 52(1) of Regulation No 1306/2013 [509] resulting from a financial correction based on a misinterpretation of Article 24(6) of Regulation No 1307/2013.

In that regard, the fact that the reduction coefficient was applied to 'alpine pastures' and not to neighbouring parcels does not necessarily show an incorrect application of Article 24(6) of Regulation No 1307/2013. That provision does not contain any details as to the extent of the areas in respect of which it is necessary to assess whether the criterion of difficult climate conditions is satisfied. Nevertheless, the Austrian authorities' approach, consisting in applying the reduction coefficient only to parcels classified as 'alpine pastures', without it being shown in the present case that the competent authorities had carried out that classification specifically and systematically on the basis of the fact that those parcels are subject to particular climatic conditions specific to them, does not make it possible to ensure that that coefficient was applied to all parcels located in areas with difficult climate conditions or to ensure that that coefficient was applied only to parcels which actually meet that criterion.

In the second place, the Court holds that the Commission was entitled to consider that the allocation of additional payment entitlements to farmers working 'pastures', in order to remedy the incorrect application of the reduction coefficient, could not be financed from the national reserve on the basis of Article 30(7)(b) of Regulation No 1307/2013.

To arrive at that conclusion, the General Court interprets Article 30(7)(b) of Regulation No 1307/2013, to which the Republic of Austria refers as the legal basis for its use of the national reserve, taking into account its wording, the context in which it occurs and the objectives of the rules of which that provision forms part.

As regards the wording of that provision, the Court finds that the adjective 'specific' supports an interpretation according to which the disadvantages in question concern certain categories of farmers, who are distinguished from others by virtue of characteristics that are inherent in their situation. The fact that farmers suffer the consequences of an error committed by a Member State in the application of EU law does not appear sufficient to support the conclusion that those farmers fall within a particular category and that the disadvantage which they suffer as a result of that error should, for that reason, be regarded as being specific to them. That interpretation is borne out by the context in which the provision at issue occurs, in particular by Article 31(2) of Regulation No 639/2014. [510]

As regards the objectives of the legislation at issue, the implementation of the reserve is intended to enable Member States to provide support to farmers in specific situations, as a matter of priority young farmers and those commencing their agricultural activity.

In the present case, the disadvantage suffered by the farmers working 'pastures' was not inherent in their situation or linked to a characteristic specific to them, but resulted from the fact that the Austrian authorities, by incorrectly applying Article 24(6) of Regulation No 1307/2013, had deprived them of payment entitlements which should have been allocated to them from the outset.

---

509 Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1200/2005 and (EC) No 485/2008 (OJ 2013 L 347, p. 549).

510 Commission Delegated Regulation (EU) No 639/2014 of 11 March 2014 supplementing Regulation (EU) No 1307/2013 of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and amending Annex X to that Regulation (OJ 2014 L 181, p. 1).

Accordingly, the fact, relied on by the Republic of Austria, that the incorrect application of EU law affected only the holders of 'pastures' – which is, moreover, disputable given the impact of that error on the value of the payment entitlements of all Austrian farmers – cannot lead to the conclusion that the holders of 'pastures' were in a situation constituting a specific disadvantage allowing the Republic of Austria to allocate additional payment entitlements to them from the national reserve on the basis of Article 30(7)(b) of Regulation No 1307/2013.

Lastly, the Court upholds the third plea in law, alleging infringement of Article 52(4)(a) of Regulation No 1306/2013.

In that regard, the communication referred to in the first subparagraph of Article 34(2) of Implementing Regulation No 908/2014 [511] constitutes the reference point for calculation of the period of 24 months laid down in Article 52(4)(a) of Regulation No 1306/2013, in so far as it identifies with sufficient precision the purpose of the investigation carried out by the Commission and the deficiencies found by it during the investigation. The limitation of the period during which the Commission may exclude certain expenditure from EU financing is intended to protect Member States against the absence of legal certainty which would exist if the Commission were able to call into question expenditure incurred several years before the adoption of a conformity clearance decision.

Given that it identified, for the first time, with sufficient precision the non-compliance found by the Commission as regards the incorrect application of the reduction coefficient to 'alpine pastures', the communication of 27 November 2018 constituted, in the present case, the reference point for calculation of the period of 24 months laid down in Article 52(4)(a) of Regulation No 1306/2013. Consequently, the Commission could not exclude from EU financing expenditure incurred before 27 November 2016.

In the light of the foregoing, the Court concludes that the contested decision must be annulled in so far as, as regards the first financial correction at issue, it excluded from EU financing expenditure incurred prior to 27 November 2016.

511 Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to paying agencies and other bodies, financial management, clearance of accounts, rules on checks, securities and transparency (OJ 2014 L 255, p. 59).

VIII. Public health

Judgment of 21 February 2024, *PAN Europe* v *Commission* (T-536/22, EU:T:2024:98)

(Plant protection products – Active substance cypermethrin – Implementing Regulation (EU) 2021/2049 – Request for internal review – Article 10(1) of Regulation (EC) No 1367/2006 – Rejection of the request – Identification of critical areas of concern by EFSA – Risk assessment and risk management – Precautionary principle – Discretion enjoyed by the Commission)

In the context of an action for annulment concerning the renewal of the approval of the active substance cypermethrin, the General Court explains the rules governing the admissibility of such an action brought by a non-governmental organisation on the basis of Regulation No 1367/2006, [512] as well as the scope of the European Commission's discretion as risk manager in the light of the precautionary principle.

Cypermethrin is an insecticide used in the European Union, which was authorised for use in plant protection products in 2005. [513]

As part of the procedure for renewing the approval of cypermethrin, the European Food Safety Authority (EFSA) identified, in its scientific conclusions of July 2018, four critical areas of concern relating to that active substance. It then published a statement on risk mitigation measures on cypermethrin in September 2019.

Following that risk assessment, on 24 November 2021 the Commission adopted Implementing Regulation (EU) 2021/2049, [514] which renews the approval of cypermethrin, accompanied by a series of specific provisions.

On 20 January 2022, the applicant, the environmental organisation Pesticide Action Network Europe (PAN Europe), sent the Commission a request for an internal review [515] of Implementing Regulation 2021/2049.

By its decision of 23 June 2022, the Commission rejected that request.

The applicant asks the General Court to annul that decision. In support of its action, it alleges infringement of the precautionary principle and of the European Union's obligation to ensure a high level of protection of human health and the environment. It claims, inter alia, that since EFSA had identified certain critical areas of concern in relation to cypermethrin, the Commission should not have renewed the approval of that substance. In that context, the Commission no longer has any discretion and cannot rely on its role as risk manager in that respect.

---

512 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13), in particular on the basis of Article 12 thereof.

513 That substance was included in Annex I to Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1) by Commission Directive 2005/53/EC of 16 September 2005 amending Council Directive 91/414/EEC to include chlorothalonil, chlorotoluron, cypermethrin, daminozide and thiophanate-methyl as active substances (OJ 2005 L 241, p. 51).

514 Commission Implementing Regulation (EU) 2021/2049 of 24 November 2021 renewing the approval of the active substance cypermethrin as a candidate for substitution in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (OJ 2021 L 420, p. 6).

515 On the basis of Article 10(1) of Regulation No 1367/2006.

By its judgment, the Court of Justice dismissed the action in its entirety.

Findings of the Court

In the first place, the General Court provides procedural clarifications concerning the scope of the rule of concordance between the request for review and the action for annulment of the decision adopted in response to that request.

In that regard, the Court points out that such an action for annulment is admissible only if it is directed against the response to that request and if the pleas in law relied on in support of the annulment relate specifically to that response.

Such an action cannot be founded on new grounds or on evidence not appearing in the request for review, otherwise the requirement that reasons be given for such a request would be made redundant and the object of the procedure initiated by the request would be altered. [516]

Nevertheless, on the one hand, an applicant under Regulation No 1367/2006 must be able to raise, at the stage of the action before the General Court, arguments which seek to criticise, in law, the merits of the response to its request for review, provided that those arguments do not alter the subject matter of the procedure initiated by that request. On the other hand, an argument which was not raised at the stage of the request for review does not constitute a new argument if it is simply an amplification of an argument already developed in the context of that request, that is to say, if it presents a sufficiently close connection with the pleas or heads of claim initially put forward in the application in order to be considered as forming part of the normal evolution of the debate in proceedings before the Court.

In the second place, the Court points out that, if the Commission is to be able to pursue effectively the objectives assigned to it by Regulation No 1107/2009, it must be recognised as enjoying a broad discretion. That applies, in particular, to the risk management decisions it must take pursuant to that regulation. [517]

Risk management corresponds to the body of actions taken by an institution faced with a risk in order to reduce it to a level deemed acceptable for society having regard to its obligation, in accordance with the precautionary principle, to ensure a high level of protection of public health, safety and the environment. [518]

That involves carrying out a prior assessment of the risks, which consists, first, in scientifically assessing those risks, based on the best scientific data available, and, second, in determining whether they exceed the level of risk deemed acceptable for society, which is a political choice of determining an appropriate level of protection for society.

Accordingly, although, as part of the procedure for the renewal of active substances, the Commission must 'take into account', inter alia, EFSA's scientific conclusions, [519] it is not bound, as risk manager, by

---

516 Judgment of 12 September 2019, ***TestBioTech and Others* v *Commission*** (C-82/17 P,EU:C:2019:719, paragraph 39).

517 Judgment of 17 May 2018, ***Bayer CropScience and Others* v *Commission*** (T-429/13 and T-451/13, EU:T:2018:280, paragraph 143).

518 Judgments of 12 April 2013, ***Du Pont de Nemours (France) and Others* v *Commission*** (T-31/07, not published, EU:T:2013:167, paragraph 148); of 17 May 2018, ***Bayer CropScience and Others* v *Commission*** (T-429/13 and T-451/13, EU:T:2018:280, paragraph 125); and of 17 March 2021, ***FMC* v *Commission*** (T-719/17, EU:T:2021:143, paragraph 78).

519 Under the terms of the second subparagraph of Article 14(1) of Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ 2012 L 252, p. 26).

EFSA's findings. Such taking into account cannot be interpreted as an obligation on the part of the Commission to follow EFSA's conclusions in all respects.

However, the Commission's broad discretion in its capacity as risk manager remains governed by the need to comply with the provisions of Regulation No 1107/2009, in particular Article 4 of that regulation, [520] read in conjunction with Annex II thereto, and by the precautionary principle which underpins all the provisions of that regulation.

In those circumstances, the Commission can renew the approval of an active substance only if it is adequately demonstrated that, notwithstanding the identification of critical areas of concern, risk mitigation measures support the conclusion that the criteria of Article 4 of Regulation No 1107/2009 are fulfilled. Accordingly, the Commission's specific role is to determine the risks which are acceptable to society, with a higher tolerance threshold for environmental protection than as regards human or animal health, and taking into account management measures to mitigate the risks identified.

In the present case, the mere fact that EFSA identified four critical areas of concern in its conclusions as regards cypermethrin does not support the conclusion that the Commission, in its capacity as risk manager, no longer had any discretion, provided that it ensured that the criteria set out in Article 4 of Regulation No 1107/2009 were fulfilled. In other words, the Commission is not precluded from ascertaining, in compliance with the precautionary principle, whether the risk could have become acceptable by imposing certain measures.

Judgment of 15 May 2024, *Fresenius Kabi Austria and Others* v *Commission* (T-416/22, EU:T:2024:316)

(Medicinal products for human use – Suspension of national marketing authorisations for medicinal products for human use containing the active substance hydroxyethyl starch (HES), solutions for infusion – Action for annulment – Direct concern – Partial inadmissibility – Obligation to state reasons – Error of law – Manifest error of assessment – Precautionary principle – Proportionality – Article 116 of Directive 2001/83/EC)

The General Court, sitting in an enlarged formation of five judges, dismisses the action brought by Fresenius Kabi Austria GmbH and other legal persons ('the applicants') for annulment of the decision of the European Commission requiring the Member States concerned to suspend the marketing authorisations ('MAs') of medicinal products containing hydroxyethyl starch ('HES'). [521]

The applicants are part of the worldwide Fresenius group. The latter manufactures and distributes, inter alia, medicinal products containing HES as an active substance which, in the form of solutions for infusion, are mainly used for the treatment of hypovolaemia (low blood volume) caused by acute (sudden) blood loss, when treatment with alternative solutions is considered insufficient. The applicants hold MAs for some of those medicines.

Following several assessments, carried out since 2013, and successive attempts to establish risk minimisation measures ('the RMMs'), the Commission found, by the contested decision, that the risk-benefit balance of those medicinal products could not be considered to be favourable, in particular

---

520 According to that article, the approval of an active substance can be granted only if it is demonstrated that the conditions for approval provided for in paragraphs 2 and 3 are satisfied, under realistic conditions of use. A presumption is established that those conditions for approval are deemed to be met if it has been established that that is the case for at least one representative use of at least one plant protection product containing that active substance.

521 Commission Implementing Decision C(2022) 3591 final of 24 May 2022 concerning, in the framework of Article 107p of Directive 2001/83/EC of the European Parliament and of the Council, marketing authorisations of medicinal products for human use which contain the active substance 'hydroxyethyl starch (HES), solutions for infusion' following an assessment of a post authorisation safety study ('the contested decision').

because of the risks associated with their off-label use. It ordered the suspension of the MAs for those medicinal products.

The applicants asked the Court to annul the contested decision on the grounds, inter alia, that the Commission had incorrectly interpreted the concept of 'risk-benefit balance' within the meaning of Directive 2001/83 [522] in so far as, in assessing the risk-benefit balance of the medicinal products in question, it took account of the risks posed by their off-label use. They also argued that the RMMs put in place were complied with in most Member States. In their view, failure to comply with those RMMs in other Member States should not lead to the conclusion that those RMMs were not effective in preventing the risks in question.

Findings of the Court

As a preliminary point, the Court notes that the conditions for amending, suspending or withdrawing an MA referred to in Directive 2001/83, namely a finding that the medicinal product is harmful, that the therapeutic effect is lacking, that the risk-benefit balance is not favourable or that the medicinal product does not have the declared qualitative and quantitative composition, [523] are alternative and not cumulative. They must, moreover, be interpreted in accordance with the general principle that the protection of public health must unquestionably be given overriding importance in relation to economic considerations.

In that context, the Court rules on the condition relating to the risk-benefit balance of the medicinal product and, more specifically, on the concept of 'risk-benefit balance'.

It observes, in the first place, that, as regards the literal interpretation, the provisions of Directive 2001/83 which are concerned with the definition of this concept and that of 'risks related to use of the medicinal product' [524] neither explicitly include nor exclude consideration of the risks resulting from the off-label use of a medicinal product in the assessment of its risk-benefit balance. By contrast, those provisions refer to 'any risk' to patient or public health relating to the quality, safety or efficacy of the medicinal product and do not restrict the concept of 'safety of the medicinal product' to specific uses. Thus, they do not exclude risks resulting from the off-label use of a medicinal product from the concept of risks relating to the safety of that medicinal product.

In the second place, as regards the contextual interpretation of that concept, the Court analyses the provisions of Directive 2001/83 which lay down certain information obligations incumbent on the holder of an MA for a medicinal product. [525] It notes that those provisions explicitly lay down an obligation to communicate to the competent national authority 'data on the use of the medicinal product where such use is outside the terms of the [MA]' which may constitute 'new information which might influence the evaluation of the benefits and risks of the medicinal product concerned'.

Moreover, by referring to the provisions of Directive 2001/83 which describe the objective of the pharmacovigilance system and the scope of the information which it serves to collect, [526] the Court states that it follows, first, that the concept of 'risks … as regards patients' or public health' also covers risks resulting from use 'outside the terms of the [MA]'. Secondly, Member States may take into

---

522 Concept contained in the first paragraph of Article 116 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), as amended by Directive 2010/84/EU of the European Parliament and of the Council of 15 December 2010 as regards pharmacovigilance (OJ 2010 L 348, p. 74)).

523 Conditions laid down in the first paragraph of Article 116 of Directive 2001/83.

524 Respectively, in Article 1(28a) and (28), first indent, of Directive 2001/83.

525 Article 23(2) of Directive 2001/83.

526 Article 101(1) of Directive 2001/83.

account all the information collected under the pharmacovigilance system, including information relating to the risks associated with the off-label use of a medicinal product, in order to examine options for preventing or reducing the risks and, if necessary, to take regulatory measures concerning the MA in question. Those provisions do not contain any indication that the suspension or revocation of an MA would be excluded as a matter of principle from the measures that Member States could take in order to address the risks related to the off-label use of a medicinal product.

Finally, the Court finds that, by the provisions of Directive 2001/83 concerning the decision to grant an MA subject to certain conditions, [527] the legislature has expressly provided for the conditions under which information on the efficacy and safety of a medicinal product relating to its use 'under normal conditions' may be limited. The fact that the provision of that directive providing for the suspension of an MA contains no reference to 'normal conditions' of use supports the interpretation that the concept of 'risks related to use of the medicinal product' also covers the risks related to its off-label use.

The Court therefore concludes that the contextual interpretation of the concept of 'risk-benefit balance' supports the conclusion that that concept covers the risks associated with the off-label use of a medicinal product.

In the third and last place, as regards the teleological interpretation of that concept, the Court emphasises that, in so far as Directive 2001/83 imposes an obligation on the competent authorities to suspend, withdraw or amend MAs where the risk-benefit balance of a medicinal product is considered to be unfavourable, it pursues its essential objective of safeguarding public health.

Therefore, in order to ensure that that objective is effectively pursued, the competent authorities must be able to take into account information relating to all the risks that a medicinal product poses to public health, including those associated with its off-label use. The off-label use of a medicinal product, which is not uncommon and is decided by a medical professional weighing up the benefits and risks and who must be informed as fully as possible, may pose risks to public health similar to those associated with the use of that medicinal product in accordance with the MA. The teleological interpretation of the concept of 'risk-benefit balance' therefore confirms the conclusion that that concept also covers the risks associated with the off-label use of a medicinal product.

Consequently, the Court concludes that, in taking account of the risks posed by the off-label use of the medicinal products in question when assessing their risk-benefit balance, the Commission did not misinterpret that concept.

As regards compliance with the RMMs, the Court finds that the Commission made no manifest error of assessment in concluding that the off-label use of the medicinal products concerned persisted despite the RMMs put in place.

527 Article 22, second paragraph, of Directive 2001/83.

IX. Energy

Judgment of 27 November 2024, *Nord Stream 2* v *Parliament and Council* (T-526/19 RENV, EU:T:2024:864)

(Energy – Internal market in natural gas – Directive (EU) 2019/692 – Amendments to Directive 2009/73/EC – Legal certainty – Equal treatment – Proportionality – Misuse of powers – Procedural irregularities)

Hearing a case referred back to it, the General Court dismisses in its entirety the action brought by Nord Stream 2 AG against Directive (EU) 2019/692 [528] amending Directive 2009/73 concerning common rules for the internal market in natural gas. In so doing, it rejects the central argument advanced by Nord Stream 2 that, in essence, the contested directive was directed specifically against it, in breach inter alia of the principles of legal certainty, equal treatment and proportionality.

Nord Stream 2 is a company incorporated under Swiss law whose sole shareholder is the Russian public joint stock company Gazprom. It is responsible for the planning, construction and operation of the offshore gas pipeline Nord Stream 2, which is intended to ensure the flow of gas between Ust-Luga (Russia) and Lubmin (Germany).

On 17 April 2019, the European Parliament and the Council of the European Union adopted the contested directive, which entered into force on 23 May 2019. That directive is aimed at ensuring that the rules laid down by Directive 2009/73 for gas transmission lines connecting two or more Member States are also applicable, within the European Union, to gas transmission lines to and from third countries, such as the Nord Stream 2 gas pipeline.

In that context, Article 49a(1) of Directive 2009/73, as amended ('Article 49a'), nevertheless provides that gas pipelines between a Member State and a third country completed before 23 May 2019 may be granted a derogation from the obligations provided for by that directive ('the derogation at issue'). In addition, Article 36, as amended, provides that new gas infrastructure may benefit from an exemption on certain conditions ('the exemption at issue'). However, the Nord Stream 2 pipeline could not benefit either from that derogation or from that exemption.

By order of 20 May 2020, [529] the General Court rejected as inadmissible the action seeking the annulment of the contested directive brought by Nord Stream 2. Hearing an appeal brought against that order, the Court of Justice set aside the order of the General Court, [530] declared that the action was partially admissible and referred the case back to the General Court for it to rule on the substance.

In the light of the claims advanced by Nord Stream 2, as clarified at the hearing, the General Court found that the action was admissible in so far as it sought the annulment of Article 1(9) of the contested directive, which inserted an Article 49a into Directive 2009/73.

Findings of the Court

In the first place, the Court holds that the fact that Nord Stream 2 could not benefit either from the exemption at issue or from the derogation at issue at the date of adoption of the contested directive

---

528 Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1; 'the contested directive').

529 Order of 20 May 2020, ***Nord Stream 2* v *Parliament and Council*** (T-526/19, EU:T:2020:210).

530 Order of 12 July 2022, ***Nord Stream 2* v *Parliament and Council*** (C-348/20 P, EU:C:2022:548).

is not capable of demonstrating that the EU legislature infringed the principle of legal certainty and its corollary, the principle of protection of legitimate expectation.

In that regard, the Court recalls that whether those principles have been complied with must be examined in the light of the knowledge that a prudent and alert economic operator could reasonably have had as to the development of the legal framework and the consequences which it needed to draw from it in order to determine its conduct. That compliance must also be examined in the light of the circumstances surrounding that development and, in particular, of the conduct of the competent institutions.

As regards the impossibility of benefiting from the exemption at issue, the Court finds that Nord Stream 2 decided to invest in a context which for a long time had been characterised by the firm and repeated intention, inter alia of several Member States, the Parliament and the European Commission, to make gas pipelines between a Member State and a third country, in general, and the Nord Stream 2 pipeline, in particular, subject to the obligations laid down by Directive 2009/73.

Furthermore, Nord Stream 2 continued to make its investments without interruption after that intention materialised in the form of proposals submitted by the Commission and despite the fact that it could therefore reasonably foresee such an application of Directive 2009/73. Moreover, it has not shown that it was unable to make changes in order to be able to benefit from the exemption at issue when the contested directive entered into force.

Consequently, the fact that Nord Stream 2 could not benefit from that exemption did not oblige the EU legislature to adapt the scope of Article 49a to its particular situation so that it could benefit from the derogation at issue.

As to the fact that Nord Stream 2 could not benefit from the derogation at issue since the construction of its pipeline was not completed until after 23 May 2019, the Court notes, first of all, that the criterion of completion of the pipeline before the date of entry into force of the contested directive was already included in the proposal for a directive and that Nord Stream 2 was in a position to foresee that its pipeline would not be completed before that date.

The Court adds that that criterion complies with the principle of legal certainty and the principle of the protection of legitimate expectations, to the extent that it is clear, precise and objective and that it reflects the principle that a new rule of law applies with effect from the entry into force of the act introducing it. That objective criterion shows, in addition, that the legislature took account of the particular situation of completed pipelines.

Furthermore, Nord Stream 2 had an additional period of time within which to amend the proposed arrangements for the operation of its pipeline, given that the deadline for transposition of the contested directive had been set for 10 months after its adoption. Moreover, the impossibility of benefiting from the derogation at issue did not prevent it from operating its pipeline under economic conditions.

In the second place, the Court rejects the plea advanced by Nord Stream 2 alleging an infringement of the principle of equal treatment in that Article 49a entailed an unjustified difference in treatment of comparable situations.

In that regard, it finds that pipelines completed before 23 May 2019, on the one hand, and pipelines not completed before that date, including those whose construction was ongoing, such as Nord Stream 2, on the other hand, are not in a comparable situation. A gas pipeline which is in service at that date necessarily entailed a prior investment which can no longer be abandoned and which would have commenced operation under a legal regime which did not provide for the application, to its situation, of the obligations laid down by Directive 2009/73.

By contrast, an investor in a pipeline which was not completed by the date of entry into force of the contested directive may have incurred a lower level of expenditure or have greater opportunities to make changes to its investment. In addition, even if the gas pipeline in question has entailed significant investments and construction work, they could have been made with full knowledge of the facts and in a context in which an amendment to the legislation applicable was foreseeable, as was the case for Nord Stream 2. Finally, an investor in such a pipeline has the time to adapt to the legislative changes provided for by the contested directive, given that it was informed about it many months in advance and that the Member States have a period of time within which to transpose it.

The Court states that the situation of the two categories of pipelines referred to above is different in the light not only of the subject matter of Article 49a but also of the objectives of the contested directive and the principles and objectives of EU policy on energy.

Indeed, the impact of a pipeline already completed on the functioning of the internal market can be assessed *ex post*, on the basis of experience acquired during the operation of the pipeline in question. In addition, the application of the obligations laid down by Directive 2009/73 to such pipelines risks disrupting the capacity and flow of supply, which justifies a rapid examination of their situation having regard to the conditions laid down in Article 49a.

However, in the case of a pipeline which was not completed before the date of entry into force of the contested directive, the assessment of its impact on the internal market and security of supply can only be prospective and requires more in-depth and complex assessments. In addition, since such a gas pipeline is not capable of being operated, the application of the contested directive to it does not present a risk of disruption to the flow of supply.

In the light of the foregoing, Article 49a leads to different situations being treated differently.

The Court adds that, even if Article 49a were to lead to comparable situations being treated differently, that difference would be justified. In that regard, it finds, first, that the criterion of completion before the date of entry into force of the contested directive, provided for by that article, is objective and reasonable. Secondly, any difference in treatment resulting from the application of that criterion is appropriate for achieving the objective pursued by that article of taking account of the lack of rules applicable to pipelines between a Member State and a third country before the date of entry into force of the contested directive. It allows pipeline owners and Member States easily to assess whether or not a gas pipeline falls within the scope of Article 49a. Thirdly, any difference in treatment resulting from that criterion does not exceed the limits of what is necessary to achieve the objective pursued by that article, since the importance of that objective justifies the constraints borne by investors, such as Nord Stream 2, due to the application of the obligations laid down by Directive 2009/73 to a pipeline which was not completed before 23 May 2019.

In the third place, the Court considers that Nord Stream 2 has not established that the extension of the scope of the obligations laid down by Directive 2009/73 to cover pipelines between a Member State and a third country infringes the principle of proportionality.

The Court notes, first of all, that the contested directive is appropriate for attaining the objective of legal certainty and the consistency of the legal framework which it essentially pursues, in that it extends the scope of Directive 2009/73 and therefore of the obligations that it lays down. The fact that Nord Stream 2 is the only one not to be able to benefit from either the exemption at issue or the derogation at issue has no bearing on that finding.

Next, the Court finds that the application of the obligations laid down by Directive 2009/73 to pipelines between a Member State and a third country in general, and to Nord Stream 2 in particular, is also appropriate for achieving the objective of completing the internal market in natural gas by avoiding distortions of competition and negative impacts on security of supply. Directive 2009/73 lays

down inter alia an unbundling obligation to separate the transmission system and the transmission system operator, an obligation to provide third-party access to the system and other obligations relating, inter alia, to tariff and non-tariff transparency. Taking into account the purpose of those obligations, the fact that they apply only to a section of gas pipelines between a Member State and a third country in no way affects their appropriateness to achieve the abovementioned objective.

Likewise, the fact that the directive applies only to part of the import capacity from third countries, namely the capacity of the Nord Stream 2 pipeline, does not call that appropriateness into question. The Nord Stream 2 pipeline project was launched in a particular context in which numerous Member States had faced shortages of gas owing to disputes involving the Russian Federation. Furthermore, the contested directive applies to all existing and future, on-shore and offshore pipelines. Finally, it was adopted in a context in which numerous pipelines completed between a Member State and a third country were already subject to the obligations laid down by Directive 2009/73, with the result that it increases the import capacity from third countries covered by the obligations laid down by it, even if the Nord Stream 2 pipeline is the only pipeline which could not benefit from an exemption or a derogation.

Finally, the Court holds that the contested directive does not exceed the limits of what is necessary for the achievement of its objectives.

Nord Stream 2 has not shown either that the contested directive imposes upon it obligations that are unnecessary as regards the objective of the completion of the internal market or that the constraints upon it, or upon the European Union and its Member States, resulting from the application of the obligations laid down by Directive 2009/73, are manifestly disproportionate compared with the importance of the objectives pursued and the advantages drawn by the European Union from those obligations. The fact that Nord Stream 2 cannot operate its pipeline as it had initially envisaged does not demonstrate that the contested directive imposes disproportionate constraints upon it. In addition, it has not demonstrated the financial consequences related to the application of the obligations laid down by Directive 2009/73 to its pipeline, which it could continue to operate under economic conditions.

In the fourth place, the Court rejects the plea advanced by Nord Stream 2 alleging a misuse of powers. It recalls, first of all, that the legal basis of the contested directive, which is not disputed, is Article 194 TFEU. The mere fact that the contested directive adversely affects the Nord Stream 2 pipeline does not suffice to demonstrate that the legislature intended to pursue an objective different from those referred to in Article 194(1) TFEU.

In addition, Nord Stream 2 has not demonstrated that the contested directive was adopted in order to pursue objectives other than those referred to in that directive, which seek to address wider problems than those related to its pipeline project, namely, inter alia, obstacles to the completion of the internal market in natural gas.

Furthermore, Nord Stream 2 is also not correct to submit that the objective of the contested directive was to circumvent the legal difficulties posed by the request for a mandate sent by the Commission to the Council with a view to negotiating an international agreement with the Russian Federation on the subject of the Nord Stream 2 pipeline. The contested directive and the negotiation of such an agreement are complementary and not substitutable instruments.

Since the latter plea by Nord Stream 2, alleging the infringement of an essential procedural requirement, was also not upheld, the Court dismisses the action in its entirety.

X. Common commercial policy

Judgment of 21 February 2024, *Sinopec Chongqing SVW Chemical and Others* v *Commission* (T-762/20, EU:T:2024:113)

(Dumping – Imports of certain polyvinyl alcohols originating in China – Definitive anti-dumping duty – Implementing Regulation (EU) 2020/1336 – Calculation of the normal value – Significant distortions in the exporting country – Article 2(6a) of Regulation (EU) 2016/1036 – WTO law – Principle of consistent interpretation – Adjustments – Non-refundable VAT – Functions similar to those of an agent acting on a commission basis – Fair comparison of the export price and the normal value – Burden of proof – Article 2(10)(b) and (i) of Regulation 2016/1036 – Non-cooperation – Facts available – Article 18 of Regulation 2016/1036 – Double application – Punitive application – Different production processes – Price undercutting – Market segments – Product control number method – Article 3(2) and (3) of Regulation 2016/1036 – Rights of the defence – Confidential treatment – Articles 19 and 20 of Regulation 2016/1036)

In an action brought by entities of the Chinese group Sinopec, the General Court annuls Implementing Regulation 2020/1336 of the European Commission imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols ('PVA') originating in the People's Republic of China. [531] In its judgment, in the context of a fair comparison of the export price and the normal value, the Court clarifies the extent of the Commission's burden of proof for the purposes of making a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions similar to those of an agent working on a commission basis. It also rules on the question whether, in the event that the Commission bases its conclusions on the facts available following a finding of a company's non-cooperation, the Commission may apply a presumption that the normal value of products sold by that company corresponds to the highest normal value of those of the other exporting producers.

In the present case, the Commission, after receiving a complaint lodged by Kuraray Europe GmbH, the main PVA producer in the European Union, initiated an anti-dumping investigation at the end of which it adopted the contested regulation.

It is in that context that Sinopec group entities – Sinopec Chongqing SVW Chemical Co. Ltd ('Sinopec Chongqing') and Sinopec Great Wall Energy & Chemical (Ningxia) Co. Ltd ('Sinopec Ningxia'), Chinese undertakings which produce PVA, and Central-China Company, Sinopec Chemical Commercial Holding Co. Ltd ('Sinopec Central-China'), a related Chinese undertaking exporting, inter alia, to the European Union products manufactured by those undertakings – considering themselves to have been adversely affected by the anti-dumping duties imposed by the Commission, brought an action before the Court for annulment of Implementing Regulation 2020/1336 in so far as that regulation concerns them. [532]

Findings of the Court

In support of their action, the applicants submit, first of all, that the Commission's application of Article 2(6a) of Regulation 2016/1036, [533] for the purpose of determining the normal value of the

531 Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the contested regulation').

532 Reference should also be made to two other judgments delivered on the same day on two actions for annulment of the contested regulation: judgment in *Inner Mongolia Shuangxin Environment-Friendly Material* v *Commission* (T-763/20, EU:T:2024:114) and judgment in *Anhui Wanwei Updated High-Tech Material Industry and Inner Mongolia Mengwei Technology* v *Commission* (T-764/20, EU:T:2024:115).

533 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic regulation').

products manufactured by them, is contrary to the obligations arising from World Trade Organisation (WTO) law. That provision establishes a special regime laying down rules for determining normal value in the case of exports from countries whose domestic market has been shown to have significant distortions, as defined in that provision.

In that regard, the Court states that the Commission was not required to interpret that provision in the light of WTO rules. Although EU legislation must be interpreted, as far as possible, in the light of international law, in particular where it is intended to give effect to an international agreement concluded by the European Union, the fact remains that Article 2(6a) of the basic regulation cannot be considered to be a provision intended to give effect to specific obligations under WTO agreements, since WTO law does not include specific rules for calculating normal value in the situations covered by the provision concerned.

Next, as regards the comparison between the export price and the normal value of the products concerned, the Court finds that the Commission was wrong to make a downward adjustment to the export price, pursuant to Article 2(10)(i) of the basic regulation. It made an error of assessment in finding that, notwithstanding the existence of common control, the applicants did not constitute a common economic entity, since, according to the Commission, Sinopec Central-China, a sales company affiliated to the other two applicants, was not acting as an internal sales department; rather, it was carrying out functions similar to those of an agent working on a commission basis.

In that regard, it is apparent from settled case-law that where EU institutions consider that it is appropriate to apply a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions similar to those of an agent working on a commission basis, it is the responsibility of those institutions to adduce at the very least consistent evidence showing that that condition is fulfilled.

Thus, the Commission was required to adduce sufficient consistent evidence to demonstrate that, notwithstanding the existence of common control, Sinopec Central-China was carrying out functions similar to those of an agent working on a commission basis and was not acting as an internal sales department. However, the Commission was unable to discharge its burden of proof, the evidence adduced being either irrelevant or of no probative value in the light of the functions carried out by Sinopec Central-China.

As regards the calculation of the normal value of the products sold by Sinopec Ningxia, the Court notes, moreover, that the Commission erred in law when it applied a presumption that that value corresponded to the highest of the normal values of the other exporting producers.

In the present case, since the applicants were unable to provide the Commission with the necessary data relating to Sinopec Ningxia, the Commission calculated the normal value of the products sold by that company on the basis of the facts available, within the meaning of Article 18 of the basic regulation. The data which it did have in its possession were thus compared. While the Commission is not required to explain why the facts available that were used were the best possible, since no such obligation is apparent either from Article 18 of the basic regulation or from the case-law, it must nevertheless explain why the facts used are relevant.

Thus, although, because of differences between the production processes of Sinopec Ningxia and Sinopec Chongqing, the Commission was entitled to reject, as relevant data, the data relating to the latter and to use those relating to the other exporting producers, it was required to justify its choice of using, for each product type sold by Sinopec Ningxia, the highest of the normal values of the other exporting producers. That choice cannot be based on a presumption which in turn is based on a mere finding of the applicants' non-cooperation, since the Commission is not entitled to penalise an exporting producer for its lack of cooperation.

Furthermore, recourse to a presumption, even where it is difficult to rebut, remains within acceptable limits provided, inter alia, that it is possible to adduce evidence to the contrary. As it is, in the present case, rebuttal of the presumption in question is possible only if the applicants provide the Commission with the information the non-production of which specifically represents the factor that triggered the Commission's use of the facts available within the meaning of Article 18 of the basic regulation.

Lastly, the Court finds that the Commission did not infringe the applicants' rights of defence by refusing to disclose to them information about the quantities sold and sales prices of the EU industry or the price undercutting and underselling margins, since that information is by nature confidential.

The fact that there was no error is confirmed by the fact that when the applicants received the email from the Commission refusing their request for access to the abovementioned information, they did not bring the matter before the hearing officer, although they could have done so. [534] In so doing, they accepted the Commission's decision which reflects the balance struck between the objectives pursued by the basic regulation, namely to allow the interested parties effectively to defend their interests, and to preserve the confidentiality of the information collected in the course of the investigation. [535]

Judgment of 21 February 2024, *Inner Mongolia Shuangxin Environment-Friendly Material* v *Commission* (T-763/20, EU:T:2024:114)

(Dumping – Imports of certain polyvinyl alcohols originating in China – Definitive anti-dumping duty – Implementing Regulation (EU) 2020/1336 – Calculation of the normal value – Significant distortions in the exporting country – Article 2(6a) of Regulation (EU) 2016/1036 – WTO law – Principle of consistent interpretation – Choice of appropriate representative country – Readily available data – Non-cooperation – Definition of 'necessary information' – Article 18 of Regulation 2016/1036 – Price undercutting – Market segments – Product control number method – Article 3(2) and (3) of Regulation 2016/1036 – Rights of the defence – Confidential treatment – Articles 19 and 20 of Regulation 2016/1036)

The General Court dismisses the action brought before it by a Chinese exporting producer for the annulment of Implementing Regulation 2020/1336 of the European Commission imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols ('PVA') originating in the People's Republic of China. [536] In its judgment, the Court clarifies what is meant by 'readily available' data in the context of the choice of appropriate representative country for the calculation of the normal value of the product concerned by an anti-dumping investigation where there are significant distortions of the market in the exporting country. It also elaborates on the concept of 'necessary information' to be provided by interested parties to the Commission in the course of the anti-dumping investigation. In the present case, the Commission, after receiving a complaint lodged by Kuraray Europe GmbH, the main PVA producer in the European Union, initiated an anti-dumping investigation at the end of which it adopted the contested regulation.

It was against that backdrop that Inner Mongolia Shuangxin Environment-Friendly Material Co. Ltd, a Chinese company which produces and exports PVA to the European Union, considering itself to have been adversely affected by the anti-dumping duties imposed by the Commission, brought an action

534 Article 15 of Decision (EU) 2019/339 of the President of the European Commission of 21 February 2019 on the function and terms of reference of the hearing officer in certain trade proceedings (OJ 2019 L 60, p. 20).

535 See, to that effect, Article 6(7) and Articles 19 and 20 of the basic regulation.

536 Commission Implementing Regulation (EU) 2020/1336 of 25 September 2020 imposing definitive anti-dumping duties on imports of certain polyvinyl alcohols originating in the People's Republic of China (OJ 2020 L 315, p. 1; 'the contested regulation').

before the Court for annulment of Implementing Regulation 2020/1336 in so far as that regulation concerns it. [537]

Findings of the Court

In support of its action, the applicant submits, in the first place, that the Commission misinterpreted Article 2(6a)(a) of the basic regulation. [538] Under that article, where it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions on the domestic market, the normal value of the product concerned is to be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks. To that end, the sources of information which the Commission may use include the corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available. Where several countries meet that criterion, preference is to be given to the country with an adequate level of social and environmental protection.

In that regard, the Court finds that the Commission did not err in choosing Türkiye over Mexico as the representative country in order to construct the normal value of the product concerned. Indeed, the Commission had no option but to rely on the data provided by a company established in Türkiye, since the data provided by the companies established in Mexico could not be regarded as being 'readily available'.

Thus, as regards, first of all, the concept of 'readily available' data, the Court confirms the literal interpretation adopted by the Commission in the contested regulation to the effect that 'publicly available' means available to the public at large, whereas 'readily available' means available to everybody, provided that certain conditions, like a payment of a fee, have been fulfilled. The data provided by the companies established in Mexico either had been supplied in confidential form alone and were not publicly available or were available only for a different period than that covered by the investigation.

Relying on a contextual and teleological interpretation, the Court rules that that concept must be construed in the light of the requirements arising from the provisions of the basic regulation concerning confidentiality and disclosure, in order to protect the parties' rights of defence. Thus, the basic regulation pursues two objectives: on the one hand, to allow the interested parties effectively to defend their interests and, on the other hand, to preserve the confidentiality of the information collected in the course of the investigation. [539] Consequently, when seeking to obtain data that are 'readily available', the Commission is, in view of those objectives, entitled to refuse to use data which are considered by the party providing them to be confidential and in respect of which it is unable to secure a non-confidential summary as a basis enabling the other interested parties in the investigation to exercise their rights of defence.

Next, the Court makes clear that, by accepting the data provided by the company established in Türkiye, the Commission did not breach its duty of care by calculating the normal value of the product concerned in an inappropriate or unreasonable manner. The applicant's arguments challenging the relevance of the data chosen – having regard to the investigation period and the information contained in those data – are not substantiated in the present case. Therefore, the applicant has not

---

537 Reference should also be made to two other judgments delivered on the same day on two actions for annulment of the contested regulation: judgment in *Sinopec Chongqing SVW Chemical and Others* v *Commission* (T-762/20, EU:T:2024:113) and judgment in *Anhui Wanwei Updated High-Tech Material Industry and Inner Mongolia Mengwei Technology* v *Commission* (T-764/20, EU:T:2024:115).

538 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic regulation').

539 See, to that effect, Article 6(7) and Articles 19 and 20 of the basic regulation.

adduced sufficient evidence to render implausible the assessments of the facts in the contested regulation.

Finally, having concluded that Türkiye was the only appropriate representative country, the Commission was fully entitled to find that it was not required to carry out an assessment of the level of social and environmental protection in accordance with Article 2(6a)(a) of the basic regulation.

As regards, in the second place, the infringement of Article 18 of the basic regulation, the Court rejects the applicant's claim that the Commission was wrong to calculate the normal value on the basis of the facts available within the meaning of Article 18 of the basic regulation, despite the fact that the applicant had cooperated to the best of its ability.

The objective of Article 18 of the basic regulation is to enable the Commission to continue with the anti-dumping investigation even though the interested parties refuse to cooperate or do not cooperate satisfactorily. Thus, the first paragraph of that provision allows the Commission to resort to the facts available where the requested information is not ultimately obtained. In order to be regarded as cooperating under that provision, the parties must provide all the information that they have which the institutions consider necessary for the purpose of reaching their findings.

As for the concept of 'necessary information', it follows from the wording, context and objective of Article 18(1) of the basic regulation that that term refers to information held by the interested parties which the EU institutions ask them to provide in order to enable those institutions to reach the appropriate findings in an anti-dumping investigation. Thus, information relating to production volumes and manufacturing costs of the product under investigation is necessary information within the meaning of that provision.

In the present case, the Court notes, first of all, that the applicant did not supply the information requested by the Commission regarding the inputs for self-produced factors of production, information that was necessary for determining the normal value. Since the normal value was constructed using a method based on production costs, there was a need to be acquainted with the consumption volumes of all the inputs used to produce PVA, including the inputs for producing self-produced factors of production. As the applicant did not demonstrate that it was impossible for it to provide that information, the Commission did not infringe Article 18(1) by using the facts available as a substitute for that information.

Next, as regards the alleged infringement of Article 18(3) of the basic regulation, the Court recalls that paragraphs 1 and 3 of that article cover different situations. Thus, whereas paragraph 1 of Article 18 sets out in general terms cases in which the information needed by the institutions for the purposes of the investigation has not been supplied, paragraph 3 of that article contemplates the cases in which the information necessary for the purposes of the investigation has been supplied but is irrelevant, with the result that the facts available do not necessarily have to be used. Since the applicant did not provide the information required, Article 18(3) of the basic regulation is not applicable and the Commission was able to use only the facts available as a substitute for the missing information.

Finally, the Commission also did not infringe the applicant's rights of defence in so far as it did not provide the applicant in good time with the 'verification report', which had to be sent to the applicant before the letter informing that party of the Commission's intention to use the facts available within the meaning of Article 18 of the basic regulation. In that regard, it follows from settled case-law that an infringement of the rights of the defence results in the annulment of the decision adopted at the end of a procedure only if, had it not been for that irregularity, the outcome of the procedure might have been different. The applicant has not put forward any evidence to show that it could not be ruled out that the outcome of the procedure might have been different if it had received that report earlier.

As regards the other pleas challenging the dumping margin adopted by the Commission in the contested regulation, it follows from the analysis of those pleas that the calculation of the dumping margin is not tainted by error, with the result that the dumping margin remains higher than the injury margin, that latter margin having been taken into account in order to determine the anti-dumping rate under the lesser duty rule. Thus, as those other pleas are not such as to call that finding into question, the Court rejects them as ineffective.

XI. Economic and monetary policy

1. Single Resolution Mechanism

Judgment of 10 July 2024, *France* v *SRB* (T-540/22, EU:T:2024:459)

(Economic and monetary policy – Banking Union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Regulation (EU) No 806/2014 – Minimum requirement for own funds and eligible liabilities – Decision of the SRB not to grant a waiver – Appeal before the Appeal Panel of the SRB – Dismissal – Condition that there is no impediment to the prompt transfer of own funds – SRB's margin of discretion – Legal certainty – Obligation to state reasons)

Hearing an action for annulment, which it dismisses, brought by the French Republic against a decision of the Appeal Panel of the Single Resolution Board (SRB) ('the Appeal Panel'), [540] the General Court rules for the first time on a decision of the Appeal Panel reviewing the examination carried out by the SRB to determine whether a banking group satisfies the necessary conditions for it to be eligible for waiver of the minimum requirement for own funds. Those conditions are laid down in Article 12h of Regulation No 806/2014. [541]

On 6 November 2020, a banking group had submitted, in respect of one of its subsidiaries, an application to the SRB for waiver of the minimum requirement for own funds and eligible liabilities ('the MREL') applied on an individual basis pursuant to Article 12g of Regulation No 806/2014. Hearing an appeal against the SRB's decision refusing that application, [542] the appeal having been lodged by the Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution (ACPR), France) ('the appellant before the Appeal Panel'), the Appeal Panel dismissed that appeal by the contested decision.

Findings of the Court

In the first place, as regards the scope of Article 12h(1) of Regulation No 806/2014 ('the provision concerned'), the Court finds, first of all, based on a literal interpretation, that Article 12h(1)(c) of that regulation does not provide for the possibility of requiring a specific guarantee in order to satisfy the condition that there is no current or foreseen material impediment to the prompt transfer of own funds or repayment of liabilities, and that nor does that provision prohibit the SRB from requiring a specific guarantee in that regard.

Next, as part of a contextual interpretation, the Court takes the view that the requirement of collateralised guarantees between the parent undertaking and its subsidiaries is provided for in Article 12g of Regulation No 806/2014 solely as a means of complying with an internal MREL, and that the condition that a guarantee is provided does not appear in Article 12h of that regulation in the context of a waiver, contrary to what was provided for by the legislature in Directive 2014/59. [543] Thus,

---

540 Decision No 3/2021 of the Appeal Panel of the Single Resolution Board (SRB) of 8 June 2022 dismissing the appeal lodged against Decision SRB/EES/2021/44 of 4 November 2021 determining the minimum requirement for own funds and eligible liabilities ('the contested decision').

541 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), as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 226).

542 Decision SRB/EES/2021/44 of the Single Resolution Board of 4 November 2021.

543 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

the possibility of obtaining a waiver under the provision concerned cannot in any way be made conditional upon the requirement of a collateralised guarantee similar to that provided for in Article 12g(3) of the same regulation. An approach to the contrary would render the provision concerned wholly ineffective and would thus constitute a flagrant infringement of that provision.

However, the Court considers that it cannot be inferred from the contextual interpretation of the provision concerned that the failure to mention a guarantee in the provision relating to the examination of an application for waiver of the internal MREL [544] prevents *ipso jure* the SRB from imposing a requirement of that kind in the context of that examination. Thus, while the SRB is obliged to refuse a waiver application if one of the cumulative conditions laid down in the provision concerned is not satisfied, it does, nevertheless, enjoy a margin of discretion to determine under which circumstances the third of those conditions, concerning the lack of any impediment to the prompt transfer of own funds, is satisfied. Accordingly, it cannot be ruled out, having regard to that discretion, that the SRB may be justified in requiring a guarantee – which is different from that provided for in Article 12g(3) of Regulation No 806/2014 – so as to counteract any impediment to the prompt transfer of own funds.

Lastly, on the basis of a teleological interpretation of the provision concerned, the Court notes that the primary objective common to Regulation No 806/2014 and Directive 2014/59, which is pursued by the legislature by imposing the MREL on all of the institutions in a banking group, is to ensure effective resolution with a minimum detrimental impact on the real economy, the financial system and the public finances. Thus, when the SRB examines an application for waiver of the internal MREL, it falls to it to assess whether there are other arrangements which could act as functional substitutes for the internal MREL. Within the context of its discretion, there is nothing to prevent it from considering that, according to the circumstances specific to each waiver application, a guarantee is necessary in order to satisfy the condition that there is no impediment to the prompt transfer of own funds. However, it may not require a guarantee which is similar in characteristics to that provided for in Article 12g(3) of Regulation No 806/2014.

In that regard, the Court states that it is not apparent from the contested decision that the SRB required the banking group concerned to provide a guarantee corresponding to, or having characteristics similar to, that provided for in Article 12g(3) of Regulation No 806/2014, nor, a fortiori, that the Appeal Panel endorsed such an approach by the SRB.

In the second place, with regard to the examination by the Appeal Panel solely of the pleas raised before it, the Court recalls, as a preliminary point, that, under Regulation No 806/2014, [545] any natural or legal person may bring an appeal before the Appeal Panel against a decision of the SRB, that the appeal is to state the grounds upon which it is based, and that it falls to the Appeal Panel to decide upon that appeal. It follows from the foregoing that the Appeal Panel is to examine the pleas raised before it. Furthermore, the Court observes that the arguments raised by the appellant before the Appeal Panel in support of its first plea did not concern the substantive assessments made by the SRB concerning the 2014 and 2015 guarantees upon which the banking group concerned relied to argue that the condition that there is no impediment to the prompt transfer of own funds was met. The arguments in question concerned the alleged error in law committed by the SRB because it exceeded its powers by applying automatically a condition not contained in Article 12h of Regulation No 806/2014.

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), as amended by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 296).

544 That is to say, Article 12h(1) of Regulation No 806/2014.

545 See Article 85(3) and (4) of that regulation.

Therefore, the Court takes the view that it was for the Appeal Panel to verify that the assessment made by the SRB was not a disguised examination *in abstracto* of the 2014 and 2015 guarantees, but rather a credible examination *in concreto* of the situation of the banking group concerned and of those guarantees put forward in support of its waiver application, and that the limits on the SRB's margin of discretion had thus been observed. The Court therefore dismisses the complaint that the pleas and arguments raised by the appellant before the Appeal Panel, based on the error in law allegedly committed by the SRB because it incorrectly applied the provision concerned and exceeded the limits of its powers, should have necessarily led the Appeal Panel to examine whether the SRB was justified, in the light of all the relevant evidence in the present case, in requiring a specific guarantee.

Lastly, as regards the breach of the principle of legal certainty, the Court observes, first, that Article 12h(1)(c) of Regulation No 806/2014 cannot be required to set out the various specific hypotheses in which the condition laid down in that provision is or is not satisfied, given that not all those hypotheses can be determined in advance by the legislature. It is impossible to list the examples of impediments to the prompt transfer of own funds, just as the legislature cannot be required to set out positively the measures which would ensure compliance with the condition that there are no such impediments. Second, the principle of legal certainty does not preclude the authorities concerned from having some discretion in the application of the criteria determined by the legislation. In the present case, the fact that the SRB enjoys a degree of discretion as to whether there is an impediment to the prompt transfer of own funds or as regards the appropriate manner in which that condition is to be satisfied does not mean, however, that there has been a breach of the principle of legal certainty.

2. Prudential supervision of credit institutions [546]

Judgment of 28 February 2024, *Sber* v *ECB* (Joined Cases T-647/21 and T-99/22, EU:T:2024:127)

(Economic and monetary policy – Prudential supervision of credit institutions – Second subparagraph of Article 9(1) of Regulation (EU) No 1024/2013 – Application by the ECB of absorption interest pursuant to Austrian law where Article 395 of Regulation (EU) No 575/2013 has been infringed and following a decision imposing an administrative pecuniary penalty under Article 18 of Regulation No 1024/2013 – Proportionality)

Judgment of 28 February 2024, *BAWAG PSK* v *ECB* (T-667/21, EU:T:2024:131)

(Economic and monetary policy – Prudential supervision of credit institutions – Second subparagraph of Article 9(1) of Regulation (EU) No 1024/2013 – Direct exercise by the ECB of a power of a competent authority under the relevant Union law – Levying absorption interest under Austrian law where Article 395 of Regulation (EU) No 575/2013 has been infringed – Competence of the ECB – Article 65(1) and Article 70 of Directive 2013/36/EU – Proportionality)

By upholding the actions for annulment brought against decisions adopted by the European Central Bank (ECB) levying absorption interest on the basis of the SSM Regulation [547] and pursuant to national law, by two judgments delivered on the same day, the General Court clarifies the circumstances in

[546] Joint résumé for cases ***Sber* v *ECB*** (T-647/21 and T-99/22) and ***BAWAG PSK* v *ECB*** (T-667/21).

[547] 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) ('the SSM Regulation').

which it may have recourse to an interpretation in conformity with EU law of national law transposing a directive, which departs from the interpretation of the national courts.

In addition, in the judgment in *Sber* v *ECB* (Joined Cases T-647/21 and T-99/22), the Court gives a ruling on the novel question of the application of the principle *ne bis in idem* where the ECB imposes administrative pecuniary penalties under the SSM Regulation, while in the judgment in *BAWAG PSK* v *ECB* (T-667/21), it develops its case-law on the extent of the ECB's competence under that regulation.

The cases concern two Austrian credit institutions subject to direct prudential supervision by the ECB.

Accordingly, in Joined Cases T-647/21 and T-99/22, the ECB imposed on the applicant, Sber Vermögensverwaltungs AG, an administrative pecuniary penalty under the SSM Regulation in respect of the limits to large exposures established by Regulation No 575/2013 [548] having been exceeded both on an individual and on a consolidated basis. Next, on the basis of the SSM Regulation, [549] and pursuant to point 2 of Paragraph 97(1) of the BWG, [550] the ECB decided to levy absorption interest on it in respect of the amounts concerned by such limits having been exceeded.

Following an opinion delivered by the ECB's Administrative Board of Review finding that there were flaws in the ECB's initial decision, the ECB, on 21 December 2021, replaced that decision with a new decision, [551] but maintained the amount of absorption interest. It stated that, in situations where an institution breaches its obligations under Regulation No 575/2013, the levying of absorption interest under the BWG fell within the exercise of a non-discretionary power by the competent authority, leaving it no discretion.

By two separate actions, the applicant requested the Court to annul both the initial decision and the decision of 21 December 2021 adopted by the ECB.

In Case T-667/21, the applicant, BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG, indirectly acquired a portfolio of residential property loans in France. That portfolio was transferred to a joint fund without legal personality, in which it acquired all the shares, thereby becoming the beneficial owner.

Following an inspection at the applicant's premises, the ECB found that the applicant was not in possession of data enabling each of the debtors of the underlying loans to be identified and that it had disregarded the limit to large exposures provided for in Regulation No 575/2013 in respect of the portfolio. Accordingly, by decision of 2 August 2021, [552] on the basis of the same legislative provisions as mentioned in the description of the joined cases referred to above, the ECB levied absorption interest on it. The applicant disputed that decision before the Court.

By its judgments in *Sber* v *ECB* (Joined Cases T-647/21 and T-99/22) and in *BAWAG PSK* v *ECB* (T-667/21), the Court annulled the ECB's decision of 21 December 2021, which had replaced its initial decision, and the decision of 2 August 2021, respectively, on the ground that, when levying absorption interest, the ECB failed to examine the circumstances of the case.

---

548 Article 395(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68 and OJ 2013 L 321, p. 6).

549 Article 4(1)(d) and (3) and the second subparagraph of Article 9(1) of the SSM Regulation.

550 Bundesgesetz über das Bankwesen (Bankwesengesetz) (Law on the banking sector) of 30 July 1993 (BGBl. 532/1993), as amended by the Law of 28 May 2021 (BGBl. I, 98/2021) ('the BWG').

551 Decision ECB-SSM-2021-ATSBE-12.

552 Decision ECB/SSM/2021-ATBAW-7-ESA-2018-0000126.

Findings of the Court

The application of the principle ne bis in idem

The Court considers that the levying of absorption interest by the ECB under point 2 of Paragraph 97(1) of the BWG in respect of conduct which has already been the subject of an administrative pecuniary penalty under the SSM Regulation is not contrary to the principle *ne bis in idem*.

In that regard, it recalls that the application of Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), which prohibits a duplication of proceedings and of penalties of a criminal nature for the same facts and against the same person, is not limited to proceedings and penalties which are classified as 'criminal' by national law. Indeed, it extends to proceedings and penalties which must be considered to have a criminal nature on the basis of the intrinsic nature of the offence and the degree of severity of the penalty which the person concerned is liable to incur.

Accordingly, the Court points out that administrative pecuniary penalties imposed under Article 18(1) of the SSM Regulation fall within the scope of Article 50 of the Charter. It observes that those penalties are clearly modelled on the fines which the European Commission may impose in the field of competition law [553] and are of an equivalent nature and severity. It results from settled case-law that the principle *ne bis in idem* must be observed in proceedings for the imposition of fines under competition law. That classification must therefore be applied, by analogy, to those penalties.

By contrast, the Court finds that it is apparent from the case-law of the Austrian courts that absorption interest is classified as a non-punitive prudential measure. Since neither the nature of the offence nor the degree of severity of the penalty brings them into the realm of criminal law, their application pursuant to the BWG does not fall within the scope of Article 50 of the Charter. That conclusion is, for that matter, confirmed by the judgment in *VTB Bank (Austria)*, [554] in which, as regards absorption interest, the Court favoured classification as an 'administrative measure' rather than as an 'administrative penalty'.

The ECB's competence to levy absorption interest

The Court states that the ECB was competent to levy absorption interest pursuant to Paragraph 97 of the BWG on the basis of the SSM Regulation.

At the outset, it states that, for the purpose of carrying out its prudential tasks, the ECB has three categories of supervisory and investigatory powers, namely those laid down in the SSM Regulation, the powers of competent authorities under relevant Union law and the power to instruct national authorities to make use of their powers in accordance with the conditions set out in national law.

In analysing whether, in the present case, the ECB had available to it the powers belonging to the second category, namely the powers of the competent authorities under relevant Union law, the Court observes that the expression 'under Union law' has been interpreted as including all the powers resulting from the legal framework established by a directive, which result from an obligation or a power for the Member State to legislate, as opposed to the recognition by that directive of the power

553 Pursuant to Article 23(2) of 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).

554 Judgment of 7 August 2018, ***VTB Bank (Austria)*** (C-52/17, EU:C:2018:648, paragraphs 40 to 42).

which the Member States enjoy under national law to provide for stricter provisions outside the framework of the regime established by that directive. [555]

However, in the judgment in *VTB Bank (Austria)*, [556] it was held, with regard to an earlier version of Paragraph 97 of the BWG, that the levying of absorption interest is akin to an administrative measure falling within the scope of Article 65(1) of Directive 2013/36, [557] which in the present case forms part of the relevant legal framework. The fact that they are not mentioned in a list of penalties and other administrative measures mentioned in that directive is irrelevant, since that list is not exhaustive, and that directive provides that Member States are to take all measures necessary to ensure that that directive and Regulation No 575/2013 are implemented. The General Court states that, in that judgment, the Court of Justice emphasised that prudential minimum requirements adopted by EU law should ensure maximum harmonisation and that, where the limits set out in Regulation No 575/2013 are exceeded, Member States are required to levy on credit institutions not a measure governed by national law but an administrative penalty or other administrative measure within the meaning of Article 65(1) of Directive 2013/36.

Accordingly, the fact that the levying of absorption interest is not referred to in the list in Directive 2013/36 does not prevent it from falling within the legal regime established by that directive. Consequently, the Court concludes that it is akin to a power available to the competent national authority 'under the relevant Union law' within the meaning of the second sentence of the second subparagraph of Article 9(1) of the SSM Regulation and which power, consequently, the ECB has.

Interpretation of national law

The Court observes that, by relying on the interpretation of the Austrian courts that absorption interest was levied automatically in cases where the limits to large exposures are exceeded and by failing to examine the circumstances of the case, the ECB relied on a premiss which was legally incorrect, which vitiated its examination of the proportionality of the application of point 2 of Paragraph 97(1) of the BWG.

In that context, the Court recalls that, where it is called upon to review the substance of the ECB's application of national law transposing a directive, the interpretation of national courts is sufficient to establish the scope of that national law where it results in a finding that it is compatible with the directive which it transposes. By contrast, where the interpretation of the national courts does not make it possible to ensure the compatibility of national law with a directive, compliance with the principle of the primacy of EU law means that the Court must, as must a national court, where necessary, interpret national law so far as possible in the light of the wording and the purpose of the directive transposed in order to achieve the result sought by that directive. Accordingly, the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change established case-law, where necessary, if it is based on an interpretation of national law which is incompatible with the objectives of a directive.

Moreover, where it is unable to interpret national law in compliance with the requirements of EU law, the General Court, like the national court which is called upon to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any national legislation, even if adopted subsequently, which is contrary to a provision of EU law with direct effect.

---

555 See, to that effect, judgment of 10 March 2016, ***Safe Interenvíos*** (C-235/14, EU:C:2016:154, paragraph 79 and the case-law cited).

556 Judgment of 7 August 2018 cited above, paragraphs 31 to 44.

557 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).

In the present case, the Court considers, on the basis of a literal, contextual and teleological interpretation of Article 70 of Directive 2013/36, [558] that that provision must be understood as meaning that it is for the competent national authority and, in consequence, the ECB, to determine the type of administrative measure by taking into account all the circumstances, which necessarily implies that they have a margin of discretion and precludes them from being in a position of non-discretionary competence as regards the application of absorption interest levied pursuant to point 2 of Paragraph 97(1) of the BWG.

Judgment of 10 July 2024, *PH and Others* v *ECB* (T-323/22, EU:T:2024:460)

(Economic and monetary policy – Prudential supervision of credit institutions – Opposition of the ECB to the acquisition of qualifying holdings in a credit institution – Action for annulment – Interest in bringing proceedings – Direct concern – Inadmissibility in part – Reputation and professional competence of the proposed acquirer – Financial soundness – Compliance with prudential requirements – Anti-money laundering and counter-terrorist financing – Proportionality)

Hearing an action for annulment, which it dismisses, against a decision of the European Central Bank (ECB) in which it refuses to allow the acquisition of a qualifying holding in a credit institution, the General Court rules on the novel issue of the standing of the company that is selling such a holding to bring an action for the annulment of a decision refusing to allow the proposed acquirer to acquire that holding. In addition, it rules on the question whether, in the context of the assessment of the good repute of the proposed acquirer, the ECB may assess the latter's professional competence.

HKB Bank GmbH ('the target bank') is a credit institution described as 'less significant' [559] that is under the direct prudential supervision of the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority, Germany; 'BaFin'). On 9 April 2020 and 9 July 2020, PH, PI and PJ ('the proposed acquirers') notified BaFin of their intention to acquire a qualifying holding and to exceed holding 50% of the capital and voting rights in the target bank ('the proposed acquisition'), as a result of the acquisition of all the shares held by Socrates Capital in the target bank. By the contested decision, of which the proposed acquirers were notified on 22 March 2022, the ECB opposed the proposed acquisition, given that the proposed acquirers did not meet the criteria of good repute, financial soundness and compliance with prudential requirements or anti-money laundering and counter-terrorist financing requirements.

Findings of the Court

As regards the admissibility of the action brought before the Court by Socrates Capital and the proposed acquirers, the Court notes that, since one and the same action is involved, provided that PH, PI and PJ have standing, there is no need to examine Socrates Capital's standing. However, the Court considers it appropriate, in the interests of the proper administration of justice and in view of the particular importance of the question of admissibility raised by the ECB's plea of inadmissibility, to rule on it.

In that regard, after setting out the rules governing which natural or legal persons are to be accorded standing to bring an action against an act which is not addressed to them, the Court finds that, in the present case, the contested decision was not notified to Socrates Capital. Moreover, no provision required such notification to be given to that applicant as the transferor of the qualifying holding at issue. Since the contested decision is not a regulatory act, the Court is then to examine whether the action, in so far as it is brought by Socrates Capital, fulfils the condition of direct concern.

---

558 Read in conjunction with Article 4(1), Article 65(1) and recital 37 of Directive 2013/36.

559 Within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

In that regard, first of all, the Court finds that the purpose of the mechanism for monitoring qualifying holdings is to assess, before such holdings are acquired, the suitability of proposed acquirers wishing to gain access to the banking sector as owners. Therefore, opposition to the acquisition of a qualifying holding in a credit institution must be regarded as not altering the legal position of the company selling such a holding. Although such opposition does call into question the possibility for proposed acquirers to enter into a contract with the seller of a qualifying holding, that opposition does not, however, call into question the seller's right to enter into a transaction to transfer the qualifying holding, which it may conclude with another potential acquirer. That opposition is merely a refusal to allow the proposed acquirers to gain access to the banking sector as owners.

The Court then moves on to find that that conclusion is borne out by the legal context of the contested decision. Directive 2013/36 [560] makes no reference either to the publication of the notification of the acquisition of a qualifying holding in a credit institution, or to the possibility of third parties being involved in the administrative procedure, or indeed to the systematic publication of the decision of the competent authority. If the opposition to the acquisition of a qualifying holding is not observed, it provides for penalties only in respect of the exercise of the voting rights corresponding to the shareholding acquired by the proposed acquirers. Thus, in the present case, the contested decision assesses the suitability of the proposed acquirers and not the lawfulness of the sale and purchase agreement.

In addition, the Court observes that the clause in the sale and purchase agreement stipulating that the agreement will not enter into force without the ECB's authorisation was voluntarily inserted by the parties to the agreement. It is true that a contractual clause may reflect legislation. However, in the present case, that clause reflects legislation which makes the proposed acquirer individually subject to an administrative authorisation the purpose of which is to assess whether that acquirer is suitable to access the banking sector as an owner. Accordingly, the ECB is not ruling on the conformity of any agreement entered into between the proposed acquirers and the seller of a shareholding in a credit institution when it assesses the notification of that acquisition.

Lastly, although the contested decision does constitute an interference with the right to property and the freedom to conduct a business of the proposed acquirers, it cannot be regarded as constituting an interference with the same rights vis-à-vis Socrates Capital. The contested decision does not directly affect Socrates Capital's right to sell its shares in the target bank.

The Court therefore concludes that the contested decision does not amount to a general prohibition on Socrates Capital selling its shares in the target bank and that, therefore, Socrates Capital is not directly concerned by the contested decision. Consequently, it dismisses the action as inadmissible in so far as it concerns Socrates Capital.

As regards whether it is possible for the ECB, as part of the assessment of the good repute of the proposed acquirers, to assess their professional competence, the Court finds that it is true that Article 23(1) of Directive 2013/36 makes reference, in subparagraph (a), only to the reputation of the proposed acquirer, [561] whereas subparagraph (b) of that article makes reference to the reputation, knowledge, [562] competence and experience [563] of any member of the management body who will direct the business of the credit institution as a result of the proposed acquisition.

---

560 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).

561 Article 23(1)(a) of Directive 2013/36.

562 Article 23(1)(b) of Directive 2013/36.

563 Article 91(1) of Directive 2013/36.

However, the Court notes that, according to its usual meaning, to be of 'good repute' means being 'worthy of esteem' or being 'known to be respectable'. Such a definition, which refers in particular to public opinion, does not preclude a person's good repute from being dependant on his or her professional competence. In addition, according to recital 8 of Directive 2007/44, [564] the provisions of which were reproduced in Directive 2013/36, the application of the criterion concerning the reputation of the proposed acquirer implies the determination of whether any doubts exist as to the integrity 'and professional competence' of the proposed acquirer and whether those doubts are founded.

The Court also states that taking into consideration professional competence when examining the reputation of the proposed acquirer is consistent with assessing the 'suitability' of the proposed acquirer and with the objective of monitoring the acquisition of qualifying holdings, which is to ensure the sound and prudent management of the credit institution. Given that the holder of a qualifying holding is in a position to influence the credit institution concerned, his or her professional competence contributes to that sound and prudent management of that institution. The Joint Guidelines [565] support that interpretation, since they state that the reputation of the proposed acquirer should cover his or her integrity and his or her professional competence. Moreover, the wording used in German law in that area does not make it possible to preclude such an interpretation, since the explanatory memorandum to the German statute which transposes Directive 2007/44 states that the reliability criterion consists of determining whether there are doubts as to the integrity 'and professional ability' of the proposed acquirer and whether those doubts are well founded.

The Court concludes from the foregoing that the reputation criterion referred to in Directive 2013/36 must be interpreted as including an assessment of the professional competence of the proposed acquirer.

564 Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ 2007 L 247, p. 1).

565 Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), published on 20 December 2016.

XII. Public procurement by the EU institutions

Judgment of 21 February 2024, *Inivos and Inivos* v *Commission* (T-38/21, EU:T:2024:100)

(Public procurement – Negotiated procedure without prior publication of a contract notice – Supply of disinfection robots to European hospitals – Extreme urgency – COVID-19 – Non-participation of the applicants in the tendering procedure – Action for annulment – Lack of individual concern – Contractual nature of the dispute – Inadmissibility – Liability)

The General Court, ruling in the extended five-judge composition, dismisses as inadmissible the action brought by the applicants, Inivos Ltd and Inivos BV, seeking, inter alia, annulment of three decisions of the European Commission concerning the award of an EU public contract for the acquisition of disinfection robots. In its judgment, the Court clarifies the conditions governing the admissibility of an action brought by an economic operator which has not been invited to participate in a negotiated procedure without prior publication of a contract notice ('NPWPP'), seeking annulment of the decision taken in the course of that procedure to award the contract.

The Commission has decided, on the basis of the urgency arising from the COVID-19 crisis, to use the NPWPP to acquire 200 autonomous disinfection robots using UV rays in order to deploy them in European hospitals. [566] A preliminary market consultation had identified six suppliers, other than the applicants, that met predefined criteria and were invited by the Commission to submit a bid under the NPWPP. The Commission adopted the decision to award that contract to two of them, with which the framework contracts for disinfection robots were therefore concluded.

Following the contract award notice of 9 December 2020, according to which the framework contracts at issue had been concluded on 19 November 2020, the applicants brought an action for annulment of the decision to use an NPWPP, the decision to award that contract ('the contested award decision') and the decision to conclude the framework contracts with the two selected operators, as well as an action for damages.

Findings of the Court

In the assessment of the admissibility of the head of claim seeking annulment of the contested award decision, the Court rules, inter alia, on the question of the standing of the applicants to bring proceedings. [567]

In the first place, the Court examines whether the contested award decision is of direct concern to the applicants. It finds, first, that the effect of that decision was to deprive them definitively of the opportunity to participate in – and thereby to exclude them from – the NPWPP. Accordingly, that decision directly produced effects on their legal situation. Stressing that the applicants must prove that they are operators active on the market concerned, the Court considers that they have sufficiently demonstrated that they were active on the market for autonomous disinfection robots using UV rays.

Secondly, the contested award decision definitively identified two operators as successful tenderers for the contract at issue with immediate and binding effect. Since that decision produces its legal

---

566 Pursuant to Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

567 Pursuant to the fourth paragraph of Article 263 TFEU, any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them.

effects without any additional measure being required, it leaves no discretion to the addressees who are entrusted with the task of implementing it. The Court concludes from the foregoing that the contested award decision directly affected the applicants.

In the second place, the Court examines whether the contested award decision is of individual concern to the applicants. In the specific circumstances of an NPWPP, an operator which has not been invited to participate in that procedure, even though it was able to fulfil the criteria applied by the contracting authority to select the undertakings to be invited to tender, must be regarded as belonging to a limited class of competitors which, had they been invited to submit a tender, would have been in a position to do so.

In that regard, the Commission explained that the criteria used in the procedure in question were the CE marking, a production capacity of at least 20 units per month and experience in deploying at least 10 robots in hospitals. Those criteria were brought to the attention of the applicants in the context of the judicial proceedings.

First, as regards the criterion relating to the CE marking, the Court considers that the applicants have demonstrated that their robot fulfilled that criterion.

Secondly, as regards the criterion relating to production capacity, although the applicants stated at the hearing that they fulfilled that criterion and were even able to increase their production capacity, the Court notes that they have not adduced any evidence establishing that their production capacity could reach 20 robots per month.

Thirdly, as regards the criterion relating to the experience required in the deployment of robots in hospitals, the Court finds that the evidence produced by the applicants does not make it possible to determine the exact number of robots deployed.

The Court infers from the foregoing that the applicants have not proved that they were in a position to fulfil the criteria used by the Commission to select the operators invited to tender in the context of the NPWPP. Consequently, they have not proved that they formed part of a limited class of operators in a position to be invited to tender and to submit a tender. They are therefore not individually concerned by the contested award decision.

Accordingly, the Court finds that the head of claim seeking annulment of the contested award decision is inadmissible. After dismissing as inadmissible the heads of claim directed against the other two contested decisions, the Court dismisses the action for annulment in its entirety. Furthermore, the Court also dismisses the action for damages brought by the applicants.

Judgment of 2 October 2024, *VC* v *EU-OSHA (Exclusion from procurement procedures based on a suspended national administrative decision)* (T-126/23, EU:T:2024:666)

(Public supply contracts – Financial regulation – Exclusion from procurement procedures and from the award of grants financed by the general budget of the European Union and by the EDF for a period of two years – Publication of the exclusion – Registration in the early detection and exclusion system database – Serious professional misconduct – Decision of a national competition authority – Suspension by a national court – Obligation to state reasons – Right to effective judicial protection – Remedial measures – Unlimited jurisdiction – Manifest error of assessment – Error of assessment – Proportionality)

The General Court, sitting in an extended composition, dismissed the action for annulment brought by the applicant, VC, against the decision excluding that party from participating in procedures for the award of public contracts of the European Union for a period of two years on the basis of serious

professional misconduct. [568] In its judgment, the Court rules, for the first time, on the effects of a national court decision suspending the administrative decision on which the exclusion was based. It has also taken the unprecedented step of specifying the scope of its unlimited jurisdiction in assessing the adequacy of the remedial measures adopted by a tenderer, as well as the need to replace an exclusion penalty by a financial penalty.

The applicant had submitted a bid for a lot in the call for tenders published by the European Agency for Safety and Health at Work (EU-OSHA) for the provision of information and communication technology services. After becoming aware of the existence of a decision of the Comisión Nacional de los Mercados y la Competencia (National Commission on Markets and Competition, Spain) ('the CNMC') finding that the applicant had participated in an infringement of competition law ('the CNMC Decision'), EU-OSHA had requested a panel, convened in accordance with the financial regulation, [569] to make a recommendation concerning whether to impose an exclusion or a financial penalty on the applicant.

Subsequently, the Audiencia Nacional (National High Court, Spain) ordered a stay of execution of the CNMC decision ('the national decision to stay execution'). However, after making a preliminary legal assessment of the applicant's conduct, [570] the abovementioned panel recommended that EU-OSHA exclude that party, taking the view that the conduct in question should be regarded as 'serious professional misconduct'. EU-OSHA followed this recommendation and adopted the contested decision.

Findings of the Court

In the first place, the Court clarifies the scope of the effects of the national decision to stay execution.

First, the Court notes that, based on the financial regulation, [571] an entity can be excluded from participating in procedures for the award of public contracts, in the absence of a final judgment or a final administrative decision, on the basis of a preliminary legal assessment of its conduct by the competent EU authority based on established facts or findings determined in particular by decisions of a national competition authority. It follows that the absence of a final judgment or decision establishing the misconduct in question does not preclude the adoption of an exclusion measure by the competent EU authority.

The Court infers from this that the EU legislature intended to allow the competent EU authority to make its own assessment of the acts committed by the economic operator concerned, without waiting for a court to give judgment.

Accordingly, in the present case, it was for EU-OSHA, in the absence of a final decision, to make its own assessment of the applicant's conduct on the basis of the CNMC decision, but also of other

---

568 Decision of the European Agency for Safety and Health at Work of 13 January 2023 ('the contested decision').

569 Article 143 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1; 'the financial regulation').

570 See Article 136(2) of the financial regulation.

571 Article 106 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1), as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1), ('the former financial regulation'), and Article 136 of the financial regulation.

relevant factors relating to the factual context, including, in particular, the stay of execution of that decision.

In the present case, the Court has held that EU-OSHA did take into account the stay of execution of the CNMC decision and that it rightly considered that the stay of execution of that decision did not preclude the findings of that decision from being taken into account in order to demonstrate the existence of serious professional misconduct on the part of the applicant and to adopt an exclusion measure.

Indeed, the facts alleged against the applicant are not based on mere supposition or presumption, but were established on the basis of the findings of an investigation carried out by the CNMC.

Furthermore, the national decision to stay execution does not take a position on the substance of the CNMC decision. The Court states that the findings and considerations of the CNMC decision relating to the applicant's failure to comply with competition law are therefore in no way called into question, or even doubted, by the national court, which has based its decision to stay execution on considerations derived solely from the consequences of the fine imposed and of the prohibition to conclude contracts on the applicant's continuation of its activities. In any event, the fact that, as the applicant maintains, by granting a provisional measure the national court implicitly but necessarily recognised the plausibility of the CNMC's allegations cannot be sufficient to call into question the explicit considerations and findings of the CNMC decision.

Lastly, it is irrelevant that the national decision to stay execution suspends not only the payment of the fine imposed by the CNMC decision but also the prohibition on the applicant's being awarded procurement contracts in Spain imposed by that decision. The reasons for the stay of execution of the CNMC decision do not call into question the accuracy of the facts serving as the basis for the contested decision and thus ordering the exclusion of the applicant. Furthermore, the national decision to stay execution does not contain any information as to whether the applicant had implemented any remedial measures or whether the adoption of such measures justified the stay of execution.

Secondly, as regards the alleged infringement of the principle of effective judicial protection by the adoption of the exclusion decision, the Court recalls its case-law according to which legislation which paid no heed to the effects of bringing administrative or legal proceedings on the opportunity to participate in a procedure for the award of a contract would risk infringing the fundamental rights of the parties concerned. However, as explained above, it cannot be considered that, in the present case, the national decision to stay execution was disregarded and that the applicant's right to judicial protection was infringed.

Furthermore, the exercise of the power to exclude a person or entity – in this case the applicant – from procedures for the award of public contracts in the European Union on the basis of a preliminary legal assessment of its conduct does not infringe Article 47 of the Charter of Fundamental Rights of the European Union. The existence of a remedy to challenge the contested decision before the Courts of the European Union makes it possible to ensure that the applicant is afforded judicial protection.

The Court considers that there is therefore no reason to give the national decision to stay execution the same effect as that given to final decisions or judgments. If the power of the EU authorities to exclude a party from such a procedure could be paralysed by the mere fact of the lodging of a suspensive appeal against the national decision that might serve as a basis for the exclusion or of a suspension of that decision, such a power would be rendered ineffective.

Lastly, the Court adds that, in the event that the national decision to stay execution is followed by a final judgment annulling the CNMC decision, the financial regulation provides [572] that the authorising officer is to terminate the exclusion without delay, thereby giving full effect to the national court decision and at the same time guaranteeing the applicant's judicial protection, which attaches in this case to the national court decision, a decision that is binding on the EU authority.

In the second place, the Court clarifies the nature of its jurisdiction and the extent of its review of the remedial measures adopted by the applicant.

First, after reiterating that it has unlimited jurisdiction to review an exclusion decision, [573] the Court finds that the scope of that jurisdiction ought to be strictly limited to determining the penalty, without covering any changes in the constituent elements of the conduct justifying that penalty.

In the present case, however, the Court believes that the examination of remedial measures is part of the assessment of the conduct justifying a penalty. The assessment to be made of the remedial measures is tantamount to verifying whether the serious professional misconduct is continuing, inferred in this case from the infringement established by a national authority, and the possibility that it might recur. It is irrelevant in this respect that the remedial measures are generally implemented after the infringement established by the national authority has occurred. The Court concludes that it cannot exercise its unlimited jurisdiction for the purposes of examining the plea in law relating to the remedial measures adopted by the applicant. It cannot therefore substitute its own assessment of the remedial measures in question for that of EU-OSHA and must confine itself to reviewing the legality of that assessment.

Second, as regards the assessment by the Courts of the European Union as to whether a manifest error of assessment has been committed, on the one hand, the Court notes that in order to establish that an institution has committed a manifest error in assessing complex facts, the evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible. Without prejudice to that examination of plausibility, it is not for the General Court to substitute its assessment of complex facts for that of the institution which adopted the decision. In so far as the institutions have a margin of discretion to assess whether conduct can be classified as serious professional misconduct and the assessment of remedial measures is an integral part of the assessment of such conduct, they must also be given a margin of discretion to assess remedial measures.

On the other hand, the Court specifies the factors that may be taken into account in order to review the legality of EU-OSHA's assessment of the remedial measures adopted by the applicant. By providing that a person or entity is not excluded if it has taken sufficient remedial measures to demonstrate its reliability, [574] the financial regulation places the onus on the person or entity in question to establish that the remedial measures taken are such as to prevent its exclusion. The Court concludes that if the burden of proof imposed by those provisions is not to be rendered ineffective, it cannot be accepted that the operator concerned may adduce evidence before the Court that was not communicated during the exclusion procedure. A fortiori, the Court cannot rule in these proceedings on remedial measures not presented before EU-OSHA.

Furthermore, it would be prejudicial to the proper administration of justice and to the principle of institutional balance if the Court were to rule on new remedial measures or new evidence submitted, where applicable, at the same time to the authorising officer and which might lead that officer to review the contested decision in the course of the proceedings. Accordingly, the Court holds that only

572 Article 136(2), third subparagraph, of the financial regulation.

573 Article 143(9) of the financial regulation.

574 Article 106(7)(c) of the former financial regulation and Article 136(6)(a) of the financial regulation.

the evidence communicated to EU-OSHA before the adoption of the contested decision may be taken into account.

In the third place, the Court notes, in the context of the examination of the proportionality of the exclusion penalty, that the remedial measures adopted by the applicant were taken into account by EU-OSHA as mitigating circumstances in order to limit the duration of the exclusion. In the present case, therefore, it is a question of analysing the remedial measures adopted by the applicant in so far as they contribute not to the establishment of the wrongful conduct but to the determination of the associated penalty, thereby justifying the exercise by the Court of its unlimited jurisdiction.

To exercise that jurisdiction, the Court is therefore entitled to consider evidence communicated for the first time in the present proceedings that has not previously been communicated to EU-OSHA, subject, however, to compliance with the rules of admissibility laid down by the Rules of Procedure of the General Court.

Finally, the Court rules on the alleged failure to assess the application of a financial penalty as an alternative to exclusion.

On the one hand, the Court infers from the provisions of the financial regulation [575] that EU-OSHA was not, in the present case, required to examine the possibility of replacing the exclusion penalty by a financial penalty.

On the other hand, as regards the request made to the Court that it should itself order that replacement within the scope of its unlimited jurisdiction, the Court rejects that request as unfounded. The applicant does not explain why the exclusion penalty should be replaced by a financial penalty in the present case. Furthermore, and in any event, the Court holds that it follows from an examination of the applicant's arguments that the exclusion penalty imposed in the present case is appropriate and should not, therefore, be replaced by a financial penalty.

575 Article 106(13)(a) of the former financial regulation.

XIII. Arbitration clause

Judgment of 11 December 2024, *UIV Servizi* v *REA* (T-440/22, EU:T:2024:898)

(Arbitration clause – Grant agreement concerning the project TTD.EU ('European Quality Wines: Taste the Difference') – Information provision and promotion measures concerning agricultural products implemented in the internal market and in third countries – Suspension of the grant agreement – Suspicion of fraud in the context of a criminal investigation relating to another grant agreement – Contractual liability)

The General Court, before which an action had been brought under Article 272 TFEU, pursuant to an arbitration clause, rules on the novel issue of the validity of the decision of the European Research Executive Agency (REA) to suspend the TTD.EU grant agreement [576] ('the contested decision'). By its judgment, the Court declares invalid the contested decision, finds that there is no longer any need to adjudicate on the claim that the REA should be ordered to lift the suspension of the TTD.EU grant agreement and dismisses the claim for damages, which was also brought before it.

In December 2019, following a call for proposals for grants for information provision and promotion measures concerning agricultural products implemented in the internal market and in third countries, the applicant, the Italian association Unione Italiana Vini Servizi Soc. coop. arl (UIV Servizi), concluded the TTD.EU grant agreement with the Consumers, Health, Agriculture and Food Executive Agency (Chafea). From April 2021, the REA was entrusted with the implementation of the actions carried out by Chafea.

In May 2021, criminal proceedings were brought at national level, in Italy, against the applicant's Chief Executive Officer and Chief Financial Officer for suspected fraud in the context of a grant agreement coordinated by the applicant, other than the TTD.EU grant agreement ('the Italian criminal investigation'). In July 2021, the applicant informed the REA that the Guardia di Finanza di Milano (Milan Financial Police, Italy) had carried out an audit of the applicant in the context of that criminal investigation. Thereafter, in August 2021, the applicant and the person in charge of the TTD.EU grant agreement at the REA held a meeting. During that meeting, the person in charge at the REA observed that, since the Italian criminal investigation related to a different grant agreement, the TTD.EU grant agreement could continue to be implemented as normal, without it being necessary to take any measures in relation to that implementation.

In January 2022, the European Anti-Fraud Office (OLAF) informed the REA that it had opened, in December 2021, an investigation concerning allegations of fraud and other irregularities in the implementation of grant agreements concluded by the applicant, which included the TTD.EU grant agreement.

A month later, the REA informed the applicant, by pre-information letter, of its intention to suspend the TTD.EU grant agreement. After having rejected the applicant's observations, the REA confirmed, in May 2022, its intention to suspend the TTD.EU grant agreement by way of the contested decision, on the basis of Article 33.2.1(a) of that agreement, in order to protect the financial interests of the European Union. In accordance with that article, the REA may suspend the implementation of the action of the grant agreement 'if a beneficiary (or a natural person who has the power to represent or take decisions on its behalf) has committed or is suspected of having committed substantial errors, irregularities or fraud, or serious breach of obligations under this Agreement'. In those circumstances, the applicant brought an action before the Court asking it to (i) declare invalid the contested decision;

---

576 Grant Agreement No 874904 for the purpose of carrying out a project entitled 'European Quality Wines: Taste the Difference – TTD.EU', aimed at promoting Italian and Spanish wines on the Chinese and United States markets ('the TTD.EU grant agreement').

(ii) order the REA to lift the suspension of the TTD.EU grant agreement; and (iii) order the REA to pay it compensation for the pecuniary and non-pecuniary damage which it has suffered.

After that action had been brought, the OLAF investigation was closed in December 2022. On the basis of the findings of that investigation, OLAF had then sent the REA financial recommendations, the implementation of which, as regards the TTD.EU grant agreement, had not given rise, on the date of the hearing, to implementing measures.

Subsequently, the REA lodged an application for a declaration that there is no need to adjudicate, in which it informed the Court of the fact that the suspension of that agreement had been lifted. Following the reopening of the oral part of the procedure, the applicant lodged its observations regarding that application for a declaration that there is no need to adjudicate, to which it was opposed.

Findings of the Court

In the first place – after having, first, recalled the relevant provisions, both of EU law and of Belgian civil law, governing the contract in which the arbitration clause is included in the present case and, second, dismissed the REA's application for a declaration that there is no need to adjudicate, in so far as, by its action, the applicant seeks to obtain a ruling from the Court in the dispute between it and the REA concerning the application of the TTD.EU grant agreement and a declaration that the decision to suspend that agreement is invalid – the Court considers the validity of the contested decision. To do so, it interprets Article 33.2.1 of the TTD.EU grant agreement.

First, as regards the wording of Article 33.2.1(a)(i), the Court finds that the applicant's Chief Executive Officer and Chief Financial Officer, who were the subject of the Italian criminal investigation for suspicious of fraud linked to the implementation of a different grant agreement, are natural persons who have the power to represent or take decisions on behalf of the applicant. In the present case, the Chief Financial Officer signed both the TTD.EU grant agreement and the grant agreement at issue in the Italian criminal investigation, on behalf of the applicant, and the Chief Executive Office signed, on behalf of the applicant, the letter of interim assignment for the implementation of actions linked to the TTD.EU grant agreement. Accordingly, the Court notes that the suspicions of fraud concerning the applicant's Chief Executive Officer and Chief Financial Officer could, in principle, justify the suspension of the TTD.EU grant agreement, in so far as they are authorised to represent or take decisions on behalf of the applicant.

Next, the Court determines whether the REA was entitled to classify those natural persons as 'persons suspected of having committed fraud' within the meaning of Article 33.2.1(a)(i), thus justifying the suspension of the agreement. In that regard, it notes that that article refers in a general manner to the suspicions of having committed 'substantial errors, irregularities or fraud', without specifying the origin or source of such suspicions. Accordingly, the existence of a criminal investigation based on suspicions of fraud, as in the present case, may constitute, in principle, a source of 'suspected fraud' within the meaning of Article 33.2.1(a)(i) of the TTD.EU grant agreement.

Lastly, the Court addresses the question of whether the REA could, by adopting the contested decision, suspend the TTD.EU grant agreement pursuant to Article 33.2.1(a)(i) thereof, despite the fact that the suspicions of fraud against the applicant's Chief Executive Officer and Chief Financial Officer arose from the Italian criminal investigation concerning a different grant agreement. In that regard, the Court undertakes a detailed interpretation of points (a) and (b) of Article 33.2.1, in the light of, inter alia, the provisions of the Belgian Civil Code.

As regards Article 33.2.1(a), the Court states that point (a)(i) does not contain any reference to the TTD.EU grant agreement, with the result that suspicions of fraud relating to the performance of a different agreement could justify the suspension of the TTD.EU grant agreement. However, point (a)(ii) does contain such a reference. Furthermore, in accordance with Article 33.2.1(b), the REA may

suspend the implementation of the grant agreement 'if a beneficiary (or a natural person who has the power to represent or take decisions on its behalf) has committed – in other EU or Euratom grants awarded to it under similar conditions – systematic or recurrent errors, irregularities, fraud'. Thus, a reading of Article 33.2.1(a)(i) that suspicions of fraud concerning a different agreement could justify the suspension of the TTD.EU grant agreement would effectively deprive Article 33.2.1(b) of any practical effect.

Consequently, the Court holds that, by deciding to suspend the TTD.EU grant agreement on account of the fact that the applicant's Chief Executive Officer and Chief Financial Officer were suspected of fraud in the context of a different grant agreement, the REA infringed Article 33.2.1(a)(i) of the TTD.EU grant agreement, making that decision invalid.

In the second place, since the suspension of the TTD.EU grant agreement had in the meantime been lifted, the Court found that there was no longer any need to adjudicate on the claim that the REA should be ordered to lift the suspension.

In the third place, as regards the claim for damages, after having held that it is necessary to give a ruling on that claim, despite the fact that the suspension of the TTD.EU grant agreement had been lifted, the Court notes that, according to the Belgian Civil Code, three cumulative conditions must be satisfied in order for damage of contractual origin to be compensated, namely non-performance of the contract, harm and a causal link between the non-performance and the harm.

It is true that the Court observes that the REA decided, by the contested decision, to suspend the TTD.EU grant agreement, in breach of Article 33.2.1(a)(i) thereof. However, it considers that, although it is indeed likely that, following the suspension of the TTD.EU grant agreement, the applicant probably had to suspend or cancel certain events scheduled for the implementation of the agreement, nevertheless it does not prove that the pecuniary damage which it alleges actually materialised in the present case. Nor does the applicant prove the non-pecuniary damage, in the form of damage to its reputation and image, which it claims to have suffered.

XIV. Budget of the European Union

Judgment of 4 September 2024, *IMG* v *Commission* (T-509/21, EU:T:2024:590)

(EU Financial Regulations – Implementation of the EU budget under indirect management by an international organisation – Decision refusing to recognise a legal person as an international organisation – Action for annulment – Lawfulness of the authority to act granted to the applicant's lawyers – Admissibility – Decision adopted in compliance with a judgment of the Court of Justice – Article 266 TFEU – Res judicata – Principle of good administration – Legal certainty – Regulation (EU, Euratom) No 966/2012 – Article 58 – Delegated Regulation (EU) No 1268/2012 – Article 43 – Regulation (EU, Euratom) 2018/1046 – Article 156 – Concepts of 'international organisation' and 'international agreement' – Errors in law – Manifest error of assessment – Non-contractual liability)

Sitting in extended composition, the General Court dismisses the action brought by International Management Group (IMG) seeking, first, annulment of the decision of 8 June 2021 by which the European Commission refused to accord it, with retroactive effect from 16 December 2014, the status of an international organisation provided for by the EU Financial Regulations for the implementation of EU funds using the indirect management method [577] ('the contested decision') and, second, compensation for the material and non-material damage which it claims to have sustained. The examination of the lawfulness of the contested decision gives the Court the opportunity to clarify, first, the appropriate extent of review by the Courts of the European Union in that regard and, second, the concepts of 'international agreement' and 'international organisation', as defined by instruments of public international law and the case-law, in particular that of international courts.

IMG, the applicant, was created on 25 November 1994 [578] to provide the States and international organisations participating in the reconstruction of Bosnia and Herzegovina with an entity specifically created for that purpose.

On 7 November 2013, the Commission adopted the implementing decision on the Annual Action Programme 2013 in favour of Myanmar/Burma [579] to be financed from the general budget of the European Union, on the basis of Regulation No 966/2012. [580] That decision provided, inter alia, for a trade development programme the cost of which was to be financed by the European Union and implemented by joint management with the applicant.

On 17 February 2014, the European Anti-Fraud Office (OLAF) informed the Commission that it had opened an investigation into the applicant's status. On 15 December 2014, the Commission received the report drawn up by OLAF following its investigation. In that report, OLAF stated, in essence, that the applicant was not an international organisation within the meaning of Regulation No 1605/2002 [581] and of Regulation No 966/2012, which succeeded it.

---

577 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1).

578 Creation by the document of 25 November 1994 concerning the establishment of International Management Group – Infrastructure for Bosnia and Herzegovina (IMG-IBH) ('the resolution of 25 November 1994').

579 Implementing Decision C(2013) 7682 final.

580 Article 84 of Regulation No 966/2012.

581 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1).

On 16 December 2014, the Commission decided to entrust the implementation, by indirect management, of the trade development programme provided for in the abovementioned implementing decision to an organisation other than the applicant ('the decision of 16 December 2014').

Lastly, on 8 May 2015, the Commission sent a letter to the applicant informing it of how it intended to follow up on the OLAF report, in which it stated that it had decided, inter alia, that, until there was absolute certainty regarding the applicant's status as an international organisation, it would not enter into any new delegation agreement with it using the indirect management method provided for by Regulation No 966/2012 ('the decision of 8 May 2015').

The applicant brought two actions before the General Court seeking, first, annulment of the decision of 16 December 2014 and, second, annulment of the decision of 8 May 2015 and compensation for the harm caused by that decision. Following the dismissal of those two actions, by judgments of 2 February 2017, *International Management Group* v *Commission*, [582] and of 2 February 2017, *IMG* v *Commission*, [583] the applicant brought an appeal before the Court of Justice. By judgment of 31 January 2019, *International Management Group* v *Commission*, [584] the Court of Justice set aside those two judgments of the General Court, annulled the decisions of 16 December 2014 and 8 May 2015, and referred Case T-381/15 back to the General Court for a ruling on the claim for compensation submitted by the applicant in respect of the harm allegedly caused by the decision of 8 May 2015.

By judgment of 9 September 2020, [585] *IMG* v *Commission*, the General Court rejected the applicant's claim for compensation for the harm allegedly caused by the decision of 8 May 2015. The applicant brought an appeal before the Court of Justice.

On 8 June 2021, after exchanges with the applicant, which submitted its observations, the Commission finally adopted the contested decision.

By judgment of 22 September 2022, *IMG* v *Commission*, [586] the Court of Justice set aside the judgment of the General Court of 9 September 2020 in part and referred Case T-381/15 RENV back to the General Court for a ruling on the applicant's claim for damages for the material harm allegedly caused by the decision of 8 May 2015.

Findings of the Court

First, the Court rejects the applicant's claims for annulment of the contested decision.

The Court finds, first of all, that the contested decision sufficiently set out the legal and factual considerations on which it was based and which were such as to enable the applicant to assess its lawfulness and to enable the Court to exercise its power of review.

Next, the Court rejects the applicant's first plea in law, alleging several errors in law, in particular infringement of Article 266 TFEU, of the force of *res judicata*, of the principle of non-retroactivity of EU measures and of the principle of equal treatment. The Court also rejects the third plea in law, alleging breach of the principle of legal certainty, and the second plea in law, alleging breach of the duty of diligence and of the principle of impartiality.

---

582 Judgment of 2 February 2017, *International Management Group* v *Commission* (T-29/15, EU:T:2017:56).

583 Judgment of 2 February 2017, *IMG* v *Commission* (T-381/15, EU:T:2017:57).

584 Judgment of 31 January 2019, *International Management Group* v *Commission* (C-183/17 P and C-184/17 P, EU:C:2019:78).

585 Judgment of 9 September 2020, *IMG* v *Commission* (T-381/15 RENV, EU:T:2020:406).

586 Judgment of 22 September 2022, *IMG* v *Commission* (C-619/20 P and C-620/20 P, EU:C:2022:722).

Lastly, the Court rejects the fourth plea in law, alleging manifest errors of assessment and errors in law by which the applicant complained that the Commission refused to classify the act establishing it as an international agreement establishing an international organisation and to recognise its status as an international organisation notwithstanding the subsequent practice of its members.

The extent of review by the Courts of the European Union in the present case In the context of the examination of the fourth plea in law, the Court provides clarification as to the extent of review by the Courts of the European Union of the lawfulness of a decision, such as the contested decision. It recalls, in that regard, that the Commission enjoys a broad discretion when exercising its responsibility for implementing the EU budget, in particular when it chooses to implement that budget using the indirect management method, and that, in accordance with that method of management, it entrusts budget implementation tasks to international organisations. Thus, where the Commission exercises the powers set out above, the adverse decisions it adopts in that context are subject to review by the Court which is limited to the manifest error of assessment, without prejudice to the examination of other grounds of illegality which may be relied on in an action for annulment, in accordance with the second paragraph of Article 263 TFEU.

Nevertheless, where, as in the present case, the Commission refuses to entrust budget implementation tasks to an organisation using the indirect management method on the ground that that organisation does not have the status of an international organisation, the lawfulness of such a decision is subject to review by the Court, both as regards an error in law and a manifest error of assessment.

In such a case, the implementation by the Commission of the general rules which make it possible to define and identify international organisations falls within the scope of a review of the error in law, whereas the interpretation of the rules of the organisation which claims to be an international organisation for the purpose of implementing the EU budget using the indirect management method and the interpretation of the positions adopted by its members, which are likely to be somewhat complex, are subject to a review limited to manifest errors of assessment.

The concepts of 'international organisation' and 'international agreement' provided for by the EU Financial Regulations for the implementation of its budget using the indirect management method

As a preliminary point, the Court recalls that the concept of 'international organisation' as defined by the successive provisions of the EU Financial Regulations [587] covers international public sector organisations set up by international agreements. EU law must be interpreted in the light of the relevant rules of international law, since international law is part of the European Union legal order and is binding on the institutions.

However, in so far as the concepts of 'international organisation' and 'international agreement' are used in the EU Financial Regulations for the specific purpose of implementing its budget, they must be interpreted narrowly, in order to protect the financial interests of the European Union.

Thus, in a dispute such as that in the present case, the Court must apply the concepts of public international law to which the EU Financial Regulations refer by having recourse to the instruments of that law which define those concepts, as interpreted in accordance with the case-law. In particular, in the present case, the Court interprets the concepts of 'international organisation' and 'international agreement' provided for in the EU Financial Regulations for the implementation of its budget under indirect management in the light of the customary principles of public international law contained,

587 The term 'international organisation', referred to in Article 53 and Article 53(d) of Regulation No 1605/2002, in Article 58 of Regulation No 966/2012 and in Article 62 of Regulation 2018/1046, has been defined, in almost identical terms, in Article 43(2) of Regulation No 2342/2002 and then in Article 43(1) of Delegated Regulation No 1268/2012, which repealed and replaced Regulation No 2342/2002, and in Article 156 of Regulation 2018/1046. Thus, under those three provisions, that concept covers organisations governed by public international law created by international agreements.

inter alia, in the Vienna Convention [588] and the Draft articles on the responsibility of international organisations. [589]

In that regard, it follows from Article 2(1)(i) of the Vienna Convention that the expression 'international organisation' means an intergovernmental organisation. Moreover, Article 2(a) of the Draft Articles states that that expression means an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality and that international organisations may include as members, in addition to States, other entities.

In the first place, as regards the condition relating to establishment by a treaty or other instrument governed by international law, it follows from Article 2(1)(a) of the Vienna Convention that 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Thus, that instrument or those instruments may be the expression of the joint intentions on the part of two or more subjects of international law, which those instruments establish formally. Furthermore, it follows from the case-law of the international courts that, irrespective of its political significance, a document signed by States cannot constitute an international agreement if it does not contain any provision creating rights or obligations to which those States have consented. [590]

In the second place, as regards the condition relating to possession of its own international legal personality, it follows from the case-law of the international courts that, first, the recognition of an international organisation is subject to the organisation concerned having a legal personality. An entity established by States and, where appropriate, by one or more international organisations, does not, in the absence of a legal personality of its own, have the character of an international organisation, but rather that of a body which is dependent either on the States which established it, [591] or on an international organisation which hosts that entity. [592]

Second, it also follows from the case-law of the international courts that international organisations enjoy, in principle, privileges and immunities which are necessary for the performance of their tasks. [593] Unlike the immunity of States from jurisdiction, based on the principle *par in parem non habet imperium*, the immunities of international organisations are, as a general rule, conferred by the treaties establishing those organisations and have a functional character, inasmuch as they are

---

588 Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations, Treaty Series*, Vol. 1155, p. 331; 'the Vienna Convention').

589 Draft articles on the responsibility of international organisations adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10) (*Yearbook of the International Law Commission*, 2011, Vol. II, Part Two; 'the Draft Articles').

590 See judgment of the International Court of Justice of 1 October 2018, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ Reports 2018, p. 507, paragraphs 105 and 106 and the case-law cited.

591 See, to that effect, judgment of the International Court of Justice of 26 June 1992, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, ICJ Reports 1992, p. 240, paragraph 47.

592 See, to that effect, Advisory Opinion of the International Court of Justice, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, of 1 February 2012, ICJ Reports 2012, p. 10, paragraphs 57 and 61.

593 See, to that effect, judgment of the Permanent Court of Arbitration of 22 November 2002, *Dr. Reineccius and Others v. Bank for International Settlements*, Case No 2000-04, paragraph 108; Advisory Opinion of the International Court of Justice, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, of 1 February 2012, ICJ Reports 2012, p. 10, paragraph 58; and judgment of the International Court of Justice of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, p. 14, paragraph 88.

intended to avoid any interference with the functioning and independence of the organisations concerned.

Third, it follows from the case-law that the constituent instruments of international organisations are treaties of a particular type in that their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realising common goals. Thus, international organisations are governed by the 'principle of speciality', that is to say they are invested by the States which create them with powers, the limits of which are a function of the common interests the promotion of which those States entrust to them and which are normally the subject of an express statement in their constituent instruments. [594]

Thus, an international organisation cannot be reduced to merely an optional mechanism made available to the parties which each may use or not, as it pleases. By creating an international organisation and investing it with all the resources necessary for its operation, its founders demonstrate their intention to provide the best possible guarantees of stability, continuity and effectiveness to the performance of the tasks entrusted to that organisation, with the result that they cannot depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. [595]

The classification by the Court of IMG's founding act as an 'international agreement'

The Court examines the content and scope of the resolution of 25 November 1994 in order to determine whether that document contains legally binding commitments for its signatories.

In that regard, the Court notes that it is apparent from the wording of the resolution of 25 November 1994 that its signatories approved the applicant's organisational rules, in particular by confirming its General Manager and deciding to set up a steering committee within it. In particular, although that resolution did not impose any obligation on its authors to become members of the applicant, the fact remains that point 5 thereof laid down an obligation for the States that were signatories to decide to integrate the applicant into the overall framework for the reconstruction of Bosnia and Herzegovina or to phase out its activities. Thus, that resolution did contain at least one legally binding commitment for its signatories, and therefore it cannot be regarded as a declaration the scope of which is exclusively political.

Consequently, the Court finds that the Commission vitiated the contested decision by an error in law in considering that the resolution of 25 November 1994 was a political declaration which was not legally binding.

The Court also considers that the Commission vitiated the contested decision by an error in law in refusing to classify that resolution as an international agreement on account of the absence of full powers of the participants in the meeting of the same day, since the signature of that resolution was subsequently confirmed by at least two States.

In that regard, the Court recalls that, where a document is signed by persons who do not have the necessary authority to engage the States to which they belong, in accordance with Article 7(1) of the Vienna Convention, such a document cannot be regarded as a legally binding international

---

594 See, to that effect, Advisory Opinion of the International Court of Justice of 8 July 1996, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, ICJ Reports 1996, p. 66, paragraphs 19 and 25; judgments of the International Court of Justice of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, ICJ Reports 1998, p. 275, paragraphs 64 to 67, and of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, p. 14, paragraph 89.

595 See, to that effect, judgment of the International Court of Justice of 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, p. 14, paragraphs 90 and 91.

agreement, unless those persons are authorised to engage those States without having to produce full powers, pursuant to paragraph 2 of that article. [596]

However, in the present case, the Court finds that, by participating in the adoption of the applicant's initial or subsequent statutes or by sitting on its steering committee or its standing committee, the States that were signatories to the resolution of 25 November 1994 acted in such a way as to make the acts of signature of that act by their representatives appear as performed and thus subsequently confirmed, within the meaning of Article 8 of the Vienna Convention, the signature of that resolution, the purpose of which was to establish the applicant.

However, the Court considers that those errors in law remain, at this stage of the examination, irrelevant to the lawfulness of the contested decision, since they do not affect the condition laid down in the EU Financial Regulations that the applicant, in order to be eligible to implement the EU budget using the indirect management method provided for the benefit of international organisations, must have been founded by an international agreement the purpose of which was to establish it as an international organisation. Therefore, the illegalities found are not, by themselves, such as to entail the annulment of the contested decision.

The Court's interpretation of the intention of the signatories to IMG's founding act and of the subsequent practice of the signatory States and the Member States of that entity

In the present case, the Court takes the view that the Commission did not vitiate the contested decision by an error in law in finding that the resolution of 25 November 1994 had neither the purpose nor the effect of conferring on the applicant the status of an international organisation.

In that regard, the Court recalls that, pursuant to Article 31 of the Vienna Convention, which expresses general customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of that treaty in their context and in the light of its object and purpose.

Next, the Court considers that the Commission did not err in law in finding, in the contested decision, that subsequent practice, following the adoption of the resolution of 25 November 1994, and then the adoption of the initial statute and the 2012 statute, did not demonstrate a sufficiently wide and clear recognition of the applicant's status as an international organisation, both on the part of the signatories to that resolution and on the part of its members.

In that regard, the Court relies on the case-law according to which instruments cannot be regarded as a subsequent agreement or subsequent practice establishing the agreement of the parties regarding the interpretation of a treaty, within the meaning of Article 31(3)(a) and (b) of the Vienna Convention, if those instruments were adopted without the support of all the States parties to that treaty. [597]

Second, the Court rejects the applicant's claim for compensation for the material and non-material damage which it claims to have sustained, recalling inter alia that the claims seeking annulment of the contested decision were rejected, and therefore the first condition for the European Union to incur non-contractual liability and relating to the existence of a breach of a rule of law intended to confer rights on individuals has not been satisfied.

---

596 See, to that effect, judgment of the International Tribunal for the Law of the Sea of 14 March 2012, *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS Reports 2012, p. 4, paragraphs 96 and 98.

597 See, to that effect, judgment of the International Court of Justice of 31 March 2014, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 2014, p. 226, paragraph 83.

XV. Access to documents of the institutions

1. Exception relating to the protection of court proceedings

Judgment of 10 July 2024, *Hungary* v *Commission* (T-104/22, EU:T:2024:467)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the correspondence addressed to the Commission by the Hungarian authorities concerning a draft call for proposals co-financed by the European Union within the framework of European Structural and Investment Funds – Documents originating from a Member State – Objection by the Member State – Exception relating to the protection of the decision-making process – Concept of 'document relating to a matter where the decision has not been taken by the institution' – Obligation to state reasons – Sincere cooperation)

In dismissing Hungary's application for annulment of the decision of the European Commission granting a third-party applicant access to the correspondence addressed to the Commission by the Hungarian authorities concerning a draft call for proposals financed by EU funds ('the contested decision'), the General Court clarifies the scope of the exception relating to the protection of the decision-making process provided for in Regulation No 1049/2001, [598] notably with regard to the precise definition of the concept of 'the institution's decision-making process'. Furthermore, this – relatively rare – dispute, in which a Member State objects to the disclosure by an EU institution of documents originating from that Member State's own authorities provides the General Court with the opportunity to rule on the novel question whether that exception may be relied on by a Member State in order to object to the disclosure of documents relating to a call for proposals drawn up by a national authority responsible for managing the European Structural and Investment funds ('the ESI Funds') in the joint management of the budget of the European Union.

In 2021, an application for access was addressed to the Commission, relating to the official correspondence between it and the Hungarian authorities concerning a call for proposals coming under an operational programme funded by ESI Funds [599] pursuant to Regulation No 1303/2013. [600] On being consulted pursuant to Regulation No 1049/2001, [601] the Hungarian authorities objected to the disclosure of the documents originating from them, on the basis of the exception relating to the protection of the decision-making process. They observed that, since the decision-making process regarding the call for proposals at issue was still ongoing, disclosure of those documents might have seriously undermined the principles of equal treatment, non-discrimination and transparency.

The Commission initially granted the third-party applicant access to 6 of the 11 documents identified as being covered by the application for disclosure, but refused to grant it access to the documents originating from the Hungarian authorities. Following a confirmatory application and a fresh consultation of the Hungarian authorities, however, and in spite of their manifest objection, the

---

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

599 Call for proposals 'EFOP 2.2.5', entitled 'Improving the transition from institutional care to community-based services – Replacement of institutional accommodation by 2023'.

600 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320, corrigendum OJ 2016 L 200, p. 140).

601 Article 4(4) and (5) of Regulation No 1049/2001.

Commission granted access to the documents originating from the Hungarian authorities, including the newly identified documents.

Findings of the Court

Adjudicating on the plea whereby Hungary takes issue with the Commission for not having applied, in this case, the exception relating to the protection of the decision-making process, the Court finds, in the first place, that no Commission decision-making process was ongoing at the time when the contested decision was adopted.

In that regard, it notes that, while the ESI Funds come under shared management, the provisions of Regulation No 1303/2013 [602] relating to the criteria to be observed with a view to the selection of the operations to be financed by those Funds show that the calls for proposals are within the exclusive responsibility of the Member States. Thus, Regulation No 1303/2013 does not confer any particular competence on the Commission in the process of finalising a call for proposals governed by that regulation.

Furthermore, following a literal, contextual and teleological interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Court observes that the application of the exception provided for in that provision is subject to the identification of a process following which an EU institution is authorised by EU law to adopt a specific decision. The mere fact that the Commission participates in a procedure governed by the budgetary rules of shared management does not prove that that procedure comes under its decision-making process. The delegation by the Commission to the national managing authorities, which characterises shared management, has no impact on the respective competences of the Commission and the Member States which are clearly defined by the provisions of Regulation No 1303/2013; consequently, its decision-making process and those of the Member States must not be confused.

The Court therefore concludes that, in this case, the Commission was not required to adopt a decision. Thus, the documents which it received cannot be regarded as relating to an EU institution's ongoing decision-making process. Consequently, they cannot be regarded as 'relat[ing] to a matter where the decision has not been taken by [an EU institution]'. [603]

In the second place, the Court rejects Hungary's argument relating to the applicability of the exception based on the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the national managing authorities' decision-making process.

In that regard, it observes that that provision is not intended to protect the decision-making processes of the Member States or of legal persons other than the EU institutions, as the actual wording of that provision refers solely to documents relating to 'a matter where the decision has not been taken by the institution'. To interpret that exception as also protecting the decision-making process of the national managing authorities would amount to reintroducing in a roundabout way the authorship rule, abolished by the EU legislature, for any document affecting decision-making by a Member State. Such an interpretation would not be compatible with either the object or the purpose of Article 15 TFEU or Regulation No 1049/2001, which is to grant the widest possible public access to institution documents in all areas of EU activity. In addition, any interpretation of that provision going beyond its actual wording would lead to an extensive interpretation of the exception provided for in that provision that would make it impossible to delimit the scope of the ground of refusal in question.

602 Article 110(2)(a) and Article 125(3) of Regulation No 1303/2013.

603 Within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

2. Exception concerning the protection of privacy and the integrity of the individual

Judgment of 8 May 2024, *Izuzquiza and Others* v *Parliament* (T-375/22, EU:T:2024:296)

(Access to documents – Protection of personal data – Regulation (EC) No 1049/2001 – Documents relating to the allowances and expenses paid to a Member of Parliament and the salaries and allowances of his or her parliamentary assistants – Refusal to grant access – Exception relating to the protection of privacy and the integrity of the individual – Article 4(1)(b) and (6) of Regulation No 1049/2001 – Protection of the data subject's legitimate interests – Necessity of the transmission of personal data for a specific purpose in the public interest – Article 9(1) of Regulation (EU) 2018/1725)

Hearing an action for annulment brought by three natural persons, the General Court, ruling in extended composition, annuls the decision of the European Parliament of 8 April 2022 [604] by which that institution refused the applicants access to documents relating to the amounts paid by that institution to Mr Ioannis Lagos, a Member of the Parliament, and to his parliamentary assistants, in the context of that Member's mandate. In so doing, the Court clarifies the exception relating to public access to documents, based on the protection of privacy and the integrity of the individual provided for in Regulation No 1049/2001. [605] It finds that the Parliament should have authorised access to documents containing personal data concerning Mr Lagos and his parliamentary assistants and which related, more specifically, to the reimbursements of travel expenses and subsistence allowances paid to Mr Lagos by that institution and to the reimbursements of travel expenses of his assistants.

Mr Lagos was elected in Greece and took office as a Member of the European Parliament on 2 July 2019. On 7 October 2020, he was sentenced by the Greek courts to a term of imprisonment of 13 years and 8 months and to payment of a fine for membership and leadership of a criminal organisation and for two minor offences. Following the waiver of his parliamentary immunity, on 27 April 2021, Mr Lagos was arrested by the Belgian authorities and surrendered to the Greek authorities. Mr Lagos is currently serving his prison sentence in Greece.

After his criminal conviction, the waiver of his immunity and his imprisonment, Mr Lagos did not resign from his mandate as a Member of the European Parliament. Moreover, his conviction did not give rise to any communication from the Greek authorities to the Parliament concerning the withdrawal of his mandate.

On 7 December 2021, the applicants submitted to the Parliament an application for access to documents concerning Mr Lagos, based on Regulation No 1049/2001 and concerning all the documents relating to the allowances paid to Mr Lagos and to the expenses linked to the salaries of his accredited and local parliamentary assistants. By decision of 4 February 2022, the Parliament refused to grant the applicants access to those documents. Following a confirmatory application by the applicants, the Parliament adopted the contested decision by which it confirmed its initial refusal to grant them access to the requested documents, relying on the exception to the right of access to documents concerning the protection of personal data, provided for in Regulation No 1049/2001 and

---

604 Decision of the European Parliament bearing reference A(2021) 10718C of 8 April 2022 ('the contested decision').

605 And in particular by Article 4(1)(b) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). Under that provision, the institutions are to refuse access to a document where its disclosure would undermine the protection of the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

the obligation for the applicants to prove the need for the transmission of personal data for a specific purpose in the public interest, under Regulation 2018/1725. [606]

Findings of the Court

As a preliminary point, the Court points out that Article 9(1)(b) of Regulation 2018/1725 makes the transmission of personal data subject to the fulfilment of a number of cumulative conditions. Thus, the applicant for access must demonstrate the necessity of the transmission of personal data for a specific purpose in the public interest, then establish that that transmission is the most appropriate of the possible measures for attaining the objective pursued and that it is proportionate to that objective. Once this has been demonstrated, the institution concerned is required to determine that there is no reason to assume that that transmission might prejudice the legitimate interests of the data subject and, in such a case, to weigh, in a demonstrable manner, the various competing interests with a view to assessing the proportionality of the requested transmission of personal data.

Thus, in the first place, the Court examines, in the context of the exception to the right of access to documents concerning the protection of personal data, [607] whether the applicants fulfilled the obligation to prove the necessity of the transmission of personal data for a specific purpose in the public interest. [608]

It undertakes, first, an analysis of whether the purpose relied on by the applicants for the transmission of the personal data at issue constitutes a specific purpose in the public interest.

In that regard, the Court states that that transmission may be based on a general objective, such as the public's right to information concerning the conduct of Members of the Parliament in the exercise of their duties. In the present case, the purpose relied on by the applicants was to ascertain the specific amounts of the sums allocated by the Parliament to Mr Lagos during the period concerned and the manner in which those sums had been used in the exercise of his mandate as a Member of Parliament in order to facilitate public control, in the light of Mr Lagos' access to public funds. Contrary to the Parliament's assertions, that purpose is not general, but specifically linked to the particular circumstances of the case in question, which are quite exceptional in nature. They concern a Member of the Parliament who, after having been sentenced, inter alia, to a term of imprisonment of 13 years and 8 months for having, in particular, committed serious crimes, such as membership of a criminal organisation and its leadership, remained a Member of the Parliament and continued to receive allowances corresponding to the exercise of that function. Accordingly, in the light of those circumstances, the Parliament was wrong to refuse to recognise the purpose put forward by the applicants as a specific purpose in the public interest.

Secondly, the Court analyses whether the applicants demonstrated the necessity of the transmission of personal data, and in particular whether that transmission was the most appropriate measure for attaining the specific public interest objective pursued by the applicants and whether it was proportionate to that objective.

---

606 Following Article 9(1)(b) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39), personal data are only to be transmitted to recipients established in the European Union other than EU institutions and bodies if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

607 As provided for in Article 4(1)(b) of Regulation No 1049/2001.

608 Article 9(1)(b) of Regulation 2018/1725.

First, as regards the general expenses allowance [609] and Mr Lagos' monthly salary, [610] the Court finds that the information on those rights is freely accessible to the public on the Parliament's website. Since disclosure of the personal data in question was therefore not the most appropriate measure for attaining the objective pursued by the applicants, they have failed to demonstrate the necessity of such a transmission. According to the Court, the situation is different as regards the reimbursement of travel expenses and the payment of the subsistence allowance of Members, in so far as the information publicly available in that regard does not make it possible to ascertain either the amounts paid by the Parliament to Mr Lagos, in the exercise of his mandate as a Member of Parliament, during the period concerned, or the purpose of the travel, the destination or the route taken by him. Thus, in so far as the transmission of those data would enable the public to have access to that information, disclosure of those data is a more appropriate measure for attaining the objective pursued by the applicants than access to information which is already in the public domain. Accordingly, the Court concludes that the transmission of the data relating to Mr Lagos constitutes a measure necessary to achieve the specific public interest objective relied on by the applicants to justify the transmission of the personal data at issue and that the Parliament was wrong to find that the applicants had not fulfilled the obligation to demonstrate the necessity of that transmission for that purpose.

Secondly, as regards the salaries of Mr Lagos' accredited and local assistants, the Court points out that they are paid to them irrespective of their specific activities in the context of the parliamentary assistance provided to Mr Lagos. Accordingly, in so far as the transmission of documents concerning the payment of those salaries cannot provide the applicants with information about any direct or indirect contribution to the financing or perpetuation of a criminal or unlawful activity by Mr Lagos, the applicants have failed to demonstrate the need for such a transmission. However, the expenses relating to the travel of Mr Lagos' parliamentary assistants are closely linked to his activities and may give indications of a possible connection, even if only indirect, with illegal activities carried out by Mr Lagos. Accordingly, the Court concludes that the transmission of personal data contained in the documents relating to the reimbursement of those costs is a measure necessary to achieve the purpose relied on by the applicants and that the Parliament was wrong to consider that the applicants had not fulfilled the obligation to demonstrate the necessity of the transmission of personal data for a specific purpose in the public interest.

In the second place, the Court rules on the possible prejudice to the legitimate interests of Mr Lagos and his assistants, caused by the transmission of the personal data at issue. In that regard, in examining the proportionality of that transmission, the Court balances the various competing interests. [611] Thus, as regards, on the one hand, the interest in protecting the free exercise of a Member's mandate, as regards the request for access to information relating to the reimbursement of travel expenses and subsistence allowances received by Mr Lagos, public knowledge of such journeys is not such as to restrict, in one way or another, the free exercise of his mandate. Accordingly, it has not been demonstrated how the disclosure of information about the journeys made was likely to affect the free exercise of the mandate of Member of the European Parliament. So far as concerns, on the other hand, the interest in ensuring Mr Lagos' security, in the case of documents relating to subsistence allowances and reimbursements of travel expenses received in the past, the security of the Member can in principle no longer be regarded as being jeopardised by the transmission of the personal data at issue, in so far as it concerns travels which had already taken place at the time when the applicants' request was made. While it is true that disclosure to the public

609 It follows from Articles 25 and 26 of Decision 2009/C 159/01 of the Bureau of the European Parliament of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament (OJ 2009 C 159, p. 1) that Members of Parliament receive a lump-sum general expenditure allowance on a monthly basis, following a single application submitted at the beginning of their term of office.

610 Under Article 10 of Decision 2005/684/EC, Euratom of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament (OJ 2005 L 262, p. 1) ('the Statute for Members'), the monthly salary of Members is to be paid automatically.

611 As provided for in Article 9(1)(b) of Regulation 2018/1725.

of Mr Lagos' recurrent travels, in particular to a private home in Greece, could be prejudicial to his security, the Court emphasises that it is for the Parliament, when weighing up competing interests, to ensure the protection of personal data essential to Mr Lagos' security, such as his personal address. Furthermore, as regards Mr Lagos' security during his future journeys in the exercise of his mandate, the question does not arise in so far as Mr Lagos was imprisoned on the date of the contested decision and could not therefore travel. In that context, the Court considers that, as the journeys at issue took place during a period when Mr Lagos had already been convicted of serious crimes, it was therefore legitimate for the applicants to be able to obtain information about the purpose and destinations of those journeys. Since the risks of a possible prejudice to the free exercise of Mr Lagos' mandate and to his security are not sufficient to justify the refusal to disclose the personal data at issue, the Parliament was wrong to consider that the transmission of those data would prejudice the legitimate interests of Mr Lagos and his assistants and that, having weighed up the various competing interests, such a transmission would not be proportionate.

In the light of the foregoing, the Court annuls the contested decision in so far as the Parliament refused access to the documents, containing personal data concerning Mr Lagos, relating to reimbursements of travel expenses and subsistence allowances paid to him by the Parliament and to the documents, containing personal data concerning Mr Lagos' parliamentary assistants, relating to reimbursements of travel expenses received by them.

XVI. Civil service

1. Disciplinary procedure

Judgment of 29 May 2024, *Canel Ferreiro* v *Council* (T-766/22, EU:T:2024:336)

(Civil service – Officials – Disciplinary proceedings – Disciplinary penalty – Reprimand – Acts contrary to the dignity of the civil service – Articles 12 and 21 of the Staff Regulations – Competence of the author of the act – Obligation to state reasons – Principle of good administration – Impartiality – Article 41 of the Charter of Fundamental Rights)

Hearing an action brought by an official of the Council of the European Union, the General Court, ruling in extended composition, annuls the Council's decision imposing on that official the disciplinary penalty of a reprimand.

On this occasion, the Court is ruling, first, on the novel question of whether the decision imposing a disciplinary penalty and the decision rejecting the complaint against that penalty may be taken by one and the same person. Secondly, its judgment aims to resolve the divergence in the case-law concerning the order in which the Court deals with pleas directed, independently, against the decision adopted following a complaint.

In the present case, following an administrative investigation concerning the applicant, the appointing authority found that the applicant had used abusive and aggressive language towards her immediate superior, accusing the latter of harassment, and imposed on her the disciplinary penalty in question. The applicant lodged a complaint against that decision, which was, however, rejected by the appointing authority. Consequently, the applicant brought an action before the Court seeking, inter alia, annulment of the decision imposing the reprimand on her and the decision rejecting the complaint.

Findings of the Court

As a preliminary point, the Court recalls that an applicant must be able to seek a review by the EU Courts of the legality of the decision rejecting his or her complaint, where he or she raises a plea relating specifically to the complaint procedure. If the applicant were entitled to challenge only the original decision, any possibility of a challenge concerning the pre-litigation procedure would be excluded. He or she would thus be deprived of the benefit of a procedure which seeks to permit and encourage an amicable settlement to the dispute which has arisen between the official and the administration and to require the authority having control over that official to reconsider its decision, in compliance with the rules, in the light of any objections which that official may make. In those circumstances, the Court considers that it is appropriate to examine, first of all, the plea alleging illegality in the adoption of the decision rejecting the complaint, before ruling on the pleas directed against the decision which was the subject of the complaint. If the Court annuls the decision rejecting the complaint, it is for the administration to re-examine the complaint while ensuring the proper conduct of the pre-litigation procedure. In such circumstances, the claims directed against the initial decision should be dismissed as inadmissible, because they are premature, since that decision cannot be subject to review by the Court unless it has first been re-examined in the context of a properly conducted pre-litigation procedure.

As regards the person having competence to adopt the decision rejecting the complaint, the Court observes, first, that Article 90(2) of the Staff Regulations of Officials of the European Union ('the Staff Regulations') in no way requires that an authority other than the appointing authority which adopted the act adversely affecting an official should hear and determine the complaint lodged against that act. On the contrary, the Court holds that it is clear that the EU legislature envisaged a situation in

which that authority takes a decision adversely affecting the official and then decides on the complaint lodged against it.

Secondly, as regards the actual nature of the complaint procedure, it does not constitute an appeal procedure, but rather is intended to compel the authority having control over the official to reconsider its decision in the light of any objections which that official may make.

Accordingly, in the light of the nature of the complaint procedure, the Court states that it cannot be concluded that there has been an infringement of Article 41(1) of the Charter of Fundamental Rights of the European Union, guaranteeing the right to have one's affairs handled impartially by the institutions of the European Union, by reason only of the fact that the decision rejecting the complaint was taken, in accordance with the Council's internal organisational rules, by the same person who had adopted the decision which was the subject of that complaint.

As to the scope of the obligation to state the reasons for a decision adversely affecting an official, the Court adds that it is intended, on the one hand, to provide the persons concerned with sufficient details to enable them to assess whether the decision was well founded and whether it would be expedient to bring legal proceedings before the EU Courts and, on the other hand, to enable the EU Courts to review the legality of that decision. The sufficiency of the statement of reasons must be assessed in the light not just of its wording, but also of the factual and legal context in which the contested act was adopted.

In that regard, the Court notes that, in the present case, the account of the facts alleged by the appointing authority against the applicant simply reproduces in part a paragraph of the conclusions of the investigation report, which is merely a brief summary of the investigators' reasoning set out in the earlier parts of that report. Cited out of context, that passage is not capable of precisely identifying the allegations made against the applicant.

Nor did the appointing authority provide the applicant with any explanations concerning the allegations against her in the decision rejecting the complaint, despite the applicant's arguments alleging infringement of the obligation to state reasons, which she had raised in support of her complaint. That decision itself merely reproduces in part the wording of the same paragraph of the conclusions of the investigation report.

However, notwithstanding the various comments concerning the applicant's inappropriate communication throughout her collaboration with her immediate superior, the Court states that it is not objectively apparent from the investigation report which element formed the basis of the investigators' conclusions concerning the infringement of the Staff Regulations. Consequently, even though the applicant was not entirely unaware of the context in which the contested decision was adopted, she rightly submits that the contested decision, read in conjunction with that investigation report, does not contain an adequate statement of reasons. The absence of information concerning the facts alleged against the applicant prevents the Court from reviewing the merits of the contested decision, which justifies its annulment.

2. Allowances

Judgment of 5 June 2024, *VA* v *Commission* (T-123/23, EU:T:2024:359)

(Civil service – Officials – Remuneration – Family allowances – Dependent child allowance – Education allowance – Decisions to terminate certain allowances – Conditions for granting – Concept of 'end of education' – Equal treatment – Principle of sound administration – Recovery of undue payment – First paragraph of Article 85 of the Staff Regulations – Responsibility)

Hearing an action brought by an official of the Council of the European Union, the General Court annuls in part the Commission's decisions, in so far as they remove that official's entitlement to receive dependent child allowance, education allowance and the tax abatement relating to the dependent child allowance, during the period between the last academic examination of his child and the date when the final results are made available by the educational establishment. In that context, the General Court rules on the novel question of the date from which an official is no longer eligible for those financial entitlements, since his child no longer receives educational or vocational training, within the meaning of Article 2(3) of Annex VII to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), and no longer attends an educational establishment on a regular full-time basis, within the meaning of Article 3(1) of that annex.

In the present case, the applicant's daughter attended university studies at a Belgian university. In particular, she sat her last examination of her course of study on 18 June 2021, learned that she had passed her examinations on 2 July 2021 and received a certificate of successful completion on 27 August 2021. The academic year ended on 13 September 2021.

Until September 2021, the applicant received, for his daughter, dependent child allowance and the education allowance provided for in Articles 2 and 3 of Annex VII to the Staff Regulations and received the tax abatement linked to the dependent child allowance. However, since his daughter had passed her examinations in June 2021 at the first examination sitting, the Commission decided that the applicant was no longer entitled to receive the financial entitlements at issue from July 2021 and therefore recovered those pecuniary entitlements for the months of July, August and September 2021.

Findings of the Court

To begin with, the General Court notes that, under Articles 2 and 3 of Annex VII to the Staff Regulations, the education allowance may be granted only if the conditions for obtaining the dependent child allowance have first been met. It follows that the condition of regular full-time attendance at an educational establishment must be assessed at a second stage, after it has been established that the child in respect of whom the education allowance is claimed is dependent on the official.

Where a child is studying at university, entitlement to the dependent child allowance is subject to the fulfilment of three conditions, namely that the official actually maintains his child, that the child is between 18 and 26 years of age and that the child is receiving educational or vocational training.

In that regard, the Court states that a 'training' consists of several stages, such as participation in the courses provided for in the programme of studies and in examinations relating to those courses, the assessment of those examinations and, at the end of the last of those examinations, the provision, by the educational establishment providing the training in question, of the final results certifying that the course has been successfully completed. Those stages are indissociable from each other, since participation in the examinations makes it possible to assess the student's acquisition of the skills and knowledge imparted in connection with the courses provided.

Since the student can only be informed that he or she has successfully completed his or her training after he or she has completed all the examinations and once the results of those examinations have been made available by the educational establishment, it is from the moment when the final results are available that the student must be regarded as no longer receiving training within the meaning of Article 2(3)(b) of Annex VII to the Staff Regulations.

Thus, a child aged between 18 and 26 who receives educational or vocational training remains the responsibility of the official not until that child sits his or her last examination, but until the final results are made available by the educational establishment.

In that context, it is therefore the official's responsibility to inform the administration of the end of his or her child's education by informing it without delay of the date on which the final results were made available by the educational establishment, so that the administration can immediately stop payment of that allowance.

As regards the condition of attendance laid down in Article 3(1) of Annex VII to the Staff Regulations for the grant of the education allowance, the General Court applies its considerations concerning the dependent child allowance to the analysis of that condition.

It follows that it is from the moment when the final results were made available by the educational establishment that the official's child must be regarded as no longer in regular full-time attendance at an educational establishment within the meaning of Article 3(1) of Annex VII to the Staff Regulations.

Judgment of 26 June 2024, *Paraskevaidis* v *Council and Commission* (T-698/21, EU:T:2024:425)

(Civil service – Officials – Remuneration – Family allowances – Education allowance – Refusal to grant – Article 3(1) of Annex VII to the Staff Regulations – Vocational training – Higher education – Delegation of powers – Recall of the delegated powers – Competent appointing authority)

Hearing an action brought by an official of the Council of the European Union, the General Court, sitting in extended composition, annuls the decision of that institution in so far as it refuses to grant the applicant the education allowance on the ground that the training programme followed by his daughter could not be regarded as higher education within the meaning of Article 3(1) of Annex VII to the Staff Regulations of Officials of the European Union ('the Staff Regulations'). In that action, the Court is called upon to determine which is the competent authority and which is the act adversely affecting the applicant where an institution recalls, during the pre-litigation procedure and in an individual case, powers which it had delegated to another institution. It also rules on the question whether Article 3(1) of Annex VII to the Staff Regulations must be interpreted as allowing the education allowance to be granted where the training followed is of a vocational nature.

By decision of 13 May 2019, [612] the Council entrusted the Commission's Office for the Administration and Payment of Individual Entitlements (PMO) with the exercise of the powers relating to the grant and management of education allowances. In accordance with Article 1(2) of that decision, the PMO is to relinquish the exercise of the delegated powers in favour of the Council if, in an individual case, the appointing authority of the Council so requests.

In the present case, between November 2019 and August 2020, the applicant's daughter followed a training programme in educational psychology. Pursuant to Article 3 of Annex VII to the Staff Regulations, an education allowance was paid to the applicant during the training programme. In

612 Council Decision (EU) 2019/792 of 13 May 2019 entrusting to the European Commission – the Office for the Administration and Payment of Individual Entitlements (PMO) – the exercise of certain powers conferred on the appointing authority and the authority empowered to conclude contracts of employment (OJ 2019 L 129, p. 3).

February 2021, the PMO notified to the applicant a decision denying the applicant the right to an education allowance, on the ground that the training programme in question was not higher education. Consequently, the amounts paid to him by way of the education allowance had to be recovered.

Following the applicant's request for reassessment, the PMO reiterated its decision. The applicant lodged a complaint with the Council against the PMO's decisions. He also lodged a complaint, in identical terms, with the Commission. The Council, while informing the applicant of the recall of the delegated powers, rejected the complaint.

Findings of the Court

To start with, the Court finds that, by the decision on the complaint, the Council completely altered the reasons given in the PMO's decisions by re-examining the applicant's situation. Thus, that decision has independent content and a different scope from the PMO's decisions and cannot be regarded as being purely confirmatory thereof. Accordingly, the decision on the complaint replaced the PMO's decisions and constitutes, in the present case, the act adversely affecting the applicant.

As regards the Council's power to recall delegated powers for an individual case, the Court notes, first, that the legislature did not expressly exclude, in the Staff Regulations, the possibility of such a recall. Secondly, the principle of legal certainty, which underpins the formal nature of operations involving the delegation of power, requires that the appointing authority first adopt an express act by virtue of which it recovers the delegated power. Thus, just as a delegation of powers requires the adoption of an express act transferring the power concerned, the recall of the delegated powers must also be made by means of the adoption of an express act. Moreover, the principle of good administration requires, inter alia, the division of powers in staff management to be clearly defined and duly published.

In the present case, the recall of the delegated powers complied with the requirements stemming from the principle of legal certainty. First, Article 1(2) of Decision 2019/792 expressly authorises the Council to recall the delegated powers, specifically in individual cases and following the lodging of a complaint. Secondly, that decision was duly published in the *Official Journal of the European Union*. Thirdly, the Council exercised its power only following an express and prior act, by which it requested the PMO to relinquish the exercise of the delegated powers in the present case, a request which the PMO complied with. Although the information on the recall of the delegated powers was communicated to the applicant only at the stage of the decision rejecting the complaint, he was not adversely affected, as he had also lodged the complaint with the Council.

In those circumstances, the fact, in particular, that Article 90c of the Staff Regulations states that requests and complaints relating to delegated powers are to be lodged with the appointing authority entrusted with the exercise of powers cannot be equated with a legislative prohibition on the recall of such powers by the holder thereof, whether total or individual. Nor can that provision be regarded as prohibiting the recall of the delegated powers during the pre-litigation procedure, having regard, in particular, to the evolving nature of that procedure.

As to the vocational nature of the training, the Court concludes that it has no bearing on the grant of an education allowance under Article 3(1) of Annex VII to the Staff Regulations, provided that it is provided by an educational establishment.

The provision requires, inter alia, three conditions for the education allowance to be granted, namely (i) attendance at an establishment of higher education, (ii) regularity of that attendance and (iii) the fact that that attendance is full time.

If the legislature did not refer to the nature of the training provided by an establishment of higher education in the context of Article 3(1) of Annex VII to the Staff Regulations, even though it did so in

the context of Article 2(3)(b) of that annex, it is not for the appointing authority or the Court to establish this as an additional condition.

Thus, admittedly, the distinction between educational and vocational training in Article 2(3)(b) of Annex VII to the Staff Regulations allows payment of the education allowance provided for in Article 3(1) of that annex to be withheld when the dependent child is receiving vocational training not connected with an educational establishment. By contrast, the distinction does not prevent payment of the education allowance where a dependent child is receiving vocational training provided by an educational establishment of higher education at which the child is in regular, full-time attendance.

3. Status of informant

Judgment of 11 September 2024, *TU* v *Parliament* (T-793/22, EU:T:2024:614)

(Civil service – Accredited parliamentary assistants – Termination of service – Fixed-term contract – Non-renewal – Status of informant – Articles 22a to 22c of the Staff Regulations – Protective measures – Confidentiality – Non-material damage)

Upholding in part an action brought by TU, a former accredited parliamentary assistant ('APA') of the European Parliament, the General Court, sitting in extended composition, rules on the novel question of the protection to be provided by that institution to an APA on the basis of his status as a whistle-blower.

The applicant was recruited as an APA for a grouping of Members to assist one Member, for a period from August 2019 to February 2022. In July 2021, he submitted a request for assistance and protection, pursuant to Article 24 of the Staff Regulations of Officials of the European Union ('the Staff Regulations'), related to incidences of harassment which he had suffered at the hands of the Member in question. In his email, the applicant also stated that he wanted to protect the financial interests of the European Union by providing, in that request, information about financial irregularities allegedly committed by the same Member. In addition, he reported those irregularities to the European Anti-Fraud Office (OLAF).

In the same month, the Parliament adopted a temporary protective measure to place the applicant under the responsibility of the chair of a delegation, who was also a member of the grouping to which the Member in question belonged. Later, following alleged retaliation on the part of the leadership of that delegation, the applicant was discharged from his duties with the delegation, at his request, until the end of his contract.

The applicant also requested that he be transferred to any other post within the Parliament and that the Parliament consider extending his contract so as to allow him to cooperate with that institution and with OLAF in the ongoing investigations, whilst being fully protected. Lastly, he submitted several requests for renewal of his contract.

Following the refusal of those requests, the applicant brought an action before the Court seeking, first, the annulment of the Parliament's decision not to renew his APA contract and of the implied decision refusing to recognise his status as an informant and to adopt other protective measures in addition to the measure discharging him from his duties and, second, compensation for the damage suffered.

Findings of the Court

First of all, the Court observes that the Parliament was not required to adopt a decision recognising that the applicant had the status of informant. The protection provided for in Article 22a(3) of the Staff Regulations is granted, without any formalities, to officials who have provided information about facts which give rise to a presumption of the existence of illegal activity, simply by virtue of having provided that information.

That finding is, however, without prejudice to the need for the institution to respect the rights arising from the status of the person concerned as an informant.

In that regard, first, regardless of OLAF's obligations to provide information to the applicant, it falls to the Parliament, the competent authority for guaranteeing the protection of its members of staff who have reported serious irregularities pursuant to Articles 22a and 22b of the Staff Regulations, since facts as referred to in Article 22a of the Staff Regulations have been brought before it, in the first place, to acknowledge receipt of that report and, in the second place, to inform the member of staff of the action taken on his or her reports, in accordance with its duty to have regard to the welfare of staff and pursuant to the internal rules on the implementation of Article 22c of the Staff Regulations.

Second, with regard to the burden of proving that the protective measures are adequate, in a situation such as the present one, in which the applicant provides credible evidence that he or she suffered prejudicial effects further to the adoption of the transfer measure and his or her complaints about the alleged retaliation by the leadership of the delegation are, moreover, still being examined, it is for the Parliament to demonstrate that it has fulfilled its duty to protect the informant by adopting adequate measures to that end.

In a situation in which an institution is required to implement the provisions laid down in Articles 22a to 22c of the Staff Regulations, which seek in particular to ensure that informants are protected against any retaliatory actions, that institution cannot provide for less protective measures than those which have been specifically adopted, in that regard, by the EU legislature in relation to the protection of informants by the Member States. [613]

Third, with regard to the scope of the institution's obligation to protect informants, the Court observes that it follows from Article 22a(3) of the Staff Regulations that the institution must take all the necessary measures to ensure that informants receive balanced and effective protection against any form of retaliation, including threats of retaliation and attempted retaliation.

It is true that, in the absence of an explicit request from one or more Members of the grouping, it is impossible for the Parliament to renew an APA contract. The initiative of renewing an APA contract rests solely with one or more Members, who cannot be required to work, or to continue to work, with APAs whom they have not freely chosen. An APA maintains with the Member or Members whom he or she assists a working relationship characterised by the existence of a bond of trust.

Similarly, the duty to have regard to the welfare of staff cannot require the Parliament, in breach of the rule contained in Article 21 of the Statute of Members, under which Members may freely choose their personal staff, to renew an APA's contract, even where the latter has acquired the status of informant.

However, that finding has no bearing on the Parliament's duty to take all the necessary measures to ensure the applicant receives balanced and effective protection against any form of retaliation.

---

613 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17).

The Court considers, in that regard, that, by simply informing the applicant that the discharge measure was the only conceivable protective measure, the Parliament failed to establish that it had taken all the necessary measures to ensure that the applicant did not suffer prejudicial effects on the part of the institution on account of his status of informant, pursuant to Article 22a(3) of the Staff Regulations. Given the applicant's status of informant, and pursuant to Article 22a(3) of the Staff Regulations, the Parliament should have supported him by attempting to help him find a solution, in addition to discharging him from his duties.

Furthermore, by simply informing the applicant that there was no conceivable measure other than discharging him from his duties in order to protect him based on his status of informant and that the renewal of his contract was not an option in that regard, the Parliament did not show that it had provided the applicant with the advice and assistance with which it was required to provide him.

Lastly, by informing the chair of the delegation that the applicant was discharged from his duties in connection with the chair on account both of the applicant's request for assistance as well as his status of informant, without the applicant having authorised the disclosure of that status, the Parliament breached its duty of confidentiality and protection of the applicant's identity as an informant.

The Court therefore finds that the applicant suffered non-material damage which cannot be repaired simply by annulling the implied decision in so far as, by that decision, the Parliament refused, in response to his request, to grant him a further protective measure in addition to discharging him from his duties. In those circumstances, the Court annuls that decision, upholds in part the claims for compensation in the amount of EUR 10 000, and dismisses the action as to the remainder.

XVII. Applications for interim measures

Order of 9 February 2024, *Bytedance* v *Commission* (T-1077/23 R, EU:T:2024:94)

(Interim relief – Digital services – Regulation (EU) 2022/1925 – Designation of gatekeepers – Application for suspension of operation of a measure – No urgency)

The President of the General Court dismisses Bytedance Ltd's application for interim measures seeking suspension of operation of the Commission decision designating Bytedance as a gatekeeper within the meaning of the Digital Markets Act [614] ('the DMA'), since there is no proof that the condition relating to urgency is satisfied.

Bytedance is a non-operating holding company established in China in 2012 which, through local subsidiaries, provides the entertainment platform TikTok. By decision of 5 September 2023, [615] the European Commission designated it as a gatekeeper within the meaning of Article 3(1) of the DMA.

Bytedance brought an action for the annulment of that decision before the General Court. By separate document, Bytedance brought an application for interim measures before the General Court seeking, in essence, suspension of operation of the contested decision in so far as it imposes on Bytedance obligations incumbent on gatekeepers under the DMA.

Findings of the President of the General Court

As a preliminary point, the President of the General Court recalls that suspension of operation of an act and other interim measures may be ordered if it is established that such an order is justified prima facie, in fact and in law, and that it is urgent. As those conditions are cumulative, the President of the General Court examines, first, whether the condition relating to urgency is satisfied in this case.

The condition relating to urgency must generally be assessed in the light of the need for an interim order to avoid serious and irreparable harm to the party requesting the interim measure.

In order to demonstrate the serious and irreparable nature of the alleged harm, Bytedance claimed, in essence, that, in the absence of the suspension of operation of the decision designating it as a gatekeeper, it would be required to comply with the obligations laid down, inter alia, in Articles 5, 6, and 15 of the DMA, within six months of designation, which would lead to an irremediable breach of confidentiality and irreversible market changes.

As regards, first, the alleged irremediable breach of confidentiality, Bytedance argued that the immediate implementation of the obligations under Article 15 of the DMA would risk causing the disclosure of highly strategic information concerning TikTok's user profiling practices, which is not otherwise in the public domain, and that disclosure would enable TikTok's competitors and other third parties to obtain insight into TikTok's business strategies in a way that would significantly harm its business.

---

614 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1).

615 Commission Decision C(2023) 6102 final of 5 September 2023 designating Bytedance as a gatekeeper under Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1).

In that regard, the President of the General Court finds, however, that Bytedance merely claims that the information at issue must be regarded as confidential for the purposes of establishing urgency, without, however, having demonstrated that such a claim satisfies the condition of a prima facie case**.**

In that context, the President of the General Court also points out that, although Article 15(1) of the DMA requires the gatekeeper to communicate to the Commission and, indirectly, to the European Data Protection Board (EDPB) an independently audited description of any techniques for profiling of consumers applied to or across its core platform services, that provision does not require them to publish that description.

More specifically, Article 15(3) of the DMA merely requires the gatekeeper to publish 'an overview' of the independently audited description, prepared by the gatekeeper itself, which may 'take account of the need to respect its business secrets'. In that regard, the final template for reporting pursuant to Article 15 of the DMA explicitly provides that the non-confidential overview provided for in Article 15(3) of the DMA allows the gatekeeper, where appropriate, to summarise and omit information from the description, including in order to take account of the need to protect business secrets or other confidential information.

More specifically, Article 15(3) of the DMA merely requires the gatekeeper to publish 'an overview' of the independently audited description, prepared by the gatekeeper itself, which may 'take account of the need to respect its business secrets'. In that regard, the final template for reporting pursuant to Article 15 of the DMA explicitly provides that the non-confidential overview provided for in Article 15(3) of the DMA allows the gatekeeper, where appropriate, to summarise and omit information from the description, including in order to take account of the need to protect business secrets or other confidential information.

Furthermore, Bytedance had failed to demonstrate, to the requisite legal standard, that the alleged risk of disclosure of confidential information would give rise to serious and irreparable harm, or that alleged serious and irreparable harm was probable or imminent, as required by the case-law.

Secondly, as regards the alleged irreversible market changes, Bytedance claimed that Articles 5 and 6 of the DMA would prevent it from using its TikTok platform to innovate and offer new features and new products. In particular, Bytedance emphasised the negative consequences of the restrictions regarding the combination and cross-use of personal data, laid down in Article 5(2) of the DMA.

On that point, however, the President of the General Court finds that the harm alleged by Bytedance is, on the one hand, purely hypothetical and, on the other, financial.

In that regard, the President of the General Court recalls that harm of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he or she suffered the harm.

In the present case, Bytedance failed to assert, let alone establish, the serious and irreparable nature of the financial harm which it could suffer. The alleged harm, even if it were established, could be the subject of an action for damages which Bytedance may bring if it were to succeed in the main proceedings.

Finally, the President of the General Court points out that, in so far as the harm alleged by Bytedance is pecuniary in nature, Bytedance could have submitted, in accordance with Article 9(1) of the DMA, a request for suspension of the obligations set out in Article 5(2)(b) and (c) of that regulation by demonstrating that compliance with those obligations would jeopardise, due to exceptional circumstances beyond its control, the economic viability of its operations in the European Union. However, as the Commission has confirmed, it has not, to date, received any request to that effect since the contested decision was notified to the applicant.

In the light of all the foregoing, the President of the General Court dismisses the application for interim measures, since Bytedance has failed to prove that the condition relating to urgency is satisfied, without it being necessary to rule on whether there is a prima facie case or to carry out a weighing of interests.

Order of 13 June 2024, *Vivendi* v *Commission* (T-1097/23 R-RENV, EU:T:2024:381) [616]

(Interim relief – Competition – Concentrations – Request for information – Article 11(3) of Regulation (EC) No 139/2004 – Application for interim measures – Prima facie case – Weighing up of interests)

Order of 13 June 2024, *Lagardère* v *Commission* (T-1119/23 R-RENV, EU:T:2024:382)

(Interim relief – Competition – Concentrations – Request for information – Article 11(3) of Regulation (EC) No 139/2004 – Application for interim measures – Prima facie case – Weighing up of interests)

Hearing a case referred back by the Court of Justice, the Vice-President of the General Court grants the applications for interim measures brought by Vivendi SE and Lagardère SA concerning a request for information sent by the European Commission in connection with a concentration.

Lagardère and Vivendi (together, 'the applicants') are the parent companies of French groups operating in the media sector. In 2023, the Commission authorised a concentration which consisted in acquisition of sole control of Lagardère by Vivendi, subject to compliance with commitments made by Vivendi. Suspecting, however, a potential early implementation of the concentration, the Commission opened a formal investigation in that regard and, in that context, sent requests for information to the applicants by way of two decisions of 19 September 2023 ('the contested decisions'). [617]

The applicants each brought an action before the General Court for annulment of the contested decisions. They also brought two applications for interim measures seeking, first, suspension of the operation of those decisions and, secondly, as a precautionary measure, an order that they retain all the documents concerned by the contested decisions.

By orders of 19 January 2024, [618] the President of the General Court had dismissed the applications for interim measures. On 24 January 2024, the Commission had extended the deadlines set by the contested decisions and coupled the extensions with a penalty payment. Subsequently, the applicants provided the Commission with some of the documents meeting the criteria set out in the contested decisions.

By orders of 11 April 2024, [619] the Vice-President of the Court of Justice set aside the abovementioned orders of 19 January 2024. In addition, giving final judgment on the condition relating to urgency, the Vice-President of the Court of Justice found that that condition was satisfied, and referred the case

---

616 Joint résumé for cases ***Vivendi* v *Commission*** (T-1097/23 R-RENV) and ***Lagardère* v *Commission*** (T-1119/23 R-RENV).

617 Commission Decisions C(2023) 6428 final and C(2023) 6429 final of 19 September 2023, relating to a procedure pursuant to Article 11(3) of Council Regulation (EC) No 139/2004 (Case M.11184 – Vivendi/Lagardère), as amended by Commission Decisions C(2023) 7463 final and C(2023) 7464 final of 27 October 2023.

618 Orders of 19 January 2024, *Vivendi* v *Commission* (T-1097/23 R, not published, EU:T:2024:15) and *Lagardère* v *Commission* (T-1119/23 R, not published, EU:T:2024:16).

619 Orders of 11 April 2024, *Lagardère* v *Commission* (C-89/24 P(R), not published, EU:C:2024:312) and *Vivendi* v *Commission* (C-90/24 P(R), not published, EU:C:2024:318).

back to the General Court in order for judgment to be given on the condition relating to a prima facie case and, where appropriate, for the interests involved to be weighed up.

Findings of the Vice-President of the General Court

The Vice-President of the General Court examines, first, the applicants' continuing interest in bringing proceedings and holds that, as regards Lagardère, there is no longer any need to rule on the application for interim measures in so far as it relates to the documents already provided to the Commission pursuant to the contested decision concerning it. The serious and irreparable damage identified by the Vice-President of the Court of Justice in his order [620] arose from the collection and communication by the applicant of the documents at issue and not from access to or use of those documents by Commission staff and officials. Lagardère nevertheless retains an interest in bringing proceedings in respect of all the documents not yet provided to the Commission.

As regards Vivendi, the serious and irreparable harm identified definitively by the Vice-President of the Court of Justice [621] arises in particular from the fact that the personal data to be collected and communicated to the Commission pursuant to the contested decision are liable to allow precise conclusions to be drawn concerning the private life of the persons concerned. Since the documents provided to the Commission pursuant to the contested decision were sealed without the Commission having had prior access to them, Vivendi retains an interest in seeking the suspension of that decision in respect of all the documents referred to therein.

On the substance, the Vice-President of the General Court begins by examining the condition relating to a prima facie case, and holds that it is satisfied in respect of the two applicants.

As concerns Lagardère, the Vice-President of the General Court considers that the complaints relating, in essence, to the impossibility of implementing the contested decision without incurring liability do not appear, prima facie, unfounded. In order to comply fully with that decision, Lagardère would have to access the communications of certain of its employees and company officers, even though it is not a public authority and French law does not explicitly confer on it any power to do so. Thus, it would be compelled to adopt conduct which could make it subject to criminal sanctions.

As regards Vivendi, the Vice-President of the General Court considers that the plea alleging breach of the right to privacy [622] does not appear, prima facie, unfounded. In that regard, the Vice-President of the General Court points out inter alia that, given the very broad scope of the obligations imposed on Vivendi by the contested decision, it appears highly likely that a significant number of the documents to be thus communicated to the Commission will not fall within the professional sphere and might provide information about the private life of the persons concerned. The contested decision does not contain any mechanism intended to prevent, in general terms, the collection and communication to the Commission of documents relating to the private life of the persons concerned or to offer safeguards vis-à-vis the handling of such documents.

The Vice-President of the General Court then weighs up the interests and concludes that the public interest in preserving the effectiveness of EU competition rules must take precedence over the interest defended by each of the applicants, since dismissal of the respective applications for interim measures would render ineffective an annulling judgment.

---

620 Order of 11 April 2024, *Lagardère* v *Commission* (C-89/24 P(R), not published, EU:C:2024:312).

621 Order of 11 April 2024, *Vivendi* v *Commission* (C-90/24 P(R), not published, EU:C:2024:318).

622 Guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

In the present case, Lagardère's interest in avoiding the serious and irreparable damage which might result from the fact that, in order to comply with the contested decision, it would be compelled to adopt conduct likely to make it subject to criminal sanctions must prevail. Dismissal of the application for interim measures would oblige Lagardère to adopt such conduct and, consequently, to contribute to the serious and irreparable damage that may result therefrom.

Similarly, Vivendi's interest in avoiding the serious and irreparable damage which might arise from a breach of the right to privacy of the persons concerned by the implementation of the contested decision must prevail, since the dismissal of the application for interim measures would oblige it to supply any information requested that has not been provided and to allow the information that has been provided to be consulted, thereby contributing to that damage.

Since all the conditions to that effect are met, the Vice-President of the General Court grants the applications for the suspension of operation of the contested decisions as regards, first, the documents not provided to the Commission by Lagardère and, second, in the case of Vivendi, the documents containing data relating to the private lives of the persons concerned. The Vice-President of the General Court also orders the parties to take additional measures to ensure that the documents in question are retained.

Order of 12 August 2024, *Nuctech Warsaw Company Limited and Nuctech Netherlands* v *Commission* (T-284/24 R, EU:T:2024:564)

(Interim relief – Foreign subsidies – Inspections within the European Union – Regulation (EU) 2022/2560 – Application for suspension of operation of a measure – No urgency – No prima facie case – Weighing up of interests)

The President of the General Court dismisses the application for interim measures brought by Nuctech Warsaw Company Limited sp. z o.o. and Nuctech Netherlands BV ('the applicants') in respect of a decision of the European Commission requiring them to submit to inspections, since the conditions for the grant of suspension of operation have not been met.

The applicants are undertakings active in the development, production and supply of security inspection equipment and after-sale services of that equipment. They are wholly owned by Nuctech Hong Kong Co. Ltd, a company registered in China.

On 16 April 2024, the European Commission adopted a decision [623] ordering an inspection pursuant to Article 14(3) of Regulation 2022/2560 on foreign subsidies distorting the internal market. [624]

Pursuant to that decision, the Commission carried out an inspection at the applicants' premises. In that context, the Commission requested the applicants to place a legal hold on the mailboxes of the employees whose data are on the servers located in China.

The applicants brought an action before the General Court seeking, inter alia, annulment of the contested decision. At the same time, the applicants brought an application for interim measures seeking the suspension of operation of the contested decision, together with any subsequent act or request by the Commission and the legal hold requests.

---

623 Decision of the European Commission of 16 April 2024 requiring an undertaking active in the threat detection systems sector to submit to inspections pursuant to Article 14(3) of Regulation (EU) 2022/2560 of the European Parliament and of the Council (Case FS.100068 – MARE) ('the contested decision').

624 Regulation (EC) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (OJ 2022 L 330, p. 1).

Findings of the President of the General Court

As a preliminary point, the President of the General Court recalls that the suspension of operation of an act and other interim measures may be ordered if it is established that such an order is justified, prima facie, in fact and in law, and that it is urgent, those conditions being cumulative. The judge hearing the application for interim measures must, where appropriate, also weigh up the interests involved.

As regards the condition relating to a prima facie case, the President of the General Court observes that an application for interim measures must be sufficiently clear and precise in itself to enable the defendant to prepare its observations and the judge hearing the application to give a ruling on that application. However, by confining themselves to a single-sentence statement of certain pleas, the applicants have not discharged the burden of establishing the existence of a prima facie case with respect to those pleas.

The President of the General Court considers that the other pleas relied on are not capable of establishing the existence of a prima facie case. As regards the first plea, first of all, the President of the General Court observes that the Commission's approach consisting in addressing an inspection decision to an undertaking incorporated outside the European Union but which operates in the European Union, and carrying out inspections at that undertaking's premises located in the European Union is not novel. It is apparent from the case-law applicable in matters of competition law that, in order to justify the Commission's jurisdiction under public international law, it is sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union. It follows from the foregoing that, contrary to the applicants' claims, the Commission must be entitled to request information from undertakings located outside the European Union in order to assess whether their conduct infringes EU law and is likely to produce a substantial effect on the internal market. That applies particularly in respect of distortions of competition in that market caused by foreign subsidies referred to in Article 1 of Regulation 2022/2560. As regards the provisions of Chinese law laying down criminal sanctions, the applicants have failed to establish either that those provisions apply to the requested information or that they have sought to obtain the necessary authorisations for the purpose of transferring it to the Commission. Moreover, the applicants have not suggested other methods which would enable them to provide the information without infringing Chinese law. As regards the plea that the contested decision was unlawful in so far as it would compel the applicants to infringe Chinese law, the President of the General Court points out that the validity of that decision and any measure taken pursuant to that decision must be assessed in the light of EU law and not Chinese law.

As regards, next, the condition relating to urgency, the President of the General Court recalls that the party requesting the interim measure must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

In the present case, the applicants argued that the continued inspection would cause serious and irreparable damage, on the one hand, to their reputation and, on the other, to their financial viability.

As regards damage to reputation, the President of the General Court notes that the harm stems from the impact of the media coverage of the inspection, so any alleged damage to their reputation already exists. The purpose of proceedings for interim relief is not to repair damage which has already occurred.

As regards the threat to the applicants' financial viability, the President of the General Court recalls that damage of a pecuniary nature cannot, otherwise than in exceptional circumstances, be regarded as irreparable. Furthermore, the judge hearing the application for interim measures must, in all cases, have specific and precise information, supported by detailed, certified documentary evidence, which shows the situation in which the party seeking the interim measures finds itself.

In the present case, the applicants have neither established nor even claimed that they were in a position that would imperil their financial viability before final judgment was given in the main action. Moreover, the applicants' argument that compliance with the contested decision would put the group to which they belong and their representatives at risk of criminal sanctions in China is rejected, as they have not established that they would be compelled to take actions in respect of which they would probably incur criminal liability.

Finally, the President of the General Court weighs up the interests, and holds that the public interest in preserving the effectiveness of EU law prevails over the applicants' interest in preventing the alleged damage that might arise from the fact that they would be compelled, in order to give effect to the contested decision, to take actions in respect of which they may incur legal liability, including criminal liability.

In that regard, the President of the General Court notes that, as they have chosen to carry out commercial activities in the internal market of the European Union, the applicants are subject to the EU rules which govern the functioning of that market, and cannot rely on the rules of a third State in order to evade them. On the other hand, as regards the Commission's interests, its task is to ensure that the conditions of competition within the European Union's internal market are not distorted. It must therefore be entitled to carry out its investigations effectively and to request information from all undertakings which carry out commercial activities in the European Union, whether they are controlled by entities in the Member States or in third States.

Order of 22 November 2024, *UniCredit* v *ECB* (T-324/24 R, EU:T:2024:858)

(Interim measures – Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 1024/2013 – Setting of prudential requirements – Application for suspension of operation of a measure – No urgency – No prima facie case – Balancing of interests)

Hearing an action brought on the basis of Articles 278 and 279 TFEU, the President of the General Court dismisses an application for interim measures seeking suspension of the operation of a decision of the European Central Bank (ECB) establishing the prudential requirements aimed at further reducing the risks related to the activities of the applicant, UniCredit SpA, within the territory of the Russian Federation.

The applicant is a credit institution at the head of an internationally active banking group which operates in Russia through four wholly owned subsidiaries, including AO UniCredit Bank, which are included in the applicant's consolidated balance sheet. As a significant entity, [625] it is subject to the direct prudential supervision of the ECB.

On 22 April 2024 the ECB adopted the contested decision, [626] in which it imposed five requirements on the applicant and issued a recommendation. Subsequently, the applicant submitted an action plan for the implementation of some of the requirements imposed by the contested decision. Nevertheless, it reiterated its inability to implement all of the requirements imposed by the contested decision due to constraints related to the Russian legal framework.

At the same time as it brought an action seeking, principally, annulment of the contested decision, the applicant brought the present application for interim measures which, following a partial withdrawal, seeks suspension of the operation of the contested decision in so far as it lays down the requirement

---

625 In accordance with Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

626 Pursuant to Article 4(1)(f) and Article 16(1)(c) and (2)(e) and (f) of Regulation No 1024/2013.

relating to deposits and the requirement relating to payments, inasmuch as it concerns payments in euros, United States dollars (USD), Chinese yuan (CNY) and Kazakh tenge (KZT).

Findings of the President of the General Court

The President of the General Court recalls the cumulative conditions which must be met in order for the judge hearing an application for interim measures to order suspension of operation of an act and other interim measures, namely that it must be established that 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 harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main proceedings. Furthermore, the judge hearing the application for interim measures must also, where appropriate, weigh up the interests involved.

In the first place, the President of the General Court examines at the outset, solely on the basis of the information submitted in the present application for interim measures, whether the condition relating to the establishment of a prima facie case is satisfied. In that regard, he rejects all the pleas raised by the applicant to show that the contested decision is unlawful, and holds that that is not the case here.

In particular, first, as regards the plea alleging infringement of the principle of good administration due to a failure to carry out an investigation, the President of the General Court rejects the first part of the plea alleging infringement of the obligation to state reasons. He finds that it is apparent from the contested decision that the ECB performed a risk assessment. [627] First of all, the ECB indicated that the applicant and its group operate in a legal framework that has become increasingly complex due to numerous restrictive measures and sanctions regimes. The ECB also identified aspects of Russian law which create risks for sound management and compliance. Next, as regards the relationship between the requirements imposed on the applicant and its overall risk profile, the ECB considered that the applicant continues to face the main obstacles to comprehensive coverage of compliance risk.

As regards the argument that the ECB could not presume, without providing detailed and precise evidence, that the applicant would infringe the sanctions regime, the President of the General Court notes that the ECB stated the facts relating to the Russian legal framework and the management problems of the subsidiaries that would increase the risk of non-compliance. Furthermore, the President of the General Court points out that the prudential analysis carried out by the ECB is of a forward-looking nature.

Lastly, as regards the statement of reasons for the proportionality of the contested requirements, the President of the General Court observes that the ECB set out the reasons why the applicant's action plan or the imposition of additional capital and liquidity requirements would not be appropriate and sufficient to address the risks.

The President of the General Court also rejects the part of that plea alleging failure to carry out an investigation. It is apparent from the actual wording of the contested decision that the ECB itself highlighted the legal and operational constraints arising from the Russian legal framework. It is precisely those constraints and restrictions that have led the ECB to adopt the contested decision, as they make it more difficult for the applicant to conduct proper risk management.

The President of the General Court also rejects the third part of the first plea, alleging breach of the ECB's obligation to carry out an individual examination. In the contested decision, the ECB identified the risks arising from the applicant's activities in Russia, specifying the aspects of Russian law which compromise sound management and coverage of risks. It analysed the actions already taken by the

627 As regards the requirements under Article 16(1)(c) of Regulation No 1024/2013.

applicant and concluded that there were deficiencies that prevented sound management and coverage of risks.

Secondly, the President of the General Court rejects the plea alleging that the contested decision is impossible to implement because of obstacles stemming from the Russian regulatory framework. He holds, first, that the applicant cannot rely on Russian law and the vagaries of its application by the Russian authorities to avoid its obligations under EU law. As an entity supervised by the ECB, the applicant is required to address the prudential risks identified by the ECB. Secondly, and in any event, in the observations it submitted to the ECB, the applicant confined itself to relying, in general terms, on the incompatibility of the requirements imposed by the contested decision with Russian law.

Thirdly, the President of the General Court rejects the plea alleging infringement of the principle of proportionality. In that regard, he recalls that the purpose of Regulation No 1024/2013 is to contribute to the safety and soundness of credit institutions and the stability of the financial system in the European Union. The objective of the measures adopted [628] is to remedy at an early stage the risks identified in the supervisory review carried out by the ECB. Moreover, although the ECB must rely, in the context of its broad discretion, on scenarios which are not implausible in the light of the available information, it is not required to prove the existence of past events with the same characteristics as the scenario analysed.

Fourthly, the President of the General Court rejects the plea alleging that the ECB lacked the competence to adopt the contested decision. In that regard, after pointing out that the contested decision is addressed exclusively to the applicant, as parent company of the UniCredit Group, a credit institution subject to prudential supervision by the ECB, the President of the General Court observes, in particular, that [629] the risks for the safety and soundness of a credit institution can arise both at the level of an individual credit institution and at the level of a banking group or of a financial conglomerate. Specific supervisory arrangements to mitigate those risks are important to ensure the safety and soundness of credit institutions. In addition to supervision of individual credit institutions, the ECB's tasks should include supervision at the consolidated level.

In the second place, the President of the General Court considers that the condition relating to urgency is not satisfied in the present case.

Firstly, as regards the damage resulting from the incompatibility of the contested decision with the Russian regulatory framework, the existence of such incompatibility does not in itself constitute damage. In the present case, the applicant has not presented any evidence enabling it to identify the occurrence of damage and to assess the serious and irreparable nature of that damage. Furthermore, the negative consequences which, according to the applicant, arise from the incompatibility with the Russian regulatory framework constitute damage of a pecuniary nature.

On that point, the President of the General Court recalls that harm of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he or she suffered the harm. However, in the present case, the applicant has not provided any information making it possible to identify precisely and quantify the pecuniary harm that is likely to occur.

Secondly, as regards the damage related to the risk of loss of control and ownership of the Russian subsidiaries, the President of the General Court observes, first of all, that the applicant has not provided any information explaining how that harm might materialise or the reasons to believe that that harm would be of a serious and irreparable nature. Secondly, the harm resulting from the loss of control and ownership of the subsidiaries is of a pecuniary nature. However, the applicant has not

628 Pursuant to Article 16(1) of Regulation No 1024/2013.

629 In accordance with recital 26 of Regulation No 1024/2013.

provided any information making it possible to identify precisely and quantify the pecuniary harm that is likely to occur.

Thirdly, as regards the damage related to the potential, very serious, personal sanctions for the senior management of the Russian subsidiaries, the applicant merely states that the requirements imposed by the contested decision would entail such sanctions, without providing any further details.

In the third and last place, as regards the balancing of interests, the President of the General Court recalls that the very purpose of balancing the interests involved is to assess whether, despite the adverse effect on the interests of the applicant, which is at risk of suffering serious and irreparable harm, the taking into account of the interests in the immediate implementation of the contested decision is such as to justify the refusal to grant the interim measures sought.

However, in the present case, first of all, the applicant does not put forward any arguments as regards balancing the interests involved. Next, as regards the interests pursued by the contested decision, the President of the General Court recalls that the specific tasks conferred on the ECB were conferred on it with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the European Union and each Member State. In addition, the ECB's power to require any credit institution to take the necessary measures at an early stage to address the problems it identifies illustrates the importance that the legislature attaches to putting in place appropriate measures as quickly as possible in order to prevent the risks identified from materialising. Finally, the applicant itself has stated that the Russian regulatory framework is particularly hostile and constantly evolving based on local dynamics which are not always predictable, or which deviate from the rules resulting from democratic processes. Furthermore, the interpretation and application of those rules depend on the development of Russia's war against Ukraine.

The President of the General Court concludes that the interest defended by the ECB must prevail over the applicant's interest.

Court of Justice
L-2925 Luxembourg
Tel. +352 4303-1

General Court
L-2925 Luxembourg
Tel. +352 4303-1

The Court on the internet:
curia.europa.eu

Text completed in February 2025 / Figures correct as at 31.12.2024

Layout: Court of Justice of the European Union| Research and Documentation Directorate, 2025

PDF WEB	QD-01-25-004-EN-N	ISBN 978-92-829-4955-9	ISSN 2812-3301	doi: 10.2862/0169072
PRINT	QD-01-25-004-EN-C	ISBN 978-92-829-4979-5	ISSN 2812-4162	doi: 10.2862/6552521

COURT OF JUSTICE
OF THE EUROPEAN UNION

Research and Documentation Directorate