

Case C-256/23

Request for a preliminary ruling

Date lodged:

20 April 2023

Referring court:

Bayerisches Verwaltungsgericht Regensburg (Germany)

Date of the decision to refer:

11 April 2023

Applicant:

European Chemicals Agency (ECHA)

Defendant:

Hallertauer Hopfenedelungsges. m.b.H.

File no: RN 7 K 19.925

**Bayerisches Verwaltungsgericht Regensburg (Bavarian Administrative
Court of Regensburg, Germany)**

In the administrative-law case of

European Chemicals Agency (ECHA)

[...]

– Applicant –

[...]

v

Hallertauer Hopfenedelungsges. m.b.H.

[...]

– Defendant –

[...]

Intervening party:

Government of Lower Bavaria

as a representative of the public interest

[...]

concerning

Enforcement of administrative fees under the REACH Fees Regulation

the Bavarian Administrative Court of Regensburg, 7th Chamber, issued, without oral proceedings

on 11 April 2023

the following

Decision

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

1. Is Article 94(1) of Regulation (EC) No 1907/2006, according to which an action may be brought before the Court of Justice of the European Union against a decision of the agency, to be interpreted as meaning that the enforceability of decisions of the agency may also be the subject of an action?

2. If the first question is to be answered in the negative: Is the first paragraph of Article 299 TFEU to be interpreted as meaning that it applies not only to acts adopted by the Council, the Commission or the European Central Bank, but also to decisions of the European Chemicals Agency imposing an administrative charge?

3. If the second question is to be answered in the affirmative: Is the second paragraph of Article 299 TFEU to be interpreted as meaning that the reference to the Member State's rules of civil procedure encompasses not only the rules of procedure but also the rules governing jurisdiction?

Grounds:

I.

The subject matter of the proceedings consists of a claim for payment of an administrative charge for a registration effected under Regulation (EC) No 1907/2006.

The applicant is an agency of the European Union established in Helsinki. The applicant is responsible for managing and carrying out the technical, scientific and administrative aspects of Regulation (EC) No 1907/2006.

Regulation (EC) No 1907/2006 lays down rules designed to increase the competitiveness of the chemical industry in the European Union and to protect human health and the environment from the potential risks of chemicals.

Manufacturers and importers of chemical substances are subject to a registration obligation under Regulation (EC) No 1907/2006. Registration is subject to payment of administrative charges and fees, for which the amounts are set in accordance with Regulation (EC) No 340/2008. The amount of administrative charges depends on the size of the enterprise.

On 16 November 2010, the defendant filed a registration with the applicant (Registration No: 01-2119485821-32-0037) and claimed entitlement to reduced fees and administrative charges as a micro-enterprise.

In 2013, the applicant reviewed the information provided by the defendant concerning the size of the enterprise. In that regard, by letter of 31 May 2013, the applicant drew the defendant's attention to the fact that small and medium-sized enterprises were eligible to claim reduced fees and charges. To that end, it was necessary to provide evidence of the size of the enterprise. A reduction could not be considered without submission of such evidence.

On 20 November 2013, the applicant issued Decision SME (2013) 4439 and served it on the defendant. In that decision, the applicant held that the defendant was not entitled to claim a reduction of the administrative charge. Consequently, an additional administrative charge of EUR 9,950.00 was to be invoiced. That decision was accompanied by a notification of the available legal remedies, which explained that the [defendant] was entitled to bring an action before the Court of Justice of the European Union within 2 months of receipt of the decision.

By letter of 22 November 2013, the applicant sent the defendant the invoice for payment of the administrative charge of EUR 9,950.00, with a due date of 22 December 2013, as notified in Decision SME (2013) 4439.

By letter of 22 December 2013, the applicant issued a reminder in respect of the outstanding payment, whereby the due date was then specified as 20 February 2014.

The defendant neither paid the administrative charge nor brought an action before the Court of Justice of the European Union against Decision SME (2013) 4439 of 20 November 2013.

On 15 May 2019, the applicant had an action brought before the Administrative Court of Regensburg seeking that the defendant be ordered to pay the amount of EUR 9,950.00.

II.

The relevant provisions of EU law are set out in:

Article 274 of the Treaty on the Functioning of the European Union based on the Treaty of Lisbon which entered into force on 1 December 2009 (consolidated version published in OJ No C 115 of 9 May 2008, p. 47), as last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community (OJ L 112/21 of 24 April 2012) with effect from 1 July 2013; ‘the TFEU’

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 288 TFEU

- (1) *To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*
- (2) *A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*
- (3) *A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*
- (4) *A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*
- (5) *Recommendations and opinions shall have no binding force.*

Article 299 TFEU

- (1) *Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.*

(2) *Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.*

(3) *When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.*

(4) *Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.*

Article 74 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ 2006 L 396, p. 1); ‘Regulation No. 1907/2006’

(1) *The fees that are required according to Article 6(4), Article 1(1) and (5), Article 9(2), Article 11(4), Article 17(2), Article 18(2), Article 19(3), Article 22(5), Article 62(7) and Article 92(3) shall be specified in a Commission Regulation adopted in accordance with the procedure referred to in Article 133(3) by 1 June 2008.*

(2) *A fee need not be paid for a registration of a substance in a quantity of between 1 and 10 tonnes where the registration dossier contains the full information in Annex VII.*

(3) *The structure and amount of the fees referred to in paragraph 1 shall take account of the work required by this Regulation to be carried out by the Agency and the competent authority and shall be fixed at such a level as to ensure that the revenue derived from them when combined with other sources of the Agency's revenue pursuant to Article 96(1) is sufficient to cover the cost of the services delivered. The fees set for registration shall take into account the work that may be done pursuant to Title VI. In the case of Article 6(4), Article 7(1) and (5), Article 9(2), Article 11(4), Article 17(2) and Article 18(2), the structure and amount of fees shall take account of the tonnage range of the substance being registered. In all cases, a reduced fee shall be set for SMEs. In the case of Article 11(4), the structure and amount*

of fees shall take into account whether information has been submitted jointly or separately. In the case of a request made under Article 10(a)(xi), the structure and amount of fees shall take into account the work required by the Agency in assessing the justification.

(4) The Regulation referred to in paragraph 1 shall specify the circumstances under which a proportion of the fees will be transferred to the relevant Member State competent authority.

(5) The Agency may collect charges for other services it provides.

Article 94 of Regulation No 1907/2006

(1) An action may be brought before the Court of First Instance or the Court of Justice, in accordance with Article 230 of the Treaty, contesting a decision taken by the Board of Appeal or, in cases where no right of appeal lies before the Board, by the Agency.

(2) Should the Agency fail to take a decision, proceedings for failure to act may be brought before the Court of First Instance or the Court of Justice in accordance with Article 232 of the Treaty.

(3) The Agency shall be required to take the necessary measures to comply with the judgment of the Court of First Instance or the Court of Justice.

Article 13 of Commission Regulation (EC) No 340/2008 of 16 April 2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2008 L 107, p. 6); ‘Regulation (EC) No 340/2008’

(1) A natural or legal person that claims to be entitled to a reduced fee or charge under Articles 3 to 10 shall inform the Agency thereof at the time of the submission of the registration, update of registration, request, notification, application, review report or appeal giving rise to the payment of the fee.

(2) A natural or legal person that claims to be entitled to the fee waiver under Article 74(2) of Regulation (EC) No 1907/2006 shall inform the Agency thereof at the time of the submission of the registration.

(3) The Agency may request, at any time, evidence that the conditions for a reduction of fees or charges or for a fee waiver apply.

(4) Where a natural or legal person that claims to be entitled to a reduction or a fee waiver cannot demonstrate that it is entitled to such a reduction or waiver, the Agency shall levy the full fee or charge as well as an administrative charge. Where a natural or legal person that has claimed

to be entitled to a reduction has already paid a reduced fee or charge, but cannot demonstrate that it is entitled to such a reduction, the Agency shall levy the balance of the full fee or charge as well as an administrative charge. Paragraphs 2, 3 and 5 of Article 11 shall apply mutatis mutandis.

The relevant provisions of national law are as follows:

Article 101 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany, ‘the GG’) of 23 May 1949 (BGBl. p.1), last amended by the Gesetz vom 19.12.2022 (Law of 19 December 2022 (BGBl. I p. 2478); ‘the GG’

- (1) Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.*
- (2) Courts for particular fields of law may be established only by a law.*

Paragraph 17a of the Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (German Courts Constitution Law in the revised version published on 9 May 1975) (BGBl. I p. 1077), as last amended by Article 5 of the Gesetz vom 19. Dezember 2022 (Law of 19 December 2022) (BGBl. I p. 2606); ‘the GVG’

- (1) If a court has declared with final and binding effect that the recourse taken to it is admissible, other courts shall be bound by this decision.*
- (2) If the recourse taken is inadmissible, the court shall declare this proprio motu after hearing the parties and shall at the same time refer the legal dispute to the competent court of admissible recourse. If several courts are competent, the dispute shall be referred to the court to be selected by the claimant or applicant or, if no selection is made, to the court designated by the referring court. The order shall be binding upon the court to which the dispute has been referred in respect of the admissibility of the recourse.*
- (3) If the recourse taken is admissible, the court may give a preliminary decision to this effect. It must give a preliminary decision if a party challenges the admissibility of the recourse.*
- (4) The order pursuant to subparagraphs (2) and (3) may be given without an oral hearing. Reasons must be given therefor. The immediate complaint (sofortige Beschwerde) shall be available against the decision pursuant to the provisions of the respective applicable code of procedure. The participants shall only be entitled to lodge a complaint against a decision of a higher regional court at the highest federal court if this has been admitted in the decision. The complaint must be admitted if the legal issue concerned is of fundamental importance or if the court deviates from a decision of one of the highest federal courts or from a decision of the Joint Panel of the Highest Federal Courts (Gemeinsamer Senat der obersten Gerichtshöfe des*

Bundes). *The highest federal court shall be bound by the admission of the complaint.*

(5) *The court that rules on an appellate remedy against a decision by the court seized of the case shall not review whether the recourse taken was admissible.*

(6) *Subparagraphs (1) to (5) shall apply accordingly to adjudicating bodies with jurisdiction over civil disputes, family matters and non-contentious matters in relation to each other.*

Paragraph 40 of the *Verwaltungsgerichtsordnung in der Fassung der Bekanntmachung vom 19. März 1991* (German Code of Administrative Court Procedure in the version published on 19 March 1991) (BGBl. I p. 686), most recently amended by Paragraph 1 of the *Gesetz vom 14. März 2023* (Law of 14 March 2023) (BGBl. 2023 I No. 71); ‘the VwGO’

(1) *Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature in so far as the disputes are not explicitly allocated to another court by a federal statute; public-law disputes in the field of Land (federal state) law may also be assigned to another court by a Land statute.*

(2) *Recourse shall be available to the ordinary courts for property claims from sacrifice for the public good and from public-law deposit, as well as for compensation claims from the violation of public-law obligations which are not based on a public-law contract; this shall not apply to disputes regarding the existence and amount of a compensation claim in the context of the second sentence of Article 14(1) of the Basic Law. The special provisions of civil service law, as well as those on legal recourse to compensate for property disadvantages for withdrawal of unlawful administrative acts, shall remain unaffected.*

Paragraph 167 of the VwGO

(1) *Unless the present Law provides otherwise, Book Eight of the Zivilprozeßordnung [German Code of Civil Procedure, ‘the ZPO’] shall apply mutatis mutandis to enforcement. The enforcement court shall be the court of first instance.*

(2) *Judgments for rescissory actions and actions to compel the performance of an administrative act may be declared provisionally enforceable in respect of the costs only.*

Paragraph 168 of the VwGO

(1) *Enforcement shall be effected on the basis of*

1. *final and provisionally enforceable court rulings,*
2. *provisional injunctions,*
3. *court settlements,*
4. *cost-setting orders,*
5. *the arbitration rulings of public-law arbitration tribunals that have been declared enforceable in so far as the ruling on the declaration of enforceability has been declared final or provisionally enforceable.*

(2) For the purposes of enforcement, those concerned may be granted copies of the judgment at their request without the facts and without reasoning for the ruling, the effect of service of which shall be equivalent to the service of a complete judgment.

Paragraph 173 of the VwGO

Unless this Law contains provisions with regard to the proceedings, the German Courts Constitution Law and the German Code of Civil Procedure, including Paragraph 278(5) and Paragraph 278a, shall apply mutatis mutandis if the fundamental differences between the two types of procedure do not rule this out; Book 6 of the German Code of Civil Procedure shall not be applied. The provisions of the Seventeenth Title of the German Courts Constitution Law shall be applied mutatis mutandis subject to the proviso that the Higher Regional Court shall be substituted by the Higher Administrative Court, the Federal Court of Justice shall be substituted by the Federal Administrative Court and the German Code of Civil Procedure shall be substituted by the German Code of Administrative Court Procedure. The court within the meaning of Paragraph 1062 of the German Code of Civil Procedure shall be the administrative court with jurisdiction; the court within the meaning of Paragraph 1065 of the German Code of Civil Procedure shall be the Higher Administrative Court with jurisdiction.

Paragraph 753 of the Zivilprozessordnung in der Fassung der Bekanntmachung vom 5. Dezember 2005 (German Code of Civil Procedure as published on 5 December 2005) (BGBl. I p. 3202; 2006 I p. 431; 2007 I p. 1781), last amended by Paragraph 19 of the Gesetz vom 22. Februar 2023 (Law of 22 February 2023) (BGBl. 2023 I No 51); ‘the ZPO’

- (1) Unless the compulsory enforcement is assigned to the courts, it will be implemented by bailiffs who are to effect it on behalf of the creditor.*
- (2) The creditor may avail himself of the assistance of the court registry in charging a bailiff with the task of compulsory enforcement. The court-appointed bailiffs charged with the task by the court registry shall be deemed to have been charged by the creditor.*

(3) *The Federal Ministry of Justice and Consumer Protection is authorised to introduce forms, use of which shall be mandatory, for charging the bailiff with his task; such forms being subject to approval by the Bundesrat [upper house of the German parliament] and being made by regulation. Special forms may be provided for instances in which instructions are submitted electronically.*

(4) *Applications and declarations by the parties for which written form is required, as well as information, statements, expert opinions, translations and declarations of third parties for which written form is required, may be submitted as an electronic document to the bailiff. Paragraph 130a, as well as regulations issued on the basis of that paragraph, and Paragraph 298 shall apply mutatis mutandis to electronic documents. The Federal Government may, in the regulation provided for under the second sentence of Paragraph 130a(2), specify special technical framework conditions for the transmission and processing of electronic documents in compulsory enforcement proceedings implemented by bailiffs.*

(5) *Paragraph 130d applies mutatis mutandis.*

Paragraph 764 of the ZPO

(1) *Ordering enforcement measures as assigned to the courts, and the assistance with such measures, is the responsibility of the local courts (Amtsgerichte) as the courts responsible for enforcement.*

(2) *Unless another local court is designated by law, the local court responsible for enforcement shall be the local court for the district in which the enforcement proceedings are to be performed or have been performed.*

(3) *The decisions of the enforcement court are issued by a court order.*

Notice on jurisdiction to issue an order for enforcement in respect of decisions of institutions of the European Economic Community and of the European Atomic Energy Community of 3 February 1961, Bundesgesetzblatt, 1961, Part II, p. 50; ‘the notice of 3 February 1961’

Issuance of the order for enforcement provided for in the second paragraph of Article 192 of the Treaty establishing the European Economic Community of 25 March 1957 [...] (Bundesgesetzblatt II, p. 753, 1014) is the responsibility of the Federal Minister of Justice.

III.

1. The decision of the Administrative Court depends on the interpretation of EU law, particularly Article 94 of Regulation (EC) No 1907/2006 and Article 299 TFEU. Before a decision on the action is taken, the proceedings must therefore be stayed and a preliminary ruling obtained from the Court of Justice of the European

Union pursuant to point (b) of the first paragraph, and the second paragraph, of Article 267 TFEU.

(a) The first question referred for a preliminary ruling

By its first question, the referring court seeks clarification as to whether recourse to the EU courts is available when a European agency seeks enforcement of a payment obligation on the basis of an unappealable decision.

A German court before which an action has been brought may rule on the substance of a case, and thus on the merits of an action, only if recourse to the relevant jurisdiction is available and the other preconditions for a decision on the substance are satisfied. There are five independent jurisdictions in Germany: the ordinary jurisdiction with civil and criminal jurisdiction, labour jurisdiction, social jurisdiction, tax jurisdiction and administrative jurisdiction.

The court seised must, of its own motion, examine the admissibility of the recourse used. If recourse is made to the administrative courts, even though such recourse is not available under Paragraph 40 of the VwGO and the special provisions imposing or displacing allocation of a dispute to the administrative jurisdiction, then the administrative court seised must, in accordance with Paragraph 17a(2) of the GVG, refer the dispute to the court that has jurisdiction for it at first instance. The court to which the case has been referred may neither refer the case back to the court that made the referral, nor refer the case onward to a court with jurisdiction for another mode of recourse.

According to the first sentence of Paragraph 17a(4) of the GVG, the referral is to be made by means of a court order. Under the third sentence of Paragraph 17a(2) of the GVG, the referral order is to be binding upon the court to which the dispute has been referred in respect of the admissibility of the recourse.

Exceptionally, the binding effect of a referral order does not apply in cases of serious and manifest illegality or manifest error. This would be the case if the referral is based on a disregard of fundamental procedural principles or on arbitrary considerations. Such arbitrariness would be present if the legal situation were to be blatantly misjudged and the adopted view devoid of any objective reason, to the effect that the referral departs in an unacceptable manner from the constitutional principle of the lawful judge, as provided for under the second sentence of Article 101(1) of the Basic Law.

It is therefore for the referring court to determine whether recourse to the administrative courts is available in the present case. Administrative recourse is available if either a special provision is relevant that provides for that legal consequence (legislative provision allocating the dispute concerned to the administrative jurisdiction (*aufdrängende Sonderzuweisung*)), or if the requirements of the general rule laid down in the first sentence of Paragraph 40(1) of the VwGO are satisfied and the dispute is not expressly allocated to another

jurisdiction (legislative provision allocating the dispute concerned to a jurisdiction other than the administrative jurisdiction (*abdrängende Sonderzuweisung*)).

According to the first sentence of Paragraph 40(1) of the VwGO, recourse to the administrative courts is available in all public-law disputes of a non-constitutional nature in so far as the disputes are not explicitly allocated to another court by federal law or *Land* (federal state) law.

The referring court considers that the relevant connecting factor for the purposes of assessing whether administrative recourse is available is the nature of the legal relationship alleged in the applicant's statement of facts upon which the cause of action is based. The legal relationship is to be determined on the basis of the applicant's claim and the facts presented in support of it. It is therefore necessary to refer to the subject matter of the dispute, that is to say, to the judicial claim, which is more particularly defined by the actually existing circumstances (cause of action) presented in support of the claim.

In the present case, the applicant is seeking payment under Regulation (EC) No 340/2008 for an administrative charge in the amount of EUR 9,950.00, which is payable and incontestable. The applicant's claim therefore seeks enforcement of the payment obligation under the law governing enforcement.

The question of whether recourse to the administrative courts is available in enforcement cases depends on the origin of the enforceable act. The substantive nature of the claim to be enforced is irrelevant since the subject matter of the enforcement proceedings no longer concerns a finding as to the existence of a substantive right, but rather its enforcement through the exercise of governmental powers.

The jurisdiction of the administrative courts to adjudicate on the enforcement proceedings is exclusively determined by Paragraph 167 of the VwGO, which, as *lex specialis*, displaces the general rule laid down in the first sentence of Paragraph 40(1) of the VwGO. According to prevailing opinion, it can be inferred from Paragraph 167 of the VwGO that that provision is intended to determine the mode of recourse. The special allocation provision laid down in Paragraph 167 of the VwGO presupposes an enforceable act issued in administrative proceedings in accordance with Paragraph 168(1) of the VwGO. In the opinion of the referring court, that precondition is not satisfied in the present case since the applicant is requiring payment from the defendant without any prior court proceedings. A court has not ruled upon the question as to whether or not a substantive claim for payment based on Regulation (EC) No. 340/2008 has in fact arisen. The applicant bases the claim for payment solely on its Decision SME (2013) 4439 of 20 November 2013, which is now unappealable.

It is possible that Article 94(1) of Regulation (EC) No [1907/2006] may constitute a legislative provision allocating the dispute concerned to a jurisdiction other than the administrative jurisdiction, with the consequence that administrative recourse

would not be available, and hence that the Administrative Court of Regensburg would not be permitted to rule on the action.

Under Article 94(1) of Regulation (EC) No 1907/2006, an action may be brought before the EU courts in accordance with [what is now] Article 263 TFEU contesting a decision taken by the board of appeal or, in cases where no right of appeal lies before the board, by the agency. Decision SME (2013) 4439 of 20 November 2013 is not a decision subject to appeal in accordance with Article 91(1) of Regulation (EC) No 1907/2006, since the agency's decision is based on Article 13(4) of Regulation (EC) No 340/2008.

According to the express wording of Article 94(1) of Regulation (EC) No 1907/2006, an action before the EU courts is admissible only if a decision of the agency is contested. An action to contest a decision within the meaning of that provision presupposes that an action is brought by a natural or legal person required to pay a charge. In the present case, however, it is the agency that is seeking judicial protection vis-à-vis the defendant as the party subject to the payment obligation.

The applicant is of the opinion that, in such a situation, Article 94(1) of Regulation (EC) No 1907/2006 does not apply. According to the applicant's submissions, it is true that Article 94 of Regulation (EC) No 1907/2006 provides for a legal remedy. However, that provision does not offer the applicant any possibility of bringing an action for compliance with the payment obligation. Nor would the applicant have the authority to enforce the decision against legal persons in Germany.

On the other hand, the defendant is of the opinion that the EU courts have jurisdiction to adjudicate on the enforcement of measures under EU law. According to the defendant, the legal recourse is fully governed by Article 94(1) of Regulation (EC) No 1907/2006. No distinction should be drawn between setting an administrative charge and the enforcement of that charge. Such an artificial division could scarcely be possible, since Article 94(1) of Regulation (EC) No 1907/2006 is intended to achieve comprehensive control of the administrative action of the applicant as an EU authority.

The referring court concurs with the defendant's submissions and is of the opinion that recourse to the EU courts is available under Article 94(1) of Regulation (EC) No 1907/2006. Moreover, in addition to the argument advanced by the defendant, the fact that a public law measure – in this case in the form of a decision on the amount of the administrative charges – is carried out directly by an agency militates in favour of the EU courts having jurisdiction. There is consequently a case of direct implementation of EU law. Conversely, it is only in those cases where the administrative action under EU law is carried out by the national authorities (indirect implementation of EU law) that recourse to the German administrative courts is available; this is because a legal act of German public authority is involved. It therefore seems appropriate that public law decisions

taken by an agency, as an institution of the European Union, should be made subject to full review by the EU courts.

Furthermore, the provision laid down in the fourth paragraph of Article 299 TFEU – which provides that the Court of Justice of the European Union is to have exclusive jurisdiction with respect to the suspension of enforcement measures and disputes regarding the continued existence of the substantive claim – lends support to the argument that the EU courts have jurisdiction. In order to ensure uniform application of the law within the European Union, it is not only the suspension of enforcement but rather – with the exception of the second sentence of the fourth paragraph of Article 299 TFEU – the entire enforcement procedure that should be reviewable by the EU courts.

In the event that the Court of Justice of the European Union answers the first question referred for a preliminary ruling to the effect that Article 94(1) of Regulation (EC) No 1907/2006 is to be interpreted as meaning that the enforceability of decisions of the agency may also form the subject of an action, the referring court requests an indication as to whether, or in what form, the pending administrative dispute is to be referred to the General Court of the European Union or the Court of Justice of the European Union. The national law contains only provisions on referrals to national courts of other jurisdictions.

(b) The second question referred for a preliminary ruling

In the event that the Court of Justice of the European Union answers the first question referred for a preliminary ruling in the negative, it is then necessary to clarify whether the agency's decision is an enforceable act within the meaning of the first paragraph of Article 299 TFEU.

According to the second paragraph of Article 299 TFEU, enforcement is to be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. However, according to the wording of the first paragraph of Article 299 TFEU, that rule applies only to acts of the Council, the Commission and the European Central Bank which impose a pecuniary obligation.

It is true that the first paragraph of Article 299 TFEU does not contain any limitation as to the nature of the acts, but applies to all acts which impose a pecuniary obligation (judgment of 16 July 2020, *ADR Center SpA v European Commission*, C-584/17, EU:C:2020:576, paragraph 51). However, as is clear from its wording, Article 299 TFEU applies only to payment orders issued by the Council, the Commission and the European Central Bank. The enforcement of payment orders issued by other European institutions, such as agencies, is not expressly covered.

On account of the schematic position and the spirit and purpose of the first paragraph of Article 299 TFEU that provision could also be interpreted as meaning that the enforcement of payment orders issued by other European authorities is governed by the rules of civil procedure of the Member State

concerned (Opinion of the Advocate General at the hearing of 7 November 2019, *ADR Center SpA v European Commission*, C-584/17; EU:C:2019:941, paragraph 44).

Moreover, the fact that neither Regulation No 1907/2006 nor Regulation (EC) No 340/2008 contain specific provisions on enforcement militates in favour of a broad interpretation of Article 299 TFEU, according to which payment orders issued by the agency would also be covered. It is true that, on closer inspection, the agency has the power to levy administrative charges and fees. However, it does not have the means to enforce unappealable decisions on administrative charges and fees. In order to give full effect to EU law, it is essential that the institutions of the European Union have the means to effect compulsory enforcement of the orders they have issued.

In the absence of specific rules on enforcement in Regulations (EC) No 1907/2006 and No 340/2008, it is necessary to refer back to the rule on enforcement under Article 299 TFEU.

The first sentence of the second paragraph of Article 299 TFEU refers to the rules of civil procedure of the Member State in whose territory the enforcement is to take place. In the Federal Republic of Germany, enforcement provided for in civil proceedings is governed by the provisions of Book 8 of the ZPO (Paragraphs 704 et seq. of the ZPO).

In so far as Decision SME (2013) 4439 constitutes an enforceable act for the purposes of the first paragraph of Article 299 TFEU, the order for payment must have an enforcement order appended to it upon application by the party seeking enforcement – in this case the agency – that is to say, it must be declared enforceable. Under the second sentence of the second paragraph of Article 299 TFEU, the order for enforcement is to be appended by the national authority designated by the government of each Member State and made known to the Commission and to the Court of Justice of the European Union. In the Federal Republic of Germany, the Federal Minister for Justice is responsible for this (Notice of 3 February 1961). Once the order for enforcement has been appended, the party seeking enforcement may bring an action directly before the authority that is competent under national law (third paragraph of Article 299 TFEU). In the Federal Republic of Germany, the competent enforcement body is the enforcement court provided for under Paragraph 764 of the ZPO or the bailiff provided for under Paragraph 753 of the ZPO.

The applicability of Article 299 TFEU is also supported by the fact that the other conditions for enforcement are fulfilled. Only natural and legal persons can be regarded as addressees of an enforcement order within the meaning of Article 299 TFEU. That condition is fulfilled in the case of the defendant, which is a legal person established under private law.

Moreover, Article 299 TFEU presupposes an enforceable order to be an act within the meaning of Article 288 TFEU. Acts within the meaning of that provision encompass not only abstract and general legal acts of secondary EU law, such as regulations or directives, but also decisions. This includes, in particular, decisions specifying to whom they are addressed, as referred to in the second sentence of the fourth paragraph of Article 288 TFEU, if the decision is binding and has direct effect on the addressee. A decision is regarded as binding if a measure is intended and capable of having direct legal effect, that is, of conferring rights or imposing obligations on the addressee of a decision (judgment of 11 November 1981; 60/81, *International Business Machines Corporation v Commission of the European Communities*, EU:C:1981:264, paragraph 9; judgment of 22. 6. 2000, C-147/96; *Kingdom of the Netherlands v Commission of the European Communities*, EU:C:2000:335, paragraph 25; Decision of 8 March 1991, *Emerald Meats v Commission*, C-66/91, EU:C:1991:110, paragraph 26). That condition is also fulfilled in the present case. The unappealable decision of the agency imposes a requirement on the defendant to pay an administrative charge.

(c) The third question referred for a preliminary ruling

By the third question referred for a preliminary ruling, the referring court seeks clarification as to whether the reference to the rules of civil procedure in force in the State in whose territory the enforcement is carried out is to be construed broadly. German civil procedure law governs not only the procedure required for a proper enforcement measure but also the competent enforcement body. In the Federal Republic of Germany, the competent enforcement bodies comprise the court responsible for enforcement (Paragraph [764] of the ZPO) or the bailiff (Paragraph [753] of the ZPO). If Article 299 TFEU were to be interpreted as referring not only to the procedure for implementation of the enforcement but also to the rules governing the competent enforcement body, then it is clear to which court the present dispute should be referred.

2. The questions referred to the Court of Justice of the European Union for a preliminary ruling are relevant to the decision.

In the provisional view of the referring court, there are many indications to suggest that recourse to the administrative courts is not available. If the Court of Justice of the European Union were to answer the first question referred for a preliminary ruling in the affirmative, recourse to the General Court of the European Union or to the Court of Justice of the European Union would be available, which would mean that the referring court would not be entitled to issue a decision on the merits. If, on the other hand, the Court of Justice of the European Union were to answer the second and third questions referred for a preliminary ruling in the affirmative, recourse to the ordinary courts would be available.

If the applicant makes recourse to the administrative courts, even though this is not available under the provisions of Paragraph 40 of the VwGO and the special provisions imposing or displacing allocation of a dispute to the administrative

jurisdiction, the administrative court seized must refer the legal dispute to the competent court of another jurisdiction pursuant to the first sentence of Paragraph 173 of the VwGO, read in conjunction with the first sentence of Paragraph 17a(2) of the GVG.

A referral can therefore be considered only once the questions referred for a preliminary ruling have been clarified.

The decision is not subject to appeal (Paragraph 146(2) of the VwGO, by analogy).

[...]

[Signatures]

For the accuracy and completeness of the copy:

Regensburg, 14 April 2023

[...]

[note regarding official copies]

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