COURT OF JUSTICE
OF THE EUROPEAN UNION

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SELECTION OF MAJOR JUDGMENTS
YEAR 2023

COLLECTION OF RÉSUMÉS
BY THE RESEARCH AND DOCUMENTATION DIRECTORATE

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Preface

The *Selection of major judgments* is an annual publication produced by the Research and Documentation Directorate, bringing together in one place the résumés of 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. As regards the Court of Justice, the résumés of the decisions delivered by the Grand Chamber are reproduced in full, as are the résumés of 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. For each résumé, a hyperlink is provided to the text of the decision, thus allowing immediate access to the content of that decision.

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. Common values of the European Union and fundamental rights [1]

1. Rule of law and effective judicial protection [2]

Judgment of 5 June 2023 (Grand Chamber), *Commission* v *Poland (Independence and private life of judges)* (C-204/21, EU:C:2023:442)

(Failure of a Member State to fulfil obligations – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union − Rule of law – Effective legal protection in the fields covered by EU law – Independence of judges – Article 267 TFEU – Possibility of making a reference to the Court for a preliminary ruling – Primacy of EU law – Jurisdiction in relation to the lifting of the immunity from criminal prosecution of judges and in the field of employment law, social security and retirement of judges of the Sąd Najwyższy (Supreme Court, Poland) conferred on the Disciplinary Chamber of that court – National courts prohibited from calling into question the legitimacy of the constitutional courts and bodies or from establishing or assessing the lawfulness of the appointment of judges or their judicial powers – Verification by a judge of compliance with certain requirements relating to the existence of an independent and impartial tribunal previously established by law classified as a 'disciplinary offence' – Exclusive jurisdiction to examine questions relating to the lack of independence of a court or judge conferred on the Extraordinary Review and Public Affairs Chamber of the Sąd Najwyższy (Supreme Court) – Articles 7 and 8 of the Charter of Fundamental

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1 Reference should also be made under this heading to the following judgments: judgment of 5 December 2023 (Grand Chamber), ***Nordic Info*** (C-128/22, EU:C:2023:951), presented under heading II.1 'Measures restricting the free movement of Union citizens'; judgment of 5 September 2023 (Grand Chamber), ***Udlændinge- og Integrationsministeriet (Loss of Danish nationality)*** (C-689/21, EU:C:2023:626), presented under heading II.2 'Loss of European citizenship due to loss of the nationality of a Member State'; judgment of 6 July 2023, ***Bundesamt für Fremdenwesen und Asyl (Refugee who has committed a serious crime)*** (C-663/21, EU:C:2023:540), judgment of 6 July 2023, ***Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)*** (C-8/22, EU:C:2023:542), judgment of 6 July 2023, ***Staatssecretaris van Justitie en Veiligheid (Particularly serious crime***) (C-402/22, EU:C:2023:543), presented under heading IV.1 'Asylum policy'; judgment of 18 April 2023, ***Afrin*** (C-1/23 PPU, EU:C:2023:296), presented under heading IV.2 'Immigration policy'; judgment of 18 April 2023 (Grand Chamber), ***E.D.L. (Ground for refusal based on illness)*** (C-699/21, EU:C:2023:295), judgment of 6 June 2023 (Grand Chamber), ***O.G. (European arrest warrant issued against a third-country national)*** (C-700/21, EU:C:2023:444), judgment of 21 December 2023 (Grand Chamber), ***GN (Ground for refusal based on the best interests of the child)*** (C-261/22, EU:C:2023:1017), presented under heading V.1 'European arrest warrant'; judgment of 7 December 2023, ***AP Assistenzprofis*** (C-518/22, EU:C:2023:956), presented under heading XIV.2 'Equal treatment in employment and occupation'; judgment of 9 November 2023, ***Všeobecná úverová banka*** (C-598/21, EU:C:2023:845), presented under heading XV.1 'Unfair terms'; judgment of 9 February 2023, ***Staatssecretaris van Justitie en Veiligheid and Others (Withdrawal of the right of residence of a Turkish worker)*** (C-402/21, EU:C:2023:77), presented under heading XVII.2 'Interpretation of an international agreement'.

2 Reference should also be made under this heading to the following judgments: judgment of 31 January 2023 (Grand Chamber), ***Puig Gordi and Others*** (C-158/21, EU:C:2023:57), presented under heading V.1 'European arrest warrant'; judgment of 22 June 2023 (Grand Chamber), ***K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings)*** (C-660/21, EU:C:2023:498), presented under heading V.2 'Right to information in criminal proceedings'.

Rights – Rights to privacy and the protection of personal data – Regulation (EU) 2016/679 – Article 6(1), first subparagraph, points (c) and (e), and Article 6(3), second subparagraph – Article 9(1) – Sensitive data – National legislation requiring judges to make a declaration as to whether they belong to associations, foundations or political parties, and to the positions held within those associations, foundations or political parties, and providing for the placing online of the data contained in those declarations)

In 2017, two new chambers were established within the Sąd Najwyższy (Supreme Court, Poland), namely the Izba Dyscyplinarna (Disciplinary Chamber) and the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber).

By a law of 20 December 2019 amending the Law on the Supreme Court, which entered into force in 2020, those two chambers were granted new jurisdiction, in particular, to authorise the initiation of criminal proceedings against judges or to place them in provisional detention. [3] For its part, the Extraordinary Review and Public Affairs Chamber was granted exclusive jurisdiction to examine complaints and questions of law relating to the independence of a court or a judge. [4] In addition, under that amending law, the Supreme Court, including the latter chamber, may not call into question the legitimacy of the courts, the constitutional organs of the State and the organs responsible for reviewing and protecting the law, or establish or assess the lawfulness of the appointment of a judge. [5] That law also clarifies the concept of disciplinary fault on the part of judges. [6]

The same amending law also amended the Law relating to the organisation of the ordinary courts, by introducing similar provisions to those amending the Law on the Supreme Court. [7] It also determines the regime applicable to any criminal proceedings initiated against judges of the ordinary courts. [8] It requires them, furthermore, as well as judges of the Supreme Court, to make declarations concerning membership of associations, non-profit foundations and political parties, including for periods

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3 Amended Law on the Supreme Court, Article 27(1).

4 Thus the Extraordinary Review and Public Affairs Chamber has jurisdiction, in particular, concerning the exclusion of judges or complaints alleging a lack of independence of a court or a judge, and to hear actions for a declaration that court decisions are unlawful, where that unlawfulness consists in the calling into question of the status of the person appointed to a judicial post who adjudicated in the case (Amended Law on the Supreme Court, Article 26(2) to (6)). It also has exclusive jurisdiction to examine questions of law in relation to the independence of a court or a judge arising before the Supreme Court (Amended Law on the Supreme Court, Article 2(2) to (5)).

5 Amended Law on the Supreme Court, Article 29(2) and (3).

6 A judge of the Supreme Court shall be accountable, at the disciplinary level, for breach of professional obligations, including in cases of manifest and flagrant breach of legal rules, acts or omissions of such a kind as to prevent or seriously undermine the functioning of a judicial authority or acts calling into question the existence of the employment relationship of a judge, the effectiveness of the appointment of a judge or the legitimacy of a constitutional organ of the Republic of Poland (Amended Law on the Supreme Court, Article 72(1)).

7 Thus, Article 42a of the amended Law relating to the ordinary courts contains the wording of Article 29(2) and (3) of the amended Law on the Supreme Court, while Article 107(1) contains the wording of Article 72(1) of the amended Law on the Supreme Court (see above).

8 See Articles 80 and 129(1) to (3) of the amended Law relating to the ordinary courts.

preceding the taking-up of their office and provides that that information be published online. [9] A large number of those new provisions also apply to the administrative courts. [10]

Considering that, by adopting that new disciplinary regime, the Republic of Poland had failed to fulfil its obligations under EU law, [11] the European Commission brought an action for failure to fulfil obligations before the Court of Justice under Article 258 TFEU.

In the judgment delivered in that case, the Court, sitting as the Grand Chamber, upheld the action brought by the Commission. It finds that those new national provisions undermine the independence of judges guaranteed by the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter and, moreover, infringe, first, the obligations imposed on national courts in the context of the preliminary ruling procedure and, second, the principle of primacy of EU law. In addition, the provisions establishing declaratory mechanisms in respect of judges and the online publication of the data thus collected infringe the right to respect for private life and the right to the protection of personal data enshrined in the Charter of Fundamental Rights of the European Union ('the Charter') and the General Data Protection Regulation ('the GDPR'). [12]

Findings of the Court

As regards, first, the jurisdiction of the Court to rule on the complaints raised by the Commission concerning the infringements of the provisions of Article 19(1) TEU, in conjunction with Article 47 of the Charter, and of the principle of primacy of EU law, the Court recalls that the European Union is founded on values which are common to the Member States [13] and that respect for those values is a prerequisite

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9 Article 88a of the amended Law relating to the ordinary courts states in paragraphs (1) and (4) that:

'1. A judge shall be required to submit a written declaration mentioning:

(1) his or her membership of an association, including the name and registered office of the association, the positions held and the period of membership;

(2) the position held within a body of a non-profit foundation, including the name and registered office of the foundation and the period during which the position was held;

(3) his or her membership of a political party prior to his or her appointment to a judge's post and his or her membership of a political party during his or her term of office before 29 December 1989, including the name of that party, the positions held and the period of membership. …

4. The information contained in the declarations referred to in paragraph 1 shall be public and published in the [*Biuletyn Informacji Publicznej* (Public Information Bulletin)] …'.

As regards judges of the Supreme Court, see Article 45(3) of the amended Law on the Supreme Court.

10 See inter alia Article 5(1a) and (1b), Article 8(2), Article 29(1) and Article 49(1) of the amended Law relating to the administrative courts.

11 The Commission considered that the Republic of Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU – which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law – under Article 47 of the Charter – relating to the right to an effective remedy and to an independent and impartial tribunal previously established by law – under the second and third paragraphs of Article 267 TFEU – which provides for the option (second paragraph), for some national courts, and the obligation (third subparagraph), for others, to make a reference for a preliminary ruling – under the principle of primacy of EU law and under Articles 7 and 8 of the Charter and points (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR, relating to the right to privacy and the right to protection of personal data.

12 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).

13 Article 2 TEU.

for accession to the European Union. [14] The European Union is thus composed of States which have freely and voluntarily committed themselves to those values, respect for those values and their promotion being the fundamental premiss on which mutual trust between the Member States is based. Compliance by a Member State with those values is thus a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State and cannot be reduced to an obligation which a candidate State is required to comply with in order to accede to the European Union and which it may disregard after its accession. The Court notes, in that regard, that Article 19 TEU gives concrete expression to the value of the rule of law set out in Article 2 TEU [15] and provides that it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The Court holds, consequently, that the requirements arising from respect for values and principles such as the rule of law, effective judicial protection and judicial independence are not capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU.

The Court thus points out that, in choosing their respective constitutional model, the Member States are required to comply, inter alia, with the requirement that the courts be independent stemming from Article 2 and the second subparagraph of Article 19(1) TEU, and that they are thus required, in particular, to ensure that, in the light of the value of the rule of law, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of judges.

Furthermore, the Court recalls, in that regard, that the second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, which imposes on the Member States a clear and precise obligation as to the result to be achieved and which is not subject to any condition, in particular as regards the independence and impartiality of the courts called upon to interpret and apply EU law and the requirement that those courts be previously established by law, has direct effect, in accordance with the principle of primacy of EU law, which means that any provision, case-law or national practice contrary to those provisions of EU law, must be disapplied. Given that the Court has exclusive jurisdiction to give a definitive interpretation of EU law, it is therefore, as required, for the national constitutional court concerned, where appropriate, to alter its own case-law which is incompatible with EU law, as interpreted by the Court. Consequently, the Court declares that it has jurisdiction to examine the complaints raised by the Commission.

Turning, secondly, to the substance of the complaints raised by the Commission, the Court holds, in the first place, that, by conferring on the Disciplinary Chamber of the Supreme Court, whose independence and impartiality are not guaranteed, jurisdiction to hear and determine cases having a direct impact on the status of judges and trainee judges, such as cases concerning the lifting of the criminal immunity of judges and in the field of employment law, social security and retirement of judges of the Supreme Court, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.

In that regard, the Court holds that the legal order of the Member State concerned must include guarantees capable of preventing any risk of political control of the content of judicial decisions or pressure and intimidation against judges which could, inter alia, lead to an appearance of a lack of independence or impartiality on their part capable of prejudicing the trust which justice in a democratic

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14 Article 49 TEU.

15 See, in that regard, judgment of 27 February 2018, ***Associação Sindical dos Juízes Portugueses*** (C-64/16, EU:C:2018:117, paragraph 32).

society governed by the rule of law must inspire in individuals. [16] It is thus essential, as the Court has held previously with regard to the rules applicable to the disciplinary regime for judges, [17] that, having regard to the major consequences likely to result from them both for the career progress of judges and their living conditions, decisions authorising the initiation of criminal proceedings against them, their arrest and detention, and the reduction of their remuneration, or decisions relating to essential aspects of the employment, social security or retirement law schemes applicable to those judges, be adopted or reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence.

In the second place, the Court finds that, by adopting and maintaining the provisions under which the examination of compliance with the EU requirements relating to an independent and impartial tribunal previously established by law may be classified as a 'disciplinary offence', [18] the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU.

In that regard, the Court recalls that the fundamental right to a fair trial means inter alia that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. It also notes that national courts, in various other circumstances, may be obliged to review compliance with the abovementioned requirements and that such a review may relate in particular to whether an irregularity vitiating the procedure for the appointment of a judge could lead to an infringement of that fundamental right. In those circumstances, the fact that a national court performs the tasks entrusted to it by the Treaties and complies with its obligations under those Treaties, by giving effect to provisions such as the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, cannot, by definition, be regarded as a disciplinary offence without those provisions of EU law being infringed *ipso facto*.

The Court observes, first of all, that the definitions of the disciplinary offences at issue are very broad and imprecise, so that they cover situations in which the judges have to examine whether they themselves, the court in which they sit, other judges or other courts satisfy the requirements arising from the provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter. Nor do the national provisions at issue ensure that the liability of the judges concerned for the judicial decisions which they are called upon to give is strictly limited to completely exceptional cases and, consequently, that the disciplinary regime applicable to judges cannot be used in order to exert political control over judicial decisions. Furthermore, in the light of the particular conditions and context in which those national provisions were adopted, the Court points out that the terms chosen by the Polish legislature clearly echo a series of questions which led various Polish courts to make a reference to the Court for a preliminary ruling as regards the compatibility with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of various recent legislative amendments affecting the organisation of justice in Poland. The Court considers, consequently, that the risk that those national provisions may be interpreted in such a way that the disciplinary regime applicable to judges may be used in order to prevent the national courts concerned from making certain findings required of them by EU law and influence the judicial decisions of those courts, thus undermining the independence of those judges, is

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16 See, to that effect, judgment of 18 May 2021, ***Asociația 'Forumul Judecătorilor din România' and Others*** (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 216).

17 See, to that effect, judgment of 15 July 2021, ***Commission* v *Poland (Disciplinary regime for judges)*** (C-791/19, EU:C:2021:596, paragraph 80).

18 Points 2 and 3 of Article 107(1) of the amended Law relating to the ordinary courts and points 1 to 3 of Article 72(1) of the amended Law on the Supreme Court.

established, and that those provisions of EU law are therefore infringed in that respect. Those national provisions also infringe Article 267 TFEU in that they create a risk of disciplinary penalties being imposed on national judges for having made references to the Court for a preliminary ruling.

As regards, more specifically, the disciplinary offence based on the 'manifest and flagrant breach of legal rules' by Supreme Court judges, [19] the Court considers that the national provision providing for it also undermines the independence of those judges since it does not prevent the disciplinary regime applicable to those judges from being used for the purpose of creating pressure and a deterrent effect likely to influence the content of their decisions. That provision also limits the obligation of the Supreme Court to refer questions to the Court for a preliminary ruling in terms of the possibility of initiating disciplinary proceedings.

In the third place, the Court holds that, by adopting provisions prohibiting any national court from reviewing compliance with the requirements arising from EU law relating to the guarantee of an independent and impartial tribunal previously established by law, [20] the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and the principle of primacy of EU law.

In that regard, the Court specifies that those national provisions prohibit not only 'establish[ing]', but also 'assess[ing]', in the light of their 'lawfulness', both the 'appointment' itself and the 'power to carry out tasks in relation to the administration of justice that derives from that appointment'. In addition, those provisions prohibit any 'calling into question' of the 'legitimacy' of 'courts and tribunals' and of the 'constitutional organs of the State and the organs responsible for reviewing and protecting the law'. Such formulations are capable, especially in the particular context in which they were adopted, of leading to the result that a series of acts which the courts concerned are nevertheless required to adopt, in accordance with the obligations incumbent on them in order to ensure compliance with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, may, by reason of their content or effects, fall within the prohibitions thus laid down. Moreover, since those national provisions are capable of preventing the Polish courts from disapplying provisions contrary to those two provisions of EU law, which have direct effect, they are also liable to infringe the principle of the primacy of EU law.

In the fourth place, the Court holds that, by conferring on the Extraordinary Review and Public Affairs Chamber exclusive jurisdiction to examine complaints and questions of law concerning the lack of independence of a court or a judge, [21] the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, read in conjunction with Article 47 of the Charter, and under Article 267 TFEU and the principle of primacy of EU law.

In that regard, the Court states that the reorganisation and centralisation of jurisdiction at issue relate to certain constitutional and procedural requirements arising from the second subparagraph of Article 19(1) TEU and Article 47 of the Charter, compliance with which must be guaranteed across all the substantive areas of application of EU law and before all national courts seised of cases falling within those areas. In that regard, those provisions are closely linked to the principle of the primacy of EU law,

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19 Point 1 of Article 72(1) of the amended Law on the Supreme Court.

20 Article 42a(1) and (2) and Article 55(4) of the amended Law relating to the ordinary courts, Article 26(3) and Article 29(2) and (3) of the amended Law on the Supreme Court, and Article 5(1a) and (1b) of the amended Law relating to the administrative courts.

21 Article 26(2) and (4) to (6) and Article 82(2) to (5) of the amended Law on the Supreme Court and Article 10 of the Law amending the Law on the Supreme Court and certain other laws.

the implementation of which by national courts contributes to ensuring the effective protection of the rights which EU law confers on individuals.

In that context, in so far as, in particular, any national court called upon to apply EU law is obliged to check whether, as composed, it constitutes an independent and impartial tribunal established by law, where serious doubt appears on that point, and since such courts must also, in certain circumstances, be able to verify whether an irregularity vitiating the procedure for the appointment of a judge could lead to an infringement of the fundamental right to such a tribunal, the review, by national courts, of compliance with those requirements is precluded from falling, in a general and indiscriminate manner, within the jurisdiction of a single national body, all the more so if that body cannot, under national law, examine certain aspects inherent in those requirements. In the present case, the Court finds that the purpose of the national provisions at issue is to reserve to a single body the overall review of the requirements relating to the independence of all courts and judges, of both the judicial and administrative order, by depriving of their powers, in that regard, the national courts which previously had jurisdiction to carry out the various types of review required by EU law and to apply the case-law of the Court. It again emphasises the particular context in which the reorganisation of judicial powers at issue carried out by the amending law, which is characterised by the fact that the Polish judges are, moreover, prevented from making certain findings and assessments which they are required to make under EU law.

The Court concludes that the conferral on a single national body of the power to verify compliance with the fundamental right to effective judicial protection, where the need for such verification may arise before any national court, is, combined with the introduction of various prohibitions and disciplinary offences, liable to weaken the effectiveness of the review of observance of that fundamental right. By thus preventing the other courts without distinction from doing what is necessary in order to ensure the observance of the right of individuals to effective judicial protection by disapplying, where appropriate, national rules contrary to the requirements of EU law, the national provisions at issue also infringe the principle of the primacy of EU law. Furthermore, since the very fact of conferring exclusive jurisdiction on the Extraordinary Review and Public Affairs Chamber of the Supreme Court to settle certain questions relating to the application of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter is such as to prevent or discourage other courts from making a reference to the Court for a preliminary ruling, the national provisions at issue also infringe Article 267 TFEU.

In the fifth and last place, the Court holds that, by adopting provisions imposing on judges an obligation to communicate information relating to their activities within associations and non-profit foundations, and to their membership of a political party, before their appointment, and by providing for the publication of that information, [22] the Republic of Poland infringed the right to respect for private life and the right to the protection of personal data guaranteed by the Charter [23] and by the GDPR. [24]

In that regard, after having concluded that the GDPR was applicable and, more specifically, so were points (c) and (e) of the first subparagraph of Article 6(1) and Article 9(1) of that regulation, the Court finds that the objectives put forward by the Republic of Poland in support of the provisions at issue, consisting of reducing the risk that judges may be influenced, in the performance of their duties, by considerations relating to private or political interests, and reinforcing the confidence of individuals as

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22 Article 88a of the amended Law relating to the ordinary courts, Article 45(3) of the amended Law on the Supreme Court and Article 8(2) of the amended Law relating to the administrative courts.

23 Article 7 and Article 8(1) of the Charter.

24 Point (c) and (e) of the first subparagraph of Article 6(1), Article 6(3) and Article 9(1) of the GDPR.

regards the existence of such impartiality, fall within an objective of general interest recognised by the European Union within the meaning of Article 52(1) of the Charter or a legitimate public interest objective within the meaning of the GDPR. [25] The Court recalls, however, that, while such an objective may therefore authorise limitations on the exercise of the rights guaranteed in Articles 7 and 8 of the Charter, that is only the case, in particular, where those limitations genuinely meet such an objective and are proportionate to it.

Examining the necessity of the measures at issue, the Court notes that the Republic of Poland has not provided clear and concrete explanations as to why the publication of information relating to a judge's membership of a political party before his or her appointment and during the exercise of his or her term of office as a judge before 29 December 1989 would be such as to currently contribute to strengthening the right of individuals to have their case heard by a court meeting the requirement of impartiality. Having regard to the particular context in which the amending law and those measures were adopted, the Court considers, moreover, that those measures were, in fact, adopted for the purpose, inter alia, of harming the professional reputation of the judges concerned and the perception of them by individuals. Accordingly, those measures are inappropriate for the purpose of attaining the legitimate objective alleged in the present case.

As regards other information, relating to judges' current or past membership of an association or non-profit foundation, the Court considers that it cannot be ruled out, a priori, that the fact of placing such information online might contribute to revealing the existence of possible conflicts of interest liable to influence the impartial performance by judges of their duties in the handling of individual cases, since such transparency may, moreover, contribute, more generally, to strengthening the confidence of individuals in that impartiality and in justice. It notes, however, first, that, in the present case, the personal data concerned relate in particular to periods prior to the date from which a judge is required to make the declaration required. The Court holds that, in the absence of a temporal limitation as regards the previous periods concerned, it cannot be considered that the measures at issue are limited to what is strictly necessary for the purposes of helping to strengthen the right of individuals to have their case heard by a court meeting the requirement of impartiality. Secondly, as regards the balance to be struck between the objective of general interest pursued and the rights at issue, the Court finds, first of all, that the placing online of the named information at issue is, depending on the object of the associations or non-profit foundations concerned, liable to reveal information on certain sensitive aspects of the private life of the judges concerned, in particular their religious or philosophical beliefs. It observes, next, that the processing of the personal data at issue results in those data being made freely accessible on the internet to the general public and, consequently, to a potentially unlimited number of persons. It notes, lastly, that, in the particular context in which the measures at issue were adopted, the placing online of those data is liable to expose the judges concerned to risks of undue stigmatisation, by unjustifiably affecting the perception of those judges by individuals and the public in general, and to the risk that the progress of their careers would be unduly hampered. In those circumstances, the Court concludes that processing of personal data such as that at issue constitutes a particularly serious interference with the fundamental rights of the persons concerned in respect of their private life and in the protection of their personal data.

In doing so, weighing the seriousness of that interference against the importance of the alleged objective of general interest, the Court finds that, having regard to the general and specific national context in which the measures at issue were adopted and the particularly serious consequences liable to stem from them for the judges concerned, the result of that weighing exercise is not balanced. In comparison with the *status quo ante* resulting from the pre-existing national legal framework, the placing online of the personal data concerned represents a potentially significant interference with the

25 Within the meaning of Article 6(3) and Article 9(2)(g) of the GDPR.

fundamental rights guaranteed in Article 7 and Article 8(1) of the Charter, without that interference being capable, in the present case, of being justified by any benefits that might result from it in terms of preventing conflicts of interest on the part of judges and an increase in confidence in their impartiality.

Judgment of 13 July 2023 (Grand Chamber), *YP and Others (Lifting of a judge's immunity and his or her suspension from duties)* (C-615/20 and C-671/20, EU:C:2023:562)

(References for a preliminary ruling – Second subparagraph of Article 19(1) TEU – Rule of law – Effective legal protection in the fields covered by Union law – Independence of judges – Primacy of EU law – Article 4(3) TEU – Duty of sincere cooperation – Lifting of a judge's immunity from prosecution and his or her suspension from duties ordered by the Izba Dyscyplinarna (Disciplinary Chamber) of the Sąd Najwyższy (Supreme Court, Poland) – Lack of independence and impartiality on the part of that chamber – Alteration of the composition of the court formation called on to adjudicate on a case which up to that time had been entrusted to that judge – Prohibitions on national courts calling into question the legitimacy of a court, on undermining its functioning or on assessing the legality or effectiveness of the appointment of judges or of their judicial powers, subject to disciplinary penalties – Obligation on the courts concerned and the bodies which have power to designate and modify the composition of court formations to disapply the measures lifting immunity and suspending the judge concerned – Obligation on the same courts and bodies to disapply the national provisions providing for those prohibitions)

- **Case C-615/20**

On the basis of an indictment from the Prokuratura Okręgowa w Warszawie (Warsaw Regional Public Prosecutor's Office, Poland), YP and other defendants were prosecuted before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) on the grounds of a series of criminal offences. That case was assigned to a single-Judge formation of that court, composed of Judge I.T.

When that case was at a very advanced stage of the proceedings, the Prokuratura Krajowa Wydział Spraw Wewnętrznych (National Public Prosecutor's Office, Internal Affairs Division, Poland), on 14 February 2020, applied to the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland) [26] for leave to prosecute Judge I.T. for having, in December 2017, allowed media representatives to record footage and sounds during a hearing and during the delivery of the decision in the case concerned and the oral statement of reasons for it and, in so doing, allegedly disclosed information deriving from the investigation procedure of the Warsaw Regional Public Prosecutor's Office in the case at issue.

By a resolution of 18 November 2020 ('the resolution at issue'), the Disciplinary Chamber authorised the initiation of criminal proceedings against Judge I.T., suspended him from his duties and reduced the amount of his remuneration by 25% for the duration of that suspension.

The referring court, which is the formation of the Warsaw Regional Court hearing the criminal proceedings initiated, inter alia, against YP and on which Judge I.T. sits as a single Judge, notes that the

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26 The Law on the Supreme Court, of 8 December 2017, established within the Sąd Najwyższy (Supreme Court, Poland), a new disciplinary chamber known as the Izba Dyscyplinarna ('the Disciplinary Chamber'). By a law of 20 December 2019 amending the Law on the Supreme Court, which entered into force in 2020, new powers were conferred on that chamber, in particular to authorise the initiation of criminal proceedings against judges or to place them in provisional detention (Article 27(1)(1a)).

resolution at issue is such as to prevent it from being able to continue those proceedings. In that context, it decided to stay the proceedings to ask the Court of Justice, in essence, about the compatibility with EU law of national provisions which confer on a body, whose independence and impartiality are not guaranteed, jurisdiction to authorise the initiation of criminal proceedings against judges of the ordinary courts and, where such authorisation is issued, to suspend the judges concerned from their duties and to reduce their remuneration during that suspension. Its questions seek, in essence, to determine whether, having regard to the provisions and principles of EU law, [27] the single Judge who makes up that court is still justified in continuing the examination of the case in the main proceedings notwithstanding the resolution at issue, which suspended him from his duties.

- **Case C-671/20**

Another set of criminal proceedings between the Warsaw Regional Public Prosecutor's Office and M.M., who is also charged with various criminal offences, concerns a decision by that public prosecutor's office to order the creation of a compulsory mortgage over a building belonging to M.M. The latter brought an action against that decision before the Warsaw Regional Court, within which court the case linked to that action was initially assigned to Judge I.T.

Following the adoption of the resolution at issue, which, inter alia, suspended Judge I.T. from his duties, the President of the Warsaw Regional Court instructed the President of the Chamber in which Judge I.T. sat to change the composition of the court formation in the cases which had been assigned to that judge, with the exception of the case in which Judge I.T. had submitted to the Court the request for a preliminary ruling forming the subject of Case C-615/20. Consequently, that Chamber President adopted an order reassigning the cases initially assigned to Judge I.T., including the case relating to M.M.

According to the referring court, namely another single-Judge formation of the Warsaw Regional Court to which that case was reassigned, those events show that the President of that court has conceded that the resolution at issue is binding by taking the view that the suspension of Judge I.T. from his duties prevented that case from being examined by that judge or that there was a lasting obstacle to such an examination.

That court raises the issue of whether an act such as the resolution at issue is binding and whether the other court formations designated as a result of the execution of that resolution are legitimate. It states, moreover, that recent national provisions prohibit it, subject to disciplinary measures, from examining the binding nature of that resolution. Its questions to the Court seek, in essence, to determine whether, having regard to the provisions and principles of EU law, [28] it may, without any risk of disciplinary liability to the single Judge sitting on it, regard the resolution at issue as non-binding, so that it is not justified in adjudicating on the case in the main proceedings which was reassigned to it following that resolution, and to determine whether that case must therefore be assigned back to the judge initially hearing it.

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27 Namely Article 47 of the Charter of Fundamental Rights of the European Union, Article 2 TEU and the second subparagraph of Article 19(1) TEU laying down the principle of the rule of law and the requirements of effective legal protection, and the principles of primacy, sincere cooperation and legal certainty.

28 Namely Article 2 and the second subparagraph of Article 19(1) TEU and the principles of primacy, sincere cooperation and legal certainty.

In its judgment delivered in these Joined Cases, the Court, sitting as the Grand Chamber, refers to the guidance contained in its case-law, [29] in particular in the judgment of 5 June 2023, *Commission* v *Poland (Independence and private life of judges)*. [30] It holds, in essence, that the second subparagraph of Article 19(1) TEU precludes national provisions which allow a body such as the Disciplinary Chamber, whose independence and impartiality are not guaranteed, to lift a judge's immunity, to suspend him or her from his or her duties and to reduce his or her remuneration. It also makes clear, in the light of the principle of the primacy of EU law and of the principle of sincere cooperation laid down in Article 4(3) TEU, the consequences of such a conclusion for the national court with respect to an act such as the resolution at issue entailing, in breach of the second subparagraph of Article 19(1) TEU, the suspension of a judge sitting as a single Judge from his or her duties, and for the judicial bodies with power to designate and modify the compositions of the formations of that national court.

Findings of the Court

In the first place, the Court rules that the second subparagraph of Article 19(1) TEU precludes national provisions which confer on a body, whose independence and impartiality are not guaranteed, jurisdiction to authorise the initiation of criminal proceedings against judges of the ordinary courts and, where such authorisation is issued, to suspend the judges concerned from their duties and to reduce their remuneration during that suspension.

The Court observes in that regard that, since those two references for a preliminary ruling were made, it has delivered the judgment in *Commission* v *Poland (Independence and private life of judges)* in which it held, inter alia, that by conferring on the Disciplinary Chamber, whose independence and impartiality are not guaranteed, [31] jurisdiction to hear and determine cases having a direct impact on the status of judges and the performance of their office, such as applications for authorisation to initiate criminal proceedings against judges, Poland had failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. [32]

In the aforementioned judgment, the Court pointed out that the mere prospect, for judges, of running the risk that authorisation to prosecute them might be sought and obtained from a body whose independence is not guaranteed is liable to affect their own independence and that the same is true of risks that such a body may decide whether to suspend them from their duties and reduce their remuneration. [33]

In the present case, the resolution at issue was adopted with regard to Judge I.T., [34] on the basis of national provisions which the Court, in the aforementioned judgment, held to be contrary to the second

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29 Relating to the lack of independence and impartiality of the Disciplinary Chamber established by the 2017 Law on the Supreme Court, as amended, in the context of the 2019 reform of the Polish judicial system.

30 Judgment of 5 June 2023, ***Commission v Poland (Independence and private life of judges)*** (C-204/21, EU:C:2023:442).

31 In paragraph 102 of the judgment in *Commission* v *Poland (Independence and private life of judges)*, the Court, on the basis of its earlier case-law (paragraph 112 of the judgment of 15 July 2021, ***Commission v Poland (Disciplinary regime for judges)*** (C-791/19, EU:C:2021:596)), reiterated its finding that the Disciplinary Chamber does not meet the requirement of independence and impartiality.

32 Judgment in *Commission* v *Poland (Independence and private life of judges)*, operative part 1.

33 Judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 101.

34 That is to say, an ordinary court which may be called on to rule, under the second subparagraph of Article 19(1) TEU, on questions linked to the application or interpretation of EU law.

subparagraph of Article 19(1) TEU inasmuch as they confer on such a body jurisdiction to adopt acts such as that resolution.

If the authorities of the Member State concerned are under a duty to amend national provisions which have been the subject of a judgment establishing a failure to fulfil obligations to make them conform with the requirements of EU law, the courts of that Member State, for their part, have an obligation to ensure, when performing their duties, that the Court's judgment is complied with, which means, in particular, that those national courts must take account, if need be, of the elements of law contained in that judgment in order to determine the scope of the provisions of EU law which they have the task of applying. Consequently, the referring court in Case C-615/20 is required, in the case in the main proceedings, to draw all the appropriate conclusions from the guidance in the judgment in *Commission* v *Poland (Independence and private life of judges)*.

In the second place, the Court interprets the second subparagraph of Article 19(1) TEU, the principle of the primacy of EU law and the principle of sincere cooperation as meaning:

– first, that a formation of a national court, seised of a case and composed of a single Judge – against whom a body, whose independence and impartiality are not guaranteed, has adopted a resolution authorising the initiation of criminal proceedings and ordering that that judge be suspended from his or her duties and that his or her remuneration be reduced – is justified in disapplying such a resolution which precludes the exercise of its jurisdiction in that case, and,

– secondly, that the judicial bodies which have power to designate and modify the composition of the formations of that national court must also disapply that resolution which precludes the exercise of that jurisdiction by that court formation.

It observes in that connection that, pursuant to settled case-law, [35] the principle of the primacy of EU law imposes a duty, inter alia, on any national court called upon within the exercise of its jurisdiction to apply provisions of EU law to give full effect to the requirements of EU law in the dispute brought before it by disapplying, as required, of its own motion, any national rule or practice that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means. Compliance with that obligation constitutes an expression of the principle of sincere cooperation.

The second subparagraph of Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights, [36] has direct effect which means that any national provision, case-law or practice contrary to those provisions of EU law, as interpreted by the Court, must be disapplied. [37]

Even in the absence of national legislative measures having brought to an end a failure to fulfil obligations established by the Court, the national courts must take all measures to facilitate the full application of EU law in accordance with the dicta in the judgment establishing that failure to fulfil

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35 See, to that effect, judgment of 22 February 2022, ***RS (Effect of the decisions of a constitutional court)*** (C-430/21, EU:C:2022:99, paragraph 53 and the case-law cited, and paragraph 55 and the case-law cited).

36 Which imposes on the Member States a clear and precise obligation as to the result to be achieved and which is not subject to any conditions, in particular as regards the independence and impartiality of the courts called upon to interpret and apply EU law and the requirement that those courts must be previously established by law.

37 Judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 78 and the case-law cited.

obligations. They must, moreover, under the principle of sincere cooperation, nullify the unlawful consequences of an infringement of EU law.

To satisfy those obligations, a national court must disapply an act such as the resolution at issue which, in breach of the second subparagraph of Article 19(1) TEU, ordered the suspension of a judge from his or her duties where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law. [38]

Lastly, the Court points out that, where an act such as the resolution at issue was adopted by a body which does not constitute an independent and impartial tribunal within the meaning of EU law, no consideration relating to the principle of legal certainty or the alleged finality of that resolution can be successfully relied on in order to prevent the referring court and the judicial bodies with power to designate and modify the composition of the formations of the national court from disapplying such a resolution. [39]

The Court observes in that regard, that the main proceedings in Case C-615/20 have been stayed by the referring court, pending the present judgment. In that context, the continuation of those proceedings by the judge comprising the single-Judge formation of the referring court, especially at the advanced stage which those particularly complex proceedings have reached, does not appear to be capable of undermining legal certainty. On the contrary, it seems to be such as to allow the handling of the case in the main proceedings to result in a decision which complies, first, with the requirements arising from the second subparagraph of Article 19(1) TEU and, secondly, with the right of the individuals concerned to a fair trial within a reasonable period.

In those circumstances, the referring court in Case C-615/20 is justified in disapplying the resolution at issue in order to be able to continue the examination of the case in the main proceedings in its present composition without the judicial bodies with power to designate and modify the composition of the formations of the national court being able to prevent that continued examination.

In the third place, the Court interprets the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation in connection with the situation of a formation of a national court, such as the referring court in Case C-671/20, to which a case which hitherto had been assigned to another formation of that national court was reassigned as a result of an act of the Disciplinary Chamber such as the resolution at issue, in order to determine, in particular, whether that referring court must, in the instant case, disapply that resolution and refrain from continuing to examine that case.

It points out in that regard that the obligation for the national courts to disapply a resolution resulting, in breach of the second subparagraph of Article 19(1) TEU, in the suspension of a judge from his or her duties, where that is essential in view of the procedural situation at issue in order to ensure the primacy of EU law, falls, in particular, on the court formation to which the case would have been reassigned on account of such a resolution. That court formation must, as a result, refrain from hearing and determining that case. That obligation also binds the bodies which have power to designate and modify the composition of the formations of that national court and those bodies must, accordingly, assign that case back to the formation which was initially seised of it.

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38 See, to that effect, judgment of 6 October 2021, ***W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*** (C-487/19, EU:C:2021:798, paragraphs 159 and 161).

39 See, to that effect, judgment in *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court– Appointment)*, paragraph 160.

In the present case, no consideration relating to the principle of legal certainty or linked to an alleged finality of that resolution can successfully be relied upon.

The Court observes in this connection that, in Case C-671/20 and unlike in other cases assigned to Judge I.T. – which would also have been reassigned to other court formations in the meantime, but the examination of which would have been continued and even, in some cases, concluded by the adoption of a decision by those new formations – the main proceedings were stayed pending delivery of the present judgment. In those circumstances, the resumption of those proceedings by Judge I.T. would appear to be such as to enable those proceedings, notwithstanding the delay caused by the resolution at issue, to result in a decision that complies both with the requirements stemming from the second subparagraph of Article 19(1) TEU and from those stemming from the right of the individual concerned to a fair trial.

Consequently, the Court interprets the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation as meaning that:

– first, a formation of a national court, to which a case which hitherto had been assigned to another formation of that court has been reassigned – as a result of a resolution adopted by a body whose independence and impartiality are not guaranteed and which authorised the initiation of criminal proceedings against the single Judge comprising the latter formation and ordered his or her suspension from duties and a reduction in his or her remuneration – and which has decided to suspend the handling of that case pending a decision by the Court on a preliminary ruling, must disapply that resolution and refrain from continuing to examine that case, and,

– secondly, the judicial bodies which have power to designate and modify the composition of the formations of that national court are required, in such a situation, to assign that case back to the formation initially hearing it.

So far as concerns, in the fourth place, the national provisions and the case-law of a constitutional court as mentioned by the referring court in Case C-671/20, [40] which would preclude the latter court from being able to rule on the lack of binding force of an act such as the resolution at issue and, if necessary, from disapplying it, even though it is required to do so having regard to the answers given by the Court to its other questions, the Court observes that the fact that a national court performs the tasks entrusted to it by the Treaties and complies with its obligations thereunder, by giving effect to provisions such as the second subparagraph of Article 19(1) TEU, cannot be prohibited or regarded as a disciplinary offence on the part of judges sitting in such a court. [41]

Likewise, in the light of the direct effect of the second subparagraph of Article 19(1) TEU, the principle of the primacy of EU law requires national courts to disapply any national case-law contrary to that provision of EU law as interpreted by the Court. Thus, in the event that, following judgments delivered by the Court, a national court finds that the case-law of a constitutional court is contrary to EU law, the

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40 Article 42a(1) and (2) of the Law on the ordinary courts of 27 July 2001, as amended by the Law of 20 December 2019, imposes on those courts prohibitions on calling into question the lawfulness of courts or on assessing the legality of the appointment of a judge or his or her authority to perform judicial tasks. Point 3 of Article 107(1) of that law makes a disciplinary offence, inter alia, any act of judges of the ordinary courts which calls into question the effectiveness of the appointment of a judge.

41 See, to that effect, judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 132.

fact that such a national court disapplies that constitutional case-law, in accordance with the principle of the primacy of EU law, cannot give rise to its disciplinary liability. [42]

Consequently, the second subparagraph of Article 19(1) TEU and the principles of the primacy of EU law and of sincere cooperation must be interpreted as precluding:

– first, national provisions which prohibit a national court, subject to disciplinary sanctions being imposed on the judges who make up that court, from examining whether an act adopted by a body whose independence and impartiality are not guaranteed and which has authorised the initiation of criminal proceedings against a judge and ordered his or her suspension from duties and a reduction in his or her remuneration is binding and, if necessary, from disapplying that act, and,

– secondly, case-law of a constitutional court under which the acts appointing judges cannot be the subject of judicial review, inasmuch as that case-law is liable to preclude that examination.

Judgment of 21 December 2023 (Grand Chamber), *Krajowa Rada Sądownictwa (Continued holding of a judicial office)* (C-718/21, EU:C:2023:1015)

(Reference for a preliminary ruling – Article 267 TFEU – Concept of 'court or tribunal' – Criteria – Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs) of the Sąd Najwyższy (Supreme Court, Poland) – Reference for a preliminary ruling from an adjudicating panel which does not have the status of an independent and impartial tribunal previously established by law – Inadmissibility)

By letter of 30 December 2020, L.G., a judge within the Sąd Okręgowy w K. (Regional Court, K., Poland), notified the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS') of his wish to continue to perform his duties beyond the normal retirement age. The KRS having declared that there was no need to rule on the application, because the time limit for lodging it had expired, L.G. brought an action before the referring body. Having doubts as to whether a piece of national legislation which (i) makes the effectiveness of such a declaration by a judge subject to the authorisation of the KRS and (ii) lays down an absolute time limit in respect of that declaration is in line with the second subparagraph of Article 19(1) TEU, that body has made a reference to the Court of Justice for a preliminary ruling.

In this instance, the referring body is composed of three judges of the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs; 'the Chamber of Extraordinary Control'), established within the Sąd Najwyższy (Supreme Court, Poland) in connection with the recent reforms of the Polish judicial system. [43] Those three judges were appointed to that chamber on the basis of Resolution No 331/2018, adopted by the KRS on 28 August 2018 ('Resolution No 331/2018').

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42 See, to that effect, judgment in *Commission* v *Poland (Independence and private life of judges)*, paragraph 132.

43 That chamber and another new chamber of the Supreme Court – the Izba Dyscyplinarna (Disciplinary Chamber) – were created under the ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017, which entered into force on 3 April 2018.

However, that resolution was annulled by a judgment handed down by the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) on 21 September 2021. [44] In addition, in its judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland* ('the judgment in *Dolińska-Ficek and Ozimek v. Poland*'), [45] the European Court of Human Rights ('the ECtHR') found a breach of the requirement of a 'tribunal established by law' laid down in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, [46] due to the process which, on the basis of Resolution No 331/2018, had led to the appointment of the members of two three-judge adjudicating panels of the Chamber of Extraordinary Control.

In its judgment, the Court, sitting as the Grand Chamber, declares the request for a preliminary ruling inadmissible on the ground that the referring body does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU.

Findings of the Court

The Court begins by recalling that, in order to determine whether a body making a reference is a 'court or tribunal' within the meaning of Article 267 TFEU, the Court 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. In that regard, the Court has already noted that the Supreme Court as such meets those requirements and has stated that, in so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that that court or tribunal satisfies those requirements, irrespective of its actual composition. In the context of a preliminary ruling procedure, it is not for the Court of Justice, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure.

However, that presumption may be rebutted where a final judicial decision handed down by a court or tribunal of a Member State or an international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). [47]

In that regard, the Court notes that the judgment in *Dolińska-Ficek and Ozimek v. Poland* of the ECtHR and the judgment of 21 September 2021 of the Supreme Administrative Court are final and relate specifically to the circumstances in which judges of the Chamber of Extraordinary Control were appointed on the basis of Resolution No 331/2018.

More specifically, in the judgment in *Dolińska-Ficek and Ozimek v. Poland* the ECtHR found, in essence, that the appointments of the members of the adjudicating panels of the Chamber of Extraordinary Control concerned had been made in manifest breach of fundamental national rules governing the procedure for the appointment of judges. While it is true that, of the six judges making up the adjudicating panels of the Chamber of Extraordinary Control at issue in the cases which gave rise to that judgment, only one of them sits within the referring body, it is nevertheless clear from the grounds

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44 That judgment was handed down following the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, (C-824/18, EU:C:2021:153).

45 CE:ECHR:2021:1108JUD004986819.

46 Signed in Rome on 4 November 1950.

47 See judgment of 29 March 2022, ***Getin Noble Bank*** (C-132/20, EU:C:2022:235, paragraph 72).

of that judgment that the assessments made by the ECtHR apply without distinction to all the judges of the Chamber of Extraordinary Control who were appointed to that chamber in similar circumstances and, in particular, on the basis of Resolution No 331/2018.

In addition, in the judgment of 21 September 2021, the Supreme Administrative Court annulled Resolution No 331/2018 by relying, inter alia, on findings and assessments that largely overlap with those set out in the judgment in *Dolińska-Ficek and Ozimek v. Poland*.

In the light of the findings and assessments arising from those two judgments and from its own case-law, the Court examines whether the presumption that the requirements of a 'court or tribunal' within the meaning of Article 267 TFEU are met must be held to be rebutted with regard to the referring body.

In that regard, the Court emphasises, in the first place, that the judges making up the referring body were appointed to the Chamber of Extraordinary Control on a proposal from the KRS – that is to say, from a body where, following recent legislative amendments, [48] 23 of its 25 members have been designated by the executive and the legislature or are members of those branches of government. Admittedly, the fact that a body, such as the KRS, which is involved in the procedure for the appointment of judges is, for the most part, made up of members chosen by the legislature cannot, in itself, give rise to any doubt as to the status of that body as a tribunal previously established by law or the independence of the judges appointed at the end of that procedure. However, the situation is different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to such doubts being raised. The legislative amendments concerning the KRS were made at the same time as the adoption of a substantial reform of the Supreme Court, including, in particular, the creation, within that court, of two new chambers and the lowering of the retirement age of judges of that court. Those amendments therefore came at a time when it was expected that numerous judicial posts at the Supreme Court declared vacant or newly created would soon be available to be filled.

In the second place, the Chamber of Extraordinary Control thus created *ex nihilo* was assigned jurisdiction over particularly sensitive matters, such as electoral disputes and proceedings relating to the holding of referendums, as well as extraordinary appeals enabling final decisions of the ordinary courts or other chambers of the Supreme Court to be set aside.

In the third place, in parallel with the legislative amendments referred to above, the rules concerning the judicial remedies available against resolutions of the KRS proposing candidates for appointment to judicial posts at the Supreme Court were substantially amended, thereby undermining the effectiveness of such remedies. In that regard, the Court of Justice has also emphasised that the restrictions introduced by those amendments concerned only appeals brought against resolutions of the KRS relating to applications for judicial posts at the Supreme Court, whereas the resolutions of the KRS relating to applications for judicial posts in other national courts remained subject to the general system of judicial review previously in force. [49]

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48 Article 9a of the ustawa o Krajowej Radzie Sądownictwa (Law on the National Council of the Judiciary) of 12 May 2011, as amended by the ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (Law amending the Law on the National Council of the Judiciary and certain other laws) of 8 December 2017, which entered into force on 17 January 2018, and by the ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw (Law amending the Law on the system of the ordinary courts and certain other laws) of 20 July 2018, which entered into force on 27 July 2018.

49 Judgment of 2 March 2021, ***A. B. and Others (Appointment of judges to the Supreme Court – Actions)*** (C-824/18, EU:C:2021:153, paragraphs 157, 162 and 164).

In the fourth place, the Court of Justice has also already held in the judgment in *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* [50] that, when the member of the Chamber of Extraordinary Control concerned by the case which gave rise to that judgment was appointed on the basis of Resolution No 331/2018, the Supreme Administrative Court, before which an action for annulment of that resolution had been brought, had ordered, on 27 September 2018, that the effects of that resolution be suspended. Those circumstances also pertain as regards the appointment of the three members sitting within the referring body. Thus the fact that the President of the Republic of Poland made the appointments at issue, as a matter of urgency and without waiting to take cognisance of the grounds of the order of 27 September 2018, on the basis of Resolution No 331/2018, even though that resolution had been suspended by that order, seriously undermined the principle of the separation of powers which characterises the operation of the rule of law.

In the fifth place, although the action for annulment of Resolution No 331/2018 had been brought before the Supreme Administrative Court and that court had stayed the proceedings pending the judgment of the Court of Justice in *A.B. and Others*, [51] the Polish legislature adopted a law providing for, inter alia, the exclusion of any future appeal against resolutions of the KRS proposing the appointment of judges to the Supreme Court and for the discontinuation of pending appeals of that nature. [52] As regards the amendments thus introduced by that law, the Court of Justice has already held that, particularly when viewed in conjunction with a set of other contextual factors, those amendments are such as to suggest that the Polish legislature acted with the specific intention of preventing any possibility of exercising judicial review of the resolutions concerned. [53]

In the sixth and last place, the Court explains that, while, admittedly, the effects of the judgment of 21 September 2021 of the Supreme Administrative Court referred to above do not relate to the validity and effectiveness of the presidential acts of appointment to the judicial posts concerned, the fact remains that the act by which the KRS puts forward a candidate for appointment to a judicial post at the Supreme Court is an essential condition for that candidate to be appointed to such a post by the President of the Republic of Poland.

In conclusion, the Court rules that the consequence of all the factors – both systemic and circumstantial – referred to above, which characterised the appointment, within the Chamber of Extraordinary Control, of the three judges constituting the referring body, is that that body does not have the status of an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter, with the result that that panel does not constitute a 'court or tribunal' within the meaning of Article 267 TFEU. Those factors are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of the persons concerned and the adjudicating panel on which they sit with regard to external factors, in particular the direct or indirect influence of the national legislature and executive, and their neutrality with respect to the interests before them. Those factors are thus capable of leading to a lack of appearance of independence or impartiality on the part of those

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

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

52 The ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz ustawy – Prawo o ustroju sądów administracyjnych (Law amending the Law on the National Council of the Judiciary and the Law on the system of administrative courts) of 26 April 2019, which entered into force on 23 May 2019.

53 Judgment of 2 March 2021, ***A. B. and Others (Appointment of judges to the Supreme Court– Actions)*** (C-824/18, EU:C:2021:153, paragraphs 137 and 138).

judges and of that body, which is likely to undermine the trust which justice in a democratic society governed by the rule of law must inspire in those individuals.

2. Principles of legality and proportionality of criminal offences and penalties

Judgment of 4 May 2023, *Agenția Națională de Integritate* (C-40/21, EU:C:2023:367)

(Reference for a preliminary ruling – Decision 2006/928/EC – Mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption – Charter of Fundamental Rights of the European Union – Article 15(1) – Article 47 – Article 49(3) – Elective public office – Conflict of interests – National legislation prohibiting the holding of elective public office for a predetermined period – Penalty additional to the termination of the term of office – Principle of proportionality)

In 2016, the applicant in the main proceedings was elected mayor of the municipality of MN (Romania). In a report drawn up in 2019, the Agenția Națională de Integritate (ANI) (National Integrity Agency, Romania) found that he had not complied with the rules governing conflicts of interest in administrative matters. In the event that that report became final, the term of office of the applicant in the main proceedings would terminate automatically and an additional prohibition on holding elective public office for a period of three years would be imposed on him.

The applicant in the main proceedings brought an action seeking the annulment of that report, claiming that EU law precluded national legislation under which a penalty is imposed, automatically and without the possibility of modulation according to the seriousness of the infringement committed, on a person deemed to have acted in a conflict of interest situation. [54] Ruling on that action, the referring court decided to ask the Court about the compatibility of that prohibition with the principle of proportionality of penalties, [55] the right to engage in work [56] and the right to an effective remedy and of access to an independent tribunal, [57] guaranteed by the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the Court

In the first place, the Court holds that Article 49(3) of the Charter does not apply to national legislation which provides, following an administrative procedure, for a measure prohibiting the holding of any

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54 Article 25 of legea nr. 176/2010 privind integritatea în exercitarea funcțiilor și demnităților publice, pentru modificarea și completarea legii nr. 144/2007 privind înființarea, organizarea și funcționarea Agenției Naționale de Integritate, precum și pentru modificarea și completarea altor acte normative (Law No 176/2010 on integrity in the performance of public duties and the holding of public office, amending and supplementing Law No 144/2007 on the establishment, organisation and operation of the National Integrity Agency, and amending and supplementing other normative acts) of 1 September 2010. That law implements the second benchmark set out in the annex to Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56).

55 Article 49(3) of the Charter.

56 Article 15(1) of the Charter.

57 Article 47 of the Charter.

elective public office for a predetermined period of three years against a person who has been found to have a conflict of interest in the holding of such an office, in the event that that measure is not criminal in nature.

In that regard, three criteria are relevant for assessing the criminal nature of a penalty: the legal classification of the offence under national law, the intrinsic nature of the offence and the degree of severity of the penalty.

First of all, as regards the first criterion, neither the automatic termination of the term of office in the event of a finding of a conflict of interest nor the prohibition on the holding of any elective public office is regarded under Romanian law as a criminal penalty. Next, the second criterion involves ascertaining whether the measure at issue has, inter alia, a punitive purpose. The legislation concerned seeks to ensure integrity and transparency in the exercise and holding of public functions and offices and to prevent institutional corruption. Thus, the purpose of that prohibition, like that of the automatic termination of the term of office, is to preserve the proper functioning and transparency of the State, by putting to a lasting end situations of conflict of interest. Therefore, such a measure pursues an essentially preventive – and not punitive – objective. In terms of the third criterion, that prohibition measure does not consist in imposing a sentence of deprivation of liberty or a fine, but in banning the future exercise of specific activities, namely elective public office, targeting individuals belonging to a limited group with a special status. It is of limited duration and does not apply to the right to vote.

To the extent that it is not criminal in nature, that measure cannot be assessed in the light of Article 49(3) of the Charter.

That said, in so far as it implements EU law, the national legislation at issue in the main proceedings must, in any event, observe the principle of proportionality, as a general principle of EU law.

In that respect, the Court finds, in the second place, that that principle does not preclude that legislation provided that, in the light of all the relevant circumstances, its application results in the imposition of a penalty commensurate with the seriousness of the breach which it penalises, having regard to the objective of ensuring integrity and transparency in the exercise and holding of public functions and offices and preventing institutional corruption. That would not be the case where, exceptionally, the unlawful conduct found to have taken place, having regard to that objective, does not have an element of seriousness, whereas the impact of that measure on the personal, professional and economic situation of that person proves particularly serious.

Imposing the penalty at issue automatically thus makes it possible to put to a lasting end the situation of conflict of interest identified while preserving the functioning of the State and of the elective bodies concerned. Moreover, providing for both the automatic termination of the term of office and an automatic prohibition on holding any elective public office for a sufficiently long predetermined period would appear likely to deter persons who exercise an electoral mandate from placing themselves in such a position and to encourage them to comply with their obligations in that regard.

In addition, in terms of the necessity of the penalty at issue, the Romanian legislature set its duration at three years in view of the intrinsic seriousness, both for the functioning of the State and for society, of the facts constituting a conflict of interest situation. Thus, that prohibition is imposed as a result of the infringement committed by a person holding elective public office and which is undoubtedly serious. In that regard, the scale of the conflicts of interest and the level of corruption observed in the national public sector must also be taken into account. Furthermore, the said prohibition is limited in time, applies only to certain categories of persons performing particular duties and applies only to defined activities, namely elective public functions, and does not prevent the pursuit of any other professional activity.

So far as concerns, last, the proportionality of the measure at issue, in the light of the seriousness of the harm to the public interest resulting from acts of corruption and conflicts of interest, even the least

significant, on the part of elected representatives in a national context involving a high risk of corruption, that measure does not appear, in principle, to be disproportionate to the offence which it seeks to penalise. That said, the fact that the duration of that prohibition is not coupled with any possibility of modulation does not rule out the possibility that, in certain exceptional cases, that penalty may prove disproportionate.

In the third place, the Court makes it clear that the right to exercise an elective mandate obtained following a democratic electoral process, such as that of mayor, is not covered by Article 15(1) of the Charter.

Although that provision is worded broadly, it does not include the right to exercise, for a fixed period, such a mandate. Article 15 of the Charter appears in Title II thereof, entitled 'Freedoms', whereas specific provisions concerning the right to stand as a candidate at elections appear in a separate title, namely Title V, entitled 'Citizens' rights'. [58] The case-law of the European Court of Human Rights supports that interpretation. [59]

In the fourth and last place, the Court finds that Article 47 of the Charter does not preclude the national legislation concerned, provided that the person concerned has had an effective opportunity to challenge the legality of the report that made the finding of a conflict of interest and the penalty imposed on the basis of it, including its proportionality.

The right to an effective remedy includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it. In the present case, that right presupposes that the referring court is able to review the legality of the assessment report calling into question the applicant in the main proceedings and, if necessary, annul that report and the penalties imposed on the basis of it.

Judgment of 24 July 2023 (Grand Chamber), *Lin* (C-107/23 PPU, EU:C:2023:606)

*(Reference for a preliminary ruling – Protection of the financial interests of the European Union – Article 325(1) TFEU – PFI Convention – Article 2(1) – Obligation to counter fraud affecting the financial interests of the European Union by taking effective deterrent measures – Obligation to provide for criminal penalties – Value added tax (VAT) – Directive 2006/112/EC – Serious VAT fraud – Limitation period for criminal liability – Judgment of a constitutional court invalidating a national provision governing the grounds for interrupting that period – Systemic risk of impunity – Protection of fundamental rights – Article 49(1) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Requirements of foreseeability and precision of criminal law – Principle of the retroactive application of the more lenient criminal law (*lex mitior*) – Principle of legal certainty – National standard of protection of fundamental rights – Duty on the courts of a Member State to disapply judgments of the constitutional court and/or the supreme court of that Member State in the event that they are incompatible with EU law – Disciplinary liability of judges in the event of non-compliance with those judgments – Principle of the primacy of EU law)*

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58 See Articles 39 and 40 of the Charter on the right to vote and to stand as a candidate at elections to the European Parliament and at municipal elections respectively.

59 See ECtHR, 8 November 2016, *Savisaar v. Estonia*, CE:ECHR:2016:1108DEC000836516.

In 2010, C.I., C.O., K.A., L.N. and S.P. ('the interested parties') omitted to indicate in their accounting documents the commercial transactions and income relating to the sale, to national recipients, of diesel fuel acquired under the excise duty suspension regime, thereby causing a loss to the State budget, in particular as regards value added tax (VAT) and excise duty on diesel fuel.

By a judgment published on 25 June 2018, the Curtea Constituțională (Constitutional Court, Romania) declared a national provision governing the interruption of the limitation period for criminal liability unconstitutional on the ground that it infringed the principle that offences and penalties must be defined by law. [60] That court subsequently clarified, in a judgment published on 9 June 2022, that, having regard to the lack of action by the Romanian legislature immediately after its 2018 judgment, Romanian positive law did not provide for any ground for interrupting that limitation period between the date of publication of the latter judgment and the date of entry into force, on 30 May 2022, of the provision replacing the invalidated provision. [61]

By judgment delivered on 30 June 2020, the Curtea de Apel Brașov (Court of Appeal, Brașov, Romania), the referring court, convicted or upheld the convictions of the interested parties and sentenced them to terms of imprisonment for tax evasion and establishment of an organised criminal group. The interested parties brought extraordinary appeals against that judgment, on the ground that they had been convicted even though the limitation period for their criminal liability had expired. More specifically, they claim that the fact that, during the abovementioned period, positive law did not provide for any possibility of interrupting the prescription periods constituted, in itself, a more favourable criminal law, which should be applied to them in accordance with the principle of the retroactive application of the more lenient criminal law (*lex mitior*). They invoke in that context a judgment of 25 October 2022 of the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania), by which that court held that a final conviction may, in principle, be the subject of an extraordinary appeal based on the effects of judgments of the Constitutional Court as a more favourable criminal law (*lex mitior*). [62]

The referring court finds that, if that interpretation were accepted, the limitation period in the present case would have expired before the decision convicting the interested parties became final, which would entail the discontinuation of the criminal proceedings and would render impossible their conviction.

The referring court questions the compatibility of that interpretation with EU law, since it would have the effect of exempting the interested parties from their criminal liability for serious fraud offences liable to affect the European Union's financial interests. Moreover, it emphasises that it might be required – if it transpires that an interpretation consistent with EU law is not possible – to disapply the judgments of the Constitutional Court and/or the High Court of Cassation and Justice. The new

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60 That provision, namely Article 155(1) of the Romanian Criminal Code, provided that the limitation period for criminal liability was to be interrupted by the performance of 'any procedural act'. According to the Constitutional Court, that provision lacked foreseeability and infringed the principle that offences and penalties must be defined by law, given that the expression 'any procedural act' also covered acts which were not notified to the suspect or accused person, thus preventing him or her from becoming aware of the fact that a new limitation period for his or her criminal liability had begun to run.

61 Article 155(1) of the Criminal Code was amended so that the limitation period for criminal liability is interrupted by any procedural act which must be notified to the suspect or accused person.

62 In that judgment of 25 October 2022, the High Court of Cassation and Justice specified that, in Romanian law, the rules relating to the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and that, consequently, they are subject to the principle of non-retroactivity of criminal law, without prejudice to the principle of the retroactive application of the more lenient criminal law (*lex mitior*).

disciplinary regime allows for the imposition of penalties on judges who, knowingly or through gross negligence, disregard the judgments of those courts.

In the context of the urgent preliminary ruling procedure, initiated by the Court of Justice, sitting as the Grand Chamber, of its own motion, the Court specifies the Member States' obligations resulting from (i) the obligation to counter fraud affecting the financial interests of the European Union and (ii) the need to respect fundamental rights, as protected by EU law and national law.

Findings of the Court

The Court holds that neither Article 325(1) TFEU nor Article 2(1) of the PFI Convention [63] require the courts of a Member State to disapply the judgments of the Constitutional Court invalidating the national legislative provision governing the grounds for interrupting the limitation period in criminal matters, even if, as a consequence of those judgments, a considerable number of criminal cases, including cases relating to offences of serious fraud affecting the financial interests of the European Union, will be discontinued because of the expiry of the limitation period for criminal liability.

In that regard, the Court clarifies first of all that, although the adoption of rules governing the limitation periods for criminal offences affecting the financial interests of the European Union fell, at the time of the facts in the main proceedings, within the competence of the Member States, those Member States are required, when exercising that competence, to comply with their obligations deriving from EU law. Accordingly, they must counter fraud and any other illegal activities affecting the financial interests of the European Union through effective deterrent measures and take the necessary measures to ensure that conduct constituting fraud affecting those interests, including VAT fraud, is punishable by effective, proportionate and dissuasive criminal penalties. Accordingly, the Member States must ensure that the limitation rules laid down by national law allow effective punishment of infringements linked to such fraud.

The application of judgments of the Constitutional Court invalidating the national legislative provision governing the grounds for interruption of the limitation period for criminal liability would entail the discontinuation of the criminal proceedings and would render impossible the conviction of the interested parties. That application could, moreover, lead to the removal of criminal liability in a substantial number of other cases, and thus entail a systemic risk of serious fraud offences affecting the financial interests of the European Union going unpunished. The existence of such a systemic risk is incompatible with the requirements of Article 325(1) TFEU and Article 2(1) of the PFI Convention.

Since those provisions have direct effect, under the principle of primacy of EU law, it is, in principle, for the national courts to give full effect to the obligations under those provisions and to disapply national provisions which, in connection with proceedings concerning serious fraud affecting the financial interests of the European Union, prevent the application of effective and deterrent penalties in order to counter such offences. It thus appears that, in principle, those courts are required to disapply those judgments.

That being said, given that the criminal proceedings instigated for VAT offences amount to an implementation of EU law, within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), it remains necessary to ascertain whether the obligation to disapply such judgments conflicts with the protection of fundamental rights and, in the present case, of those

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63 The Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995 and annexed to the Council Act of 26 July 1995 (OJ 1995 C 316, p. 49; 'the PFI Convention').

enshrined, in the EU legal order, in Article 49(1) of the Charter. [64] Since the rules governing limitation periods in criminal matters do not fall within the scope of that provision, the obligation to disapply those judgments is not such as to undermine the fundamental rights as guaranteed in that provision.

However, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where the action of the Member States is not entirely determined by EU law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, and the primacy, unity and effectiveness of EU law are not thereby compromised. In so far as, in Romanian law, the rules concerning the interruption of the limitation period for criminal liability fall within the scope of substantive criminal law and, consequently, are subject to the principle that offences and penalties must be defined by law and to the principle of the retroactive application of the more lenient criminal law (*lex mitior*), those principles must therefore be regarded as national standards of protection of fundamental rights.

In this respect, the Court notes, in the first place, the importance given, both in the EU legal order and in national legal systems, to the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability, precision and non-retroactivity of criminal law. Those requirements constitute a specific expression of the principle of legal certainty, which is an essential element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States.

In the present case, the Constitutional Court applied a national standard of protection of the principle that offences and penalties must be defined by law, as to its requirements concerning the foreseeability and precision of criminal law, which supplements the protection against arbitrariness in criminal matters offered by EU law, under the principle of legal certainty. Having regard to the importance of that protection against arbitrariness, such a standard may preclude the obligation which the national courts are under, pursuant to Article 325(1) and (2) TFEU, to disapply national provisions governing limitation periods in criminal matters.

In the second place, the Court holds that, under Article 325(1) TFEU and Article 2(1) of the PFI Convention, the courts of a Member State are, however, required to disapply a national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) which makes it possible, including in the context of appeals brought against final judgments, to call into question the interruption of the limitation period for criminal liability in cases relating to serious fraud offences affecting the financial interests of the European Union by procedural acts which took place before the finding of invalidity of a national legislative provision governing the grounds for interrupting the limitation period in criminal matters.

Contrary to the national standard of protection relating to the principle that offences and penalties must be defined by law, as to its requirements relating to the foreseeability and precision of criminal law, which is limited to neutralising the interrupting effect of procedural acts which occurred during the period from 25 June 2018, the date of the publication of the judgment finding the national legislative provision in question invalid, to 30 May 2022, the date on which the provision replacing that provision

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64 That provision, which enshrines in EU law the principle that offences and penalties must be defined by law and the principle of the retroactive application of the more lenient criminal law (*lex mitior*), is worded as follows: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'

entered into force, the national standard of protection relating to the principle of the retroactive application of the more lenient criminal law (*lex mitior*) permits the neutralisation of the interrupting effect of procedural acts which took place even before 25 June 2018. The application of such a national standard of protection is liable to exacerbate the systemic risk that serious fraud affecting the financial interests of the European Union will go unpunished, in breach of Article 325 TFEU and Article 2(1) of the PFI Convention.

In such circumstances, in view of the need to weigh the latter national standard of protection against the provisions of Article 325 TFEU and Article 2(1) of the PFI Convention, the application of that standard by a national court is liable to compromise the primacy, unity and effectiveness of EU law.

In the last place, the Court finds that the principle of primacy precludes national legislation or a national practice under which the ordinary national courts of a Member State are bound by the decisions of the constitutional court and by those of the supreme court of that Member State and cannot, for that reason and at the risk of incurring the disciplinary liability of the judges concerned, disapply of their own motion the case-law resulting from those decisions, even if they consider, in the light of a judgment of the Court, that that case-law is contrary to provisions of EU law having direct effect. The fact that a national court performs the tasks entrusted to it by the Treaties and fulfils its obligations under the Treaties, by giving effect – in accordance with the principle of the primacy of EU law – to a provision of EU law such as Article 325(1) TFEU or Article 2(1) of the PFI Convention and to the interpretation given to it by the Court, cannot, by definition, be regarded as a disciplinary offence on the part of judges sitting in that court without that provision and that principle being infringed *ipso facto*.

3. Principle ne bis in idem

Judgment of 14 September 2023, *Volkswagen Group Italia and Volkswagen Aktiengesellschaft* (C-27/22, EU:C:2023:663)

(Reference for a preliminary ruling – Article 50 of the Charter of Fundamental Rights of the European Union – Principle ne bis in idem *– Penalty imposed concerning unfair commercial practices – Criminal nature of the penalty – Criminal penalty imposed in a Member State after the adoption of a penalty concerning unfair commercial practices in another Member State but which became final before the latter penalty – Article 52(1) – Limitations to the principle* ne bis in idem *– Conditions – Coordination of proceedings and penalties)*

In August 2016, the Italian competition authority imposed a fine of EUR 5 million on Volkswagen Group Italia SpA and Volkswagen Aktiengesellschaft (respectively, 'VWGI' and 'VWAG') for having implemented unfair commercial practices for the purposes of the Consumer Code. The infringements in question consisted, first, in the marketing in Italy, from 2009, of diesel vehicles equipped with systems intended to distort the measurement of pollutant emissions and, second, in the dissemination of advertising messages which emphasised the compliance of those vehicles with the criteria provided for under environmental legislation. VWGI and VWAG challenged the decision of the Italian competition authority before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

In June 2018, before that court delivered its judgment, the public prosecutor's office before which the case had been brought in Germany imposed a fine of EUR 1 billion on VWAG, in accordance with the Law on administrative offences. That fine related, inter alia, to the marketing of diesel vehicles equipped with systems intended to distort the measurement of pollutant emissions and the dissemination of advertising messages which emphasised the compliance of those vehicles with the criteria provided for

under environmental legislation. The decision of that public prosecutor's office became final on 13 June 2018, since VWAG waived its right to challenge it and, moreover, paid the fine prescribed therein.

In April 2019, the Regional Administrative Court, Lazio, dismissed the action brought by VWGI and VWAG on the ground, inter alia, that the principle *ne bis in idem* does not preclude the fine prescribed by the decision of the Italian competition authority from being maintained.

The Consiglio di Stato (Council of State, Italy), before which VWGI and VWAG brought an appeal against that judgment, decided to ask the Court of Justice to clarify the conditions under which, in a situation where there is a duplication of proceedings in which a penalty is imposed in two Member States, conducted by competent authorities in different sectors of activity, limitations may be made to the principle *ne bis in idem*, as enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'). [65]

By its judgment, the Court states, first of all, that an administrative fine provided for under national legislation, which is imposed on a company by the competent national consumer protection authority for unfair commercial practices, although classified as an administrative penalty under national legislation, constitutes a criminal penalty, for the purposes of Article 50 of the Charter, where it has a punitive purpose and has a high degree of severity.

Next, the Court states that the principle *ne bis in idem* enshrined in that provision precludes national legislation which allows a fine of a criminal nature imposed on a legal person for such unfair commercial practices to be maintained where that person has been the subject of a criminal conviction in respect of the same facts in another Member State, even if that conviction is subsequent to the date of the decision imposing that fine but became final before the judgment in the judicial proceedings brought against that decision acquired the force of *res judicata*.

Lastly, the Court holds that Article 52(1) of the Charter [66] authorises the limitation of the application of the principle *ne bis in idem*, enshrined in Article 50 of the Charter, so as to permit a duplication of proceedings or penalties in respect of the same facts, provided that the conditions laid down in Article 52(1) of the Charter, as defined by the case-law, are satisfied. First, such duplication must not represent an excessive burden for the person concerned; second, there must be clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication; and, third, the sets of proceedings in question must have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe.

Findings of the Court

In the first place, as regards the assessment as to whether the proceedings and penalties are criminal in nature, the Court recalls that the principle *ne bis in idem*, as enshrined in Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, for the same acts and against the same person. In order to carry out such an assessment, the Court relies on three relevant criteria derived from the case-law. The first is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty which the person concerned is liable to incur. As regards, in particular,

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65 Under 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.'

66 According to that provision: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

the second criterion, the mere fact that a penalty also pursues a deterrent purpose does not mean that it cannot be characterised as a criminal penalty. It is of the very nature of criminal penalties that they seek both to punish and to deter unlawful conduct. As regards the third criterion, the Court notes that the degree of severity of the measures at issue is determined by reference to the maximum potential penalty for which the relevant provisions provide. Thus, a financial administrative penalty capable of reaching an amount of EUR 5 million has a degree of severity which is liable to support the view that that penalty is criminal in nature.

In the second place, in order to assess whether the Italian legislation at issue is in compliance with the principle *ne bis in idem* provided for in Article 50 of the Charter, the Court first of all provides clarification regarding the 'bis' condition. Thus, in order for a judicial decision to be regarded as having given a final ruling on the facts subject to a second set of proceedings, that decision must not only have become final but must also have been taken after a determination has been made as to the merits of the case. While it is true that the application of the principle *ne bis in idem* presupposes the existence of a prior final decision, it does not necessarily follow that the subsequent decisions precluded by that principle can only be those which were adopted after that prior final decision. Where a final decision exists, that principle precludes criminal proceedings in respect of the same facts from being initiated or maintained.

Next, as regards the 'idem' condition, the Court notes that, for the purposes of assessing the existence of the same offence, the relevant criterion is identity of the material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned. By contrast, the legal classification under national law of the facts and the legal interest protected are not relevant, in so far as the protection conferred by Article 50 of the Charter cannot vary from one Member State to another. Furthermore, it is not sufficient that the facts be merely similar, since the principle *ne bis in idem* may apply only where the facts to which the two sets of proceedings or the two penalties at issue relate are identical, which is a matter for the referring court to assess.

Lastly, as regards the conditions under which limitations on the principle *ne bis in idem*, enshrined in the Charter, may be justified, the Court notes that, under Article 52(1) of the Charter, such a limitation may be justified in so far as it is provided for by law and respects the essence of Article 50 of the Charter as well as the principle of proportionality. The possibility of a duplication of proceedings and penalties respects the essence of Article 50 of the Charter, provided that the pieces of national legislation concerned do not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provide only for the possibility of a duplication of proceedings and penalties under different legislation. As for the principle of proportionality, it requires that the duplication of proceedings and penalties provided for by the national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous. In that regard, public authorities can legitimately choose complementary legal responses to certain conduct that is harmful to society, provided that the accumulated legal responses do not represent an excessive burden for the person concerned. Consequently, the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued. With regard to the strict necessity of the duplication of proceedings and penalties, it is necessary to assess whether there are clear and precise rules making it possible to predict which acts or omissions may be subject to such duplication, and also to predict that there will be coordination between the different authorities, whether the two sets of proceedings have been conducted in a manner that is sufficiently coordinated and within a proximate timeframe and whether any penalty that may have been imposed in the proceedings that were first in time was taken into account in the assessment of the second penalty,

meaning that the resulting burden, for the persons concerned, of that duplication is limited to what is strictly necessary and the overall penalties imposed correspond to the seriousness of the offences committed.

4. Protection of personal data [67]

a. Authorisation of telephone tapping in criminal proceedings

Judgment of 16 February 2023, *HYA and Others (Grounds for authorising telephone tapping)* (C-349/21, EU:C:2023:102)

(Reference for a preliminary ruling – Telecommunications sector – Processing of personal data and the protection of privacy – Directive 2002/58 – Article 15(1) – Restriction of the confidentiality of electronic communications – Judicial decision authorising the interception, recording and storage of telephone conversations of persons suspected of having committed a serious intentional offence – Practice whereby the decision is drawn up in accordance with a pre-drafted template text that does not contain individualised reasons – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Obligation to state reasons)

In the context of criminal proceedings, the President of the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) had, by several decisions, granted applications from the Spetsializirana prokuratura (Specialised Public Prosecutor's Office, Bulgaria) for authorisation to use special investigative methods in order to listen to and record the telephone conversations of various persons suspected of having committed serious offences. In stating the reasons for his decisions, the President followed the current domestic judicial practice of using a pre-drafted template that does not contain individualised reasons, which in essence merely indicates that the requirements laid down by the national legislation on interception of telecommunications, to which the template refers, have been complied with.

Subsequently, the Specialised Public Prosecutor's Office had accused the persons concerned by that telephone tapping of participation in an organised criminal gang. The content of the recorded conversations was of direct relevance in establishing whether the indictments of those persons were well founded.

Hearing the substance of the case, the Specialised Criminal Court, which is the referring court, explained that it must first review the validity of the procedure for authorising the telephone tapping. Faced in particular with doubts as to whether the abovementioned judicial practice was consistent with EU law, that court decided to refer a question to the Court of Justice for a preliminary ruling.

Findings of the Court

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67 Reference should also be made under this heading to the judgment of 5 June 2023 (Grand Chamber), ***Commission v Poland (Independence and private life of judges)*** (C-204/21, EU:C:2023:442), presented under heading I.1 'Rule of law and effective judicial protection'.

The Court notes that the judicial practice at issue forms part of the legislative measures adopted by Bulgaria under the Directive on privacy and electronic communications, [68] which provide for the possibility of reasoned judicial decisions having the effect of restricting the principle of confidentiality of electronic communications and traffic data, enshrined in that directive. [69] That practice is thus intended to implement the duty to state reasons laid down in those legislative measures in accordance with the requirements of the Charter of Fundamental Rights of the European Union [70] to which that directive refers.

The Court also notes that it is apparent from the legal rules governing those national proceedings that the court entitled to adjudicate and which grants authorisation to use special investigative methods is to take that decision on the basis of a reasoned and detailed application, the content of which, provided for by law, must enable that court to determine whether the conditions for the grant of such authorisation have been met.

In that context, the Court considers that, where the court entitled to adjudicate has examined the grounds of such a detailed application and considers, at the end of that examination, that it is justified, that court, by signing a pre-drafted text in accordance with a template indicating that the legal requirements have been met, endorsed the grounds for the application while ensuring compliance with the legal requirements. It would be artificial to require such an authorisation to contain a specific and detailed statement of reasons, when the application in respect of which that authorisation is granted already contains such a statement of reasons under national law.

The Court adds, however, that once the person concerned has been informed that special investigative methods have been applied to him or her, the obligation to state reasons under the Charter requires that person to be in a position to understand the grounds on which those methods were authorised, in order to be able, where appropriate, to challenge that authorisation effectively. That requirement also applies to any court which, in accordance with its powers, must examine, of its own motion or at the request of the person concerned, the lawfulness of that authorisation.

It is therefore for the referring court to determine whether, in the context of the domestic practice at issue, compliance with the Charter and the Directive on privacy and electronic communications is guaranteed and whether the persons to whom the phone tapping relates, and the court responsible for reviewing the legality of the authorisation to use it, are in a position to understand the reasons for that authorisation.

In that regard, the Court states that, since the authorisation is granted on the basis of a reasoned and detailed application, it must be verified, first, that such persons can have access not only to the authorisation decision but also to the application.

Secondly, those persons must be able to understand easily and unambiguously, by means of a cross-reading of the application and the authorisation decision, the precise reasons why authorisation was granted in the light of the factual and legal circumstances of the individual case underlying the application, just as it is imperative that such a cross-reading should reveal the validity period of the authorisation.

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68 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).

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

70 Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

In particular, where the authorisation decision merely indicates the validity period of the authorisation and states that the legal provisions to which it refers have been met, it is essential that the application should clearly state all the information necessary to enable the persons concerned to understand that, on the basis of that information alone, the court which issued the authorisation, by endorsing the statement of reasons contained in the application, reached the conclusion that all the legal requirements had been met. If a cross-reading of the application and subsequent authorisation does not make it possible to understand, easily and unequivocally, the reasons for that authorisation, it must be held that the obligation to state reasons under the Charter has not been complied with.

b. Collection of biometric and genetic data in criminal proceedings

Judgment of 26 January 2023, *Ministerstvo na vatreshnite raboti (Recording of biometric and genetic data by the police)* (C-205/21, EU:C:2023:49)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Directive (EU) 2016/680 – Article 4(1)(a) to (c) – Principles relating to processing of personal data – Purpose limitation – Data minimisation – Article 6(a) – Clear distinction between personal data of different categories of data subjects – Article 8 – Lawfulness of processing – Article 10 – Transposition – Processing of biometric data and genetic data – Concept of 'processing authorised by Member State law' – Concept of 'strictly necessary' – Discretion – Charter of Fundamental Rights of the European Union – Articles 7, 8, 47, 48 and 52 – Right to effective judicial protection – Presumption of innocence – Limitation – Intentional criminal offence subject to public prosecution – Accused persons – Collection of photographic and dactyloscopic data in order for them to be entered in a record and taking of a biological sample for the purpose of creating a DNA profile – Procedure for enforcement of collection – Systematic nature of the collection)

In criminal proceedings for tax fraud instituted by the Bulgarian authorities, V.S. was accused of participation in a criminal organisation, formed with the aim of enrichment, with a view to committing offences in concert on Bulgarian territory. Following that accusation, the Bulgarian police requested V.S. to consent to the collection of her dactyloscopic and photographic data in order for them to be entered in a record and to the taking of a sample for the purpose of creating her DNA profile. V.S. opposed their collection.

Relying on national legislation which provides for the 'creation of a police record' for persons accused of an intentional criminal offence subject to public prosecution, the police authorities requested the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria) to authorise enforcement of the collection of V.S.'s genetic and biometric data. Only copies of the order accusing her and of the declaration in which she refused to give her consent to the collection of her data accompanied the police authorities' application.

That court had doubts as to whether the Bulgarian legislation applicable to such 'creation of a police record' is compatible with Directive 2016/680, [71] read in the light of the Charter of Fundamental Rights of the European Union ('the Charter'), and therefore made a reference to the Court of Justice for a preliminary ruling.

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

In its judgment, the Court explains, first of all, the conditions under which the processing of biometric and genetic data by the police authorities may be regarded as authorised by Member State law, within the meaning of Directive 2016/680. It rules, next, on the implementation of the requirement, set out in that directive, concerning the processing of data of a category of persons with regard to whom there are serious grounds for believing that they are involved in a criminal offence, and on observance of the right to effective judicial protection and of the principle of the presumption of innocence where the national court having jurisdiction is permitted by national legislation to authorise the compulsory collection of those data, regarded as 'sensitive' by the EU legislature. It addresses, finally, the question whether national legislation providing for the systematic collection of those data is compatible with the provisions of Directive 2016/680 that relate to their processing, having regard to the principles applicable thereto.

Findings of the Court

First of all, the Court holds that Directive 2016/680, read in the light of the Charter, [72] must be interpreted as meaning that the processing of biometric and genetic data by the police authorities with a view to their investigative activities, for purposes of combating crime and maintaining law and order, is authorised by Member State law provided that the law of the Member State contains a sufficiently clear and precise legal basis to authorise that processing. The fact that the national legislative act containing such a legal basis refers, furthermore, to the General Data Protection Regulation, [73] and not to Directive 2016/680, is not capable, in itself, of calling the existence of such authorisation into question, provided that it is apparent, in a sufficiently clear, precise and unequivocal manner, from the interpretation of the set of applicable provisions of national law that the processing of biometric and genetic data at issue falls within the scope of that directive, and not of the GDPR.

In that context, in the light of the fact that the relevant national legislation referred to the provisions of the GDPR which govern the processing of sensitive data, while reproducing the content of the provisions of Directive 2016/680 which relate to the processing of the same data, [74] the Court observes that those provisions are not equivalent. Whereas processing of sensitive data by the competent authorities for inter alia the purposes, covered by Directive 2016/680, of the prevention and detection of criminal offences is capable of being allowed only where strictly necessary, and must be subject to appropriate safeguards and be provided for by EU or Member State law, the GDPR lays down a general prohibition of the processing of those data, coupled with a list of exceptions. Whilst the national legislature may provide, in the same legislative instrument, for the processing of personal data for purposes covered by Directive 2016/680 and for other purposes covered by the GDPR, it is obliged to make sure that there is no ambiguity as to the applicability of one or other of those two EU acts to the collection of sensitive data.

In addition, with regard to a possible incorrect transposition of Directive 2016/680, raised by the referring court, the Court points out that that directive does not require the national measures which authorise processing of data falling within its scope to contain a reference to the directive. It states that, where the national legislature provides for the processing by competent authorities of biometric and genetic data which are capable of falling either within the scope of that directive or within the scope of

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72 Article 10(a) of Directive 2016/680, read in the light of Article 52 of the Charter.

73 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').

74 Article 9 of the GDPR and Article 10 of Directive 2016/680 respectively.

the GDPR, it may, for reasons of clarity and precision, refer explicitly, on the one hand, to the provisions of national law transposing that directive and, on the other, to the GDPR, but is not obliged to mention that directive. However, in the event of an apparent conflict between the national provisions authorising the data processing at issue and those seeming to preclude it, the national court must give the provisions an interpretation which safeguards the effectiveness of Directive 2016/680.

Next, the Court rules that Directive 2016/680 [75] and the Charter [76] do not preclude national legislation which provides that, if the person accused of an intentional offence subject to public prosecution refuses to cooperate voluntarily in the collection of the biometric and genetic data concerning him or her in order for them to be entered in a record, the criminal court having jurisdiction must authorise a measure enforcing their collection, without having the power to assess whether there are serious grounds for believing that the person concerned has committed the offence of which he or she is accused, provided that national law subsequently guarantees effective judicial review of the conditions for that accusation, from which the authorisation to collect those data arises.

In that regard, the Court notes that, pursuant to Directive 2016/680, [77] the Member States must ensure that a clear distinction is made between the data of the different categories of data subjects in such a way that they are not subject without distinction – whatever the category to which they belong – to same degree of interference with their fundamental right to the protection of their personal data. However, that obligation is not absolute. Furthermore, in so far as that directive refers to the category of persons with regard to whom there are serious grounds for believing that they have committed a criminal offence, the Court states that the existence of sufficient items of evidence pointing to a person's guilt constitutes, in principle, a serious ground for believing that he or she has committed the offence at issue. Thus, Directive 2016/680 does not preclude national legislation which provides for the compulsory collection of data of persons in respect of whom sufficient evidence is gathered that they are guilty of an intentional offence subject to public prosecution and who have been accused for that reason.

So far as concerns observance of the right to effective judicial protection, where the national court having jurisdiction, with a view to authorising a measure enforcing the collection of sensitive data of an accused person, cannot review, on the merits, the conditions for his or her accusation, the Court points out, in particular, that it may prove justified, during the preliminary stage of the criminal procedure, to shield temporarily from judicial review the assessment of the evidence on which accusation of the person concerned is founded. Such review, at this stage, might impede the conduct of the criminal investigation in the course of which those data are being collected and excessively limit the investigators' ability to clear up other offences on the basis of a comparison of those data with data gathered during other investigations. That limitation of effective judicial protection is therefore not disproportionate, provided that national law subsequently guarantees effective judicial review.

As regards observance, by a judicial decision authorising the collection of the data at issue, of the right to be presumed innocent, the Court observes, first, that, in so far as, in the present instance, the collection of such data is limited to the category of persons whose criminal liability has not yet been established, their collection cannot be regarded as being such as to reflect the feeling of the authorities that those persons are guilty. Second, the fact that the court which will have to rule on the guilt of the

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75 Article 6(a) of Directive 2016/680.

76 Articles 47 and 48 of the Charter, enshrining respectively the right to effective judicial protection and the principle of the presumption of innocence.

77 Article 6 of Directive 2016/680.

person concerned cannot assess, at this stage of the criminal procedure, whether the evidence on which the accusation of that person is based is sufficient constitutes a guarantee of observance of his or her right to be presumed innocent.

Finally, the Court concludes that Directive 2016/680 [78] precludes national legislation which provides for the systematic collection of biometric and genetic data of any person accused of an intentional offence subject to public prosecution in order for them to be entered in a record, without laying down an obligation on the competent authority to verify whether and demonstrate that, first, their collection is strictly necessary for achieving the specific objectives pursued and, second, those objectives cannot be achieved by measures constituting a less serious interference with the rights and freedoms of the person concerned.

In that regard, the Court points out that Directive 2016/680 is intended to ensure, inter alia, enhanced protection with regard to the processing of sensitive data – which include biometric and genetic data – since it is liable to create significant risks to fundamental rights and freedoms. The requirement set out therein, that that processing is allowed 'only where strictly necessary', must be interpreted as establishing strengthened conditions for lawful processing of such sensitive data. [79] Furthermore, the scope of that requirement must also be determined in the light of the principles relating to data processing, such as purpose limitation and data minimisation.

In that context, national legislation which provides for the systematic collection of the biometric and genetic data of any person accused of an intentional offence subject to public prosecution in order for them to be entered in a record is, in principle, contrary to that requirement. It is liable to lead, in an indiscriminate and generalised manner, to collection of the data of most accused persons since the concept of '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, their particular circumstances, any link between them and other procedures in progress, the criminal record of the person concerned or his or her individual profile.

c. Re-use in the context of an administrative procedure of personal data made available to the authorities in the course of criminal proceedings

Judgment of 7 September 2023, *Lietuvos Respublikos generalinė prokuratūra* (C-162/22, EU:C:2023:631)

(Reference for a preliminary ruling – Telecommunications – Processing of personal data in the electronic communications sector – Directive 2002/58/EC – Scope – Article 15(1) – Data retained by providers of electronic communications services and made available to authorities in charge of criminal proceedings – Subsequent use of those data in an investigation into misconduct in office)

The Lietuvos Respublikos generalinė prokuratūra (Prosecutor General's Office of the Republic of Lithuania; 'the Prosecutor General's Office') opened an internal investigation into the appellant in the main proceedings, who at the time was a public prosecutor in a Lithuanian public prosecutor's office,

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78 Article 10 of Directive 2016/680, read in conjunction with Article 4(1)(a) to (c) and Article 8(1) and (2) thereof.

79 Compared with the conditions following from Article 4(1)(b) and (c) and Article 8(1) of Directive 2016/680.

on the ground that there was reason to believe that he had, when leading a pre-trial investigation, unlawfully provided information pertaining to that pre-trial investigation to the suspect and his lawyer.

In its report on that investigation, the Prosecutor General's Office found that the appellant in the main proceedings had in fact engaged in misconduct in office. According to that report, that misconduct in office was demonstrated by the evidence obtained during the internal investigation. In particular, information obtained during criminal intelligence operations and data collected during two pre-trial investigations confirmed telephone communications between the appellant in the main proceedings and the suspect's lawyer in the pre-trial investigation led by the appellant in the main proceedings concerning the suspect. On the basis of that report, the Prosecutor General's Office adopted two orders by which it imposed a penalty on the appellant in the main proceedings and dismissed him from service. The Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), before which the appellant in the main proceedings brought an action for annulment of those two orders, dismissed that action on the ground, inter alia, that the criminal intelligence operations carried out in the present case were lawful and that the information gathered in accordance with the provisions of the Law on criminal intelligence [80] had been used lawfully to assess whether the appellant in the main proceedings had engaged in misconduct in office.

The appellant in the main proceedings brought an appeal before the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania), the referring court in the present case, claiming that access by the intelligence bodies, in connection with a criminal intelligence operation, to traffic data and the actual content of electronic communications constituted such a serious interference with fundamental rights that, having regard to the provisions of the Directive on privacy and electronic communications [81] and the Charter of Fundamental Rights of the European Union ('the Charter'), such access could be granted only for the purpose of combating serious crime. However, according to the appellant in the main proceedings, the Law on criminal intelligence [82] provides that such data may be used to investigate not only serious criminal offences, but also disciplinary misconduct or misconduct in office related to acts of corruption.

According to the referring court, the issues raised by the appellant in the main proceedings involve two elements: (i) access to data retained by providers of electronic communications services for purposes other than combating serious crime and preventing serious threats to public security; and (ii) once such access has been obtained, the use of those data in investigating corruption-related misconduct in office.

After recalling the conclusions drawn from the judgment in *Privacy International* [83] concerning the scope of the Directive on privacy and electronic communications, and those drawn from the judgment in *Prokuratuur (Conditions of access to data relating to electronic communications)* [84] so far as concerns the

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80 Lietuvos Respublikos kriminalinės žvalgybos įstatymas (Law of the Republic of Lithuania on criminal intelligence) of 2 October 2012 (Žin., 2012, No 122-6093), in the version applicable to the facts in the main proceedings ('the Law on criminal intelligence').

81 Inter alia 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).

82 Article 19(3) of the Law on criminal intelligence.

83 Judgment of 6 October 2020, ***Privacy International*** (C-623/17, EU:C:2020:790, paragraph 39).

84 Judgment of 2 March 2021, ***Prokuratuur (Conditions of access to data relating to electronic communications)*** (C-746/18, EU:C:2021:152, paragraphs 33 and 35).

scope of the objective of preventing, investigating, detecting and prosecuting criminal offences, the referring court notes that the Court of Justice has not yet ruled on the impact of the subsequent use of the data concerned on the interference with fundamental rights. In those circumstances, the referring court harbours doubts as to whether such subsequent use must also be regarded as constituting such a serious interference with the fundamental rights enshrined in the Charter [85] that it can be justified only for the purposes of combating serious crime and preventing serious threats to public security, thus denying the possibility of using the data concerned for the investigation of corruption-related misconduct in office.

By its judgment, the Court clarifies the scope of its case-law stemming from the judgments in *La Quadrature du Net and Others* [86] and *Commissioner of An Garda Síochána and Others*, [87] holding that Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, [88] precludes the use, in connection with investigations into corruption-related misconduct in office, of personal data relating to electronic communications which have been retained, pursuant to a legislative measure adopted under that provision, by providers of electronic communications services and which have subsequently been made available, pursuant to that measure, to the competent authorities for the purpose of combating serious crime.

Findings of the Court

As regards the conditions under which traffic and location data relating to such communications may be used during an internal procedure concerning corruption-related misconduct in office, the Court recalls, first of all, that access to those data may be granted, pursuant to a measure adopted under Article 15(1) of the Directive on privacy and electronic communications, only in so far as those data have been retained by those providers in a manner that is consistent with that provision. Next, subsequent use of those data is possible only on condition, first, that the retention of those data by providers of electronic communications services was consistent with Article 15(1) of the Directive on privacy and electronic communications, as interpreted by the case-law of the Court, and, second, that the access to those data granted to the competent authorities was itself consistent with that provision.

As regards the objectives capable of justifying the use, by public authorities, of data retained by providers of electronic communications services pursuant to a measure in accordance with Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, the Court recalls that that provision enables the Member States to introduce exceptions to the obligation of principle to ensure the confidentiality of personal data, laid down in Article 5(1) of that directive, and to the corresponding obligations, referred to, inter alia, in Articles 6 and 9 of that directive, where such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security, defence and public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system. To that end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on one of those grounds.

However, the Court recalls that Article 15(1) of the Directive on privacy and electronic communications cannot permit the exception to the obligation of principle to ensure the confidentiality of electronic

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85 Articles 7 and 8 of the Charter.

86 Judgment of 6 October 2020, ***La Quadrature du Net and Others*** (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

87 Judgment of 5 April 2022, ***Commissioner of An Garda Síochána and Others*** (C-140/20, EU:C:2022:258).

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

communications and data relating thereto and, in particular, to the prohibition on storage of those data, laid down in Article 5 of that directive, to become the rule, if the latter provision is not to be rendered largely meaningless.

As regards the objectives that are capable of justifying a limitation of the rights and obligations laid down, in particular, in Articles 5, 6 and 9 of the Directive on privacy and electronic communications, the Court recalls that the list of objectives set out in the first sentence of Article 15(1) of that directive is exhaustive, as a result of which a legislative measure adopted under that provision must correspond, genuinely and strictly, to one of those objectives.

As regards the public interest objectives that may justify a measure taken pursuant to Article 15(1) of the Directive on privacy and electronic communications, the Court recalls that it is clear from its case-law, in particular from the judgments in *La Quadrature du Net and Others* and *Commissioner of An Garda Síochána and Others*, that, in accordance with the principle of proportionality, there is a hierarchy amongst those objectives according to their respective importance and that the importance of the objective pursued by such a measure must be proportionate to the seriousness of the interference that it entails. In that regard, the importance of the objective of safeguarding national security exceeds that of the other objectives referred to in Article 15(1) of the Directive on privacy and electronic communications, inter alia the objectives of combating crime in general, even serious crime, and of safeguarding public security. Subject to meeting the other requirements laid down in Article 52(1) of the Charter, the objective of safeguarding national security is therefore capable of justifying measures entailing more serious interferences with fundamental rights than those which might be justified by those other objectives.

As regards, more specifically, the objective of preventing, investigating, detecting and prosecuting criminal offences, the Court notes that, in accordance with the principle of proportionality, only action to combat serious crime and measures to prevent serious threats to public security are capable of justifying serious interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, such as the interference entailed by the retention of traffic and location data. Accordingly, only non-serious interference with those fundamental rights may be justified by the objective of preventing, investigating, detecting and prosecuting criminal offences in general.

It follows from that case-law that the fight against serious crime and the prevention of serious threats to public security are of lesser importance in the hierarchy of objectives of public interest than the safeguarding of national security, but, by contrast, that their importance is greater than that of fighting crime generally and of preventing non-serious threats to public security. In that context, the Court nevertheless recalls that the question whether the Member States may justify a limitation on the rights and obligations laid down, inter alia, in Articles 5, 6 and 9 of the Directive on privacy and electronic communications must be assessed by measuring the seriousness of the interference entailed by such a limitation and by verifying that the importance of the public interest objective pursued by that limitation is proportionate to that seriousness.

Moreover, the Court recalls that access to traffic and location data retained by providers in accordance with a measure taken under Article 15(1) of the Directive on privacy and electronic communications, which must be given effect in full compliance with the conditions resulting from the case-law interpreting that directive, may, in principle, be justified only by the public interest objective for which those providers were ordered to retain those data. It is otherwise only if the importance of the objective pursued by access is greater than that of the objective which justified retention.

According to the Court, those considerations apply *mutatis mutandis* to the subsequent use of traffic and location data retained by providers of electronic communications services pursuant to a measure adopted under Article 15(1) of the Directive on privacy and electronic communications for the purpose of combating serious crime. Once they have been retained and made available to the competent authorities for the purpose of combating serious crime, such data cannot be transmitted to other authorities and used in order to achieve objectives, namely, in the present case, combating corruption-

related misconduct in office, which are of lesser importance in the hierarchy of objectives of public interest than the objective of combating serious crime and preventing serious threats to public security. To authorise, in that situation, access to retained data and the use thereof would be contrary to that hierarchy of public interest objectives recalled above.

d. Processing of personal data on online social networks

Judgment of 4 July 2023 (Grand Chamber), *Meta Platforms and Others (General terms of use of a social network)* (C-252/21, EU:C:2023:537)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Online social networks – Abuse of a dominant position by the operator of such a network – Abuse which entails the processing of the personal data of the users of that network as provided for in its general terms of use – Powers of a competition authority of a Member State to find that processing not consistent with that regulation – Reconciliation with the powers of the national data protection supervisory authorities – Article 4(3) TEU – Principle of sincere cooperation – Points (a) to (f) of the first subparagraph of Article 6(1) of Regulation 2016/679 – Whether the processing is lawful – Article 9(1) and (2) – Processing of special categories of personal data – Article 4(11) – Concept of 'consent')

Meta Platforms owns the online social network Facebook, which is free of charge for private users. The business model of that social network is based on financing through online advertising, which is tailored to its individual users. That advertising is made possible in technical terms by the automated production of detailed profiles in respect of the network users and the users of the online services offered at the level of the Meta group. In order to be able to use that social network, when they register, users must accept the general terms drawn up by Meta Platforms, which refer to the data and cookies policies set by that company. Under those policies, in addition to the data which those users provide directly when they register, Meta Platforms also collects data about user activities on and off the social network and links the data with the Facebook accounts of the users concerned. The latter data, also known as 'off-Facebook data', are data concerning visits to third-party webpages and apps as well as data concerning the use of other online services belonging to the Meta group (including Instagram and WhatsApp). The aggregate view of the data thus collected allows detailed conclusions to be drawn about those users' preferences and interests.

By decision of 6 February 2019, the Bundeskartellamt (Federal Cartel Office, Germany), prohibited Meta Platforms, first, from making, in the general terms in force at the time, [89] the use of the social network Facebook by private users resident in Germany subject to the processing of their off-Facebook data and, second, from processing those data without their consent. In addition, the Federal Cartel Office required Meta Platforms to adapt those general terms in such a way that it is made clear that those data will neither be collected nor linked with Facebook user accounts nor used without the consent of the users concerned. Last, the office clarified that such a consent was not valid if it was a condition for using the social network. It based its decision on the fact that the processing of the data at issue, which

89 On 31 July 2019, Meta Platforms introduced new general terms expressly stating that the user agrees to be shown advertisements instead of paying to use Facebook products.

it found to be inconsistent with the GDPR, [90] constitutes an abuse of Meta Platforms's dominant position on the market for online social networks.

Meta Platforms brought an action against that decision before the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany). Having doubts as to (i) whether national competition authorities may review whether the processing of personal data complies with the requirements set out in the GDPR and (ii) the interpretation and application of certain provisions of that regulation, the Higher Regional Court, Düsseldorf, referred the matter to the Court of Justice for a preliminary ruling.

By its judgment, the Court, sitting as the Grand Chamber, rules on the powers of a national competition authority to find that the processing of personal data is not consistent with the GDPR as well as on how to reconcile this with the powers of the national data protection supervisory authorities. [91] Moreover, it provides clarification on whether users' 'sensitive' personal data may be processed by the operator of a social network, on the conditions for lawful data processing by such an operator and on whether consent given for the purposes of such processing by those users to an undertaking holding a dominant position on the national market for online social networks is valid.

Findings of the Court

In the first place, with regard to the powers of a competition authority to find that the processing of personal data is not consistent with the GDPR, the Court holds that, subject to compliance with its duty of sincere cooperation [92] with the data protection supervisory authorities, such an authority can find, in the context of the examination of an abuse of a dominant position by an undertaking, [93] that that undertaking's general terms of use relating to the processing of personal data and the implementation thereof are not consistent with that regulation, where that finding is necessary to establish the existence of such an abuse. Nevertheless, where a competition authority identifies an infringement of the GDPR in the context of the finding of an abuse of a dominant position, it does not replace the supervisory authorities.

Thus, in the light of the principle of sincere cooperation, when competition authorities are called upon, in the exercise of their powers, to examine whether an undertaking's conduct is consistent with the provisions of the GDPR, they are required to consult and cooperate sincerely with the national supervisory authorities concerned or with the lead supervisory authority. All of these authorities are then bound to observe their respective powers and competences, in such a way as to ensure that the obligations arising from the GDPR and the objectives of that regulation are complied with while their effectiveness is safeguarded. It follows that, where, in the context of the examination seeking to establish whether there is an abuse of a dominant position by an undertaking, a competition authority takes the view that it is necessary to examine whether that undertaking's conduct is consistent with the provisions of the GDPR, that authority must ascertain whether that conduct or similar conduct has already been the subject of a decision by the competent national supervisory authority or the lead supervisory authority or the Court. If that is the case, the competition authority cannot depart from it,

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90 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').

91 For the purposes of Articles 51 to 59 of the GDPR.

92 Enshrined in Article 4(3) TEU.

93 Within the meaning of Article 102 TFEU.

although it remains free to draw its own conclusions from the point of view of the application of competition law.

Where it has doubts as to the scope of the assessment carried out by the competent national supervisory authority or the lead supervisory authority, where the conduct in question or similar conduct is, simultaneously, under examination by those authorities, or where, in the absence of investigation by those authorities, it takes the view that an undertaking's conduct is not consistent with the provisions of the GDPR, the competition authority must consult these authorities and seek their cooperation in order to dispel its doubts or to determine whether it must wait for the supervisory authority concerned to take a decision before starting its own assessment. In the absence of any objection from them or of a reply within a reasonable time, the competition authority may continue its own investigation.

In the second place, with regard to the processing of special categories of personal data, [94] the Court finds that, where the user of an online social network visits websites or apps to which one or more of those categories relate and, as the case may be, enters information into them when registering or when placing online orders, the processing of personal data by the operator of that online social network [95] must be regarded as 'processing of special categories of personal data' within the meaning of Article 9(1) of the GDPR, where it allows information falling within one of those special categories to be revealed, irrespective of whether that information concerns a user of that network or any other natural person. Such data processing is in principle prohibited, subject to certain derogations. [96]

In the latter regard, the Court states that, where the user of an online social network visits websites or apps to which one or more of those special categories relate, the user does not manifestly make public [97] the data relating to those visits collected by the operator of that online social network via cookies or similar storage technologies. Moreover, where he or she enters information into such websites or apps or where he or she clicks or taps on buttons integrated into those sites and apps, such as the 'Like' or 'Share' buttons or buttons enabling the user to identify himself or herself on those sites or apps using login credentials linked to his or her social network user account, his or her telephone number or email address, that user manifestly makes public the data thus entered or resulting from the clicking or tapping on those buttons only in the circumstance where he or she has explicitly made

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94 Referred to in Article 9(1) of the GDPR. Under this provision, 'processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited'.

95 That processing entails the collection – by means of integrated interfaces, cookies or similar storage technologies – of data from visits to those sites and apps and of the information entered by the user, the linking of all those data with the user's social network account and the use of those data by that operator.

96 Provided for in Article 9(2) of the GDPR. That article provides that 'paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

…

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

…'

97 Within the meaning of Article 9(2)(e) of the GDPR.

the choice beforehand, as the case may be on the basis of individual settings selected with full knowledge of the facts, to make the data relating to him or her publicly accessible to an unlimited number of persons.

In the third place, as regards more generally the conditions for the lawful processing of personal data, the Court recalls that, under the GDPR, data processing is lawful if and to the extent that the data subject has given consent for one or more specific purposes. [98] In the absence of such a consent, or where that consent was not freely given, specific, informed and unambiguous, such processing is nevertheless justified if it meets one of the requirements of necessity, [99] which must be interpreted strictly. The processing of the personal data of its users by the operator of an online social network can be regarded as necessary for the performance of a contract to which those users are party only on condition that the processing is objectively indispensable for a purpose that is integral to the contractual obligation intended for those users, such that the main subject matter of the contract cannot be achieved if that processing does not occur.

In addition, according to the Court, the data processing at issue can be regarded as necessary for the purposes of the legitimate interests pursued by the controller or by a third party only on condition that the operator has informed the users from whom the data have been collected of a legitimate interest that is pursued by the data processing, that such processing is carried out only in so far as is strictly necessary for the purposes of that legitimate interest and that it is apparent from a balancing of the opposing interests, having regard to all the relevant circumstances, that the interests or fundamental freedoms and rights of those users do not override that legitimate interest of the controller or of a third party. The Court finds, inter alia, that in the absence of consent on their part, the interests and fundamental rights of those users override the interest of the operator of an online social network in personalised advertising through which it finances its activity.

Last, the Court specifies that the processing of personal data at issue is justified where it is actually necessary for compliance with a legal obligation to which the controller is subject, pursuant to a provision of EU law or the law of the Member State concerned, where that legal basis meets an objective of public interest and is proportionate to the legitimate aim pursued and where that processing is carried out only in so far as is strictly necessary.

In the fourth and last place, as regards the validity of the consent of the users concerned to the processing of their data under the GDPR, the Court holds that the fact that the operator of an online social network holds a dominant position on the market for online social networks does not, as such, preclude the users of such a network from being able validly to consent to the processing of their personal data by that operator. However, since that position is liable to affect the freedom of choice of those users and to create a clear imbalance between them and the controller, it is an important factor in determining whether the consent was in fact validly and, in particular, freely given, which it is for that operator to prove. [100]

In particular, the users of the social network in question must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not

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98 Within the meaning of point (a) of the first subparagraph of Article 6(1) of the GDPR.

99 Referred to in points (b) to (f) of the first subparagraph of Article 6(1) of the GDPR. Under those provisions, processing is lawful only if and to the extent that it is, inter alia, necessary for the performance of a contract to which the data subject is party (point (b) of the first subparagraph of Article 6(1) of the GDPR), for compliance with a legal obligation to which the controller is subject (point (c) of the first subparagraph of Article 6(1) of the GDPR) or for the purposes of the legitimate interests pursued by the controller or by a third party (point (f) of the first subparagraph of Article 6(1) of the GDPR).

100 Pursuant to Article 7(1) of the GDPR.

necessary for the performance of the contract, without being obliged to refrain entirely from using that online social network, which means that those users are to be offered, if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations. Moreover, it must be possible to give separate consent for the processing of off-Facebook data.

e. Right of access to personal data

Judgment of 26 October 2023, *FT (Copies of medical records)* (C-307/22, EU:C:2023:811)

(Reference for a preliminary ruling – Processing of personal data – Regulation (EU) 2016/679 – Articles 12, 15 and 23 – Data subject's right of access to his or her data undergoing processing – Right to obtain a first copy of those data free of charge – Processing of a patient's data by his or her medical practitioner – Medical records – Reasons for the request for access – Use of data for the purpose of triggering the liability of the person providing treatment – Concept of 'copy')

DW requested that FT, his dentist, provide him with a first copy of his medical records free of charge. He made that request with a view to triggering FT's liability for errors allegedly made by her in providing him with dental care.

Relying on German law pursuant to which the patient may obtain a copy of his or her medical records on condition that he or she reimburse the person providing treatment for the costs resulting therefrom, [101] FT refused to provide DW with such a copy, following which DW brought an action. Both the court of first instance and the court hearing the appeal upheld DW's request to be provided with a first copy of his medical records free of charge.

Hearing an appeal on a point of law (*Revision*) brought by FT, the Bundesgerichtshof (Federal Court of Justice, Germany) has put questions to the Court of Justice concerning the interpretation of the provisions of the GDPR which refer to the rules governing the exercise of the data subject's right of access to his or her data, as well as the restrictions of the scope of that right. [102]

By its judgment, the Court concludes, first of all, that, where the data subject so requests, the controller is obliged to provide him or her with a first copy of his or her personal data, free of charge, for purposes other than becoming aware of the processing of those data and verifying the lawfulness of that processing, which are explicitly referred to in the preamble to the GDPR. Next, it rules on the parameters of the option for the Member States to restrict, in the name of the economic interests of the controller, the right to obtain a copy of the data by requiring the data subject to pay fees incurred by that controller in that regard. Lastly, it examines the need to provide the data subject, in certain cases, with a full copy of the data in his or her medical records.

Findings of the Court

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101 Second sentence of subparagraph 2 of Paragraph 630g of the Bürgerliches Gesetzbuch (German Civil Code).

102 More specifically, Article 12(5), Article 15(1) and (3), and Article 23(1)(i) 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').

In the first place, as regards the question whether the controller is also under an obligation to provide the data subject with a first copy of his or her data free of charge with a view to pursuing purposes other than those explicitly referred to in the preamble to the GDPR, the Court recalls that the first sentence of Article 15(3) of that regulation confers on the data subject the right to obtain a faithful reproduction of his or her personal data, understood in a broad sense, that are subject to operations that can be classified as 'processing carried out by the controller'. [103] In addition, it follows from a combined reading of the relevant provisions of the GDPR [104] that (i) the data subject has the right to obtain a first copy, free of charge, of his or her personal data undergoing processing and (ii) the controller is given the option, under certain conditions, to charge a reasonable fee taking administrative costs into account or to refuse to act on a request if it is manifestly unfounded or excessive.

However, none of those provisions makes the provision, free of charge, of a first copy of personal data conditional upon a data subject putting forward reasons to justify his or her request. Accordingly, the reasons for requests set out explicitly in the preamble to the GDPR [105] cannot restrict the scope of those provisions. Thus, the right to access data relating to health [106] cannot be restricted, either by refusing to grant access or by requiring the payment of consideration, to one of those reasons – a finding which also applies as regards the right to obtain a first copy free of charge.

In addition, the principle that the first copy of the data should be free of charge and the lack of a need to rely on a specific reason to justify the request for access necessarily contribute to facilitating the exercise, by the data subject, of the rights conferred on him or her by the GDPR. Consequently, given the importance which the regulation ascribes to the right to access personal data for achieving the objectives pursued by that regulation, the exercise of that right cannot be made subject to conditions which have not been expressly laid down by the EU legislature.

In the second place, the Court rules that a Member State is not entitled to adopt a piece of national legislation which, in order to protect the economic interests of the controller, makes the data subject bear the costs of a first copy of his or her personal data.

It is true that, under the GDPR, the right of the data subject to obtain a first copy, free of charge, of his or her personal data is not absolute and, under certain conditions, the protection of the rights and freedoms of others could justify a restriction of that right. [107] However, in the present case, in so far as the objective of the piece of national legislation is to protect the economic interests of persons providing treatment by preventing needless requests for copies, such considerations cannot be included in such rights and freedoms.

Indeed, that piece of legislation deters not only needless requests, but also requests seeking to obtain, for a legitimate reason, a first copy, free of charge, of processed personal data. Consequently, it is necessarily in breach of the principle that the first copy should be free of charge and thereby

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103 Judgment of 4 May 2023, ***Österreichische Datenschutzbehörde and CRIF*** (C-487/21, EU:C:2023:369, paragraph 28).

104 Article 12(5) and Article 15(1) and (3) of the GDPR.

105 The first sentence of recital 63 of the GDPR states that 'a data subject should have the right of access to personal data which have been collected concerning him or her, and to exercise that right easily and at reasonable intervals, in order to be aware of, and verify, the lawfulness of the processing'.

106 Guaranteed in Article 15(1) of the GDPR.

107 Pursuant to Article 23(1)(i) of the GDPR.

undermines the effectiveness of the data subject's right of access to his or her data, provided for by the GDPR, as well as, as a result, the protection guaranteed therein.

Furthermore, the Court emphasises that the economic interests of controllers were taken into account under the GDPR, which defines the circumstances in which the controller may charge a fee connected with the provision of a copy of personal data.

In the third and last place, the Court considers that, in doctor-patient relationships, the right to obtain a copy of personal data means giving the data subject a faithful and intelligible reproduction of all those data. That right entails the right to obtain a full copy of the documents included in his or her medical records if this is essential in order to enable the data subject to verify how accurate and exhaustive his or her data are, as well as to ensure they are intelligible.

In that regard, it notes that, as regards personal data relating to health, the GDPR specifies that the right of access of data subjects includes 'the data in their medical records containing information such as diagnoses, examination results, assessments by treating physicians and any treatment or interventions provided'. [108] It is because of the sensitive nature of those data that the EU legislature thus highlighted the importance of ensuring that natural persons are given access to the data contained in their medical records as fully and precisely as possible, but also in a form which is intelligible.

Regarding examination results, assessments by treating physicians and treatments or interventions provided to a patient, which, as a general rule, involve a large amount of technical data, or even images, the provision of a simple summary or a compilation of those data by the medical practitioner, in order to present them in an aggregated form, could create the risk of some relevant data being omitted or incorrectly reproduced, or, in any event, of it being made harder for the patient to verify how accurate and exhaustive those data are and to understand those data.

f. Imposition of administrative fines for infringement of the GDPR

Judgment of 5 December 2023 (Grand Chamber), *Nacionalinis visuomenės sveikatos centras* (C-683/21, EU:C:2023:949)

(Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Article 4(2) and (7) – Concepts of 'processing' and 'controller' – Development of a mobile IT application – Article 26 – Joint control – Article 83 – Imposition of administrative fines – Conditions – Requirement that the infringement be intentional or negligent – Responsibility and liability of the controller for the processing of personal data carried out by a processor)

In 2020, in order better to manage the COVID-19 pandemic, the Lithuanian authorities decided to organise the acquisition of a mobile IT application. That application was to contribute to epidemiological follow-up by allowing for the registration and monitoring of the data of persons exposed to the COVID-19 virus.

To that end, the Nacionalinis visuomenės sveikatos centras prie Sveikatos apsaugos ministerijos (National Public Health Centre under the Ministry of Health, Lithuania; 'the NVSC'), which was entrusted with that acquisition, contacted the company UAB 'IT sprendimai sėkmei' ('the company ITSS'), asking it

[108] Recital 63 of the GDPR.

to create such a mobile application. Emails concerning, inter alia, the questions to be included in that application were subsequently sent to that company by employees of the NVSC.

During the period from April to May 2020, the mobile application created by the company ITSS was made available to the public. As a result, 3 802 persons used that application and provided various data relating to them, as requested by the application. However, due to a lack of funding, the NVSC did not award any public contract to the company ITSS for the official acquisition of its mobile application and terminated the procedure relating thereto.

In the meantime, the national supervisory authority initiated an investigation concerning the processing of personal data resulting from the use of that application. By decision of that authority, adopted following the investigation, administrative fines were imposed both on the NVSC and on the company ITSS, which was considered to be a joint controller.

The NVSC has challenged that decision before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania). Having doubts as to the interpretation of several provisions of the GDPR, [109] that court has made a request for a preliminary ruling to the Court of Justice.

In its judgment, the Court, sitting as the Grand Chamber, provides clarification as regards the concepts of 'controller', 'joint controllers' and 'processing', [110] and rules on the possibility of imposing an administrative fine on a controller [111] where the infringement of the provisions of the GDPR being penalised has not been committed intentionally or negligently.

Findings of the Court

In the first place, the Court finds that an entity which has entrusted an undertaking with the development of a mobile IT application and which has, in that context, participated in the determination of the purposes and means of the processing of personal data carried out through that application may be regarded as a controller. [112] That finding cannot be called into question by the fact that that entity has not itself performed any processing operations in respect of such data, has not expressly agreed to the performance of specific operations for such processing or to that mobile application being made available to the public, and has not acquired the abovementioned mobile application, unless, prior to that application being made available to the public, that entity expressly objected to such making available and to the processing of personal data resulting therefrom.

In the second place, the Court observes that the classification of two entities as joint controllers does not require that there be an arrangement between those entities regarding the determination of the purposes and means of the processing of personal data; nor does it require that there be an arrangement laying down the terms of the joint control. It is true that, under the GDPR, [113] joint controllers must, by means of an arrangement between them, determine in a transparent manner their

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109 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').

110 Defined in Article 4(7), Article 26(1) and Article 4(2) of the GDPR respectively.

111 By virtue of Article 83 of the GDPR.

112 Within the meaning of Article 4(7) of the GDPR.

113 Article 26(1) of the GDPR, read in the light of recital 79 thereof.

respective responsibilities for compliance with the obligations under that regulation. However, the existence of such an arrangement constitutes not a precondition for two or more entities to be classified as 'joint controllers', but rather an obligation which the GDPR imposes on joint controllers, once they have been classified as such, for the purposes of compliance with their obligations under that regulation. Thus, such classification arises solely from the fact that several entities have participated in the determination of the purposes and means of processing.

As regards the joint determination, by the entities concerned, of the purposes and means of processing, the Court states that their participation in that determination can take different forms and can result from a common decision taken by them or from converging decisions on their part. However, where the latter is the case, those decisions must complement each other in such a manner that they each have a tangible impact on the determination of the purposes and means of the processing.

In the third place, the Court states that the use of personal data for the purposes of the IT testing of a mobile application constitutes processing. [114] However, that is not the case where such data have been rendered anonymous in such a manner that the subject of those data is not or is no longer identifiable, or where it involves fictitious data which do not relate to an existing natural person.

First, the question whether personal data are used for the purposes of IT testing or for another purpose has no bearing on whether the operation is classified as 'processing'. Second, only processing which relates to personal data may be classified as 'processing' within the meaning of the GDPR. However, fictitious or anonymous data do not constitute personal data.

In the fourth and last place, the Court finds that, under Article 83 of the GDPR, an administrative fine may be imposed on a controller only where it is established that that controller has intentionally or negligently committed an infringement of the rules contained in that regulation. [115]

In that regard, the Court clarifies that the EU legislature did not leave the Member States a margin of discretion as regards the substantive conditions which must be satisfied by a supervisory authority where that authority decides to impose an administrative fine on a controller under that provision. The fact that the GDPR grants Member States the possibility to lay down exceptions in relation to public authorities and bodies established in those Member States [116] and requirements concerning the procedure to be followed by supervisory authorities in order to impose an administrative fine [117] in no way means that they are also authorised to lay down such substantive conditions.

With regard to those conditions, the Court notes that the factors listed in the GDPR, in the light of which the supervisory authority may impose an administrative fine on the controller, include 'the intentional or negligent character of the infringement'. [118] By contrast, none of those factors refers to any possibility of rendering the controller liable in the absence of wrongful conduct on its part. Thus, only infringements of the provisions of the GDPR which are committed intentionally or negligently by the

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114 Within the meaning of Article 4(2) of the GDPR.

115 An infringement referred to in Article 83(4) to (6).

116 By virtue of Article 83(7) of the GDPR which provides that '... each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State'.

117 By virtue of Article 83(8) of the GDPR, read in the light of recital 129 thereof.

118 Article 83(2)(b) of the GDPR.

controller may result in an administrative fine being imposed on that controller pursuant to Article 83 of that regulation.

The Court adds that such an interpretation is supported by the general scheme and purpose of the GDPR. In that context, it states that the existence of a system of sanctions under the GDPR, which allows an administrative fine to be imposed where justified by the specific circumstances of each individual case, provides an incentive for controllers and processors to comply with that regulation, and that, through their dissuasive effect, administrative fines contribute to strengthening the protection of data subjects. However, the EU legislature did not deem it necessary to provide for the imposition of administrative fines in the absence of fault. Having regard to the fact that the GDPR aims to achieve a level of protection which is both equivalent and homogenous, and that, to that end, it must be applied consistently throughout the Union, it would be contrary to that purpose to allow the Member States to lay down such a regime for imposing a fine.

In addition, the Court concludes that such a fine may be imposed on a controller in respect of personal data processing operations performed by a processor on behalf of that controller, unless, in the context of those operations, that processor has carried out processing for its own purposes or has processed such data in a manner incompatible with the framework of, or detailed arrangements for, the processing as determined by the controller, or in such a manner that it cannot reasonably be considered that that controller consented to such processing. In such a situation, the processor must be considered to be a controller in respect of such processing.

Judgment of 5 December 2023 (Grand Chamber), *Deutsche Wohnen* (C-807/21, EU:C:2023:950)

(Reference for a preliminary ruling – Protection of personal data – Regulation (EU) 2016/679 – Article 4(7) – Concept of 'controller' – Article 58(2) – Powers of supervisory authorities to apply corrective measures – Article 83 – Imposition of administrative fines on a legal person – Conditions – Discretion of the Member States – Requirement that the infringement be intentional or negligent)

Deutsche Wohnen SE ('DW') is a real estate company which holds, indirectly via participating interests in various companies, a large number of commercial and housing units. As part of its business activities, it processes personal data of tenants of those units.

Following two inspections carried out in 2017 and in 2019, the Berliner Beauftragte für den Datenschutz (Berlin Data Protection Authority, Germany) found that DW had committed a series of infringements of the GDPR. [119] By decision of 30 October 2019, that supervisory authority imposed administrative fines in respect of such infringements.

DW brought an action against that decision before the Landgericht Berlin (Regional Court, Berlin, Germany), which closed the proceedings without taking further action. That court observed that, under German law, [120] a finding of an administrative infringement can be made only against a natural person

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119 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').

120 Gesetz über Ordnungswidrigkeiten (Law on administrative offences) of 24 May 1968 (BGBl. I, p. 481), in the version in the Communication of 19 February 1987 (BGBl. I, p. 602), as amended by the Law of 19 June 2020 (BGBl. I, p. 1350).

and not against a legal person. In addition, in a situation involving a legal person incurring liability, only the actions of representatives of the legal person or of members of bodies thereof can be attributed to that legal person. The Staatsanwaltschaft Berlin (Berlin Public Prosecutor's Office) brought an appeal against that decision before the Kammergericht Berlin (Higher Regional Court, Berlin, Germany). In that context, that court made a reference to the Court of Justice for a preliminary ruling on the interpretation of the GDPR. [121]

In its judgment, the Grand Chamber of the Court rules on the conditions for imposing administrative fines under the GDPR. In the first place, it examines the question whether the Member States may make the imposition of an administrative fine on a legal person subject to the condition that the infringement of that regulation must first be attributed to an identified natural person. In the second place, it addresses the question whether the infringement of the provisions of the GDPR in relation to which a penalty was imposed must be committed intentionally or negligently. [122]

Findings of the Court

As regards the imposition of an administrative fine under the GDPR on a legal person, the Court states, first of all, that the principles, prohibitions and obligations laid down by the GDPR are directed, in particular, at 'controllers', whose responsibility extends to any processing of personal data which they carry out themselves or which is carried out on their behalf. It is that liability which forms, in the event of infringement of the provisions of the GDPR, the basis for the imposition of an administrative fine on the controller pursuant to Article 83 of that regulation. However, the EU legislature did not distinguish, for the purposes of determining such liability, between natural persons and legal persons, that liability being subject to the sole condition that those persons, alone or jointly with others, determine the purposes and means of processing of personal data. [123] Consequently, as a rule, any person meeting that condition is responsible, inter alia, for any infringement of the GDPR which is committed by that person or on behalf of that person. That implies, first, that legal persons are liable not only for infringements committed by their representatives, directors or managers, but also by any other person acting in the course of the business of those legal persons and on their behalf. Second, the administrative fines provided for by the GDPR in respect of such infringements must be capable of being imposed directly on legal persons where they may be classified as controllers.

Next, the Court observes that no provision of the GDPR permits the inference that the imposition of an administrative fine on a legal person as a controller is subject to a previous finding that that infringement was committed by an identified natural person. In addition, the EU legislature did not provide the Member States with a margin of discretion in that regard. The fact that the GDPR provides them with the possibility to lay down requirements concerning the procedure to be followed by the supervisory authorities in order to impose an administrative fine [124] in no way means that they are also authorised to lay down substantive conditions over and above those set by the GDPR.

In that context, the Court clarifies that to allow Member States to make it a requirement, unilaterally and as a necessary condition for the imposition of an administrative fine pursuant to Article 83 of the GDPR on a controller who is a legal person, that the infringement in question is first attributed or

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121 Article 58(2) and Article 83 of the GDPR.

122 In that regard, see also judgment in *Nacionalinis visuomenės sveikatos centras* (C-683/21, EU:C:2023:949), delivered on the same day.

123 In accordance with Article 4(7) of the GDPR.

124 As is apparent from Article 58(4) and Article 83(8) of the GDPR, read in the light of recital 129 thereof.

attributable to an identified natural person, would be contrary to the purpose of the GDPR. In addition, such an additional requirement would, ultimately, risk weakening the effectiveness and deterrent effect of administrative fines imposed on legal persons as controllers.

Lastly, the Court points out that the concept of an 'undertaking', within the meaning of Articles 101 and 102 TFEU, [125] has no bearing on whether and under what conditions an administrative fine may be imposed pursuant to the GDPR on a controller who is a legal person and is relevant only for the purpose of determining the amount of such a fine.

Accordingly, the Court concludes that the GDPR [126] precludes national legislation under which an administrative fine may be imposed on a legal person in its capacity as controller in respect of an infringement of that regulation [127] only in so far as that infringement has previously been attributed to an identified natural person.

As regards the question whether the Member States may provide for an administrative fine to be imposed even where the infringement in respect of which a penalty has been imposed has not been committed intentionally or negligently, the Court recalls, first of all, that the substantive conditions which a supervisory authority must satisfy when it imposes such a fine on a controller are governed solely by EU law and that the Member States have no discretion in that regard.

As regards those conditions, the Court notes that the factors listed in the GDPR to which the supervisory authority is to have regard when imposing such a fine include 'the intentional or negligent character of the infringement'. [128] By contrast, none of those factors mention any possibility that the controller will incur liability in the absence of wrongful conduct on its part. Accordingly, only infringements of the provisions of the GDPR committed by the controller intentionally or negligently can result in a fine being imposed on the controller pursuant to Article 83 of that regulation.

The Court adds that that interpretation is supported by the general scheme and purpose of the GDPR. In that context, it states that the existence of a system of penalties under the GDPR making it possible to impose, where justified by the specific circumstances of each individual case, an administrative fine creates an incentive for controllers and processors to comply with that regulation and that, through their deterrent effect, administrative fines contribute to strengthening the protection of data subjects. However, the EU legislature did not consider it necessary to provide for administrative fines to be imposed in the absence of wrongdoing. In view of the fact that the GDPR aims for a level of protection which is both equivalent and homogeneous, and that it must, to that end, be applied consistently throughout the European Union, it would be contrary to that purpose to allow Member States to provide such a system for the imposition of a fine.

Therefore, the Court finds that, under Article 83 of the GDPR, an administrative fine may be imposed only where it is established that the controller, which is both a legal person and an undertaking, intentionally or negligently, committed an infringement of the rules contained in that regulation.

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125 To which reference is made in recital 150 of the GDPR.

126 See Article 58(2)(i) and Article 83(1) to (6) of the GDPR.

127 Referred to in Article 83(4) to (6) of the GDPR.

128 Article 83(2)(b) of the GDPR.

II. Citizenship of the Union

1. Measures restricting the free movement of Union citizens

Judgment of 5 December 2023 (Grand Chamber), *Nordic Info* (C-128/22, EU:C:2023:951)

(Reference for a preliminary ruling – Directive 2004/38/EC – Articles 27 and 29 – Measures restricting the free movement of Union citizens on public health grounds – Measure of general application – National legislation providing for a ban on leaving the national territory in order to engage in non-essential travel to Member States classified as high-risk zones in the context of the COVID-19 pandemic and an obligation for every traveller entering the national territory from one of those Member States to undergo screening tests and to observe quarantine – Schengen Borders Code – Article 23 – Exercise of police powers in the field of public health – Equivalence with the exercise of border checks – Article 25 – Possibility of reintroducing border controls at internal borders in the context of the COVID-19 pandemic – Controls carried out in a Member State as part of measures prohibiting the crossing of borders for the purpose of engaging in non-essential travel from or to States in the Schengen area classified as high-risk zones in the context of the COVID-19 pandemic)

In the context of the COVID-19 pandemic, in July 2020 a Belgian Ministerial Order prohibited non-essential travel between Belgium and the countries of the European Union, the countries of the Schengen area and the United Kingdom, provided that those countries were classified as high-risk zones ('red zones') in the light of their epidemiological situation or the level of the restrictive health measures taken by their authorities. The Belgian legislation also required every traveller entering national territory from one of those countries to undergo screening tests and to observe quarantine.

During that period, controls were carried out by the Belgian authorities to verify compliance with these measures.

From 12 to 15 July 2020, Sweden was one of the countries classified as a high-risk zone. Nordic Info BV, a travel agency specialising in travel to and from Scandinavia, cancelled all scheduled trips from Belgium to Sweden during the summer season in order to comply with the Belgian legislation.

That travel agency then brought an action before the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium), the referring court, seeking compensation for the damage which it claims to have suffered as a result of faults allegedly committed by the Belgian State in the drafting of the legislation at issue.

By its reference for a preliminary ruling, the referring court asks the Court of Justice first whether such general legislation of a Member State is compatible with the provisions of Directive 2004/38 [129] which govern measures restricting freedom of movement adopted on public health grounds. [130] It then asks the Court whether the prohibition on crossing the internal borders of that Member State for the purpose of engaging in non-essential travel to or from countries within the Schengen area classified as

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

130 These are, in particular, Articles 27 and 29 of that directive.

high-risk zones is compatible with the articles of the Schengen Borders Code [131] relating to the absence of internal border controls, their possible temporary reintroduction and the exercise of police powers. [132]

By its judgment, the Court answers those two questions in the affirmative, while specifying the conditions under which such national legislation must be applied.

Findings of the Court

As regards the legality, in the light of Directive 2004/38, of measures restricting freedom of movement laid down by a Member State in the context of a pandemic such as the COVID-19 pandemic, the Court states that the national legislation laying down those measures must comply with all the conditions and safeguards referred to in Articles 30 to 32 of that directive, the rights and principles enshrined in the Charter of Fundamental Rights of the European Union, in particular the principle of the prohibition of discrimination and the principle of proportionality.

In that regard, the Court states, in the first place, that, even though they appear in a chapter of Directive 2004/38 entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health', Article 27(1) and Article 29(1) of Directive 2004/38 expressly refer to 'freedom of movement', so that they cover both components of that freedom, namely the right of entry and the right of exit, and thus allow Member States to adopt measures restricting each of those rights on public health grounds. The measures restricting free movement which a Member State may adopt on grounds of public health under those provisions may therefore consist not only of a prohibition on leaving the territory of a Member State in order, as in the present case, to engage in non-essential journeys, but also an obligation for travellers entering that territory to undergo screening tests and to observe quarantine.

In the second place, neither of those two provisions precludes the imposition of such restrictive measures in the form of an act of general application which applies without distinction to any person in a situation covered by that act. Such an interpretation is supported by the fact that diseases that may justify such measures – namely infectious diseases or contagious parasitic diseases such as COVID-19 – are liable, on account of their very characteristics, to affect entire populations irrespective of the behaviour of the individuals making up those populations.

In the third place, the Court points out that, despite their wording, which is, prima facie, designed for individual decisions, all the conditions and safeguards laid down in Articles 30 to 32 of Directive 2004/38 must also be complied with where the restrictive measures are adopted in the form of acts of general application. Thus, pursuant to Article 30(1) and (2) of that directive, any act of general application laying down measures restricting freedom of movement on public health grounds must be brought to the attention of the public by an official publication of the Member State which adopts it and by means of sufficient official media coverage so that the content and effects of that act can be understood, as well as the specific public health grounds relied on in support of that act. Furthermore, in order to comply with the safeguards laid down in Article 30(3) and Article 31 of that directive, the act of general application must be open to challenge in judicial and, where appropriate, administrative redress procedures, the methods for the exercise of which must be communicated to the public. Such

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131 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), as amended by Regulation (EU) 2017/2225 of the European Parliament and of the Council of 30 November 2017 (OJ 2017 L 327, p. 1).

132 More specifically, Articles 22, 23 and 25 of that code are referred to.

restrictive measures must also comply with the principle of prohibition of discrimination laid down in the Charter.

In the fourth and last place, in accordance with the provisions of Article 31(1) and (3) of Directive 2004/38, any measure restricting freedom of movement laid down on grounds of public health must be proportionate in the light of the objective of protection of public health pursued, and the proportionality of such a measure must be assessed having regard also to the precautionary principle. The requirement of the principle of proportionality specifically requires verification, first, that such measures are appropriate for attaining the objective of general interest pursued, in this case the protection of public health, second, are limited to what is strictly necessary, which means that that objective must not reasonably be capable of being achieved in an equally effective manner by other means less prejudicial to the rights and freedoms guaranteed to the persons concerned, and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms.

As regards the controls designed to ensure compliance with the legislation at issue, the Court holds that such controls are possible within the national territory only on condition that they fall within the exercise of police powers, within the meaning of Article 23(a) of the Schengen Borders Code. Where those controls are carried out directly at internal borders, it is necessary for the Member State to comply with all the conditions referred to in Articles 25 to 28 of that code relating to the temporary reintroduction of border controls at internal borders, given that the threat posed by a pandemic such as the COVID-19 pandemic corresponds to a serious threat to public policy or internal security within the meaning of Article 25(1) of that code.

As regards, in the first place, Article 23(a) of the Schengen Borders Code, the Court recalls that that provision guarantees Member States the right to carry out, within the national territory, including in border areas, controls justified by the exercise of police powers, provided that that exercise does not have an effect equivalent to a border check, which it is for the referring court to ascertain.

To that end, the second sentence of Article 23(a), items (i) to (iv), of that code provides indicia to guide the Member States in implementing such police powers.

In that regard, as regards, first, the indicator in the second sentence of Article 23(a), item (i), of that code, the objectives pursued by the controls must be distinguished from those pursued by border checks, namely those of ensuring that persons may be authorised to enter the territory of the Member State or authorised to leave it. The Court considers that that appears to be the case here, in so far as the main objective of the controls to ensure compliance with the Belgian legislation at issue was to limit, as a matter of urgency, the spread of COVID-19 within the Belgian population.

As regards, second, the indicator in the second sentence of Article 23(a), item (ii), of the Schengen Borders Code, it is sufficient that the controls were decided on and implemented in the light of circumstances objectively giving rise to a risk of grave and serious harm to public health, which may be relied on by a Member State under that provision, and on the basis of the authorities' general knowledge of the areas of entry to and exit from the national territory through which a large number of travellers targeted by that prohibition were likely to transit.

As regards, third, the indicators set out in the second sentence of Article 23(a), items (iii) and (iv), of the Schengen Borders Code, all the controls at issue in the main proceedings must have been carried out randomly and, therefore, '[on the spot]' and must moreover have been devised and executed in a manner clearly distinct from systematic checks on persons at the external borders of the European Union. In that latter regard, the Court specifies that, in the context of a pandemic such as that of COVID-19, the Member States have some measure of discretion as regards the intensity, frequency and selectivity of the controls.

In the second place, if it is established that the controls at issue were carried out at internal borders, the referring court will have to ascertain whether the Kingdom of Belgium complied with all the conditions referred to in Articles 25 to 28 of the Schengen Borders Code for the temporary reintroduction of border controls at internal borders where there is a serious threat to public policy and/or internal security. The Court states in that regard that a pandemic of a scale such as that of COVID-19 may be classified as a serious threat to public policy and/or internal security within the meaning of Article 25(1) of that code, in so far as it is liable to affect one of the fundamental interests of society, namely that of ensuring the lives of citizens, and in so far as it affects the very survival of a part of the population, in particular the most vulnerable.

Judgment of 21 December 2023 (Grand Chamber), *Chief Appeals Officer and Others* (C-488/21, EU:C:2023:1013)

(Reference for a preliminary ruling – Citizenship of the European Union – Articles 21 and 45 TFEU – Right of Union citizens to move and reside freely in the territory of the Member States – Worker having acquired the nationality of the host Member State while retaining his or her nationality of origin – Directive 2004/38/EC – Article 3 – Beneficiaries – Article 2(2)(d) – Family member – Dependent direct relatives in the ascending line of a worker who is a Union citizen – Article 7(1)(a) and (d) – Right of residence for more than three months – Retention of the status of dependant in the host Member State – Article 14(2) – Retention of the right of residence – Regulation (EU) No 492/2011 – Article 7(2) – Equal treatment – Social advantages – Social assistance benefits – Unreasonable burden on the social assistance system of the host Member State)

GV, a Romanian national, is the mother of AC, also a Romanian national, who resides and works in Ireland. Moreover, AC has been naturalised as an Irish national.

Since 2017, GV has resided in Ireland with her daughter, on whom she is financially dependent. In September 2017, as a result of the deterioration in her state of health linked to arthritis, GV applied for a disability allowance under a social protection law.

As is apparent from the order for reference, that allowance, which is meant to protect against poverty, is a social assistance payment financed by the general budget, without the person concerned having to make any social security contributions. In addition, entitlement to the allowance is subject to certain criteria, relating in particular to age, means and disability. Moreover, that disability allowance is a 'special non-contributory cash benefit' within the meaning of Regulation No 883/2004. [133] Last, it appears that Irish law precludes the payment of that allowance to a person who is not habitually resident in Ireland, such as a person who does not have a right to reside there.

In February 2018, GV's application for the disability allowance was refused, on the ground that she did not have a right of residence in Ireland.

Tasked with reviewing the refusal of that application, in July 2019, the Appeals Officer (Ireland) concluded that GV, as a dependent direct ascendant of a Union citizen working in Ireland, had a right to reside but was not entitled to receive social welfare assistance. Hearing an application for revision, the Chief Appeals Officer (Ireland) confirmed that reasoning given that, in accordance with the national

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133 Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigenda OJ 2004 L 200, p. 1, and OJ 2007 L 204, p. 30).

legislation transposing Directive 2004/38, [134] if she were granted the allowance, GV would become an unreasonable burden on the national social assistance system and, therefore, she would no longer have a right to reside.

By a judgment delivered in July 2020, the High Court (Ireland) annulled the decision taken by the Chief Appeals Officer. That court considers, in particular, that the abovementioned national legislation, to the extent that it makes the right of residence of a family member of an Irish citizen subject to the condition that that family member must not become an unreasonable burden on the social assistance system of the State, is inconsistent with Directive 2004/38, governing the right of Union citizens and their family members to move and reside freely within the territory of the Member States.

Hearing an appeal against that judgment, the referring court decided to ask the Court of Justice, in essence, whether EU law precludes legislation of a Member State which permits the authorities of that Member State to refuse to grant a social assistance benefit to a direct relative in the ascending line who, at the time the application for that benefit is made, is dependent on a worker who is a Union citizen, or even to withdraw from him or her the right of residence for more than three months, on the ground that the grant of the said benefit would have the effect that that family member would no longer be dependent on the worker who is a Union citizen and would thus become an unreasonable burden on the social assistance system of the said Member State.

By its judgment, delivered by the Grand Chamber, the Court rules that the principle of freedom of movement for workers, [135] as implemented by Regulation No 492/2011 [136] on freedom of movement for workers within the Union, read in combination with Directive 2004/38, precludes such national legislation.

Findings of the Court

As a preliminary point, the Court recalls that Directive 2004/38, the interpretation of which was sought by the referring court, governs only the conditions of entry and residence of a Union citizen in Member States other than the one of which he or she is a national. Consequently, it is not intended to confer, in the territory of that Member State, a derived right of residence on family members of that citizen. In this case, since AC's naturalisation, that directive is no longer intended to govern either her right of residence in Ireland or the derived right of residence that her family members may enjoy.

That being so, the Court has held that the situation of a national of one Member State who has exercised his or her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to his or her nationality of origin. Thus, if the rights conferred on Union citizens by Article 21 TFEU and, more specifically, on workers by Article 45 TFEU, are to be effective, a family member of a Union citizen who is a worker who, after having exercised his or her freedom of movement by residing and working in the host Member State, has acquired the nationality of that Member State, must be able to be granted a

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

135 That principle is laid down in Article 45 TFEU.

136 More specifically Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

derived right of residence. Furthermore, the conditions for granting the derived right of residence enjoyed by that family member must not be stricter than those provided for in Directive 2004/38 for the family member of a Union citizen who has exercised his or her right of freedom of movement by settling in a Member State other than that of which he or she is a national, since that directive must be applied by analogy to such a situation. Finally, a worker who is a Union citizen enjoys – including where, as in this case, he or she has acquired the nationality of the host Member State, in addition to his or her nationality of origin – the right to equal treatment under Article 45(2) TFEU, as implemented by Article 7(2) of Regulation No 492/2011. [137]

In that context, in the first place, the Court states that it follows from a combined reading of several provisions of Directive 2004/38 [138] that the direct relatives in the ascending line of a worker who is a Union citizen have a derived right of residence for more than three months where they are 'dependent' on that worker. In order for the family member concerned to be able to enjoy that right, that situation of dependence must exist, in the country from which that person comes, at the time when he or she applies to join the Union citizen on whom he or she is dependent. The person concerned will be able to retain the said right as long as he or she remains dependent on that worker, [139] until such time as that relative, having resided lawfully for a continuous period of five years in the host Member State, can claim a right of permanent residence. [140]

In the second place, as regards the abovementioned right to equal treatment enjoyed by a worker who is a Union citizen under Article 7(2) of Regulation No 492/2011, the Court recalls that the concept of 'social advantages' provided for in that provision includes all the advantages which, whether or not they are linked to a contract of employment, are granted to national workers generally, primarily because of their objective status as workers or by virtue of the mere fact of their residence in the national territory, and which it therefore appears appropriate to extend to workers who are nationals of other Member States in order to facilitate their mobility within the European Union. That concept may include social assistance benefits which, at the same time, come under the specific scope of Regulation No 883/2004, like the disability allowance. Moreover, a social assistance benefit, such as the disability allowance granted to a direct relative in the ascending line, constitutes for the migrant worker a 'social advantage' within the meaning of Article 7(2) of Regulation No 492/2011, since that direct relative in the ascending line is dependent on that worker, within the meaning of Article 2(2)(d) of Directive 2004/38. Furthermore, the said dependent direct relative in the ascending line, as an indirect beneficiary of the equal treatment accorded to the said worker, may rely on Article 7(2) of Regulation No 492/2011 in order to obtain that allowance where, under national law, it is granted directly to such relatives in the ascending line. Having regard to the protection against discrimination that the migrant worker and members of his or her family may suffer in the host Member State guaranteed by that provision, the status of 'dependent' relative in the ascending line within the meaning of Article 2(2)(d) of Directive 2004/38 cannot be affected by the grant of a social assistance benefit in the host Member State. To decide otherwise would, in practice, preclude that dependent family member from claiming that benefit and would thus undermine the equal treatment accorded to the migrant worker. It is important in that regard to emphasise that, through the taxes which a migrant worker pays in the host Member State in the course of his or her employment, that worker also contributes to the financing of the social policies of that Member State and should, consequently, profit from them under the same conditions as

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137 Under that provision, a worker who is a national of a Member State is, in the territory of another Member State, to enjoy 'the same social and tax advantages as national workers'.

138 Those being Article 2(2)(d) and Article 7(1)(a) and (d) of Directive 2004/38.

139 In accordance with Article 14(2), read in combination with Article 2(2)(d) and Article 7(1)(a) and (d), of Directive 2004/38.

140 That right of permanent residence is governed by Article 16(1) of Directive 2004/38.

national workers. Therefore, the objective consisting in avoiding an unreasonable financial burden on the host Member State cannot justify the unequal treatment of migrant workers as compared with national workers.

2. Loss of European citizenship due to loss of the nationality of a Member State

Judgment of 5 September 2023 (Grand Chamber), *Udlændinge- og Integrationsministeriet (Loss of Danish nationality)* (C-689/21, EU:C:2023:626)

(Reference for a preliminary ruling – Citizenship of the European Union – Article 20 TFEU – Article 7 of the Charter of Fundamental Rights of the European Union – Citizen holding the nationality of a Member State and the nationality of a third country – Loss of the nationality of the Member State by operation of law upon reaching the age of 22 on the ground of lack of a genuine link with that Member State where no application to retain nationality has been made before the date on which that age is reached – Loss of citizenship of the Union – Examination of the proportionality of the consequences of that loss from the point of view of EU law – Limitation period)

X, who was born in the United States of America to a Danish mother and an American father, held, since birth, Danish and American nationality. After reaching 22 years of age, she applied to the Udlændinge- og Integrationsministeriet (Ministry of Immigration and Integration, Denmark) to retain her Danish nationality.

By decision of 31 January 2017, the Ministry of Immigration and Integration informed X that she had lost her Danish nationality at the age of 22 and that it could not allow the retention of her nationality, since she had made her application after reaching that age. In the absence of an application for retention of nationality before reaching that age, Danish legislation provides for the loss of nationality by operation of law for Danish nationals born outside Danish territory and who have never resided or spent time there in conditions demonstrating a genuine link with Denmark. Accordingly, X lost her Danish nationality and, therefore, her citizenship of the Union, without the Danish authorities having carried out, in the light of EU law, any review of proportionality of the consequences of that loss for her situation.

On 9 February 2018, X brought an action before the Danish courts for annulment of that decision. In that context, the referring court, the Østre Landsret (High Court of Eastern Denmark, Denmark), raised the question of whether domestic legislation such as the Danish legislation on nationality is consistent with Article 20 TFEU, read in conjunction with Article 7 of the Charter of Fundamental Rights of the European Union.

The Court of Justice, sitting as the Grand Chamber, holds that such national legislation is consistent with EU law provided that the person concerned has had the opportunity to lodge, within a reasonable period, an application for the retention or recovery of nationality, enabling an examination of the proportionality of the loss of nationality from the point of view of EU law to be made and, where appropriate, the retention or recovery *ex tunc* of that nationality to be obtained; such a period can begin to run only from the time when the competent authorities have duly informed that person of that loss or of the imminence of that loss, and of his or her right to apply, within that period, for the retention or recovery of that nationality.

Findings of the Court

The Court notes, first of all, that EU law does not preclude a Member State from providing, when laying down the conditions for the acquisition and loss of nationality, that the assessment of whether or not

there is a genuine link with that Member State is based on the taking into account of criteria such as the place of birth and residence of the person concerned and on the conditions of that person's stay in the national territory, or from that Member State limiting that assessment to the period up to the date on which that person reached the age of 22.

However, the Court points out that, where the loss of the nationality of a Member State arises by operation of law at a given age and entails the loss of citizenship of the Union and the rights attaching thereto, the competent national authorities and courts must be in a position to examine the consequences of the loss of that nationality from the point of view of EU law and, where appropriate, to enable that person to retain his or her nationality or to recover it *ex tunc*.

As regards, more specifically, the time limit for making an application for such an examination for the purposes of retaining or recovering nationality, it is, in the absence of a specific time limit laid down by EU law for that purpose, for each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law, provided that those rules comply, inter alia, with the principle of effectiveness in that they do not make it in practice impossible or excessively difficult to exercise rights conferred by EU law. The Member States may, in that regard, require, on the basis of the principle of legal certainty, that such an application be submitted to the competent authorities within a reasonable period.

However, in the light of the serious consequences created by the loss of the nationality of a Member State, where that loss entails the loss of citizenship of the Union, for the effective exercise of the rights which such citizens derive from Article 20 TFEU, national rules or practices liable to have the effect of preventing the person concerned from seeking an examination of the proportionality of those consequences from the point of view of EU law cannot be regarded as compatible with the principle of effectiveness. Thus, where that person has not been duly informed of the right to request such an examination and of the deadline for lodging such a request, his or her request cannot be held to be inadmissible on the ground that that deadline has expired.

In the present case, given that, in the context of the examination of the proportionality of the consequences of the loss of Danish nationality from the point of view of EU law, a person concerned, such as X, must be able to rely on all the relevant matters which may have arisen up to his or her 22nd birthday, the Court considers that the period must extend, for a reasonable length of time, beyond the date on which that person reaches that age. Moreover, that reasonable period cannot begin to run unless the competent authorities have duly informed that person of the loss of his or her nationality or of the imminence of that loss, and of his or her right to apply, within that period, for the retention or recovery of that nationality. Failing that, the competent national authorities and courts must be in a position to carry out an examination of proportionality of the consequences of the loss of nationality, as an ancillary issue, in the context of the application by the person concerned for a travel document or any other document showing his or her nationality.

The relevant date to be taken into account for the purposes of such an examination necessarily corresponds to the day on which the person concerned reached the age of 22, since that date forms an integral part of the legitimate criteria which the Member State has determined, and on which the retention or loss of that person's nationality depends.

Lastly, the Court notes that the absence of any possibility offered by national law, under conditions which are consistent with EU law, to obtain from the national authorities and, potentially, from the national courts, an examination of the proportionality of the consequences of the loss of the nationality of the Member State concerned from the point of view of EU law and which may, where appropriate, lead to the recovery *ex tunc* of that nationality, cannot be compensated for by the possibility of naturalisation, regardless of the conditions – possibly favourable – under which that naturalisation may be obtained.

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

Judgment of 22 June 2023, *Staatssecretaris van Justitie en Veiligheid (Thai mother of a Dutch minor child)* (C-459/20, EU:C:2023:499)

(Reference for a preliminary ruling – Citizenship of the Union – Article 20 TFEU – Right to move and reside freely within the territory of the Member States – Decision of a Member State refusing residence to a third-country national parent of a minor child who has the nationality of that Member State – Child living outside the territory of the European Union and never having resided in its territory)

X, a Thai national, resided legally in the Netherlands where she was married to A, a Dutch national. Their child, of Dutch nationality, was born in Thailand where he has always lived. After the birth of the child, X returned to the Netherlands. In 2017, following the couple's separation, the Netherlands authorities revoked X's residence permit. After the divorce, X applied, in 2019, to reside in the Netherlands with another national of that Member State. In that context, the Netherlands authorities sought to ascertain of their own motion whether she could obtain a derived right of residence under Article 20 TFEU in order to be able to reside with her minor child, a Union citizen, in the territory of the European Union. The Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) rejected that application on 8 May 2019. On the same day, X was deported to Thailand.

Seised by X against that rejection decision, the rechtbank Den Haag, zittingsplaats Utrecht (District Court, The Hague, sitting in Utrecht, Netherlands), which is the referring court, has doubts as to the interpretation to be given to Article 20 TFEU in the present case.

In its judgment, the Court sets out the conditions in which a third-country national may benefit from a derived right of residence based on Article 20 TFEU where the minor child of that national is a Union citizen but is outside the territory of the European Union and has never resided in its territory.

Findings of the Court

At the outset, the Court recalls that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the members of the family of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status. In those situations there must also be, between the third-country national and the Union citizen, who is a member of his or her family, a relationship of dependency such that a decision refusing the right of residence to the third-country national would deprive the family member of the genuine enjoyment of the substance of the rights conferred by the status of Union citizen. That is the case where the latter is compelled to go with the third-country national in question and to leave the territory of the European Union as a whole, or not to be able to enter and reside in the territory of the Member State the nationality of which he or she holds.

In the present case, the minor child, a Union citizen, has lived since birth in a third country, without ever having resided in the European Union. In those circumstances, the Court considers, in the first place, that the refusal of a right of residence to the third-country national parent of such a child is capable of affecting the latter's exercise of his or her rights, pursuant to Article 20 TFEU, only if it is established that he or she will enter and reside in the territory of the Member State of which he or she has the nationality together with the parent, or will join that parent in that territory. It is for the referring court to assess whether that is the case and whether there is a relationship of dependency between the third-country national parent and the minor child.

In the second place, the Court holds that the application for a derived right of residence of that parent, upon whom the child citizen of the Union is dependent, may be rejected only on the ground that the move to the Member State of which the child holds the nationality, which the exercise by that child of

his or her rights as a Union citizen presupposes, is not in the real or plausible interests of that child. The right to move and reside freely within the territory of the Member States, which is conferred on every citizen of the Union, flows directly from the status of Union citizen without its exercise being subject to proof of any interest whatsoever in order to rely on its benefits or conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity personally to exercise those rights as a Union citizen.

It is true that the Court has previously found that it is for the competent authorities, when ruling on an application for residence pursuant to Article 20 TFEU, to take into consideration the best interests of the child concerned. [141] However, that finding was relevant not for the rejection of an application for a residence permit but, on the contrary, for the purpose of precluding the adoption of a decision that compelled that child to leave the territory of the European Union.

Lastly, the Court gives details as to the assessment to be made in the context of an application for a derived right of residence, on the issue of whether the minor child, who is a Union citizen, is dependent upon his or her third-country national parent. It states, in particular, that the competent authorities must take account of the situation as it appears to be at the time when they are called upon to make a decision, as those authorities must assess the foreseeable consequences of their decision on the genuine enjoyment, by the child concerned, of the substance of the rights that he or she derives from the status that Article 20 TFEU confers on him or her.

Furthermore, that assessment must always be based on an examination of all of the relevant circumstances of the case at hand. In particular, the fact that the third-country national parent has not always assumed day-to-day care of that child but now has sole care of that child, or that the other parent, who is a Union citizen, could assume the actual day-to-day care of that child, cannot be regarded as decisive in that respect.

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141 See, to that effect, judgments of 10 May 2017, ***Chavez-Vilchez and Others*** (C-133/15, EU:C:2017:354, paragraph 71), and of 5 May 2022, ***Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)*** (C-451/19 and C-532/19, EU:C:2022:354, paragraph 53).

III. Freedom of movement within the European Union [142]

1. Freedom of establishment

Judgment of 8 June 2023, *Prestige and Limousine* (C-50/21, EU:C:2023:448)

(Reference for a preliminary ruling – Article 49 TFEU – Article 107(1) TFEU – Private-hire vehicles (PHVs) – Licencing scheme involving the issue, in addition to a licence to provide urban and interurban transport services throughout the national territory, of a second operating licence in order to be able to provide urban transport services in a metropolitan area – Limitation of the number of licences for PHV services to one thirtieth of the licences for taxi services)

Prestige and Limousine, SL ('P&L') provides private-hire vehicle services ('PHV services') in the Barcelona metropolitan area (Spain). P&L and 14 other companies providing the same services, including companies linked to international online platforms, are challenging before the Tribunal Superior de Justicia de Cataluña (High Court of Justice of Catalonia, Spain) the validity of a regulation of the Área Metropolitana de Barcelona (Barcelona Metropolitan Area, Spain; 'the AMB') relating to the organisation of such services in the Barcelona conurbation. In the context of the present dispute, that court has doubts as to the compatibility of the legislation in question with, in particular, the freedom of establishment.

In addition to the national licence required to provide urban and interurban PHV services in Spain, that regulation requires, first, an additional licence to provide PHV services in the Barcelona conurbation. Secondly, it limits the number of PHV service licences to one thirtieth of the taxi service licences granted for that conurbation. According to the referring court, the essential aim of that legislation was to reduce competition between PHV services and taxi services.

To justify the measures at issue, the AMB invokes in particular the objective of ensuring the quality, safety and accessibility of taxi services. It points out that those services are considered to be a 'service of general interest' in so far as the taxi trade is highly regulated, with taxi services subject to licence quotas, regulated fares, an obligation to provide universal transport and accessibility for people with reduced mobility. In that regard, the AMB points out that the economic viability of that activity appears to be jeopardised by growing competition from PHV services.

By its judgment, the Court of Justice concludes that the requirement of an additional specific licence to operate PHV services in the Barcelona conurbation may, under certain conditions, be compatible with Article 49 TFEU. By contrast, that article precludes the limitation of the number of licences for PHV services, since that measure appears to go beyond what is necessary to achieve the objectives of sound management of transport, traffic and public space in that conurbation and of protection of the environment.

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[142] Reference should also be made under this heading to the following judgments: judgment of 21 December 2023 (Grand Chamber), ***Chief Appeals Officer and Others*** (C-488/21, EU:C:2023:1013), presented under heading II.1 'Measures restricting the free movement of Union citizens'; judgment of 21 December 2023 (Grand Chamber), ***Royal Antwerp Football Club*** (C-680/21, EU:C:2023:1010), presented under heading VIII.1 'Agreements, decisions and concerted practices (Article 101 TFEU)'; judgment of 9 February 2023, ***Staatssecretaris van Justitie en Veiligheid and Others (Withdrawal of the right of residence of a Turkish worker)*** (C-402/21, EU:C:2023:77), presented under heading XVII.2 'Interpretation of an international agreement'.

Findings of the Court

First, the Court rejects the arguments put forward by the parties to the main proceedings in support of the alleged inadmissibility of the reference for a preliminary ruling. In the Court's view, the fact that the answers to be given to the questions referred clearly follow from its case-law does not have the effect of rendering such a reference inadmissible, but empowers it to answer, where appropriate, by way of an order. [143] Furthermore, the fact that a national supreme court has already considered, in the context of a dispute similar to that at issue in the main proceedings, the potential relevance of the provisions of EU law referred to by the referring court is not such as to render inadmissible a reference for a preliminary ruling seeking a ruling from the Court on the interpretation of those provisions, in accordance with Article 267 TFEU.

Second, having concluded that the two measures provided for by the legislation at issue do not appear to confer State aid, within the meaning of Article 107(1) TFEU, on undertakings providing taxi services, the Court examines the compatibility of those measures with Article 49 TFEU. In that regard, the Court notes, first of all, that they effectively limit access to the market for any newcomer, restricting the number of PHV service providers established in the AMB, and must therefore be classified as restrictions on the freedom of establishment guaranteed by that provision.

Next, as regards the existence of overriding reasons in the public interest capable of justifying such restrictions, the Court considers that the objective of sound management of transport, traffic and public space in a conurbation and the objective of protecting the environment in such a conurbation may constitute such reasons. However, that is not the case as regards the objective of ensuring the economic viability of taxi services, since the preservation of a balance between the two modes of urban transport in question is a matter of purely economic considerations. The fact that taxi services are described in Spanish law as a 'service of general interest' is irrelevant in that regard. While the characteristics put forward by the AMB certainly show that the regulation of taxi services is intended, inter alia, to ensure the quality, safety and accessibility of taxi services, for the benefit of users, it appears, by contrast, that the measures at issue in the main proceedings do not in themselves pursue those objectives. The Court also finds that it does not appear that taxi service providers have been entrusted with a specific public service task capable of falling, where appropriate, within the concept of a service of general economic interest (SGEI) within the meaning of Article 106(2) TFEU.

Finally, the Court analyses the proportionality of the requirement for an additional licence and the limitation of PHV licences to one thirtieth of taxi licences. It concludes that the first measure appears appropriate for achieving the objectives mentioned and can be considered necessary to achieve them. Given the nature of the service in question and the impossibility of distinguishing between vehicles used to provide PHV services and those used privately over a vast urban area, it may be considered that an a posteriori control would come too late to guarantee its real effectiveness. The requirement of an additional licence may thus be justified, provided, however, that such licencing is based on objective, non-discriminatory criteria which are known in advance and that exclude any arbitrariness and do not duplicate controls which have already been carried out under the national licencing procedure, but which meet the particular needs of the conurbation concerned. It is for the referring court to determine whether those conditions are satisfied in the present case.

By contrast, the second measure does not appear to guarantee the attainment of the objectives of sound management of transport, traffic and public space. First of all, the arguments put forward in favour of PHV services, which seek to demonstrate that those services can in fact promote the attainment of those objectives, in particular by reducing the use of private cars, by the contribution of

143 See Article 99 of the Rules of Procedure of the Court.

those services to the objective of efficient and inclusive mobility, through their level of digitalisation and flexibility in the provision of services, and by the use of alternative energy vehicles, encouraged by the State rules on PHV services, have not been overturned before the Court.

Next, it cannot be ruled out that any impact of the PHV fleet on transport, traffic and public space in the Barcelona conurbation could adequately be limited by measures that are less restrictive than a restriction on licences. Thus, the Court refers, by way of example, to measures for the organisation of PHV services, limitations on those services during certain time periods or restrictions on traffic in certain areas. The Court added that it could not be ruled out that the objective of protecting the environment in the Barcelona conurbation could be achieved by measures less prejudicial to the freedom of establishment, such as emission limits applicable to vehicles circulating in that conurbation.

Judgment of 13 July 2023, *Xella Magyarország* (C-106/22, EU:C:2023:568)

(Reference for a preliminary ruling – Free movement of capital – Freedom of establishment – Regulation (EU) 2019/452 – Legislation of a Member State establishing a mechanism for filtering foreign investment in resident companies considered to be 'strategic' – Decision adopted on the basis of that legislation, prohibiting the acquisition by a resident company of all the shares of another resident company – Acquired company considered to be 'strategic' on the ground that its primary activity concerns the extraction of certain raw materials such as gravel, sand and clay – Acquiring company considered to be a 'foreign investor' on the ground that it forms part of a group of companies whose ultimate parent company is established in a third country – Harm or risk of harm to a national interest, public security or public order of the Member State – Objective intended to ensure the security of supply of raw materials to the construction sector, in particular at the local level)

Janes és Társa is a Hungarian company whose main activity is the extraction of gravel, sand and clay from its quarry situated in Lázi (Győr-Moson-Sopron County, Pannonhalma District, Hungary).

Because of that activity, Janes és Társa is regarded as a 'strategic company', within the meaning of a law establishing a foreign investment screening mechanism. Its market share on the Hungarian market for the production of the raw materials concerned is 0.52%.

Xella Magyarország is another Hungarian company which forms part of a group of companies whose ultimate parent company is established in Bermuda and which belongs, ultimately, to an Irish national. It operates on the Hungarian construction materials market and is primarily engaged in the manufacture of concrete construction products. It purchases about 90% of the annual production of Janes és Társa with a view to the processing of those raw materials into sand-lime bricks in its factory near the quarry.

In October 2020, Xella Magyarország concluded a sale agreement for the purpose of acquiring 100% of the shares in Janes és Társa and requested the competent Minister to take note of the transaction concerned or to confirm that that formality was not necessary in view of its ownership structure. By a decision adopted in July 2021, that Minister prohibited the execution of the notified legal transaction, classifying Xella Magyarország as a 'foreign investor' because it is indirectly owned by LSF10 XL Investments, a company registered in Bermuda.

In addition, that Minister maintained that the security and foreseeability of the extraction and supply of raw materials were of strategic importance, particularly in the light of the serious disruptions to the functioning of global supply chains caused by the COVID-19 pandemic. The Minister highlighted that the production of aggregates, such as sand, gravel and crushed stone, for the construction sector was already dominated by foreign-owned Hungarian producers. Accordingly, if Janes és Társa were to be indirectly owned by a company registered in Bermuda, this would pose a longer-term risk to the security

of supply of raw materials, such as those at issue in this case, which could harm the 'national interest', in the broad sense.

By its judgment, the Court of Justice concludes that the provisions of FEU Treaty on the freedom of establishment preclude the foreign investment screening mechanism in question. By means of that mechanism, a resident company which is a member of a group of companies established in several Member States, over which an undertaking of a third country has decisive influence, may be prohibited from acquiring ownership of another resident company regarded as strategic. The Court thus rejects the Hungarian Government's argument that such an acquisition harms or risks harming the national interest in ensuring the security of supply to the construction sector, in particular at the local level, with respect to basic raw materials.

Findings of the Court

First, the Court finds that national legislation allowing the authorities of a Member State to prohibit an EU company, on grounds of security and public policy, from acquiring a shareholding in a 'strategic' resident company allowing it to exert a definite influence on the management and control of that company clearly constitutes a restriction on the freedom of establishment of that EU company, in this case a particularly serious restriction.

Secondly, the Court examines whether that restriction may be justified by an overriding reason relating to the public interest. In that respect, the Court notes that, in accordance with its case-law, such a justification presupposes that the restriction is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it.

In this case, the specific interest at issue, namely in ensuring the security and the continuity of supply to the construction sector as regards certain basic raw materials, is capable of falling within the scope of Article 52(1) TFEU. That provision provides that a restriction on the freedom of establishment may be justified on grounds of public policy, public security or public health.

However, according to the case-law, while Member States are still free to determine the requirements of public policy and public security in the light of their national needs, those grounds may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

As regards specifically an objective linked to the security of supply to the construction sector, in particular at the local level, as regards certain basic raw materials, the Court finds that it cannot constitute a public security reason and, therefore, possibly justify an obstacle to a fundamental freedom at issue in the main proceedings, in this case a particularly serious obstacle. It cannot be considered that that objective concerns a 'fundamental interest of society', within the meaning of the Court's case-law.

Moreover, it does not appear that the acquisition prohibited by the decision at issue in the main proceedings is actually capable of giving rise to a 'genuine and sufficiently serious threat', within the meaning of the Court's case-law. First, prior to that acquisition, the acquiring company already purchased approximately 90% of the production of the basic raw materials concerned from the quarry of the acquired company; the remaining 10% of that production being purchased by local undertakings in the construction sector. Secondly, it is well known that those basic raw materials have, by their very nature, a relatively low market value compared, above all, with their transport cost. Accordingly, the risk that a significant part of those extracted raw materials would be exported appears unlikely or even non-existent in practice.

2. Freedom to provide services [144]

Judgment of 16 March 2023, *Beobank* (C-351/21, EU:C:2023:215)

(Reference for a preliminary ruling – Approximation of laws – Payment services in the internal market – Directive 2007/64/EC – Article 47(1)(a) – Information for the payer after receipt of the payment order – Articles 58, 60 and 61 – Payment service provider's liability for unauthorised transactions – Obligation of that service provider to refund unauthorised transactions to the payer – Framework contracts – Obligation of that service provider to provide that payer with information relating to the payee concerned)

ZG, a Belgian resident, is the holder of a bank account with Beobank, in Belgium, for which he has a debit card. On the night of 20 to 21 April 2017, he made a payment for EUR 100 by means of that card, in an establishment located in Valencia (Spain). Thereafter, two further payments were made with that card on the same mobile payment terminal for the amounts of EUR 991 and EUR 993 respectively.

Before the referring court, ZG seeks, in particular, the refund of the latter two payments which he maintains were 'unauthorised'. He explains that he no longer remembers the name and address of the establishment nor what happened after having a drink in the establishment concerned and claims to have been the victim of fraud facilitated by the administration of a drug. Beobank refuses, however, to refund those payments contending that ZG authorised them or at the very least that ZG was 'grossly negligent'.

Thereafter, Beobank provided only the digital reference and the geolocation of the payment terminal used without stating the identity of the payee of the contested payments other than by the following entry: 'COM SU VALENCIA ESP'. That payee's bank, for its part, refuses to pass on the information identifying the payee to Beobank.

In that context, the referring court raises the question as to the extent of the obligation of the payment service provider, provided for in a provision of Directive 2007/64, [145] to provide 'where appropriate' the payer with the information relating to the payee of a payment transaction. The response to that question by the Court of Justice will enable the referring court to draw the appropriate conclusions as to Beobank's obligation to refund the disputed payments.

By its judgment, the Court ruled that the payer's payment service provider is required, under that provision, to provide that payer with information enabling the natural or legal person who benefited from a payment transaction debited from that payer's account to be identified and not only the information which that provider, after making its best efforts, has available with regard to that payment transaction.

Findings of the Court

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144 Reference should also be made under this heading to the following judgments: judgment of 21 December 2023, ***Commission v Denmark*** (C-167/22, EU:C:2023:1020), presented under heading VII 'Transports'; judgment of 21 December 2023 (Grand Chamber), ***European Superleague Company*** (C-333/21, EU:C:2023:1011), presented under heading VIII.2 'Abuse of a dominant position (Article 102 TFEU)'; judgment of 9 November 2023, ***Google Ireland and Others*** (C-376/22, EU:C:2023:835), presented under heading XI 'Internet and electronic commerce'.

145 That obligation is provided for by Article 47(1)(a) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ 2007 L 319, p. 1).

As a preliminary point, the Court recalls that the payment service provider's liability for unauthorised payment transactions, provided for in Article 60(1) of Directive 2007/64 has been the subject of full harmonisation. Therefore, a parallel liability regime in respect of the same operative event is incompatible with that directive, as is a competing liability regime, allowing the payment service user to trigger that liability on the basis of other operative events.

A national court cannot ignore the distinction made in that directive as regards payment transactions, depending on whether or not they are authorised. Therefore, such a court cannot rule on a claim for reimbursement of payments such as the payments at issue in the main proceedings without first classifying those payments as authorised or unauthorised. Article 60(1), cited above, read in conjunction with Article 86(1) of Directive 2007/64, [146] precludes a payment service user from being able to hold the provider of those services liable because that service provider has failed to fulfil its obligation to provide information laid down in Article 47(1)(a) of that directive, in so far as that liability concerns the refund of payment transactions.

However, in so far as the referring court considers it necessary, in its assessment of whether or not the payments at issue in the main proceedings are authorised, to know the nature and extent of the information which the payer's payment service provider concerned must provide to the payer, pursuant to Article 47(1)(a) of Directive 2007/64, the relevance of the questions referred for the resolution of the dispute in the main proceedings cannot be called into question.

As regards specifically the nature and extent of the information obligations provided for in that provision, the Court considers that, in light of the fact that Directive 2007/64 carries out a full harmonisation, those obligations are necessarily obligations which the Member States must implement without being able to derogate from them and without even being able to mitigate them by categorising them as obligations to use best endeavours and not as obligations as to the result to be achieved. There is nothing in the scheme of Article 47 that leads to the conclusion that, by providing for obligations which indicate precisely the action to be taken, the EU legislature sought only to ensure that efforts were made in that regard.

Moreover, the phrase 'where appropriate' in Article 47(1) must be understood as meaning that the information relating to the payee of a payment transaction which the payment service provider must provide to the payer concerned, after the amount of a payment transaction has been debited from that payer's account or at the time agreed in accordance with Article 47(2) of that directive, includes information which that payment service provider has or should have at its disposal in accordance with EU law. That interpretation is supported by the objective pursued by Directive 2007/64, which consists, inter alia, in ensuring that the users of those services can easily identify payment transactions by having 'the same high level of clear' information. In order to guarantee the fully integrated and straight-through processing of the operations concerned and to improve the efficiency and speed of payments, that information must be both necessary and sufficient with regard to the payment service contract and the payment transactions themselves, and proportionate to the needs of those users.

In the present case, in order to meet those requirements, the information which the payment service provider had to provide to the payer concerned, pursuant to Article 47(1)(a) of Directive 2007/64, had to be sufficiently accurate and meaningful. In the absence of such a description, the payer would not be able, with the help of that information, to identify with certainty the payment transaction concerned. The 'reference enabling the payer to identify each payment transaction', referred to in the first part of the sentence in Article 47(1)(a) of Directive 2007/64, does not put the payer concerned in a position to link that reference to a specific payment transaction. It is therefore necessarily in the context of the

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146 That provision governs, for the Member States, the consequences of full harmonisation carried out by that directive.

additional element referred to in the second limb of Article 47(1)(a), namely the 'information relating to the payee', that the payment service provider of the payer concerned had to provide to the payer the information necessary to meet fully the requirements stemming from that provision.

3. Free movement of capital

Judgment of 12 October 2023, *BA (Inheritance – Public housing policy in the European Union)* (C-670/21, EU:C:2023:763)

(Reference for a preliminary ruling – Taxation – Free movement of capital – Articles 63 to 65 TFEU – Inheritance tax – Movement of capital between Member States and third countries – Immovable property located in a third country – More favourable tax treatment for immovable property located in a Member State or in a State which is party to the Agreement on the European Economic Area – Restriction – Justification – Housing policy – Effectiveness of fiscal supervision)

A, a German resident, who died in 2016, bequeathed in 2013 to his son, BA, also a German resident, a share of an immovable property located in Canada let for residential purposes.

In July 2017, the competent tax office determined the amount of inheritance tax payable by BA in Germany. For the purpose of calculating that tax, that immovable property was assessed at its full market value. In March 2018, BA sought to amend the amount of that tax, so that that property would be taxed at 90% of its market value, as provided for in the German law on inheritance and gift tax. Observing that that law requires, in order for that immovable property to benefit from that tax advantage, that that property be located in Germany, another Member State or a State which is party to the Agreement on the European Economic Area, [147] BA claimed that that law infringed the free movement of capital between Member States and third countries enshrined in Article 63 TFEU. Taking the view, however, that such a difference in treatment between immovable property located in one of those three types of country and property of the same nature located in a non-Member State other than a State which is party to the EEA Agreement complies with that provision, the Tax Office first rejected BA's request for amendment and then the objection which he had lodged.

Seised of an action by BA, the referring court asks the Court of Justice whether national legislation which excludes from the benefit of a tax advantage a property let for residential purposes in Canada is compatible with Article 63 TFEU. If such legislation constitutes a restriction on the free movement of capital, that court asks whether that restriction can be justified under Article 65 TFEU [148] or by an overriding reason in the public interest.

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147 Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

148 According to that provision:

'1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties. …'

By its judgment, the Court holds that Articles 63 to 65 TFEU preclude national legislation which provides that, for the purposes of calculating inheritance tax, developed immovable property forming part of personal assets which is located in a non-Member State other than a State which is party to the EEA Agreement and is let for residential purposes is assessed at its full market value, whereas property of the same nature which is located within the national territory, another Member State or a State which is party to the EEA Agreement is assessed, for the purposes of that calculation, at 90% of its market value.

Findings of the Court

The Court finds, in the first place, that the legislation at issue, which makes entitlement to the tax advantage dependent on the location of the assets contained in the inheritance, results in immovable property situated in a non-Member State other than a State which is party to the EEA Agreement being subject to a heavier tax burden than that situated within the national territory, thus reducing the value of that inheritance and being liable to deter a natural person resident in Germany from investing in an immovable property let for residential purposes in such a non-Member State or from keeping any such property of which he or she is the proprietor. Such legislation therefore constitutes a restriction on the movement of capital for the purposes of Article 63(1) TFEU.

Examining, in the second place, whether that restriction may be justified under Article 65 TFEU, the Court notes, first of all, that the calculation of inheritance tax is, under the national legislation, directly linked to the market value of the assets included in the estate. Consequently, there is objectively no difference in situation capable of justifying unequal tax treatment so far as concerns the level of inheritance tax payable in relation to, respectively, an immovable property located in Germany, another Member State or a State which is party to the EEA Agreement and an immovable property located in a non-Member State other than States which are party to the EEA Agreement. In those circumstances, it would deprive Article 63(1) TFEU of all meaning if it were accepted that situations are not comparable solely because the immovable property in question is situated in a non-Member State other than a State which is party to the EEA Agreement, when that provision specifically prohibits restrictions on cross-border movements of capital.

Taking the view, therefore, that the difference in treatment at issue concerns situations that are objectively comparable, the Court then examines whether the different treatment of those situations can be justified by an overriding reason in the public interest.

In that regard, it recalls, first, that requirements related to public housing policy in a Member State and to the financing of that policy can, in principle, constitute overriding reasons in the public interest. Similarly, since the European Union has an economic and a social purpose, the rights under the provisions of the FEU Treaty on the freedoms of movement must be balanced against the objectives pursued by social policy, which includes proper social protection. As regards the EEA Agreement, it is in the light of the privileged relationship between the European Union and the European Free Trade Association (EFTA) States that one of its main objectives, namely extending to the EFTA States the internal market established within the territory of the European Union, must be understood. Thus, an objective relating to social policy, such as the promotion and provision of affordable rented accommodation in Member States and States which are party to the EEA Agreement, may, in principle, constitute an overriding reason in the public interest capable of justifying restrictions on the free movement of capital. However, it is not apparent that legislation such as that at issue is suitable for securing, in a consistent and systematic manner, the attainment of that objective. In particular, that legislation, which applies generally, does not focus on places where the shortage of affordable rented accommodation is particularly acute, such as in large German cities. Moreover, all categories of immovable property let for residential purposes, from the most basic to the most luxurious, may be valued at 90% of their market value for the purposes of calculating inheritance tax. In addition, it is not apparent that that legislation requires heirs to retain their housing for a certain period and to use it for rental purposes, so that they may, after obtaining the tax advantage at issue, sell that housing or use it as a second home. Consequently, that tax advantage cannot be regarded as justified by the objective

of promoting and providing affordable rented accommodation in Member States and States which are party to the EEA Agreement.

Second, the Court holds that the overriding reason in the public interest relating to the need to guarantee the effectiveness of fiscal supervision cannot justify the restriction on the free movement of capital brought about by the national legislation at issue. After recalling the relevant provisions of the Tax Agreement between Germany and Canada, [149] the Court finds that the German authorities are in a position to ask the competent Canadian authorities for the information necessary to verify that the conditions laid down by the national legislation at issue are satisfied in order to grant the tax advantage referred to above when the immovable property is located in Canada.

149 Agreement between the Federal Republic of Germany and Canada for the Avoidance of Double Taxation with respect to Taxes on Income and certain other Taxes, the prevention of Fiscal Evasion and the Assistance in Tax Matters, concluded in Berlin on 19 April 2001 (BGBl. 2002 II, p. 670).

IV. Border controls, asylum and immigration

1. Asylum policy

Judgment of 6 July 2023, *Bundesamt für Fremdenwesen und Asyl (Refugee who has committed a serious crime)* (C-663/21, EU:C:2023:540)

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test – Directive 2008/115/EU – Return of illegally staying third-country nationals – Postponement of removal)

Judgment of 6 July 2023, *Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)* (C-8/22, EU:C:2023:542)

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test)

Judgment of 6 July 2023, *Staatssecretaris van Justitie en Veiligheid (Particularly serious crime)* (C-402/22, EU:C:2023:543)

(Reference for a preliminary ruling – Directive 2011/95/EU – Standards for granting refugee status or subsidiary protection status – Article 14(4)(b) – Revocation of refugee status – Third-country national convicted by a final judgment of a particularly serious crime – Danger to the community – Proportionality test)

In *Bundesamt für Fremdenwesen und Asyl (Refugee who has committed a serious crime)* (C-663/21), AA was granted, in December 2015, refugee status in Austria. Between March 2018 and October 2020, he received custodial sentences on a number of occasions and a fine for various offences including, inter alia, dangerous threatening behaviour, destroying or damaging the property of others, the unauthorised handling of drugs, drug trafficking, wounding, and aggressive behaviour towards a member of a public supervisory body.

By a decision adopted in September 2019, the competent Austrian authority withdrew AA's refugee status, issued a return decision accompanied by a prohibition on residence against him and set a period for voluntary departure, while stating that his removal was not permitted.

Following an appeal brought by AA, the Bundesverwaltungsgericht (Federal Administrative Court, Austria), by judgment delivered in May 2021, annulled that decision of September 2019. That court found that AA had been convicted by a final judgment of committing a particularly serious crime and that he constituted a danger to the community. Nevertheless, it considered that it was necessary to weigh up the interests of the host Member State against those of the individual concerned as a beneficiary of international protection, taking into account the measures to which that person would be exposed in the event of revocation of that protection. Given that AA would be exposed, if returned to his country of origin, to a risk of torture or death, that court held that his interests outweighed those of Austria. The competent Austrian authority brought an appeal on a point of law against that judgment before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

In *Commissaire général aux réfugiés et aux apatrides (Refugee who has committed a serious crime)* (C-8/22), XXX was granted, in February 2007, refugee status in Belgium. By a judgment delivered in December 2010, he was sentenced to 25 years' imprisonment for, inter alia, aggravated theft of multiple moveable objects and intentional homicide with a view to facilitating that theft or ensuring impunity.

By a decision adopted in May 2016, the competent Belgian authority withdrew his refugee status. XXX brought an appeal against that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium), which, by a judgment delivered in August 2019, dismissed that appeal. That court held that the danger which XXX represents to the community stems from his conviction for a particularly serious crime, with the result that it was not for that authority to demonstrate that he constitutes a genuine, present and sufficiently serious danger to the community. On the contrary, it was for XXX to establish that, despite that conviction, he no longer constitutes such a danger. XXX brought an appeal on a point of law against that judgment before the Conseil d'État (Council of State, Belgium).

In *Staatssecretaris van Justitie en Veiligheid (Particularly serious crime)* (C-402/22), M.A. lodged, in July 2018, an application for international protection in the Netherlands. The competent Netherlands authority rejected that application in June 2020 on the ground that the applicant had been convicted, in 2018, to a term of imprisonment of 24 months for three sexual assaults, an attempted sexual assault and the theft of a mobile telephone, all committed on the same evening.

Following an appeal brought by M.A., the decision of June 2020 was annulled by a first instance court on the ground that an inadequate statement of reasons had been provided. The competent Netherlands authority brought an appeal against that judgment before the Raad van State (Council of State, Netherlands). It submits, first, that the acts of which M.A. was convicted should be regarded as a single offence constituting a particularly serious crime and, second, that the conviction for a particularly serious crime demonstrates in principle that M.A. represents a danger to the community.

In those three cases, the referring courts ask the Court, in essence, about the conditions governing the revocation of refugee status pursuant to Article 14(4)(b) of Directive 2011/95, [150] and the weighing up, in that context, of the interests of the host Member State and those of the individual concerned as a beneficiary of international protection.

By those three judgments delivered on the same day, the Court answers those questions by clarifying, first, the concepts of 'particularly serious crime' and 'danger to the community' and, second, the scope of the proportionality test to be carried out in that context. It also explains the relationship between the revocation of refugee status and the adoption of the return decision.

Findings of the Court

The Court finds, first of all, that the application of Article 14(4)(b) of Directive 2011/95 is subject to two separate conditions being satisfied, namely, first, that the third-country national concerned has been convicted by a final judgment of a particularly serious crime and, second, that it has been established that that third-country national constitutes a danger to the community of the Member State in which

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150 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 14(4)(b) of that directive provides: 'Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when … he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.'

he or she is present. Therefore, it cannot be held that the fact that the first of those two conditions has been satisfied is sufficient to establish that the second has also been satisfied. Such an interpretation of that provision follows from its wording and from a comparison of that provision with Article 12(2)(b) [151] and Article 17(1) of Directive 2011/95. [152]

As regards the first of those conditions, in the absence of an express reference to the law of the Member States for the purpose of determining its meaning and scope, the concept of 'particularly serious crime' must normally be given an independent and uniform interpretation throughout the European Union. First, in accordance with its usual meaning, the term 'crime' characterises, in that context, an act or omission which constitutes a serious breach of the legal order of the community concerned and which is, therefore, criminally punishable as such within that community. Second, the expression 'particularly serious', in so far as it adds two qualifiers to that concept of 'crime', refers to a crime of exceptional seriousness.

As regards the context in which the term 'particularly serious crime' is used, first, account must be taken of the Court's case-law relating to Article 12(2)(b) of Directive 2011/95, which refers to a 'serious non-political crime', and Article 17(1)(b) of that directive, which refers to a 'serious crime', given that those articles are also intended to deprive of international protection a third-country national who has committed a crime of a certain degree of seriousness. Second, it is apparent from a comparison of Articles 12, 14, 17 and 21 of Directive 2011/95 that the EU legislature imposed different requirements as regards the degree of seriousness of the crimes which may be relied on in order to justify the application of a ground for exclusion or revocation of international protection or the refoulement of a refugee. Thus, Article 17(3) of Directive 2011/95 refers to the commission of 'one or more crimes' and Article 12(2)(b) and Article 17(1)(b) of that directive refer to the commission of a 'serious crime'. It follows that the use, in Article 14(4)(b) of Directive 2011/95, of the expression 'particularly serious crime' highlights the choice of the EU legislature to make the application of that provision subject to the satisfaction, inter alia, of a particularly strict condition relating to the existence of a final conviction for a crime of exceptional seriousness, more serious than the crimes which may justify the application of those provisions of that directive.

So far as concerns the assessment of the seriousness of a crime in the light of Article 14(4)(b) of Directive 2011/95, it is true that that assessment is to be carried out on the basis of a common standard and common criteria. However, in so far as the criminal law of the Member States is not the subject of general harmonisation measures, the assessment is to be carried out taking into account the choices made, within the framework of the criminal system of the Member State concerned, as regards the identification of the crimes which, in the light of their specific features, are exceptionally serious, in so far as they most seriously undermine the legal order of the community.

Still, given that that provision refers to a final conviction for a 'particularly serious crime' in the singular, the degree of seriousness of a crime cannot be attained by a combination of separate offences, none of which constitutes per se a particularly serious crime.

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151 Article 12(2)(b) of Directive 2011/95 expressly provides that a third-country national is to be excluded from being a refugee where he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, without any requirement that that person represents a danger to the community of the Member State in which he or she is present.

152 Article 17(1) of Directive 2011/95, concerning the granting of subsidiary protection, which can offer more limited protection than refugee status, refers, in (b), to the commission of a serious crime and, in (d), to the existence of a danger to the community, and those criteria are expressly presented as alternative conditions each of which, taken in isolation, entails the exclusion from eligibility for subsidiary protection.

Lastly, in order to assess the degree of seriousness of such a crime, all the specific circumstances of the case concerned are to be examined. In that regard, of significant relevance are, inter alia, the grounds of the conviction, the nature and quantum of the penalty provided for and the penalty imposed, the nature of the crime committed, all of the circumstances surrounding the commission of that crime, whether or not that crime was intentional, and the nature and extent of the harm caused by that crime.

As regards the second condition, namely that it has been established that a third-country national constitutes a danger to the community of the host Member State, the Court finds, in the first place, that a measure referred to in Article 14(4)(b) of Directive 2011/95 may be adopted only where the third-country national concerned constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of that Member State. In that regard, the Court states, inter alia, that it is apparent from the very wording of that provision that it applies only where that national 'constitutes' a danger to the community, which suggests that that danger must be genuine and present. Accordingly, the later a decision under that provision is taken after the final conviction for a particularly serious crime, the more it is incumbent on the competent authority to take into consideration, inter alia, developments subsequent to the commission of such a crime in order to determine whether a genuine and sufficiently serious threat exists on the day on which it is to decide on the potential revocation of refugee status. In that regard, the Court also relies on the fact that it is clear from a comparison of various provisions of Directive 2011/95 with Article 14(4)(b) of that directive that the application of the latter provision is subject to strict conditions.

In the second place, as regards the respective roles of the competent authority and the third-country national concerned in the assessment of whether a danger exists, it is for the competent authority, when applying Article 14(4)(b) of Directive 2011/95, to undertake, for each individual case, an assessment of all the specific circumstances of the case. In that context, that authority must have available to it all the relevant information and carry out its own assessment of the facts with a view to determining the tenor of its decision and providing a full statement of reasons for that decision.

Lastly, the Member State's option of adopting the measure provided for in Article 14(4)(b) of Directive 2011/95 is to be exercised in observance of, inter alia, the principle of proportionality, which entails that the threat that the third-country national concerned represents to the society of the Member State in which he or she is present, on the one hand, must be weighed against the rights which must be guaranteed to persons satisfying the substantive conditions of Article 2(d) of that directive, on the other. In that assessment, the competent authority must also take into account the fundamental rights guaranteed by EU law and, in particular, determine whether it is possible to adopt other measures less prejudicial to the rights guaranteed to refugees and to fundamental rights which would have been equally effective to ensure the protection of society in the host Member State.

However, when it adopts such a measure, that authority is not required to verify, in addition, that the public interest in the return of the third-country national to his or her country of origin outweighs that third-country national's interest in the continuation of international protection, in the light of the extent and nature of the measures to which that third-country national would be exposed if he or she were to return to his or her country of origin. The consequences, for the third-country national concerned or for the community of the Member State in which that third-country national is present, of that national's potential return to his or her country of origin are to be taken into account not when the decision to revoke refugee status is adopted but, as the case may be, where the competent authority considers adopting a return decision against that third-country national.

In that regard, the Court states that Article 14(4)(b) of Directive 2011/95 corresponds in part to the grounds for exclusion contained in Article 33 of the Geneva Convention. [153] In those circumstances, in so far as the first of those provisions provides, in the scenarios referred to therein, for the possibility for Member States to revoke refugee status, while the second permits the refoulement of a refugee covered by one of those scenarios to a country where his or her life or freedom would be threatened, EU law provides more extensive international protection for the refugees concerned than that guaranteed by the Geneva Convention. Consequently, in accordance with EU law, the competent authority may be entitled to revoke, pursuant to Article 14(4)(b) of Directive 2011/95, the refugee status granted to a third-country national, without, however, necessarily being authorised to remove him or her to his or her country of origin. In addition, at a procedural level, such removal would involve the adoption of a return decision, in compliance with the substantive and procedural safeguards provided for in Directive 2008/115, [154] which provides, inter alia, in Article 5 thereof, that the Member States are required, when implementing that directive, to respect the principle of non-refoulement. Therefore, the revocation of refugee status, pursuant to Article 14(4) of Directive 2011/95, cannot be regarded as implying the adoption of a position on the separate question of whether that person can be deported to his or her country of origin. In that context, the Court further clarifies that Article 5 of Directive 2008/115 precludes the adoption of a return decision in respect of a third-country national where it is established that his or her removal to the intended country of destination is, by reason of the principle of non-refoulement, precluded for an indefinite period.

2. Immigration policy

Judgment of 18 April 2023, *Afrin* (C-1/23 PPU, EU:C:2023:296)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Border controls, asylum and immigration – Immigration policy – Directive 2003/86/EC – Right to family reunification – Article 5(1) – Submission of an application for entry and residence for the purposes of exercising the right to family reunification – Legislation of a Member State requiring the sponsor's family members to submit the application in person to the competent diplomatic post of that Member State – Impossibility or excessive difficulty to reach that post – Charter of Fundamental Rights of the European Union – Articles 7 and 24)

Ms X and Mr Y, Syrian nationals, were married in 2016 in Syria. They had two children, born in 2016 and 2018 respectively. In 2019, Mr Y left Syria to travel to Belgium while Ms X and their two children remained in the town of Afrin, located in north-west Syria, where they are still currently located. In August 2022, Mr Y was recognised as a refugee in Belgium.

By email of 28 September 2022, sent to the Office des étrangers (Immigration Office, Belgium; 'the Office'), the lawyer for the applicants submitted an application for family reunification on behalf of Ms X and the two children, so that they could join Mr Y in Belgium. That email stated that the application had

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153 Article 33 of the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954 and was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967 ('the Geneva Convention') provides: '1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

154 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).

been submitted by the applicants' lawyer to the Office, as Ms X and her children were in exceptional circumstances which prevented them in practice from travelling to a Belgian diplomatic post in order there to submit their application for family reunification, as required by Belgian law.

On 29 September 2022, the Office replied that, according to Belgian law, it was not possible to submit such an application via email and invited the applicants to contact the competent Belgian embassy. By interlocutory application of 9 November 2022, the applicants brought an action against the État belge (Belgian State) before the referring court to have their application for family reunification registered. They argue that Belgian law, which allows a refugee's family members to apply for entry and residence only in person and at a diplomatic post, even where those persons are unable to travel there, is not consistent with EU law.

The referring court confirms that, under Belgian law, no derogation from the requirement to appear in person at the beginning of the procedure is provided for in a situation such as that in the present case. However, that court observes that Ms X and her children have no real possibility of leaving Afrin to travel to a competent Belgian diplomatic post, since the bordering countries where those posts are located are unsafe for persons fleeing Syria or appear to be inaccessible, due to the need to cross a front line. Although Article 5(1) of Directive 2003/86 [155] leaves it to the Member States to determine who – the sponsor or his or her family members – may submit an application for family reunification, in the present case, the choice made by the Belgian legislature is tantamount to denying Ms X and her children any possibility of submitting such an application. The referring court therefore seeks to determine whether that refusal undermines the effectiveness of that directive or whether it infringes the fundamental rights [156] which it seeks to protect.

In the context of the urgent preliminary ruling procedure, the Court of Justice states that Directive 2003/86, [157] read in conjunction with the Charter, [158] precludes national legislation which requires, for the purposes of submitting an application for entry and residence with a view to family reunification, that the sponsor's family members, in particular those of a recognised refugee, appear in person at the diplomatic or consular post of a Member State competent in respect of the place of their temporary or permanent residence abroad, including in a situation where it is impossible or excessively difficult for them to travel to that post. However, that Member State retains the possibility of requiring those family members to appear in person at a later stage of the application procedure for family reunification.

Findings of the Court

To reach that conclusion, first, the Court notes that, in order to achieve the objective of Directive 2003/86 of promoting family reunification, the Member States must show, in situations such as that at issue in the main proceedings, the necessary flexibility to enable the persons concerned to submit their application for family reunification in good time, by facilitating the submission of that application and by permitting, in particular, the use of remote means of communication. In the absence of such flexibility, the requirement to appear in person at a competent diplomatic or consular post when the application is submitted does not make it possible to take account of any obstacles that might prevent

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

156 This includes the right to respect for private and family life, guaranteed in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), the right to have regard to the best interests of the child and the right of the child to maintain on a regular basis a personal relationship with both parents, enshrined in Article 24 of the Charter.

157 In relation to Article 5(1) of Directive 2003/86.

158 The Court refers to Article 7 and Article 24(2) and (3) of the Charter.

the submission of that application, in particular where the sponsor's family members are in a country where there is armed conflict. Furthermore, as regards the particular situation of refugees, the absence of any flexibility on the part of the Member State concerned, preventing their family members from submitting their application for family reunification, irrespective of the circumstances, may have the consequence that the persons concerned will not be able to comply with the time limit laid down in the third subparagraph of Article 12(1) of Directive 2003/86, [159] which means that the family reunification of those persons could be subject to additional conditions, contrary to the aim of paying particular attention to the situation of refugees. Consequently, the requirement to appear in person when an application for reunification is submitted, without allowing for derogations in order to take account of the specific situation of the sponsor's family members, results in the exercise of the right to family reunification becoming impossible in practice, so that such legislation, applied without the necessary flexibility, undermines the objective pursued by Directive 2003/86 and deprives it of its effectiveness.

Second, the Court states that a national provision which requires, without exception, the sponsor's family members to appear in person in order to submit an application for family reunification, even where that is impossible or excessively difficult, infringes the right to respect for family unity laid down in Article 7 of the Charter, read, where appropriate, in conjunction with Article 24(2) and (3) thereof. Such an obligation constitutes a disproportionate interference with the right to respect for family unity in relation to the aim, which is nevertheless legitimate, of combating fraud relating to family reunification. Since the application procedure for family reunification takes place in stages, the Member States may request the sponsor's family members to appear in person at a later stage of that procedure, without it being necessary to impose, for the purposes of processing the application for family reunification, the requirement for them to be there in person at the time when the application is submitted. However, in order not to undermine the aim pursued by Directive 2003/86 of promoting family reunification and the fundamental rights which that directive seeks to protect, where the Member State requires the sponsor's family members to appear in person at that later stage, that Member State must facilitate such an appearance, in particular by issuing consular documents or *laissez-passers*, and reduce the number of appearances to the strict minimum.

Judgment of 29 June 2023, *Stadt Frankfurt am Main and Stadt Offenbach am Main (Renewal of a residence permit in the second Member State)* (C-829/21 and C-129/22, EU:C:2023:525)

(Reference for a preliminary ruling – Immigration policy – Status of third-country nationals who are long-term residents – Directive 2003/109/EC – Second subparagraph of Article 9(4), Article 14(1), second subparagraph of Article 15(4), Article 19(2) and Article 22 – Right of third-country nationals to long-term resident status in a

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159 According to that provision, '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 a period of three months after the granting of the refugee status'. Article 7(1) of Directive 2003/86 provides for its part: 'When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

(a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

(b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;

(c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.'

Member State – Grant by the first Member State of a 'long-term resident's EU residence permit' of unlimited duration – Third-country national absent from the territory of the first Member State for a period of more than six years – Consequent loss of entitlement to long-term resident status – Application for renewal of a residence permit issued by the second Member State pursuant to the provisions of Chapter III of Directive 2003/109/EC – Application rejected by the second Member State because of the loss of that entitlement – Conditions)

TE, a Ghanaian national, and EF, a Pakistani national, obtained long-term resident's EU residence permits in Italy bearing, inter alia, the word '*illimitata*' (unlimited (duration)). In 2013 and 2014 respectively, they entered Germany from Italy. On the basis of the long-term resident status conferred on them in Italy, the German authorities granted them, in accordance with German legislation on residence of foreign nationals, [160] residence permits that were valid for one year.

Subsequently, the German authorities rejected applications by TE and EF for renewal of their residence permits. TE and EF challenged the non-renewal before the courts. In particular, in the case of EF, the refusal to renew was based on the ground, provided for in the second subparagraph of Article 9(4) of Directive 2003/109, [161] that he was no longer entitled to long-term resident status in Italy because he had not resided in that Member State for more than six years. The same ground was raised in TE's case in proceedings in which she challenged the rejection of her application for renewal.

The German courts seised of the actions brought by TE and EF, respectively, namely the Hessischer Verwaltungsgerichtshof (Higher Regional Court, Hesse, Germany) and the Verwaltungsgericht Darmstadt (Administrative Court, Darmstadt, Germany), decided to refer a number of questions of interpretation of Directive 2003/109 to the Court of Justice.

In its judgment, the Court clarifies, inter alia, the conditions governing a decision, such as the decisions at issue in the main proceedings, refusing to renew a residence permit of a third-country national on the ground that that person was absent for a period of more than six years from the territory of the Member State that granted long-term resident status and was, therefore, no longer entitled to that status.

Findings of the Court

First of all, the Court notes that entitlement to long-term resident status in the 'first Member State' [162] is a mandatory precondition that must be met by a third-country national wishing to obtain or renew a residence permit in the 'second Member State' [163] under the provisions of Chapter III of Directive 2003/109. Consequently if the second Member State finds that the third-country national concerned is no longer entitled to maintain long-term resident status in the first Member State on the ground, in

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160 Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal Territory) of 30 July 2004 (BGBl. 2004 I, p. 1950), in the version applicable to the disputes in the main proceedings.

161 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), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1).

162 According to Article 2(c) of Directive 2003/109, this is the Member State which for the first time granted long-term resident status to a third-country national.

163 According to Article 2(d) of Directive 2003/109, the term refers to 'any Member State other than the one which for the first time granted long-term resident status to a third-country national and in which that long-term resident exercises the right of residence'.

particular, as provided for in the second subparagraph of Article 9(4) of Directive 2003/109, that he or she has been absent from the territory of the first Member State for a period of more than six years, that finding precludes the renewal of such a residence permit.

Next, as regards the relevant date for assessment of the condition relating to the right to long-term resident status, the Court states that this is the date on which the third-country national concerned lodged his or her application for renewal of the residence permit pursuant to the provisions of Chapter III of Directive 2003/109. However, there is nothing to prevent the second Member State from adopting a new decision refusing that renewal or withdrawing the residence permit pursuant to Article 22 of that directive if it considers that the loss of entitlement to long-term resident status in the first Member State occurred during the administrative procedure or judicial proceedings concerning the renewal application.

Lastly, the Court states that the burden of proof of entitlement to long-term resident status in the first Member State lies, as a matter of principle, with the third-country national concerned. It follows however from Directive 2003/109 [164] that a long-term resident's EU residence permit gives rise to a presumption that that third-country national remains entitled to that status. Admittedly, that presumption is not irrebuttable, since the second Member State may find it necessary to examine one of the grounds for loss of long-term resident status referred to in Article 9 of Directive 2003/109. Nevertheless, any such challenge is subject to a finding that there is sufficiently specific and consistent evidence that one of those grounds may apply.

In that context, the Court specifies the checks which the second Member State must carry out, where such evidence exists, in the light of the ground provided for in the second subparagraph of Article 9(4) of Directive 2003/109, seeking, if necessary, the assistance of the first Member State, in accordance with the principle of sincere cooperation. [165] On the one hand, the third-country national must first be invited to produce proof of his or her presence (if any) in the territory of the first Member State during the six-year period referred to in that provision, a presence in that territory of a total duration of only a few days being sufficient to prevent the loss of entitlement to long-term resident status. On the other hand, in the event of any absence from that territory for a period of more than six years, the second Member State must check, in accordance with the third subparagraph of Article 9(4) of Directive 2003/109, whether the first Member State has made use of the option to provide that, 'for specific reasons', the long-term resident is to maintain his or her status in that Member State in the event of such an absence and, if that is the case, whether such a specific reason is established.

3. Crossing of borders

Judgment of 5 September 2023 (Grand Chamber), *Parliament* v *Commission (Visa exemption for nationals of the United States)* (C-137/21, EU:C:2023:625)

(Action for failure to act – Regulation (EU) 2018/1806 – Point (f) of the first paragraph of Article 7 – List of third countries whose nationals must be in possession of visas when crossing the external borders of the Member State – List of third countries whose nationals are exempt from that requirement – Principle of reciprocity –

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164 Specifically, the first subparagraph of Article 15(4) of Directive 2003/109, read in the light of recital 11 thereof.

165 This principle is set out in Article 4(3) TEU.

Request to adopt a delegated act temporarily suspending the visa exemption for a 12-month period for nationals of the United States of America)

Under Regulation 2018/1806, [166] which lists the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States and those whose nationals are exempt from that requirement, the European Union set the objective of the principle of full visa reciprocity in order to improve the credibility and consistency of its external policy in respect of third countries. [167] On that basis, that regulation provides that a mechanism enabling the principle of reciprocity to be implemented must enable the European Union to respond in solidarity if one of the third countries included in the list in Annex II of the regulation decides to make the nationals of one or more Member States subject to a visa requirement. [168] The regulation delegates to the Commission the power to adopt acts in accordance with Article 290 TFEU concerning in particular the temporary suspension of the exemption from the visa requirement for nationals of such a third country. [169]

In April 2016, the Commission presented to the European Parliament and the Council of the European Union a communication [170] which stated that a situation of non-reciprocity continued in relation to three third countries, including the United States of America, which at that time imposed a visa requirement on nationals of five Member States. After the Commission found [171] that visa non-reciprocity concerned only two third countries, including the United States of America, the Parliament adopted a resolution [172] in March 2017 in which it considered that the Commission was 'legally obliged to adopt a delegated act – temporarily suspending the exemption from the visa requirement for nationals of third countries which have not lifted the visa requirement for citizens of certain Member States' and called upon the Commission to adopt such an act. The Commission replied unfavourably to

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166 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) (OJ 2018 L 303, p. 39).

167 See recital 14 of Regulation 2018/1806.

168 See recital 15 of Regulation 2018/1806.

169 See recital 17 and Article 7(e), (f) and (h) of Regulation 2018/1806. In particular, under Article 7:

'Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

…

(f) if within 24 months of the date of the publication referred to in the third subparagraph of point (a), the third country concerned has not lifted the visa requirement, the Commission shall adopt a delegated act in accordance with Article 10 temporarily suspending the exemption from the visa requirement for a period of 12 months for the nationals of that third country. … Without prejudice to the application of Article 6, during the periods of that suspension the nationals of the third country concerned by the delegated act shall be required to be in possession of a visa when crossing the external borders of the Member States;

…'

170 Communication from the Commission to the European Parliament and the Council of 12 April 2016 – State of play and the possible ways forward as regards the situation of non-reciprocity with certain third countries in the area of visa policy (COM(2016) 221 final).

171 By its second follow-up communication of 21 December 2016.

172 European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 539/2001 (2016/2986(RSP)) (OJ 2018 C 263, p. 2; 'the resolution of March 2017').

that request in May 2017. [173] Following the submission by the Commission of its sixth follow-up communication in March 2020, the Parliament reiterated its call to act [174] given that the United States of America continued to impose a visa requirement on nationals of four Member States. Again, the Commission did not respond favourably to that call. [175]

The Parliament – taking the view that point (f) of the first paragraph of Article 7 of Regulation 2018/1806 requires the Commission to adopt a delegated act where the conditions for the adoption of such an act laid down by that provision are satisfied – brought an action for failure to act against the Commission under Article 265 TFEU.

In its judgment, the Court of Justice rules on the admissibility of the action for failure to act, that is to say, on the one hand, on the time limit for bringing proceedings laid down in that provision and, on the other, on the concept of position defined by an institution within the meaning of that provision in an interinstitutional context. The Court dismisses the action as to the substance on the ground that, by complying with the criteria of that regulation, the Commission did not exceed its discretion when it took the view that it was not required to adopt the delegated act requested.

Findings of the Court

In the first place, the Court rules on the admissibility of the action. [176]

The first plea of inadmissibility alleges that the action was brought out of time, since the Parliament brought its action for failure to act after sending the Commission, by a resolution of October 2020, a second invitation to act, whereas it had not brought such an action following the resolution of March 2017. In this respect, the Court finds that the question whether the Parliament thus failed to comply with the time limit for bringing proceedings laid down in the second paragraph of Article 265 TFEU depends on whether that second call to act is, in the light of objective factors relating to its content or its context, distinct from the first. In that regard, in the communication which followed the resolution of March 2017, the Commission had considered, inter alia, that the adoption of a delegated act temporarily suspending the visa exemption would be counterproductive 'at this moment' and would not serve to contribute to achieving the objective of visa-free travel for all EU citizens. By its resolution of October 2020, the Parliament had asked the Commission to reconsider the approach it had chosen three years earlier, in the light of developments which had occurred in the meantime. The Court notes, in that regard, that various reasons – both of a legal and political nature – may have led the Parliament, in the first instance, not to bring legal proceedings following the adoption of that communication by the Commission. Moreover, it is apparent that the Parliament adopted the resolution of October 2020 after having assessed the evolution of the situation since the adoption of the first call to act. Since the calls to act contained in the two resolutions are distinct in the light of both their content and the context in which they were adopted, the Court concludes that the purpose of the resolution of October 2020 could not have been to circumvent the time limit for bringing proceedings laid down in the second

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173 By its follow-up communication of 2 May 2017 (COM(2017) 227 final).

174 European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity in accordance with Article 7 of Regulation (EU) 2018/1806 (2020/2605(RSP)) (OJ 2021 C 404, p. 157; 'the resolution of October 2020').

175 Communication from the Commission to the European Parliament and the Council defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play (COM(2020) 851 final) ('the communication of December 2020').

176 Under the second paragraph of Article 265 TFEU, an action for failure to act is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, that institution, body, office or agency has not defined its position, that action may be brought within a further period of two months.

paragraph of Article 265 TFEU, which had started to run with the call to act contained in the resolution of March 2017.

As regards the second plea of inadmissibility, alleging that the Commission had defined its position in its communication of December 2020, the Court recalls that, under the first paragraph of Article 265 TFEU, the matter may be brought before it for a declaration that the institution concerned has failed to act, in infringement of the Treaties. In that regard, the Court points out that the fact that the response of an institution to a call to act does not satisfy the person who addressed that call to the institution does not mean that that answer does not amount to a position defined by an institution, the adoption of which puts an end to the failure to act. However, that solution cannot apply in an interinstitutional context, in cases where the inadmissibility of an action for failure to act would allow the institution concerned to persist in a state of inaction. That would be the case if the communication of the Commission at issue were to be classified as a position defined by an institution, for the purposes of the second paragraph of Article 265 TFEU. A refusal to act following a call to act can thus be brought before the Court on the basis of the second paragraph of Article 265 TFEU since that refusal, however explicit it may be, does not put an end to the failure to act. In those circumstances, in an interinstitutional context, the response of an institution consisting – as in the present case – in a statement of the reasons why, according to that institution, it is appropriate not to adopt the requested measure, must necessarily be regarded as a refusal to act on the part of that institution and must therefore be capable of being referred to the Court in the context of an action brought under Article 265 TFEU.

In the second place, as regards the single plea in law raised, on the substance, by the Parliament, according to which the Commission infringed the Treaties by failing to adopt, pursuant to point (f) of the first paragraph of Article 7 of Regulation 2018/1806, a delegated act temporarily suspending the exemption from the visa requirement for nationals of the United States of America, the Court observes that, admittedly, it appears from the wording of that provision that the Commission is required to adopt such an act where the conditions required for its adoption are satisfied. However, that interpretation must be ruled out in the light of the general scheme of the first paragraph of Article 7 of Regulation 2018/1806, characterised in particular by the multi-stage structure of the reciprocity mechanism which it establishes. It is thus apparent, in particular, from a combined reading of the provisions set out in that article, read in the light of recital 17 of that regulation, that the Commission enjoys discretion as to whether or not to adopt a delegated act based on that article. The Commission is therefore not obliged to adopt the delegated act in question after the expiry of the 24-month period commencing on the date of publication of the notification referred to in point (a) of the first paragraph of Article 7 of that regulation.

By contrast, the Commission must take into account the three criteria set out in point (d) of the first paragraph of Article 7 of Regulation 2018/1806 for the purpose of determining whether it is appropriate, in the light of the objective of full reciprocity, to suspend the exemption from the visa requirement for nationals of the third country concerned or whether, on the contrary, it is appropriate to refrain from taking such a measure, in the light of interests relating, in particular, to the external relations of the Member States, the countries associated with the Schengen area and the European Union. [177] After having examined those three criteria, the Court finds that the Commission did not

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177 According to Article 7(d) of Regulation 2018/1806:

'Where a third country listed in Annex II applies a visa requirement for nationals of at least one Member State, the following provisions shall apply:

...

exceed the discretion it enjoyed in this case in taking the view, following the call to act which the Parliament had addressed to it in October 2020, that it was not required to adopt the delegated act in question. Consequently, it dismisses the action as unfounded.

(d) the Commission shall, when considering further steps in accordance with point (e), (f) or (h), take into account the outcome of the measures taken by the Member State concerned with a view to ensuring visa-free travel with the third country in question, the steps taken in accordance with point (b), and the consequences of the suspension of the exemption from the visa requirement for the external relations of the Union and its Member States with the third country in question;

...'

V. Judicial cooperation in criminal matters

1. European arrest warrant

a. Jurisdiction of the issuing judicial authority

Judgment of 31 January 2023 (Grand Chamber), *Puig Gordi and Others*
(C-158/21, EU:C:2023:57)

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Surrender procedures between Member States – Conditions for execution – Jurisdiction of the issuing judicial authority – Second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union – Right of access to a tribunal previously established by law – Possibility of issuing a new European arrest warrant relating to the same person)

Following the adoption of the laws relating to the independence of the Autonomous Community of Catalonia (Spain) and the holding of a referendum to that end, criminal proceedings were initiated against a number of individuals before the Tribunal Supremo (Supreme Court, Spain), the referring court. In the autumn of 2019, several European arrest warrants (EAWs) were thus issued by that court. The procedures for the execution of the EAWs issued against Mr Puigdemont Casamajó and Mr Comín Oliveres were suspended after their election to the European Parliament. As regards the EAW issued against Mr Puig Gordi, the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium), by order adopted in August 2020, refused to execute it on the ground that, in its view, the referring court did not have jurisdiction to issue that EAW. By judgment delivered in January 2021, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) dismissed the appeal brought against that order.

Against that background, the referring court asks the Court of Justice a series of questions aimed, essentially, at establishing whether an executing judicial authority may refuse to execute an EAW on the ground that, it its view, the issuing judicial authority does not have jurisdiction to issue that warrant or to try the person prosecuted, and whether the framework decision on the EAW [178] precludes the issuing of a new EAW after the execution of a first EAW has been refused.

By its judgment, the Court, sitting as the Grand Chamber, clarifies, inter alia, the conditions under which the executing judicial authority may refuse to act on an EAW on account of the risk of infringement, where the requested person is surrendered, of that person's fundamental right to a fair trial, [179] in connection with such a lack of jurisdiction.

Findings of the Court

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178 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').

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

First of all, the Court states that an executing judicial authority may not refuse to execute an EAW on the basis of a ground for non-execution which stems not from Framework Decision 2002/584, but solely from the law of the executing Member State. In that regard, the Court states that the grounds relied on in its case-law as requiring or authorising that no action be taken in respect of an EAW all derive from Framework Decision 2002/584. Furthermore, to accept that a Member State may add other grounds, based on national law, to those grounds for not executing an EAW would hinder the proper functioning of the simplified system for the surrender of persons established by that framework decision. The Court adds, however, that a Member State is entitled, exceptionally, to invoke a ground for non-execution based on the obligation to ensure respect for the fundamental rights afforded to the person concerned under EU law, [180] subject to compliance with the strict conditions set out in the Court's case-law in that regard.

In the second place, the Court rules that the executing judicial authority may not verify whether an EAW has been issued by a judicial authority which had jurisdiction for that purpose and refuse to execute that EAW where it considers that that is not the case. [181] In that regard, Article 6(1) of Framework Decision 2002/584 provides that the issuing judicial authority is the judicial authority of the issuing Member State which is competent to issue an EAW by virtue of the law of that State. Although the executing judicial authority must ensure, before executing an EAW, that it was indeed issued by a judicial authority, it cannot, however, verify that the authority in question has jurisdiction to issue such a warrant in the light of the rules of the law of the issuing Member State. Within the framework of the procedural autonomy afforded to each Member State, it is for the latter to designate the judicial authorities that have jurisdiction to issue an EAW, those judicial authorities then having to assess themselves their jurisdiction for that purpose in the light of the law of the issuing Member State.

In the third place, the Court states that the executing judicial authority called upon to decide on the surrender of a person for whom an EAW has been issued may not refuse to execute that warrant on the ground that that person is at risk, following his or her surrender to the issuing Member State, of being tried by a court which lacks jurisdiction for that purpose unless,

– first, that judicial authority has objective, reliable, specific and properly updated information showing that there are systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs, in the light of the requirement for a tribunal established by law, which mean that the individuals concerned are generally deprived, in that Member State, of an effective legal remedy enabling a review of the jurisdiction of the criminal court called upon to try them, and

– secondly, that judicial authority finds that, in the particular circumstances of the case in question, there are substantial grounds for believing that, taking into account the information that is provided by the person for whom that EAW has been issued, the court which is called upon to hear the proceedings to which that person will be subject manifestly lacks jurisdiction for that purpose.

In particular, the Court states that the jurisdiction of a court to hear a case is part of the requirement for a 'tribunal established by law', flowing from Article 47 of the Charter. Consequently, where a person for whom an EAW has been issued claims that he or she will be exposed, following his or her surrender, to an infringement of his or her right to an effective remedy before an impartial tribunal because the court called upon to try him or her lacks jurisdiction, it is for the executing judicial authority to assess whether that allegation is well founded in the context of that two-step examination. Where the

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180 Article 1(3) of Framework Decision 2002/584.

181 The Court rules on the basis of Article 1(1) and (2) and Article 6(1) of Framework Decision 2002/584.

executing judicial authority considers that the information available to it does not demonstrate the existence of the abovementioned deficiencies, that authority cannot refuse to execute that EAW on that ground. Where, in the issuing Member State, legal remedies make it possible to review the jurisdiction of the court called upon to try such a person (in the form of an examination of its own jurisdiction by that court or an action available before another court), the risk, for that same person, of being tried by a court of that Member State which has no jurisdiction for that purpose may, in principle, be ruled out by the exercise, by that person, of those legal remedies. In the absence of evidence to demonstrate the existence of the deficiencies referred to above, the executing judicial authority cannot presume that such legal remedies are lacking, since that authority is, on the contrary, required, in accordance with the principle of mutual trust, to base its analysis on the existence and effectiveness of those legal remedies.

In the fourth place and lastly, the Court finds that several successive EAWs may be issued against a requested person with a view to obtaining his or her surrender by a Member State after the execution of a first EAW concerning that person has been refused by that Member State, provided that the execution of a new EAW does not result in an infringement of the fundamental rights and legal principles enshrined in Article 6 TEU, [182] and provided that the issuing of the latter EAW is proportionate. The issuing of a new EAW may prove necessary, in particular after the evidence which prevented execution of the previous EAW has been rejected. In the context of the examination of whether it is proportionate to issue a new EAW, the issuing judicial authority must nevertheless take into account the nature and gravity of the offence for which the requested person is being prosecuted, the consequences for that person of the EAW or EAWs previously issued against him or her, or the prospects of execution of any new EAW.

b. Execution of European arrest warrants and conditions of surrender

Judgment of 18 April 2023 (Grand Chamber), *E.D.L. (Ground for refusal based on illness)* (C-699/21, EU:C:2023:295)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 23(4) – Surrender procedures between Member States – Grounds for non-execution – Article 4(3) TEU – Duty of sincere cooperation – Postponement of the execution of the European arrest warrant – Article 4 of the Charter of Fundamental Rights of the European Union – Prohibition of inhuman or degrading treatment – Serious, chronic and potentially irreversible illness – Risk of serious harm to health affecting the person concerned by the European arrest warrant)

In 2019, a Croatian court issued a European arrest warrant for E.D.L., who resides in Italy, for the purposes of conducting a criminal prosecution. In the context of the execution of that arrest warrant, the Corte d'appello di Milano (Court of Appeal, Milan, Italy) required E.D.L. to be assessed by a psychiatrist; the psychiatrist's report revealed that he was suffering from a psychotic disorder requiring treatment that made him unsuitable for prison life. On that basis, the Court of Appeal, Milan, held that the execution of the European arrest warrant would interrupt E.D.L.'s treatment and lead to a deterioration in his general state of health, or even to an increased risk of suicide. However, the

182 That obligation is laid down in Article 1(3) of Framework Decision 2002/584.

provisions of Italian law [183] transposing Framework Decision 2002/584 [184] on the European arrest warrant make no provision to the effect that the surrender of a requested person can be refused for such health reasons.

The Court of Appeal, Milan, had doubts as to the constitutionality of those national provisions and therefore referred them to the Corte costituzionale (Constitutional Court, Italy). Additionally, according to the latter court, the situation of a serious threat to the health of the person concerned due to chronic illnesses of a potentially indefinite duration, such as those from which E.D.L. is suffering, is not one of the grounds for refusing to execute a European arrest warrant provided for in Framework Decision 2002/584. It therefore decided to make a reference to the Court of Justice on how to interpret that framework decision in such a situation.

In its judgment, the Court of Justice, sitting in its Grand Chamber formation, gives a ruling on the conditions in which the executing judicial authority has the power or the obligation, under Framework Decision 2002/584, to postpone the surrender of a requested person and to refuse to execute a European arrest warrant where there is a risk of serious harm to the health of that person and on the obligation, in such circumstances, to enter into dialogue with the issuing judicial authority.

Findings of the Court

In the first place, the Court holds that Framework Decision 2002/584 does not provide that the executing judicial authorities may refuse to execute a European arrest warrant solely on the ground that the person who is the subject of such an arrest warrant suffers from serious, chronic and potentially irreversible illnesses. Having regard to the principle of mutual trust which underlies the area of freedom, security and justice, [185] there is a presumption that the care and treatment provided in the Member States for the management of, inter alia, such illnesses will be adequate, including in a prison setting.

Nevertheless, having regard to Article 23(4) of Framework Decision 2002/584, [186] the executing judicial authority may postpone the surrender of the requested person temporarily provided that there are serious reasons for believing, on the basis of objective material, such as medical certificates or expert reports, that the execution of the arrest warrant manifestly risks endangering the health of that person, for example because of a temporary illness or condition of that person existing before the date on which he or she is to be surrendered.

In the second place, the Court holds that it cannot be ruled out that the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, either as a result of or, in certain circumstances,

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183 Legge n. 69 – Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (Law No 69 laying down provisions to bring domestic law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States), of 22 April 2005 (GURI No 98 of 29 April 2005, p. 6), as amended and in the version applicable to the facts in the main proceedings.

184 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).

185 That field of EU law is governed by Article 67 et seq. TFEU and covers, inter alia, judicial cooperation in criminal matters.

186 According to that provision 'the surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health'.

regardless of the level of quality of the care available in the issuing Member State, in cases where that treatment reaches a minimum level of severity exceeding the unavoidable level of suffering inherent in detention.

Where the executing judicial authority has, in the light of the objective material before it, substantial and established grounds for believing that the surrender of the requested person, who is seriously ill, would expose him or her to a real risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health, that authority must postpone the surrender temporarily. In addition, it must ask the issuing judicial authority to provide it with all the information necessary to ensure that the manner in which the criminal proceedings on which the European arrest warrant is based will be conducted or the conditions of any detention of that person make it possible to rule out the risk at issue. If such safeguards are provided by the issuing judicial authority, the European arrest warrant must be executed and a new surrender date must be agreed.

In the third place, the Court holds that it would, however, be contrary to the general scheme of Article 23(4) of Framework Decision 2002/584, which refers to the 'temporary' nature of the postponement of the surrender, for an executing judicial authority to be able to defer the surrender of a requested person for a considerable or even indefinite period of time in order to avoid a risk of serious harm to health materialising.

Consequently, in exceptional circumstances, in the light of the information provided by the issuing judicial authority, and of any other information available to the executing judicial authority, the latter authority may come to the conclusion, first, that there are substantial and established grounds for believing that, if he or she is surrendered to the issuing Member State, the requested person will be subject to a risk of serious harm to his or her health and, second, that that risk cannot be ruled out within a reasonable period of time. In such circumstances, the executing judicial authority must, in accordance with Article 1(3) of Framework Decision 2002/584, [187] read in the light of Article 4 of the Charter, refuse to execute the European arrest warrant.

Judgment of 6 June 2023 (Grand Chamber), *O.G. (European arrest warrant issued against a third-country national)* (C-700/21, EU:C:2023:444)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Grounds for optional non-execution of the European arrest warrant – Article 4(6) – Objective of social rehabilitation – Third-country nationals staying or residing on the territory of the executing Member State – Equal treatment – Article 20 of the Charter of the Fundamental Rights of the European Union)

O.G., a Moldovan national, was convicted and sentenced in Romania to five years' imprisonment for tax evasion and misappropriation of funds due for payment of income tax and value added tax (VAT), committed between September 2003 and April 2004. On 13 February 2012, the Judecătoria Brașov (Court of First Instance, Brașov, Romania) issued a European arrest warrant against O.G., who in the meantime had moved to Italy, for the purposes of executing a custodial sentence.

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[187] According to that provision, Framework Decision 2002/584 is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

By a first judgment of 7 July 2020, the competent Court of Appeal [188] ordered that O.G. be surrendered to the issuing judicial authority. O.G. appealed against that decision before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which set aside that judgment and referred the case back to the Court of Appeal.

Under EU law, [189] Member States may only refuse to execute a European arrest warrant on the grounds laid down in Framework Decision 2002/584, [190] which include optional grounds for non-execution, namely grounds that the Member States have the power – but not the obligation – to make provision for when transposing that framework decision. One of those grounds concerns the option for the executing judicial authority to refuse to execute that warrant if it has been issued for the purpose of executing a custodial penalty where the requested person is staying in, or is a national or a resident of the executing Member State, and that State undertakes to execute the sentence or detention order in accordance with its domestic law. [191]

The Court of Appeal held that the law transposing that ground of optional non-execution into Italian law limits the option of refusing surrender to Italian nationals and nationals of other Member States only, to the exclusion of third-country nationals, even where the latter prove that they have established stable economic, occupational and emotional ties in Italy.

Finding that O.G.'s stable family and employment situation in Italy was sufficiently proven, that court raised questions as to the constitutionality of that law before the Corte costituzionale (Constitutional Court, Italy), which is the referring court in this case. The referring court asks whether, by imposing surrender on third-country nationals residing permanently in Italy for the purposes of executing a custodial sentence abroad, that law improperly restricts the scope of the ground of optional non-execution laid down in Article 4(6) of the framework decision, the objective of which is to ensure the social rehabilitation of the sentenced person after the end of his or her sentence, which presupposes the maintenance of the sentenced person's family and social connections.

The referring court considers that it is necessary, before ascertaining whether the national law at issue in the main proceedings is consistent with the Italian constitution, to examine whether it complies with EU law.

Asked by the referring court as to the interpretation of Article 4(6) of the framework decision, the Court of Justice, sitting as the Grand Chamber, held that that provision precludes a law of a Member State which, in transposing it, excludes, absolutely and automatically, any third-country national staying or residing in the territory of that Member State from benefiting from the ground for optional non-execution of a European arrest that it lays down, without the executing judicial authority being able to assess the connections that that national has with that Member State. It also clarifies the nature of the assessment that that authority must undertake to determine whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is resident in the executing Member State, and as to the elements which are capable of showing that there are, between that person and the executing Member State, connections demonstrating sufficient integration into that State such that the execution in that Member State of the custodial sentence pronounced against

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188 Corte d'appello di Bologna (Court of Appeal, Bologna, Italy; 'the Court of Appeal').

189 Article 1(2) and Articles 4 and 4a of 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).

190 'The framework decision'.

191 Optional ground for non-execution laid down in Article 4(6) of the framework decision.

that person in the issuing Member State will contribute to increasing the chances of social rehabilitation after that sentence has been executed.

Findings of the Court

As a first step, the Court recalls that, in accordance with the principle of mutual recognition, the execution of the European arrest warrant constitutes the rule. The refusal of execution, which is only possible on the grounds of mandatory or optional non-execution laid down in the framework decision, is intended to be an exception, which must be interpreted strictly.

As regards the grounds for optional non-execution of the European arrest warrant listed in the framework decision, it is clear from the case-law of the Court that, when transposing that framework decision into national law, the Member States have a margin of discretion. Therefore, they are free to transpose those grounds into their domestic law or not to do so. They may also choose to limit the situations in which the executing judicial authority may refuse to execute a European arrest warrant, thus facilitating the surrender of requested persons, in accordance with the principle of mutual recognition.

There are, however, limits to the discretion available to Member States when transposing a ground for optional non-execution laid down in Article 4(6) of the framework decision.

In the first place, a Member State choosing to transpose that ground must comply with the fundamental rights and principles of EU law, which include the principle of equality before the law, guaranteed by Article 20 of the Charter of the Fundamental Rights of the European Union, [192] which requires that similar situations must not be treated differently and that different situations must not be treated in the same manner, unless such different treatment is objectively justified.

The requirement that situations must be comparable, for the purpose of determining whether there is a breach of the principle of equality before the law, must be assessed in the light, in particular, of the subject matter and purpose of the act that makes the distinction in question, taking into account the principles and objectives of the field to which the act relates.

The Court notes, in that regard, that the difference in treatment resulting from the national law at issue in the main proceedings between Italian nationals and those of other Member States, on the one hand, and third-country nationals on the other hand, was established with a view to transposing Article 4(6) of the framework decision, which makes no distinction depending on whether the person, who is the subject of the European arrest warrant and who is not a national of the executing Member State, is or is not a national of another Member State.

It follows from the wording of that provision and the objective that it pursues that it cannot be assumed that a third-country national, who is the subject of such a European arrest warrant and staying or resident in the executing Member State, is necessarily in a situation that is different from that of a national of that Member State or that of a national of another Member State staying or resident in the executing Member State and is the subject of such a warrant. On the contrary, those persons may be in comparable situations, for the purpose of applying the ground of optional non-execution provided for in that provision, when they are integrated to a certain extent in the executing Member State.

Therefore, a national law transposing Article 4(6) of the framework decision does not comply with Article 20 of the Charter if it treats differently, on the one hand, its own nationals and other citizens of the Union and, on the other hand, third-country nationals, by refusing the latter, absolutely and

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192 'The Charter'.

automatically, the benefit of the ground for optional non-execution provided for in the framework decision, even where those third-country nationals are staying or resident in the territory of that Member State and without account being taken of their degree of integration within the society of that Member State. That difference of treatment cannot be regarded as objectively justified.

However, there is nothing to preclude a Member State, when transposing that provision into its domestic law, from making the benefit of the ground of optional non-execution that that provision lays down subject to the condition that that national has stayed or resided continuously in that Member State for a minimum period of time, provided that that condition does not go beyond what is necessary to ensure that the requested person is integrated to a certain degree in the executing Member State.

In the second place, a transposition of Article 4(6) of the framework decision cannot have the effect of depriving the executing judicial authority of the discretion necessary to be able to decide whether or not, having regard to the intended objective of social rehabilitation, to refuse to execute the European arrest warrant.

A law such as the one in issue undermines the objective of social rehabilitation by depriving the executing judicial authority of the power to assess whether the connections of the third-country national referred to in an European arrest warrant to the executing Member State are sufficient to decide that the execution of the sentence in that Member State would increase the chances of rehabilitation after the end of that sentence.

As a second step, the Court states that, in order to assess whether it is appropriate to refuse to execute the European arrest warrant issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all of the specific elements characterising the situation of the requested person capable of showing that there are connections between that person and the executing Member State that may lead to the conclusion that that person is sufficiently integrated into that State. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State.

In particular, where the requested person has established the centre of his or her family life and his or her interests in the executing Member State, account must be taken of the fact that the social rehabilitation of that person after he or she has served his or her sentence will be assisted by the fact that he or she may maintain regular and frequent contact with his or her family and persons close to him or her.

Judgment of 21 December 2023 (Grand Chamber), *GN (Ground for refusal based on the best interests of the child)* (C-261/22, EU:C:2023:1017)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Article 15(2) – Surrender procedure between Member States – Grounds for non-execution – Charter of Fundamental Rights of the European Union – Article 7 – Respect for private and family life – Article 24(2) and (3) – Taking into consideration the best interests of the child – Right of every child to maintain on a regular basis a personal relationship and direct contact with both parents – Mother of young children living with her)

In June 2020, the Belgian authorities issued a European arrest warrant (EAW) in respect of GN for the purpose of enforcing a custodial sentence handed down for the offences of trafficking in human beings and facilitating illegal immigration, committed in 2016 and 2017.

On 2 September 2021, GN was arrested in Bologna (Italy). At the time of her arrest, she was pregnant and in the company of her son who was under three years of age and who lived with her. In the light of her situation, the Corte d'appello di Bologna (Court of Appeal, Bologna, Italy) unsuccessfully requested the Belgian authorities to provide it with information concerning, inter alia, the detailed arrangements for enforcement, in Belgium, of sentences imposed on mothers living with minor children and concerning the measures envisaged in relation to those children.

By judgment of 15 October 2021, that court refused to surrender GN on the ground that, in the absence of a satisfactory response to that request for information, it was uncertain that Belgian law makes provision for custodial arrangements protecting the rights of mothers and their young children to an extent that is comparable to the law in force in Italy.

Hearing an appeal on a point of law against that refusal decision, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the referring court, states that neither the provisions of the Italian law in force [193] nor Framework Decision 2002/584 [194] refers, as a ground for refusing to execute an EAW, to the situation where the requested person is the mother of young children living with her. It is nevertheless uncertain whether it may refuse to execute an EAW on the ground that the surrender of the mother of young children to the issuing Member State would risk undermining her right to respect for private and family life and the best interests of her children, as protected, respectively, by Articles 7 and 24 of the Charter of Fundamental Rights of the European Union ('the Charter'). [195]

In its judgment, the Court of Justice, sitting as the Grand Chamber, rules that Framework Decision 2002/584, [196] read in the light of the Charter, [197] precludes the executing judicial authority from refusing to surrender the person who is the subject of an EAW on the ground that that person is the mother of young children living with her, unless, first, that authority has available to it information demonstrating that there is a real risk of breach of that person's fundamental right to respect for her private and family life and of disregard for the best interests of her children on account of systemic or generalised deficiencies in the conditions of detention of mothers of young children and of the care of those children in the issuing Member State, and second, there are substantial grounds for believing that, in the light of their personal situation, the persons concerned will run that risk on account of those conditions.

Findings of the Court

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193 Legge n. 69 – Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri (Law No 69 laying down provisions to bring domestic law into line with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) of 22 April 2005 (GURI No 98 of 29 April 2005, p. 6), in the version resulting from decreto legislativo n. 10 (Legislative Decree No 10) of 2 February 2021 (GURI No 30 of 5 February 2021), and applicable to the facts of the main proceedings.

194 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').

195 Article 7 of the Charter concerns the right to respect for private and family life, while Article 24(2) provides that, 'in all actions relating to children, … the child's best interests must be a primary consideration'. Article 24(3) provides that 'every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'.

196 Article 1(2) and (3) of that framework decision.

197 Article 7 and Article 24(2) and (3) of the Charter.

First of all, the Court states that Framework Decision 2002/584 does not provide for the possibility of refusing to execute an EAW on the sole ground that the requested person is the mother of young children living with her. Having regard to the principle of mutual trust between the Member States, there is a presumption that the conditions of detention of the mother of young children and of the care of those children in the Member State issuing the EAW are appropriate to such a situation.

Nevertheless, Framework Decision 2002/584 [198] is not to have the effect of modifying the obligation to respect the fundamental rights guaranteed by the Charter, and, in the present case, more specifically, those enshrined in Article 7 and Article 24(2) and (3) thereof. Thus, first, the obligation to take account of the best interests of the child applies also in the context of an EAW issued in respect of the mother of young children, which, while not addressed to those children, has significant consequences for them. Second, every child has the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests, those interests having to be assessed by taking into account all the specific circumstances. Moreover, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life.

It follows that the executing judicial authority may refrain, exceptionally, from giving effect to the EAW if there is a real risk that the execution of that warrant would result in a breach of the abovementioned fundamental rights. However, a lack of certainty on the part of that authority as regards the existence, in the issuing Member State, of conditions comparable to those existing in the executing Member State concerning the detention of mothers of young children and the care of those children cannot permit the inference that that risk has been established. That authority is required to ascertain, in the context of a two-step examination, first, whether there are systemic or generalised deficiencies in those conditions in the issuing Member State, or deficiencies in those conditions affecting more specifically an objectively identifiable group of persons, and second, whether there are substantial grounds for believing that, on account of those conditions and in the light of their personal situation, the persons concerned by an EAW will run a real risk of breach of their fundamental rights.

If the executing judicial authority considers that it does not have available to it all the information necessary to take a decision on the surrender, it must request the issuing judicial authority to furnish supplementary information and the issuing judicial authority is required to furnish such information. In order not to bring the operation of the EAW to a standstill, those authorities must engage in sincere cooperation. [199]

Consequently, it is only where the executing judicial authority considers, having regard to all the information available to it, including the possible absence of assurances provided by the issuing judicial authority, that the execution of the EAW is liable to give rise to a real risk of breach of the fundamental rights at issue of the persons concerned that that authority must refrain from giving effect to that EAW.

2. Right to information in criminal proceedings

Judgment of 22 June 2023 (Grand Chamber), *K.B. and F.S. (Raising ex officio of an infringement in criminal proceedings)* (C-660/21, EU:C:2023:498)

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198 Article 1(3) of that framework decision.

199 The principle of sincere cooperation is laid down in the first subparagraph of Article 4(3) TEU.

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – Directive 2012/13/EU – Articles 3 and 4 – Obligation for the competent authorities to inform suspects and accused persons promptly of their right to remain silent – Article 8(2) – Right to invoke a breach of that obligation – National legislation prohibiting the trial court from raising such a breach of its own motion – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union)

On 22 March 2021, K.B. and F.S. were questioned by police officers and arrested in the act of committing theft of fuel.

The French court before which criminal proceedings were brought against K.B. and F.S. found that certain investigative acts had been carried out, and certain self-incriminating statements taken, before K.B. and F.S. had been informed of their rights, contrary to the national law [200] transposing Articles 3 and 4 of Directive 2012/13. [201] Owing to the delay in placing them in custody and informing them of their rights, in particular the right to remain silent, that court considered that the right not to incriminate oneself had been infringed. In those circumstances, the vehicle search, the suspects' detention in custody and all the consequential acts should, in principle, be annulled. However, in French criminal law, [202] pleas of procedural invalidity, such as breach of the obligation to inform a person of the right to remain silent at the time when that person is placed in custody, must be raised by the person concerned or that person's lawyer before any defence on the merits. Neither the suspects nor their lawyer raised a plea of invalidity alleging breach of that obligation before putting forward a defence on the merits.

Furthermore, the referring court states that, according to the Cour de cassation (Court of Cassation, France), trial courts are prohibited from raising of their own motion a plea of invalidity of the procedure, apart from lack of jurisdiction, since, as in the present case, the accused person, who has the right to be assisted by a lawyer when he or she appears or is represented before a trial court, can plead such invalidity before mounting a defence on the merits, and, moreover, can do so on appeal if he or she did not appear or was not represented at first instance.

In that context, the referring court asked the Court of Justice whether the prohibition on it raising of its own motion a breach of an obligation such as the obligation, laid down in Articles 3 and 4 of Directive 2012/13, to inform suspects and accused persons promptly of their right to remain silent, is compatible with EU law.

In its judgment, the Court, sitting as the Grand Chamber, replies that Articles 3 and 4 and Article 8(2) of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), do not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities to inform suspects or accused persons promptly of their right to remain silent, where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer, [203] if necessary having

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200 Article 63-1 of the French Code of Criminal Procedure provides in particular that a person who is placed in custody is to be immediately informed by a senior police officer or, under the latter's supervision, by a police officer, that he or she has the right, at the hearings, after having stated his or her identity, to make statements, to answer the questions put to him or her or to remain silent.

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

202 In this case, Article 385 of the Code of Criminal Procedure.

203 In accordance with Article 3 of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have

obtained legal aid, [204] and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time.

Findings of the Court

The Court recalls that Directive 2012/13 [205] is based on the rights set out, inter alia, in Articles 47 and 48 of the Charter and seeks to promote those rights with regard to suspects or accused persons in criminal proceedings. The right to remain silent is safeguarded not only by Article 48 of the Charter, relating to the presumption of innocence and right of defence, but also by the second paragraph of Article 47 of the Charter, relating to the right to a fair hearing.

Article 3(1)(e) and (2) and Article 4(1) and (2) of Directive 2012/13 lay down an obligation, for the competent authorities of the Member States, to inform suspects or accused persons promptly of their rights, in particular the right to remain silent. In any event, that information must be provided at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

Under Article 8(2) of Directive 2012/13, Member States must ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with that directive. Since that provision is particularly intended to be applied in a situation in which information about the right to remain silent has been given late, suspects or accused persons or their lawyers must be able to challenge that failure of communication.

The provision referred to above, however, specifies neither the procedure under and time limits within which suspects and accused persons, and their lawyers, if any, may invoke a breach of the obligation to inform such suspects and accused persons promptly of their right to remain silent, nor the possible procedural consequences of a failure to invoke such a breach, such as the power, for the trial court in a criminal case, to raise such a breach of its own motion with a view to the annulment of the procedure. Member States thus have some leeway to establish that procedure and those consequences.

Nevertheless, when implementing Article 3(1)(e), Article 4(1) and Article 8(2) of Directive 2012/13, the Member States must, in accordance with Article 51(1) of the Charter, ensure that the requirements arising both from the right to an effective remedy and to a fair hearing laid down in the first and second paragraphs of Article 47 of the Charter, and the rights of defence laid down in Article 48(2) of the Charter, to which specific expression is given by those provisions of Directive 2012/13, are respected.

In that regard, the Court notes that, according to the explanations given by the French Government, French criminal law [206] allows suspects or accused persons and also their lawyers, if any, to invoke at any time, between their being placed in custody and the submission of the defence on the merits, any breach of the obligation to inform suspects or accused persons promptly of their right to remain silent, and it should be made clear that both suspects and accused persons as well as their lawyers have a

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a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

204 As provided in Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L 297, p. 1).

205 See recital 14 of Directive 2012/13.

206 In particular, Article 63-1(3), Article 63-4-1 and Article 385 of the Code of Criminal Procedure.

right of access to the file and, in particular, to the record of notification of the custodial measure and the associated rights.

It is open to the Member States, by virtue of the leeway given to them by Directive 2012/13, to limit the time within which such a breach may be invoked to the stage preceding submission of the defence on the merits. In particular, the prohibition on the trial court raising that breach of its own motion with a view to the annulment of the procedure respects, in principle, the rights affirmed by the Charter, as long as the suspects, the accused persons or their lawyers had a practical and effective opportunity to invoke the breach concerned and had a reasonable period of time within which to do so as well as access to the file.

However, that conclusion applies only in so far as, throughout the period within which those persons could invoke an infringement of Article 3(1)(e) and Article 4(1) of Directive 2012/13, they – practically and effectively – had the right of access to a lawyer, as laid down in Article 3 of Directive 2013/48 and as facilitated by the system of legal aid provided for by Directive 2016/1919.

The fact that suspects and accused persons must be offered a practical and effective opportunity under national law to consult a lawyer does not however preclude them, if they waive that opportunity, from having, in principle, to bear the possible consequences of that waiver where it has been given in accordance with Directive 2013/48. In that regard, the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of waiving it, and the waiver must be given voluntarily and unequivocally.

Lastly, the Court notes that, under the case-law of the European Court of Human Rights, where a procedural defect has been identified, it falls to the domestic courts to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being prima facie incompatible with the requirements of a fair trial according to Article 6 of the European Convention on Human Rights. [207] Thus, where a suspect has not been informed in due time of the privilege against self-incrimination and the right to remain silent, it is necessary to assess whether, notwithstanding that failure, the criminal proceedings as a whole can be considered fair, taking into account a series of factors, including whether the statements taken without such information having been given formed an integral or significant part of the probative evidence, and the strength of the other evidence in the case. [208]

3. Mutual recognition of criminal convictions

Judgment of 12 January 2023, *MV (Formation of a cumulative sentence)* (C-583/22 PPU, EU:C:2023:5)

(Reference for a preliminary ruling – Area of freedom, security and justice – Police and judicial cooperation in criminal matters – Framework Decision 2008/675/JHA – Article 3(1) – Principle of assimilation of earlier convictions handed down in another Member State – Obligation to ensure that the effects attached to those convictions are equivalent to those attached to previous national convictions – National rules concerning subsequent formation of a cumulative sentence – Multiple offences – Determination of an aggregate

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207 ECtHR, 28 January 2020, *Mehmet Zeki Çelebi v. Turkey*, CE:ECHR:2020:0128JUD002758207, § 51.

208 ECtHR, 13 September 2016, *Ibrahim and Others v. the United Kingdom*, CE:ECHR:2016:0913JUD005054108, §§ 273 and 274.

sentence – Maximum of 15 years for non-life custodial sentences – Article 3(5) – Exception – Offence committed before the handing down or execution of sentences in another Member State)

On 10 October 2003, MV, a French national, abducted a female student from a university campus in Germany and raped her. Although he had never previously been convicted of a criminal offence in Germany, MV had, however, been sentenced on several occasions in France, in particular to a period of 15 years' imprisonment. All those convictions were handed down by French courts after the said date and related to acts committed before October 2003.

After being imprisoned in France for 17 years and 9 months, MV was surrendered to the German authorities in July 2021. In February 2022, the Landgericht Freiburg im Breisgau (Regional Court, Freiburg im Breisgau, Germany) tried MV for the offences committed in Germany in October 2003, convicted him of aggravated rape and sentenced him to six years' imprisonment. That court held that the sentence 'actually commensurate' with the offences committed by MV in Germany was seven years' imprisonment. Nevertheless, since it was not possible to form a subsequent cumulative sentence which included the sentences imposed in France, that court reduced that sentence by one year 'on a compensatory basis'.

The referring court, hearing an appeal on a point of law against that judgment, is uncertain, in essence, as to whether it is compatible with the provisions of Framework Decision 2008/675 [209] which lay down, first, the principle of equal treatment of criminal convictions handed down in other Member States [210] and, secondly, the exception to that principle. [211]

In that context, that court states that the convictions handed down in France against MV could in principle be cumulated if they were treated in the same way as sentences handed down in Germany. However, in the context of the formation of a subsequent cumulative sentence, account must be taken of the maximum custodial sentence of 15 years, in accordance with the rules of German law. Were there to be equal treatment of convictions handed down in France against MV, that maximum would already have been reached with the custodial sentence of 15 years imposed on the person concerned in that Member State. Consequently, the sentence imposed on him in Germany could not, in practice, be executed.

The referring court therefore asks the Court of Justice whether the abovementioned principle is applicable in the present case. If that principle was not applicable, the referring court also seeks to ascertain whether, when determining the penalty imposed for an offence committed on national

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

210 This principle is set out in Article 3(1) of Framework Decision 2008/675, according to which 'each Member State shall ensure that in the course of criminal proceedings against a person, previous convictions handed down against the same person for different facts in other Member States, in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records, are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law'.

211 That exception is provided for in the first subparagraph of Article 3(5) of Framework Decision 2008/675, according to which 'if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, paragraphs 1 and 2 shall not have the effect of requiring Member States to apply their national rules on imposing sentences, where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings'.

territory, the disadvantage resulting from the impossibility of imposing a subsequent cumulative sentence must necessarily be specifically demonstrated and justified.

In the context of the urgent preliminary ruling procedure, the Court defines the scope of the exception to the principle of equal treatment of criminal convictions handed down in other Member States and the obligations of the Member States when implementing that principle.

Findings of the Court

In the first place, the Court states that, under Framework Decision 2008/675, [212] a Member State is not required, in criminal proceedings brought against a person, to attach to previous convictions handed down in another Member State, against that person and in respect of different facts, effects equivalent to those attached to previous national convictions in accordance with the rules of national law relating to the formation of a cumulative sentence where, first, the offence giving rise to those previous proceedings was committed before the previous convictions were handed down and, secondly, taking account of the previous convictions in accordance with those rules would prevent the national court hearing the proceedings from imposing a sentence that could be executed against the person concerned.

In reaching that conclusion, the Court points out, first of all, that that framework decision [213] requires the Member States, in principle, to take into account, in criminal proceedings brought against a person, previous convictions handed down in another Member State against that person in respect of different facts. However, under the exception to that principle, if the offence for which the new proceedings being conducted was committed before the previous conviction had been handed down or fully executed, Member States are not obliged to apply their national sentencing rules where the application of those rules to foreign convictions would limit the judge in imposing a sentence in the new proceedings.

The Court then states that, since the time-related condition laid down by that exception is satisfied in the circumstances of the dispute in the main proceedings, those circumstances may fall within that exception. In that regard, the Court states, first, that the rules of German law relating to the cumulation of sentences constitute 'national rules on imposing sentences' and, secondly, that the application of those rules with regard to previous convictions handed down in France would prevent the national court from handing down a sentence that could be executed. Accordingly, in the present case, attaching to previous convictions handed down in France effects equivalent to those attached to previous national convictions would 'limit the judge in imposing a sentence in the new proceedings'. Consequently, that exception is applicable in the circumstances of the present case and has the effect of releasing the national court from the obligation to attach to previous convictions handed down in France effects equivalent to those attaching to national convictions in accordance with the rules on the formation of cumulative sentences.

In the second place, the Court ruled that the taking into account of previous convictions handed down in another Member State, within the meaning of Framework Decision 2008/675, [214] does not require the national court to establish and give specific reasons for the disadvantage resulting from the

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212 This concerns, in particular, Article 3(1) and (5) of Framework Decision 2008/675.

213 See Article 3(1) of Framework Decision 2008/675.

214 The Court refers to the second subparagraph of Article 3(5) of Framework Decision 2008/675, which provides that 'however, the Member States shall ensure that in such cases their courts can otherwise take into account previous convictions handed down in other Member States'.

impossibility of imposing a subsequent cumulative sentence which is laid down for earlier national convictions.

The Court points out in that regard that, in any criminal proceedings covered by the abovementioned exception, the Member States must ensure that 'their courts can otherwise take into account previous convictions handed down in other Member States'. However, no obligation can be inferred from the provision laying down that exception as regards the specific substantive or procedural arrangements which should be observed, in that regard, by the national courts. Thus, it cannot be inferred from that provision that the court ruling on the substance of the case is under an obligation, in the circumstances of the case, to calculate the disadvantage resulting from the fact that it is impossible to apply the national rules on cumulative sentences laid down for national convictions and subsequently to grant a reduction in sentence based on that calculation.

4. European Public Prosecutor's Office

Judgment of 21 December 2023 (Grand Chamber), *G.K. and Others (European Public Prosecutor's Office)* (C-281/22, EU:C:2023:1018)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – European Public Prosecutor's Office – Regulation (EU) 2017/1939 – Article 31 – Cross-border investigations – Judicial authorisation – Scope of the review – Article 32 – Enforcement of assigned measures)

The European Public Prosecutor's Office (EPPO), through a European Delegated Prosecutor in Germany, is conducting preliminary investigations into G.K., S.L. and B.O.D. GmbH. They are suspected of making false customs declarations and thus of causing damage of approximately EUR 1 295 000 to the financial interests of the European Union.

In the context of the investigation taking place in Germany, the EPPO considered it necessary to gather evidence in other Member States, including Austria. To that end, the German handling European Delegated Prosecutor assigned [215] the search and seizure of property of the accused persons in Austria to an Austrian assisting European Delegated Prosecutor. On 9 November 2021, the latter prosecutor ordered searches and seizures, both at the business premises of B O.D. and its parent company and at the homes of G.K. and S.L., all located in Austria. That prosecutor also requested the competent Austrian courts to authorise those measures. [216] Those authorisations having been obtained, the measures ordered were enforced.

On 1 December 2021, G.K., B.O.D. and S.L. brought actions before the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), the referring court, against the decisions of the Austrian courts which authorised the measures at issue. In particular, they challenged the justification for the investigation measures ordered against them.

The referring court asks whether, where an assigned investigation measure requires judicial authorisation to be obtained in the Member State of the assisting European Delegated Public

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215 Pursuant to Article 31 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ 2017 L 283, p. 1).

216 The first subparagraph of Article 31(3) of Regulation 2017/1939 provides that, if judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor is to obtain that authorisation in accordance with the law of that Member State.

Prosecutor, that measure must be examined by a court of that Member State in the light of all the procedural and substantive rules laid down by that Member State.

In its judgment, the Court of Justice, sitting as the Grand Chamber, provides clarification on the scope of the review that may be carried out by courts hearing a request from an assisting European Delegated Prosecutor to authorise an assigned investigation measure.

Findings of the Court

First of all, the Court observes that, although the first subparagraph of Article 31(3) of Regulation 2017/1939 provides that judicial authorisation is to be obtained in accordance with the law of the Member State of the assisting European Delegated Prosecutor where an assigned investigation measure requires such authorisation under the law of that Member State, Articles 31 and 32 of that regulation do not specify the extent of the review to be carried out by the competent court. Nevertheless, it is apparent from the wording of those two articles [217] that the adoption of an assigned investigation measure, as well as its justification, are to be governed by the law of the Member State of the handling European Delegated Prosecutor, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor. The distinction thus drawn by those articles between the justification and adoption of an assigned investigation measure, on the one hand, and its enforcement, on the other, reflects the logic underlying the system of judicial cooperation in criminal matters between the Member States, which is based on the principles of mutual trust and mutual recognition. In the context of judicial cooperation based on those principles, the executing authority is not supposed to review compliance by the issuing authority with the conditions for issuing the judicial decision which it must execute.

The Court then observes that, by setting up an EPPO, the objective of Regulation 2017/1939 is to combat more effectively offences affecting the financial interests of the European Union. [218] It follows that, by defining the procedures laid down by that regulation, the EU legislature intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition. However, although the grant of the judicial authorisation referred to in the first subparagraph of Article 31(3) of that regulation could be made subject to an examination, by the competent authority of the Member State of the assisting European Delegated Prosecutor, of the elements relating to the justification and adoption of the assigned investigation measure concerned, that would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation. First, the competent authority of the Member State of the assisting European Delegated Prosecutor would, in particular, have to examine in detail the entire case file, which would have to be forwarded to it and, where relevant, translated. Second, in order to carry out its examination, it would have to apply the law of the Member State of the handling European Delegated Prosecutor, although it cannot be considered to be the best placed to do so.

The Court concludes that Regulation 2017/1939 establishes, for the purposes of cooperation between European Delegated Prosecutors in the context of EPPO cross-border investigations, a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the enforcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor. In

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217 More specifically, from the wording of Article 31(1) and (2) and Article 32 of Regulation 2017/1939.

218 See recitals 12, 14, 20 and 60 of Regulation 2017/1939.

accordance with that sharing of responsibilities, any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure.

As regards matters relating to the justification and adoption of the assigned measure, the Court nevertheless points out that they must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter of Fundamental Rights of the European Union. In accordance with Article 31(2) of Regulation 2017/1939, it is for the Member State of the handling European Delegated Prosecutor to provide for a prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure, taking into account the requirements stemming from the Charter of Fundamental Rights. Where the measures concerned are investigation measures such as searches of private homes, conservatory measures relating to personal property or asset freezing, it is then for that Member State to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures.

VI. 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 13 July 2023, *TT (Wrongful removal of a child)* (C-87/22, EU:C:2023:571)

(Reference for a preliminary ruling – Jurisdiction in matters of parental responsibility – Regulation (EC) No 2201/2003 – Articles 10 and 15 – Transfer to a court of another Member State better placed to hear the case – Conditions – Court of the Member State to which the child has been wrongfully removed – The 1980 Hague Convention – Interests of the child)

The Slovak nationals TT and AK are the parents of V and M, born in Slovakia in 2012. In 2014, the family moved to Austria. TT and AK separated in 2020 and AK brought the children to live with her in Slovakia, without TT's consent. TT then lodged a request for the return of the children with a Slovak court pursuant to the 1980 Hague Convention. [219] In parallel, he lodged an application with an Austrian court for the purpose of being granted sole custody of the two children. AK seised that same court, requesting that it ask a Slovak court to assume jurisdiction on the matter of custody of the children, in accordance with Regulation No 2201/2003, [220] [221] arguing that the Slovak courts would be better placed to rule on the matter of parental responsibility for the two children.

The referring court wonders whether jurisdiction as regards custody of a child can be transferred, pursuant to Regulation No 2201/2003, [222] to a court of the Member State in which the child has settled his or her habitual residence following a wrongful removal and whether the conditions laid down for such a transfer are exhaustive.

Seised by that court, the Court of Justice provides clarifications concerning the conditions under which the court of a Member State, which has jurisdiction to rule on the substance of a case on the matter of parental responsibility under Article 10 of Regulation No 2201/2003, may exceptionally request the transfer of that case, provided for by Article 15(1)(b) of that regulation, to a court of the Member State to which the child has been wrongfully removed by one of his or her parents.

Findings of the Court

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

220 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). Article 15 of Regulation No 2201/2003 provides that, by way of exception, the courts of a Member State having jurisdiction as to the substance of a case in matters of parental responsibility may request the transfer of that case, or a specific part thereof, to a court of another Member State with which the child has a particular connection, if that court is better placed to hear the case, and where the transfer is in the best interests of the child.

221 In particular with Article 15(1)(b), (2)(a) and (5) of that regulation.

222 Under Article 15(1)(b) of that regulation.

The rules on jurisdiction in matters of parental responsibility contained in Regulation No 2201/2003 were drawn up with the objective of meeting the best interests of the child and, to that end, they favour the criterion of proximity. Thus, a general rule of jurisdiction is established [223] in favour of the courts of the Member State in which the child is habitually resident at the time the court is seised. That rule applies, however, [224] subject to, inter alia, Article 10 of that regulation, which attributes jurisdiction to the courts of the Member State in which that child was habitually resident immediately before the wrongful removal or retention. That provision, which gives effect to the aim of deterring the wrongful removal or retention of children between Member States, serves to defeat what would otherwise be the effect of the application of the general rule of jurisdiction in a case of the wrongful removal of the child concerned, namely the transfer of jurisdiction to the Member State where the child may have acquired a new habitual residence, following his or her wrongful removal or retention.

In addition, Article 15 of Regulation No 2201/2003 provides for a means of cooperation by which a court of a Member State which has jurisdiction to hear the case may, by way of exception, transfer that case to a court of another Member State, provided that that court accepts jurisdiction within six weeks. A court whose jurisdiction is based on Article 10 of Regulation No 2201/2003 also has the power to request a transfer, and it cannot be ruled out that the transfer may be made to a court of the Member State to which the child concerned has been wrongfully removed by one of his or her parents. The best interests of the child, which is one of the objectives pursued by Regulation No 2201/2003, is a fundamental consideration and the transfer at issue must be in those best interests. It is therefore not contrary to the objectives pursued by Regulation No 2201/2003 for a court having jurisdiction in matters of parental responsibility on the basis of Article 10 of that regulation to be able to request the transfer of the case of which it is seised to a court in the Member State to which the child concerned has been wrongfully removed by one of his or her parents.

The transfer at issue may, however, be requested only if three cumulative and exhaustive conditions are satisfied, [225] namely that there is a 'particular connection' between the child and another Member State, that the court having jurisdiction as to the substance of the case considers that a court of that other Member State is 'better placed' to hear the case and that the transfer is in the best interests of the child, in so far as it is not liable to be detrimental to the situation of the child concerned. The existence of a return application based on the 1980 Hague Convention, in respect of which a final decision has not yet been delivered in the Member State to which the child concerned has been wrongfully removed by one of his or her parents, does not preclude the transfer at issue, but that fact must be taken into account in the analysis of whether the conditions laid down for that transfer have been satisfied.

In that regard, in the first place, the fact that a Member State is the place of the child's nationality is one of the criteria permitting a finding that that child has a 'particular connection' with that Member State.

In the second place, as regards the condition that the court to which it is envisaged that the transfer will be made must be 'better placed' to hear the case, the court having jurisdiction should take several factors into account. First of all, the transfer should provide genuine and specific added value to the adoption of a decision relating to the child, compared with if the case were to continue before the court having jurisdiction. That is the case, for example, where the court to which it is envisaged that the transfer will be made has, at the request of the parties to the main proceedings and in accordance with

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223 In accordance with Article 8(1) of that regulation.

224 In accordance with Article 8(2) of that regulation.

225 Listed exhaustively in Article 15(1) of Regulation No 2201/2003.

the applicable rules of procedure, adopted a series of urgent provisional measures based on, inter alia, Article 20 of Regulation No 2201/2003. Next, that transfer cannot give rise to a clear risk that the parent applying for the return of the child will be deprived of the opportunity to present his or her arguments effectively before the court to which it is envisaged that the transfer will be made. Lastly, where a return application based on the 1980 Hague Convention has been lodged with the competent authorities of the Member State to which the child concerned has been wrongfully removed, no court of that Member State may be held to be 'better placed' to hear the case before the period of six weeks laid down for delivering a judgment on the application for the return of the child [226] has expired. Furthermore, a substantial delay by the courts of that Member State in ruling on that application is capable of constituting a factor weighing against a finding that those courts are better placed to rule on the substance of rights of custody. After having been informed of the wrongful removal of a child, the courts of the contracting State to which the child has been removed cannot rule on the substance of rights of custody until it has been established that, inter alia, the conditions for the return of the child are not satisfied. [227]

In the third and last place, as regards the condition relating to the best interests of the child, the assessment of that condition cannot disregard the temporary impossibility for the courts of the Member State to which the child has been wrongfully removed by one of his or her parents to adopt a decision on the substance of rights of custody, consistent with those best interests, before the court of that Member State hearing the application for the return of that child has, at the very least, ruled on that application.

2. Regulation No 805/2004 creating a European Enforcement Order for uncontested claims

Judgment of 16 February 2023, *Lufthansa Technik AERO Alzey* (C-393/21, EU:C:2023:104)

(Reference for a preliminary ruling – Judicial cooperation in civil and commercial matters – Regulation (EC) No 805/2004 – European Enforcement Order for uncontested claims – Article 23(c) – Stay of enforcement of a judgment certified as a European Enforcement Order – Exceptional circumstances – Concept)

On 14 June 2019, the Amtsgericht Hünfeld (Local Court, Hünfeld, Germany) served on Arik Air Limited an order for payment with a view to recovering a debt of EUR 2 292 993.32 owed to Lufthansa Technik AERO Alzey GmbH ('Lufthansa'). Then, on 24 October 2019, it issued a European Enforcement Order and, on 2 December 2019, a European Enforcement Order certificate.

A bailiff operating in Lithuania was instructed by Lufthansa to carry out the European Enforcement Order in respect of Arik Air.

The latter company made an application before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany) [228] for the withdrawal of the European Enforcement Order and the termination of the compulsory recovery of the debt. In its view, the procedural documents had been

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226 Laid down in Article 11 of the 1980 Hague Convention and Article 11 of Regulation No 2201/2003.

227 Article 16 of the 1980 Hague Convention.

228 That application was made on the basis of Article 10 of Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (OJ 2004 L 143, p. 15).

served improperly by the Local Court, Hünfeld, which had led to a failure to comply with the time limit available to it for objecting to the order for payment at issue.

In Lithuania, Arik Air also requested the bailiff to have the enforcement proceedings stayed until the Regional Court, Frankfurt am Main, has given a final ruling, which the bailiff refused to do, taking the view that the national legislation did not allow for such a stay in those circumstances.

By order of April 2020, the Regional Court, Frankfurt am Main, considering, inter alia, that Arik Air had failed to demonstrate that the European Enforcement Order had been issued improperly, made the suspension of the compulsory execution of the order concerned conditional on the provision of a security of EUR 2 000 000.

By order adopted in June 2020, the Kauno apylinkės teismas (District Court, Kaunas, Lithuania) dismissed the action brought by Arik Air against the bailiff's decision refusing to stay those enforcement proceedings.

On appeal, the Kauno apygardos teismas (Regional Court, Kaunas, Lithuania) set aside that order, staying the enforcement proceedings at issue pending the final ruling of the German court on Arik Air's claims. That court took the view that, given the risk of disproportionate harm liable to arise from the enforcement proceedings against Arik Air, the bringing of an action against the European Enforcement Order certificate before the court of the Member State of origin was a sufficient basis for staying those proceedings. It also found that there was no reason to consider that it was for Regional Court, Frankfurt am Main to decide on the merits of the request for the enforcement measures to be stayed.

Lufthansa then brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) against that decision.

Seised by that court, the Court of Justice clarifies the meaning and scope of the concept of 'exceptional circumstances' permitting the competent court or authority in the Member State of enforcement, within the meaning of Article 23 of Regulation No 805/2004, [229] to stay the enforcement of a judgment certified as a European Enforcement Order in the Member State of origin.

Findings of the Court

In the first place, the Court states that the concept of 'exceptional circumstances' contained in Article 23(c) of Regulation No 805/2004 covers a situation in which continued enforcement proceedings in respect of a judgment certified as a European Enforcement Order, where the debtor has challenged that judgment or has brought an application for the rectification or withdrawal of the European Enforcement Order certificate in the Member State of origin, would expose the debtor to a real risk of particularly serious harm. The reparation of such harm would prove impossible or extremely difficult if that judgment were to be annulled or the European Enforcement Order certificate were to be rectified

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229 Under that provision, entitled 'Stay or limitation of enforcement':

'Where the debtor has:

– challenged a judgment certified as a European Enforcement Order, including an application for review within the meaning of Article 19, or

– applied for the rectification or withdrawal of a European Enforcement Order certificate in accordance with Article 10,

the competent court or authority in the Member State of enforcement may, upon application by the debtor:

(a) limit the enforcement proceedings to protective measures; or

(b) make enforcement conditional on the provision of such security as it shall determine; or

(c) under exceptional circumstances, stay the enforcement proceedings.'

or withdrawn. That concept does not refer to circumstances connected with the judicial proceedings brought in the Member State of origin against the judgment certified as a European Enforcement Order or against the European Enforcement Order certificate.

In order to reach that conclusion, the Court observes, first, that the concept of 'exceptional circumstances' is an autonomous concept of EU law. In that regard, it must be inferred from the reference by the EU legislature to that concept that it did not intend to limit the scope of that provision solely to situations of force majeure, which, as a general rule, follow from unforeseeable and unavoidable events arising from a cause external to the debtor. Consequently, the power to stay the enforcement proceedings in respect of a judgment certified as a European Enforcement Order must be considered to be reserved for cases in which continued enforcement would expose the debtor to a real risk of particularly serious harm, the reparation of which would prove to be impossible or extremely difficult if the challenge or the application brought by the debtor in the Member State of origin were to be successful. The initiation of such court proceedings by the debtor is, moreover, a prerequisite for the competent court or authority of the Member State of enforcement to examine whether there are exceptional circumstances.

In addition, the division of jurisdiction between the courts and authorities of the Member State of origin and those of the Member State of enforcement under Regulation No 805/2004 means that the latter have no jurisdiction to examine, in the context of a request to have the enforcement proceedings stayed, a judgment on an uncontested claim given in the Member State of origin or the certification thereof as a European Enforcement Order. Thus, the courts or authorities of the Member State of enforcement have limited discretion as regards the assessment of the circumstances in the light of which a request for a stay of enforcement may be granted. When examining such a request, those courts or authorities must limit themselves, in order to establish whether there are exceptional circumstances within the meaning of Article 23 of that regulation, to weighing up the creditor's interest in ensuring the immediate enforcement of the judgment on his or her claim and the debtor's interest in avoiding harm that is particularly serious and impossible to remedy or difficult to remedy.

In the second place, the Court specifies that Article 23 of Regulation No 805/2004 permits the simultaneous application of the measures limiting the enforcement proceedings and requiring the provision of security laid down in subparagraphs (a) and (b), [230] but that it does not permit the simultaneous application of either one of those two measures and that staying the enforcement proceedings under subparagraph (c).

In the third and last place, the Court rules that, where the enforceability of a judgment certified as a European Enforcement Order has been suspended in the Member State of origin and the certificate referred to in Article 6(2) of Regulation No 805/2004 has been produced before the court of the Member State of enforcement, that court is required to stay, on the basis of that judgment, the enforcement proceedings initiated in the latter State. [231]

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230 Those measures seek to limit the enforcement proceedings to protective measures (a) and to make enforcement conditional on the provision of such security as determined by the competent court or authority in the Member State of enforcement (b) respectively.

231 On that issue, the Court rules on the basis of Article 6(2) of Regulation No 805/2004, read in conjunction with Article 11.

Article 6 of Regulation No 805/2004, entitled 'Requirements for certification as a European Enforcement Order', provides, in paragraph 2: 'Where a judgment certified as a European Enforcement Order has ceased to be enforceable or its enforceability has been suspended or limited, a certificate indicating the lack or limitation of enforceability shall, upon application at any time to the court of origin, be issued, using the standard form in Annex IV.'

Article 11 of that regulation, entitled 'Effects of the European Enforcement Order certificate', states, for its part: 'The European Enforcement Order certificate shall take effect only within the limits of the enforceability of the judgment.'

VII. Transport

Judgment of 21 December 2023, *Commission* v *Denmark (Maximum parking time)* (C-167/22, EU:C:2023:1020)

(Failure of a Member State to fulfil obligations – International road haulage – Regulation (EC) No 1072/2009 – Articles 8 and 9 – Regulation (EC) No 561/2006 – Rest periods – National legislation introducing a maximum parking time at public rest areas of 25 hours along the motorway network of a Member State – Restriction on the freedom to provide road transport services – Burden of proof)

Regulation No 1072/2009 on common rules for access to the international road haulage market [232] aims to establish a common transport policy leading to the removal of all restrictions against the person providing transport services on the grounds of nationality or the fact that he or she is established in a different Member State from the one in which the services are to be provided.

On 1 July 2018, the Kingdom of Denmark laid down a rule limiting the maximum parking time at public rest areas along its motorway network to 25 hours ('the 25-hour rule'). [233]

After sending the Kingdom of Denmark a request for information, the European Commission initiated infringement proceedings on the basis of Article 258 TFEU for failure to fulfil the obligation to ensure the freedom to provide transport services as laid down in Regulation No 1072/2009. It argued, in essence, that, although the 25-hour rule does not introduce direct discrimination, it constitutes a restriction on the freedom to provide transport services since it does not affect road hauliers established in Denmark in the same way as non-resident road hauliers. The Kingdom of Denmark denied any infringement in that regard and provided the additional information requested by the Commission. Taking the view that that reply was unconvincing, the Commission sent a reasoned opinion to that Member State, to which the latter responded, maintaining its position concerning the compliance of the 25-hour rule with EU law. Still unconvinced by the arguments put forward by the Danish Government, the Commission brought an action for failure to fulfil obligations before the Court of Justice, seeking a declaration that, by laying down the 25-hour rule, the Kingdom of Denmark had failed to fulfil its obligations relating to the freedom to provide transport services laid down in Articles 1, 8 and 9 of Regulation No 1072/2009. According to the Commission, that rule affects non-resident hauliers more and the resulting obstacle to the freedom to provide services is not justified by any of the overriding reasons of public interest relied on by that Member State.

By its judgment, the Court dismisses the Commission's action. It points out, in the light of its settled case-law, that, in an action for failure to fulfil obligations, the burden of proof relating to establishing the existence of such a failure is borne by the Commission, and it may not rely on any presumption. The Court considers that, in the present case, the Commission has not adduced, to the requisite legal standard, proof of its allegations.

Findings of the Court

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232 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).

233 That rule was implemented by the road authority pursuant to Paragraph 92(1) of the færdselsloven (Danish Highway Code).

After rejecting the plea of inadmissibility raised by the Kingdom of Denmark, the Court examines the substance of the case and points out, first of all, that the services which are classified as 'service[s] in the field of transport' fall within the scope of Article 58(1) TFEU, which excludes them from the scope of Article 56 TFEU relating to the freedom to provide services in general. [234] That does not prevent an EU act adopted on the basis of those provisions of the Treaties relating to transport [235] from being able, to the extent that it determines, to make the principle of freedom to provide services as enshrined in Article 56 TFEU applicable to a transport sector.

In the present case, the Court notes that Regulation No 1072/2009 is to apply to the international carriage of goods by road for hire or reward for journeys carried out within the territory of the European Union and to the national carriage of goods by road for hire or reward undertaken on a temporary basis by a non-resident haulier. [236] In that regard, Article 9(2) of Regulation No 1072/2009 states, inter alia, that the national provisions referred to in paragraph 1 of that article are to be applied in the same way to non-resident hauliers as to those established in the host Member State, so as to prevent any discrimination on grounds of nationality or of place of establishment.

Next, as regards the Kingdom of Denmark's argument that competence to lay down rules on the duration of parking at public rest areas lies with the Member States, the Court recalls that, according to settled case-law, the Member States must exercise their powers in compliance with EU law, and therefore, in the present case, with the relevant provisions of Regulation No 1072/2009. In that context, they must also take account of the rules on driving times, breaks and rest periods which, under Regulation No 561/2006, [237] must be observed by drivers engaged in the carriage of goods with vehicles with a maximum permissible mass exceeding 3.5 tonnes [238] ('the vehicles concerned'). Compliance with those rest periods may depend, inter alia, on the availability of rest areas on motorways. In that regard, the Court finds that, by its very nature, a rule such as that of 25 hours has the effect of making those rest areas unavailable in order to comply with the various rest periods provided for in Regulation No 561/2006. [239] It follows that such a rule is, a priori, capable of having a specific effect on the exercise, by non-resident hauliers, of transport rights, in particular cabotage, and of affecting them more than hauliers established in Denmark.

In that regard, the Court points out, however, that, according to settled case-law, in proceedings for failure to fulfil obligations it is for the Commission to establish the existence of the alleged infringement and to provide the Court with the information necessary for it to assess whether the infringement exists, and that the Commission may not rely on any presumption. In the present case, the Kingdom of Denmark produced, in the pre-litigation procedure and in its defence, data on the number of parking spaces available for the vehicles concerned, in particular those provided by the private sector, and provided clarification on those data at the hearing. However, in its application, the Commission merely

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234 Judgments of 20 December 2017, ***Asociación Profesional Elite Taxi*** (C-434/15, EU:C:2017:981, paragraph 44), and of 8 December 2020, ***Poland*** **v** ***Parliament and Council*** (C-626/18, EU:C:2020:1000, paragraph 145).

235 Namely, Title VI of Part Three of the FEU Treaty, which comprises Articles 90 to 100 TFEU.

236 In accordance with Article 1(1) and (4) of Regulation No 1072/2009, read in conjunction with Article 2(6) of that regulation.

237 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).

238 Those rules are expressly referred to in recital 13 and Article 9(1)(d) of Regulation No 1072/2009.

239 Regular weekly rest periods (of at least 45 hours) and reduced weekly rest periods (less than 45 hours, which may be reduced, in compliance with the conditions laid down in Article 8(6) of Regulation No 561/2006, to a minimum of 24 consecutive hours), with the sole exception of reduced weekly rest periods of between 24 and 25 hours.

relied on a lack of adequate alternative parking capacity spread over the Danish motorway network and, moreover, in its reply, merely observed that the data produced in defence by the Kingdom of Denmark did not alter its conclusions in that regard.

By contrast, the Commission has not produced any objective data establishing the inadequacy of alternative parking capacities for the purposes of compliance with rest periods exceeding 25 hours. Without such data, it cannot be established, except on the basis of presumptions, that the 25-hour rule is in fact such as to impede cabotage activities carried out by non-resident service providers to the detriment of the latter compared to those established in Denmark. Thus, the mere existence of capacity problems on the public rest areas of the Danish motorway network and the identification by the Member State concerned of the challenges to be addressed in terms of parking capacity, which was one of the main reasons for the introduction of the 25-hour rule, do not support the conclusion that it infringes Regulation No 1072/2009. The same is true of the fact that the parking capacities provided by the private sector are lower than those of public rest areas, since, within that 25-hour limit, the parking of those vehicles remains permitted at such places.

Nor, lastly, has the Commission, in the present case, objectively established that the location of the alternative places provided by the private sector and their distribution across the territory or the fact that some of those places are subject to a fee would be such as to impede transport activities to the detriment of non-resident service providers, but merely relied in that regard on presumptions.

Accordingly, the Court considers that the Commission has not adduced, to the requisite legal standard, proof of its assertions that the 25-hour rule constitutes an obstacle to the freedom to provide transport services falling within the scope of Regulation No 1072/2009. Consequently, it dismisses the Commission's action for failure to fulfil obligations.

VIII. Competition

1. Agreements, decisions and concerted practices (Article 101 TFEU) [240]

Judgment of 21 December 2023 (Grand Chamber), *International Skating Union* v *Commission* (C-124/21 P, EU:C:2023:1012)

(Appeal – Competition – Rules introduced by an international sports association – Skating – Private law entity vested with regulatory, control and decision-making powers, and the power to impose sanctions – Rules on the prior approval of competitions, the participation of athletes in those competitions and the arbitration rules governing conflicts – Parallel pursuit of economic activities – Organisation and marketing of competitions – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Possible justification – Conditions)

The International Skating Union ('ISU'), an association governed by private law with its headquarters in Switzerland, describes itself as the sole international sports federation recognised by the International Olympic Committee (IOC) in the field of figure skating and speed skating. Overseeing the national associations in charge of those two disciplines, which are its members, the ISU set itself the objective, according to its statutes, of regulating, administering, governing and promoting those disciplines worldwide. The ISU also carries out a commercial activity that entails the organisation of various speed skating and figure skating events in the context of international competitions, such as the European and World Championships and the Olympic Winter Games.

In accordance with its objective set out in its statutes, the ISU adopted and published a set of acts establishing its regulations, which include, inter alia, the prior authorisation rules and the eligibility rules. Those rules determine the conditions for the organisation of international skating competitions and the conditions for the participation of athletes in such competitions, respectively. In order to ensure compliance with those rules, the regulations set out by the ISU include, in addition, a set of rules governing sanctions. Lastly, the ISU also adopted rules establishing a mechanism for arbitral dispute settlement ('the arbitration rules'), which confers on the Court of Arbitration for Sport, located in Lausanne (Switzerland), exclusive jurisdiction to hear those disputes.

Following a complaint lodged by two professional skaters, the European Commission found, by decision of 8 December 2017 [241] ('the decision at issue'), that the ISU's prior authorisation and eligibility rules were incompatible with Article 101 TFEU in so far as they had as their object the restriction of competition. By preventing professional speed skaters from taking part freely in international events organised by third parties, they deprived those third parties of the services of athletes which were necessary in order to organise those events. The Commission, consequently, ordered the ISU, on pain of a periodic penalty payment, to put an end to the infringement thus found, without, however, imposing a fine on it. Moreover, that institution found that the arbitration rules reinforced that

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240 Reference should also be made under this heading to the judgment of 21 December 2023 (Grand Chamber), ***European Superleague Company*** (C-333/21, EU:C:2023:1011), presented under heading VIII.2 'Abuse of a dominant position (Article 102 TFEU)'.

241 Commission Decision C(2017) 8230 final of 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40208 – International Skating Union's Eligibility rules).

infringement, in so far as they did not enable the persons concerned to obtain effective judicial review, with regard to the EU competition rules, of decisions adopted by the ISU.

Ruling, by its judgment of 16 December 2020 [242] ('the judgment under appeal'), on the action for annulment brought by the ISU against the decision at issue, the General Court held, in essence, that the decision at issue was not vitiated by illegality in so far as it related to the ISU's prior authorisation and eligibility rules, but that it was unlawful in so far as it related to the arbitration rules.

In that context, the ISU lodged an appeal against the judgment under appeal, seeking that it be set aside in so far as it held that the Commission had correctly classified the prior authorisation and eligibility rules at issue as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU. The two professional skaters who made the abovementioned complaint and the European Elite Athletes Association, for their part, lodged a cross-appeal against that judgment seeking annulment thereof in part, in so far as it annulled the aspects of the decision at issue relating to the arbitration rules.

By its judgment, delivered on the same day as two other judgments [243] concerning the application of EU economic law to the rules established by international or national sports federations, the Court of Justice, sitting as the Grand Chamber, dismisses the main appeal but upholds the cross-appeal and, consequently, sets aside the judgment under appeal in so far as concerns the arbitration rules. Finally, ruling definitively on the part corresponding to the ISU's action before the General Court, the Court of Justice holds that none of the complaints made by the ISU seeking to contest the analysis of those rules on the part of the Commission is successful, with the result that its action must also be dismissed in that regard.

The present case allows the Court of Justice to provide clarification as to the obligations imposed on sports federations in the light of Article 101(1) TFEU, where they have established, in the exercise of the powers they hold under their statutes, rules governing authorisation and control, subject to sanctions, relating to the organisation of sporting competitions, while in parallel pursuing an economic activity in the field. On this occasion, the Court specifies in particular that the fundamental requirement that such rules must be capable of being subject to effective judicial review entails, in a situation involving provisions that confer mandatory and exclusive jurisdiction on an arbitration body for the purpose of settling disputes concerning the application of the rules at issue, ensuring that the court called upon to review the awards made by that body are capable, first, of ensuring compliance with the public policy provisions of EU law, which include the competition rules and, secondly, of referring questions, if necessary, to the Court of Justice for a preliminary ruling under Article 267 TFEU.

Findings of the Court

- **The main appeal**

Before examining the ISU's complaints challenging the interpretation and application of the concept of restriction of competition by 'object' referred to in Article 101(1) TFEU in respect of the prior authorisation and eligibility rules at issue, the Court defines the subject matter of the appeal before it. In that regard, it observes that it is not disputed that the ISU must be classified, in the light of Article 101 TFEU, as 'an association of undertakings' pursuing, moreover, an economic activity consisting in organising and marketing international skating competitions. Furthermore, it is not disputed that those

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242 Judgment of 16 December 2020, *International Skating Union* v *Commission* (T-93/18 EU:T:2020:610).

243 Judgments of 21 December 2023, ***European Superleague Company*** (C-333/21, EU:C:2023:1011), and of 21 December 2023, ***Royal Antwerp Football Club*** (C-680/21, EU:C:2023:1010).

prior authorisation and eligibility rules constitute 'a decision by an association of undertakings' which may 'affect trade between Member States', within the meaning of that article. Lastly, nor has any challenge on appeal been made to the findings to the effect that that decision by an association of undertakings, on the assumption that it is caught by the prohibition laid down in Article 101(1) TFEU, does not satisfy the various conditions required in order to benefit from an exemption under Article 101(3) TFEU.

Having specified the above, the Court points out, first, that, in so far as the practice of sport constitutes an economic activity, it is subject to the provisions of EU law applicable to such activity, except for certain specific rules adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. Apart from those specific rules, the rules issued by sporting associations and, more broadly, the conduct of the associations which adopted them therefore come within the scope of the FEU Treaty provisions on competition law where the conditions of application of those provisions are met. That is particularly true of the rules establishing a system of prior authorisation for sporting competitions, on the one hand, and rules governing the participation of athletes in such competitions, on the other hand, since the organisation and marketing of sporting competitions and the practice of sport as a professional or semi-professional constitute economic activities.

That being so, in so far as the sporting activity, even when pursued as an economic activity, undeniably has specific characteristics, the Court of Justice points out that, when applying Article 101 TFEU, the categorisation of the existence of conduct having as its 'object' the prevention, restriction or distortion of competition may involve taking into account, along with other elements and provided that they are relevant, characteristics such as, for example, those connected with the nature, organisation or functioning of the sport concerned, in accordance with how professionalised it is.

Next, the Court recalls the elements categorising the existence of conduct having as its 'object' the prevention, restriction or distortion of competition, and stresses, at the outset, the strict interpretation that must be given to that concept, taking into account the particular legal and evidentiary rules applicable to it. Accordingly, that concept must be understood as referring exclusively to certain types of coordination between undertakings or decisions by associations of undertakings that reveal, by their very nature, a sufficient degree of harm to competition so as to exclude the need to examine their effects. In order to determine, in a given case, whether the conduct at issue reveals such a degree of harm, it is necessary to examine, first, the content of the agreement, decision or practice in question, secondly, the legal and economic context of which it forms a part and, thirdly, its objectives, in the context of an assessment based on taking into consideration all of the abovementioned elements. By contrast, no analysis of its effects is required, not even of potential positive effects on competition.

Furthermore, the Court notes that it follows from settled case-law that certain specific types of conduct such as ethical or principled rules adopted by that association are liable not to be caught by the prohibition laid down in Article 101(1) TFEU even if they have the inherent effects of restricting competition, provided that they are justified by the pursuit of legitimate objectives which are not per se anticompetitive in nature and that the necessity and proportionate nature of the means used for that purpose have been duly established. It states however that that case-law does not apply in situations involving a degree of harm that justifies the view that they have as their very 'object' the prevention, restriction or distortion of competition.

It is in the light of all those considerations that the Court of Justice examines the ISU's arguments seeking to challenge the classification made in the present case.

In the first place, the Court of Justice holds that the General Court can in no way be criticised for having found, as did the Commission, that, given the type of conduct at issue in the present case, the examination of its object should be carried out in the light of the case-law arising from the judgments

in *MOTOE* [244] and *Ordem dos Técnicos Oficiais de Contas* [245] relating to the exercise at the same time, by the same entity, of an economic activity and of the powers likely to be used to prevent entities or undertakings currently or potentially in competition with it from entering the relevant market.

In that regard, it states that, given the conflict of interests inherent in such a situation, such a power, irrespective of its origin, may be conferred on a given undertaking only on condition that it is subject to restrictions, obligations and review, or that power, where it is conferred on an undertaking in a dominant position in any way, would infringe, by its very existence, Article 102 TFEU, read, as appropriate, in combination with Article 106 TFEU. Likewise, such a power may be regarded as having as its 'object' the prevention, restriction or distortion of competition, within the meaning of Article 101(1) TFEU.

In this instance, having found that the type of conduct at issue in the present case consisted in a decision by an association of undertakings conferring on the ISU regulatory, control and sanctioning powers allowing it to authorise or prevent access by potentially competing undertakings to the market for the organisation and marketing of international speed skating competitions, in which the ISU also pursues an economic activity, the General Court inferred, correctly, that the examination of that conduct should be made in the light of the principles arising from the judgments in *MOTOE* and *Ordem dos Técnicos Oficiais de Contas*.

In the second place, as regards the classification of the conduct at issue in the present case, it follows from the case-law referred to above that it is necessary to check whether the power at issue is circumscribed by substantive criteria which are transparent, clear and precise making it possible to avoid any arbitrary use, and which must have been set out in an accessible form, prior to any implementation of that power. In the field of sport, this may concern, for example, criteria that promote, in an appropriate and effective manner, the holding of competitions based on equality of opportunity and merit. That said, even where the appropriate criteria are present, they must be such as to ensure that such a power is exercised without discrimination and that any sanctions that may be imposed are objective and proportionate. Finally, those criteria must be capable of being subject to effective review. Furthermore, the power in question must be subject to transparent and non-discriminatory detailed procedural rules, such as those relating to the applicable time limits for submitting a prior authorisation request and the adoption of a decision on that request, which must not be liable to undermine potentially competing undertakings by preventing them from effectively accessing the market.

The General Court did not therefore err in law, in its examination of the objective of the prior authorisation and eligibility rules, by referring to the question whether those rules were designed in a manner such as to make it possible to prevent the powers of prior authorisation and control and the power to impose sanctions that they confer on the ISU from being used in an arbitrary, discriminatory or disproportionate manner.

In the third place, as regards the General Court's assessment following its examination of the rules at issue in the light of the abovementioned criteria, the Court of Justice holds that the General Court did not err in law in finding that those rules were not justified, in a verifiable manner, by any specific objective and that they granted a discretionary power to the ISU to decide on planned competitions subject to its authorisation, in the absence of transparent, objective, non-discriminatory and, consequently, reviewable criteria. The General Court also correctly held that the sanctions liable to be

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244 Judgment of 1 July 2008, ***MOTOE*** (C-49/07, EU:C:2008:376).

245 Judgment of 28 February 2013, ***Ordem dos Técnicos Oficiais de Contas*** (C-1/12, EU:C:2013:127).

imposed by the ISU on athletes taking part in competitions that had not received prior authorisation were not subject to criteria such as to ensure that they were objective and proportionate.

In those circumstances, it is apparent that those rules are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content. In so doing, those rules also completely deprive athletes of the opportunity to participate in those competitions, even where they could be of interest to them, for example on account of an innovative format, while observing all the principles, values and rules underlying the sporting discipline concerned. Lastly, they are ultimately such as to completely deprive spectators and viewers of any opportunity to attend those competitions or to watch a broadcast thereof. Thus, the General Court did not commit any error of law or of legal characterisation of the facts in finding that the Commission had correctly classified the prior authorisation and eligibility rules as having as their 'object' the restriction of competition, within the meaning of Article 101(1) TFEU.

- **The cross-appeal**

In the cross-appeal, the Court of Justice examines the complaints concerning the findings based on which the General Court invalidated the Commission's analysis concerning the arbitration rules, that is to say, whether to admit their justification in respect of the existence of legitimate interests linked to the specific nature of the sport.

In that regard, the Court of Justice stresses at the outset that the arbitration rules at issue apply to disputes likely to arise in relation to the exercise of a sport as an economic activity in EU territory. It follows that those rules fall within EU competition law, with the result that they must comply with it, in so far as they are implemented in the territory in which the EU and FEU Treaties apply, irrespective of the place where the entities that adopted them are established.

Furthermore, since Articles 101 and 102 TFEU are provisions having direct effect which create rights for individuals which national courts must protect and which are a matter of EU public policy, the Court, while acknowledging the possibility for individuals to submit their disputes to an arbitration body whose awards are capable of giving rise to limited judicial review, recalls that that review must nevertheless, in any event, be able to cover the question whether those awards comply with those articles. Such a requirement applies, more especially, in a situation involving an arbitration mechanism imposed by one individual on another for the purpose of conferring mandatory and exclusive jurisdiction on an arbitration body.

Given that the rules adopted by sports associations cannot limit the exercise of rights and freedoms conferred on individuals by EU law, prior authorisation and eligibility rules must be subject to effective judicial review. That requirement itself means that the court having jurisdiction to review awards made by an arbitration body may confirm that those awards comply with Articles 101 and 102 TFEU. In addition, that court must satisfy all the requirements under Article 267 TFEU so that it is entitled, or, as the case may be, required to satisfy the obligation to refer a question to the Court of Justice where it considers that a decision of the Court is necessary concerning a matter of EU law raised in a case pending before it.

In the present case, the Court of Justice holds that the General Court merely found, in an undifferentiated and abstract manner, that the arbitration rules 'may be justified by legitimate interests linked to the specific nature of the sport', in so far as they confer on 'a specialised court' the power to review disputes relating to the prior authorisation and eligibility rules. The General Court did not therefore seek to ensure that the arbitration rules complied with all the requirements referred to above and thus allowed for an effective review of compliance with Article 101 TFEU, even though the Commission correctly relied on those requirements in concluding that those rules reinforced the anticompetitive nature of the ISU's prior authorisation and eligibility rules. In doing so, the General Court committed errors of law.

Moreover, the General Court erred in law in holding that, despite that lack of effective judicial review, the effectiveness of EU competition law was ensured in full given, first, the existence of remedies allowing recipients of a decision refusing to allow them to participate in a competition or of an ineligibility decision to seek damages for the harm caused to them by that decision before the relevant national courts and, secondly, the possibility of lodging a complaint with the Commission or a national competition authority. Those mechanisms may supplement such review but cannot compensate for its absence.

Consequently, the Court of Justice sets aside the judgment under appeal, in so far as it upheld in part the ISU's claims for annulment.

- **The action in Case T-93/18**

Considering that the part of the action for annulment that remained to be examined following the setting aside in part of the judgment under appeal permits final judgment, the Court decides to give final judgment on that part. In that regard, it points out in particular that, where the Commission finds the existence of an infringement of Article 101 or Article 102 TFEU, it has the power to require, by means of a decision, the undertakings or associations of undertakings concerned to bring an end to that infringement and, to that end, impose on them a corrective measure that is proportionate to that infringement and necessary to bring it to an immediate end. In the present case, given the scope of the requirement of effective judicial review set out above, the Court holds that the Commission was correct in concluding that the arbitration rules reinforced the infringement identified by making judicial review, in the light of EU competition law, of awards of the Court of Arbitration for Sport delivered after the decisions adopted by the ISU by virtue of the discretion conferred on it by the prior authorisation and eligibility rules more difficult. Furthermore, the Commission was correct in requiring the ISU to put an end to that situation.

Judgment of 21 December 2023 (Grand Chamber), *Royal Antwerp Football Club* (C-680/21, EU:C:2023:1010)

(Reference for a preliminary ruling – Competition – Internal market – Rules introduced by international and national sports associations – Professional football – Private law entities vested with regulatory, control and sanctioning powers – Rules requiring professional football clubs to use a minimum number of 'home-grown' players – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Exemption under Article 101(3) TFEU – Conditions – Article 45 TFEU – Indirect discrimination on the basis of nationality – Restriction on the freedom of movement for workers – Justification – Conditions – Burden of proof)

The Union of European Football Associations (UEFA) is an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of every type of football in Europe. It oversees the various European national football associations responsible for the organisation of football in their State – including the Union royale belge des sociétés de football association ASBL (Royal Belgian Football Association; URBSFA) for Belgium. Those associations, as UEFA members, are required to comply with the statutes, regulations and decisions of UEFA and to ensure observance of them, in their State, by the professional leagues subject to them and by clubs and players.

In 2005, UEFA adopted rules stipulating that professional football clubs participating in its international interclub football competitions must include a maximum number of 25 players on the match sheet, of whom a minimum of 8 must be 'home-grown players', defined as players who, regardless of their nationality, have been trained by their club or by a club affiliated to the same national football association for at least three years ('the rules on "home-grown players"'). Out of eight players, at least four must have been trained by the club which lists them. In 2011, the URBSFA introduced into its

regulations rules relating to 'home-grown players', defined as players who, regardless of their nationality, have been trained for at least three years by a Belgian club.

UL is a football player who has the nationality of a third country, in addition to Belgian nationality. He is engaged in a professional activity in Belgium where he played for Royal Antwerp, a professional football club based in Belgium, and then for another professional football club in Belgium.

Claiming that the rules relating to 'home-grown players' are contrary to the provisions of the FEU Treaty, UL and Royal Antwerp brought an action before the Cour Belge d'Arbitrage pour le Sport (Belgian Court of Arbitration for Sport; CBAS) for compensation for the damage caused by those rules. Those claims were rejected by the CBAS, whereupon UL and Royal Antwerp brought an action before the tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium), the referring court, for annulment of the arbitration award.

It was against that background that the national court decided to refer a number of questions to the Court of Justice for a preliminary ruling, in essence, on whether the rules on 'home-grown players' adopted by UEFA and the URBSFA may be categorised as 'agreements between undertakings', 'decisions by associations of undertakings' or 'concerted practices' within the meaning of Article 101 TFEU. It also questions whether the rules adopted by the URBSFA are compatible with the freedom of movement for workers guaranteed by Article 45 TFEU.

By its judgment, delivered the same day as two other judgments [246] concerning the application of EU economic law to rules introduced by international sports federations, the Court, sitting in Grand Chamber, provides clarification on the application of Articles 45 and 101 TFEU to the rules adopted by sports federations with regard to the composition of teams, the participation of players in those teams and the training of those players.

Findings of the Court

As a preliminary point, the Court observes, in the first place, that the rules on 'home-grown players' fall within the scope of Articles 45 and 101 TFEU. In that regard, it points out that, to the extent that the pursuit of a sport constitutes an economic activity, it comes under the provisions of EU law that are applicable to that activity, with the exception of certain specific rules which (i) were adopted exclusively for reasons of a non-economic nature, and (ii) relate to questions of interest solely to sport per se. As it is, the rules at issue in the main proceedings, whether they originate from UEFA or the URBSFA, do not come under such an exception. They concern economic activities. Moreover, although those rules do not formally govern the players' working conditions, they must be regarded as having a direct impact on that work in that they impose certain conditions, which are backed with sanctions, on the composition of the teams able to participate in interclub football competitions and, accordingly, the participation of the players themselves in those competitions.

Addressing, in the second place, the inferences liable to be attached to Article 165 TFEU – which sets out both the objectives assigned to the Union action in the area of sport and the means which may be used to contribute to the attainment of those objectives – the Court observes that that provision does not constitute a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It also points out that the undeniable specific characteristics of sporting activities may be taken into account along with other elements and provided they are relevant in the application of Articles 45 and 101 TFEU,

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246 Judgments of 21 December 2023, ***International Skating Union*** **v** ***Commission*** (C-124/21 P, EU:C:2023:1012), and of 21 December 2023, ***European Superleague Company*** (C-333/21, EU:C:2023:1011).

although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

In the light of those observations, the Court examines, as a first step, whether the UEFA and the URBSFA rules on 'home-grown players' are compatible with Article 101 TFEU.

In that regard, it states, first of all, that the rules at issue in the main proceedings must be categorised as a 'decision by an association of undertakings' in that (i) they originate from UEFA and the URBSFA, which are associations of undertakings, and (ii) they have a direct impact on the conditions for engaging in the economic activity of the undertakings who are directly or indirectly their members.

Next, as to whether those rules have an anticompetitive object, the Court states, in the first place, that, by their content, they appear to require professional football clubs participating in interclub football competitions under those associations to include on the match sheet, subject to sanctions, a minimum number of 'home-grown players'. In doing so, those rules appear to limit, by their very nature, the possibility for those clubs to include on that sheet players who do not meet those requirements. In the second place, with regard to the economic and legal context of which those rules form part, it is apparent from the specific characteristics of professional football, in particular its social, cultural and media importance, together with the fact that that sport is based on openness and sporting merit, that it is legitimate for associations such as UEFA and the URBSFA to adopt rules relating, inter alia, to the organisation of competitions in that discipline, their proper functioning and the participation of sportspersons in those competitions and, more particularly, to regulate the conditions in which professional football clubs may put together teams participating in interclub competitions within their territorial jurisdiction. In the third place, as regards the outcome which the rules at issue in the main proceedings seek to attain, they appear to limit or control one of the essential parameters of competition, namely the recruitment of talented players, whatever the club or place where they were trained, which could enable their team to win in the encounter with the opposing team. That limitation is likely to have an impact on the competition in which the clubs may engage, not only in the 'upstream or supply market', which, from an economic point of view, is constituted by the recruitment of players, but also in the 'downstream market', which, from the same point of view, is constituted by interclub football competitions.

Notwithstanding that, it is for the referring court to determine, in the light of those clarifications and having regard to all the arguments and evidence submitted by the parties, whether the rules at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition to be able to be regarded as having as their 'object' the restriction of competition. If that is not the case, that court will then have to determine whether those rules can be regarded as having, as their actual or potential effect, the restriction of competition on the market concerned.

Finally, with regard to the question whether those rules can be justified or exempted, the Court recalls that certain specific conduct, such as ethical or professional conduct rules adopted by an association, may not fall within the prohibition laid down in Article 101(1) TFEU even if they have the inherent effects of restricting competition, provided that they are justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature and that the necessity and proportionality of the means used for that purpose have been duly established.

It points out, however, that that case-law cannot be applied in relation to conduct that presents a degree of harm which justifies a finding that it has as its very 'object' the prevention, restriction or distortion of competition, without prejudice to any possible exemption under Article 101(3) TFEU, provided that the conditions required for that purpose are met, which is for the party relying on that exemption to demonstrate.

The Court recalls that, in order to be eligible for that exemption, the conduct under consideration must allow, with a sufficient degree of probability, the achievement of efficiency gains while reserving for users an equitable part of the profit resulting from those gains, without imposing restrictions that are

not indispensable for achieving those gains and without eliminating all effective competition for a substantial part of the products or services concerned. It will be for the referring court, if it considers that the rules on home-grown players have as their object or effect the restriction of competition, to assess whether those conditions are met in the present case.

As a second step, in relation to the question whether the URBSFA rules on 'home-grown players' are compatible with Article 45 TFEU, the Court states that those rules prima facie infringe the freedom of movement for workers. They are based on a connection of a 'national' character in that, first, they define 'home-grown players' as those who were trained within a 'Belgian' club. Secondly, they require professional football clubs wishing to participate in interclub football competitions under the URBSFA to enter in the list of their players and to include on the match sheet a minimum number of players who satisfy the conditions to be eligible in that way. It follows that such rules are likely to place at a disadvantage professional football players who wish to pursue an economic activity in the territory of a Member State, namely Belgium, other than their Member State of origin, and who do not satisfy the conditions required by those rules. To that extent, those rules are likely to give rise to indirect discrimination at the expense of players coming from another Member State, in that they risk operating mainly to the detriment of those players.

As regards any possible justification, the Court recalls that measures of non-State origin may be permitted even though they impede a freedom of movement enshrined in the FEU Treaty, if two cumulative conditions are fulfilled, which is for the party who introduced those measures to demonstrate. Thus, first, the adoption of those measures must pursue a legitimate objective in the public interest that is compatible with the Treaty and, therefore other than of a purely economic nature and, secondly, those measures must observe the principle of proportionality, which entails that they are suitable for ensuring the achievement of that objective and do not go beyond what is necessary for that purpose.

In the present case, the objective of encouraging the recruitment and training of young professional football players constitutes such a legitimate objective in the public interest. As regards the suitability of those rules for ensuring the attainment of that objective, that must be assessed, in particular, having regard to the fact that, by placing on the same level all young players who have been trained by any club affiliated to the national football association in question, those rules might not constitute real and significant incentives for some of those clubs, in particular those with significant financial resources, to recruit young players with a view to training them themselves. On the contrary, such a recruitment and training policy is placed on the same level as the recruitment of young players already trained by any other club also affiliated to that association, regardless of the location of that other club within the territorial jurisdiction of that association. However, it is precisely local investment in the training of young players, in particular when it is carried out by small clubs, where appropriate in partnership with other clubs in the same region and possibly with a cross-border dimension, which contributes to fulfilling the social and educational function of sport.

That being said, the Court points out that it will ultimately be for the referring court alone to assess whether the URBSFA rules meet the conditions set out above, in the light of the arguments and evidence produced by the parties.

2. Abuse of a dominant position (Article 102 TFEU) [247]

Judgment of 19 January 2023, *Unilever Italia Mkt. Operations* (C-680/20, EU:C:2023:33)

(Reference for a preliminary ruling – Competition – Article 102 TFEU – Dominant position – Imputation, to the producer, of actions of its distributors – Existence of contractual links between the producer and the distributors – Concept of 'economic unit' – Scope – Abuse – Exclusivity clause – Need to demonstrate the effects on the market)

By decision of 31 October 2017, the Italian Competition and Markets Authority ('the AGCM') [248] found that Unilever Italia Mkt. Operations Srl ('Unilever') had abused its dominant position on the Italian market for the sale of individually packaged ice cream intended for consumption 'outside', that is to say, away from consumers' homes, at various sales outlets.

The abuse alleged against Unilever resulted from conduct materially committed not by that company, but by independent distributors of its products who had imposed exclusivity clauses on the operators of those sale outlets. In that regard, the AGCM considered, inter alia, that the practices which were the subject of its investigation had precluded, or at least limited, the possibility for competing operators to engage in competition on the merits of their products.

In that context, it did not find that it was compulsory to analyse the economic studies produced by Unilever in order to demonstrate that the practices at issue did not have an exclusionary effect against its equally efficient competitors, on the ground that those studies were irrelevant where there were exclusivity clauses, since the use of such clauses by an undertaking in a dominant position was sufficient to establish abusive use of that position.

Consequently, the AGCM imposed a fine of EUR 60 668 580 on Unilever for abuse of its dominant position in breach of Article 102 TFEU.

The action brought by Unilever against that decision was dismissed in its entirety by the court of first instance.

Hearing an appeal, the Consiglio di Stato (Council of State, Italy) referred questions to the Court of Justice for a preliminary ruling on the interpretation and application of EU competition law in the light of the AGCM's decision.

By its judgment, the Court sets out the detailed rules for the implementation of the prohibition of abuse of a dominant position referred to in Article 102 TFEU in relation to a dominant undertaking whose distribution network is organised exclusively on a contractual basis and the Court clarifies, in that context, the burden of proof borne by the national competition authority.

Findings of the Court

First of all, the Court holds that abusive conduct by distributors forming part of the distribution network of a producer in a dominant position, such as Unilever, may be imputed to that producer under

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247 Reference should also be made under this heading to the judgment of 4 July 2023 (Grand Chamber), ***Meta Platforms and Others (General terms of use of a social network)*** (C-252/21, EU:C:2023:537), presented under heading I.4 'Protection of personal data'.

248 Autorità Garante della Concorrenza e del Mercato (Competition and Markets Authority, Italy).

Article 102 TFEU if it is established that that conduct was not adopted independently by its distributors, but forms part of a policy decided unilaterally by that producer and implemented through those distributors.

In such a situation, the distributors and, consequently, the distribution network which those distributors form with the dominant undertaking must be regarded as merely an instrument of territorial implementation of the commercial policy of that undertaking and, on that basis, as being the instrument by which, as the case may be, the exclusionary practice at issue was implemented.

That applies in particular where, as in the present case, the distributors of a producer in a dominant position are required to have operators of sales outlets sign standard contracts which are supplied by that producer and contain exclusivity clauses for the benefit of its products.

Next, the Court answers the question of whether, for the purposes of the application of Article 102 TFEU, in a case such as that at issue in the main proceedings, the competent competition authority is required to establish that exclusivity clauses in distribution contracts have the effect of excluding from the market competitors that are as efficient as the dominant undertaking and whether that authority is required to examine in detail the economic analyses produced by that undertaking, in particular where they are based on the 'as efficient competitor test'.

In that regard, the Court states that abuse of a dominant position may, inter alia, be established where the conduct complained of has produced exclusionary effects in respect of competitors that are as efficient as the perpetrator of that conduct in terms of cost structure, capacity to innovate or quality, or where that conduct is based on the use of means other than those which come under the scope of 'normal' competition, that is to say, on the basis of the merits. It is, in general, for the competition authorities to demonstrate the abusive nature of conduct in the light of all the relevant factual circumstances surrounding the conduct in question, which includes those highlighted by the evidence adduced in defence by the undertaking in a dominant position.

It is true that, in order to establish that conduct is abusive, a competition authority does not necessarily have to demonstrate that that conduct actually produced anticompetitive effects. Accordingly, a competition authority may find that there has been an infringement of Article 102 TFEU by establishing that, during the period in which the conduct in question was implemented, that conduct was, in the circumstances of the case, capable of restricting competition on the merits despite its lack of effect. However, that demonstration must, in principle, be based on tangible evidence which establishes, beyond mere hypothesis, that the practice in question is actually capable of producing such effects, since the existence of doubt in that regard must benefit the undertaking which engages in such a practice.

Although a competition authority may rely on guidance from economic sciences, confirmed by empirical or behavioural studies, in order to assess whether an undertaking's conduct is capable of restricting competition, other factors specific to the circumstances of the case, such as the extent of that conduct on the market, capacity constraints on suppliers of raw materials, or the fact that the undertaking in a dominant position is, at least, for part of the demand, an inevitable partner, must also be taken into account in order to determine whether, in the light of that guidance, the conduct at issue must be regarded as having been capable of producing exclusionary effects on the market concerned.

In that context, with regard more specifically to the use of exclusivity clauses, it follows from the Court's case-law that clauses by which contracting parties undertake to purchase all or a considerable part of their requirements from an undertaking in a dominant position, even if not accompanied by rebates, constitute, by their very nature, an exploitation of a dominant position and that the same is true of the loyalty rebates granted by such an undertaking.

In the judgment in *Intel*, [249] however, the Court clarified that case-law by stating, in the first place, that where an undertaking in a dominant position submits, during the administrative procedure, that its conduct was not capable of producing the alleged exclusionary effects and puts forward evidence in support of its claims, the competition authority is required, inter alia, to assess whether there is a strategy aimed at excluding competitors that are at least as efficient as the dominant undertaking.

In the second place, the Court added that the analysis of the capacity to exclude is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from a system of rebates, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of the intrinsic capacity of that practice to exclude competitors that are at least as efficient as the dominant undertaking.

That clarification in the judgment in *Intel* in relation to rebate schemes must be understood as also being applicable to exclusivity clauses.

It follows that, first, where a competition authority suspects that an undertaking has infringed Article 102 TFEU by using such clauses, and where that undertaking disputes, during the procedure, the specific capacity of those clauses to exclude equally efficient competitors from the market, with supporting evidence, that authority must ensure, at the stage of classifying the infringement, that those clauses were, in the circumstances of the case, actually capable of excluding competitors as efficient as that undertaking from the market.

Secondly, the competition authority which initiated that procedure is also required to assess, specifically, the ability of those clauses to restrict competition where, during the administrative procedure, the undertaking which is under suspicion maintains that there are justifications for its conduct.

In any event, the submission, in the course of the procedure, of evidence capable of demonstrating the inability to produce restrictive effects gives rise to an obligation for that competition authority to examine that evidence.

Consequently, where the undertaking in a dominant position has produced an economic study in order to demonstrate that the practice of which it is accused is not capable of excluding competitors, the competent competition authority cannot exclude the relevance of that study without setting out the reasons why it considers that the study does not contribute to demonstrating that the practices in question were incapable of undermining effective competition on the relevant market and, consequently, without giving that undertaking the opportunity to determine the evidence which could be substituted for that study.

Since the referring court expressly referred, in its reference for a preliminary ruling, to the 'as efficient competitor' test, the Court states, lastly, that such a test is only one of a number of methods for assessing whether a practice is capable of producing exclusionary effects. Consequently, the competition authorities cannot be under a legal obligation to use that test in order to find that a practice is abusive. However, if the results of such a test are submitted by the undertaking concerned during the administrative procedure, the competition authority is required to assess the probative value of those results.

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249 Judgment of 6 September 2017, ***Intel* v *Commission*** (C-413/14 P, EU:C:2017:632, paragraph 138; 'the judgment in *Intel*').

Judgment of 21 December 2023 (Grand Chamber), *European Superleague Company* (C-333/21, EU:C:2023:1011)

(Reference for a preliminary ruling – Competition – Internal market – Rules introduced by international sports associations – Professional football – Private law entities vested with regulatory, control and decision-making powers, and the power to impose sanctions – Rules on prior approval of competitions, on the participation of football clubs and players in those competitions, and also on the exploitation of commercial and media rights related to those competitions – Parallel pursuit of economic activities – Organisation and marketing of competitions – Exploitation of related commercial and media rights – Article 101(1) TFEU – Decision by an association of undertakings adversely affecting competition – Concepts of anticompetitive 'object' and 'effect' – Exemption under Article 101(3) TFEU – Conditions – Article 102 TFEU – Abuse of dominant position – Justification – Conditions – Article 56 TFEU – Restrictions on the freedom to provide services – Justification – Conditions – Burden of proof)

The Fédération internationale de football association (FIFA) is an association governed by Swiss law whose objectives include, inter alia, to draw up regulations and provisions governing the game of football and related matters, and to control every type of football at world level, but also to organise its own international competitions. FIFA is made up of national football associations which are members of six continental confederations recognised by it – which includes the Union of European Football Associations (UEFA), an association governed by Swiss law whose principal missions consist in monitoring and controlling the development of every type of football in Europe. As members of FIFA and UEFA, those national associations have the obligation, inter alia, to cause their own members or affiliates to comply with the statutes, regulations, directives and decisions of FIFA and UEFA, and to ensure that they are observed by all stakeholders in football, in particular by the professional leagues, clubs and players.

In accordance with their respective Statutes, FIFA and UEFA have the power to approve the holding of international professional football competitions, including competitions between football clubs affiliated to a national association ('interclub football competitions'). They may also organise such competitions and exploit the rights related thereto.

European Superleague Company SL ('ESLC') is a company governed by Spanish law established on the initiative of a number of professional football clubs with the objective of organising a new European interclub football competition known as the 'Super League'.

The shareholder and investment agreement signed by the project promoters makes the establishment of the Super League subject to approval by FIFA and UEFA as a new competition compatible with their Statutes.

Following the announcement of the creation of the Super League, FIFA and UEFA issued a joint statement on 21 January 2021, setting out their refusal to recognise that new competition and warning that any player or club taking part in that new competition would be expelled from competitions organised by FIFA and UEFA. In another announcement, UEFA and a number of national associations reiterated the possibility of adopting disciplinary measures in respect of participants in the Super League, notably excluding them from certain major European and world competitions.

In those circumstances, ESLC brought an action before the Juzgado de lo Mercantil no 17 de Madrid (Commercial Court No 17, Madrid, Spain), seeking, in essence, a declaration that those announcements, and also conduct by which FIFA and UEFA and their member national associations might put them into action, were unlawful and harmful.

According to that court, FIFA and UEFA hold a monopoly or, at least, a dominant position in the market for the organisation and marketing of international interclub football competitions, and that of the exploitation of the various rights related to those competitions. In that context, it is uncertain as to the compatibility of certain provisions of FIFA's and UEFA's Statutes with EU law, most notably Articles 101 and 102 TFEU, and also the provisions relating to the various fundamental freedoms guaranteed by the FEU Treaty.

By its judgment, delivered the same day as two other judgments [250] concerning the application of EU economic law to rules adopted by international or national sporting federations, the Court of Justice, sitting as the Grand Chamber, states that the conditions in which the rules put in place by FIFA and UEFA, concerning, on the one hand, prior approval of international interclub football competitions, the participation of football clubs and players therein, and also the sanctions provided for to accompany those rules, and, on the other, the exploitation of the various rights related to those competitions, may be viewed as constituting abuse of a dominant position under Article 102 TFEU, as well as an anticompetitive agreement under Article 101 TFEU. The Court also rules on the compatibility of those rules on prior approval, participation and sanctions with the freedom to provide services guaranteed by Article 56 TFEU.

Findings of the Court

The Court begins by setting out three sets of observations.

First of all, it observes that the questions submitted by the referring court concern solely a set of rules adopted by FIFA and UEFA on the prior approval of international interclub football competitions and the participation therein of professional football clubs and their players, on the one hand, and the exploitation of the various rights related to those competitions, on the other. Accordingly, the Court is not called upon to rule on the very existence of FIFA and UEFA or on the well-foundedness of other rules adopted by those two federations or, lastly, on the existence or characteristics of the Super League project itself, either in the light of the competition rules or the economic freedoms enshrined in the FEU Treaty.

Next, the Court observes that all of the rules about which questions have been referred to it come within the scope of provisions of the Treaty relating to competition law and also those relating to the freedoms of movement. It observes in that regard that, in so far as it constitutes an economic activity, the practice of sport is subject to the provisions of EU law applicable to such activity, apart from certain specific rules which were adopted solely on non-economic grounds and which relate to questions of interest solely to sport per se. The rules at issue in the main proceedings, however, irrespective of whether they originate from FIFA or UEFA, do not come within that exception, since they relate to the pursuit of football as an economic activity.

Lastly, as regards the consequences that may be inferred from Article 165 TFEU – which specifies both the objectives assigned to Union action in the field of sport and the means which may be used to contribute to the attainment of those objectives – the Court observes that that provision is not a special rule exempting sport from all or some of the other provisions of primary EU law liable to be applied to it or requiring special treatment for sport in the context of that application. It further recalls that the undeniable specific characteristics of sporting activity may be taken into account along with other elements and provided they are relevant in the application of the provisions of the FEU Treaty relating

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250 Judgments of 21 December 2023, ***International Skating Union*** **v** ***Commission*** (C-124/21 P, EU:C:2023:1012), and of 21 December 2023, ***Royal Antwerp Football Club*** (C-680/21, EU:C:2023:1010).

to competition law and the freedoms of movement, although they may be so only in the context of and in compliance with the conditions and criteria of application provided for in each of those provisions.

In the light of those observations and after having noted that FIFA and UEFA must be categorised as 'undertakings' for the purposes of EU competition law in so far as they pursue economic activities such as organising football competitions and exploiting the rights related thereto, the Court turns first to the question whether the adoption by FIFA and UEFA of rules on prior approval of interclub football competitions and participation therein, on pain of sanctions, may be held to be abuse of a dominant position under Article 102 TFEU, on the one hand, and an anticompetitive agreement under Article 101 TFEU, on the other.

In that regard, the Court observes that the specific characteristics of professional football, including its considerable social and cultural importance and the fact that it generates great media interest, together with the fact that it is based on openness and sporting merit, support a finding that it is legitimate to subject the organisation and conduct of international professional football competitions to common rules intended to guarantee the homogeneity and coordination of those competitions within an overall match calendar as well as to promote the holding of sporting competitions based on equal opportunities and merit. It is also legitimate to ensure compliance with those common rules through rules such as those put in place by FIFA and UEFA on prior approval of those competitions and the participation of clubs and players therein. It follows that, in the specific context of professional football and the economic activities to which the practice of that sport gives rise, neither the adoption of those rules nor their implementation may be categorised, in terms of their principle or generally, as an 'abuse of a dominant position' under Article 102 TFEU. The same holds true for sanctions introduced as an adjunct to those rules, since such sanctions are legitimate, in terms of their principle, as a means of guaranteeing the effectiveness of those rules.

Be that as it may, none of those specific attributes makes it possible to consider as legitimate the adoption or the implementation of rules and sanctions provided for by way of adjunct thereto, where there is no framework for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, non-discriminatory and proportionate. More specifically, it is necessary, in particular, that those criteria and those detailed rules should have been laid down in an accessible form prior to any implementation of the rules at issue. Moreover, in order for those criteria and detailed rules to be regarded as being non-discriminatory, they must not make the organisation and marketing of third-party competitions and the participation of clubs and players therein subject to requirements which are either different from those applicable to competitions organised and marketed by the decision-making entity, or are identical or similar to them but are impossible or excessively difficult to fulfil in practice for an undertaking that does not have the same status as an association or the same powers at its disposal as that entity and which, accordingly, is in a different situation to that entity. Lastly, in order for the sanctions introduced as an adjunct to those rules not to be discretionary, they must be governed by criteria that must not only be transparent, objective, precise and non-discriminatory, but must also guarantee that those sanctions are determined, in each specific case, in accordance with the principle of proportionality, in the light of, inter alia, the nature, duration and seriousness of the infringement found.

It follows that the adoption and implementation of rules on prior approval, participation and sanctions, where there is no framework for those rules providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, constitute abuse of a dominant position under Article 102 TFEU.

As regards the application of Article 101 TFEU to those rules, the Court observes that, although the stated reasons for the adoption of rules on prior approval for interclub football competitions may include the pursuit of legitimate objectives, such as ensuring observance of the principles, values and rules of the game underpinning professional football, they do confer on FIFA and UEFA the power to authorise, control and set the conditions of access to the market concerned for any potentially

competing undertaking, and therefore to determine both the degree of competition that may exist on that market and the conditions in which that potential competition may be exercised.

Moreover, the rules on the participation of clubs and players in those competitions are liable to reinforce the anticompetitive object inherent in any prior approval mechanism that is not subject to restrictions, obligations and review suitable for ensuring that it is transparent, objective, precise and non-discriminatory, by preventing any undertaking organising a potentially competing competition from calling, in a meaningful way, on the resources available in the market, namely clubs and players, the latter being vulnerable – if they participate in a competition that has not had the prior approval of FIFA and UEFA – to sanctions for which there is no framework providing for substantive criteria or detailed procedural rules capable of ensuring that they are transparent, objective, precise, non-discriminatory and proportionate.

It follows that, where there is no framework providing for such substantive criteria or detailed procedural rules, the rules at issue reveal, by their very nature, a sufficient degree of harm to competition and must, as a result, be held to have as their object the prevention thereof. They accordingly come within the scope of the prohibition laid down in Article 101(1) TFEU, without its being necessary to examine their actual or potential effects.

In the second place, the Court turns to the question whether the rules on prior approval, participation and sanctions at issue may benefit from an exemption or be held to be justified. In that regard, the Court recalls, first, that certain specific conduct, such as ethical or principled rules adopted by an association, are liable to fall outside the scope of the prohibition laid down in Article 101(1) TFEU, even if they have an inherent effect of restricting competition, provided that they are justified by the pursuit of legitimate objectives in the public interest which are not per se anticompetitive in nature and the specific means used to pursue those objectives are genuinely necessary and proportionate for that purpose. It states, however, that that case-law does not apply in situations involving conduct that by its very nature infringes Article 102 TFEU or reveals a sufficient degree of harm as to justify a finding that it has as its 'object' the prevention, restriction or distortion of competition within the meaning of Article 101 TFEU.

Secondly, as regards the exemption provided for in Article 101(3) TFEU, it is for the party relying on such an exemption to demonstrate that all four of the cumulative conditions required for the exemption are satisfied. Thus, the conduct being examined must, with a sufficient degree of probability, make it possible to achieve efficiency gains, whilst reserving for the users an equitable share of the profits generated by those gains and without imposing restrictions which are not indispensable for the achievement of those gains and without eliminating all effective competition for a substantial part of the products or services concerned.

It is for the referring court to determine, on the basis of the evidence adduced by the parties to the main proceedings, whether those conditions are satisfied in the specific case. That being said, as regards the last condition, concerning the maintenance of effective competition, the Court observes that the referring court will have to take account of the fact that there is no framework for the rules on prior approval, participation and sanctions providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise and non-discriminatory, and that such a situation is liable to enable entities having adopted those rules to prevent any and all competition on the market for the organisation and marketing of interclub football competitions on European Union territory.

Consistently with the Court's case-law on Article 102 TFEU, abusive conduct by an undertaking holding a dominant position may escape the prohibition laid down in that provision if the undertaking concerned establishes that its conduct was either objectively justified by circumstances extraneous to the undertaking and proportionate to that justification, or counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumer.

In the present case, as regards, first, possible objective justification, the rules put in place by FIFA and UEFA have the aim of reserving the organisation of any such competition to those entities, at the risk of eliminating any and all competition from third-party undertakings, meaning that such conduct constitutes an abuse of a dominant position prohibited by Article 102 TFEU, one not justified, moreover, by technical and commercial necessities. Secondly, as regards the advantages in terms of efficiency, it will be for those two sporting associations to demonstrate, before the referring court, that efficiency gains can be achieved through their conduct, that those efficiency gains counteract the likely harmful effects of that conduct on competition and consumer welfare on the markets concerned, that that conduct is necessary for the achievement of such gains in efficiency, and that it does not eliminate effective competition by removing all or most existing sources of actual or potential competition.

In the third place, as regards the FIFA and UEFA rules relating to the rights emanating from professional interclub football competitions organised by those entities, the Court observes that, given their content, what they objectively aim to achieve in terms of competition and the economic and legal context of which they form a part, those rules are liable not only to prevent any and all competition between the professional football clubs affiliated to the national football associations which are FIFA and UEFA members in the marketing of the various rights related to the matches in which they participate, but also to affect the functioning of competition, to the detriment of third-party undertakings operating across a range of media markets for services situated downstream from that marketing, to the detriment of consumers and television viewers.

It follows that such rules have as their 'object' the prevention or restriction of competition on the different markets concerned within the meaning of Article 101(1) TFEU, and constitute 'abuse' of a dominant position within the meaning of Article 102 TFEU, unless it can be proven that they are justified, inter alia in the light of the achievement of efficiency gains and the profit reserved for users. Thus, it will be for the referring court to determine, first, whether the negotiation for the purchase of those rights with two exclusive vendors enables actual and potential buyers to bring down their transaction costs and reduce the uncertainty they would face if they had to negotiate on a case-by-case basis with the participating clubs and, secondly, whether the profit derived from the centralised sale of those rights demonstrably enables a certain form of 'solidarity redistribution' within football for the benefit of all users.

In the fourth and last place, the Court holds that the rules on prior approval, participation and sanctions constitute an obstacle to the freedom to provide services enshrined in Article 56 TFEU. By enabling FIFA and UEFA to exercise discretionary control over the possibility for any third-party undertaking to organise and market interclub football competitions on European Union territory, the possibility for any professional football club to participate in those competitions as well as, by way of corollary, the possibility for any other undertaking to provide services related to the organisation or marketing of those competitions, those rules tend not only to impede or make less attractive the various economic activities concerned, but to prevent them outright, by limiting access for any newcomer. Moreover, the absence of a framework for those rules containing objective, non-discriminatory criteria known in advance does not enable a finding that their adoption is justified by a legitimate objective in the public interest.

3. Concentrations

Judgment of 13 July 2023 (Grand Chamber), *Commission* v *CK Telecoms UK Investments* (C-376/20 P, EU:C:2023:561)

(Appeal – Competition – Regulation (EC) No 139/2004 – Control of concentrations of undertakings – Mobile telecommunications services – Decision declaring a concentration incompatible with the internal market – Oligopolistic market – Significant impediment to effective competition – Non-coordinated effects – Standard

of proof – European Commission's margin of discretion with regard to economic matters – Limits of judicial review – Guidelines on horizontal mergers – Factors relevant to demonstrating a significant impediment to effective competition – Concepts of 'important competitive force' and 'close competitors' – Closeness of competition between the parties to the concentration – Quantitative analysis of the effects of the proposed concentration on prices – Efficiencies – Distortion – Complaint raised by the General Court of the European Union of its own motion – Annulment)

A proposed concentration involving two of the four mobile telephone operators active on the retail market for mobile telecommunications services in the United Kingdom was notified to the European Commission on 11 September 2015. That proposed transaction was to enable CK Hutchison Holdings Ltd, through the intermediary of its indirect subsidiary Hutchison 3G UK Investments Ltd, which became CK Telecoms UK Investments Ltd ('CK Telecoms'), to obtain sole control over Telefónica Europe plc ('O2'). Following the proposed concentration, Hutchison 3G UK Ltd ('Three'), an indirect subsidiary of CK Hutchison Holdings, and O2 would become the main player on that market, ahead of the two remaining operators, namely EE Ltd, a subsidiary of BT Group plc and former legacy operator ('BT/EE'), and Vodafone.

By decision of 11 May 2016, [251] the Commission, pursuant to the Merger Regulation [252] and its guidelines on the assessment of horizontal mergers, [253] declared the concentration incompatible with the internal market. The Commission put forward three 'theories of harm'. The Commission took the view that the concentration would create significant impediments to effective competition due to non-coordinated effects resulting from, first, the elimination of important competitive constraints on the retail market (first 'theory of harm'), which would probably have led to an increase in prices for mobile telecommunications services and a restriction of choice for consumers. Secondly, since a characteristic of the market in question was that BT/EE and Three, on the one hand, and Vodafone and O2, on the other, had concluded network-sharing agreements, the concentration would have a negative influence on the quality of services for consumers, hindering the development of mobile network infrastructure in the United Kingdom (second 'theory of harm'). Thirdly, there was a risk that the concentration would have significant non-coordinated effects on the wholesale market (third 'theory of harm').

The General Court, before which CK Telecoms brought an action seeking to have the decision at issue set aside, was also called upon to give a ruling, for the first time, on the conditions in which the Merger Regulation applies to a concentration on an oligopolistic market entailing neither the creation nor the strengthening of an individual or collective dominant position, but which could give rise to non-coordinated effects.

By judgment of 28 May 2020, [254] the General Court set aside the decision at issue, holding, in essence, that the Commission had not been able to demonstrate that the notified concentration would give rise to non-coordinated effects which were likely to constitute significant impediments to effective

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251 Commission Decision C(2016) 2796 final of 11 May 2016 declaring a concentration incompatible with the internal market (Case M.7612 – Hutchison 3G UK/Telefónica UK), non-confidential version available in English at the following address: <https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf>, and published in summary format in the *Official Journal of the European Union* (OJ 2016 C 357, p. 15; 'the decision at issue').

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

253 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the guidelines').

254 Judgment of 28 May 2020, ***CK Telecoms UK Investments* v *Commission*** (T-399/16, EU:T:2020:217; 'the judgment under appeal').

competition, either on the retail market, as regards the first and second theories of harm, or on the wholesale market, as regards the third theory.

The Commission appealed against the judgment under appeal.

By its judgment, the Court of Justice, sitting in Grand Chamber formation, holds that most of the complaints made by the Commission under the six grounds of appeal relied on in support of its appeal are well founded, and it therefore sets aside the judgment under appeal in its entirety. In so doing, the Court provides clarification, in particular, in relation to: (i) the standard of proof required of the Commission in order to make a finding that there may be a significant impediment to effective competition, (ii) the interpretation of Article 2(3) of the Merger Regulation, (iii) the extent of judicial review, (iv) the interpretation of the concepts 'important competitive force' and 'close competitors', (v) the efficiencies which the Commission may take into account, and (vi) the overall assessment of the relevant factors which may influence whether or not significant non-coordinated effects are likely to result from a merger on an oligopolistic market.

Findings of the Court

First, the Court of Justice examines the ground of appeal seeking to challenge, in principle, the General Court's determination of the standard of proof required of the Commission when carrying out the prospective analysis of the effects of the concentration in question, in order to demonstrate that there may be significant impediments to effective competition such as to justify a decision of incompatibility.

As regards the determination of the standard of proof required, the Court of Justice observes, at the outset, that the provisions of the Merger Regulation setting out the scope of the Commission's power as regards merger control [255] are symmetrical as regards the standards 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. In that context, the Court recalls that in relation to the analysis thereby required, there can be no general presumption of compatibility or incompatibility with the internal market. Furthermore, the standard of proof required is not dependent on the type of concentration examined by the Commission or the inherent complexity of a theory of competitive harm put forward in relation to a notified concentration. In those circumstances, in the light of the prospective nature of the required economic analysis, the Court considers that, in order to be able to give a ruling on a concentration, 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 the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it. Therefore, by taking the view, in the judgment under appeal, that the Commission is required to demonstrate with a 'strong probability the existence of significant impediments' to effective competition following the concentration and that 'the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is "more likely than not"', the General Court applied a standard of proof which does not follow from the Merger Regulation, as interpreted by the Court of Justice, and in so doing made an error in law.

Secondly, the Court of Justice finds that the General Court's interpretation of Article 2(3) of the Merger Regulation, read in the light of recital 25 thereof is incorrect as regards the conditions required in order to establish whether there is a significant impediment to effective competition resulting from a concentration which has non-coordinated effects on an oligopolistic market. The General Court took the view that that recital sets out two cumulative conditions for such effects to be able, in certain

255 See, in the present case, Article 2(2) and (3), and Article 8(1) and (3) of the Merger Regulation.

circumstances, to result in a significant impediment to effective competition, namely, first, the elimination of important competitive constraints that the merging parties had exerted upon each other and, secondly, the reduction of competitive pressure on the remaining competitors. Accordingly, the General Court required the Commission to demonstrate that those two conditions were fulfilled in the present case. In so far as such an interpretation, that those conditions are cumulative, would mean that the elimination of important competitive constraints that the merging parties had exerted upon each other and the unilateral price increase which might result therefrom would never, in themselves, be sufficient to demonstrate a significant impediment to effective competition, that interpretation is incompatible with the objective of the Merger Regulation, which is to establish effective control of all concentrations which are capable of resulting in such an impediment, including those giving rise to non-coordinated effects.

Acting on the implications of the foregoing statements of principle, the Court of Justice examines, thirdly, the ground of appeal by which the Commission complained, in essence, that the General Court had, first of all, exceeded the limits of judicial review incumbent on it in interpreting the concepts of 'important competitive force' and 'close competitors', next, distorted both the decision at issue and the Commission's defence and, last, misinterpreted the concepts of 'important competitive force' and 'close competitors' contained in the guidelines.

In that regard, the Court of Justice states first of all that the General Court cannot be criticised for having exceed the limits of judicial review incumbent on it in interpreting those concepts. While it is true that those concepts require an economic analysis when they are implemented, the EU Courts nevertheless continue to have jurisdiction to interpret them when conducting their review of Commission merger control decisions.

However, the Court of Justice's examination of the grounds under criticism finds that the inadequacies of the General Court in relation to the implementation of those concepts, constituted both a distortion of the decision at issue and a misinterpretation of the concepts of 'important competitive force' and 'close competitors'.

It is not apparent from the decision at issue that the Commission was of the view that the elimination of an 'important competitive force' or the closeness of competition would be sufficient in the present case, in themselves, to prove a significant impediment to effective competition. In making a finding to the contrary, the General Court therefore distorted the meaning of the decision at issue. Moreover, the Court of Justice observes that the General Court made an error of law in finding that, in order to be able to classify an undertaking as an 'important competitive force', it was for the Commission to demonstrate, in particular, that the undertaking concerned competed particularly aggressively in terms of prices and that it forced the other players on the market to align with its prices, whereas it is sufficient for the Commission to establish that the undertaking in question had more of an influence on the competitive process than its market share or similar measures would suggest, as borne out by paragraph 37 of the guidelines. The General Court therefore erred in finding, in the present case, that the Commission had not demonstrated to the requisite legal standard that Three fell within that concept. Similarly, the Court of Justice finds that, for the purposes of implementing the concept of 'close competitors', the General Court was also not justified in requiring the Commission to establish 'particular' closeness between the parties to the concentration in order to be able to classify them as 'close competitors'.

Fourthly, as regards the quantitative analysis of the effects of the proposed concentration on prices, which the General Court had also found to be insufficiently supported, it is apparent from the examination of the relevant paragraphs of the judgment under appeal that none of the factors relied on by the General Court is such as to provide the basis for the finding criticised.

Indeed, on the one hand, in observing – having compared the estimate, which was presented as not subject to dispute, of the predicted price increase in the present case with the higher increases found in other cases – that the Commission did not for that reason regard those higher increases as

'significant', the General Court (i) distorted the Commission's written pleadings at first instance, which reveals the parties' lack of agreement as regards the estimate to be used, and (ii) erred in comparing the present case to those other concentration cases examined by the Commission.

On the other hand, the General Court also erred in taking the view that it was for the Commission to include in its quantitative analysis the so-called 'standard' efficiencies which, according to the General Court, are specific to all concentrations. The Court of Justice considers that it is for the parties to the concentration alone to demonstrate such pro-competitive effects and there can be no presumption thereof.

Fifthly, the Court of Justice examines the ground of appeal by which the Commission criticises the General Court for not having analysed whether all the relevant factors supported the conclusion that the Commission had been able, in the present case, to establish that the concentration would result in a significant impediment to effective competition and to have therefore erroneously limited its examination to certain factors supporting the first theory of harm and whether, taken separately, those factors were sufficient to establish such an impediment. The Court of Justice upholds that ground of appeal and observes that by failing to carry out, following its examination of the substance of the factors and findings contested by CK Telecoms at first instance and in the light of the result of that examination, an overall assessment of the relevant factors and findings, in order to ascertain whether the Commission had demonstrated the existence of a significant impediment to effective competition, the General Court erred in law.

Sixthly, the Court of Justice examines the grounds referred to in the appeal on which the General Court relied in order to reject the Commission's analysis in relation to the second theory of harm. In that regard, the Court of Justice rules, first, that the General Court's finding that the Commission had failed to assess possible degradation of the quality of the network resulting from the concentration is attributable to a distortion of the decision at issue. Secondly, the Court of Justice observes that CK Telecoms did not criticise the Commission, before the General Court, for having failed to specify or analyse the appropriate time frame within which that institution intended to establish the existence of non-coordinated effects and of a significant impediment to effective competition. However, the General Court carried out an analysis of its own motion of that issue. Accordingly, the General Court erred in raising of its own motion a complaint which cannot be classified as a plea involving a matter of public policy.

Having regard to the breadth, nature and scope of the errors made by the General Court, which affect that court's reasoning as a whole in the judgment under appeal, the Court of Justice holds that the judgment under appeal must be set aside. Given that the General Court made its ruling without having examined all of the grounds raised and given that the nature and scope of the errors identified by the Court of Justice require, essentially, a new analysis, the Court of Justice takes the view that the state of the proceedings does not permit a final judgment to be given in the matter and, therefore, the Court of Justice orders the case to be referred back to the General Court.

4. State aid

Judgment of 12 January 2023 (Grand Chamber), *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1)

(Reference for a preliminary ruling – State aid – Article 107(1) TFEU – National legislation imposing an obligation on the public operator to purchase from renewable energy producers at a price higher than the market price – Failure to pay a portion of the aid concerned – Application for compensation submitted by those producers to a public authority distinct from that which is, in principle, required, under that national legislation, to pay that aid and whose budget is intended solely to ensure its own operation – New aid –

Notification requirement – De minimis *aid – Regulation (EU) No 1407/2013 – Article 5(2) – Cumulation – Taking into account the amounts of aid already received during the reference period on the basis of that national legislation)*

The companies 'DOBELES HES' SIA and 'GM' SIA ('the producers concerned') operate hydroelectric power plants in Latvia and generate electricity from renewable energy sources.

Until 7 June 2005, a provision of the Latvian Law on Energy granted electricity producers, subject to certain conditions, the right to sell their surplus electricity production to the approved electricity distribution undertaking at a preferential price corresponding to twice the average electricity sale tariff, as determined by the national regulatory authority. From the entry into force, on 8 June 2005, of new provisions governing the sale by electricity producers of surplus production at a preferential tariff, a provision allowed producers of electricity from renewable energy sources that had already commenced their activity on that date to continue to benefit from the previous scheme.

The regulatory authority interpreted that provision as blocking for those producers the applicable preferential tariff at its value on 7 June 2005, so that it ceased to update it. Thus, from that date, the two producers concerned sold their surplus production at a price corresponding to twice the average tariff for the sale of electricity then in force. However, by decision of 20 January 2010, the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) held that the regulatory authority's interpretation of the provision at issue was incorrect, in so far as the latter had taken the view that the term 'price' had to be understood as a fixed price and not a price-fixing mechanism, with the result that it was also wrong to consider itself no longer competent, from 8 June 2005, to fix the average electricity sale tariff.

In those circumstances, each of the producers concerned submitted to the regulatory authority a claim for compensation for the losses sustained as a result of the failure to update that average tariff as from 8 June 2005. In 2011, when the regulatory authority refused to grant their respective claims, the producers concerned applied to the administrative judicature which, by judgments of 31 May 2019 and 10 July 2019, upheld their respective claims in part, while making the payment of the sums charged to the regulatory authority, as payment of State aid, subject to the adoption of a decision of the European Commission authorising such aid.

The regulatory authority brought an appeal on a point of law against those judgments before the Augstākā tiesa (Supreme Court, Latvia). Uncertain, in particular, as to the classification of the compensation at issue in the light of the concept of 'State aid' and of the requirements to be satisfied, where appropriate, in order to enable payment of the compensation in the light of the Commission's prerogatives in the field of State aid, the Supreme Court decided to stay the proceedings and, in turn, to refer to the Court of Justice for a preliminary ruling a series of questions on that subject, worded identically in both cases.

By its Grand Chamber judgment, the Court specifies the conditions under which a national measure allowing producers of electricity from renewable energy sources to receive a higher tariff may be classified as 'State aid' within the meaning of Article 107(1) TFEU. Moreover, if the measure in question receives that classification, although it has not been duly notified to the Commission, the Court nevertheless accepts that the national court may grant a request for payment of a sum in respect of such a support measure, while making the payment subject to the requirement of prior notification of the aid to the Commission and to the Commission's consent in that regard.

Findings of the Court

In the first place, the Court provides the interpretative guidance sought by the referring court in order to enable it to determine whether the national measure giving rise to the cases before it may be classified as 'State aid' within the meaning of Article 107(1) TFEU.

In that regard, the Court examines, first of all, whether national legislation which obliges the approved electricity distribution undertaking to purchase electricity generated from renewable energy sources at a price higher than the market price and which provides that the resulting additional costs are financed by a compulsory surcharge borne by end consumers constitutes intervention 'through State resources' within the meaning of that provision. In the present case, the Court points out that funds resulting from a surcharge, the financial burden of which is borne in practice by a defined category of persons, can be regarded as being 'State resources' only where the surcharge in question is compulsory under national law. Therefore, funds financed by a levy or other compulsory surcharges under national legislation and managed and apportioned in accordance with that legislation constitute 'State resources' within the meaning of that provision. However, the fact that sums constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as 'State resources'. Consequently, subject to the verifications which it is for the referring court to carry out, the funds by means of which a tariff advantage is granted, pursuant to the Latvian legislation concerned, to producers of electricity from renewable energy sources are 'State resources', within the meaning of Article 107(1) TFEU, in the light of the two alternative criteria for that concept.

In addition, the Court states that the date of complete liberalisation of the electricity market in Latvia is irrelevant for the purpose of determining whether the aid provided by the public operator in that Member State by purchasing electricity generated from renewable energy sources at a price higher than the market price must be classified as State aid.

Furthermore, where national legislation has established 'State aid' within the meaning of that provision, the payment of a sum claimed before the courts in accordance with that legislation also constitutes such aid. According to the Court, it is irrelevant, for the purpose of determining whether sums correspond to 'State aid', whether actions seeking payment of those sums are classified as 'claims for compensation' or as 'claims for damages' under national law.

Finally, the Court observes that, although the national court may, where appropriate, deliver a judgment from which it follows that one of the parties must, in accordance with national law, receive a sum corresponding to State aid, that does not mean that, in that case, it itself grants that aid. The establishment as such of State aid cannot result from a judicial decision since it entails a decision as to the appropriate course of action which falls outside the scope of a court's powers and obligations. The Court thus concludes that, where national legislation establishing a statutory right to a higher payment for electricity generated from renewable energy sources constitutes 'State aid', within the meaning of Article 107(1) TFEU, legal proceedings seeking full entitlement to that right must be regarded as requests for payment of the portion of that State aid not received, and not as requests for the grant by the court seised of a separate State aid.

In the second place, the Court provides clarification on the application of the criteria laid down by Regulation No 1407/2013 [256] in relation to *de minimis* aid, which is not subject to the notification obligation laid down in Article 108(3) TFEU. In that regard, the Court considers that compliance with the *de minimis* threshold laid down in Article 3(2) of that regulation must be assessed in the light of the amount of aid claimed under the relevant national legislation cumulated with the amount of the payments already received during the reference period under that legislation.

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256 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 [TFEU] to *de minimis* aid (OJ 2013 L 352, p. 1).

In the third place, the Court rules on the relationship between the respective prerogatives of the national court and the Commission, in the event that the sums sought by the producers concerned in the cases in the main proceedings correspond to State aid.

In the present case, in so far as the aid in question does not correspond to any of the categories of existing aid provided for by EU law, [257] subject to the verifications which it is for the referring court to carry out, the Court concludes that the support in question, including the portion thereof whose payment is claimed subsequently, must be classified as 'new aid'. [258]

Thus placing itself, in the light of the foregoing finding, in a situation where the national court is seised of a request seeking the payment of aid which is unlawful, since it was not notified to the Commission, the Court points out that the task of reviewing State aid which EU law confers on that court must, in principle, lead the latter to reject such a request. Nevertheless, the Court accepts that a decision of the national court ordering the defendant to pay the aid in question subject to the condition that that aid must first be notified to the Commission by the national authorities concerned and that that institution gives its consent, or is deemed to have given it, is also likely to prevent new aid from being paid in breach of Article 108(3) TFEU and Article 2(1) and Article 3 of Regulation 2015/1589.

Judgment of 31 January 2023 (Grand Chamber), *Commission* v *Braesch and Others* (C-284/21 P, EU:C:2023:58)

(Appeal – State aid – Articles 107 and 108 TFEU – Restructuring aid – Banking sector – Preliminary examination stage – Decision declaring the aid compatible with the internal market – Restructuring plan – Commitments given by the Member State concerned – Burden-sharing measures – Conversion of subordinated debts into equity – Bondholders – Action for annulment – Admissibility – Fourth paragraph of Article 263 TFEU – Locus standi *– Natural or legal person directly and individually concerned – Breach of the procedural rights of interested parties – Failure to initiate the formal investigation procedure – Article 108(2) TFEU – Concept of 'parties concerned' – Regulation (EU) 2015/1589 – Article 1(h) – Concept of 'interested party' – National measures taken into account by the European Commission – Inadmissibility of the action)*

In 2008, the Italian bank Banca Monte dei Paschi di Siena ('BMPS') undertook a capital increase of EUR 950 million underwritten in full by J.P. Morgan Securities Ltd ('JPM'), under the terms of contracts concluded between them ('the FRESH contracts'). JPM obtained the funds necessary to finance that transaction from Mitsubishi UFJ Investor Services & Banking (Luxembourg) SA ('MUFJ') which issued the bonds entitled FRESH in an amount of EUR 1 billion. The bondholders receive, for their part, fees in the form of coupons passed on to them by MUFJ.

At the end of 2016, BMPS requested extraordinary public financial support in the form of a precautionary recapitalisation under Italian legislation. In response to that request, the Italian authorities notified the European Commission of aid for the recapitalisation of BMPS in the amount of EUR 5.4 billion. That aid was to be added to EUR 15 billion of individual liquidity aid to BMPS, which the Commission had temporarily approved by decision of 29 December 2016.

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257 Article 1(b) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

258 Within the meaning of Article 1(c) of Regulation 2015/1589.

By decision of 4 July 2017, [259] the Commission approved, following the preliminary examination stage, both the EUR 15 billion of individual liquidity aid to BMPS and the aid for precautionary recapitalisation of BMPS in the amount of EUR 5.4 billion ('the decision at issue'). Those aid measures, which were accompanied by a restructuring plan for BMPS and commitments offered by the Italian authorities, were considered to constitute State aid compatible with the internal market for reasons of financial stability. [260]

BMPS's restructuring plan provided, inter alia, for the possibility of cancelling the FRESH contracts concluded between BMPS and JPM. Following the annulment of those contracts, several holders of FRESH bonds brought an action before the General Court seeking annulment of the decision at issue. In support of their actions, those applicants submitted, inter alia, that they had suffered a substantial economic loss as a result of the cancellation of the FRESH contracts and that that annulment stemmed from the restructuring plan accompanying the aid measures notified by the Italian Republic.

Before the General Court, the Commission raised a plea of inadmissibility on the ground that the appellants do not have an interest in bringing proceedings or standing to bring proceedings for the purposes of Article 263 TFEU. Since that objection of inadmissibility was rejected by the General Court, [261] the Commission brought an appeal before the Court of Justice limited to the question of *locus standi*. In upholding that appeal, the Grand Chamber of the Court of Justice clarifies the concept of 'party concerned' within the meaning of Article 108(2) TFEU, conferring standing to bring proceedings as a person directly and individually concerned, within the meaning of Article 263 TFEU.

Findings of the Court

By its single ground of appeal, the Commission complained, in essence, that the General Court erred in law in holding that, as 'parties concerned' within the meaning of Article 108(2) TFEU and 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589, [262] the appellants have standing to bring an action for annulment, under the fourth paragraph of Article 263 TFEU, [263] against the decision at issue in order to safeguard their procedural rights under Article 108(2) TFEU.

In that regard, the Court of Justice recalls that it follows from its case-law that a 'party concerned', within the meaning of Article 108(2) TFEU, is entitled to bring an action for annulment of a Commission decision not to raise objections to notified State aid, adopted at the end of the preliminary examination stage, provided that that person seeks to safeguard the procedural rights available to him or her under the latter provision. Since the decision at issue was adopted at the conclusion of the preliminary examination stage, without the formal investigation procedure provided for in Article 108(2) TFEU being initiated, and since the appellants are seeking to safeguard their procedural rights under that provision,

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259 Decision C(2017) 4690 final of 4 July 2017 on State Aid SA.47677 (2017/N) – Italy – New aid and amended restructuring plan of Banca Monte dei Paschi di Siena.

260 Under Article 107(3)(b) TFEU, concerning aid intended to remedy a serious disturbance in the economy of a Member State.

261 Judgment of 24 February 2021, ***Braesch and Others* v *Commission*** (T-161/18, EU:T:2021:102).

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

263 The fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute annulment proceedings against an EU act which is not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to those persons. Secondly, they may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them.

the General Court was right to examine whether they have the status of 'parties concerned' in order to determine whether their action is admissible under the fourth paragraph of Article 263 TFEU.

However, the General Court erred in law in concluding that the appellants have the status of 'parties concerned' in the context of the procedure for reviewing notified aid, as conducted by the Commission under Article 108 TFEU.

Regulation 2015/1589 defines the concept of 'interested party' – which is analogous to the concept of 'party concerned' within the meaning of Article 108(2) TFEU – as any person, undertaking or association of undertakings whose interests might be affected by the granting of aid. Since that concept is interpreted broadly in the case-law, it may encompass any person capable of demonstrating that the grant of State aid is likely to have a specific effect on its situation.

In that regard, the General Court held that the commitments given by the Italian authorities concerning BMPS's restructuring plan, which accompanied the notified aid measures and which, according to the appellants, entailed a significant economic loss for holders of the FRESH bonds, formed an integral part of the notified aid measures, since the Commission had, by the decision at issue, rendered those measures binding, with the result that that decision concerns both the notified aid measures and the commitments given by the Italian authorities. The General Court inferred from this that the grant of the notified aid and, accordingly, the adoption of the decision at issue had a specific effect on the appellants' situation, with the result that they must be classified as 'interested parties' within the meaning of Article 1(h) of Regulation 2015/1589.

In so ruling, the General Court misconstrued the rules of EU law governing the scope of the decision at issue.

On that point, the Court states that where a notified aid measure incorporates, on a proposal from the Member State concerned, commitments granted by that State, it does not follow that those commitments must be regarded as being imposed as such by the Commission and that any adverse effects they may have on third parties are therefore attributable to the decision adopted by that institution.

By a decision adopted at the conclusion of the preliminary examination stage, the Commission cannot impose or prohibit any action by the Member State concerned. It is only entitled to approve, by a decision not to raise objections, the planned aid as notified by that Member State, declaring that aid compatible with the internal market.

It follows that, by the decision at issue, the Commission merely authorised the Italian Republic to implement the notified State aid while taking note of the factual framework already defined by that Member State in the restructuring plan for BMPS and the commitments which it notified in order to dispel any doubt as to the compatibility of that aid with the internal market, for the purposes of Article 107(3)(b) TFEU. It cannot therefore be considered that the commitments proposed by the Italian Republic in the context of the preliminary examination procedure were imposed by the decision at issue itself, since those commitments result solely from acts adopted by that Member State.

Accordingly, the annulment of the FRESH contracts, when the restructuring plan accompanying the notified aid was implemented, cannot be regarded as a binding effect of the decision at issue, since it does not result from the implementation of that aid as such. Rather, it results from measures – which are indeed linked de facto, but which are legally distinct – adopted by the Member State that notified that aid to the Commission. The fact that those measures were, inter alia, adopted by that Member State with a view to obtaining from the Commission a decision authorising that aid and that they are the subject of commitments taken into account in such a decision of the Commission is irrelevant in that regard.

Thus, contrary to what was held by the General Court, the commitments referred to in the decision at issue were not imposed or rendered binding by the Commission in that decision, but constitute purely national measures notified by the Italian Republic, under Article 108(3) TFEU, under its own responsibility, which were taken into account by the Commission as a factual element in assessing whether the State aid in question could, in the absence of any doubt in that regard, be declared compatible with the internal market at the conclusion of the preliminary examination stage.

In response to the appellants' argument based on the Commission's obligation to verify that the aid measures notified by the Italian Republic comply with EU law as a whole, the Court notes that, according to settled case-law, the procedure provided for in Article 108 TFEU must never produce a result which is contrary to the specific provisions of the Treaty. Accordingly, State aid which, as such or by reason of some modalities thereof, contravenes provisions or general principles of EU law cannot be declared compatible with the internal market. In accordance with that case-law, the Commission therefore verified, in the decision at issue, that the notified aid complied with Directive 2014/59. [264] In that context, the Commission verified, inter alia, that the burden-sharing measures provided for in the restructuring plan proposed by the Italian Republic, which led to the annulment of the FRESH contracts, were adequate for the purpose of limiting the amount of aid granted to the strict minimum necessary to achieve the objective of recapitalising BMPS.

However, the Commission was not required to verify whether those burden-sharing measures themselves infringed the rights which the appellants claim to derive from EU law or national law. Such an infringement, even if it were established, would not arise from the aid as such, its object or its indissociable modalities, but rather from the measures taken by the Italian Republic in order to obtain from the Commission a decision authorising that aid at the conclusion of the preliminary examination stage.

In those circumstances, the fact that the burden-sharing measures form part of a restructuring plan requiring the payment of State aid, notified by the Italian Republic to the Commission in order to seek the approval of that aid at the conclusion of the preliminary examination stage, does not confer on the appellants, who consider that they have been affected by those measures, the status of 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, in the context of the procedure conducted by the Commission under Article 108 TFEU. If the appellants consider that, as a result of the adoption of the burden-sharing measures provided for in BMPS's restructuring plan, the Italian Republic has infringed EU law, they must challenge the legality of those measures before the national court, which has sole jurisdiction in that regard and which has the power, or even the obligation, if it rules at last instance, to make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU, if necessary, in order to question it as to the interpretation or validity of the relevant provisions of EU law. That is precisely the situation in the present case, since the appellants do not claim to be affected by the aid in question, but claim only to be adversely affected by the burden-sharing measures provided for in the restructuring plan referred to in the decision at issue.

In the light of those clarifications, the Court of Justice upholds the single ground raised by the Commission in its appeal and sets aside the judgment of the General Court. Since the state of the proceedings permits final judgment to be given, the Court also upholds the objection of inadmissibility raised by the Commission at first instance and, accordingly, dismisses the appellants' action as inadmissible.

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264 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

Judgment of 5 December 2023 (Grand Chamber), *Luxembourg and Others* v *Commission* (C-451/21 P and C-454/21 P, EU:C:2023:948)

(Appeal – State aid – Article 107(1) TFEU – Tax rulings adopted by a Member State – Aid declared incompatible with the internal market – Obligation to recover that aid – Concept of 'advantage' – Determination of the reference framework – 'Normal' taxation under national law – Review by the Court of Justice of the interpretation and application of national law by the General Court of the European Union – Direct taxation – Strict interpretation – Powers of the European Commission – Obligation to state reasons – Legal classification of the facts – Concept of 'abuse of law' – Ex ante assessment by the tax authorities of the Member State concerned – Principle of legal certainty)

Between 2008 and 2014, the Luxembourg tax authorities issued two sets of tax rulings concerning two restructuring operations carried out by several Luxembourg companies in the Engie group.

The restructuring operations in question, which have a similar economic and legal structure, are both centred on the transfer, within the Engie group, of the assets of one company to a subsidiary company. In order to finance that purchase, the subsidiary company issues to an intermediary company a zero-interest bond that is mandatorily convertible into shares at maturity, known as a *zéro-intérêts obligation remboursable en actions* (zero-interest bond repayable in shares (ZORA)). When the bond matures, the subsidiary company must repay, by issuing shares, the nominal amount of the bond plus a 'premium' consisting of all the profit made by the subsidiary company during the term of the bond, referred to as 'ZORA accretions'.

In order to finance the bond that it has acquired, the intermediary company, for its part, uses a prepaid forward sale contract entered into with a holding company in the Engie group, which is the sole shareholder of both the subsidiary company and the intermediary company. On entering into that contract, the holding company pays to the intermediary company an amount corresponding to the nominal amount of the ZORA, in consideration for which the intermediary company transfers to the holding company the rights to the shares that will be issued at the end of the ZORA, including those corresponding, where applicable, to the cumulative value of the ZORA accretions.

After requesting information from the Luxembourg authorities concerning the tax rulings adopted with regard to the Engie group, the European Commission initiated the formal investigation procedure. At the end of that procedure, the Commission found, by decision of 20 June 2018, [265] that the Grand Duchy of Luxembourg had granted, through its tax authorities, in breach of Article 107(1) and Article 108(3) TFEU, a selective advantage to the Engie group. It ordered the recovery of that advantage from the beneficiaries. In its decision, the Commission found, in essence, that, as a result of the tax rulings at issue, almost all of the profit made by the Engie subsidiaries in Luxembourg had not been taxed.

The Grand Duchy of Luxembourg and the Engie group companies brought actions for annulment of that decision, which were dismissed by the General Court. [266]

Following appeals brought by the Grand Duchy of Luxembourg and the Engie group companies, the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court and then,

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265 Commission Decision (EU) 2019/421 of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of Engie (OJ 2019 L 78, p. 1; 'the decision at issue').

266 Judgment of 12 May 2021, ***Luxembourg and Others* v *Commission*** (T-516/18 and T-525/18, EU:T:2021:251).

giving final judgment in the dispute, also annuls the decision at issue. In that context, it clarifies its case-law concerning the definition and the analysis of the reference framework in the light of which the selectivity of tax measures must be assessed in order to determine whether they constitute State aid for the purposes of Article 107(1) TFEU.

Findings of the Court

First of all, the Court declares admissible the grounds of the appeals challenging the General Court's findings with regard to the reference framework under Luxembourg law that the Commission determined for the purpose of examining whether the tax rulings at issue granted a selective advantage to the Engie group.

In that regard, the Court notes that the question whether the General Court adequately defined the reference system under Luxembourg law and, by extension, correctly interpreted the national provisions making up that system is a question of law which can be reviewed by the Court on appeal. Thus, the appellants' 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.

After declaring those grounds admissible, the Court recalls, as to the substance, that, in order to classify a national tax measure as 'selective' for the purpose of applying 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.

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.

In the light of those principles, the Court finds that, in order to prove the selectivity of the tax rulings at issue, the Commission relied on four lines of reasoning, the second of which was endorsed by the General Court in the judgment under appeal. In connection with that second line of reasoning, the Commission argued that the exemption of income corresponding to the ZORA accretions, granted under the tax rulings at the level of the holding companies, derogated from the 'normal' application of Articles 164 and 166 of the Luxembourg Law on income tax ('the LIR'), [267] relating respectively to the taxation of profit distributions and the exemption of income from participations.

The Grand Duchy of Luxembourg having challenged the Commission's interpretation of Articles 164 and 166 of the LIR, the Court notes that, where the interpretation of the 'normal' tax regime given by the Member State concerned is compatible with the wording of the provisions in question, the Commission may depart from that interpretation only if it is able to establish, on the basis of reliable

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267 Loi du 4 décembre 1967, concernant l'impôt sur le revenu (Law of 4 December 1967 on income tax) (Mémorial A 1967, p. 1228), as amended.

and consistent evidence that has been the subject of an exchange of arguments, that another interpretation prevails in the case-law or the administrative practice of that Member State.

However, the elements on which the General Court relied did not permit it validly to find that the Commission had been able to establish to the requisite legal standard that, with regard to the interpretation of Articles 164 and 166 of the LIR, an interpretation prevailed in Luxembourg law other than that put forward by the Grand Duchy of Luxembourg, that interpretation being compatible with the wording of those provisions. Thus, the Court finds that it was following an analysis vitiated by an error of law and a distortion of the facts that the General Court upheld as well founded the second line of reasoning put forward by the Commission for the purpose of establishing the selectivity of the tax rulings.

The Court also examines the appellants' arguments relating to the fourth line of reasoning put forward in the alternative by the Commission for the purpose of establishing the selectivity of the tax rulings at issue, according to which the selective advantage resulted from the non-application by the Luxembourg tax authorities of Article 6 of the Law on tax adjustment, [268] on abuse of law. On that point, the appellants challenge the General Court's analysis that the Commission could establish the selective nature of the tax rulings in the light of that article without taking into account the national administrative practice relating to that provision, on the ground that that provision did not give rise to any difficulties of interpretation.

In that regard, the Court recalls that classifying a tax measure as 'selective' presupposes not only familiarity with the content of the provisions of relevant law but also requires examination of their scope on the basis, inter alia, of the administrative and judicial practice of the Member State concerned. It also emphasises that Article 6 of the Law on tax adjustment, on abuse of law, is inherently particularly general in nature. The choice to lay down such a provision and to define the manner in which it is to be implemented falls within the Member States' own competence in the matter of direct taxation in areas that have not been harmonised under EU law and, therefore, within their fiscal autonomy.

In those circumstances, the Commission could not conclude that the non-application of Article 6 of the Law on tax adjustment by the Luxembourg tax authorities in order to refuse the tax treatment sought by a taxpayer in a tax ruling request led to the grant of a selective advantage unless that non-application departs from the national case-law or administrative practice relating to that provision. If that were not the case, the Commission would itself be able to define what does or does not constitute a correct application of such a provision, which would exceed the limits of the powers conferred on it by the Treaties in the field of State aid review.

Accordingly, the Court concludes that the General Court also erred in law in finding that the Commission was not required to take into account the administrative practice of the Luxembourg tax authorities relating to Article 6 of the Law on tax adjustment, on the ground that that provision did not give rise to any difficulties of interpretation.

In the light of the foregoing, the Court sets aside the judgment under appeal. Taking the view, moreover, that the state of the proceedings permits final judgment to be given in the matter, the Court then itself examines the actions for annulment of the decision at issue brought by the Grand Duchy of Luxembourg and the Engie group companies.

In support of their actions for annulment, those parties dispute, in essence, the four lines of reasoning on which the Commission relied in order to establish the selectivity of the tax rulings at issue.

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268 Steueranpassungsgesetz (Law on tax adjustment) of 16 October 1934 (Mémorial A 1934, p. 9001).

As regards the second line of reasoning put forward by the Commission, according to which the exemption of income corresponding to the ZORA accretions, granted under the tax rulings at the level of the holding companies, derogated from the 'normal' application of Articles 164 and 166 of the LIR, the Court points out, first, that it follows from its analysis of the grounds of the appeals that the General Court's assessment is vitiated by a distortion of the facts. Secondly, the Court confirms that, in the contested decision, the Commission departed from the interpretation of Articles 164 and 166 of the LIR given by the Grand Duchy of Luxembourg without establishing that that interpretation was incompatible with the wording of those provisions or that another interpretation prevailed in the case-law or administrative practice of Luxembourg, which constitutes an error of law.

After finding that it follows from its analysis of the grounds of the appeals that the fourth line of reasoning was also legally flawed, the Court examines the grounds for annulment relating to the first and third lines of reasoning, in which the Commission relied on a reference framework encompassing the Luxembourg corporate income tax system for the purpose of establishing the selectivity of the tax rulings.

In that regard, the Court observes, in particular, that the reference system or the 'normal' tax regime must include the provisions laying down the exemptions which the national tax authorities considered to be applicable to the present case, where, as in the present case, those provisions do not, in themselves, confer a selective advantage for the purposes of Article 107(1) TFEU. In such a situation, in the light of the Member States' own competence in the matter of direct taxation and the regard to be had for their fiscal autonomy, the Commission cannot establish a derogation from a reference framework merely by finding that a measure departs from a general objective of taxing all companies resident in the Member State concerned, without taking account of provisions of national law specifying the manner in which that objective is to be implemented. In the present case, the Commission did not include Article 166 of the LIR in the reference framework encompassing the Luxembourg corporate income tax system, even though that provision constitutes the legal basis for the tax rulings at issue. Thus, the Court concludes that that error necessarily vitiated the whole of the selectivity analysis carried out by the Commission on the basis of the reference framework encompassing the Luxembourg corporate income tax system.

In the light of the foregoing, the Court upholds the pleas for annulment of the decision at issue alleging errors of assessment and of law in the identification of a selective advantage and, consequently, annuls that decision.

Judgment of 14 December 2023, *Commission* v *Amazon.com and Others* (C-457/21 P, EU:C:2023:985)

(Appeal – State aid – Article 107(1) TFEU – Tax ruling adopted by a Member State – Aid declared incompatible with the internal market – Concept of 'advantage' – Determination of the reference framework – 'Normal' taxation according to national law – Arm's length principle – Review by the Court of Justice of the interpretation and application of national law by the General Court)

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS ('LuxSCS') and Amazon EU Sàrl ('LuxOpCo'), a wholly owned subsidiary of LuxSCS.

In that context, LuxSCS obtained, by various agreements concluded with American entities of the Amazon group, the right to use certain intellectual property rights concerning, essentially, technology, client data and the marks of that group, as well as the right to sub-license the intangible assets covered. On that basis, LuxSCS concluded, inter alia, a licence agreement with LuxOpCo, as the principal operator

of the Amazon group's business in Europe. Under that agreement, LuxOpCo undertook to pay a royalty to LuxSCS in return for the use of the intangible assets.

In 2014, the Amazon group underwent a new restructuring and the contractual arrangement between LuxSCS and LuxOpCo was no longer applicable.

In preparation for the 2006 restructuring, the Luxembourg tax authorities granted the Amazon group, following the request by the latter, a tax ruling confirming the treatment of LuxOpCo and LuxSCS for the purposes of Luxembourg corporate income tax. That tax ruling, first, confirmed that LuxSCS was not subject to Luxembourg corporate income tax because of its legal form and, secondly, endorsed the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS under the abovementioned licence agreement.

By decision of 4 October 2017 [269] ('the decision at issue'), the European Commission found that that tax ruling, as well as its annual implementation from 2006 to 2014, constituted an aid to the Amazon group that was incompatible with the internal market within the meaning of Article 107 TFEU. In that regard, the Commission found that the method of calculating the annual royalty to be paid by LuxOpCo to LuxSCS, as confirmed in the tax ruling, did not allow an arm's length outcome to be reached. According to the Commission, the annual royalty calculated using that method was too high, which artificially reduced the tax base of LuxOpCo.

Seised of two actions for annulment brought by the Grand Duchy of Luxembourg and the Amazon group against the decision at issue, the General Court annulled that decision by a judgment of 12 May 2021, [270] on the ground, in essence, that the Commission had not succeeded in demonstrating the existence of an advantage within the meaning of Article 107(1) TFEU.

The appeal brought by the Commission is dismissed by the Court of Justice, which holds, by a substitution of grounds and in an extension of its judgment in *Fiat Chrysler Finance Europe* v *Commission*, [271] that by applying, in the decision at issue, the arm's length principle, even though that principle was not incorporated into Luxembourg tax law at the time the tax ruling was made, the Commission committed an error in the identification of the reference framework with regard to which that tax ruling had to be assessed, which vitiated all of its reasoning as to the existence of a selective advantage.

Findings of the Court

As a first step, the Court declares admissible the grounds of the appeal challenging the interpretation and application of the arm's length principle made by the General Court in support of its conclusion that the Commission had not succeeded in demonstrating the existence of an advantage within the meaning of Article 107(1) TFEU.

The Commission having included the arm's length principle in the reference framework used for the purposes of its examination of whether there was a selective advantage, the Court finds that the question whether, in the judgment under appeal, the General Court adequately defined the relevant

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269 Commission Decision (EU) 2018/859 of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (OJ 2018 L 153, p. 1).

270 Judgment of 12 May 2021, ***Luxembourg and Amazon* v *Commission*** (T-816/17 and T-318/18, EU:T:2021:252).

271 Judgment of 8 November 2022, ***Fiat Chrysler Finance Europe* v *Commission*** (C-885/19 P and C-898/19 P, EU:C:2022:859; 'the judgment in *Fiat*').

reference system and, by extension, correctly interpreted and applied its constituent provisions, is a question of law which can be reviewed by the Court of Justice on appeal.

It follows that the Commission's arguments seeking to put at issue the interpretation and application of the arm's length principle made by the General Court in order to rule that the reference system used in the decision at issue was incorrect and, therefore, that the existence of an advantage for the benefit of the Amazon group was not established.

On the substance, the Court recalls, as a second step, that, as EU law currently stands, the arm's length principle cannot be applied for the purposes of examining tax measures in the context of Article 107(1) TFEU unless it is recognised by the national law concerned and in accordance with the rules defined by the latter. Therefore, the General Court erred in law in finding that the Commission could, in a general manner, apply the arm's length principle in the context of implementing Article 107(1) TFEU, without stating that that institution was required, as a preliminary step, to satisfy itself that that principle was incorporated into Luxembourg tax law and that express reference was made to it as such in that law.

Furthermore, by referring to the Organisation for Economic Cooperation and Development (OECD) Guidelines as having a 'certain practical significance' in the assessment of whether the arm's length principle has been observed despite those guidelines not being binding on the member States of the OECD, the General Court committed another error of law in that it took for granted that those guidelines applied, without reviewing whether the Commission had satisfied itself that Luxembourg tax law had made express reference to them.

Accordingly, the Court concludes that the analysis by the General Court as regards the condition that there is a selective advantage, for the purposes of Article 107(1) TFEU, is vitiated in law since it rests on an incorrect determination of the relevant reference system.

As a third step, the Court decides, nevertheless, to dismiss the appeal in its entirety, by a substitution of grounds.

In that regard the Court finds, first, that, in order to establish the existence of an advantage for the benefit of the Amazon group, the Commission applied the arm's length principle as if it had been recognised as such in EU law, even though it is clear from the judgment in *Fiat* that as EU law currently stands, there is no autonomous arm's length principle that applies irrespective of the incorporation of that principle into the national law.

Secondly, the Commission considered that the Luxembourg law on income tax was interpreted by the tax administration as enshrining the arm's length principle in Luxembourg tax law. However, as is clear from the judgment in *Fiat*, only the incorporation of that principle as such into national law, which as a minimum requires that that law refer explicitly to that principle, would permit the Commission to apply it in the determination of the existence of a selective advantage within the meaning of Article 107(1) TFEU. As the Commission itself recognised in the decision at issue, that requirement was not satisfied at the time the tax ruling at issue was made, such that that institution could not apply that principle retroactively in that decision.

Thirdly, the Court finds that, by applying, in the decision at issue, the OECD Guidelines on transfer pricing without having demonstrated that they had been, wholly or in part, explicitly adopted in Luxembourg law, the Commission breached the prohibition, recalled in the judgment in *Fiat*, on taking into account, in the examination of the existence of a selective tax advantage within the meaning of Article 107(1) TFEU and for the purposes of establishing the tax burden that should normally be borne by an undertaking, parameters and rules external to the national tax system at issue, such as those guidelines, unless that national tax system makes explicit reference to them.

Having regard to the foregoing, the Court concludes that the General Court was fully entitled to find that the Commission had not established the existence of an advantage for the benefit of the Amazon

group, within the meaning of Article 107(1) TFEU, and to annul, therefore, the decision at issue. Accordingly, it dismisses the appeal brought by the Commission in its entirety.

IX. Tax provisions [272]

Judgment of 28 February 2023 (Grand Chamber), *Fenix International* (C-695/20, EU:C:2023:127)

(Reference for a preliminary ruling – Implementing power of the Council of the European Union – Article 291(2) TFEU – Common system of value added tax (VAT) – Directive 2006/112/EC – Articles 28 and 397 – Taxable person, acting in his or her own name but on behalf of another person – Provider of services by electronic means – Implementing Regulation (EU) No 282/2011 – Article 9a – Presumption – Validity)

Fenix International Ltd ('Fenix'), a company registered for value added tax (VAT) purposes in the United Kingdom, operates on the internet a social media platform known as Only Fans. That platform is offered to 'users' throughout the world, who are divided into 'creators' and 'fans'. Each creator has a 'profile' to which he or she uploads and publishes content, such as photos, videos and messages, which fans can access by making ad hoc payments or by paying a monthly subscription. Fenix sets the minimum amount payable both for subscriptions and for 'tips' and the general terms and conditions for use of the platform. In addition, Fenix provides the means of enabling financial transactions to be carried out. Fenix is responsible for collecting and distributing the payments made by fans through a payment services supplier. Fenix levies 20% on any sum paid to a creator and applies VAT at a rate of 20% on the sum which it levies in this way, which appears on the invoices which it issues. All payments appear on the relevant fan's bank statement as payments made to Fenix.

In VAT assessments for the VAT due for the months of July 2017 to January 2020 and April 2020, taking the view that Fenix had to be deemed to be acting in its own name, [273] Her Majesty's Revenue and Customs ('HMRC') required that Fenix pay VAT on all of the sums received from a fan and not only on the 20% of the sums which it levied by way of remuneration.

Fenix appealed before the referring court, [274] challenging the validity of the legal basis for the tax assessments, [275] and their respective amounts. In support of its appeal, Fenix maintained that, by adopting the contested provision, the Council exceeded the implementing powers exclusively conferred

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272 Reference should also be made under this heading to the judgment of 24 July 2023 (Grand Chamber), ***Lin*** (C-107/23 PPU, EU:C:2023:606), presented under heading I.2 'Principles of legality and proportionality of criminal offences and penalties'.

273 Under the first subparagraph of Article 9a(1) of Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ 2011 L 77, p. 1), as amended by Council Implementing Regulation (EU) No 1042/2013 of 7 October 2013 (OJ 2013 L 284, p. 1), a taxable person taking part in the supply of electronically supplied services through a telecommunications network, an interface or a portal such as a marketplace for applications, is to be 'presumed to be acting in his own name but on behalf of the provider of those services unless that provider is explicitly indicated as the supplier by that taxable person and that is reflected in the contractual arrangements between the parties'. The second subparagraph of that provision requires two conditions to be satisfied 'in order to regard the provider of electronically supplied services as being explicitly indicated as the supplier of those services by the taxable person'. Lastly, according to the third subparagraph of that provision, 'a taxable person who, with regard to a supply of electronically supplied services, authorises the charge to the customer or the delivery of the services, or sets the general terms and conditions of the supply, shall not be permitted to explicitly indicate another person as the supplier of those services'.

274 The First-tier Tribunal (Tax Chamber), United Kingdom.

275 Namely, Article 9a(1) of Council Implementing Regulation (EU) No 282/2011 ('the contested provision').

on it by the VAT Directive. [276] The contested provision goes beyond Article 28 of that directive, [277] of which it was intended to constitute an implementing measure, by providing that an agent who takes part in a supply of services by electronic means is to be deemed to have received and supplied those services, even though the identity of the provider is known. It fundamentally alters the liability of the agent in the field of VAT by transferring the tax burden on platforms operated on the internet, since it proves impossible, in practice, to rebut the presumption it laid down.

The question having been raised by the referring court of whether the contested provision is invalid [278] in so far as it had been submitted that the Council exceeded its implementing powers under the FEU Treaty and the VAT Directive, the Court, sitting as the Grand Chamber, holds in its judgment that the examination of that question has disclosed no factor of such a kind as to affect the validity of that provision.

Findings of the Court

As a preliminary point, the Court notes, in the first place, that although it is for the Member States to implement legally binding Union acts, [279] implementing powers may, in duly justified specific cases and in the cases specifically provided for in the EU Treaty, be conferred on the Council under Article 291(2) TFEU. As regards the VAT Directive, the Council, acting unanimously on a proposal from the Commission, is to adopt the measures necessary to implement that directive. That enabling power of the Council is explained and justified, first, by the necessity for measures implementing that directive to be uniform and, second, by the intention that the right to adopt such implementing measures be reserved to the Council on account of the impact, sometimes significant, that such measures could have on the budgets of Member States. The contested decision is one of the measures adopted by the Council under that enabling power, intended to ensure the uniform application of Article 28 of that directive.

In the second place, as regards the limits of the implementing powers referred to in Article 291(2) TFEU, the Court notes that the adoption of the essential rules of a matter is reserved to the EU legislature, the provisions laying down the essential elements of the basic legislation cannot be delegated or appear in implementing acts, but must be adopted in compliance with the applicable legislative procedure, namely, as regards the VAT Directive, the special procedure established in Article 113 TFEU. [280]

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276 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive'). Article 397 of that directive provides that 'the Council, acting unanimously on a proposal from the Commission, shall adopt the measures necessary to implement this Directive'.

277 Article 28 of the VAT Directive provides that where a taxable person acting in his or her own name but on behalf of another person takes part in a supply of services, he or she shall be deemed to have received and supplied those services himself or herself.

278 The Court has jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period as laid down in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), namely 31 December 2020.

279 Article 291(1) TFEU.

280 Article 113 TFEU provides that 'the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition'.

The Court adds that those considerations relating to the limits of the Commission's implementing powers, in accordance with its case-law, are also valid where, pursuant to Article 291(2) TFEU, such powers are conferred on the Council. First, in referring both to the Commission and to the Council, that provision draws no distinction as to the nature and scope of the implementing powers on the basis of the institution on which they are conferred. Second, it follows from the scheme of Articles 290 and 291 TFEU that the Council's exercise of implementing powers cannot be governed by conditions different from those imposed on the Commission when it is called upon to exercise its implementing powers.

Therefore, the implementing powers conferred on the Council entail the power to adopt measures which are necessary or appropriate for the uniform implementation of the provisions of the legislative act on the basis of which they are adopted and which merely specify the content of that act, in compliance with the essential general aims pursued by that act, without amending or supplementing it, in its essential or non-essential elements. In particular, it must be held that an implementing measure merely specifies the provisions of the legislative act concerned where it is intended solely, in general or in certain specific cases, to clarify the scope of those provisions or to determine the detailed rules for their application, provided, however, that in so doing, that measure avoids any contradiction with the objectives of those provisions and does not in any way alter the normative content of that act or its scope of application.

Therefore, in order to determine whether, in the contested provision, the Council complied with the limits of the implementing powers conferred on it, the Court ascertains whether that provision merely clarifies the content of Article 28 of the VAT Directive which it implements, which entails examining whether it respects the essential general objectives of that directive and whether it is necessary or appropriate for the uniform implementation of Article 28 and whether it supplements or amends it in any way.

In that regard, the Court finds, first of all, that the contested provision complies with the essential general aims of the VAT Directive and of Article 28 thereof. The objective of the contested provision is to ensure the uniform application of the current VAT system as regards, inter alia, the taxation of electronically supplied services to a non-taxable person, [281] and of the presumption, provided for in Article 28 of the VAT Directive, according to which a taxable person who, in the context of a supply of services, acts as an intermediary in his or her own name but on behalf of another person, is deemed to be the supplier of those services.

Next, the Court rules that the contested provision is appropriate, or even necessary, for the uniform implementation of the VAT Directive in the light of the importance of ensuring legal certainty for service providers and to avoid double taxation or non-taxation which would have resulted from divergent implementation arrangements between Member States.

Lastly, the Court examines whether the contested provision complies with the prohibition on supplementing or amending the elements of Article 28 of the VAT Directive. In that regard, it finds that it is in no way apparent from the VAT Directive that the EU legislature refrained from ensuring, if necessary, by conferring implementing powers on the Council pursuant to that directive, a uniform application of the conditions referred to in Article 28 of the directive, in particular the condition that, in order to be regarded as the supplier of a service, the taxable person taking part in that supply must act in his or her own name but on behalf of another person. More specifically, the contested provision cannot be regarded as supplementing or amending the elements of Article 28 of the VAT Directive, nor in particular the presumption set out in that article, but is a mere clarification of its elements in the

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281 Which are, from 1 January 2015, taxable in the Member State where the customer is established, has his or her permanent address or usually resides, regardless of where the taxable person supplying those services is established.

specific context of the supply of electronically supplied services through a telecommunications network, an interface or a portal such as a marketplace for applications. In particular, that provision takes full account of the economic and commercial reality of the transactions as a fundamental criterion for the application of the common system of VAT. The Court therefore holds that, by adopting the contested provision, for the purposes of ensuring that Article 28 of the VAT Directive is implemented under uniform conditions throughout the European Union, the Council did not exceed the implementing powers conferred on it by the VAT Directive, pursuant to Article 291(2) TFEU.

X. Approximation of laws

1. Intellectual and industrial property

Judgment of 16 February 2023, *Monz Handelsgesellschaft International* (C-472/21, EU:C:2023:105)

(Reference for a preliminary ruling – Intellectual property – Design – Directive 98/71/EC – Article 3(3) and (4) – Conditions for obtaining protection for a component part of a complex product – Concepts of 'visibility' and 'normal use' – Visibility of a component part of a complex product during normal use of that product by the end user)

Monz, a company incorporated under German law, is the holder of the design representing the underside of a bicycle or motorcycle saddle that has been registered since 2011 at the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office, Germany; 'the DPMA').

On 27 July 2016, Büchel, a company incorporated under German law, filed an application with the DPMA for a declaration of invalidity of that design, claiming that it did not meet the requirements for legal protection as a design. [282] In its view, that design applied to a bicycle saddle, which is a component part of a complex product such as a bicycle or a motorcycle, was not visible during normal use of that product.

The DPMA rejected the application for a declaration of invalidity, holding that there were no grounds for excluding the design at issue from legal protection. It took the view that the component part to which the design is applied remains visible during normal use of the complex product, since such normal use covers also the disassembly and reassembly of the saddle for purposes other than maintenance, servicing or repair work.

Hearing an action brought against that decision, the Bundespatentgericht (Federal Patent Court, Germany) declared the design at issue invalid on the ground that it did not meet the requirements of novelty and individual character. According to that court, a component part which is visible only when it is separated from a complex product does not satisfy the condition of visibility and cannot therefore benefit from that legal protection. That court is of the view, moreover, that only the acts of riding a bicycle and getting on and off a bicycle can be considered to be normal use, and the underside of the saddle is not visible during such use.

It is against that background that the Bundesgerichtshof (Federal Court of Justice, Germany), hearing an appeal brought by Monz, asked the Court of Justice, in essence, first, whether the requirement of the visibility of designs applied to or incorporated in a product which constitutes a component part of a complex product must be assessed on the basis of certain conditions of use of the complex product or, rather, only on the objective possibility of recognising the design applied to the component part as integrated into the complex product. Second, it asked, in essence, what the relevant criteria are for determining the normal use of a complex product by the end user.

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282 For the purposes of Paragraph 4 of the Gesetz über den rechtlichen Schutz von Design (Law on the legal protection of designs) of 24 February 2014 (BGBl. 2014 I, p. 122), transposing Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (OJ 1998 L 289, p. 28).

By its preliminary ruling, the Court clarifies, first, the requirement of visibility that must be met in order for a design applied to or incorporated in a product which constitutes a component part of a complex product to be eligible to benefit from the legal protection of designs and, second, the criteria characterising the concept of 'normal use' of that product, within the meaning of Article 3(3) and (4) of Directive 98/71.

Findings of the Court

In the first place, the Court focuses on the matter of the visibility of a component part once it has been incorporated into a complex product. At the outset, it recalls that Article 3(3) of Directive 98/71 lays down a special rule for designs applied to or incorporated in a product which constitutes a component part of a complex product. It points out, in that regard, that it is the appearance of the whole or part of a product which is the subject matter of the legal protection for designs.

As regards the requirements which must be met in order for the appearance of a component part of a complex product to be eligible for protection as a design, the Court refers to its earlier case-law according to which that component part must be visible and defined by features which constitute its particular appearance, which presupposes that the appearance of the component part cannot be completely lost in the overall product. The Court points out that that case-law, which was created in the context of the protection of designs provided for by Regulation No 6/2002, [283] is also applicable to the design protection system under Directive 98/71.

However, in order to benefit from the legal protection of designs, the component part, once it has been incorporated into the complex product, must remain visible during normal use of that product. Thus, an assessment *in abstracto* of the visibility of the component part incorporated into a complex product, unconnected to any practical situation of use of that product, is not sufficient to allow a component part to benefit from legal protection. Nevertheless, Article 3(3) of Directive 98/71 does not require a component part that is incorporated into a complex product to remain fully visible the whole time that the complex product is being used.

Therefore, the visibility of a component part incorporated into a complex product cannot be assessed solely from the perspective of the end user of that product, but must also be assessed from the perspective of an external observer.

In the second place, the Court examines the concept of 'normal use' of such a product by the end user, within the meaning of Article 3(4) of Directive 98/71. As regards, first, the question whether the 'normal use' of a complex product corresponds to the use intended by the manufacturer of the component part, to that intended by the manufacturer of the complex product or to the customary use of that product by the end user, the Court states that that provision covers the normal use of the complex product by the end user.

The Court specifies in that connection that the normal or customary use of a complex product by the end user corresponds, as a general rule, to a use consistent with the intended purpose of the complex product, as intended by the manufacturer or designer of that product. However, the EU legislature intended to refer to the customary use of the complex product by the end user in order to exclude the use of that product at other stages of trade and thus to prevent circumvention of the visibility condition. Accordingly, the assessment of the normal use of a complex product cannot be based solely on the intention of the manufacturer of the component part or of the complex product.

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283 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

Second, as regards the question of what use of a complex product by the end user constitutes 'normal use' within the meaning of Article 3(4) of Directive 98/71, the Court takes the view that the fact that that provision does not specify what type of use of the product is covered by that concept and refers, generally, to the use of such a product by the end user supports a broad interpretation of that concept. In that regard, in view of the fact that, in practice, the use of a product in its principal function often requires various acts which may be performed before or after the product has fulfilled that principal function, the Court concludes that the normal use of a complex product covers all those acts, with the exception of those which are expressly excluded, namely acts relating to maintenance, servicing and repair work.

Consequently, the concept of 'normal use' must cover acts relating to the customary use of a product as well as other acts which may reasonably be carried out during such use and which are customary from the point of view of the end user, including those which may be performed before or after the product has fulfilled its principal function, such as the storage and transportation of that product.

In the light of those considerations, the Court holds that the requirement of visibility of designs applied to or incorporated in a product which constitutes a component part of a complex product must be assessed in the light of a situation of normal use of the complex product, so that the component part concerned, once it has been incorporated into that product, remains visible during such use. To that end, the visibility of a component part of a complex product during its normal use by the end user must be assessed from the perspective of that user as well as from the perspective of an external observer. That normal use must cover acts performed during the principal use of a complex product as well as acts which must customarily be carried out by the end user in connection with such use, with the exception of maintenance, servicing and repair work.

2. Motor insurance

Judgment of 12 October 2023, *KBC Verzekeringen* (C-286/22, EU:C:2023:767)

(Reference for a preliminary ruling – Insurance against civil liability in respect of the use of motor vehicles – Directive 2009/103/EC – Point 1 of Article 1 – Concept of a 'vehicle' – National legislation providing for the automatic compensation of certain road users who are the victims of a road accident – Person not driving a 'motor vehicle' within the meaning of that legislation – Concept equivalent to that of 'vehicle' within the meaning of Directive 2009/103 – Bicycle equipped with an electric motor providing pedal assistance, equipped with a boost function which can be activated only after the use of muscular power)

On 14 October 2017, BV ('the victim'), who was riding an electric bicycle on a public road, was struck by a car insured by KBC Verzekeringen NV ('KBC'). The victim subsequently died. Since that accident was considered to be a 'commuting accident', P&V Verzekeringen CVBA ('P&V'), the occupational accident insurer of the victim's employer, paid compensation and was subrogated to the rights of the victim and those of his successors in title.

P&V brought an action against KBC seeking the reimbursement of its expenses on the basis of the national legislation. In the present case, that legislation lays down, inter alia, an obligation for the insurers of the civil liability of drivers of motor vehicles involved in a road traffic accident to compensate in all cases the damages suffered by the victims of that accident where they are considered to be 'vulnerable road users'. The classification as a 'vulnerable road user' depends upon whether or not the victim of the accident was the driver of a 'motor vehicle' at the time of that accident. KBC lodged a counterclaim requesting that P&V be ordered to reimburse a sum which allegedly should not have been paid. In its defence, P&V argued that the victim could not be regarded as having been the driver of a motor vehicle.

Ruling on an appeal brought by KBC, the Hof van Cassatie (Court of Cassation, Belgium) made a reference for a preliminary ruling to the Court of Justice concerning the interpretation of the concept of 'vehicle', within the meaning of point 1 of Article 1 of Directive 2009/103. [284]

By its judgment, the Court holds that that concept does not encompass a bicycle whose electric motor provides pedal assistance only and which is equipped with a function allowing the bicycle to accelerate to a speed of 20 km/h without pedalling, which may be activated only after the use of muscular power.

Findings of the Court

The Court notes, first of all, that it follows from the wording of point 1 of Article 1 of Directive 2009/103 that the concept of a 'vehicle', within the meaning of that provision, encompasses only vehicles intended for travel on land which may be propelled by mechanical power, with the exception of vehicles running on rails. However, that wording is not sufficient, by itself, to determine whether such mechanical power must be exclusively responsible for the propulsion of the vehicle concerned.

Next, the Court notes, first, that according to recital 2 of Directive 2009/103, the compulsory 'insurance against civil liability in respect of the use of motor vehicles' provided for in that directive refers to 'motor insurance', an expression which traditionally refers to insurance against civil liability in respect of the use of devices such as motorcycles, cars and trucks which, unless they are out of order, are propelled exclusively by means of mechanical power.

Secondly, Article 13 of Directive 2009/103 [285] specifies that each Member State is to take all appropriate measures to ensure that any statutory provision or any contractual clause contained in an insurance policy is deemed to be void in respect of claims by third parties who have been victims of an accident where that statutory provision or contractual clause excludes from insurance the use or driving of vehicles by persons who do not hold a licence permitting them to drive the vehicle concerned. It follows from Directive 2006/126, [286] that, in principle, only the driving of vehicles capable of running under their own power, other than rail-borne vehicles, is subject to a national driving licence.

Lastly, as regards the objectives pursued by Directive 2009/103, the Court emphasises that it is intended to guarantee that the victims of accidents caused by motor vehicles will receive comparable treatment irrespective of where in the European Union the accidents occurred, as well as ensuring the protection of those victims.

Devices which are not propelled exclusively by mechanical power and which therefore cannot travel on land without the use of muscular power, such as an electric bicycle which may accelerate to 20 km/h without pedalling, do not appear to be capable of causing bodily or material damage to third parties comparable, as regards gravity or scale, to the damage that may be caused by motorcycles, cars, trucks or other vehicles, travelling on land, propelled exclusively by mechanical power. The latter can reach speeds significantly higher than those that can be achieved by such devices and, at present, predominate on the road. The objective of protecting victims of road accidents caused by motor

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284 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263, p. 11).

285 Directive 2009/103, Article 13(1)(b).

286 Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (OJ 2006 L 403, p. 18), Article 4(1).

vehicles, pursued by Directive 2009/103, therefore does not require that such devices be covered by the concept of a 'vehicle', within the meaning of point 1 of Article 1 of that directive.

3. Motor vehicles

Judgment of 21 March 2023 (Grand Chamber), *Mercedes-Benz Group (Liability of manufacturers of vehicles fitted with defeat devices)* (C-100/21, EU:C:2023:229)

(Reference for a preliminary ruling – Approximation of laws – Approval of motor vehicles – Directive 2007/46/EC – Article 18(1) – Article 26(1) – Article 46 – Regulation (EC) No 715/2007 – Article 5(2) – Motor vehicles – Diesel engine – Pollutant emissions – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Defeat device – Protection of the interests of an individual purchaser of a vehicle equipped with an unlawful defeat device – Right to compensation from the vehicle manufacturer on the basis of tortious liability – Method of calculating compensation – Principle of effectiveness – Article 267 TFEU – Admissibility – Reference to the Court from a single judge)

In 2014, QB purchased a used Mercedes-Benz motor vehicle – model C 220 CDI, equipped with a Euro 5 generation diesel engine – from a dealer. That vehicle, placed on the market by the car manufacturer Mercedes-Benz Group AG (formerly Daimler AG), was first registered in 2013. The vehicle was equipped with engine programming software that reduced the exhaust gas recirculation rate when outside temperatures were below a certain threshold, which resulted in an increase in nitrogen oxide (NOx) emissions. Accordingly, that recirculation was fully effective only if the outside temperature did not fall below that threshold.

QB brought an action before the Landgericht Ravensburg (Regional Court, Ravensburg, Germany), the referring court, seeking compensation for the damage allegedly caused to him by Mercedes-Benz Group by equipping the vehicle in question with defeat devices, prohibited under the regulation on type approval of motor vehicles. [287]

The objective pursued by that regulation is to ensure a high level of environmental protection and, more specifically, to considerably reduce the NOx emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution. [288] That provision defines a 'defeat device' as being 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'. [289] In addition, the directive establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, as applicable to the dispute in the main proceedings, [290] contains the

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287 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1), and more specifically under Article 5(2) of that regulation.

288 Recitals 1 and 6 of the regulation on type approval of motor vehicles.

289 Article 3(10) of the regulation on type approval of motor vehicles.

290 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such

administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the European Union. [291]

Under German law, the exercise, by the individual purchaser of a motor vehicle which does not comply with EU law, of the right to compensation presupposes the infringement of a law intended to protect others. [292] The referring court therefore decided to ask the Court whether the relevant provisions, in the present case, of the Framework Directive [293] and the regulation on type approval of motor vehicles, [294] protect, in addition to public interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a defeat device prohibited by that regulation. Furthermore, it raised the question whether, in the context of compensation for damage caused to the purchaser of a vehicle equipped with a prohibited defeat device, EU law precludes the offsetting of the benefit derived from the actual use of that vehicle against the reimbursement of the purchase price of that vehicle and, if that is not the case, the calculation of that benefit on the basis of the total purchase price of that vehicle.

Sitting as the Grand Chamber, the Court provides significant clarification on the question of the right to compensation of purchasers of vehicles the engines of which have been equipped with an unlawful defeat device intended to reduce the effectiveness of the NOx emissions control systems.

Findings of the Court

As a preliminary point, the Court points out that it is for the referring court to decide, where appropriate, whether, in the light of the Court's case-law, the software with which the vehicle purchased by QB is equipped constitutes a 'defeat device' within the meaning of the regulation on type approval of motor vehicles.

Next, it notes that there are three exceptions to the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems. The only one of those exceptions which is relevant in the present case concerns the situation where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'. [295] In order to be justified, that defeat device must strictly meet the need to avoid immediate risks of damage to the engine of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, a defeat device which, under normal driving conditions, operated during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle, would clearly run counter to the objective of environmental protection pursued by that regulation and cannot therefore be justified. Here also it is for the referring court to carry out the factual assessments necessary for the purposes of applying those conditions.

Primarily, in the first place, the Court rules that the relevant provisions of the Framework Directive and the regulation on type approval of motor vehicles, considered together, protect, in addition to public

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vehicles (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 385/2009 of 7 May 2009 (OJ 2009 L 118, p. 13; 'the Framework Directive').

291 Article 1 of the Framework Directive.

292 Paragraph 823(2) of the Bürgerliches Gesetzbuch (Civil Code).

293 Namely Article 18(1), Article 26(1) and Article 46 of the Framework Directive.

294 Namely Article 5(2)(a) of the regulation on type approval of motor vehicles.

295 Exception laid down in Article 5(2)(a) of the regulation on type approval of motor vehicles.

interests, the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a defeat device prohibited under that regulation.

The Court notes that the prohibition on the use of defeat devices that reduce the effectiveness of emission control systems pursues a general objective of ensuring a high level of environmental protection and that the obligation on manufacturers to ensure that customers and users are supplied with objective and precise information as to the extent to which vehicles are polluting when making their purchasing decisions forms part of that general objective. In addition, vehicles falling within the scope of the Framework Directive must be type approved and such type-approval may be granted only if the type of vehicle in question satisfies the provisions of the regulation on type approval of vehicles, in particular those relating to emissions.

The Court adds that, in accordance with the Framework Directive, in addition to those requirements relating to EC type-approval, manufacturers are also required to issue a certificate of conformity to the individual purchaser of a vehicle. Under that Framework Directive, that certificate is required for the purposes of registration and sale or entry into service of a vehicle. Furthermore, the penalties provided for in the Framework Directive must ensure that the purchaser of a vehicle has a certificate of conformity enabling him or her to register that vehicle in any Member State without having to provide additional technical documents. That purchaser can therefore reasonably expect that the regulation on type approval of motor vehicles has been complied with. The Court concludes that the Framework Directive, considered in conjunction with the regulation on type approval of motor vehicles, establishes a direct link between the motor vehicle manufacturer and the individual purchaser of a motor vehicle intended to guarantee to the latter that the vehicle complies with the relevant EU legislation.

In that regard, the Court states that it cannot be ruled out that a vehicle type covered by an EC type-approval allowing that vehicle to be driven on the road may, initially, be approved by the approval authority without the presence of the software, such as that at issue in the main proceedings, having been disclosed to it. The Framework Directive envisages the situation in which the unlawfulness of an element of design of a vehicle, for example in the light of the requirements of the regulation on type approval of vehicles, is discovered only after that approval has been granted. Consequently, the unlawfulness of a defeat device equipped in a motor vehicle, discovered after the grant of EC type-approval for that vehicle, is capable of calling into question the validity of that type-approval and, by extension, the validity of the certificate of conformity intended to certify that that vehicle, belonging to the series of the type approved, complied with all regulatory acts at the time of its production. That unlawfulness is thus liable, inter alia, to create uncertainty as to the possibility of registering or selling that vehicle or entering it into service and, ultimately, to harm the purchaser of a vehicle equipped with an unlawful defeat device.

In the second place, in answer to the question, in essence, whether EU law must be interpreted as precluding – in the context of compensation for damage caused to the purchaser of a vehicle equipped with a prohibited defeat device – the offsetting of the benefit derived from the actual use of that vehicle against the reimbursement of the purchase price of that vehicle and, if that is not the case, the calculation of that benefit on the basis of the total purchase price of that vehicle, the Court holds that, in the absence of provisions of EU law governing the matter, it is for the law of the Member State concerned to determine the rules concerning compensation for damage actually caused to the purchaser of a vehicle equipped with a prohibited defeat device, provided that that compensation is adequate with respect to the damage suffered.

First, the Court notes the conclusion it reached, according to which the Framework Directive protects the specific interests of the individual purchaser of a motor vehicle vis-à-vis the manufacturer of that vehicle where that vehicle is equipped with a prohibited defeat device, with the result that the purchaser has the right that that vehicle not be fitted with a prohibited defeat device. Secondly, it points out that the Framework Directive and the regulation on type approval of motor vehicles provide that it is for the Member States to establish penalties, which must be effective, proportionate and dissuasive, applicable in the event of infringements of the provisions of that legislation. Consequently, the Member States are

required to provide that the purchaser of a vehicle equipped with a prohibited defeat device has a right to compensation from the manufacturer of that vehicle. It is indeed for each Member State to lay down the detailed rules for obtaining such compensation. Nevertheless, the Court states that national legislation which makes it, in practice, impossible or excessively difficult for the purchaser of a motor vehicle to obtain adequate compensation for the damage caused to him or her by the infringement, by the manufacturer of that vehicle, of the prohibition on the use of defeat devices would not be compatible with the principle of effectiveness. Subject to that proviso, the Court notes that national courts are entitled to ensure that the protection of rights guaranteed by the legal order of the European Union does not result in unjust enrichment. Thus, it is for the referring court to determine whether the offsetting of the benefit derived from the actual use of the vehicle in question ensures adequate compensation for the purchaser concerned, if it is established that that purchaser suffered damage connected with the installation in that vehicle of a prohibited defeat device.

4. Release of genetically modified organisms (GMOs)

Judgment of 7 February 2023 (Grand Chamber), *Confédération paysanne and Others (In vitro random mutagenesis)* (C-688/21, EU:C:2023:75)

(Reference for a preliminary ruling – Environment – Deliberate release of genetically modified organisms – Directive 2001/18/EC – Article 3(1) – Point 1 of Annex I B – Scope – Exemptions – Techniques/methods of genetic modification which have conventionally been used and have a long safety record – In vitro random mutagenesis)

In 2015, the Confédération paysanne, a French agricultural union, and eight associations whose purpose is the protection of the environment and the dissemination of information concerning the hazards posed by genetically modified organisms (GMOs) brought an action before the Conseil d'État (Council of State, France) concerning the exclusion of certain techniques or methods of mutagenesis [296] from the scope of the French legislation intended to transpose Directive 2001/18 [297] on the deliberate release into the environment of GMOs. In that context, the Conseil d'État (Council of State) had submitted to the Court of Justice a request for a preliminary ruling, which gave rise to the judgment in *Confédération paysanne and Others* (C-528/16), delivered in 2018. [298]

The present case follows on from that judgment, in which the Court ruled that the scope of Directive 2001/18 excludes only organisms obtained by means of techniques/methods of mutagenesis which have conventionally been used in a number of applications and have a long safety record. The Conseil d'État (Council of State) took the view that it follows from that judgment that the organisms obtained by means of techniques/methods which appeared or were mainly developed after the date of the adoption of that directive, namely by virtue of techniques of '*in vitro* random mutagenesis' [299] must be

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296 Technique that enables mutations to be artificially caused, with the help of chemical or physical factors, at a much faster rate (between 1 000 and 10 000 times greater) than spontaneous mutations.

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

298 Judgment of 25 July 2018, ***Confédération paysanne and Others*** (C-528/16, EU:C:2018:583).

299 Random mutagenesis refers to a process in which, after artificially causing, with the help of chemical or physical factors, mutations at a much faster rate than spontaneous mutations, the mutations are randomly induced in the organisms. *In vitro*

included in the scope of Directive 2001/18. Accordingly, the Conseil d'État (Council of State) issued an order and, to ensure its implementation, the French Government, in particular, drew up a draft decree relating to the modification of the list of techniques for obtaining GMOs which have been traditionally used without proven harm for public health or the environment. That draft decree provided that random mutagenesis, with the exception of *in vitro* random mutagenesis, had to be regarded as falling within such use.

Following notification of that draft decree, [300] the European Commission issued a detailed opinion, in which it stated that it was not justified, in the light of EU law and in the light of scientific advances, to draw a distinction between *in vivo* random mutagenesis and *in vitro* random mutagenesis. Since the draft decree was not adopted by the French authorities, the Confédération paysanne and the group of environmental protection associations again referred the matter to the Conseil d'État (Council of State) seeking enforcement of the order which had been declared.

The supreme administrative court considered that it needed clarification as to the scope of the judgment in *Confédération paysanne and Others*, in order to determine whether, in the light of the characteristics and uses of *in vitro* random mutagenesis, that technique/method should be regarded as falling within the scope of Directive 2001/18. It therefore referred the question to the Court of Justice for a preliminary ruling.

By its judgment, delivered by the Grand Chamber, the Court specifies the conditions under which organisms obtained through the application of a technique/method of mutagenesis which is based on the same processes of modification, by the mutagenic agent, of genetic material as a technique/method of mutagenesis which has conventionally been used in a number of applications and has a long safety record, but which differs from that second technique/method of mutagenesis by other characteristics, are, in principle, excluded from the exemption provided for by Directive 2001/18. [301]

Findings of the Court

First of all, the Court states that the limitation of the scope of the exemption provided for by Directive 2001/18 as regards the applicability of that exemption to techniques/methods of mutagenesis, by reference to the dual criterion of, first, conventional use in a number of applications, and, second, having a long safety record, [302] is closely linked to the very objective of that directive, [303] namely to protect human health and the environment, in accordance with the precautionary principle. The application of that dual criterion thus makes it possible to ensure that, on account of the age and variety of uses of a technique/method of mutagenesis and the information available as to its safety, organisms

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random mutagenesis is a technique subjecting plant cells cultivated *in vitro* to chemical or physical mutagenic agents, unlike *in vivo* random mutagenesis, which is practised on whole plants or on parts of plants.

300 In application of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services (OJ 2015 L 241, p. 1).

301 Exemption provided for in Article 3(1) of Directive 2001/18, read in conjunction with point 1 of Annex I B thereto. Under that provision, that directive does not apply to organisms obtained through the techniques of genetic modification listed in Annex I B to that directive, which include mutagenesis.

302 That dual criterion was established by the Court in the judgment in *Confédération paysanne and Others* (C-528/16).

303 Under Article 1 of Directive 2001/18, that refers, in accordance with the precautionary principle, to protect human health and the environment when, first, GMOs are deliberately released into the environment for any purpose other than placing on the market within the European Union, and, secondly, when GMOs are placed on the market within the European Union as or in products.

obtained through that technique/method may be released into the environment or placed on the market within the European Union, without it being necessary, in order to avoid adverse effects on human health and the environment, to subject those organisms to risk assessment procedures. [304]

In that context, the Court finds that a general extension of the benefit of the exemption from the scope of Directive 2001/18 to organisms obtained through the application of a technique/method of mutagenesis which is based on the same processes of modification, by the mutagenic agent, of the genetic material of the organism concerned as a technique/method of mutagenesis which has been conventionally used in a number of applications and which has a long safety record, but which combines those processes with other characteristics, distinct from those of that second technique/method of mutagenesis, would not respect the intention of the EU legislature.

The release into the environment or the placing on the market, without having carried out a risk assessment procedure, of organisms obtained by means of such a technique/method of mutagenesis is capable, in certain cases, of entailing negative effects, which may be irreversible and affecting several Member States, on human health and the environment, even where those characteristics do not relate to the processes of modification, by the mutagenic agent, of the genetic material of the organism concerned.

However, to consider that organisms obtained through the application of a technique/method of mutagenesis which has conventionally been used in a number of applications and with a long safety record necessarily fall within the scope of Directive 2001/18 where that technique/method has undergone any modification would be liable to render largely redundant the exemption provided for by that directive. Such an interpretation could make all forms of adaptation of techniques/methods of mutagenesis excessively difficult, even though that interpretation is not necessary to achieve the objective of protecting the environment and human health pursued by that directive, in accordance with the precautionary principle.

Therefore, the Court considers that the fact that a technique/method of mutagenesis includes one or more characteristics distinct from those of a technique/method of mutagenesis conventionally used in a number of applications and which has a long safety record justifies the exclusion of the exemption provided for by the directive only in so far as it is established that those characteristics are liable to result in modifications of the genetic material of the organism concerned that differ, by their nature or by the rate at which they occur, from those obtained by the application of that second technique/method of mutagenesis.

That being said, in the final part of its analysis, the Court examines the distinction between *in vivo* and *in vitro* mutagenesis techniques at the heart of the dispute in the main proceedings. It notes in that regard, following an analysis of the scheme laid down in Directive 2001/18 on techniques/methods involving *in vitro* cultures, that to hold that, because of the effects inherent in *in vitro* cultures, an organism obtained through the *in vitro* application of a technique/method of mutagenesis initially used *in vivo* is excluded from the exemption provided for by Directive 2001/18 would fail to have regard to the fact that the EU legislature did not consider that those inherent effects were relevant for the purpose of defining the scope of that directive. In particular, the Court states that Directive 2001/18 provides for the exclusion of several techniques of genetic modification involving the use of in vitro cultures from the GMO control scheme provided for by that directive.

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304 Referred to in Part B and Part C of Directive 2001/18 respectively.

5. Package travel, package holidays and package tours

Judgment of 8 June 2023, *UFC – Que choisir and CLCV* (C-407/21, EU:C:2023:449)

(Reference for a preliminary ruling – Package travel and linked travel arrangements – Directive (EU) 2015/2302 – Article 12(2) to (4) – Termination of a package travel contract – Unavoidable and extraordinary circumstances – COVID-19 pandemic – Refund of payments made by the traveller concerned for a package – Refund in the form of a sum of money or equivalent refund in the form of a credit note ('voucher') – Obligation to provide that traveller with a refund not later than 14 days after the relevant contract is terminated – Temporary derogation from that obligation – Adjustment of the temporal effects of a decision taken in accordance with national law annulling national legislation that is contrary to that obligation)

In the context of the COVID-19 pandemic, the French Government adopted legislation with the aim of temporarily releasing package travel organisers from their obligation to provide a refund of the payments made by travellers in the event of termination of a package travel contract. [305] Two consumer protection associations sought, before the Conseil d'État (Council of State, France), the annulment of that legislation, claiming an infringement of the right of travellers who had entered into such a contract to terminate it following the occurrence of 'unavoidable and extraordinary circumstances' and to be provided with a full refund of any payments made for the package not later than 14 days after termination, as provided for by the Package Travel Directive. [306]

That court expresses doubts, in particular, as to the interpretation of the concept of 'refund' provided for by that directive and as to the compatibility with that directive of national legislation relating to the temporary exemption of package travel organisers from their reimbursement obligation.

By its judgment, the Court of Justice clarifies the concept of 'refund' in the context of the Package Travel Directive. In addition, it rules on the incompatibility of the national legislation with that directive [307] and on the adjustment of the temporal effects of a national decision annulling that same legislation, held to be incompatible with EU law.

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305 Under Article 1 of ordonnance No 2020-315 du 25 mars 2020 relative aux conditions financières de résolution de certains contrats de voyages touristiques et de séjours en cas de circonstances exceptionnelles et inévitables ou de force majeure (Order No 2020-315 of 25 March 2020 concerning the financial conditions for the rescission of certain tourist travel and holiday contracts in the event of unavoidable and extraordinary circumstances or force majeure), travel organisers were authorised, as regards any 'rescission' notified between 1 March and 15 September 2020, to fulfil their reimbursement obligation by offering the traveller concerned, not later than three months after notification of the 'rescission' of the relevant package travel contract, a voucher for an amount equal to the payments made for that package, with that offer being valid for a period of 18 months.

306 See Article 12 of Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ 2015 L 326, p. 1; 'the Package Travel Directive'). Under the first sentence of Article 12(2), the traveller has the right to terminate a package travel contract before the start of the package without paying any termination fee in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination.

307 See in particular Article 4 and Article 12(2) to (4) of the Package Travel Directive.

Findings of the Court

In the first place, the Court holds that, on a literal interpretation, the concept of 'refund' within the meaning of the Package Travel Directive [308] refers to the reimbursement of any payments made for a package solely in the form of a sum of money. The possibility of replacing that obligation to pay a sum of money with a benefit in another form, such as the offer of vouchers, is not expressly provided for in that directive. That right to reimbursement in money, which consumers are able to dispose of freely, contributes to the objective of protecting their interests.

In the second place, the Court holds that the Package Travel Directive [309] precludes the temporary release of package travel organisers, in the context of the COVID-19 pandemic, from their obligation to provide the travellers concerned, not later than 14 days after a contract is terminated, with a full refund of any payments made under the terminated contract. That conclusion remains the same even where such a national measure is intended to prevent, due to the large number of anticipated reimbursement claims, the solvency of those travel organisers from being affected to the point of jeopardising their existence and thus to preserve the viability of the sector concerned.

The Court analyses, first of all, the concept of 'unavoidable and extraordinary circumstances'. [310] In accordance with the principle of legal certainty and with regard to consumer protection, that concept is capable of covering the COVID-19 pandemic, in so far as it entails the existence of 'serious risks to human health', [311] and may be applied to terminations of package travel contracts where such terminations are based on the consequences caused by such an event.

Next, the Court points out that the concept of 'unavoidable and extraordinary circumstances' is akin to the concept of '*force majeure*' and constitutes, in the light, in particular, of the *travaux préparatoires* for the Package Travel Directive, an exhaustive implementation of the latter concept for the purposes of that directive. Thus, Member States may not release, on the grounds of *force majeure*, even if only temporarily, package travel organisers from their reimbursement obligation laid down by that directive, since that directive does not provide for any exception to the imperative nature of that obligation.

Lastly, even if Member States were able to argue, before their national courts, that the non-conformity of national legislation with the provisions of a directive is justified on the grounds of *force majeure*, the Court states that national legislation which temporarily releases, in the circumstances of a global health crisis such as the COVID-19 pandemic, package travel organisers from their obligation to provide the travellers concerned with a full refund of any payments made for a package does not satisfy the conditions governing reliance on *force majeure* by the Member States.

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308 See in particular Article 12(2) and (3) of the Package Travel Directive. The second sentence of Article 12(2) provides that, in the event of termination of a package travel contract, that traveller is entitled to a full refund of any payments made for the package. Furthermore, in accordance with Article 4 and Article 12(3)(b) of that directive, if the tour organiser concerned is prevented from performing a package travel contract because of 'unavoidable and extraordinary circumstances', it may terminate that contract and provide the traveller with a full refund of any payments made for the package, with such refund to be made without undue delay and, in any event, not later than 14 days after the package travel contract is terminated.

309 See Article 4 and Article 12(2) to (4) of the Package Travel Directive.

310 As provided for in Article 12(2) and (3)(b) of the Package Travel Directive. The concept of 'unavoidable and extraordinary circumstances' is defined in Article 3(12) of that directive as a 'situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken'.

311 In accordance with recital 31 of the Package Travel Directive, which clarifies the scope of the concept of 'unavoidable and extraordinary circumstances', serious risks to human health come within that concept.

Thus, first, while the COVID-19 pandemic falls within circumstances beyond the control of the Member State concerned and those circumstances are abnormal and unforeseeable, national legislation which releases, in a generalised manner, all travel organisers from their reimbursement obligation cannot, by its very nature, be justified by *force majeure*. A general temporary suspension of that reimbursement obligation does not take into account the specific and individual financial situation of the travel organisers concerned. Secondly, it has not been proven that the financial consequences which that legislation is intended to address could not have been avoided other than by infringing the Package Travel Directive, in particular by adopting certain State aid measures. Thirdly, that national legislation, which provides for the release of package travel organisers from their reimbursement obligation for a period of up to 21 months from notification of the 'rescission' of the relevant package travel contract, is clearly not framed in such a way as to limit its effects to the period necessary to remedy the difficulties caused by the event capable of constituting *force majeure*.

In the third and final place, the Court recalls that where a national court is hearing an action, brought in accordance with its national law, for the annulment of national legislation which it considers to be contrary to EU law, that court is required to annul that legislation. In the present case, the Court states, first, that the threat to the economic interests of operators active in the package travel sector, occasioned by the COVID-19 pandemic, is not comparable to overriding considerations relating to the protection of the environment or the electricity supply in the Member State concerned, which are exceptional circumstances in respect of which the Court has, moreover, recognised that national courts have the power to adjust the temporal effects of their decisions to annul national legislation that is held to be incompatible with EU law. Secondly, the Court states that it is not apparent that the annulment of national legislation allowing Member States to release, in the context of the COVID-19 pandemic, package travel organisers from their reimbursement obligation would have adverse consequences for the package travel sector to such an extent that maintaining its effects would be necessary in order to protect the financial interests of the operators in that sector. Therefore, the principle of sincere cooperation [312] does not allow a national court, which is hearing an action for the annulment of national legislation that is contrary to the Package Travel Directive, to adjust the temporal effects of its decision annulling that national legislation.

312 Laid down in Article 4(3) TEU.

XI. Internet and electronic commerce

Judgment of 9 November 2023, *Google Ireland and Others* (C-376/22, EU:C:2023:835)

(Reference for a preliminary ruling – Directive 2000/31/EC – Information society services – Article 3(1) – Principle of control in the home Member State – Article 3(4) – Derogation from the principle of free movement of information society services – Concept of 'measures taken against a given information society service' – Article 3(5) – Possibility of a posteriori notification of measures restricting the free movement of information society services in urgent cases – Failure to provide notification – Enforceability of those measures – Legislation of a Member State imposing on providers of communication platforms, whether established on its territory or not, a set of obligations relating to the monitoring and notification of allegedly unlawful content – Directive 2010/13/EU – Audiovisual media services – Video-sharing platform service)

Google Ireland Limited, Meta Platforms Ireland Limited and Tik Tok Technology Limited are companies established in Ireland which provide, inter alia in Austria, communication platform services.

By its decisions, adopted in 2021, the Kommunikationsbehörde Austria (KommAustria) (the Austrian communications regulatory authority) declared that the three companies referred to above were subject to Austrian law. [313]

Taking the view that that Austrian law, which imposes a set of obligations on providers of communication platform services, whether established in Austria or elsewhere, relating to the monitoring and notification of allegedly unlawful content, should not be applied to them, those companies brought actions against the KommAustria decisions. Those actions were dismissed at first instance.

Following that dismissal, those companies lodged appeals on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). In support of those appeals, they submit in particular that the obligations introduced by the Austrian law are disproportionate and incompatible with the free movement of information society services and with the principle of control of those services by the home Member State (in other words, by the State on whose territory the service provider is established), as laid down in the Directive on electronic commerce. [314]

Having doubts as to the compatibility of the Austrian law and the obligations it imposes on service providers with the Directive on electronic commerce, which allows a Member State other than the home Member State to derogate, under certain conditions, from the principle of free movement of information society services, the Supreme Administrative Court made a reference to the Court of Justice on the interpretation of that directive.

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313 Namely, the Bundesgesetz über Maßnahmen zum Schutz der Nutzer auf Kommunikationsplattformen (Kommunikationsplattformen-Gesetz) (Federal Law on measures for the protection of users of communications platforms) (BGBl. I, 151/2020).

314 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1; 'the Directive on electronic commerce').

In its judgment, the Court rules on the question whether a Member State of destination of information society services may derogate from the free movement of those services by taking not only individual and specific measures, but also general and abstract measures aimed at a category of given services and, specifically, whether those measures are likely to fall within the concept of 'measures taken against a given information society service' within the meaning of the Directive on electronic commerce. [315]

Findings of the Court

First of all, the Court notes that the possibility of derogating from the principle of free movement of information society services concerns, according to the wording of the Directive on electronic commerce, a 'given information society service'. In this context, the use of the word 'given' tends to indicate that the service referred to must be understood as an individualised service. Consequently, Member States cannot adopt general and abstract measures aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services.

That assessment is not called into question by the fact that the Directive on electronic commerce uses the concept of 'measures'. By using such a broad and general term, the EU legislature has left to the discretion of the Member States the nature and form of the measures they may adopt to derogate from the principle of free movement of information society services. However, the use of that term in no way prejudges the substance or material content of those measures.

Next, the Court notes that that literal interpretation is corroborated by the contextual analysis of the Directive on electronic commerce.

The possibility of derogating from the principle of free movement of information society services is subject to the condition that the Member State of destination of those services must first ask the Member State of their origin to take measures, [316] which presupposes the possibility of identifying the service providers and, consequently, the Member States concerned. If Member States were authorised to restrict the free movement of such services by means of measures of a general and abstract nature applying without distinction to any provider of a category of such services, such identification would be, if not impossible, at least excessively difficult, so that Member States would not be able to comply with such a condition.

Finally, the Court points out that the Directive on electronic commerce is based on the application of the principles of home Member State control and mutual recognition, so that, within the coordinated field, [317] information society services are regulated solely in the Member State on whose territory the providers of those services are established. However, if Member States of destination were authorised to adopt measures of a general and abstract nature applying without distinction to any provider of a category of such services, whether established in the latter Member State or not, the principle of control in the Member State of origin would be called into question. That principle results in a division of regulatory powers between the Member State of origin and the Member State of destination. To authorise the latter State to adopt such measures would encroach on the regulatory powers of the Member State of origin and would have the effect of subjecting such providers to the legislation of both that State and the Member State or Member States of destination. Calling into question that principle would undermine the system and objectives of the Directive on electronic commerce. Furthermore, to

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315 Article 3(4) of the Directive on electronic commerce.

316 Article 3(4)(b) of the Directive on electronic commerce.

317 Within the meaning of Article 2(h) of the Directive on electronic commerce.

allow the Member State of destination to adopt such measures would undermine mutual trust between Member States and would be in conflict with the principle of mutual recognition.

In addition, the Court states that the Directive on electronic commerce seeks to eliminate legal obstacles to the proper functioning of the internal market arising from divergences in legislation and from the legal uncertainty as to which national rules apply to such services. However, the possibility of adopting the abovementioned measures would ultimately amount to subjecting the service providers concerned to different laws and, consequently, reintroducing the legal obstacles to freedom to provide services which that directive seeks to eliminate.

Thus, the Court concludes that general and abstract measures aimed at a category of given information society services described in general terms and applying without distinction to any provider of that category of services do not fall within the concept of 'measures taken against a given information society service' within the meaning of the Directive on electronic commerce.

XII. Economic and monetary policy

Judgment of 4 May 2023, *ECB* v *Crédit lyonnais* (C-389/21 P, EU:C:2023:368)

(Appeal – Economic and monetary policy – Prudential supervision of credit institutions – Regulation (EU) No 575/2013 – Calculation of the leverage ratio – Exposure measure – Article 429(14) – Exclusion of exposures meeting certain conditions – Partial refusal of authorisation – Discretion of the European Central Bank (ECB) – Action for annulment – Manifest error of assessment – Judicial review)

Crédit lyonnais is a public limited company incorporated under French law and authorised as a credit institution. That credit institution is a subsidiary of Crédit agricole SA, and is, as such, subject to the direct prudential supervision of the European Central Bank (ECB).

On 5 May 2015, Crédit agricole, on its own behalf and on behalf of the entities forming part of the Crédit agricole group, including Crédit lyonnais, applied to the ECB for authorisation [318] to exclude for the purposes of the calculation of the leverage ratio the exposures to the Caisse des dépôts et consignations (CDC), a French public institution, resulting from deposits made on various savings passbooks, which must, under the applicable French legislation, be transferred to the CDC ('the regulated savings').

The decision of 24 August 2016 by which the ECB refused to grant Crédit agricole the authorisation that it had sought was annulled by a judgment of the General Court. [319] Following that judgment, Crédit agricole resubmitted its application for authorisation to exclude the exposures to the CDC to the ECB. By decision of 3 May 2019, [320] the ECB authorised Crédit agricole and the entities forming part of the Crédit agricole group, with the exception of Crédit lyonnais, to exclude from the calculation of the leverage ratio all their exposures to the CDC. By contrast, Crédit lyonnais was authorised to exclude only 66% of those exposures. In the decision at issue, the ECB, taking the view that it had a discretion in the present case, applied a methodology that took into account three factors, namely the creditworthiness of the French central government, the risk of fire sales of assets and the level of concentration of exposures to the CDC.

Crédit lyonnais's action, for annulment of the decision at issue in so far as it refused to authorise it to exclude from the calculation of its leverage ratio all of its exposures to the CDC, was upheld by the General Court. [321] Specifically, the Court found that the ground of the decision at issue relating to the level of risk of fire sales of assets was vitiated by 'illegality'. Consequently, it concluded that the other two elements of the methodology applied by the ECB could not have led the ECB to refuse, in the decision at issue, to grant Crédit lyonnais the benefit of the exclusion for the entirety of that institution's exposures to the CDC.

On hearing the appeal brought by the ECB, the Court set aside the judgment under appeal and, giving final judgment in the case, dismissed the action brought by Crédit lyonnais. By its judgment, the Court

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318 Under Article 429(14) 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), as amended by Commission Delegated Regulation (EU) 2015/62 of 10 October 2014 (OJ 2015 L 11, p. 37).

319 Judgment of 13 July 2018, ***Crédit agricole* v *ECB*** (T-758/16, EU:T:2018:472).

320 Decision ECB SSM-2019-FRCAG-39 ('the decision at issue').

321 Judgment of 14 April 2021, ***Crédit lyonnais* v *ECB*** (T-504/19, EU:T:2021:185; 'the judgment under appeal').

clarifies the level of review by the Courts of the European Union when assessing the lawfulness of administrative decisions adopted by the ECB, where the latter enjoys a broad discretion.

Findings of the Court

The Court notes that, in so far as the ECB has a broad discretion in deciding whether or not to authorise the exclusion for the purposes of calculating the leverage ratio of exposures meeting certain conditions, the judicial review which the Courts of the European Union must carry out of the merits of the grounds of the ECB's decision must not lead it to substitute its own assessment for that of the ECB. That review seeks to ascertain that such a decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers. In that regard, the Courts of the European Union must, inter alia, establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Where an institution enjoys broad discretion, observance of procedural guarantees is of fundamental importance, including the obligation for that institution to examine carefully and impartially all the relevant aspects of the situation in question.

The Court observes that, in carrying out its own assessment of the characteristics of the regulated savings and their cumulative effect, the General Court considered that the level of risk of fire sales of assets was not sufficiently high to justify the ECB's refusal to exclude from the calculation of the leverage ratio all Crédit lyonnais's exposures to the CDC.

However, in so doing, the General Court, in the first place, did not call into question the ECB's findings concerning the characteristics of regulated savings which led the ECB to conclude that those characteristics did not make it possible to rule out completely any risk that Crédit lyonnais might be compelled to make fire sales of assets. That applies in particular to the ECB's findings concerning the high liquidity of the regulated savings in the absence of statutory rules limiting withdrawals of those savings and the obligation of Crédit lyonnais to reimburse depositors even during the deferred adjustment period between the positions of Crédit lyonnais and those of the CDC. Consequently, the reasoning of the General Court neither calls into question the material accuracy, reliability and consistency of the factors taken into account in the decision at issue, nor establishes that those factors do not constitute all the relevant information which had to be taken into consideration by the ECB.

In the second place, the General Court's finding that the information taken into account by the ECB was not capable of substantiating the conclusions drawn from it in the decision at issue follows from its own assessment of the level of risk of fire sales of assets. That assessment, which is based on the same factors as those taken into account by the ECB, departs from the assessment made by that institution without establishing that that assessment was manifestly incorrect.

By reasoning in that way, the General Court did not review the manifest error of assessment as was incumbent on it, but substituted its own assessment for that of the ECB in a situation in which, moreover, that institution enjoys a broad discretion.

Furthermore, concerning the General Court's assessment of the ECB's reasoning based on the experience of recent banking crises, the General Court did not establish how the considerations that regulated savings deposits cannot be invested, unlike sight deposits, in risky or illiquid assets are such as to demonstrate that the ECB's assessment of the possible risk of massive withdrawals, which had to be used to analyse the risk of fire sales of assets to which Crédit lyonnais was exposed, was manifestly incorrect. The same is true of the considerations based on the difference between the dual guarantee

of the French Republic enjoyed by regulated savings passbooks and the guarantee mechanism under Directive 2014/49. [322]

The Court concluded from this that the General Court annulled the decision at issue, substituting its own assessment of the risk of fire sales of assets to which Crédit lyonnais was exposed, without establishing how the ECB's assessment set out in that decision was, in that regard, vitiated by a manifest error of assessment. In so doing, it exceeded the scope of its judicial review. In addition, it was also wrong to find that the ECB had failed to fulfil its obligation to examine carefully and impartially all the relevant aspects of the situation in question.

Following the partial annulment of the judgment under appeal, the Court ruled definitively on the action at first instance. Analysing the arguments raised by Crédit lyonnais at first instance, it finds that, having regard to the limited judicial review which is for it to carry out in the light of the ECB's wide discretion in the present case, Crédit lyonnais is not able to demonstrate that that institution's assessment, set out in the decision at issue, concerning the risk of fire sales of assets and the creditworthiness of the French government is manifestly incorrect. The Court thus upholds the ECB's decision to refuse to exclude for the purposes of the calculation of the leverage ratio of Crédit lyonnais 34% of its exposures to the CDC.

322 Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes (OJ 2014 L 173, p. 149).

XIII. Public procurement

Judgment of 21 December 2023 (Grand Chamber), *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias* (C-66/22, EU:C:2023:1016)

(Reference for a preliminary ruling – Procedures for the award of public works contracts, public supply contracts and public service contracts – Directive 2014/24/EU – Point (d) of the first subparagraph of Article 57(4) – Award of public contracts in the transport sector – Directive 2014/25/EU – Article 80(1) – Facultative grounds for exclusion – Obligation to transpose – Economic operator entering into agreements aimed at distorting competition – Competence of the contracting authority – Impact of an earlier decision of a competition authority – Principle of proportionality – Article 47 of the Charter of Fundamental Rights of the European Union – Right to an effective remedy – Principle of sound administration – Obligation to state reasons)

Toscca is an economic operator that submitted a tender in the context of a public procurement procedure organised by Infraestruturas de Portugal for the purchase of creosoted pine sleepers and rods for use in the railway infrastructure sector; the public contract was awarded to Futrifer. Since its action seeking annulment of that award decision was dismissed, Toscca brought an appeal before the Tribunal Central Administrativo Norte (North Central Administrative Court, Portugal). That court gave judgment upholding that appeal, and ordered Infraestruturas de Portugal to award the contract to Toscca. That judgment was set aside, on grounds of a failure to state reasons, by the Supremo Tribunal Administrativo (Supreme Administrative Court, Portugal), which referred the case back to the Tribunal Central Administrativo Norte (North Central Administrative Court). That court delivered a second judgment, by way of which it confirmed the approach taken in its first judgment.

Appeals were brought against that second judgment by Infraestruturas de Portugal and Futrifer before the Supremo Tribunal Administrativo (Supreme Administrative Court), which is the referring court. It states that, in 2019, Futrifer was ordered by the Autoridade da Concorrência (Competition Authority, Portugal) to pay a fine in respect of a breach of competition rules in the context of public procurement procedures, organised in 2014 and 2015, by the same contracting authority.

By its judgment, delivered by the Grand Chamber, the Court rules, first, on the existence of an obligation, for the Member States, to transpose the facultative grounds for exclusion provided for by Directives 2014/24 [323] and 2014/25. [324] Next, it clarifies the conditions in which contracting authorities may exercise their competence in order to exclude an economic operator from participating in a public procurement procedure on grounds of lack of reliability, on account of a breach of competition rules unrelated to the public procurement procedure concerned. It clarifies, finally, the obligation on the part of contracting authorities to state reasons for a decision as to the reliability of an economic operator,

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323 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65). The first subparagraph of Article 57(4) of Directive 2014/24 makes provision for the situations in which contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure.

324 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). The third subparagraph of Article 80(1) of Directive 2014/25 provides that, if Member States so request, the objective rules and criteria for exclusion are also to include the exclusion grounds listed in Article 57(4) of Directive 2014/24 on the terms and conditions set out in that article.

in the light of the facultative ground for exclusion linked to the involvement of such an operator in agreements aimed at distorting competition, provided for by Directive 2014/24.

Findings of the Court

As a preliminary point, the Court rules on the question whether Member States are under the obligation to transpose into their national law the facultative grounds for exclusion mentioned in Directive 2014/24, [325] and in the provision of Directive 2014/25 which refers to those grounds.

As regards, on the one hand, the facultative grounds for exclusion provided for by Directive 2014/24, the Court observes that, contrary to what is apparent from certain judgments of the Court, [326] the Member States are under the obligation to transpose those grounds into their national law. That obligation means that they must provide for either the option or the obligation for contracting authorities to apply those grounds. First of all, it is clear from the wording of the provision of Directive 2014/24 on the facultative grounds for exclusion that the choice as to the decision whether or not to exclude an economic operator from a public procurement procedure on one of those grounds falls to the contracting authorities, unless the Member States decide to transform that optional exclusion into an obligation to do so. Consequently, in order not to deprive such contracting authorities of, at the very least, the possibility of applying those grounds for exclusion, a Member State cannot omit those grounds from its national legislation transposing Directive 2014/24. Second, that interpretation is also confirmed by the context of the provision relating to facultative grounds for exclusion, in contrast with other provisions under that directive which offer the Member States a choice as to whether or not to transpose those provisions. In that connection, the Court points out that the choice left to the Member States in so far as concerns the conditions for application of the facultative grounds for exclusion [327] cannot be extended to the question whether or not those grounds are to be transposed into national law. Third, as to the objective pursued by Directive 2014/24 in so far as concerns the facultative grounds for exclusion, the Court points out that the EU legislature intended to confer on the contracting authorities, and on them alone, the task of assessing the integrity and reliability of economic operators participating in a public procurement procedure and, where necessary, to exclude any operators they deem unreliable.

As regards, on the other hand, Directive 2014/25, [328] the Court points out that the Member States must, in accordance with their obligation to transpose the first subparagraph of Article 80(1) of Directive 2014/25, make provision for the possibility for contracting entities to include those exclusion grounds amongst the objective exclusion criteria in procedures which fall within the scope of that directive, without prejudice to any decision on the part of those States consisting in requiring that those entities include those grounds amongst those criteria.

Having set out those clarifications, the Court rules, in the first place, on the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition,

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325 More specifically, by the first subparagraph of Article 57(4) of that directive.

326 Judgments of 19 June 2019, ***Meca*** (C-41/18, EU:C:2019:507, paragraph 33), of 30 January 2020, ***Tim*** (C-395/18, EU:C:2020:58, paragraphs 34 and 40), and of 3 June 2021, ***Rad Service and Others*** (C-210/20, EU:C:2021:445, paragraph 28). By virtue of those of those judgments, the Member States may decide whether or not to transpose the facultative grounds for exclusion referred to in that provision.

327 Under Article 57(7) of Directive 2014/24.

328 More specifically, the third subparagraph of Article 80(1) of that directive.

provided for by Directive 2014/24. [329] The Court holds that that ground precludes national legislation which limits the possibility of excluding a tender from a tenderer on account of the existence of significant evidence of conduct on the part of that tenderer liable to distort competition rules in the public procurement procedure in the context of which that type of conduct has arisen. Such limitation is not apparent from the wording of the provision laying down that ground for exclusion. Furthermore, it is apparent from the context in which that provision occurs [330] that Directive 2014/24 permits, at any time during the procedure, contracting authorities to exclude or to be required by Member States to exclude an economic operator where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations covered by the grounds of exclusion provided for by that directive. Such an interpretation of that provision enables the contracting authority to ascertain the integrity and reliability of each of the economic operators, which integrity and reliability are liable to be cast into doubt not only in the event of the participation of such an operator in anticompetitive conduct in the context of that procedure, but also in the event of that operator's participation in such conduct in the past.

In the second place, the Court points out that the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition, provided for by Directive 2014/24, precludes national legislation which confers the power to decide to exclude economic operators from public procurement procedures, on the grounds of a breach of competition rules, solely on the national competition authority. Admittedly, where there is a specific procedure regulated by EU law or by national law for pursuing certain offences and in which the national competition authority is entrusted with carrying out investigations in this connection, the contracting authority must, within the context of the assessment of the evidence provided, rely in principle on the outcome of such a procedure. In that context, the decision of such a competition authority, finding that such an infringement has been committed and, on that ground, imposing a financial penalty on a tenderer, may take on particular significance, and all the more so if that penalty is accompanied by a temporary prohibition on participation in public procurement procedures. However, where such a decision may lead the contracting authority to exclude that economic operator from the public procurement procedure in question, conversely, the absence of such a decision can neither prevent nor exempt the contracting authority from carrying out such an assessment. That assessment should be carried out having regard to the principle of proportionality and taking into account all the relevant factors in order to determine whether the application of the facultative ground for exclusion linked to an economic operator entering into agreements aimed at distorting competition is justified. Accordingly, national legislation which ties the assessment of the integrity and reliability of tenderers to the findings in a decision of the national competition authority in relation to, in particular, future participation in public procurement procedures, undermines the discretion to be afforded to the contracting authority in the context of the application of the facultative grounds for exclusion provided for by Directive 2014/24.

In bringing that analysis to a close, the Court also specifies that the Member States cannot, in their legislation, restrict the scope of the facultative ground for exclusion linked to the participation of the economic operator concerned in anticompetitive conduct.

In the third place, the Court states that, in the light of the principle of sound administration, the decision of the contracting authority as to the reliability of an economic operator, adopted pursuant to the facultative ground for exclusion linked to an economic operator entering into agreements aimed at

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329 Pursuant to point (d) of the first subparagraph of Article 57(4) of Directive 2014/24, contracting authorities may exclude or may be required by Member States to exclude any economic operator from participation in a procurement procedure where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition.

330 Inter alia, the second subparagraph of Article 57(5) of Directive 2014/24.

distorting competition, provided for by Directive 2014/24, must be reasoned. That obligation concerns, first, decisions by way of which the contracting authority excludes a tenderer by applying, in particular, such facultative ground for exclusion. Second, the contracting authority is subject to that obligation to state reasons for its decision when it finds that a tenderer is concerned by one of the facultative grounds for exclusion, but it nonetheless decides not to exclude that tenderer, for example, on the ground that such an exclusion would constitute a disproportionate measure. Such a decision affects the legal situation of all the other economic operators participating in the public procurement procedure in question, who must therefore be able to defend their rights, where applicable, by bringing an action against it.

XIV. Social policy [331]

1. Equal treatment in employment and social security

Judgment of 12 January 2023, *TP (Audiovisual editor for public television)* (C-356/21, EU:C:2023:9)

(Reference for a preliminary ruling – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 3(1)(a) and (c) – Conditions for access to self-employment – Employment and working conditions – Prohibition of discrimination based on sexual orientation – Self-employed person working on the basis of a contract for specific work – Termination and non-renewal of contract – Freedom to choose a contracting party)

Between 2010 and 2017, J.K. personally prepared, on the basis of consecutive short-term contracts for specific work, concluded in the context of his independent economic activity, audiovisual material, trailers or features for the Editorial and Promotional Office of a channel of TP, a company which operates a nationwide public television channel in Poland.

On 20 November 2017, a new contract for specific work was concluded between J.K. and TP for a term of one month, providing for two one-week shifts in December. However, following the publication by J.K. and his partner, on 4 December 2017, of a video on YouTube aimed at promoting tolerance towards same-sex couples, TP informed J.K. that those two one-week shifts had been cancelled.

J.K. therefore did not carry out any shift in December 2017, and no new contract for specific work was concluded between him and TP.

Subsequently, J.K. brought an action before the referring court, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court, Warsaw, Poland), seeking, inter alia, compensation for non-material harm resulting from TP's refusal to renew his contract, terminating their professional relationship, on the ground, according to J.K, of his sexual orientation.

In the context of that dispute, that court has doubts as to the compatibility of a provision of Polish law [332] with EU law, in so far as that provision excludes the freedom of choice of contracting parties from the protection against discrimination conferred by Directive 2000/78, [333] so long as that choice is not based on sex, race, ethnic origin or nationality.

In that regard, the Court of Justice holds that Article 3(1)(a) and (c) of Directive 2000/78 preclude such a national provision which has the effect of excluding, on the basis of the freedom of choice of contracting

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331 Reference should also be made under this heading to the judgment of 21 December 2023 (Grand Chamber), ***Chief Appeals Officer and Others*** (C-488/21, EU:C:2023:1013), presented under heading II.1 'Measures restricting the free movement of Union citizens'.

332 Article 5(3) of the ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania (Law on the transposition of certain provisions of EU law regarding equal treatment) of 3 December 2010 (Dz. U. No 254, item 1700). In its consolidated version (Dz. U. of 2016, item 1219), that provision states that that law does not apply to the freedom of choice of contracting parties, provided that that choice is not based on sex, race, ethnic origin or nationality.

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

parties, from the protection against discrimination, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work by that person in the context of the pursuit of a self-employed activity.

Findings of the Court

In the first place, the Court points out that the terms 'employment', 'self-employment' and 'occupation' in Article 3(1)(a) of Directive 2000/78 [334] must be interpreted broadly. Directive 2000/78 is thus intended to cover a wide range of occupational activities, including those carried out by self-employed workers in order to earn their livelihood. It is nevertheless necessary to distinguish activities falling within the scope of that directive from those consisting of the mere provision of goods or services to one or more recipients, which do not fall within that scope.

It is therefore necessary, in order for occupational activities to fall within the scope of Directive 2000/78, that those activities are genuine and are pursued in the context of a legal relationship characterised by a degree of stability, which is for the referring court to assess as regards the activity pursued by J.K.

That being so, since that activity constitutes a genuine and effective occupational activity, pursued on a personal and regular basis for the same recipient and enabling J.K. to earn his livelihood, in whole or in part, the question whether the conditions for access to such an activity fall within Article 3(1)(a) of Directive 2000/78 does not depend on the classification of that activity as 'employment' or 'self-employment'.

The Court concludes that, in order for a person to be able to pursue his or her occupational activity effectively, the conclusion of a contract for specific work constitutes a factor the existence of which may be essential. Consequently, the concept of 'conditions for access' to self-employment [335] may include the conclusion of such a contract, and the refusal to conclude that contract on grounds linked to the sexual orientation of that contractor falls within the scope of Directive 2000/78.

In the second place, as regards the interpretation of Article 3(1)(c) of Directive 2000/78, [336] the Court observes that, having regard to the objective of that directive, the concept of 'employment and working conditions' in that provision refers, in a broad sense, to the conditions applicable to any form of employment or self-employment, whatever the legal form in which it is pursued.

Consequently, the fact that J.K. was unable to complete any of the shifts provided for in the contract for specific work appears to constitute an involuntary termination of activity of a self-employed person which may be assimilated to dismissal of an employee, which is a matter for the referring court to determine. In those circumstances, TP's decision not to renew the contract for specific work with J.K. on the ground, according to the latter, of his sexual orientation, and thus terminate the professional relationship between them, falls within the scope of Article 3(1)(c) of Directive 2000/78.

In the third and last place, the Court points out that to accept that freedom of contract allows a refusal to contract with a person on the ground of that person's sexual orientation would be tantamount to

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334 As provided in Article 3(1)(a) of Directive 2000/78, 'within the limits of the areas of competence conferred on the [European Union], [that] Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'.

335 Within the meaning of Article 3(1)(a) of Directive 2000/78.

336 Under Article 3(1)(c) of Directive 2000/78, that directive is applicable in relation to employment and working conditions, including dismissals and pay.

depriving Article 3(1)(a) of Directive 2000/78 of its practical effect in so far as that provision specifically prohibits any discrimination based on that ground as regards access to self-employment.

Thus, since the freedom to conduct a business is not absolute, the provision of Polish law at issue, which does not include sexual orientation among the exceptions to the freedom to choose a contracting party, cannot justify, in the present case, an exclusion from the protection against discrimination conferred by Directive 2000/78, where that exclusion is not necessary, in accordance with Article 2(5) of that directive, for the protection of the rights and freedoms of others in a democratic society.

2. Equal treatment in employment and occupation

Judgment of 28 November 2023 (Grand Chamber), *Commune d'Ans* (C-148/22, EU:C:2023:924)

(Reference for a preliminary ruling – Social policy – Directive 2000/78/EC – Establishing a general framework for equal treatment in employment and occupation – Prohibition of discrimination on the grounds of religion or belief – Public sector – Terms of employment of a public administration prohibiting the visible wearing of any philosophical or religious sign in the workplace – Islamic headscarf – Requirement of neutrality in contacts with the public, hierarchical superiors and colleagues)

OP has held, since 11 October 2016, the post of 'head of office' in the municipality of Ans (Belgium), a function which she performs primarily without being in contact with users of the public service.

On 8 February 2021, she requested authorisation to wear an Islamic headscarf in her workplace. That request was provisionally rejected by her employer.

Subsequently, the municipal board amended the terms of employment of the municipality of Ans by inserting a requirement of 'exclusive neutrality' in the workplace, understood as prohibiting all its workers from wearing, in that workplace, any visible sign that might reveal their beliefs – religious or philosophical in particular – whether or not they were in contact with the public.

Taking the view that she had been discriminated against because of her religion, OP brought an action for an injunction before the tribunal du travail de Liège (Labour Court, Liège, Belgium).

According to that court, the prohibition on wearing the Islamic headscarf, imposed on OP by her employer pursuant to the terms of employment, creates a difference in treatment constituting discrimination, within the meaning of Directive 2000/78. [337] In view of the doubts that it has as to the compatibility with that directive of the provision of the terms of employment at issue, the said court decided to refer questions to the Court of Justice for a preliminary ruling.

The Court, sitting as the Grand Chamber, rules that an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish an entirely neutral administrative environment provided that

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

that rule is appropriate, necessary and proportionate in the light of its context and taking into account the various rights and interests at stake.

Findings of the Court

After having rejected, on the basis of the factual elements put forward by the referring court, the possibility of direct discrimination, the Court recalls that an internal rule decreed by an employer, such as that at issue in the main proceedings, may constitute a difference of treatment indirectly based on religion or belief, within the meaning of Article 2(2)(b) of Directive 2000/78, if it is established that the apparently neutral obligation contained in that rule results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

Such a difference in treatment does not, however, amount to indirect discrimination if, in accordance with Article 2(2)(b)(i) of Directive 2000/78, it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

In the first place, according to the Court, a provision of a public administration's terms of employment, such as that at issue in the present case, may be regarded as pursuing a legitimate aim within the meaning of that provision.

In the absence of consensus at EU level, each Member State, including, where appropriate, its infra-State bodies, in compliance with the powers conferred on them, must be afforded a margin of discretion in designing the neutrality of the public service which it intends to promote in the workplace. That margin of discretion allows the Member States and those infra-State bodies to take account of their own specific context, having regard to the diversity of their approaches as to the place they intend to accord, within their respective systems, to religion and philosophical beliefs in the public sector. However, it is for the national and EU courts to verify whether the national, regional or local measures taken were justified in principle and proportionate.

In the second place, the Court states that the provision of the terms of employment must be appropriate for the purpose of ensuring that the aim pursued by the employer is properly applied. In that regard, it will be for the referring court, first of all, to determine whether the municipality of Ans pursues the objective of 'exclusive neutrality' in a genuinely consistent and systematic manner with respect to all employees.

Next, the Court states that the legitimate objective of ensuring, through a policy of 'exclusive neutrality', an entirely neutral administrative environment can be effectively pursued only if no visible manifestation of beliefs – philosophical or religious in particular – is allowed when employees are in contact with users of the public service or with other employees. The wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy.

Finally, it will be for the referring court, in the light of all the factors characteristic of the context in which that rule was adopted, to weigh up the interests at stake, taking into account, on the one hand, the fundamental rights and principles at issue, and, on the other hand, the principle of neutrality seeking to guarantee the users of its services and the members of the public administration's staff an administrative environment devoid of visible manifestations of beliefs, philosophical or religious in particular.

Judgment of 7 December 2023, *AP Assistenzprofis* (C-518/22, EU:C:2023:956)

(Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(5) – Prohibition of discrimination on grounds of age – United Nations

Convention on the Rights of Persons with Disabilities – Article 19 – Living independently and being included in the community – Charter of Fundamental Rights of the European Union – Article 26 – Social and occupational integration of persons with disabilities – Personal assistance service for persons with disabilities – Job offer stating a minimum age and maximum age of the person to be hired – Account taken of the wishes and interests of the disabled person – Justification)

In July 2018, AP Assistenzprofis GmbH, a provider of assistance and advisory services to persons with disabilities, published a job offer stating that A., a 28-year-old female student, was looking for female personal assistants, who should be 'preferably between 18 and 30 years old', to help her in all areas of everyday life.

J.M.P., who was born in 1968, responded to that job offer and received a rejection from AP Assistenzprofis.

Claiming that she had been discriminated against on grounds of age, J.M.P. brought an action against AP Assistenzprofis before the Arbeitsgericht Köln (Labour Court, Cologne, Germany) seeking compensation for the resulting damage. That court upheld that action.

Following a judgment of the Landesarbeitsgericht Köln (Higher Labour Court, Cologne, Germany), by which the appeal brought by AP Assistenzprofis was upheld, J.M.P. brought an appeal on a point of law (*Revision*) against that judgment before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany).

Since it was uncertain regarding the justification, under Directive 2000/78, [338] of the direct discrimination on grounds of age suffered by J.M.P., and sought clarification on the balance to be struck, having regard to that directive, between the right to effective protection against discrimination on grounds of age and the disabled person's right to effective protection against discrimination on the basis of her disability, the referring court decided to make a reference for a preliminary ruling to the Court of Justice.

By its judgment, the Court answers that Directive 2000/78, read in the light of Article 26 of the Charter of Fundamental Rights of the European Union, concerning the integration of persons with disabilities, and Article 19 of the United Nations Convention on the Rights of Persons with Disabilities, [339] entitled 'Living independently and being included in the community', does not preclude the recruitment of a person providing personal assistance from being subject to an age requirement, pursuant to the national legislation, if such a measure is necessary for the protection of the rights and freedoms of others.

Findings of the Court

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

339 Approved on behalf of the European Union by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35; 'the UN Convention').

The Court analyses the difference of treatment on grounds of age at issue in the main proceedings in order to determine whether it is justified having regard to Article 2(5) of Directive 2000/78. [340]

First of all, it finds that that difference of treatment is the result of a measure laid down by national law, [341] in accordance with Article 2(5) of that directive.

Next, it examines whether that measure pursues the objective of 'the protection of the rights and freedoms of others', laid down by that provision.

In that regard, according to the Court, the national legislation in question pursues an objective of protecting the self-determination of persons with disabilities, by guaranteeing those persons' right to express their wishes and to make choices freely as regards decisions on the personal assistance services and their provision, since those services concern all areas of life and extend considerably into the private and intimate areas of the life of the person in receipt of them. That objective comes within the scope of Article 2(5) of Directive 2000/78.

That right to express wishes and to choose freely gives specific expression to the right to integration of persons with disabilities enshrined in Article 26 of the Charter of Fundamental Rights. Furthermore, respect for the self-determination of persons with disabilities is an objective enshrined in Article 19 of the UN Convention, the provisions of which may be relied on for the purpose of interpreting Directive 2000/78.

Lastly, the Court ascertains whether the difference of treatment at issue in the main proceedings is the result of a measure that is necessary for the protection of that right to self-determination.

The Court states, in that regard, that, in a situation such as that at issue in the main proceedings, taking account of the preference for a certain age range expressed by the disabled person is likely to promote respect for that person's right to self-determination in the provision of those personal assistance services, inasmuch as it appears reasonable to expect that a person within the same age range as the disabled person will fit more easily in that person's personal, social and university circle.

Thus, the Court concludes that, subject to verifications which it is for the referring court to carry out, having regard to all the facts of the main proceedings, the difference of treatment on grounds of age in the case at hand is the result of a measure that is necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of Directive 2000/78, and could, consequently, be justified having regard to that provision.

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340 Pursuant to that provision, the directive is to be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

341 Namely Paragraph 8(1) of the Sozialgesetzbuch, Neuntes Buch (IX) (Book IX of the Social Security Code), of 23 December 2016 (BGBl. 2016 I, p. 3234; 'the SGB IX'), read in conjunction with Paragraph 33 of the Sozialgesetzbuch, Erstes Buch (I) (Book I of the Social Security Code), of 11 December 1975 (BGBl. 1975 I, p. 3015; 'the SGB I'), which provides that, when deciding on personal assistance services and in the performance of those services intended to promote the disabled person's participation in the community, the legitimate wishes of the persons entitled to receive those services are to be respected, in so far as those wishes are reasonable and by taking account of those persons' personal circumstances, age, sex, family and religious and philosophical needs.

3. Organisation of working time

Judgment of 14 December 2023, *Sparkasse Südpfalz* (C-206/22, EU:C:2023:984)

(Reference for a preliminary ruling – Protection of the safety and health of workers – Organisation of working time – Article 31(2) of the Charter of Fundamental Rights of the European Union – Directive 2003/88/EC– Article 7 – Right to paid annual leave – SARS-Cov-2 virus – Quarantine measure – Impossible to carry over the paid annual leave granted for a period coinciding with a period of quarantine)

TF, who has been employed by the Sparkasse Südpfalz since 2003, was granted paid annual leave for the period from 3 to 11 December 2020.

A day before that leave started, the competent German authority ordered TF to quarantine, in accordance with the national health measures intended to prevent the spread of the SARS-CoV-2 virus, for the period from 2 to 11 December 2020, on the ground that he had been in contact with an individual infected with that virus.

On 4 March 2021, TF requested his employer to carry over the days of paid annual leave granted for the period coinciding with the period of enforced quarantine.

After that carry-over was refused, TF brought an action before the Arbeitsgericht Ludwigshafen am Rhein (Labour Court, Ludwigshafen am Rhein, Germany), the referring court.

In the context of that dispute, that court is uncertain whether the case-law of the German courts, according to which mere quarantine does not amount to incapacity for work obliging the employer to agree to carry over the days of leave granted, is compatible with the right to paid annual leave guaranteed by EU law.

Ruling on a question referred by the national court for a preliminary ruling, the Court of Justice finds that such a national practice, which does not permit the carry-over of days of paid annual leave that were granted to a worker who is not sick, which coincide with a period of quarantine, is compatible with the right to paid annual leave enshrined in Article 31(2) of the Charter of Fundamental Rights of the European Union and given concrete expression in Article 7(1) of Directive 2003/88. [342]

Findings of the Court

First, after recalling the dual purpose of paid annual leave, that is to say, enabling the worker both to rest from carrying out the work he or she is required to do under his or her contract of employment and to enjoy a period of relaxation and leisure, the Court states that the purpose of the quarantine measure, provided for by the German law, is different. That measure is intended to prevent the spread of a contagious illness by way of isolation on the part of persons likely to develop symptoms.

Second, the Court confirms that such a measure is, like the occurrence of incapacity for work on account of an illness, an unforeseeable event beyond the control of the person subject to it.

Having said that, a worker who is placed under quarantine on the ground that he or she has been in contact with an individual infected with the SARS-Cov-2 virus but who is not in a situation of incapacity for work as evidenced by a medical certificate is in a situation that is different from that of a worker on

[342] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

sick leave, who is subject to physical or psychological constraints caused by the illness. Therefore, the purpose of quarantine is not, as a matter of principle, comparable to that of sick leave. Accordingly, a period of quarantine cannot, in itself, present an obstacle to the attainment of the purposes of paid annual leave.

Third, according to the Court, although quarantine is likely to affect the conditions under which workers enjoy their free time, it does not, in itself, undermine those workers' right to have the actual benefit of their paid annual leave. During the period of paid annual leave, workers must not be subject to any obligation vis-à-vis their employers which may prevent them from pursuing freely and without interruption their own interests in order to neutralise the effects of work on their safety or health.

Therefore, the employer cannot be required to compensate for the disadvantages arising from an unforeseeable event, such as quarantine ordered by a public authority, that would prevent its employees from taking full advantage of their right to paid annual leave. Directive 2003/88 is not intended to ensure that any event capable of preventing workers from enjoying fully and in the manner they wish a period of rest or relaxation is a reason for granting workers additional leave so as to ensure that the purpose of annual leave is attained.

XV. Consumer protection [343]

1. Unfair terms

Judgment of 12 January 2023, *D.V. (Lawyers' fees – Principle of an hourly rate)* (C-395/21, EU:C:2023:14)

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Contract for the provision of legal services concluded between a lawyer and a consumer – Article 4(2) – Assessment of the unfairness of contractual terms – Exclusion of terms relating to the main subject matter of the contract – Term providing for the payment of lawyers' fees on the basis of an hourly rate – Article 6(1) – Powers of the national court when dealing with a term considered to be 'unfair')

M.A., as a consumer, concluded five contracts for the provision of legal services with D.V., a lawyer. Each of those contracts provided that the lawyer's fees were to be calculated on the basis of an hourly rate, fixed at EUR 100 for each hour of consultation or of provision of legal services to M.A.

When she did not receive all the fees claimed, D.V. brought an action before the court of first instance seeking an order that M.A. pay the fees due in respect of legal services performed. The court of first instance upheld D.V.'s claim in part. However, it found the contractual term regarding the price of the services provided to be unfair and reduced the fees claimed by half. After that judgment was upheld by the appeal court, D.V. brought an appeal on a point of law before the Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania).

On a request for a preliminary ruling from that court, the Court of Justice rules on the interpretation of Directive 93/13. [344] In its judgment, it focuses in particular on the requirement of transparency of terms relating to the main subject matter of contracts for the provision of legal services and the effects of a finding that a term setting the price of those services is unfair.

Findings of the Court

First of all, the Court finds that a term in a contract for the provision of legal services concluded between a lawyer and a consumer, which sets the cost of the services provided on the basis of an hourly rate, falls within the 'main subject matter of the contract' under Directive 93/13. [345]

Next, when examining whether that term, which contains no information other than the hourly rate charged, meets the requirement of being drafted in plain intelligible language, [346] the Court notes that, given the nature of the services which are the subject matter of a contract for the provision of legal

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343 Reference should also be made under this heading to the following judgments: judgment of 8 June 2023, ***UFC – Que choisir and CLCV*** (C-407/21, EU:C:2023:449), presented under heading X.5 'Package travel, package holidays and package tours'; judgment of 30 March 2023, ***Green Network (Order for repayment of costs)*** (C-5/22, EU:C:2023:273), presented under heading XVI 'Energy'.

344 Article 3(1), Article 4(2), Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

345 Within the meaning of Article 4(2) thereof.

346 Laid down in Article 4(2) of Directive 93/13.

services, it is often difficult, if not impossible, for the seller or supplier to predict, at the time the contract is concluded, the exact number of hours needed to ensure the performance of that contract and, thus, the actual total cost of the services provided. However, although a seller or supplier cannot be required to inform the consumer of the final financial consequences of his or her commitment, which depend on future events which are unpredictable and beyond the control of that seller or supplier, the seller or supplier is required to provide the consumer, before the conclusion of the contract, with information that enables him or her to take a prudent decision in full knowledge of the possibility that such events may occur and of the consequences which they are likely to have with regard to the duration of the provision of legal services.

That information, which may vary according to, on the one hand, the subject matter and nature of the services provided for in the contract for legal services and, on the other, the applicable rules of professional conduct, must include particulars that enable the consumer to assess the approximate total cost of those services. An estimate of the expected number or minimum number of hours of work needed or a commitment to send, at reasonable intervals, bills or periodic reports indicating the number of hours worked could constitute such particulars. The Court states that it is for the national court to assess, taking into account those considerations and all the relevant factors surrounding the conclusion of the contract concerned, whether the seller or supplier has provided appropriate pre-contractual information to the consumer.

Thus, the Court concludes that a term which sets the price on the basis of an hourly rate, without the consumer being provided, before the conclusion of the contract, with information that enables him or her to take a prudent decision in full knowledge of the economic consequences of concluding that contract, does not satisfy the requirement of being drafted in plain intelligible language.

Next, the Court recalls that the assessment of the unfair character of a term in a contract concluded with a consumer is based, in principle, on an overall assessment which does not take account solely of the possible lack of transparency of that term. However, it is open to the Member States to ensure a maximum degree of protection for the consumer. [347]

Consequently, the Court finds that a term in a contract for the provision of legal services, which sets the price of those services on the basis of an hourly rate and therefore falls within the main subject matter of that contract, is not to be considered unfair [348] simply on the ground that it does not satisfy the requirement of transparency, unless the Member State whose national law applies to the contract in question has expressly provided, as in the present case, for classification as an 'unfair term' simply on that ground.

Lastly, as regards the consequences of a finding that a term regarding cost is unfair, the Court points out that the national court is under an obligation to disapply that term, unless the consumer objects.

It states that, where, pursuant to the relevant provisions of national law, a contract for the provision of legal services is not capable of continuing in existence after the unfair term regarding cost has been removed and those services have already been provided, Directive 93/13 [349] does not preclude the invalidation of that contract or the national court from restoring the situation in which the consumer

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347 In accordance with Article 8 of Directive 93/13.

348 Under Article 3(1) of Directive 93/13.

349 Article 6(1) and Article 7(1) of Directive 93/13.

would have been in the absence of that term, even if, as a result, the seller or supplier does not receive any remuneration for the services provided.

As regards the consequences which annulment of the contracts at issue in the main proceedings could have for the consumer, the Court recalls its case-law according to which, in the case of a loan agreement, the annulment of the loan agreement in its entirety would, in principle, make the outstanding balance of the loan become due forthwith, which would be likely to be in excess of the consumer's financial capacities and could expose the consumer to particularly unfavourable consequences. [350] However, the particularly unfavourable nature of the annulment of a contract cannot be reduced solely to purely pecuniary consequences.

It is possible that the annulment of a contract for the provision of legal services that have already been performed may place the consumer in a situation of legal uncertainty, in particular where national law allows the seller or supplier to claim remuneration for those services on a different basis from that of the annulled contract. Furthermore, the invalidity of the contract could possibly affect the validity and effectiveness of the transactions conducted under it.

In those circumstances, the Court finds that, in the event that the annulment of the contract in its entirety would expose the consumer to particularly unfavourable consequences, which it is for the referring court to ascertain, Directive 93/13 [351] does not preclude the national court from remedying the invalidity of the unfair term by replacing it with a supplementary provision of national law or a provision of national law applied by mutual agreement of the parties to that contract. On the other hand, that directive precludes the national court from replacing the unfair term that has been annulled with a judicial assessment of the level of remuneration due for those services.

Judgment of 9 November 2023, *Všeobecná úverová banka* (C-598/21, EU:C:2023:845)

(Reference for a preliminary ruling – Unfair terms in consumer contracts – Consumer credit contract – Directive 93/13/EEC – Article 1(2) – Term reflecting a mandatory statutory provision – Article 3(1), Article 4(1), Article 6(1) and Article 7(1) – Acceleration clause – Judicial review – Proportionality with regard to the consumer breaches of contract – Articles 7 and 38 of the Charter of Fundamental Rights of the European Union – Contract secured by a charge on immovable property – Extrajudicial sale of the consumer's home)

SP and CI, the applicants in the main proceedings, took out a consumer credit repayable over a period of 20 years and secured by a charge on immovable property – the family home in which they were resident.

Less than a year after the conclusion of that agreement, since the applicants in the main proceedings were in default of payment, the lender demanded repayment in full of the sums due under the credit agreement, on the basis of an acceleration clause contained in that agreement. It then proceeded to enforce its charge by extrajudicial auction of the pledged property.

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350 See, to that effect, judgment of 3 March 2020, ***Gómez del Moral Guasch*** (C-125/18, EU:C:2020:138, paragraph 63 and the case-law cited).

351 Article 6(1) and Article 7(1) of Directive 93/13.

Hearing an application by the applicants for suspension of that sale, the Okresný súd Prešov (District Court, Prešov, Slovakia) dismissed their application by a first judgment, which it subsequently confirmed, on remittal, notwithstanding the annulment of that judgment by the Krajský súd v Prešove (Regional Court, Prešov, Slovakia). The applicants brought an appeal against that second judgment before the Prešov Regional Court, the referring court. According to that court, the national legislation authorising the extrajudicial enforcement of a charge by auction of the property constituting the home of the consumers may be contrary to Directive 93/13 and to the principle of proportionality.

In its judgment, the Court of Justice examines the interpretation of Directive 93/13 [352] and, more specifically, the scope of judicial review of the unfairness of a clause accelerating the term contained in a consumer credit agreement, where that clause allows the extrajudicial sale of the consumer's family home.

Findings of the Court

In the first place, the Court finds that an acceleration clause which allows the creditor to claim repayment in advance of the entire outstanding balance in the event of the debtor's failure to fulfil his or her contractual obligations falls within the scope of Directive 93/13. It points out that, subject to verification by the referring court, that clause is not to be classified as a '[term] which reflect[s] mandatory statutory or regulatory provisions' within the meaning of Article 1(2) of Directive 93/13. Although that clause reproduces certain provisions of national law, [353] those provisions are not mandatory and do not satisfy the second condition laid down in Article 1(2) for the application of the exclusion provided for therein.

In the second place, after recalling the general rules governing judicial review of the unfairness of contractual terms falling within the scope of Directive 93/13, the Court recalls the criteria in the light of which the national court may determine whether a term in a long-term mortgage loan agreement determining the conditions under which the creditor is authorised to demand early repayment, such as the acceleration clause, is unfair.

Thus, in making that assessment, it is important to know, first, whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation of essential importance in the context of the contractual relationship in question and, second, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan. It is also important to know, third, whether the seller or supplier's right derogates from the ordinary law applicable, in the absence of specific contractual provisions and, fourth, whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.

Therefore, when assessing whether an acceleration clause is unfair, the national court must, inter alia, examine the proportionality of the option available to the creditor under that clause to demand all the sums due under the contract. Therefore, that court must take into account, inter alia, the extent to which the consumer fails to fulfil his or her contractual obligations, such as the amount of the instalments which have not been paid in relation to the total amount of the credit and the duration of the contract.

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352 See in particular, Article 3(1), Article 4(2), Article 6(1)' and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

353 In the present case, Paragraph 53(9), and Paragraph 565 of the Slovak Civil Code.

However, the criteria set out above are neither cumulative or alternative nor exhaustive. Thus, first, when reviewing the proportionality of the acceleration clause, additional criteria, such as any contractual imbalance created by that acceleration clause and the fact that the application of that clause may, where appropriate, lead to the recovery by the creditor of the sums owed under the contract by the sale of the family home of the consumer without any judicial process, may be applied. Second, when assessing the means enabling the consumer to remedy the effects of the loan becoming due, the national court must take into account, in particular with regard to the fundamental right to housing, [354] the consequences of the consumer and his or her family being evicted from the dwelling constituting their principal residence. Therefore, applying those criteria and taking into account all the circumstances in which the contract was concluded, the national court could conclude that the acceleration clause was unfair if it finds that the seller or supplier may, under that clause, exercise its right to claim early repayment of the outstanding balance due under the loan without taking into account the extent of the consumer's failure to fulfil obligations in relation to the amount granted and the duration of the loan.

In those circumstances, the Court ruled that Directive 93/13, read in the light of the Charter, [355] precludes national legislation under which the judicial review of the unfairness of an acceleration clause contained in a consumer credit agreement does not take account of the proportionality of the option given to the seller or supplier to exercise his or her right under that clause, in the light of specific criteria. Those include criteria linked, in particular, to the extent of the consumer's failure to fulfil his or her contractual obligations, such as the amount of the instalments that have not been paid in relation to the total amount of credit and the duration of the contract, as well as the possibility that implementation of the clause would result in the seller or supplier being able to recover the sums due under that clause by selling the consumer's family home without any judicial process.

2. Right of withdrawal from distance contracts

Judgment of 21 December 2023 (Grand Chamber), *BMW Bank and Others* (C-38/21, C-47/21 and C-232/21, EU:C:2023:1014)

(Reference for a preliminary ruling – Consumer protection – Leasing agreement for a motor vehicle without an obligation to purchase – Directive 2008/48/EC – Article 2(2)(d) – Concept of a leasing agreement without an obligation to purchase the object of the agreement – Directive 2002/65/EC – Article 1(1) and Article 2(b) – Concept of a contract for financial services – Directive 2011/83/EU – Article 2(6) and Article 3(1) – Concept of a service contract – Article 2(7) – Concept of a distance contract – Article 2(8) – Concept of an off-premises contract – Article 16(l) – Exception from the right of withdrawal in respect of the provision of car rental services – Credit agreement for the purchase of a motor vehicle – Directive 2008/48 – Article 10(2) – Requirements relating to the information that must be stated in the agreement – Presumption of compliance with the obligation to provide information in the case of use of a statutory information model – Absence of horizontal direct effect of a directive – Article 14(1) – Right of withdrawal – Start of the withdrawal period in the event of incomplete or incorrect information – Abusive nature of the exercise of the right of withdrawal – Time-barring of the right of withdrawal – Obligation to return the vehicle in advance in the event of exercise of the right of withdrawal in respect of a linked credit agreement)

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354 See Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

355 Articles 7 and 38 of the Charter.

The three joined cases form part of several disputes between consumers and financial institutions linked to motor vehicle dealerships, regarding the validity of the exercise of those consumers' right of withdrawal concerning, respectively, a leasing agreement for a motor vehicle without an obligation to purchase (Case C-38/21) and a number of credit agreements intended to finance the purchase of second-hand motor vehicles (Cases C-47/21 and C-232/21).

In Case C-38/21, VK visited the premises of a BMW motor vehicle dealership where one of the latter's employees, acting as a credit intermediary for BMW Bank GmbH, offered VK a leased motor vehicle and set out the various aspects of that type of agreement, such as the duration and monthly instalments. In November 2018, VK, using a means of distance communication, concluded a leasing agreement with BMW Bank in respect of a motor vehicle for private use. Under that agreement, concluded for 24 months and based on a loan being granted by BMW Bank, VK was not required to purchase the vehicle at the end of the contractual period. On 25 June 2020, VK stated that he wished to withdraw from the leasing agreement. He took the view that the 14-day withdrawal period provided for under national law had not yet started to run because the information that should have been provided to him under that law was insufficient and illegible.

In Cases C-47/21 and C-232/21, several consumers concluded loan agreements for the purchase of second-hand vehicles for private use. When those agreements were prepared and concluded, the car dealers from which the vehicles were purchased acted as intermediaries for C. Bank AG (Case C-47/21) and for Volkswagen Bank GmbH and Audi Bank (Case C-232/21). Those consumers subsequently withdrew from the loan agreements, essentially seeking repayment of the monthly instalments which they had paid up to the date of withdrawal. According to those consumers, the 14-day withdrawal period provided for under national law had not yet started to run because the information on the right of withdrawal and the other mandatory pieces of information had not been duly provided to them.

In its judgment, delivered by the Grand Chamber, the Court of Justice explains, in the context of a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, the scope of Directives 2002/65, [356] 2008/48 [357] and 2011/83 [358] on consumer protection and the scope of the concepts of 'service contract', 'distance contract' and 'off-premises contract' within the meaning of Directive 2011/83. The Court also rules, in the context of credit agreements, on several aspects of the obligation on creditors, under Directive 2008/48, to provide consumers with information on, inter alia, the right of withdrawal and on the consequences of providing incorrect or incomplete information on the exercise of that right. The Court also deals with, in the same context and under the same directive, the issue of a consumer's abusive exercise of the right of withdrawal and the issue of when that right is time-barred.

Findings of the Court

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356 Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ 2002 L 271, p. 16).

357 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133, p. 66).

358 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304, p. 64).

In the first place, the Court examines the nature of a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, in the light of Directives 2002/65, 2008/48 and 2011/83.

As regards, first, Directive 2011/83, the Court rules that a leasing agreement for a motor vehicle, which is characterised by the fact that neither that agreement nor a separate agreement provides that the consumer is required to purchase the vehicle upon the expiry of the agreement, falls within the scope of that directive, as a 'service contract' within the meaning of Article 2(6) thereof. [359] That concept is defined broadly and must be understood as including all agreements which do not fall within the concept of a 'sales contract' provided for in that directive. [360] In the present case, a leasing agreement by which a trader undertakes to provide a consumer with a vehicle in return for payment by instalments without an obligation to purchase that vehicle at the end of the lease does not fall within that concept given that it does not provide for the transfer of ownership of the vehicle to the consumer. Such a leasing agreement also does not come under the list of contracts excluded from the scope of Directive 2011/83. [361]

Second, the Court finds that such an agreement does not fall within the scope of Directive 2008/48. Although it does fall within the scope of a 'leasing agreement' under that directive, [362] it is nevertheless expressly excluded from the scope of that directive because it is not coupled with an obligation on the consumer to purchase the object of the agreement at the end of the latter.

Third, as regards Directive 2002/65, the Court also finds that a leasing agreement for a motor vehicle, which is characterised, inter alia, by the fact that neither that agreement nor a separate agreement provides that the consumer is required to purchase the vehicle upon the expiry of the agreement, does not fall within the scope of that directive. The Court states that, in order to fall within the scope of that directive, the purpose of an agreement must be, inter alia, the provision of a 'financial service', [363] such as a service of a credit nature. Although it is true that a leasing agreement for a motor vehicle without an obligation to purchase comprises both a credit element and a rental element, the Court states that such an agreement does not differ, for the most part, from a long-term car rental agreement. Since the main purpose of that type of agreement is the rental of the vehicle, it cannot be classified as a contract for a financial service of a credit nature.

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359 Under Article 2(6) of Directive 2011/83, the concept of a 'service contract' means 'any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof'.

360 Under Article 2(5) of Directive 2011/83, a 'sales contract' means 'any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services'.

361 As laid down in Article 3(3) of Directive 2011/83.

362 Within the meaning of Article 2(2)(d) of Directive 2008/48.

363 Under Article 2(b) of Directive 2002/65, 'any service of a banking, credit, insurance, personal pension, investment or payment nature' comes under the concept of a financial service.

In the second place, in the context of the interpretation of Directive 2011/83 as regards a leasing agreement for a motor vehicle without an obligation on the consumer to purchase the vehicle, the Court considers, first, the concepts of a 'distance contract' [364] and an 'off-premises contract'. [365]

Thus, the Court states, on the one hand, that a service contract concluded between a consumer and a trader by using a means of distance communication cannot be classified as a 'distance contract' where the stage which prepared the ground for the conclusion of the contract took place in the simultaneous physical presence of the consumer and an intermediary acting in the name or on behalf of the trader, who provided the consumer with all the information referred to in Directive 2011/83, [366] enabling that consumer to ask that intermediary questions about the proposed contract or offer in order to remove any uncertainty as to the scope of his or her possible contractual commitment with the trader.

On the other hand, the Court finds that a service contract concluded between a consumer and a trader cannot be classified as an 'off-premises contract', where, during the stage preparing the ground for the conclusion of the contract through the use of a means of distance communication, the consumer visited the business premises of an intermediary acting in the name or on behalf of the trader for the purposes of the negotiation of that contract, but operating in a field of activity other than that of the trader, provided that two conditions are met. The first condition is that the consumer must have been able to expect, as an average consumer who is reasonably well informed and reasonably observant and circumspect, by visiting the business premises of the intermediary, to be solicited by that intermediary for the purposes of the negotiation and conclusion of a service contract with the trader. The second condition is that the consumer must have been able easily to understand that that intermediary was acting in the name or on behalf of that trader.

Second, examining the exceptions provided for in Article 16 of Directive 2011/83 under which the consumer does not have a right of withdrawal in certain situations, the Court finds that a leasing agreement for a motor vehicle, concluded between a trader and a consumer and classified as a distance or off-premises service contract within the meaning of that directive, comes under the exception relating to the provision of car rental services coupled with a specific date or period of performance, [367] where the main purpose of such an agreement is to allow the consumer to use a vehicle for the specific period of time stipulated in that agreement, in return for the regular payment of sums of money. In that regard, the Court states, on the one hand, that the term 'specific' to which that exception refers is also capable of covering long-term rental agreements, such as the 24-month leasing agreement in the case in the main proceedings, provided that that duration is set out in sufficient detail in the agreement. On the other hand, the Court states that, in the context of a leasing agreement for a vehicle that is acquired specifically at the consumer's request in order to meet the latter's specifications, the trader might, where the consumer has a right of withdrawal, find it difficult to put the vehicle to different use. As a result of, inter alia, those specifications, the trader might not succeed, within a reasonable period

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364 Under Article 2(7) of Directive 2011/83, that concept covers 'any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded'.

365 Under Article 2(8) of Directive 2011/83, that concept covers 'any contract between the trader and the consumer concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader'.

366 In particular in Article 6 of Directive 2011/83.

367 Article 16(l) of Directive 2011/83 concerns the exception regarding 'the provision of accommodation other than for residential purpose, transport of goods, car rental services, catering or services related to leisure activities if the contract provides for a specific date or period of performance'.

following the exercise of the right of withdrawal, in putting the vehicle to another equivalent use for the period corresponding to the duration of the originally planned lease, without suffering significant financial loss.

In the third place, in the context of the interpretation of Directive 2008/48, the Court states, first of all, that the loan agreements for the purchase of second-hand motor vehicles for private use, at issue in Cases C-47/21 and C-232/21, fall within the scope of Directive 2008/48 as credit agreements. [368]

Next, the Court explains the extent of the trader's obligation in respect of the information that is to be provided in credit agreements falling within the scope of that directive [369] and, inter alia, the extent of the trader's obligation to provide information regarding the right of withdrawal. [370] Thus, the Court rules that that obligation precludes national legislation establishing a statutory presumption that the trader has complied with its obligation to inform the consumer of his or her right of withdrawal where that trader refers, in a contract, to national provisions which themselves refer to a statutory information model regarding the right of withdrawal, while using terms set out in that model which do not comply with the requirements of Directive 2008/48. [371] If it is not possible to interpret such national legislation in a manner consistent with that directive, a national court hearing a dispute exclusively between private individuals is not required, solely on the basis of EU law, to disapply such legislation, without prejudice to the possibility for that court to disapply it on the basis of its domestic law and, failing that, without prejudice to the right of the party harmed as a result of national law not being in conformity with EU law to claim compensation for the resulting loss which he or she has suffered.

Lastly, the Court rules on the various aspects relating to the right of withdrawal, as provided for in Directive 2008/48. [372]

First, it explains the point at which the withdrawal period starts to run. In that regard, where information provided by the creditor to the consumer under that directive [373] proves to be incomplete or incorrect, the 14-day withdrawal period provided for in Directive 2008/48 starts to run only if the incompleteness or incorrectness of that information is not capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under that directive or his or her decision to conclude the contract and, where relevant, is not capable of depriving him or her of the possibility of exercising his or her rights, in essence, under the same conditions as would have prevailed if that information had been provided in a complete and correct manner. The provision of incomplete or incorrect information may be treated as a failure to provide information only if the consumer is thereby misled as to his or her rights and obligations, and if, therefore, he or she is led to conclude a contract which he or she might not have concluded if all the complete and materially correct information had been available to him or her.

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368 In accordance with Article 2(1) of Directive 2008/48.

369 As laid down in Article 10(2) of Directive 2008/48.

370 Article 10(2)(p) of Directive 2008/48 sets out the obligation to include, in credit agreements, information on the existence or absence of a right of withdrawal, the period during which that right may be exercised and other conditions governing the exercise of that right.

371 Article 10(2)(p) of Directive 2008/48.

372 Under Article 14(1) of Directive 2008/48, a consumer has a period of 14 calendar days in which to withdraw from the credit agreement without giving any reason.

373 Under Article 10(2) of Directive 2008/48.

Second, the Court analyses what effect the full performance of a credit agreement has on the continuance of the right of withdrawal. It thus finds that the full performance of such an agreement extinguishes that right. Since the performance of a contract constitutes the natural mechanism for extinguishing contractual obligations, a consumer can no longer rely on his or her right of withdrawal once the credit agreement has been performed in full by the parties and the mutual obligations arising from that agreement have therefore come to an end.

Third, as regards the issue of a consumer exercising his or her right of withdrawal, the Court rules that a creditor cannot validly plead that, on account of the consumer's conduct between the conclusion of the agreement and the exercise of the right of withdrawal, the consumer exercised that right abusively where, due to the incompleteness or incorrectness of the information in the credit agreement, in breach of Directive 2008/48, the withdrawal period has not begun to run because the incompleteness or incorrectness of that information affected the consumer's ability to assess the extent of his or her rights and obligations under Directive 2008/48 and his or her decision to conclude the agreement.

Fourth, ruling on whether the right of withdrawal can be time-barred, the Court states that Directive 2008/48 precludes a creditor from being able to plead, where the consumer exercises his or her right of withdrawal in accordance with the conditions laid down in that directive, [374] that that right is time-barred where at least one of the mandatory pieces of information referred to in that directive [375] was not included in the credit agreement or was set out in it in an incomplete or incorrect manner without being duly communicated subsequently and where, on that ground, the withdrawal period has not started to run. Directive 2008/48 does not lay down any temporal limitation on the consumer's exercise of his or her right of withdrawal in the situation that has just been stated. The national legislation cannot therefore impose such a limitation.

Fifth, the Court examines the effects of the right of withdrawal. It thus states that that right, read in conjunction with the principle of effectiveness, precludes national legislation which provides that, where the consumer withdraws from a linked credit agreement, [376] he or she must return to the creditor the goods financed by the credit or must have given the creditor formal notice to take back those goods without that creditor being required, at the same time, to repay the monthly instalments of the credit already paid by the consumer. Subject to the checks which it is for the referring court to carry out, national procedural rules requiring a borrower who withdraws from such an agreement to return to the creditor the goods financed by the credit or to have given the creditor formal notice to take back those goods without that creditor being under an obligation to repay, at the same time, the monthly instalments of the credit already paid, are capable, in practice, of making it impossible or excessively difficult for the right of withdrawal to be exercised.

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374 As set out in Article 14(1) of Directive 2008/48.

375 As set out in Article 10(2) of Directive 2008/48.

376 Within the meaning of Article 3(n) of Directive 2008/48.

XVI. Energy

Judgment of 30 March 2023, *Green Network (Order for repayment of costs)* (C-5/22, EU:C:2023:273)

(Reference for a preliminary ruling – Internal market in electricity – Directive 2009/72/EC – Article 37 – Annex I – Duties and powers of the national regulatory authority – Consumer protection – Administrative management costs – Power of the national regulatory authority to order the repayment of sums paid by final customers pursuant to contractual terms that have been penalised by that authority)

In 2019, the Autorità di Regolazione per Energia Reti e Ambiente (Regulatory Authority for Energy, Networks and the Environment, Italy) imposed on Green Network, an Italian electricity and natural gas distribution undertaking, an administrative fine of EUR 655 000 for having breached obligations relating to tariff transparency. That authority also ordered that undertaking to repay its final customers the sum of EUR 13 987 495.22, invoiced to them in respect of administrative management costs pursuant to a contractual term considered to be unlawful by that authority.

After unsuccessfully challenging that decision before an administrative court, Green Network brought an appeal before the Consiglio di Stato (Council of State, Italy), before which it claimed that the power of the national regulatory authority to require the repayment of sums invoiced to customers, provided for under Italian law, was contrary to Directive 2009/72. [377]

In that context, the Council of State referred two questions to the Court of Justice for a preliminary ruling concerning Article 37(1) and (4) of Directive 2009/72, relating to the powers of regulatory authorities, and Annex I thereto, which sets out the measures to be taken by Member States to protect consumers.

In its judgment, the Court states that Article 37(1)(i) and (n) [378] and Article 37(4)(d) [379] of Directive 2009/72 and Annex I thereto do not preclude a Member State from conferring on a national regulatory authority the power to order electricity undertakings to reimburse their final customers for the sums paid by those customers to cover 'administrative management costs' pursuant to a contractual term considered to be unlawful by that authority. The same is true in cases where that order for repayment is based not on considerations of the quality of the relevant service provided by those undertakings, but on the breach of obligations relating to tariff transparency.

Findings of the Court

The Court holds, first of all, that, in order to pursue the objectives of Directive 2009/72, that directive requires Member States to confer wide powers on their national regulatory authorities to regulate and monitor the market in electricity, in particular with a view to ensuring consumer protection.

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377 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55).

378 Those provisions concern, respectively, the duties of regulatory authorities with regard to ensuring compliance with transparency obligations and consumer protection.

379 That provision provides that regulatory authorities have the power to impose effective, proportionate and dissuasive penalties on electricity undertakings not complying with their obligations under Directive 2009/72 or any relevant legally binding decisions of the regulatory authority, or to propose that a competent court impose such penalties.

Next, it notes that Article 37 of Directive 2009/72, concerning the duties and powers of the regulatory authority, does not mention the power to require electricity undertakings to repay any sums received as consideration under a contractual term considered to be unlawful. However, the use, in Article 37(4) of Directive 2009/72, of the words 'the regulatory authority shall have at least the following powers' indicates that powers other than those expressly mentioned in Article 37(4) may be conferred on such an authority in order to enable it to carry out the tasks referred to in Article 37(1), (3) and (6) of that directive.

Furthermore, ensuring compliance with the transparency obligations incumbent on electricity undertakings and protecting consumers fall within the scope of the duties of national regulatory authorities referred to in Article 37(1), (3) and (6) of that directive.

The Court therefore considers that a Member State may grant such an authority the power to require those operators to repay sums received by them in breach of consumer protection requirements, in particular those concerning the obligation of transparency and the accuracy of invoicing.

Such an interpretation is not called into question by the fact that Article 36 of Directive 2009/72 provides, in essence, that the national regulatory authority is to take the necessary measures 'in close consultation with other relevant national authorities including competition authorities, as appropriate, and without prejudice to their competencies', or that Article 37(1)(n) of that directive contains the words 'together with other relevant authorities'.

It is not apparent from those provisions that, in a case such as that in the main proceedings, only one of those other national authorities may order the repayment of sums unduly received from final customers by electricity undertakings. On the contrary, the use of the words 'as appropriate' implies that such consultation is only necessary where the measure whose adoption is envisaged is likely to have implications for other relevant authorities.

Last, the Court states that, in so far as consumer protection and compliance with transparency obligations fall within the scope of the duties referred to in Article 37 of Directive 2009/72, the exact reason why, in order to accomplish one of those duties, an electricity undertaking is ordered to reimburse its customers is irrelevant.

XVII. International agreements [380]

1. External competence of the European Union

Judgment of 17 January 2023 (Grand Chamber), *Spain* v *Commission* (C-632/20 P, EU:C:2023:28)

(Appeal – External relations – Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part – Electronic communications – Regulation (EU) 2018/1971 – Body of European Regulators for Electronic Communications (BEREC) – Article 35(2) – Participation of the regulatory authority of Kosovo in that body – Concepts of 'third country' and 'third State' – Competence of the European Commission)

Between 2001 and 2015, the European Union signed stabilisation and association agreements (SAA) with six countries of the Western Balkans, including Kosovo. In that context, the European Commission recommended actions to, inter alia, align the legislation of those countries with EU legislation and incorporate the Western Balkans into existing regulatory bodies, such as the Body of European Regulators for Electronic Communications (BEREC) established by Regulation 2018/1971. [381] In order to establish a closer relationship between the national regulatory authorities (NRAs) of the European Union and of the Western Balkans, the Commission adopted six decisions, on 18 March 2019, concerning the participation in BEREC of the NRAs of the countries of the Western Balkans. The decisions in question include a decision by which the Commission allowed the NRA of Kosovo to participate in the Board of Regulators and working groups of BEREC and in the Management Board of the BEREC Office ('the decision at issue'). [382]

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380 Reference should also be made under this heading to the judgment of 12 October 2023, ***BA (Inheritance – Public housing policy in the European Union)*** (C-670/21, EU:C:2023:763), presented under heading III.3 'Free movement of capital'.

381 Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 (OJ 2018 L 321, p. 1).

382 Commission Decision of 18 March 2019 on the participation of the National Regulatory Authority of Kosovo in the Body of European Regulators for Electronic Communications (OJ 2019 C 115, p. 26).

The Kingdom of Spain brought an action for annulment of the decision at issue on the ground of the Commission's infringement of Article 35 of Regulation 2018/1971. [383] It claimed, in essence, that that decision misconstrued the concept of 'third country' used in that provision, which could not relate to Kosovo, as Kosovo is not a sovereign State. That action was dismissed in its entirety by the General Court in its judgment of 23 September 2020, *Spain* v *Commission* [384] ('the judgment under appeal').

On appeal by the Kingdom of Spain, the Grand Chamber of the Court of Justice sets aside the judgment of the General Court and annuls the decision at issue, on the ground that the General Court erred in law in finding [385] that the power to draw up working arrangements applying to the participation of NRAs of third countries in BEREC, within the meaning of the second subparagraph of Article 35(2) of Regulation 2018/1971, lies unilaterally with the Commission under Article 17 TEU.

Findings of the Court

As regards, in the first place, the concept of 'third country' used in Article 35 of Regulation 2018/1971, the Court of Justice considers first of all that it is not possible to determine the meaning of that concept on the basis of a literal interpretation of the Treaties. In addition, not all the language versions of the EU and FEU Treaties use the terms 'third State' and 'third country' together. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all the languages of the European Union and, where there is any divergence between those various versions, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part. The wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision. In the present case, the General Court, proceeding on the basis that the provisions of the FEU Treaty relating to 'third countries' allow international agreements to be concluded with entities 'other than States', considered that the scope of the concept of 'third country', within the meaning of Article 35(2), went beyond sovereign States alone. That premiss was, however, established without the General Court taking into account the differences between the language versions of the EU and FEU Treaties, the wording of which does not support the conclusion that there is a difference in meaning between the words 'third country' and 'third State'. Moreover, since the words 'third country' do not appear in all the language versions of Regulation 2018/1971, only the equivalent of the term 'third State' being used in some of them, the Court of Justice finds that the General Court's reasoning was vitiated by an error of law.

Since the operative part of the judgment under appeal may, however, be well founded on other legal grounds, the Court of Justice goes on to examine whether the General Court was entitled to conclude

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383 According to that provision, entitled 'Cooperation with Union bodies, third countries and international organisations': '1. In so far as necessary in order to achieve the objectives set out in this Regulation and carry out its tasks, and without prejudice to the competences of the Member States and the institutions of the Union, BEREC and the BEREC Office may cooperate with competent Union bodies, offices, agencies and advisory groups, with competent authorities of third countries and with international organisations. To that end, BEREC and the BEREC Office may, subject to prior approval by the Commission, establish working arrangements. Those arrangements shall not create legal obligations. 2. The Board of Regulators, the working groups and the Management Board shall be open to the participation of regulatory authorities of third countries with primary responsibility in the field of electronic communications, where those third countries have entered into agreements with the Union to that effect. Under the relevant provisions of those agreements, working arrangements shall be developed specifying, in particular, the nature, extent and manner in which the regulatory authorities of the third countries concerned will participate without the right to vote in the work of BEREC and of the BEREC Office, including provisions relating to participation in the initiatives carried out by BEREC, financial contributions and staff to the BEREC Office. As regards staff matters, those arrangements shall, in any event, comply with the Staff Regulations. …'

384 Judgment of 23 September 2020, ***Spain* v *Commission*** (T-370/19, EU:T:2020:440).

385 See paragraphs 77 and 82 of judgment of 23 September 2020, ***Spain* v *Commission*** (T-370/19, EU:T:2020:440).

that the Commission had not infringed Article 35 of Regulation 2018/1971 by treating Kosovo in the same way as a 'third country' within the meaning of that provision. In that regard, for the purposes of ensuring the effectiveness of Article 35(2) of Regulation 2018/1971, a territorial entity situated outside the European Union which the European Union has not recognised as an independent State must be capable of being treated in the same way as a 'third country' within the meaning of that provision, without infringing international law. In the case of Kosovo, the International Court of Justice concluded that the adoption, on 17 February 2008, of the Kosovo declaration of independence had not violated general international law, United Nations Security Council resolution 1244 (1999) or the applicable constitutional framework. [386] Furthermore, as the first footnote to the decision at issue indicates, the treatment of Kosovo as a third country referred to above does not affect the individual positions of the Member States as to whether Kosovo has the status of an independent State that is claimed by its authorities. Accordingly the Court of Justice holds that Kosovo may be treated in the same way as a 'third country', within the meaning of Article 35(2) of Regulation 2018/1971, without infringing international law.

As regards, moreover, the integration of 'third countries' into the participation scheme provided for in Article 35(2) of Regulation 2018/1971, the Court of Justice recalls that, according to that provision, the participation of the NRAs of such countries is subject to two cumulative conditions, consisting, first, in the existence of an 'agreement' entered into with the European Union and, second, in the fact that that agreement was entered into 'to that effect'. The European Union has entered into several agreements with Kosovo, thus recognising its capacity to conclude such agreements. They include the Kosovo SAA, [387] which provides, in Article 111, that the cooperation established in relation to electronic communications networks and services is primarily to focus on priority areas related to the EU *acquis* in that field, and that the parties are to strengthen that cooperation. The Kosovo SAA must therefore also be regarded as having been concluded for the purposes of permitting the participation of the NRA of Kosovo in the bodies of BEREC, in so far as Article 111 of that agreement relates to the adoption of the EU *acquis* and to strengthening cooperation between the parties in the area of electronic communications networks and services. Lastly, the Court of Justice notes that, in accordance with its objective of cooperation, Article 35(2) of Regulation 2018/1971 opens up certain BEREC bodies to the participation of NRAs of third countries with primary responsibility in the field of electronic communications. In the light of the above, the General Court did not err in law when it concluded that the Commission had not infringed, in the decision at issue, Article 35(2) of Regulation 2018/1971 by finding that Kosovo was to be treated as a 'third country' within the meaning of that provision.

As regards, in the second place, the General Court's interpretation of the consequences of the lack of an EU position on the status of Kosovo under international law, the Court of Justice considers that the decision at issue does not infringe the Kosovo SAA and Regulation 2018/1971 merely because it establishes cooperation with the NRA of Kosovo by implementing those acts, and that that decision does not entail recognition of Kosovo as a third State. Consequently, the Commission's adoption of the decision at issue cannot be interpreted as entailing the implicit recognition by the European Union of Kosovo's status as an independent State.

As regards, in the third place, the ground of appeal alleging that the General Court wrongly held that the cooperation referred to in Article 111 of the Kosovo SAA did not correspond to the participation envisaged in Article 35(2) of Regulation 2018/1971, the Court of Justice rules that ground to be unfounded, finding, in particular, that that provision of the Kosovo SAA does constitute an agreement

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386 Advisory opinion of the International Court of Justice of 22 July 2010, Accordance with international law of the unilateral declaration of independence in respect of Kosovo (ICJ Reports 2010, p. 403).

387 Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part (OJ 2016 L 71, p. 3; 'the Kosovo SAA').

'to that effect', within the meaning of Regulation 2018/1971. Article 35(1) of that regulation envisages various degrees and forms of closer and less close cooperation, by means, inter alia, of working arrangements with the NRAs of third countries. By contrast, the participation of the NRA of Kosovo in BEREC bodies cannot be equated with the incorporation of that NRA into that EU body. Moreover, the participation of the NRA of Kosovo in BEREC does not allow Kosovo to contribute to the development of EU sectoral legislation on electronic communications.

The Court of Justice nevertheless upholds, in the fourth place, the Kingdom of Spain's appeal in so far as it relates, in essence, to the Commission's lack of competence. The Court notes, first of all, that the decision at issue could not be taken on the basis of Article 17 TEU by virtue of the Commission's executive or external representation functions, the Commission being intended to exercise only a supervisory function in the context of the adoption of the working arrangements in question. In particular, it is apparent from Article 35(2) of Regulation 2018/1971 that the purpose of the working arrangements is not the external representation as such of the European Union, but specifying, in particular, the nature, extent and manner in which the NRAs of third countries which have entered into agreements with the European Union to that effect will participate in the work of EU bodies. Next, the fact that Article 35(2) of Regulation 2018/1971 does not, unlike paragraph 1 of that provision, mention that BEREC and the BEREC Office are to establish working arrangements 'subject to prior approval by the Commission' does not mean that the power to establish such arrangements with the NRAs of third countries lies with the Commission. That finding is not called into question by the fact that the participation in the work of BEREC and the BEREC Office referred to in that provision is a closer form of cooperation with the NRAs of third countries than that established under Article 35(1) of that regulation. Lastly, the fact that the Commission could unilaterally decide on certain working arrangements for participation in the work of BEREC and the BEREC Office, without their agreement, is not compatible with BEREC's independence and would go beyond the supervisory function assigned to the Commission by the regulation. Thus, by holding that the power to draw up working arrangements applying to the participation of NRAs of third countries, including the NRA of Kosovo, lay with the Commission, the General Court failed to have regard to the division of powers between, on the one hand, the Commission and, on the other hand, BEREC and the BEREC Office, as well as to the rules guaranteeing the independence of BEREC laid down by the regulation. Such arrangements should be agreed between BEREC and the BEREC Office, on one side, and the competent authorities of those third countries, on the other, and be authorised jointly, as is apparent from Regulation 2018/1971, [388] by the Board of Regulators and the Director of the BEREC Office. While making clear that that power does not lie with the Council, the Court of Justice concludes that the General Court erred in law in ruling [389] that the Commission had a unilateral power to draw up those arrangements.

While setting aside, in consequence, the judgment under appeal and annulling the decision at issue, the Court of Justice nevertheless rules, in view of the necessity of the arrangements at issue, that the effects of the annulled decision are to be maintained until that decision is replaced by a new act.

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388 Article 9(i) and Article 20(6)(m) of Regulation 2018/1971.

389 Judgment of 23 September 2020, ***Spain* v *Commission*** (T-370/19, EU:T:2020:440) paragraphs 77 and 82.

2. Interpretation of an international agreement

Judgment of 9 February 2023, *Staatssecretaris van Justitie en Veiligheid and Others (Withdrawal of the right of residence of a Turkish worker)* (C-402/21, EU:C:2023:77)

(Reference for a preliminary ruling – EEC-Turkey Association Agreement – Decision No 1/80 – Articles 6 and 7 – Turkish nationals already integrated into the labour market of the host Member State and enjoying an associated right of residence – Decisions of national authorities withdrawing the right of residence of Turkish nationals who have been lawfully resident in the Member State concerned for more than 20 years on the ground that they constitute a present, genuine and sufficiently serious threat to a fundamental interest of society – Article 13 – Standstill clause – Article 14 – Justification – Grounds of public policy)

In the Netherlands, a foreign national's unlimited residence permit may be withdrawn, inter alia, where he or she has been convicted of offences punishable by a term of imprisonment of three years or more and the total length of the sentences imposed reaches a certain threshold. Until 2012, however, such a withdrawal was prohibited when the foreign national had been legally resident in that country for at least 20 years. Following a legislative amendment adopted in July 2012, on the ground of the changed perception of public policy protection within Netherlands society, that prohibition was removed. [390]

Pursuant to that new legislation, S, E and C, three Turkish nationals who had been legally resident in the Netherlands for more than 20 years had their residence permits of unlimited duration withdrawn by decisions of the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands). The reasons for the withdrawal were that, during their residence, they had been the subject of several criminal convictions, the seriousness of the offences and the total duration of the fixed prison sentences reaching the required threshold, and that that conduct constituted a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

The actions brought by S, E and C respectively against those decisions before the rechtbank Den Haag (District Court, The Hague, Netherlands) led to different conclusions as regards the applicability, in the present case, of Article 13 of Decision No 1/80 of the Association Council, [391] which has been applicable since 1 December 1980. That article lays down a standstill clause prohibiting Member States from introducing new restrictions on the conditions of access to employment applicable to Turkish workers and members of their families legally resident and employed in their respective territories. However, according to Article 14 of Decision No 1/80, the application of the provisions of that decision relating to employment and the freedom of movement of workers may be subject to limitations justified, inter alia, on grounds of public policy.

Hearing an appeal in those actions, the Raad van State (Council of State, Netherlands) decided to ask the Court of Justice about the scope of, and relationship between, Articles 13 and 14 of Decision No 1/80.

In its judgment, the Court confirms that Article 13 of Decision No 1/80 applies to Turkish nationals who already hold employment and freedom of movement rights under that decision. It also specifies the

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390 Besluit houdende wijziging van het Vreemdelingenbesluit 2000 in verband met aanscherping van de glijdende schaal (Decree amending the Decree on foreign nationals as regards the tightening of the sliding scale) of 26 March 2012 (Stb. 2012, No 158).

391 Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey.

circumstances in which a new restriction of those rights, against which Turkish nationals may rely on Article 13, may be justified by public policy requirements within the meaning of Article 14 of Decision No 1/80.

Findings of the Court

In the first place, the Court examines the scope of the standstill clause laid down in Article 13 of Decision No 1/80. It recalls its case-law according to which that clause has direct effect and must, in the light of the objective of Decision No 1/80, which is to allow freedom of movement for workers, be interpreted broadly. Both a new restriction which tightens the conditions of access to the first professional activity of a Turkish worker or members of his or her family and that which, once that worker or members of his or her family benefit from rights in the field of employment under Article 6 or Article 7 of Decision No 1/80, [392] restricts his or her access to paid employment guaranteed by those rights, are contrary to the objective of that decision.

Furthermore, it follows from the Court's case-law that measures taken by a Member State which seek to define the criteria for the lawfulness of the situation of Turkish nationals, by adopting or amending, inter alia, the conditions relating to the residence of those nationals in its territory, are capable of constituting new restrictions within the meaning of Article 13 of Decision No 1/80.

Therefore, national legislation which permits the withdrawal of the right of residence of the persons concerned which they enjoy pursuant to Articles 6 and 7 of Decision No 1/80 restricts their right to freedom of movement in relation to the right to freedom of movement which they enjoyed at the time of the entry into force of that decision and, accordingly, constitutes a new restriction within the meaning of Article 13 of that decision. That provision may therefore be relied on by the Turkish nationals concerned.

In the second place, the Court examines the relationship between Article 13 and Article 14 of Decision No 1/80. It notes that the exception to the prohibition on adopting 'new restrictions' for public policy requirements, laid down in Article 14 is a derogation from the freedom of movement of workers and must therefore be interpreted strictly. In addition, any national measure covered by those requirements must be suitable for securing the attainment of the objective of protecting public policy pursued and must not go beyond what is necessary in order to attain it.

Furthermore, as regards Turkish nationals who, like S, E and C, have been resident for more than 10 years in the host Member State, the Court refers, for the purposes of the application of Article 14, to Article 12 of Directive 2003/109 [393] concerning the protection of long-term residents. Measures justified on grounds of public policy or public security concerning such residents presuppose that the national authorities assess on a case-by-case basis, in compliance with the principle of proportionality and the fundamental rights of the person concerned, whether the personal conduct of the person concerned constitutes a present, genuine and sufficiently serious threat to a fundamental interest of society.

In the light of the foregoing, the Court finds that the legislative measure at issue is covered by the Netherlands authorities' discretion laid down in Article 14 of Decision No 1/80. However, the reference to the changed social perceptions and the justification based on public policy are not sufficient in themselves to give legitimacy to that measure. It is also for the referring court to assess, taking into

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392 Articles 6 and 7 of Decision No 1/80 provide for the employment rights of Turkish workers and of members of their families who have been authorised to join them, respectively.

393 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).

account the rights conferred by Decision No 1/80, whether the national measure is suitable for securing the attainment of the objective pursued, whether it does not go beyond what is necessary in order to attain it, and whether it provides for a prior and individual assessment of the current situation of the Turkish worker concerned.

Chapter 2 – The General Court

I. Proceedings of the European Union

1. *Locus standi*

Order of 6 September 2023, *EDPS* v *Parliament and Council* (T-578/22, EU:T:2023:522)

(Action for annulment – Law governing the institutions – Processing of personal data by Europol – Regulation (EU) 2016/794 – The institutional prerogatives of the EDPS – Locus standi – Action in part inadmissible and in part manifestly inadmissible)

On 3 January 2022, following an own-initiative inquiry, the European Data Protection Supervisor (EDPS) adopted a decision against the European Union Agency for Law Enforcement Cooperation (Europol). [394] By that decision, the EDPS ordered Europol, in essence, for each contribution received as from 4 January 2022, to proceed to data subject categorisation within 6 months as from the date of reception of that contribution, and to proceed to data subject categorisation within 12 months for all datasets existing as at the date of that decision, after which periods Europol was required to erase those data.

On 8 June 2022, the European Parliament and the Council adopted the amended Europol regulation. [395] That regulation laid down, in essence, under two transitional provisions, [396] the conditions in which Europol is to proceed, within a specified period, to the categorisation of the datasets in its possession at the time of entry into force of the amended Europol regulation, and specifies the conditions and procedures according to which the processing of personal data not relating to categories of data subjects listed in Annex II to the amended Europol regulation, and which were transferred to Europol before 28 June 2022, is to be authorised in support of an ongoing criminal investigation.

The EDPS took the view that the contested provisions infringed his independence and his powers as a supervisory authority, since, in his view, they retroactively legalised Europol's contested data retention practices and de facto annulled the decision of 3 January 2022. Thus, pursuant to Article 263 TFEU, he sought, before the General Court, the annulment of those provisions. The EDPS submitted that his standing to bring an action was justified by the need to be able to have a judicial remedy in order to defend his institutional prerogatives and, in particular, his independence as a supervisory authority.

In the present case, the General Court has before it, for the first time, an action for annulment brought by the EDPS against a legislative act of the Council and the Parliament, which raises, inter alia, the issue

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394 Pursuant to Article 43(3)(e) of 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 initial Europol regulation').

395 By means of Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation (OJ 2022 L 169, p. 1), thereby amending the initial Europol regulation ('the amended Europol Regulation').

396 Articles 74a and 74b of the amended Europol Regulation ('the contested provisions').

of the jurisdiction of the General Court to hear and determine that action, the issue of the application of the judgment in *Parliament* v *Council* (C-70/88) [397] by analogy to the present case, and the issue of the direct concern of the EDPS, who is treated in the same way as a legal person, under the fourth paragraph of Article 263 TFEU.

Findings of the Court

In the first place, the Court examines whether it has jurisdiction to hear the action brought by the EDPS and observes, first of all, that the EDPS is not among the applicants referred to in the second and third paragraphs of Article 263 TFEU, [398] or in the list of institutions in Article 13(1) TEU. [399] Next, the Court notes that although the first paragraph of Article 263 TFEU expressly refers to EU bodies, offices and agencies in the list of authors of acts whose legality may be called into question in the context of an action for annulment, the same is not true as regards the second and third paragraphs of Article 263 TFEU. Thus, the General Court states that although the status of the EDPS, as an independent supervisory authority, is enshrined both in the FEU Treaty and in the Charter, [400] the EDPS was established as an EU body not by an act of primary law, but by an act of secondary legislation. [401] Consequently, the EDPS, although an EU body with a particular status, is not an EU institution and, in any event, cannot be regarded as one of the applicants referred to in the second and third paragraphs of Article 263 TFEU. Lastly, the General Court concludes that it has jurisdiction to rule on the action, since actions referred to in Article 263 TFEU, brought in particular by an EU institution against a legislative act, [402] must be reserved to the Court of Justice, and the EDPS is neither an institution nor an applicant referred to in the second and third paragraphs of Article 263 TFEU.

In the second place, the General Court assesses whether the EDPS has standing under the case-law resulting from the judgment in *Parliament* v *Council* (C-70/88). It notes that, in that judgment, relied on by the EDPS in support of his specific standing to bring proceedings to defend his institutional prerogatives, the Court of Justice held that the Parliament did not have any opportunity to challenge, before the Courts of the European Union, the acts adopted by the other institutions liable to infringe its own prerogatives and the Court of Justice chose to fill that gap by having recourse to the general principle of institutional balance. By contrast, the EDPS may bring an action for annulment on the basis of the fourth paragraph of Article 263 TFEU, since the EDPS is a body created by an act of secondary EU legislation that may be treated in the same way as a legal person. Furthermore, the General Court states that although the EDPS has a particular status, recognised both by the FEU Treaty and the Charter, and that the creation of independent supervisory authorities is an essential element of the protection of

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397 Judgment of 22 May 1990, ***Parliament* v *Council***, C-70/88, EU:C:1990:217.

398 Under that provision, an action may be brought before the Court, on the one hand, by a Member State, the Parliament, the Council or the Commission, and, on the other, by the Court of Auditors, the European Central Bank (ECB) and the Committee of the Regions.

399 The seven institutions referred to in that provision are the Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors.

400 Under Article 16(2) TFEU and Article 8(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), compliance with the rules relating to the protection of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies is to be subject to the control of independent authorities.

401 Article 41(1) of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ 2001 L 8, p. 1).

402 Pursuant to Article 51(b) of the Statute of the Court of Justice of the European Union.

individuals with regard to the protection of personal data, the independence in which the EDPS must carry out his duties in practice is not intended to limit the powers of the EU legislature. [403] Consequently, the EDPS is required to exercise his duties and powers in complete independence, and it is within the framework of the legislative acts adopted jointly by the Parliament and the Council and in accordance with them that he supervises compliance with the rules relating to the protection of individuals with regard to the processing of personal data by the EU institutions, bodies, offices and agencies. The General Court concludes that the judgment in *Parliament* v *Council* (C-70/88) cannot be applied by analogy to the EDPS's situation, who cannot be recognised as having standing to bring proceedings in accordance with that judgment and who has to be regarded as an applicant who must fulfil the conditions for admissibility laid down in the fourth paragraph of Article 263 TFEU.

In the third place, in the context of the examination of the EDPS's standing to bring proceedings, under the fourth paragraph of Article 263 TFEU, the Court analyses, as a preliminary point, whether the EDPS may, as an EU body, be treated in the same way as a legal person within the meaning of that article. The Court notes that, by applying an interpretation of that provision in the light of the principles of effective judicial review and the rule of law, an EU body, such as the EDPS, has, as a 'legal person', standing to bring an action for annulment of the contested provisions, provided that the EDPS is directly and individually concerned by them within the meaning of that provision. Such a legal person is indeed equally as likely as any another person or entity to have its rights or interests adversely affected by an EU act and must, therefore, be able, in compliance with those conditions, to seek the annulment of such an act.

As regards the condition that a legal person must be directly concerned, the Court points out that two cumulative criteria must be met in that respect. As regards, first, the criterion relating to the effects of the contested provisions on the legal situation of the EDPS, the Court points out that the EDPS is responsible for monitoring the application by the EU institutions, bodies, offices or agencies of the relevant rules relating to the protection of personal data. [404] In the present case, the contested provisions amend the initial Europol regulation and have no bearing on the nature or scope of the tasks entrusted to the EDPS by EU legislation. Thus, while it is true that the legal regime which the EDPS is responsible for monitoring has been changed, his own powers have not been, since the way in which he can lawfully exercise those powers has not been altered as such. The EDPS is not, therefore, directly concerned by the contested provisions, inasmuch as his rights, obligations or powers have not been affected by those provisions. Furthermore, as regards the effects of the contested provisions on the decision of 3 January 2022, the Court makes clear that that decision is an administrative decision which cannot affect legislative acts, such as the amended Europol regulation, or affect the content thereof.

Secondly, as regards the criterion relating to the discretion of the addressees responsible for implementing the contested provisions, the Court notes that those provisions leave Europol a certain discretion. They are not, therefore, purely automatic in nature resulting from the EU rules alone vis-à-vis the EDPS, without the application of other intermediate rules.

Consequently, given that the contested provisions do not directly affect the legal situation of the EDPS and that the conditions that the act whose annulment is sought should be of direct concern and individual concern are cumulative, the Court concludes that the action is inadmissible.

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403 As provided for in Article 14(1) and 16(1) TEU.

404 Pursuant to Article 1(3) 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), and Article 43(1) of the initial Europol regulation.

Order of 20 September 2023, *Nicoventures Trading and Others* v *Commission*
(T-706/22, EU:T:2023:39)

(Action for annulment – Public health – Withdrawal of certain exemptions for heated tobacco products – Direct concern – Lack of individual concern – Inadmissibility)

Nicoventures Trading, one of the applicants, which was established in 2011 within the British American Tobacco group, develops and markets innovative non-combustible products, such as heated tobacco products. It sells them to other companies in the group, including the other applicants, which distribute or intend to distribute them on the markets of 14 Member States.

On 29 June 2022, the European Commission adopted Delegated Directive 2022/2100 [405] ('the contested measure') amending Directive 2014/40 [406] as regards the withdrawal of certain exemptions in respect of heated tobacco products. That measure has the effect of prohibiting the marketing of heated tobacco products with a characterising flavour and of subjecting heated tobacco products for smoking which contain no characterising flavour to the same labelling obligations as certain other tobacco products for smoking, namely cigarettes, roll-your-own tobacco and waterpipe tobacco. The Member States are required to adopt the transposing measures necessary to implement that new prohibition and those new obligations before 23 October 2023.

Arguing that the contested measure has a negative impact on their legal situation, the applicants brought an action for annulment of that measure before the General Court.

By its order, the Court dismisses the action as inadmissible on the ground that the applicants are not individually concerned by the contested measure.

Findings of the Court

As a preliminary point, the Court recalls that, under 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, and against a regulatory act which is of direct concern to them and which does not entail implementing measures.

Since the contested measure, which is a regulatory act, entails implementing measures and is therefore not covered by the last situation provided for in the fourth paragraph of Article 263 TFEU, the Court examines whether the applicants are directly and individually concerned by that measure for the purpose of the second situation provided for in that provision.

As regards direct concern, the Court, after recalling the two cumulative criteria that have to be met in that regard, notes that the applicants are subject to a prohibition and to obligations arising directly from the contested measure, irrespective of whether that measure entails implementing measures, namely transposing measures. The transposing measures provided for in that measure are necessary

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405 Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions in respect of heated tobacco products (OJ 2022 L 283, p. 4).

406 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

only for the implementation in full of the prohibition and obligations in question in the laws of the Member States, without the Member States having any discretion of their own, since the contested measure does not leave any discretion to the Member States in those respects. The applicants must therefore be regarded as being directly concerned by the contested measure.

As regards individual concern, the Court recalls that a measure of general application may be of individual concern to certain natural or legal persons and is thus in the nature of a decision in their regard where that measure affects specific natural or legal persons by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as an addressee.

In the first place, the Court finds that the marketing authorisations, declarations and notifications required by Directive 2014/40 before the placing on the market of tobacco products and relied on by the applicants do not make it possible to prove that the applicants are individually concerned by the contested measure.

In that regard, the Court takes the view, first, that the fact that the operators which have made a declaration or notification or hold an authorisation were identifiable at the time of the adoption of the contested measure is not, by itself, sufficient to conclude that those operators are individually concerned.

Secondly, the number of natural or legal persons affected by the contested measure is also not decisive.

Thirdly, even though the absolute prohibition on marketing heated tobacco products with characterising flavours laid down in the contested measure will necessarily have the effect of calling into question the authorisations held by some of the applicants, those authorisations cannot be regarded as differentiating the position of the holders of those authorisations and distinguishing that position individually with regard to the contested measure as if those holders had been its addressees. First of all, the effects of the contested measure are produced in the same way both in respect of operators which have been granted an authorisation and in respect of operators which have made the declarations or notifications provided for in Directive 2014/40, or even in respect of operators which have not yet been granted an authorisation or made a declaration or notification, but which intend to place such products on the market. Next, the authorisations and the declarations or notifications meet objective requirements, determined in a general and abstract manner for all operators, without any element of exclusivity for the operators in question. Lastly, since Directive 2014/40 provides that various delegated acts may specify or amend the conditions for marketing tobacco products falling within its scope, the marketing authorisations and rights cannot be regarded as having been acquired indefinitely.

Fourthly, the fact that the applicants are not in the same situation as operators which are upstream and downstream in the production and distribution chain of the products in question is irrelevant. The applicants must prove that they are affected by reason of an attribute or a factual situation which is peculiar to them and which distinguishes them in the same way as the addressee of a decision.

In the second place, the Court rejects the applicants' argument alleging a substantial effect on their competitive position. The fact that certain operators are more affected economically by a measure of general application than others is not sufficient to distinguish them individually from all other operators, since the application of that measure takes effect by virtue of an objectively determined situation. The mere fact that natural or legal persons may lose a major source of income as a result of new legislation does not prove that they are in a specific situation. It is also not sufficient to establish that that legislation applies to them individually, those persons having to adduce proof of circumstances which make it possible to consider that the harm allegedly suffered is such as to distinguish them individually from all other economic operators concerned by that legislation in the same way as they are.

2. Actions to establish non-contractual liability

Judgment of 28 June 2023, *IMG* v *Commission* (T-752/20, EU:T:2023:366)

(Non-contractual liability – OLAF investigations – Press leaks – Material and non-material damage – Causal link – Imputability of the leaks – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Confidentiality of legal advice)

According to its Statute, International Management Group (IMG) was established as an international organisation with the aim of providing the States participating in the reconstruction of Bosnia and Herzegovina with a dedicated entity for that purpose. As part of its activities, which have expanded in the meantime, it has concluded a number of agreements with the European Commission, in application, inter alia, of the 'indirect or joint management' method of implementing the EU budget.

At the end of its investigation into the applicant's legal status, on 9 December 2014 the European Anti-Fraud Office (OLAF) drew up a final report, in which it found that the applicant is not an 'international organisation' within the meaning of the EU financial regulations and that it might not even have its own legal personality.

Shortly after it was drawn up, the OLAF report was sent to the legal addressees, namely the competent national authorities and the Commission. Subsequently, its content was leaked to the press. On 13 February 2015, the information regarding the content of that report was published in the magazine Der Spiegel and, on 11 December 2015, the report was published on the website of the newspaper New Europe. The Commission's investigations failed to identify the source of that leak.

The applicant has brought an action for compensation of the material and non-material damage which it claims to have suffered following the leak of the OLAF report to the press as a result of the unlawfulness of the conduct of the Commission and of OLAF.

In dismissing that action, the General Court provides clarification of (i) the conditions to be fulfilled in order to establish a sufficiently serious breach, resulting from an omission by an EU institution, of a rule of law intended to confer rights on individuals and (ii) the scope of the duty of diligence in that context, in particular in the light of the action to be taken, in response to the disclosure of a document to the press, by the EU institution responsible for ensuring the confidentiality of that document.

Findings of the Court

In its judgment, the Court finds that the plea of illegality raised by the applicant, based on breach of the Commission's duty to have regard for the welfare of officials and to act diligently and consisting of a failure to act on the part of the Commission, inasmuch as it did not publicly condemn the leak of the OLAF report, did not put an end to the dissemination of false information caused by that leak and did not correct that information, must be rejected.

As regards the duty to have regard for the welfare of officials, the Court finds that it relates specifically to the obligations of the EU institutions towards their officials and other servants, which involves, inter alia, taking account of their individual interests. The present case, however, does not relate to the relationship between the EU administration and one of its officials or other servants. Consequently, the duty to have regard for the welfare of officials does not apply.

As regards the breach of the duty to act diligently, the Court begins by recalling that, first, the non-contractual liability of the Union cannot be triggered unless the person who claims to have suffered loss or harm establishes the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. In particular, the requirement that the breach be sufficiently serious depends on

the discretion enjoyed by the EU institution, body, office or agency which has allegedly acted in breach of that rule and on whether it has manifestly and gravely disregarded the limits placed on that discretion, in view of, inter alia, the degree of clarity and precision of the rule, the difficulties of interpretation or application which may ensue therefrom, and the complexity of the situation to be resolved. Secondly, omissions by EU institutions are capable of triggering liability on the part of the Union only when those institutions have failed to fulfil a legal obligation to act resulting from a provision of EU law.

Thus, the Court concludes that the examination of the question whether an institution has committed a sufficiently serious breach of a rule of law intended to confer rights on individuals on account of an omission involves determining whether three conditions are satisfied, namely (i) the existence of a legal obligation to act, (ii) the existence of discretion on the part of the EU institution, body, office or agency in question, and (iii) a manifest and serious breach by that institution of the limits placed on that discretion.

The Court notes that, in the present case, the applicant has not established that the Commission was under a legal obligation to act. In that context, it notes that the breach of the duty to act diligently relied on by the applicant is intrinsically linked to Regulation No 883/2013 [407] and that, under that regulation, the Commission is required to ensure that the confidentiality of OLAF investigations is respected. Nevertheless, despite that obligation, the duty to act diligently to which the Commission is subject cannot impose on it, since it has not failed to fulfil that obligation of confidentiality and since responsibility for the leak of the OLAF report to the press cannot be attributed to it, an obligation to act consisting in condemning the leaking to the press of information relating to such an investigation and distancing itself from the information published. The duty to act diligently does not have the scope which the applicant ascribes to it. It is the leak of that report to the press, and not the omission of which the Commission is accused by the applicant, which constitutes a failure to fulfil the obligation of confidentiality. However, the imputability of that leak to the Commission has not been demonstrated.

The Court adds that, even assuming that the Commission was under a legal obligation to act by virtue of its duty to act diligently, it cannot be held that the breach of that duty, alleged by the applicant, constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals.

In that regard, it states that, in the event that such an obligation exists, the duty to act diligently should be interpreted as meaning that, in the event of the leak of a confidential document in respect of which it has not been demonstrated that the institution concerned is the source, it would be for that institution not to aggravate the damage which might result from that breach of confidentiality.

However, no such obligation to act in order not to aggravate the damage caused by a breach of confidentiality which is not imputable to that institution arises from Regulation No 883/2013. By providing that the institutions concerned are to ensure that the confidentiality of OLAF investigations is respected, that regulation imposes an obligation on those institutions to ensure that the content of OLAF investigations remains confidential. Nevertheless, it does not impose on them, where that confidentiality has not been respected and the disclosure does not originate from within the institution concerned, obligations to condemn the leak, to put an end to the dissemination of the information at issue, or to correct the parts of that information which are incorrect. Such obligations cannot be regarded as forming part of the obligation to ensure that the confidentiality of OLAF investigations is respected. First, since that confidentiality has been breached, the Commission's obligation to ensure respect therefor has become devoid of purpose. Secondly, (i) the possible need to condemn the leak

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407 Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

exceeds the mere obligation to ensure that confidentiality is respected, (ii) in such a case, it is impossible for the Commission to put an end to the dissemination of the OLAF report resulting from such a leak to the press, and (iii) assuming that some of the information disseminated is incorrect, the correction of that information is not such as to restore its confidential nature, which has permanently disappeared.

3. Jurisdiction of the EU Courts [408]

Judgment of 26 July 2023, *Stockdale* v *Council and Others* (T-776/20, EU:T:2023:422)

(Action for annulment and compensation – International contracted staff with the European Union Special Representative in Bosnia and Herzegovina – Common foreign and security policy – Termination of the employment contract following the withdrawal of the United Kingdom from the European Union – Jurisdiction of the EU Courts – Contractual nature of the dispute – Absence of arbitration clause and jurisdiction clause – Articles 263, 268, 272 and 274 TFEU – Regulation (EU) No 1215/2012 – Admissibility – Identification of the defendants – Concept of 'body, office or agency of the Union' – Partial lack of competence and inadmissibility)

The applicant, a national of the United Kingdom of Great Britain and Northern Ireland, held the position of Head of Finance and Administration with the European Union Special Representative ('the EUSR') in Bosnia and Herzegovina between 2006 and 31 December 2020 and, as such, had concluded 17 fixed-term employment contracts with the EUSR. Following the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom, [409] which entered into force on 1 February 2020 and provided for a transition period ending on 31 December 2020, the EUSR in Bosnia and Herzegovina took the decision to terminate the applicant's last employment contract as of that date.

In an action for annulment and for damages brought against the Council of the European Union, the European Commission, the European External Action Service (EEAS) and the EUSR in Bosnia and Herzegovina, the applicant sought, primarily, the annulment of the termination decision, together with compensation for the damage he allegedly suffered as a result of that decision. The applicant also claimed that his contractual relationship should be reclassified as a permanent contract and sought compensation for the damage he allegedly suffered as a result of the failure to adopt a clear status applicable to him. In the alternative, the applicant claimed that the non-contractual liability of the European Union should be incurred in the event that his principal claims were dismissed.

Examining the pleas of lack of jurisdiction and inadmissibility raised by the defendants, the General Court rules on those applications – which it upholds in part – before going to the substance of the case. In that respect, the Court rules on a number of issues which have not previously been addressed. First, it establishes that, where a contractual dispute involving the European Union is brought before the Court, when the contract at issue does not contain an arbitration clause in its favour, it retains jurisdiction to review the legality of acts adopted by EU entities [410] and to rule on the liability of the

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408 Reference should also be made under this heading to the order of 6 September 2023, ***EDPS* v *Parliament and Council*** (T-578/22, EU:T:2023:522), presented under heading I.1, '*Locus standi*'.

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

410 Pursuant to Article 263 TFEU.

European Union, [411] if no competent national court can be identified on the basis of the contract or the Brussels Ia Regulation. [412] It then identifies the EUSR in Bosnia and Herzegovina as the EU body that adopted the termination decision. Lastly, with regard to the compensation claim in respect of damage allegedly caused by the absence of a general legal regime applicable to common foreign and security policy (CFSP) staff, the Court considers that it is for the Council to adopt such a regime, where appropriate.

Findings of the Court

In the first place, the Court examines its jurisdiction to rule on the heads of claim relating to the termination decision and the succession of fixed-term contracts, respectively.

As a preliminary point, it notes that the applicant's claims made under those heads of claim are contractual in nature. First, the termination decision has a direct link with the contract at issue. Second, the claims that the employment relationship should be reclassified as a permanent contract stem from the successive fixed-term contracts concluded between the applicant and the EUSR in Bosnia and Herzegovina. Since the fixed-term contracts do not contain an arbitration clause, the Court declares that it has no jurisdiction to rule under Article 272 TFEU, such that, in accordance with Article 274 TFEU, those heads of claim fall, in principle, within the jurisdiction of the national courts.

Nevertheless, the Court recalls that, when, in the context of a contractual dispute, the EU judicature declines the jurisdiction conferred on it by Articles 263 and 268 TFEU, it is to ensure that those provisions are interpreted consistently with Articles 272 and 274 TFEU and, accordingly, to preserve the coherence of the judicial system of the European Union, which is a complete system of legal remedies and procedures designed to ensure, respectively, review of the legality of acts of the institutions, bodies, offices and agencies of the European Union, and the compensation of the damage caused by the European Union. Therefore, in the context of a contractual dispute, the EU judicature may not decline the jurisdiction conferred on it by the FEU Treaty when this has the effect of excluding from any judicial review, either by the EU Courts or the national courts, the acts of the European Union or a claim for compensation for damage caused by the European Union.

In those circumstances, despite the contractual nature of the heads of claim put forward in the present case, the Court assesses whether the applicant may bring such claims before a court of a Member State in order to ensure that an effective judicial review exists. That is the reason why, from the outset, it rejects the defendants' argument that those heads of claim could fall within the jurisdiction of the Bosnian courts. Similarly, it rejects the argument that the applicant had the option of referring the matter to the arbitration body provided for in the contract at issue, since such a body cannot be considered to have jurisdiction to the exclusion of the courts of the European Union or the courts of the Member States.

In addition, since the content of the contract at issue does not make it possible to identify a court of a Member State with jurisdiction to rule on the heads of claim in question, the Court points out that the EU legislature adopted the Brussels Ia Regulation, which applies in the present case. Indeed, the termination decision does not constitute an act of a public authority, [413] but has its basis in the contract

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411 Pursuant to Article 268 TFEU.

412 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1; 'the Brussels Ia Regulation').

413 Pursuant to Article 1(1) of the Brussels Ia Regulation.

at issue. Accordingly, the heads of claim in question relate to civil and commercial matters and – since they concern a dispute of a contractual nature which is intended to fall within the general jurisdiction of the national courts – the Court examines whether the provisions of the Brussels Ia Regulation make it possible to identify a court of a Member State with jurisdiction to rule on those heads of claim.

The Court notes that the applicant's employer was the EUSR in Bosnia and Herzegovina, and that since no court of a Member State has jurisdiction to rule on the heads of claim in question, relating to the contract, the general provision of the Brussels Ia Regulation, according to which, 'if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall … be determined by the law of that Member State' [414] should in principle apply.

However, the Court points out that the application of that provision would imply that the jurisdiction of a national court is random, to the extent that it is the law of each Member State that determines whether the courts of that Member State may hear the dispute, with the possible consequence that, ultimately, no court of a Member State has jurisdiction. It considers that such an outcome is particularly likely in the present case since – like the EUSR in Bosnia and Herzegovina – the applicant is domiciled in a third country, and it is not obvious that the present dispute has a connection with a Member State.

Since the Court may not, in the context of a contractual dispute involving the European Union, decline the jurisdiction conferred on it by Articles 263 and 268 TFEU, when this leads to the exclusion from any judicial review of acts of the European Union or of a claim for compensation of the damage caused by the European Union, it examines whether the claims made in the heads of claim in question come within the scope of the jurisdiction it derives from those provisions.

First, under the first head of claim, the Court has jurisdiction to rule (i) on the basis of Article 263 TFEU, on the application for a review of the legality of the termination decision, which is a decision adopted by an EU entity established under the Treaties, namely the EUSR in Bosnia and Herzegovina, and (ii) on the basis of Article 268 TFEU, on the claim for financial compensation for the psychological and material damage allegedly suffered as a result of that decision.

Conversely, regarding the applicant's claim that the Court should order his reinstatement as a member of staff of the EUSR in Bosnia and Herzegovina, the Court declines jurisdiction, since the EU judicature cannot, in principle – even in the context of an action for damages – issue directions to an institution, body, office or agency of the European Union without encroaching on the prerogatives of the administrative authority. Although the provisions of the FEU Treaty relating to the non-contractual liability of the European Union allow, under certain conditions, the granting of a compensation in kind which may take the form of an injunction to do or not to do something, causing the defendant institution to act in a certain way, such a scenario can be envisaged only in certain cases, where the applicant is alleging damage that cannot be entirely remedied by damages, and whose specific characteristics require an injunction to do or not to do something, particularly if that injunction is intended to address the root cause of damage where the effects are ongoing, which is not the case here.

Second, the Court dismisses the second head of claim in its entirety, on the ground that it lacks jurisdiction. The Court lacks jurisdiction to rule on the application to issue directions to the EUSR in Bosnia and Herzegovina, as the applicant's employer, seeking the reclassification of his employment contract as a permanent contract. In addition, since the claim that the Court should find that the defendants were in breach of their contractual obligations was not put forward in support of a claim for annulment or for damages, it must be regarded as seeking only that the Court take a position by

414 Article 6(1) of the Brussels Ia Regulation.

means of a general declaration or statement of principle, which does not fall within the jurisdiction conferred on it by the Treaties.

In the second place, on the pleas of inadmissibility relating to the identification of the defendant(s), the Court recalls, as regards the first head of claim, to the extent that it has jurisdiction to examine that claim in so far as it seeks the annulment of the termination decision and financial compensation for the psychological and material damage allegedly caused by that decision, first that actions for annulment must be brought against the institution, body, office or agency of the European Union that adopted the act in question and, second, that in matters of non-contractual liability of the European Union, it has jurisdiction to hear disputes relating to compensation for damage caused by the latter, represented before the Court by the institution, body, office or agency against which the matter giving rise to liability is alleged.

In the present case, since the first head of claim relates to the termination decision, which is imputable to the EUSR in Bosnia and Herzegovina, the Court examines whether the EUSR can be classified as a body, office or agency of the European Union capable of being a defendant in the actions for annulment and for non-contractual liability at issue in the present case.

In that regard, it recalls that an entity or structure coming under or working within the European Union's organisational framework may be regarded as an office or agency of the European Union if, in the light of the provisions governing its status, it has sufficient legal capacity in order to be regarded as an independent body of the European Union and to be recognised as having legal capacity to be a defendant. In particular, it must be classified as an office or agency of the European Union when, on the one hand, it has a mandate intrinsically linked to the functioning of the European Union and, on the other hand, it is legally distinct from the existing institutions, bodies, offices and agencies of the European Union.

The EUSR in Bosnia and Herzegovina has such a mandate, since, first of all, he or she is appointed by the Council to exercise a 'mandate in relation to particular policy issues'. [415] In addition, although the EUSR is responsible for executing his or her mandate and acts on the authority of the High Representative of the European Union for Foreign Affairs and Security Policy, that authority does not extend to administrative management in connection with that mandate, particularly as regards the EUSR's staff. Furthermore, the EUSR is legally distinct from the other institutions, bodies, offices or agencies of the European Union in so far as he or she has the legal capacity to award contracts and to purchase goods, to conclude a contract with the Commission for the management of his or her expenditure and to employ staff seconded by EU institutions or by the EEAS. Lastly, as regards the management of his or her contract staff, the EUSR has the legal capacity to act independently and, as such, is responsible for constituting a team. He or she may also conclude contracts to recruit international staff, whom he or she may choose without requiring the approval of the other institutions, bodies, offices or agencies of the European Union, since such staff come under his or her direct authority.

The Court concludes that, for the purposes of the present case, concerning matters relating to the management of staff of the EUSR in Bosnia and Herzegovina, the EUSR must be regarded as having the same status as the bodies, offices and agencies of the European Union, capable of being the defendants in an action for annulment or for non-contractual liability, and that the first head of claim is admissible in respect of the EUSR.

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415 According to Article 33 TEU.

Second, with regard to the head of claim seeking compensation for the damage allegedly suffered by the applicant as a result of the failure to adopt a clear status applicable to him, the Court considers that any failure to adopt a general regime applicable to CFSP contract staff in general or to the contract staff of the EUSR in Bosnia and Herzegovina in particular must be imputed to the Council, such that this head of claim is admissible in respect of the latter.

Indeed, the Council is responsible for framing the CFSP and for taking the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council. The adoption, where appropriate, of a legal regime applicable to contract staff recruited under the CFSP falls within the implementation of that policy and is therefore a matter for the Council. Moreover, the Court observes that in 2012, the Commission had suggested that the Council apply the Conditions of Employment of Other Servants of the European Union to contract staff of CFSP missions and of the EUSRs. The Court notes that the adoption of a legal regime applicable to contract staff recruited under the CFSP, which is applicable to the international contracted staff of the EUSR in Bosnia and Herzegovina, falls within the competence of the Council and is at its discretion and that if that recommendation was not followed up, it is because the Member State delegations were unable to reach an agreement within the Council.

II. Institutional law [416]

Judgment of 7 June 2023, *TC* v *Parliament* (T-309/21, EU:T:2023:315)

(Law governing the institutions – Rules governing expenses and allowances for Members of Parliament – Parliamentary assistance allowance – Recovery of sums unduly paid – Reasonable time – Burden of proof – Right to be heard – Protection of personal data – Article 9 of Regulation (EU) 2018/1725 – Article 26 of the Staff Regulations)

By a judgment of 7 March 2019, *L* v *Parliament*, [417] the General Court had annulled the decision of the European Parliament terminating L's contract as the accredited parliamentary assistant ('the APA') – accredited for the purposes of assisting TC, the applicant, a Member of the European Parliament – due to the breakdown in the relationship of trust on the ground that the APA had failed to comply with the rules relating to authorisations to engage in external activities. The Court had found that it was apparent from the material in the file that not only was the applicant aware of the APA's external activities, but that, moreover, they were on his direct initiative.

Following that judgment, the Secretariat-General of the Parliament informed the applicant of the commencement of a procedure for the recovery of sums unduly paid, [418] in respect of the parliamentary assistance provided to the applicant by the APA. At the same time the applicant was invited to submit, within two months, observations and evidence to rebut the Parliament's preliminary findings on the external activities which the APA had carried out and to prove that the APA had actually performed the duties of an accredited parliamentary assistant. In response, the applicant sent observations and additional evidence to the Parliament, while requesting a number of documents and information relating to the APA's personal file at the Parliament, the copies of the correspondence exchanged by the APA with the Parliament's representatives concerning his work and the complete file in the case which gave rise to the judgment of 7 March 2019. The Parliament partially granted the applicant's request for the documents and the information.

By decision of 16 March 2021 ('the contested decision'), the Secretary-General of the Parliament considered that a sum of money had been unduly borne by that institution in connection with the use of the APA and that it should be recovered from the applicant. [419] Consequently, the Director-General for Finance of the Parliament issued, on 31 March 2021, a debit note ordering the recovery of that sum.

Hearing an action for annulment of the contested decision, which it upholds, the General Court rules in the present case on a debtor's right to plead infringement of the reasonable time principle when the institution sends it a debit note within the five-year period laid down by the Financial Regulation, reaffirms the importance of observing the principle of the right to be heard in proceedings for recovery of parliamentary assistance expenses commenced by the Parliament against its Members and, lastly,

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416 Reference should also be made under this heading to the judgment of 26 July 2023, ***Stockdale* v *Council and Others*** (T-776/20, EU:T:2023:422), presented under heading I.3, 'Jurisdiction of the EU Courts'.

417 Judgment of 7 March 2019 ***L* v *Parliament*** (T-59/17, EU:T:2019:140).

418 Pursuant to Article 68 of the Decision of the Bureau 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; 'the IMS').

419 Pursuant to Article 68(1) of the IMS.

decides on the novel question of the right to rely, as a guarantee of the right to be heard, on grounds of public interest in order to obtain the transmission of personal data.

Findings of the Court

In the first place, the Court rejects the plea alleging infringement of the reasonable time principle on the ground that the Parliament based the contested decision on data from the case *L* v *Parliament*, in respect of which the application had been lodged in April 2017.

In that regard, the Court notes that Article 41(1) of the Charter of Fundamental Rights of the European Union lays down the reasonable time principle, which forms an integral part of the right to good administration, and that there is an obligation to act within a reasonable time in all cases where, in the absence of any statutory rule, the principles of legal certainty or the protection of legitimate expectations preclude the EU institutions and natural or legal persons from acting without any time limits. On the other hand, where the administration acts within the period specifically prescribed by a provision, it cannot be validly claimed that the requirements arising from the right for a person to have his or her affairs dealt with within a reasonable time are disregarded.

Contrary to the previous rules, [420] those applicable in the present case [421] now provide for the authorising officer to 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 EU institution is in a position to claim its debt.

There is therefore no need, in the present case, to have recourse to the reasonable time principle in order to assess the period within which the debit note was sent. In addition, the Court notes that, first, the debit note was sent to the applicant immediately after the establishment of the amount receivable, in the contested decision, and that, second, the moment at which the Parliament was able to claim its debt coincides with the lodging of the application in the case *L* v *Parliament* or with the delivery of the judgment in that case, with the result that the five-year period laid down by the Financial Regulation in force was complied with by the Parliament.

In the second place, the Court upholds the plea alleging infringement of the right to be heard. As a preliminary point, it notes that the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, is guaranteed, in particular, by the IMS, [422] under which the Member concerned is to be heard prior to the adoption of any decision on the matter. That right guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely.

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420 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), and Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 (OJ 2012 L 362, p. 1).

421 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).

422 Article 68(2) of the IMS.

In the present case, the Court finds that several requests by the applicant to the Parliament for documents and information were refused, except the documents concerning the end of the APA's contract.

It should be borne in mind that, where there is doubt as to the propriety of the use of parliamentary assistance expenses paid to an APA, it is for the Member of Parliament to establish that that APA worked for him or her, in connection with his or her parliamentary mandate, throughout the period during which those expenses were paid. Furthermore, when requested to provide such proof, the Member of Parliament must disclose to the Parliament, within the prescribed time limit, the information in his or her possession. If other information appears to be relevant, he or she may request disclosure thereof from the institutions, bodies, offices and agencies of the European Union which have that information, on the basis of the right to be heard, provided that they concern the data necessary to enable him or her to make his or her observations effectively on the proposed recovery measure. The Parliament which receives such a request cannot refuse to provide the data requested without infringing the right to be heard, unless it relies, in support of that refusal, on grounds which may be regarded as justified having regard, first, to the circumstances of the case and, second, to the applicable rules.

The Court therefore examines whether the grounds relied on by the Parliament for not disclosing the data requested by the applicant are justified.

First, the Court rejects the grounds relied on by the Parliament for refusing the applicant's request concerning the disclosure of 'all emails from 2015, 2016 and 2019' and the correspondence exchanged by the applicant with the relevant services of the Parliament concerning the APA's work. It points out that each institution organises its work in compliance with the rules applicable to it and which it can lay down, and considers that, in the present case, the Parliament was entitled to limit the retention period for Members' emails by allowing them to be safeguarded in private folders. However, the Court determines whether, in the present case, that policy was implemented in such a way as to ensure observance of the right to be heard.

The Court notes that, from the beginning of 2016, the Parliament became aware of a situation of conflict between the applicant and the APA as regards whether or not the latter was carrying out his activities for the applicant in compliance with the rules governing parliamentary assistance. Consequently, from that time, it was necessary for the Parliament to ensure the retention of emails which could establish the exact nature of the activities of the APA during the dismissal procedure and, if that procedure gave rise to other judicial or administrative proceedings, such as a recovery procedure, for as long as those other proceedings remained open.

Furthermore, the possibility of personal archiving cannot have the effect of relieving the Parliament of the obligation to ensure the retention of all emails relevant to establishing that, in accordance with the rules which the institution has laid down for itself, an APA has effectively and exclusively carried out his or her activities for the Member to whom he or she was assigned, in direct connection with the latter's mandate. It adds that that possibility cannot relieve the Parliament of the obligation to disclose the emails thus retained, where, in accordance with the right to be heard, which is fundamental in the legal order of the European Union, a request to that effect is made by the Member concerned who, as in the present case, is the subject of a recovery procedure for improper use of parliamentary assistance expenses.

Second, the Court rejects the grounds relied on by the Parliament for refusing the request concerning the APA's 'personal file' (all the documents relating to his recruitment and work), including information on the number of times protection of Parliament had been requested in respect of that APA, and the data relating to his presence which could be extracted from his Parliamentary access card.

As regards the ground that the transmission of those data was contrary to the regulation on the protection of personal data with regard to the processing of personal data by the institutions, bodies,

offices and agencies of the European Union and on the free movement of such data, [423] admittedly, the Court notes that, since they had to be used for his defence in the recovery procedure, the data requested by the applicant could not be regarded as being 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient'. [424] For the same reason, it cannot be considered that the transmission of those data to the applicant served a 'specific purpose in the public interest'. [425]

However, the Court notes that the request for observations sent by the Parliament to the applicant in order to enable him to exercise his right to be heard is based, in the present case, on information held by that institution without being known, as the case may be, to the applicant, or on information of which the applicant was aware when he was the APA's hierarchical superior, but which is no longer available to him.

Therefore, with regard to the importance accorded to the right to be heard, the fact that such information may be found in the APA's 'personal file' cannot, as such, preclude the information from being disclosed to the applicant in order to enable him to make his observations effectively in the exercise of that right.

The right to the protection of personal data is not absolute, but should be considered in relation to its function in society and weighed on that basis against other fundamental rights, in an approach which gives each of the rights involved its proper place in the EU legal order, in the light of the facts of the case, in accordance with the principle of proportionality. The need to strike such a balance between the right to the protection of personal data and the other fundamental rights recognised in that legal order is emphasised by the EU legislature in the regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, [426] of which the regulation on the protection of personal data by the EU institutions, bodies, offices and agencies is the equivalent.

The Court concludes that it cannot be accepted that the Parliament may invite the applicant to state his views effectively on the information contained, as the case may be, in the APA's file, without, as in the present case, giving him access to that information, after weighing up, on the one hand, that APA's interest in the data concerning him not being transmitted to third parties and, on the other hand, the applicant's interest in presenting his observations effectively in the context of the recovery procedure commenced against him.

As regards the ground that the transmission of those data was contrary to the provisions of the Staff Regulations of Officials of the European Union on personal files of officials and other servants, [427] applicable to parliamentary assistants, the Court finds that the confidentiality of the documents in question cannot be relied on against the applicant, who is, moreover, the author of some of the

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423 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).

424 Within the meaning of Article 9(1)(a) of Regulation 2018/1725.

425 Within the meaning of Article 9(1)(b) of Regulation 2018/1725.

426 Recital 4 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).

427 Article 26 of Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, as amended.

documents concerned as the APA's hierarchical superior, to the extent necessary for the applicant to exercise his right to be heard.

Lastly, third, the Court rejects the grounds relied on by the Parliament for refusing the applicant's request concerning the file relating to the case which gave rise to the judgment of 7 March 2019. As regards the granting of anonymity to the APA by the Court in the proceedings which gave rise to that judgment, the Court notes that anonymity is intended to omit the name of a party to the dispute or that of other persons mentioned in connection with the proceedings concerned, or of other information in the documents relating to the case to which the public has access. By contrast, the anonymity granted by the Court does not concern the confidentiality of the material placed on the file of those proceedings outside those proceedings, in the context of the relations between the parties and third parties. Consequently, the Court's decision on anonymity did not preclude the Parliament from disclosing to the applicant the documents exchanged in the judgment of 7 March 2019, which were likely to be relevant for the purposes of the applicant's exercise of his right to be heard.

III. Competition

1. Procedure – Request for information

Judgment of 24 May 2023, *Meta Platforms Ireland* v *Commission* (T-451/20, EU:T:2023:276)

(Competition – Data market – Administrative procedure – Article 18(3) and Article 24(1)(d) of Regulation (EC) No 1/2003 – Request for information – Virtual data room – Obligation to state reasons – Legal certainty – Rights of the defence – Necessity of the information requested – Misuse of powers – Right to privacy – Proportionality – Principle of good administration – Professional secrecy)

On the basis of suspicions of anticompetitive behaviour by the Facebook group in its use of data and in the management of its social network platform, the European Commission, by decision of 4 May 2020, [428] sent a request for information to Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd. That decision, adopted pursuant to Article 18(3) of Regulation No 1/2003, [429] required Meta Platforms Ireland to provide the Commission with all documents prepared or received by three of its executives within the period concerned which contained one or more of the search terms defined in the annexes. That decision provided for a potential penalty payment of EUR 8 million per day in the event of failure to provide the information requested. [430]

The decision of 4 May 2020 replaced an earlier similar decision, which laid down broader search criteria. That new decision, taken after exchanges between the Commission and Meta Platforms Ireland, reduced the number of documents requested by refining search terms and limiting the number of officials concerned.

On 15 July 2020, Meta Platforms Ireland brought, first, an action for annulment of the decision of 4 May 2020 and, second, an application for interim measures.

By interim order of 29 October 2020, [431] the President of the General Court ordered that the operation of the decision of 4 May 2020 be suspended until a specific procedure had been put in place for the production of the requested documents which were not linked to Meta Platforms Ireland's business activities and which also contained sensitive personal data. Subsequent to that order, the Commission adopted an amending decision [432] stating that those documents could be placed on the investigation file only after having been examined in a virtual data room in the manner specified in the interim order.

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428 Commission Decision C(2020) 3011 final of 4 May 2020 relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Regulation (EC) No 1/2003 (Case AT.40628 – Facebook Data-related practices).

429 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).

430 On the same date, the Commission adopted a request for information under Article 18(3) of Regulation (EC) No 1/2003 in respect of Meta Platforms Ireland Ltd in the context of its parallel investigation into certain practices relating to the Marketplace product. The action for annulment brought by Meta Platforms Ireland Ltd against that decision is dismissed by the Court in its judgment of the same date in Case T-452/20, *Meta Platforms Ireland* v *Commission*.

431 Order of 29 October 2020, ***Facebook Ireland* v *Commission*** (T-451/20 R, not published, EU:T:2020:515).

432 Commission Decision C(2020) 9231 final of 11 December 2020.

Meta Platforms Ireland modified its application for annulment to take account of that amending decision. The Fifth Chamber, Extended Composition, of the General Court dismisses the action in its entirety. In that context, the General Court examines, for the first time, the lawfulness under Regulation No 1/2003 of a request for information using search terms, as well as the lawfulness of a virtual data room procedure for the processing of documents containing sensitive personal data.

Findings of the Court

In support of its action for annulment, Meta Platforms Ireland argued, inter alia, that applying the search terms specified in the request for information would inevitably lead to the capture of a significant number of documents with no relevance to the investigation carried out by the Commission, which would be contrary to the principle of necessity set out in Article 18 of Regulation No 1/2003.

On that point, the Court recalled that, under Article 18(1) of Regulation No 1/2003, the Commission may, by simple request or by decision, require undertakings to provide 'all necessary information' in order to monitor compliance with the EU competition rules. It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate presumed infringements which justify the conduct of its investigation. Having regard to the broad powers of investigation conferred on the Commission by Regulation No 1/2003, that necessity requirement is satisfied if the Commission could reasonably suppose, at the time of the request, that the information may help it to determine whether an infringement of the competition rules has taken place.

In support of its complaints challenging whether the principle of necessity had been complied with, Meta Platforms Ireland had disputed certain search terms in the request for information, while arguing that those specific criticisms ought to be understood as non-exhaustive examples intended to illustrate its more general line of argument. In its view, it would have been unreasonable, if not impossible, to focus on each search term separately.

However, the Court rejects that approach and considers that an overall assessment of compliance with the principle of necessity set out in Article 18 of Regulation No 1/2003 is not appropriate in the present case, even if it were possible. The fact that certain search terms may, as Meta Platforms Ireland submits, be too vague has no bearing on the fact that other search terms may be sufficiently precise or targeted to enable the finding – that they may help the Commission to determine whether an infringement of the competition rules has taken place – to be established.

Having regard to the presumption that acts of the EU institutions are valid, the Court accordingly concludes that only the search terms specifically challenged by Meta Platforms Ireland may be reviewed as to whether the principle of necessity has been observed. The other search terms must, by contrast, be regarded as having been defined in accordance with that principle.

In addition, after noting that the arguments concerning the search terms referred to for the first time at the stage of the reply are inadmissible, the Court examines only the search terms referred to in the application. Taking the view that Meta Platforms Ireland has not successfully established that those terms were contrary to the principle of necessity, the Court rejects the various arguments put forward in that regard as being unfounded.

In its action for annulment, Meta Platforms Ireland also submitted that, by requiring the production of numerous irrelevant documents of a private nature, the decision of 4 May 2020, as amended ('the contested decision'), infringed the fundamental right to privacy enshrined in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

In that regard, the Court recalls that, in accordance with Article 7 of the Charter, which contains rights which correspond to those guaranteed by Article 8(1) ECHR, everyone has the right to respect for his or her private and family life, home and communications.

As regards impediments to that right, Article 52(1) of the Charter provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In addition, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the light of those clarifications, the Court examines whether the impediment to Article 7 of the Charter created by the contested decision satisfies the conditions set out in Article 52(1) thereof.

After observing that Regulation No 1/2003 confers on the Commission the power to adopt the contested decision, such that the interference with privacy which it causes is provided for by law, that that decision meets objectives of general interest of the European Union and that Meta Platforms Ireland had not maintained that the contested decision compromises the essence of the right to privacy, the Court examines whether the contested decision disproportionately impedes that right.

On that point, the Court confirms, in the first place, that a request for information under Article 18(3) of Regulation No 1/2003 constitutes an appropriate measure for attaining the objectives of general interest pursued by the Commission, namely the maintenance of the system of competition intended by the Treaties.

As regards, in the second place, the question whether the contested decision goes beyond what is necessary in order to achieve those objectives of general interest, the Court notes that, following the delivery of the interim order of 29 October 2020, the Commission adopted a separate procedure for the treatment of documents to be produced by Meta Platforms Ireland but which, prima facie, were not linked with its business activities and which contained sensitive personal data ('the Protected Documents').

Under that procedure, the Protected Documents were to be transmitted to the Commission on a separate electronic medium and placed in a virtual data room accessible to a limited number of members of the team responsible for the investigation, in the presence of Meta Platforms Ireland's lawyers, with a view to selecting the documents to be placed on the file. In the event of continuing disagreement regarding the classification of a document, the amending decision also lays down a system for resolving disputes. In accordance with that decision, the Protected Documents may, moreover, be transmitted to the Commission in a redacted form by removing the names of the individuals concerned and any information allowing to identify them. Upon request by the Commission motivated by the needs of the investigation, those documents must nevertheless be provided to it in a full version.

The Court observes, furthermore, that it is not disputed that certain documents requested by the Commission contained sensitive personal data capable of falling within the data referred to in Article 9 of Regulation 2016/679 [433] and Article 10 of Regulation 2018/1725, [434] in relation to which the ability to undertake processing is subject to the following three conditions:

– the processing must pursue a significant public interest, with its basis in EU law;

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433 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).

434 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).

– the processing must be necessary to fulfil that public interest;

– EU law must be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Since those conditions are also relevant for assessing whether, in accordance with Article 52(1) of the Charter, the contested decision does not go beyond what is necessary to achieve the objectives of general interest which it pursues, the Court recalls, first, that a request for information such as the contested decision constitutes an appropriate measure for achieving the objectives of general interest pursued by the Commission (first condition) and, second, that the processing of personal data entailed by the contested decision is necessary to fulfil the significant public interest pursued (second condition).

Referring to the arrangements for the transmission, consultation, evaluation and anonymisation of the Protected Documents, the Court considers that the third condition referred to above is also satisfied in the present case.

Having thereby established that the contested decision, in so far as it lays down the virtual data room procedure, does not go beyond what is necessary to achieve the objectives of general interest pursued, the Court finds, in the third place, that the disadvantages involved in that procedure were also not disproportionate to the aims pursued.

In the light of all the foregoing, the Court concludes that the impediment to the right to privacy caused by the contested decision satisfies the conditions set out in Article 52(1) of the Charter and therefore rejects the complaints alleging infringement of Article 7 of the Charter.

Since the other pleas in law raised by Meta Platforms Ireland have also proved to be unfounded, the Court dismisses the action in its entirety.

2. Agreements, decisions and concerted practices – Setting fines

Judgment of 18 October 2023, *Clariant and Clariant International* v *Commission* (T-590/20, EU:T:2023:650)

(Competition – Agreements, decisions and concerted practices – Ethylene market – Decision finding an infringement of Article 101 TFEU – Coordination on a purchase price element – Settlement procedure – Fine – Adjustment of the basic amount of the fine – Point 37 of the Guidelines on the method of setting fines – Repeated infringement – Point 28 of the Guidelines on the method of setting fines – Unlimited jurisdiction – Counterclaim for increase of the amount of the fine)

By decision of 14 July 2020 [435] ('the contested decision'), the European Commission found that four undertakings had infringed Article 101 TFEU by participating, during the period from 26 December 2011 to 29 March 2017, in a single and continuous infringement consisting of exchanging sensitive commercial and pricing-related information and of fixing a price element relating to purchases of ethylene, in Belgium, Germany, France and the Netherlands.

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435 Commission Decision C(2020) 4817 final of 14 July 2020 relating to a proceeding under Article 101 TFEU (AT.40410 – Ethylene).

The four undertakings sanctioned under that decision include Clariant International AG, which accepted unreservedly its liability for its direct participation in the infringement committed in the relevant period, and Clariant AG, which accepted unreservedly its 'joint and several liability' in its capacity as parent company of Clariant International AG.

For the purposes of calculating the fine imposed jointly and severally on those two undertakings, the Commission first determined the basic amount, using the figures for the value of purchases of ethylene acquired in the period covering the last full year of participation in the infringement, which was 2016.

Second, the Commission made some adjustments to the basic amount. First, it applied a 50% increase to the basic amount of the fine due to the aggravating circumstance that it was a repeat infringement, pursuant to point 28 of the Guidelines on the method of setting fines. [436] Second, it applied a 10% increase to the basic amount in order to take into account the particular features of the case and the need to achieve sufficient deterrence, pursuant to point 37 of those same guidelines.

Third and lastly, after having made sure that the fine did not exceed 10% of the two undertakings' total turnover in 2019, the Commission granted them a reduction of 30% of the amount of the fine by way of leniency pursuant to the 2006 Leniency Notice, [437] as well as a 10% reduction for their cooperation in the settlement procedure.

Clariant AG and Clariant International AG brought an action for partial annulment of the contested decision as regards the amount of the fine imposed and, in the alternative, a reduction of that amount. They also seek dismissal of the Commission's counterclaim for an increase in the amount of the fine, to be achieved through a withdrawal of the 10% reduction granted for their cooperation in the settlement procedure.

The General Court rejects the action in its entirety and also the Commission's counterclaim. In its judgment, it addresses inter alia the question of the well-foundedness and statement of reasons for the application of an increase to the basic amount of the fine pursuant to point 37 of the Guidelines on the method of setting fines, on the ground that the cartel was a purchase cartel. Moreover, in the exercise of its unlimited jurisdiction, it rules on the Commission's counterclaim, seeking withdrawal of the 10% reduction granted to the applicants for their cooperation in the settlement procedure on the ground that, by the present action, they were challenging facts recognised and accepted by them for the purposes of the settlement procedure.

Findings of the Court

In the first place, the Court rejects the plea alleging that the Commission was wrong to increase the basic amount of the fine pursuant to point 37 of the Guidelines on the method of setting fines, referring to the need to take into account both the particular features of a given case and the need to achieve sufficient deterrent effect.

In the present case, the Court observes, first of all, that, given that the infringement concerned a purchase cartel and not all the parties were present on the same downstream markets, the Commission calculated the basic amount of the fine using the purchase value rather than the value of sales of downstream products.

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

437 Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

Next, it finds that, in applying a 10% increase to that basic amount pursuant to point 37 of the Guidelines on the method of setting fines, the Commission duly exercised its discretion and made no manifest error of assessment. The Commission took account of the particular features of the case, namely the fact that the cartel in question was a purchase cartel and that the value of purchases, taken into account in lieu and stead of the value of sales, was not in itself liable to constitute a suitable proxy to reflect the economic importance of the infringement. It also took account of the need to achieve a deterrent effect of the fine in finding that, if the general method provided for by the Guidelines on the method of setting fines was being applied without the slightest adjustment, the deterrent effect would not be assured. The Commission was not, however, required to take account of the effects of the infringing conduct on the market, since a fine increase pursuant to point 37 of the Guidelines on the method of setting fines is not conditional on prior proof being made out of such effects.

Lastly, the Court considers that the Commission provided a statement of the reasons that led it to find that the particular features of the case and the need to achieve a deterrent effect with the fine justified departing from the general method and increasing the basic amount and that it duly explained the factors it took into consideration for determining that a 10% increase applied to the basic amount of the fine was appropriate. In that regard, given that the Commission is not required to state the figures relating to each step in the calculation method, it was not required to provide any additional explanations about the specific increase chosen.

In the second place, the Court dismisses the Commission's counterclaim. It finds that, in the settlement procedure, in return for a 10% reduction of the amount of the fine imposed on them under the standard procedure, the parties to the settlement procedure must acknowledge, inter alia, their liability for the infringement and provide an indication of the maximum amount of the fine they foresee to be imposed by the Commission and which they would accept. The Court nevertheless observes that the parties to the settlement procedure are not required under the settlement notice [438] to accept the final amount of the fine and all of its parameters in order to enter into settlement discussions.

Thus, the fact that Clariant AG and Clariant International AG accepted a maximum amount of the fine in their settlement submission is not the same as accepting the exact final amount of the fine and the method of its calculation, including the adjustments made under points 28 and 37 of the Guidelines on the method of setting fines. Moreover, the fine increases applied pursuant to points 28 and 37 of the Guidelines on the method of setting fines had not been expressly acknowledged by those undertakings in their settlement submission and had not been the subject of a common understanding with the Commission at the time of the procedure. It follows that the Commission could not assume that the applicants would no longer question the fine increases applied pursuant to points 28 and 37 of the Guidelines on the method of setting fines in the context of an action.

Accordingly, given that, by the present action, those undertakings are challenging the amount of the fine imposed on them by arguing that the application of those points was incorrect, the Commission has not succeeded in demonstrating that it is justified not to grant a 10% reduction to compensate them for their cooperation during the administrative procedure.

In the light of the foregoing, the Court dismisses the action in its entirety and also the Commission's counterclaim.

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438 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1).

3. State aid

Judgment of 10 May 2023, *Ryanair and Condor Flugdienst* v *Commission (Lufthansa; COVID-19)* (T-34/21 and T-87/21, EU:T:2023:248)

(State aid – German air transport market – Aid granted by Germany to an airline in the context of the COVID-19 pandemic – Recapitalisation of Deutsche Lufthansa – Decision not to raise any objections – Temporary Framework for State aid measures – Actions for annulment – Locus standi – Substantial effect on competitive position – Admissibility – Significant market power – Additional measures to preserve effective competition on the market – Obligation to state reasons)

On 12 June 2020, the Federal Republic of Germany notified the European Commission of individual aid in the form of a recapitalisation of EUR 6 billion ('the measure at issue') granted to Deutsche Lufthansa AG ('DLH'). The recapitalisation, part of a wider series of support measures for the Lufthansa Group, [439] was intended to restore the balance sheet position and liquidity of the undertakings in that group in the exceptional situation caused by the COVID-19 pandemic.

The measure at issue consisted of three different elements, namely an equity participation of approximately EUR 300 million, a silent participation that is not convertible into shares of approximately EUR 4.7 billion ('Silent Participation I') and a silent participation of EUR 1 billion with the features of a convertible debt instrument ('Silent Participation II').

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission classified the measure at issue as State aid that was compatible with the internal market [440] under Article 107(3)(b) TFEU [441] and the Communication from the Commission on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak. [442]

The airlines Ryanair DAC and Condor Flugdienst GmbH ('Condor') brought two actions for annulment of that decision, which are upheld by the Tenth Chamber (Extended Composition) of the General Court on the ground that the Commission, by adopting the contested decision, infringed several conditions and requirements laid down in the Temporary Framework.

Findings of the Court

- **The admissibility of the actions for annulment**

As regards the standing of the applicants to bring proceedings to challenge the merits of the contested decision, the Court observes that, in accordance with the fourth paragraph of Article 263 TFEU, there are two alternative situations in which any natural or legal person may institute proceedings against an

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439 DLH is the parent company of the Lufthansa Group, which, inter alia, comprises Lufthansa Passenger Airlines, Brussels Airlines SA/NV, Austrian Airlines AG, Swiss International Air Lines Ltd and Edelweiss Air AG.

440 Commission Decision C(2020) 4372 final of 25 June 2020 concerning State Aid SA.57153 (2020/N) – Germany – COVID-19 – Aid to Lufthansa ('the contested decision'). On 14 December 2021, the Commission adopted Decision C(2021) 9606 final, correcting the contested decision.

441 Under Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may, under certain conditions, be considered to be compatible with the internal market.

442 Communication from the Commission of 19 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID- 19 outbreak (OJ 2020 C 91 I, p. 1; 'the Temporary Framework'), which was amended, for the first time, on 3 April 2020 (OJ 2020 C 112 I, p. 1) and, for a second time, on 8 May 2020 (OJ 2020 C 164, p. 3).

act which is not addressed to them, namely, first, if the act at issue is of direct and individual concern to them and, second, if it is a regulatory act that is of direct concern to them and does not entail implementing measures.

Since the contested decision, which is addressed to the Federal Republic of Germany, does not constitute a regulatory act, the Court determines whether the applicants are directly and individually concerned by that decision.

As regards, first, the question of individual concern, it is apparent from the case-law that that condition may be satisfied if the applicants adduce evidence to show that the measure concerned is liable to have a substantial adverse effect on their position on the market at issue. Accordingly, Ryanair and Condor showed their status as direct competitors to the Lufthansa Group on a multitude of routes, which would all constitute relevant markets. Ryanair also highlighted its status as a direct competitor of the Lufthansa Group on the German, Belgian and Austrian markets.

After observing that, at the stage of examining the admissibility of an action, it is sufficient to find that the definition of the market at issue put forward by the applicants is plausible, that being without prejudice to the substantive examination of that issue, the Court confirms that the measure at issue was liable to have a substantial effect on the competitive position of the applicants on the markets for the transport of passengers by air.

It is apparent from examining the relevant and credible data provided by the applicants, read in combination with the contested decision, that the measure at issue was not only likely to allow the Lufthansa Group to cope with the risk of an exit from the markets on which it was in direct competition with the applicants, but also to strengthen its competitive position. Accordingly, the grant of the measure at issue was prima facie capable of causing the loss of an opportunity to make a profit or a less favourable development than would have been the case for the applicants without such a measure.

As regards, second, the question of whether the applicants are directly concerned, the Court observes that a competitor of a beneficiary of aid is directly concerned by a Commission decision authorising a Member State to pay the aid when there is no doubt as to that State's intention to do so, which was the case in this instance.

Having regard to all those factors, the Court confirms that the applicants are entitled to challenge the contested decision on the merits by means of their actions for annulment.

- **The merits of the actions for annulment**

Before examining the merits of the various pleas for annulment raised by the applicants, the Court observes that the Commission is bound by the guidelines and notices that it issues in the specific area of State aid, to the extent that they do not depart from the rules in the Treaty. It is therefore for the Courts of the European Union to determine whether the Commission has observed the rules which it has adopted in that area.

The Court states, furthermore, that in the context of the review that it conducts on complex economic assessments carried out by the Commission in the field of State aid, it is true that it is not for the Court to substitute its own economic assessment for that of the Commission. However, the Court must establish not only whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. In addition, the review carried out by the Courts of the European Union is comprehensive as regards the evaluations made by the Commission which do not involve complex economic assessments or as regards questions of a strictly legal nature.

A. The eligibility of DLH for the notified aid

Having made those observations, the Court examines, first of all, the various complaints contesting the eligibility of DLH for the notified aid. In that regard, the applicants in particular alleged an infringement of point 49(c) of the Temporary Framework, which states that, in order to be eligible for a recapitalisation measure, the beneficiary must be unable to obtain financing on the markets at affordable terms.

According to the contested decision, that condition was satisfied since DLH would not have had sufficient collateral to obtain financing on the markets for the entire amount of the aid.

On that point, the Court observes, however, that there is nothing in the contested decision to indicate that the Commission assessed the possible availability of collateral, such as DLH's unencumbered aircraft, their value and the terms for any loans that it may have been possible to obtain on the financial markets against such collateral. Furthermore, the assertion that the 'collateral' – not specified in the contested decision – would not be sufficient to cover the entire amount of the funds necessary is based on a false premiss, that the financing that can be obtained on the markets must necessarily cover all of the beneficiary's needs. Neither the wording, purpose nor context of point 49(c) of the Temporary Framework provides support for the view that the beneficiary must be incapable of finding financing on the markets for the entirety of its needs.

Since the Commission did not assess whether DLH could have raised a non-negligible part of the necessary financing on the markets, the Court finds that the Commission failed to take account of all the relevant evidence that must be taken into consideration in order to assess the compliance of the measure at issue with point 49(c) of the Temporary Framework. Consequently, the Court upholds the complaint made by Ryanair based on an infringement of that point, and, a fortiori, that of Condor alleging the existence of serious doubts in that regard.

B. The remuneration and exit of the State

The Court then addresses the complaints alleging an infringement of the conditions laid down in the Temporary Framework as regards the remuneration and exit of the State.

In that regard, Ryanair in particular criticised the Commission for not providing a step-up mechanism for increasing the remuneration of the German State as regards, first, the equity participation in DLH and, second, Silent Participation II after its possible conversion into equity.

In the first place, as regards the remuneration for equity instruments, such as the equity participation, point 61 of the Temporary Framework states that any recapitalisation measure is to include a step-up mechanism increasing the remuneration of the State, to incentivise the beneficiary to buy back the State capital injections. Point 62 of the framework provides that the Commission may accept alternative mechanisms, provided that they lead overall to a similar outcome with regard to the incentive effects on the exit of the State and have a similar impact overall on the State's remuneration.

While the participation of the German State in the equity of DLH was not accompanied by any step-up mechanism within the meaning of point 61 of the Temporary Framework, the Commission found that the overall structure of the notified aid constituted an alternative step-up mechanism, within the meaning of point 62, in that it included sufficiently strong incentives for the exit of the State from DLH's capital. In support of that finding the Commission referred inter alia to the significant discount at which Germany had acquired the shares in DLH, which would provide the State with higher remuneration than that which would have resulted from the application of a step-up mechanism.

That line of argument is, however, rejected by the Court, which observes that the price at which the State acquires shares on entry into the capital of the beneficiary is governed by point 60 of the Temporary Framework, according to which a capital injection by the State is to be conducted at a price that does not exceed the average share price over the 15 days preceding the request for the capital injection. The subject matter and objective of that rule are different from those underlying the step-up

mechanism. While the latter mechanism is intended to be an incentive to the beneficiary concerned to buy back the State's shareholding as quickly as possible, the rule concerning the purchase price of the shares is intended, in essence, to ensure that the price at which the State acquires its shares does not exceed their market price. Since the price of the shares may rise as well as fall, the purchase price is not necessarily intended to increase the incentive, over time, for the beneficiary concerned to buy back the State's shareholding.

It follows that, contrary to what was argued by the Commission, the price of the shares at the time of the entry of the German State into the capital of DLH did not constitute an alternative step-up mechanism for increasing the remuneration of that State.

In the second place, as regards Silent Participation II, which is a hybrid capital instrument, point 68 of the Temporary Framework requires that, after its conversion into equity, a step-up mechanism must be included to increase the remuneration of the State and to incentivise the beneficiaries concerned to buy back the State capital injections. According to the Court, it is common ground that Silent Participation II, at the time of its conversion into equity, is likewise not accompanied by a step-up or similar mechanism.

Consequently, the Court finds that the Commission infringed the Temporary Framework in that it failed to require the inclusion of a step-up mechanism to increase the remuneration of the State or a similar mechanism in the remuneration for the equity participation and for Silent Participation II, at the time of the latter's conversion into equity.

C. The existence of significant market power on the part of the Lufthansa Group on the markets at issue and the structural commitments

Lastly, the Court examines the complaints alleging an infringement of point 72 of the Temporary Framework, which states that if the beneficiary of a COVID-19 recapitalisation measure above EUR 250 million is an undertaking with significant market power ('SMP') on at least one of the relevant markets on which it operates, Member States must propose additional measures to preserve effective competition on those markets.

In that regard, the applicants essentially raised three sets of complaints relating to (a) the definition of the markets at issue; (b) whether the Lufthansa Group holds SMP on those markets; and (c) the effectiveness and sufficiency of the structural commitments accepted by the Commission.

a. The definition of the relevant markets

In the first place, as regards the definition of the relevant markets, the Commission held in the contested decision that the markets on which the Lufthansa Group operated were the markets for the provision of passenger air transport services to and from the airports served by that group. It thus identified the relevant markets according to the 'airport-by-airport' approach. That approach is contested by the applicants, which state that the Commission should have defined the markets for the provision of passenger air transport services as pairs of cities between a point of origin and a point of destination ('the O&D markets').

Since point 72 of the Temporary Framework does not specify the method that should be used for defining the relevant markets, the Court observes that the recapitalisation measures falling under the Temporary Framework are intended to remedy a serious disturbance in the economy of a Member State by supporting, in particular, the viability of the undertakings affected by the COVID-19 pandemic so as to restore their capital structure to the level existing before the pandemic. Those aid measures thus target the overall financial situation of the beneficiary and, more generally, that of the economic sector concerned.

In that context, the measure at issue sought to ensure, in essence, that the companies of the Lufthansa Group have sufficient liquidity and that the disruptions caused by the COVID-19 pandemic do not undermine their viability, and not to support the presence of that group on a particular route. Consequently, the Commission was right to state that the measure at issue was aimed at preserving the overall ability of the Lufthansa Group to operate air transport services and that, as a result, it was not appropriate to analyse the impact of the measure at issue on each O&D market taken in isolation.

The arguments put forward by the applicants based on the approach followed in the area of merger control, in which the relevant markets are defined according to the O&D approach, likewise fail to convince, since that analogy does not take sufficient account of the specific features of the Temporary Framework and the measure at issue, which does not have a direct link with particular O&D markets rather than others.

Consequently, for the purpose of applying point 72 of the Temporary Framework, the Commission was entitled, without making a manifest error of assessment, to define the markets at issue according to the 'airport-by-airport' approach.

In addition, the Court rejects the complaints made by Ryanair, in the alternative, that the Commission erred in its application of the 'airport-by-airport' approach by limiting its examination solely to the airports in the European Union where the Lufthansa Group had a base. On that point, the Court observes that inasmuch as Ryanair has not demonstrated to the requisite legal standard that the Lufthansa Group was likely to have SMP at the airports at which it had no base, the Commission was entitled to exclude those airports from its analysis. Furthermore, in questions of State aid, the Commission has no jurisdiction to examine whether the Lufthansa Group holds SMP at an airport located outside the European Union.

b. Whether the Lufthansa Group holds SMP at the relevant airports

With all of the applicants' arguments concerning the definition of the relevant markets having been rejected as unfounded, the Court analyses, in the second place, the complaints related to whether the Lufthansa Group holds SMP at the airports examined by the Commission.

Since the concept of SMP is not defined in the Temporary Framework, nor more generally in the field of State aid, the Court begins by observing that that concept must be regarded, in essence, as equivalent to that of a dominant position under competition law. According to settled case-law, such a dominant position is defined as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

In the contested decision, as corrected, the Commission based its analysis of whether the Lufthansa Group held SMP at the 10 airports examined [443] on the slot holdings possessed by that group at those airports, the level of congestion there, and the number of slots held by competitors; it also took into account the number of aircraft based by that group and its competitors at some of the airports.

In that regard, the Court finds that those criteria, which relate in essence to airport capacity and concern access by airlines to airport infrastructure, do not provide direct information about the market shares of the Lufthansa Group on the market for the provision of passenger air transport services at the airports examined. However, given that the relationship between the market shares of the latter

443 Namely Berlin Tegel, Brussels, Düsseldorf, Frankfurt, Hamburg, Munich, Palma de Mallorca, Stuttgart, Vienna and Hannover airports.

undertaking and of its competitors is relevant evidence of the existence of SMP, the Commission could not ignore factors providing information on that issue, such as the number of flights and seats offered to and from the airports concerned. It follows that, by failing to take into consideration all the factors that were relevant for assessing the market power of the Lufthansa Group at the airports concerned, the Commission made a manifest error of assessment.

Furthermore, and in any event, the Commission also made a manifest error of assessment by finding, on the basis solely of the criteria that it examined, that the Lufthansa Group enjoyed SMP at Frankfurt and Munich airports during the 2019 summer and the 2019/2020 winter seasons, but that such was not the case as regards the other relevant airports. In that regard, the Court observes that an overall assessment of the criteria analysed by the Commission for Düsseldorf and Vienna airports during the 2019 summer season demonstrates the existence of a very high slot holding on the part of the Lufthansa Group at Düsseldorf Airport and a high slot holding at Vienna Airport, including during peak hours; a very high congestion rate at those two airports, characterised by almost complete congestion during peak hours; and the weak position of the group's competitors. Consequently, on the basis of those criteria alone, the Commission could not properly find that the Lufthansa Group did not hold SMP at Düsseldorf and Vienna airports, at least during the 2019 summer season. Furthermore, and in any event, the data which led the Commission to find that the Lufthansa Group held SMP at Frankfurt and Munich airports were not materially different from those concerning Düsseldorf and Vienna airports, at least as regards the 2019 summer season. On that basis, the Court upholds the complaints put forward by the applicants.

c. The structural commitments

In the third and final place, the Court examines the complaints contesting several aspects of the structural commitments accepted by the Commission under point 72 of the Temporary Framework, in order to preserve effective competition at Frankfurt and Munich airports.

Under point 72, the Member States may, in proposing such measures, offer structural or behavioural commitments foreseen in the Notice on remedies. [444] In accordance with that notice, the commitments proposed have to eliminate the competition concerns entirely, be comprehensive and effective from all points of view and, furthermore, must be capable of being implemented effectively within a short period of time. In that context, the Commission must in particular consider all relevant factors relating to the proposed remedy itself, including the type, scale and scope of the remedy proposed, judged by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other players on the market.

It is necessary also to take account of the specific features of the law on State aid and, more particularly, the Temporary Framework, of which the requirement related to additional measures is part. Given that the objective of the aid granted in accordance with that framework is to ensure the operational continuity of viable undertakings during the COVID-19 pandemic, the commitments set out in point 72 thereof must be designed so as to ensure that, after the aid has been granted, the beneficiary will not become more powerful on the market than it was before the COVID-19 outbreak and that effective competition on the markets concerned will be maintained.

In the present case, the contested decision envisaged, as measures proposed by Germany under point 72 of the Temporary Framework, in particular, the divestiture by DLH of 24 slots a day at each of

444 Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1).

Frankfurt and Munich airports as well as additional assets, as required by the Slot Coordinator to allow for the transfer of slots.

In that regard, the applicants contested, inter alia, the procedure for the divestiture of the slots approved in the contested decision, which was intended to take place in two stages. In the first stage, the slots were to be offered 'to new entrants' only. If, after a specific period exceeding several seasons, the slots were not divested to a new entrant, they would, in a second stage, be made available to carriers which already have a base at those two airports.

Referring to the Commission's duty to consider all the relevant factors relating to the proposed commitments, judged by reference to the structure and particular characteristics of the market at issue, including the position of the parties and other players on the market, the Court finds that the Commission failed to examine whether it was appropriate to exclude the competitors already based at Frankfurt and Munich airports from the first stage of the procedure. In the contested decision, the Commission did not put forward any reason capable of demonstrating that that exclusion was likely to maintain effective competition on the relevant markets and that it was necessary for that purpose.

In the present case, such an examination was all the more necessary since the structure of the market at Frankfurt and Munich airports was characterised, according to the contested decision itself, by the much greater weight of the Lufthansa Group in comparison with that of its closest competitors, which already had a base at those airports, such that their exclusion from the first stage of the procedure risked having the effect of further fragmenting competition at those airports. Furthermore, the fact that the closest competitors of the Lufthansa Group, which, owing to their presence at Frankfurt and Munich airports could be better placed to acquire the slot portfolio at issue and increase the competitive pressure, may become eligible during the second stage of the procedure does not call that finding into question, since their eligibility depends on the failure of the first stage.

In the light of the foregoing, the Court finds that by excluding the competitors that already have a base at Frankfurt and Munich airports from the first stage of the slot divestiture procedure, the Commission failed to examine all the relevant factors relating to the proposed commitment, and therefore made a manifest error of assessment.

As regards the divestiture of DLH's slots at Frankfurt and Munich airports, Condor, in addition, alleged that the Commission infringed its obligation to state reasons in that it did not explain how the requirement to pay for the divestiture of the slots at issue, as set out in the contested decision, rather than requiring their transfer free of charge is, first, in compliance with the applicable rules and, second, makes the commitments sufficiently attractive to a potential purchaser.

On that point, the Court observes that the requirement that the divestiture of slots should be remunerated was of decisive importance in the scheme of the contested decision, with the result that the Commission was obliged to state the reasons why it considered that that requirement complied with the applicable rules. Given the absence of any indication as to the reasons which led the Commission to find that the slot divestiture at issue should be carried out in return for remuneration and not carried out free of charge, and that that requirement would not have the effect of reducing the attractiveness of those slots and, therefore, the effectiveness of the related commitments, the Court finds that the Commission failed to fulfil its obligation to state reasons for the contested decision.

In the light of all of the foregoing, the Court finds that the contested decision, as corrected, is vitiated by several errors and irregularities and, in consequence, it annuls that decision.

Judgment of 13 September 2023, *ITD and Danske Fragtmænd* v *Commission*
(T-525/20, EU:T:2023:542)

(State aid – Postal and road haulage sector – Complaint from a competitor – Capital contribution granted by a public undertaking to its subsidiary – Decision finding no State aid after the preliminary examination stage – Parent company of the group jointly controlled by two Member States – Approval of the capital contribution by the parent company of the group – Whether imputable to the State)

PostNord Logistics A/S is a road haulage undertaking in Denmark entirely owned by PostNord Group AB. The latter is, for its part, a wholly owned subsidiary of PostNord AB, the share capital of which is 40% owned by the Kingdom of Denmark and 60% owned by the Kingdom of Sweden.

At the end of 2018, PostNord Group decided to make a capital injection of 115 million Danish kroner (approximately EUR 15.4 million) in favour of PostNord Logistics, an initial tranche of which was paid on 20 December 2018 ('the capital injection'). In view of the amount at stake, PostNord Group subjected that injection to the prior approval of PostNord's board of directors.

It is in those circumstances that ITD, [445] a trade association comprising Danish haulage and logistics companies, lodged a complaint with the European Commission alleging, inter alia, that the capital injection constituted unlawful State aid incompatible with the internal market.

Taking the view, inter alia, that, not being imputable to the Danish and Swedish States, the capital injection did not constitute State aid, the Commission rejected that complaint without initiating the formal investigation procedure provided for in Article 108(2) TFEU. [446]

Hearing an action for annulment brought by ITD and by a competitor of PostNord Logistics, the General Court annuls that Commission decision in part, on the ground that that institution erred in law by failing to initiate the formal investigation procedure despite the serious difficulties raised by the assessment of the capital injection in the light of Article 107 TFEU.

Findings of the Court

The lodging of a complaint informing the Commission of alleged illegal aid triggers the initiation of the preliminary examination stage provided for by Article 108(3) TFEU. If, following that preliminary examination, the Commission finds that, notwithstanding the fact that the measure in question falls within the scope of Article 107(1) TFEU, it does not raise any doubts as to its compatibility with the internal market, the Commission is to adopt a decision not to raise objections. On the other hand, if there are serious difficulties encountered during the examination of the aid character of the measure at issue or its compatibility with the internal market, the initiation of the formal investigation procedure provided for in Article 108(2) TFEU is required. In that latter regard, it follows from the case-law that, if the examination carried out by the Commission during the preliminary examination procedure is insufficient or incomplete, this constitutes an indication of the existence of such difficulties.

In the light of those principles, the applicants have, in essence, argued that the conclusion of the Commission according to which the capital injection was not imputable to the Danish and Swedish States was contradicted by the circumstances of the case, which in their view demonstrates the existence of serious difficulties necessitating the initiation of the formal investigation procedure.

In that regard, the Court notes that, while it is true that the imputability of the capital injection to the Danish and Swedish States could not be inferred from the mere fact that PostNord Group, which was

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445 ITD, Brancheorganisation for den danske vejgodstransport A/S ('ITD').

446 Decision C(2020) 3006 final of the Commission of 12 May 2020 concerning State aid SA.52489 (2018/FC) – Denmark and SA.52658 – Sweden ('the contested decision').

required to approve the said capital injection, is a public undertaking, it was still necessary for the Commission to examine whether the public authorities had to be regarded as having been involved, in one way or another, in the adoption of that measure.

While finding that the Commission examined the involvement of the Danish and Swedish authorities in the capital injection by reference to 12 different factors, however, the Court considers that that examination and the conclusion reached by the Commission of lack of involvement are indicators of serious difficulties, such as to oblige it to initiate the formal investigation procedure provided for in Article 108(2) TFEU.

On that point, the Court considers, in the first place, that the arguments put forward by the applicants, according to which PostNord's board of directors was composed of 8 members out of 11 the appointment of whom fell to the ministers of the Danish and Swedish States, and 2 of whom were, moreover, senior civil servants, tend to establish that, at the time of the capital injection, PostNord had a limited degree of independence from those Member States. The circumstance that those organic factors, capable of constituting a non-negligible indicator that the capital injection was imputable to the Danish and Swedish States, had not been duly taken into consideration by the Commission, demonstrates the incomplete and insufficient nature of its examination and therefore constitutes a first indication of the existence of serious difficulties.

Given that the organic links between a public undertaking and the State which owns it cannot, in principle, suffice to establish the imputability to the State of a measure taken by that undertaking, the Court looks, in the second place, at other signs of involvement of the Danish and Swedish public authorities available to the Commission, which confirm the incomplete and insufficient nature of its examination.

In that regard, the Court notes first of all that the Commission failed to examine whether the existence of a dialogue on the restructuring of PostNord's Danish business, which had taken place between PostNord and the Danish and Swedish States, was capable of concerning PostNord Logistics' business, even though that matter had been put forward by ITD in its complaint, as an indication of the role of supervision and control exercised by those States over the capital injection, approved by PostNord.

Next, the Court emphasises that PostNord, the primary purpose of which is to operate nationwide postal services in Denmark and Sweden and the subsidiaries of which are, moreover, entrusted with the universal service obligation in those Member States, pursues public policy objectives falling within the competence of those States. Although that fact tends to prove, according to the case-law, that the Danish and Swedish public authorities pay special attention to the decisions taken by PostNord, the Commission failed to take into account that element during its analysis of the imputability to those Member States of the capital injection, as approved by PostNord.

Last, the Court finds that the Commission's analysis, according to which the amount of the capital injection in absolute terms did not raise suspicions as to the involvement of the Danish and Swedish States in the adoption of that measure, demonstrates once more the incomplete and insufficient nature of its examination, especially since that amount, approximately EUR 15.4 million, exceeded the threshold above which capital injections within the group had to obtain approval from PostNord, the board of directors of which had close links with those States.

The applicants having therefore adduced evidence of the existence of serious difficulties which the Commission did not overcome during its assessment of the capital injection in the light of Article 107 TFEU, the Court upholds their action in so far as it is directed against the part of the contested decision in which the Commission, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, concluded that that capital injection was not imputable to the Danish and Swedish States and, therefore, did not constitute State aid.

Judgment of 20 September 2023, *Belgium* v *Commission* (T-131/16 RENV, EU:T:2023:561) [447]

(State aid – Aid scheme put into effect by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Taxable profit – Excess profit exemption – Advantage – Selectivity – Adverse effect on competition – Recovery)

Judgment of 20 September 2023, *Magnetrol International and Others* v *Commission* (T-263/16 RENV, T-265/16, T-311/16, T-319/16, T-321/16, T-343/16, T-350/16, T-444/16, T-800/16 and T-832/16, EU:T:2023:565)

(State aid – Aid scheme put into effect by Belgium – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering recovery of the aid granted – Tax ruling – Taxable profit – Excess profit exemption – Advantage– Selectivity – Recovery)

Between 2004 and 2014, the Belgian tax administration issued tax rulings to Belgian entities of multinational corporate groups. On the basis of those tax rulings, those entities were able to reduce their tax base in Belgium by deducting what was considered to be 'excess' profit from the profit which they had recorded. According to the Belgian tax authorities, that excess profit arose from synergies, economies of scale or other benefits resulting from membership of a multinational group and, accordingly, was not attributable to the Belgian entities in question.

By a decision of 11 January 2016, [448] the European Commission found that the excess profit exemption scheme, pursuant to which the Kingdom of Belgium had issued the tax rulings, constituted a State aid scheme for the purposes of Article 107(1) TFEU that was incompatible with the internal market. Taking the view that that scheme had been put into effect in breach of Article 108(3) TFEU, the Commission ordered that the aid thus granted be recovered from its beneficiaries, a definitive list of which was to be drawn up by the Kingdom of Belgium following the decision.

After actions for annulment were brought before it by the Kingdom of Belgium and by a number of undertakings that were identified in the Commission's decision or that had benefited from a tax ruling, the General Court annulled the Commission's decision by a judgment of 14 February 2019, [449] on the ground that the Commission had incorrectly found that there was an aid scheme.

On appeal by the Commission, the Court of Justice set aside the judgment of the General Court and definitively rejected the pleas challenging the existence of an aid scheme and the Commission's power. [450] Since the state of the proceedings was not such as to permit final judgment to be given in respect of the pleas for annulment that had not yet been examined by the General Court, the Court of Justice referred the case back to the General Court in order for it to rule on those pleas.

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447 Joint résumé for cases *Belgium* v *Commission* (T-131/16 RENV) and *Magnetrol International and Others* v *Commission* (T-263/16 RENV, T-265/16, T-311/16, T-319/16, T-321/16, T-343/16, T-350/16, T-444/16, T-800/16 and T-832/16).

448 Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) (ex 2015/NN) implemented by Belgium (OJ 2016 L 260, p. 61; 'the contested decision').

449 Judgment of 14 February 2019, ***Belgium and Magnetrol International* v *Commission*** (T-131/16 and T-263/16, EU:T:2019:91).

450 Judgment of 16 September 2021, ***Commission* v *Belgium and Magnetrol International*** (C-337/19 P, EU:C:2021:741).

In the proceedings following referral, the General Court rejects all of the pleas for annulment which it was required to review and accordingly dismisses in their entirety the actions brought by the Kingdom of Belgium and the applicant undertakings.

Findings of the Court

In support of their actions for annulment, the Kingdom of Belgium and the applicant undertakings challenged in particular the existence of an advantage arising from the excess profit scheme and the selectivity of that advantage.

As regards the reference system, that is to say, the ordinary or 'normal' tax system in relation to which the two aforementioned elements must be analysed, the Kingdom of Belgium and the applicants claimed that the Commission had erred in finding that the Belgian corporate income tax system provided for all of a company's recorded profit to be taxed, while disregarding the possibility that adjustments might be made. Moreover, the Commission had, in their submission, incorrectly excluded the excess profit scheme from that reference system.

In that regard, it was apparent, however, from the applicable provisions of the Belgian Income Tax Code that the taxable profit consisted, fundamentally, of all profits recorded by undertakings subject to taxation in Belgium. Those recorded profits constituted the starting point for calculating that tax, and could be subject to the upward and downward adjustments provided for by law. However, while the applicable legislation made the downward adjustment of profits subject to a twofold condition, namely that the Belgian entity's profit that was to be adjusted should have been included in the profit of another associated company and that the latter company would have made that profit if conditions similar to those agreed between independent companies had been applicable, the excess profit exemption which the Belgian tax authorities applied in their tax rulings was not subject to that twofold condition. In the light of that finding, the Court concludes that the Commission was right to find that the excess profit exemption scheme, as applied by the Belgian tax authorities, did not form part of the reference system applicable in the present case.

The Court also rejects the criticism which the Kingdom of Belgium and the applicant undertakings levelled against the finding, in the contested decision, of the existence of an advantage favouring the beneficiaries of the tax rulings.

First, the Court confirms that the Commission did indeed consider the advantage criterion and disclosed the factors taken into account in considering the existence of an advantage. The fact that the analysis of advantage was included in a section that also covers the examination of selectivity did not have any impact in that regard. Secondly, the Court notes that the implementation of the excess profit scheme, characterised by the grant of exemptions in disregard of the legal conditions applicable, was capable of resulting in a reduction of the tax which the benefiting entities would otherwise have had to pay. In those circumstances, the Commission cannot be criticised for having found that that scheme was such as to favour its beneficiaries.

The Court rejects, moreover, the various complaints put forward to counter the Commission's finding, concluding its primary line of reasoning, that the excess profit scheme derogated from the ordinary Belgian corporate income tax system, in that the Belgian tax authorities' practice of making a unilateral downward adjustment without the need to establish that the profit that was to be adjusted had been included in the profit of another company, and that it was profit which would have been made by that other company if the relevant transactions had been between independent companies, was not provided for by that system. The Court also rejects the complaints against the Commission's conclusion that the advantage resulting from that practice of the Belgian tax authorities, in derogation from the reference system, was not available to all entities in a similar legal and factual situation.

In the first place, the Court rules that, in the light of the administrative practice of the tax authorities, the Commission did not err in finding that the entities forming part of a multinational group which

benefited from the excess profit exemption were treated differently from other entities in Belgium that did not benefit from it, although those entities were in a comparable factual and legal situation in the light of the objective of the ordinary tax rules, which is the taxation of all taxable profits of all companies resident or operating through a permanent establishment in Belgium.

In the second place, the Court finds that the Commission did not, moreover, make an error of assessment when it stated that the scheme at issue was selective in that it excluded companies that had decided not to make investments, centralise activities or create employment in Belgium. In fact, it was apparent from the sample of tax rulings analysed in the contested decision that all of those rulings had been granted following proposals by requesting parties to invest, to relocate certain operations or to create a certain number of jobs in Belgium.

In the third place, in view of the fact that none of the tax rulings in that sample concerned entities belonging to small groups of undertakings, the Commission also cannot be criticised for having stated that the scheme at issue was selective in that it was not open to undertakings that were part of a small group.

In those circumstances, the Court does not consider it necessary to examine the complaints against the Commission's subsidiary line of reasoning as to selectivity, in so far as the excess profit exemption derogated from the arm's length principle.

The Court also rejects the arguments put forward by the Kingdom of Belgium to the effect that the excess profit scheme was not financed through State resources since the excess profit did not fall within its tax jurisdiction.

On that point, the Court makes clear that, under the ordinary system of taxation of corporate profits in Belgium, the total amount of profit recorded by resident companies is, fundamentally, taxable in Belgium. Thus, it is by taking into account that choice made by the Belgian legislature, in the exercise of its tax jurisdiction, that the Commission was able to conclude that the non-taxation of the excess profit of Belgian entities of multinational groups, when it was, fundamentally, taxable profit, constituted a loss of resources that belonged to that State.

The Kingdom of Belgium's argument that the excess profit exemption, as applied by the tax authorities, was justified by the nature and general scheme of the tax system and, more specifically, by the objective of avoiding double taxation, is not compelling either. In practice, that exemption was not conditional upon proof that the excess profit had been included in the profit of another associated company or that it had actually been taxed in another State. The Commission was, therefore, right to conclude that the exemption system at issue did not address situations of double taxation in a necessary and proportionate manner.

Nor had the Commission erred in finding that the excess profit exemption scheme distorted or threatened to distort competition and was liable to affect trade within the European Union.

In that regard, the Court notes that the exemption system at issue was capable of altering the activities within the groups of undertakings that included a Belgian entity, in that decisions on making investments, the location of activities and creating employment were liable to be taken in such a way that that Belgian entity would make profits that would subsequently be exempt in Belgium. In those circumstances, the Commission cannot be criticised for having found that the aid granted by the tax rulings was liable to affect trade between the Member States and to distort or threaten to distort competition.

The Court rejects, moreover, the pleas put forward by the Kingdom of Belgium and the applicant undertakings alleging errors by the Commission in identifying the Belgian entities that had obtained an advance ruling and the multinational groups to which those entities belonged as beneficiaries of the scheme at issue.

On that point, the Court states that, in the contested decision, the Commission highlighted elements that supported its conclusion that there were, in principle, links of control within the multinational corporate groups to which the Belgian entities that had obtained advance rulings belonged. In view of those elements, the Commission did not exceed the limits of its broad discretion when it found that those groups constituted an economic unit with those entities, benefiting from State aid under the scheme at issue, within the meaning of Article 107(1) TFEU. Nor, in the light of those considerations, had the Commission breached the principles of legal certainty and legality by ordering that the unlawful aid be recovered from those groups.

Furthermore, it is also apparent from the contested decision that the Commission had, in accordance with the case-law, provided explanations enabling the Kingdom of Belgium to look at the individual situation of each undertaking concerned both as regards the beneficiaries from which the aid was to be recovered and the amount to be recovered.

In the same context, the Court rejects the arguments of the applicant undertakings alleging breach of the principle of proportionality in that recovery was ordered from all beneficiaries, regardless of their size, resources and degree of sophistication. Indeed, since recovery of State aid is the only consequence of its unlawfulness and of its incompatibility with the rules on State aid, it cannot be contingent on the situation of its beneficiaries.

Lastly, the Court rejects the complaint of the applicant undertakings that, in ordering the recovery of an amount equal to the tax that would have been imposed on the beneficiaries' income had a tax ruling not been issued, without taking into account any upward adjustments that might have been made by another tax administration in respect of the excess profit, the contested decision had required an amount to be recovered that might have been higher than the advantage received by the beneficiaries.

In that regard, the Court recalls, first, that the Commission is not required to carry out an analysis of the aid granted in individual cases under an aid scheme. It is only at the stage of recovery of the aid that it becomes necessary to look at the individual situation of each undertaking concerned. Secondly, and in any event, the contested decision does not affect the rights on which any taxpayer may rely, under the double taxation treaties applicable, inter alia, in order to secure an appropriate adjustment of that taxpayer's taxable profit, following an upward adjustment by the tax authorities of other jurisdictions.

Judgment of 27 September 2023, *Banco Santander and Others* v *Commission* (T-12/15, T-158/15 and T-258/15, EU:T:2023:583)

(State aid – Aid scheme implemented by Spain – Deduction of corporation tax allowing companies which are tax resident in Spain to amortise goodwill resulting from the indirect acquisition of shareholdings in non-resident companies through the direct acquisition of shareholdings in non-resident holding companies – Decision declaring the aid scheme unlawful and incompatible with the internal market and ordering the recovery of the aid paid out – Decision 2011/5/EC – Decision 2011/282/EU – Scope – Withdrawal of an act – Legal certainty – Legitimate expectations)

In order to encourage investment abroad by Spanish companies, Article 12(5) of the Spanish Law on Corporation Tax ('the TRLIS') [451] provides, subject to certain conditions, for a tax amortisation of financial

[451] Ley 43/1995 del Impuesto sobre Sociedades (Law 43/1995 on corporation tax) of 27 December 1995 (BOE No 310 of 28 December 1995, p. 37072).

goodwill in the case of the acquisition of shareholdings of at least 5% in a foreign company. For the purposes of that provision, financial goodwill is defined as the part of the difference between the purchase price of the shareholding and its book value on the date of the acquisition that has not been booked under the goods and rights of the non-resident company.

In 2005 and 2006, that tax amortisation scheme ('the scheme at issue') was the subject of several questions from Members of the European Parliament. [452] In its replies of 19 January and 17 February 2006, the European Commission stated that the scheme did not fall within the scope of the State aid rules.

By letter of 26 March 2007, the Commission nevertheless asked the Spanish authorities to provide it with information so that it could assess the scope and effects of the scheme at issue, in particular as regards the types of transactions covered. In response, the Spanish authorities stated that only the financial goodwill arising from direct acquisitions was deductible under the scheme at issue.

Having initiated the formal investigation procedure by a decision published in summary form in December 2007, the Commission adopted Decisions 2011/5 [453] and 2011/282 [454] declaring the scheme at issue incompatible with the internal market ('the initial decisions'). However, in the light of the legitimate expectation created on the part of certain beneficiary undertakings by the Commission's replies of 19 January and 17 February 2006, the Commission accepted that the scheme could continue to apply for the entire amortisation period provided for therein to acquisitions of shareholdings which took place before the publication of the decision to initiate the formal investigation procedure or, under certain conditions, before the publication of Decision 2011/282.

In April 2012, the Spanish authorities informed the Commission of the adoption of a new binding opinion by the Spanish Directorate-General for Taxation, according to which financial goodwill arising not only from direct, but now also from indirect acquisitions of shareholdings in foreign companies, including those already carried out, was covered by the scheme at issue ('the new administrative interpretation').

After initiating a second formal investigation procedure, the Commission found, by decision of 15 October 2014, [455] that the new administrative interpretation was not covered by the initial decisions and that it constituted new aid that was incompatible with the internal market. The Commission also refused to recognise the existence of a legitimate expectation entertained by certain beneficiary undertakings under the conditions laid down in that regard in the initial decisions. Consequently, the

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452 That scheme has also already given rise, inter alia, to the judgments of 21 December 2016, ***Commission*** **v** ***World Duty Free Group and Others*** (C-20/15 P and C-21/15 P, EU:C:2016:981); of 6 October 2021, ***Sigma Alimentos Exterior*** **v** ***Commission*** (C-50/19 P, EU:C:2021:792); of 6 October 2021, ***World Duty Free Group and Spain*** **v** ***Commission*** (C-51/19 P and C-64/19 P, EU:C:2021:793); of 6 October 2021, ***Banco Santander*** **v** ***Commission*** (C-52/19 P, EU:C:2021:794); of 6 October 2021, ***Banco Santander and Others*** **v** ***Commission*** (C-53/19 P and C-65/19 P, EU:C:2021:795); of 6 October 2021, ***Axa Mediterranean*** **v** ***Commission*** (C-54/19 P, EU:C:2021:796); of 6 October 2021, ***Prosegur Compañía de Seguridad*** **v** ***Commission*** (C-55/19 P, EU:C:2021:797); and of 15 November 2018, ***Deutsche Telekom*** **v** ***Commission*** (T-207/10, EU:T:2018:786).

453 Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

454 Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C-45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1).

455 Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain – Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2015 L 56, p. 38; 'the contested decision').

Commission required the Kingdom of Spain to put an end to the aid scheme as a result of the new administrative interpretation and to recover all the aid granted under it.

Seised of several actions for annulment brought by Spanish undertakings which benefited from a tax amortisation of financial goodwill from indirect acquisition of shareholdings in foreign companies, the Court annuls the contested decision for infringement of the principles of legal certainty and the protection of legitimate expectations.

Findings of the Court

In support of their actions, the applicants challenged, in the first place, the Commission's classification of the new administrative interpretation as new aid. In that context, they argued, in essence, that indirect shareholding acquisitions were already covered by the initial decisions, so that the Commission was no longer entitled to adopt the contested decision specifically in respect of that type of transaction.

In that regard, the Court notes, first, that it is apparent from the wording of the initial decisions that, despite the assurances provided by the Spanish authorities during the administrative procedure, according to which the scheme at issue related only to direct acquisitions, the Commission examined that scheme as covering both direct and indirect acquisitions of shareholdings. Moreover, it cannot validly be inferred from the evidence put forward by the Commission in the contested decision that the new administrative interpretation had broadened the scope of Article 12(5) of the TRLIS.

In the light of those considerations, the Court finds that, contrary to the Commission's finding in the contested decision, the initial decisions already covered indirect shareholding acquisitions for the purposes of applying the scheme at issue.

In those circumstances, the Court then examines whether the Commission was entitled to adopt the contested decision, having regard to the scope of the initial decisions.

On that point, the Court points out that the contested decision requires the Kingdom of Spain to recover all the aid granted under that scheme, as applied to indirect acquisitions, whereas some of that aid was not subject to the recovery obligation under the initial decisions because of the legitimate expectation recognised by the Commission in those decisions. Such a result is tantamount to withdrawing the initial decisions, in so far as they related to indirect acquisitions.

In accordance with Article 9 of Regulation No 659/1999, [456] read in conjunction with Article 13(3) thereof, it is true that a decision may be revoked where it was based on incorrect information provided during the procedure which was a determining factor for the decision. However, there is nothing in the documents before the Court, nor is there anything which the Commission relies on, to show that the contested decision was based on inaccurate information provided during the administrative procedure leading to its adoption.

Similarly, although the abovementioned provisions of Regulation No 659/1999 are merely a specific expression of the general principle of law according to which retroactive withdrawal of an unlawful administrative act which has created individual rights is permissible, the Commission has never claimed that the initial decisions were unlawful in that they related to indirect acquisitions of shareholdings. In fact, the case at hand does not by any means concern the withdrawal of an unlawful act, but the

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

withdrawal of two legal decisions, namely the initial decisions in so far as they related to indirect acquisitions.

According to settled case-law, the retroactive withdrawal of a lawful administrative act which has conferred individual rights or similar benefits is contrary to the general principles of law.

In that regard, the Court finds that the initial decisions conferred on the Kingdom of Spain an individual right to implement the scheme at issue as regards certain acquisitions and, incidentally, on the undertakings which had benefited from that scheme an individual right not to have to repay certain unlawful aid and that the contested decision subsequently withdrew that right in respect of indirect acquisitions. Thus, in addition to undermining the principle of legal certainty, the contested decision called into question the legitimate expectation which the Spanish authorities and the undertakings concerned had been able to derive from the initial decisions that those decisions would be applicable to indirect acquisitions.

In the light of that error of law committed by the Commission, the Court annuls the contested decision in its entirety.

For the sake of completeness, the Court upholds, in the second place, the applicants' claims that the principle of the protection of legitimate expectations was infringed in the light of the replies given by the Commission to the questions put by Members of the European Parliament in 2006.

According to the Court, the Commission had given such precise, unconditional and consistent assurances in those statements to the Parliament that the beneficiaries of the scheme at issue, whether in respect of their direct acquisitions or their indirect acquisitions, entertained justified hopes that the aid scheme at issue was lawful, in the sense that it did not fall within the scope of State aid rules, and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings.

Moreover, the fact that the applicants had been aware of the initial administrative interpretation, which excluded indirect acquisitions from the scope of Article 12(5) of the TRLIS, does not deprive of legitimacy the expectations which they were able to derive from the Commission's statements. According to the case-law, only statements and conduct originating from the Commission must be taken into account in order to assess the legitimate expectation of the beneficiaries of the scheme at issue.

Therefore, even it was entitled to adopt the contested decision, the Commission could not, without erring in law, refuse to recognise, in that decision, a legitimate expectation on the part of the beneficiaries of the scheme at issue in respect of their indirect acquisitions before the publication of the decision to initiate the first formal investigation procedure, or even, under certain conditions, before the publication of Decision 2011/282, in the same terms as in the initial decisions.

Judgment of 20 December 2023, *Ryanair and Malta Air* v *Commission (Air France-KLM and Air France; COVID-19)* (T-494/21, EU:T:2023:831)

(State aid – Aid granted by France to Air France and Air France-KLM in the context of the COVID-19 pandemic – Recapitalisation – Decision declaring the aid compatible with the internal market – Action for annulment – Locus standi – Substantial adverse effect on the applicant's position on the market – Admissibility – Determination of the beneficiary of the aid in the context of a group of companies)

In April 2020, the French Republic notified the European Commission of a plan to grant aid to the airline Air France, a subsidiary of the Air France-KLM holding. The notified aid consisted of (i) a State loan guarantee covering 90% of a loan of EUR 4 billion granted by a consortium of banks and (ii) a shareholder loan of up to EUR 3 billion.

Subsequently, in March 2021, the French Republic notified the Commission of a plan to grant aid to Air France and the Air France-KLM holding for the recapitalisation of those two companies in the amount of EUR 4 billion, by means of a share capital increase and the conversion of the shareholder loan referred to above into a hybrid instrument equivalent to an equity participation in the Air France-KLM holding.

Those measures, which form part of a series of other aid measures aimed at supporting the companies forming part of the Air France-KLM group, were intended to finance the immediate liquidity needs of Air France and the Air France-KLM holding in order to help them overcome the adverse effects of the COVID-19 pandemic.

By decision of 4 May 2020 ('the Air France decision'), [457] corrected on two separate occasions in December 2020 and July 2021, and by decision of 5 April 2021 ('the Air France-KLM and Air France decision'), [458] the Commission concluded that the notified measures constituted State aid compatible with the internal market under (i) Article 107(3)(b) TFEU [459] and (ii) its communication of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak'. [460]

In the Air France decision, the Commission considered that the beneficiaries of the notified aid were Air France and its subsidiaries. Accordingly, neither the Air France-KLM holding nor its other subsidiaries, including KLM and the companies controlled by that company, were considered to be beneficiaries of that measure. In the Air France-KLM and Air France decision, the Commission identified both Air France and its subsidiaries and the Air France-KLM holding and its subsidiaries – with the sole exception of KLM and its subsidiaries – as beneficiaries of the notified aid.

The airlines Ryanair and Malta Air have brought actions seeking the annulment of the abovementioned Commission decisions. The Eighth Chamber (Extended Composition) of the General Court upholds those actions and finds that the Commission committed a manifest error of assessment in determining the beneficiaries of the notified aid and, therefore, acted in breach of Article 107(3)(b) TFEU. In that context, the Court clarifies how the beneficiaries of an aid measure should be determined in the context of a group of companies.

Findings of the Court

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457 Decision C(2020) 2983 final of 4 May 2020 on State Aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021.

458 Commission Decision C(2021) 2488 final of 5 April 2021 on State Aid SA.59913 – France – COVID-19 – Recapitalisation of Air France and the Air France – KLM Holding and Commission Decision C(2020) 2983 final of 4 May 2020 on State aid SA.57082 (2020/N) – France – COVID-19 – Temporary Framework 107(3)(b) – Guarantee and shareholder loan for Air France, as corrected by Decisions C(2020) 9384 final of 17 December 2020 and C(2021) 5701 final of 26 July 2021 ('the contested decisions').

459 Pursuant to Article 107(3)(b) TFEU, aid to remedy a serious disturbance in the economy of a Member State may, under certain circumstances, be considered to be compatible with the internal market.

460 Communication from the Commission of 20 March 2020 on the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ 2020 C 91 I, p. 1), as amended on 4 April 2020 (OJ 2020 C 112 I, p. 1), 13 May 2020 (OJ 2020 C 164, p. 3) and 29 June 2020 (OJ 2020 C 218, p. 3) ('the Temporary Framework').

In support of their actions, the applicants challenged, inter alia, the exclusion of, on the one hand, the Air France-KLM holding and KLM (the Air France decision) and, on the other, KLM (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified measures.

In that regard, the Court recalls that, although the Commission has a broad discretion when it is called upon to identify the beneficiaries of a notified aid measure, the fact remains that the EU judicature must establish not only whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the relevant information which must be taken into account and whether it is capable of substantiating the conclusions drawn from it.

Furthermore, it is apparent from the case-law and from the Commission Notice on the notion of State aid [461] that several separate legal entities may be considered to form one economic unit for the purposes of the application of the rules on State aid. The factors taken into account in order to determine whether such an economic unit exists include, inter alia, the capital, organic, functional and economic links between the entities concerned, the agreements providing for the grant of the notified aid and the context in which that aid is granted.

In the light of those clarifications, the Court notes, first of all, that the capital and organic links within the Air France-KLM group as described in the contested decisions indicate that the separate legal entities within that group form a single economic unit for the purposes of the application of the rules on State aid. In that regard, the Court emphasises that it follows from the Commission's findings that the Air France-KLM holding actually exercises control over Air France and KLM by involving itself directly or indirectly in their management and thus takes part in the economic activity carried out by them. Moreover, according to those findings, there is, at the level of the Air France-KLM group, a centralised decision-making procedure and a certain degree of coordination, carried out through joint bodies bringing together high-level representatives of the Air France-KLM holding, Air France and KLM, at least as regards the way in which certain important decisions are taken.

The Commission's conclusion that the Air France-KLM holding, Air France and KLM do not constitute an economic unit for the purpose of identifying the beneficiaries of the notified aid measures is also undermined by the functional and economic links between those entities. The description of those links in the contested decisions and the various examples relied on in that regard by Ryanair and Malta Air demonstrate a degree of functional, commercial and financial integration and cooperation between those entities.

Next, the Court notes that, contrary to the Commission's arguments, the contractual framework on the basis of which the notified measures are granted and the commitments given by the French Republic in the context of the Air France-KLM and Air France decision do not preclude the Air France-KLM holding, Air France and KLM from being classified as an economic unit. In that regard, the Court states that neither the contractual clauses cited by the Commission nor the commitments given by the French Republic allow the circle of beneficiaries of the measures notified to Air France to be restricted to the Air France-KLM holding and Air France respectively. With regard to the Air France-KLM and Air France decision, the Court also notes that the improvement of the financial position of the Air France-KLM holding following the notified measure has the effect, in any event, of excluding the risk of its default and, by extension, the default of its subsidiary KLM and the companies controlled by KLM.

Furthermore, in view of the chronological and structural link between the measures forming the subject matter of the contested decisions, and noting that the Air France-KLM and Air France decision was

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461 Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

adopted before the second corrigendum to the Air France decision, the Court finds that the existence of each of those decisions should have been taken into account by the Commission in its examination of the notified measures. Accordingly, the Commission failed to explain why it defined the beneficiaries of the notified aid measures differently in the contested decisions.

Lastly, the Court rejects the Commission's line of argument according to which the notified aid measures have, at most, merely secondary economic effects vis-à-vis the Air France-KLM holding and its other subsidiaries (the Air France decision) and vis-à-vis KLM and its subsidiaries (the Air France-KLM and Air France decision). In that regard, the Court recalls that the foreseeable effects of those measures from an *ex ante* perspective suggest that the financing solution provided for was likely to benefit the Air France-KLM group as a whole, by improving its overall financial position. In accordance with the Commission Notice on the notion of State aid, such a financing solution indicates the existence, at the very least, of an indirect advantage in favour of the Air France-KLM group, including KLM and its subsidiaries.

In the light of all of those factors, the Court concludes that the Commission committed a manifest error of assessment in excluding, on the one hand, the Air France-KLM holding and its other subsidiaries, including KLM and KLM's subsidiaries (the Air France decision), and, on the other, KLM and its subsidiaries (the Air France-KLM and Air France decision) from the scope of the beneficiaries of the notified aid measures. Since that incorrect identification of the beneficiaries is likely to have an impact on the entire analysis of the compatibility of the notified measures with the internal market under Article 107(3)(b) TFEU and the Temporary Framework, the Court annuls the contested decisions.

IV. Designs

Judgment of 22 March 2023, *B&Bartoni* v *EUIPO – Hypertherm (Electrode to insert into a torch)* (T-617/21, EU:T:2023:152)

(Community design – Invalidity proceedings – Registered Community design representing an electrode to insert into a torch – Ground for invalidity – Article 4(2) of Regulation (EC) No 6/2002 – Component part of a complex product)

Hypertherm, Inc. is the holder of a Community design representing an electrode to insert into a torch forming part of a plasma cutting system. The company B&Bartoni spol. s r.o filed an application for a declaration of invalidity against that Community design with the European Union Intellectual Property Office (EUIPO) on the ground that it did not meet the requirements for protection of Community designs, since the electrode was not visible during normal use of the torch. [462] That application was first of all upheld by the Invalidity Division but was subsequently dismissed by the Board of Appeal, which took the view that the product represented in the contested Community design, namely the electrode at issue, could not be regarded as a component part of a complex product.

Sitting as a chamber in extended composition, the General Court interprets the concept of 'component part of a complex product' as set out in Article 4(2) of Regulation No 6/2002. This is the first time that the Court rules on the question whether a consumable, such as the electrode in the present case, can constitute a component part of a complex product.

Findings of the Court

At the outset, the Court states that the question whether a product comes within the concept of 'component part of a complex product' must be assessed on a case-by-case basis, according to a set of relevant factors. Therefore, in order to assess whether the electrode at issue constitutes a component part of a complex product, the Court examines the relevance of four factors taken into account by the Board of Appeal in the contested decision.

In the first place, the Court takes the view that the consumable nature of the electrode is a relevant factor in assessing whether the electrode constitutes a component part of a complex product. More specifically, since the concept of 'component part of a complex product' has not been defined in Regulation No 6/2002, the standard characteristics of a consumable, such as the absence of a firm and durable connection with the complex product and the regular purchase and replacement of the electrode on account of its short lifespan are relevant factors for identifying what constitutes a component part of a complex product. In that regard, the Court observes that the component parts of a complex product are components intended to be assembled into a complex industrial or handicraft item, which can be replaced permitting disassembly and re-assembly of such an item. The electrode at issue, as a consumable item for a torch, is intended to be easily attached to the torch, consumed and used quickly, and easily replaced by the end user without that operation requiring disassembly and re-

462 Under Article 4 of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), a design applied to or incorporated in a product which constitutes a component part of a complex product is only to be considered to be new and to have individual character if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter.

assembly of that torch. In addition, the end user, who regularly purchases and replaces electrodes, is able to perceive and assess its characteristics, irrespective of its visibility once inserted into the torch.

In the second place, the Court takes the view that the question whether the replacement of a product requires disassembly and re-assembly of a complex product is also a relevant factor to be taken into consideration in determining whether such a product constitutes a component part of that complex product. The Board of Appeal's taking into account of 'disassembly' and 're-assembly' is based on Regulation No 6/2002 [463] and on the case-law of the Court of Justice. [464] Thus, a product which, when being replaced, does not require the disassembly and re-assembly of the product in which it is incorporated and which is specifically intended to be replaced regularly and in a straightforward manner by end users is less likely to constitute a component part of a complex product than a product which is normally replaced by professionals with specific expertise to carry out that replacement. In the present case, the replacement of the electrode remains a simple operation for the end user which cannot be regarded as 'disassembly' and 're-assembly' of the torch within the meaning of Regulation No 6/2002.

In the third place, the Court finds, first, that the completeness of the complex product, without the electrode at issue, is a relevant factor for the purpose of assessing the concept of 'component part of a complex product'. In that regard, the Court makes clear that, when purchasing a torch without an electrode or when the electrode is removed from the torch, the end user will not perceive that torch as being broken or incomplete. By contrast, without its component parts, a complex product will not, in principle, be perceived by the end user as a complete product capable of being subject to normal use or as a product in good condition. Furthermore, although the torch and the plasma cutting system cannot fulfil their function, namely to cut or gouge metal, without an electrode fitted in the torch, this does not mean that the electrode must be regarded as a component part of a complex product. Indeed, to claim that, in the case where a product cannot fulfil the function for which it is intended without another product, that other product must be regarded in all cases as a component part of the first product would mean that a large number of separate products, in particular of a consumable nature, without which complex products cannot fulfil the function for which they are intended, would wrongly be regarded as component parts of those complex products.

Secondly, the fact that the torch can be offered on the market without the electrode and that the electrode is commonly advertised and sold separately is also a relevant factor in order to determine whether the electrode at issue constitutes a component part of a complex product. It is true that each producer remains free to market the complex product with its component parts or to sell them separately and such a commercial decision is not a decisive factor in assessing whether a product constitutes a component part of a complex product. However, it is unusual for the purchase of a complex product not to include its actual component parts. In the present case, the complex product at issue, namely the torch, is sold either with or without the electrodes at issue.

In the fourth and last place, the Court takes the view that the interchangeability of the electrode is a factor to be taken into account in that analysis. A product which cannot be replaced by another non-identical product or be used in different complex products is, in principle, more likely to be linked in a durable and tailored manner to that complex product, and thus to constitute a component part of that complex product. Consequently, the fact that the electrode at issue can be replaced by a different electrode and that torches of different types can use the electrode at issue is a factor to be taken into account in determining that that electrode does not constitute a component of a complex product.

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463 Article 3(c) of Regulation No 6/2002.

464 Judgment of 20 December 2017, *Acacia and D'Amato* (C-397/16 and C-435/16, EU:C:2017:992, paragraph 65).

In the light of the foregoing, the Court holds that the factors relied on by the Board of Appeal are relevant and concludes that it did not err in finding that the electrode at issue constitutes a separate product and not a component part of a complex product.

V. Common foreign and security policy – Restrictive measures

1. Venezuela

Judgment of 13 September 2023, *Venezuela* v *Council* (T-65/18 RENV, EU:T:2023:529)

(Common foreign and security policy – Restrictive measures taken in view of the situation in Venezuela – Prohibition on the sale, supply, transfer or export of certain goods and services – Right to be heard – Obligation to state reasons – Material inaccuracy of the facts – Manifest error of assessment – Public international law)

Having regard to the worsening of the situation regarding human rights, the rule of law and democracy, in 2017 the Council of the European Union adopted restrictive measures in view of the situation in the Bolivarian Republic of Venezuela ('Venezuela'). Articles 2, 3, 6 and 7 of Regulation 2017/2063 [465] lay down, in essence, a prohibition on the sale, supply, transfer or export of equipment which might be used for internal repression and services related to that equipment and to military equipment to any natural or legal person, entity or body in, or for use in, Venezuela.

In 2018, Venezuela brought an action seeking the annulment of Regulation 2017/2063, in so far as the provisions of that act concerned it. Subsequently, Venezuela amended its action to cover, in addition, Decision 2018/1656 [466] and Implementing Regulation 2018/1653, [467] acts by which the Council had, respectively, extended and amended the restrictive measures adopted. By judgment of 20 September 2019, the General Court dismissed that action as inadmissible, on the ground that Venezuela's legal situation was not directly affected by the provisions at issue. [468] Hearing the appeal, the Court of Justice, by judgment of 22 June 2021, [469] set aside the decision of the General Court, holding that Venezuela did indeed have standing to bring proceedings against Articles 2, 3, 6 and 7 of Regulation 2017/2063. [470] It also referred the case back to the General Court for a ruling on the substance.

In its judgment, delivered by the Grand Chamber and dismissing the action, the General Court, in an unprecedented situation, regarding an action brought by a third State in the field of restrictive measures, rules on Venezuela's right to be heard and on the alleged infringements of international law relied on by that party.

Findings of the Court

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465 Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela (OJ 2017 L 295, p. 21; 'the contested regulation').

466 Council Decision (CFSP) 2018/1656 of 6 November 2018 amending Decision (CFSP) 2017/2074 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 10).

467 Council Implementing Regulation (EU) 2018/1653 of 6 November 2018 implementing Regulation (EU) 2017/2063 concerning restrictive measures in view of the situation in Venezuela (OJ 2018 L 276, p. 1).

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

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

470 In that judgment, the Court of Justice indicated that the initial judgment had become final concerning the inadmissibility of the action with regard to Implementing Regulation 2018/1653 and Decision 2018/1656.

As a preliminary point, the Court finds that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the contested regulation constitute restrictive measures of general application, as they constitute, in accordance with Article 215(1) TFEU, measures interrupting or reducing economic relations with a third country as regards certain goods and services. Those measures do not target identified natural or legal persons, but apply to objectively determined situations and to a category of persons viewed generally and in the abstract.

Regarding, in the first place, the plea alleging infringement of the right to be heard, the Court recalls, first of all, that the right to be heard cannot be transposed, in a context such as in the present case, to the adoption of measures of general application, and that there is no provision that requires the Council to inform any person potentially affected by a new criterion of general application of the adoption of that criterion. In addition, Article 41(2)(a) of the Charter of Fundamental Rights of the European Union applies to 'individual [measures]' taken in respect of a person, with the result that that provision cannot be relied on in connection with the adoption of measures of general application. The Court also adds that the contested regulation reflects a choice made by the Union in the field of international policy. The interruption or reduction of economic relations with a third country pursuant to Article 215(1) TFEU forms part of the very definition of the common foreign and security policy (CFSP) [471] adopted by the Union authorities at their discretion, in response to a particular international situation, in order to influence such a situation. Hearing the third country concerned beforehand would, according to the Court, be tantamount to requiring the Council to conduct discussions similar to international negotiations with that country and would, accordingly, negate the desired effect of imposing those measures with regard to that country, namely exerting pressure on that country in order to bring about a change in its behaviour. Lastly, the fact that Venezuela is directly concerned by Articles 2, 3, 6 and 7 of the contested regulation cannot, in itself, confer on it the right to be heard. In the light of those various elements, the Court concludes that Venezuela cannot rely on that right with regard to the restrictive measures adopted by the Council in the contested regulation.

Regarding, in the second place, the plea alleging material inaccuracy of the facts, as well as a manifest error in assessing the political situation in Venezuela, the Court recalls that the Council has a broad discretion as to what to take into consideration for the purpose of adopting restrictive measures on the basis of Article 29 TEU and Article 215 TFEU, and that the review carried out by the EU judicature in that regard is to be restricted to checking that the rules governing procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power. That limited review applies, especially, to the assessment of the considerations of appropriateness on which such measures are based. The Court observes that, in the present case, Articles 2, 3, 6 and 7 of the contested regulation reproduce, in essence, the political position of the Union expressed in Decision 2017/2074. It states in that regard that it is apparent from recitals 1 and 8 of that decision that the restrictive measures provided for in those articles are based on the continuing deterioration of democracy, the rule of law and human rights in Venezuela, as well as, in particular, the occurrence of violence, the recurrence of which it was necessary to prevent by means of those restrictive measures.

Concerning, first of all, the items of evidence put forward by the Council in order to establish the material accuracy of the facts on which those measures are based, the Court notes that those items of evidence come from credible sources and refer in detail to, inter alia, the brutal repression, by the regime, of dissidents and opponents thereto, and the pressure put on the Prosecutor-General of Venezuela investigating security forces' conduct.

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471 As set out in the second subparagraph of Article 24(1) TEU.

Concerning, next, the items of evidence produced, in response, by Venezuela, the Court concludes that that party has not shown that the facts on which the Council relied in order to adopt the restrictive measures at issue are vitiated by material inaccuracies, as almost all of those items of evidence do not relate to Venezuela and are based on two internal government reports, which are not supported by items of evidence originating from sources outside that government.

Concerning, lastly, the Council's assessment of the political situation in Venezuela, the Court remarks that the items of evidence put forward by the applicant in that regard appear to be a means of disputing the appropriateness of adopting the restrictive measures at issue. However, it is not for the Court to substitute its own assessment regarding that matter for that expressed by the Council, which has a broad political discretion as regards defining the approach of the Union to a matter relating to the CFSP, in accordance with Article 29 TEU.

Regarding, in the third and last place, the plea alleging that unlawful countermeasures have been imposed and there has been an infringement of international law, the Court begins by recalling the wording of Article 49 – relating to the object and limits of countermeasures – of the Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the United Nations International Law Commission. [472] It emphasises, in that regard, that the contested regulation was adopted in a context of reacting to the continuing deterioration of the situation in Venezuela, with the aim of preventing, inter alia, the risk of further violence and violations of human rights in that country. The Court finds, in addition, that the restrictive measures provided for in Articles 2, 3, 6 and 7 of the contested regulation were not intended as a reaction to an internationally wrongful act imputable to Venezuela through the temporary non-performance of the Union's international obligations. It concludes from this that those measures do not constitute countermeasures for the purposes of Article 49 of the Draft articles of the ILC and, consequently, rejects Venezuela's allegations relating to the Council acting in breach of the principle of non-interference in that country's internal affairs.

Similarly, the Court rejects the argument based on the restrictive measures at issue having been adopted without the prior authorisation of the United Nations Security Council. It recalls that the Treaties give the Council the power to adopt acts containing independent restrictive measures, [473] distinct from measures specifically recommended by the United Nations Security Council. The Court notes that Venezuela has not established, in that regard, the existence of a 'general practice accepted as law', in accordance with Article 38(1)(b) of the Statute of the International Court of Justice, which would require authorisation to be obtained from the United Nations Security Council prior to the adoption, by the Council, of restrictive measures.

In addition, regarding the alleged breach of the principle of proportionality, the Court finds that there is a reasonable relationship between the restrictive measures at issue and the objective pursued, which is to prevent the risk of further violence, excessive use of force, and violations of human rights. It considers, in the light of the limited nature of the measures provided for in Articles 2, 3, 6 and 7 of the contested regulation, as well as the derogations provided for therein, that (i) those measures are not

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472 Draft adopted in 2001 by the United Nations International Law Commission ('the Draft articles of the ILC'). Article 49 states: '1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two. 2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State. 3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.'

473 Article 29 TEU and Article 215 TFEU.

manifestly inappropriate and do not go beyond what is necessary to achieve the objective pursued, and (ii) the principle of proportionality has not, therefore, been disregarded.

Accordingly, the Court rejects Venezuela's arguments alleging infringement of customary international law in view of the alleged imposing of unlawful countermeasures.

Lastly, as regards Venezuela's argument that the measures adopted by the Council involve the exercise of extraterritorial jurisdiction on the part of the Union, which is, accordingly, unlawful under international law, the Court recalls again the power conferred on the Council by the Treaties [474] in relation to the adoption of restrictive measures, as these provide for, inter alia, 'the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries'. It emphasises that the restrictive measures at issue concern persons and situations falling within the jurisdiction of the Member States *ratione loci* or *ratione personae*. The Council's power to adopt restrictive measures falls within the sphere of independent measures of the Union adopted in the context of the CFSP, in accordance with the objectives and values of the Union, [475] namely (inter alia) the objective of promoting, in the wider world, democracy, the rule of law, and the universality and indivisibility of human rights and fundamental freedoms, which constitutes a common 'legal interest' in the rights in question being protected, in accordance with the case-law of the International Court of Justice. [476]

In the light of the foregoing, the Court dismisses the action.

2. Ukraine

Judgment of 15 November 2023, *OT* v *Council* (T-193/22, EU:T:2023:716)

(Common foreign and security policy – Restrictive measures taken 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 freezing of funds and economic resources – Inclusion and maintenance of the applicant's name on the lists – Notion of 'leading businessperson' – Article 2(1)(g) of Decision 2014/145/CFSP – Plea of illegality – Obligation to state reasons – Error of assessment – Right to be heard – Right to property – Freedom to conduct a business – Proportionality – Misuse of powers)

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted, on 15 March 2022, Decision (CFSP)

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474 Article 29 TEU and Article 215 TFEU.

475 Article 3(5) TEU and Article 21 TEU.

476 Judgments of the International Court of Justice of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (ICJ Reports 1970, p. 3, paras 33 and 34), and of 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (ICJ Reports 2012, p. 422, paras 68 to 70).

2022/429 [477] and Regulation 2022/427, [478] by which the applicant's name was added to the lists of persons, entities and bodies adopted by the Council since 2014 [479] on grounds of supporting actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

The applicant, a businessman who is a Russian national, had his funds and banking assets frozen by the Council pursuant to Article 2(1)(d) and (g) of Decision 2014/145 on the ground that, as a major shareholder of a large Russian conglomerate which is one of Russia's largest taxpayers, he is believed to be one of the most influential persons in Russia with ties to the Russian President, who has not failed to reward that conglomerate for its loyalty to the Russian authorities. Those measures were extended in respect of the applicant by Decision (CFSP) 2022/1530 [480] and Regulation 2022/1529 [481] of 14 September 2022 for the same reasons.

The applicant brought an action for annulment of the Council acts before the General Court of the European Union.

The Court, which dismisses the action for annulment brought by the applicant in its entirety, rules inter alia, in the examination of a plea of illegality, on the legality of the listing criteria adopted by the Council, which are based in particular on the applicant's material and financial support of the Russian Government and the benefit he obtains in return, and on his status as a leading businessperson involved in economic sectors providing a substantial source of revenue to the Russian Government.

Findings of the Court

With regard to the plea of illegality raised by the applicant concerning Article 1(d) and (g) of Regulation 2022/330 [482] ('criterion (d)' and 'criterion (g)'), which, in his view, breach inter alia the principle of legal certainty and have recourse to criteria which are inappropriate having regard to the objectives of those

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477 Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 871, p. 44).

478 Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing 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 871, p. 1).

479 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).

480 Council Decision (CFSP) 2022/1530 of 14 September 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 239, p. 149-296).

481 Council Implementing Regulation (EU) 2022/1529 of 14 September 2022 implementing 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 239, p. 1).

482 Council Regulation (EU) 2022/330 of 25 February 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 51, p. 1). Under Article 1 thereof:

'… 1. Annex I shall include: …

(d) natural or legal persons, entities or bodies supporting, materially or financially, or benefiting from Russian decision-makers responsible for the annexation of Crimea or the destabilisation of Ukraine;

…

(g) leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine, and natural or legal persons, entities or bodies associated with them.'

measures, the Court notes that it is absolutely clear from its wording that criterion (d) applies in a targeted and selective manner to persons who, even if they do not, as such, have any link with the destabilisation of Ukraine, support, materially or financially, or benefit from Russian decision-makers responsible for that destabilisation. In addition, that criterion does not require that the persons or entities concerned benefit personally from the annexation of Crimea or the destabilisation of Ukraine.

In respect of criterion (g), the Court holds that its wording refers sufficiently clearly and precisely to leading businesspersons involved in sectors providing a substantial source of revenue to the Russian Government. It follows that the persons referred to may be considered to be influential on account of their importance in the sector in which they are involved and the importance of that sector for the Russian economy. Furthermore, there is a rational connection between their targeting and the objective of the restrictive measures at issue, which is to increase pressure on Russia and the costs of Russia's actions to undermine the territorial integrity, sovereignty and independence of Ukraine. The Court also states that those criteria, as interpreted in the light of the legislative and historical content in which they were adopted, are not manifestly inappropriate having regard to the objective of the restrictive measures and the prime importance of maintaining peace. Accordingly, it rejects the complaint alleging breach of the principle of legal certainty, the complaint disputing that those criteria are necessary and appropriate and, therefore, the plea of illegality.

With regard, further, to the manifest error of assessment relied on by the applicant, alleging, first, the purported absence of probative value of the evidence produced in support of criterion (g), the Court recalls that the activity of the EU Courts is governed by the principle of the unfettered assessment of the evidence. The evidence must be assessed according to its credibility, having regard to the reliability of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears to be sound and reliable. In the absence of investigative powers in third countries, the assessment of the EU authorities may, moreover, rely on publicly available sources of information. In that regard, the Court notes that the conflict situation involving Russia and Ukraine can make it particularly difficult to access the primary source of some information and to collect testimonies from persons who agree to be identified and states that ensuing investigation difficulties can prevent specific evidence and objective information from being provided. In the light of those considerations, the Court concludes that in the case at issue the probative value of the items in the evidence file provided by the Council cannot be discounted.

Second, as regards the second part of the plea in law, the Court points out that that plea in law must be regarded as alleging an error of assessment of the facts having regard to criterion (g) and not a 'manifestly' incorrect assessment of the facts, as the EU Courts must ensure the review, in principle the full review, of the lawfulness of all EU acts. It also states that the judicial review [483] must be effective and is based, in particular, on a verification of the factual allegations in the summary of reasons underpinning the decision at issue. Furthermore, the assessment whether the reasons relied on against the person concerned are well founded must be carried out by examining the evidence and information in its context. The Council thus discharges the burden of proof borne by it if it presents to the EU Courts a set of indicia sufficiently specific, precise and consistent to establish that there is a sufficient link between the person concerned and the regime or the situations being combated.

With regard, in the first place, to the initial inclusion of the applicant on the lists based on criterion (g), the Court notes that that criterion has recourse to the notion of 'leading businesspersons' in connection with involvement in 'economic sectors providing a substantial source of revenue to the [Russian] Government', without any other condition concerning a link, whether direct or indirect, with that

483 Article 47 of the Charter of Fundamental Rights of the European Union.

government. In that respect, there is a rational connection between the targeting of that category of persons and the objective of the restrictive measures in question, which is to increase pressure on Russia and the costs of its actions against Ukraine. The Court states that an interpretation to the contrary would run counter to both the wording of criterion (g) and the objective pursued. Having regard to the wording, the persons referred to must be considered to be 'leading' on account of their importance in the sector in which they are involved and the importance of that sector for the Russian economy. As for the objective of the restrictive measures at issue, the Court notes that it is not to penalise certain persons or entities because of their links with the situation in Ukraine or with the Russian Government, but to impose economic sanctions on Russia in order to increase pressure on it and the costs of its actions against Ukraine. It concludes that criterion (g) does not require the Council to demonstrate the existence of close links or a relationship of interdependence with the Russian Government nor is it dependent on the imputability to the applicant of the decisions to continue the conflict in Ukraine or a direct or indirect link with the destabilisation of that country.

In this regard, the Court observes that the Council did not commit an error of assessment by considering the applicant to be a leading businessperson, describing him, inter alia, as a 'major shareholder of the Alfa Group conglomerate', even though he sold his shares in that company. In view of criterion (g), the notion of 'leading businesspersons' refers to facts occurring both in the past and over time with the result that the grounds for listing the applicant may refer to a factual situation which existed before the adoption of the initial acts and which has been modified, without, however, necessarily meaning that the restrictive measures adopted against him on that basis are obsolete.

With regard, in the second place, to the maintenance of the applicant's name on the lists based on that criterion, the Court points out that it is for the Council, in the course of the periodic review of restrictive measures, to conduct an updated assessment of the situation and to appraise the impact of the previously adopted measures in the light of their objective in respect of the persons concerned. In order to justify such maintenance, the Council may base its decision on the same evidence justifying the initial inclusion, provided that the grounds for inclusion remain unchanged and the context has not changed in such a way that that evidence is now out of date. In the present case, the Court notes that the purported sale of the applicant's shares in ABH Holdings has not been established by sufficiently convincing evidence. Consequently, the Council was fully entitled to take the view that the applicant's individual situation had not really changed since his initial inclusion on the lists at issue. The Council did not therefore commit an error of assessment in maintaining the restrictive measures at issue.

Lastly, as regards the breaches of the principle of proportionality, the right to property, the freedom to conduct a business and the right to pursue a profession alleged by the applicant, the Court holds that the disadvantages suffered by the applicant in that regard are not disproportionate in view of the importance of the objective pursued by the contested acts.

Accordingly, the Court dismisses the action in its entirety.

VI. Agriculture and fisheries

Judgment of 8 March 2023, *Bulgaria* v *Commission* (T-235/21, EU:T:2023:105)

(EAGF and EAFRD – Expenditure excluded from financing – Expenditure incurred by Bulgaria – Promotional measures – OLAF investigation report – Conformity clearance – Obligation to state reasons)

In 2017, the European Commission opened a conformity clearance procedure in respect of certain expenditure incurred by the Republic of Bulgaria under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD). The communication of the findings sent to that Member State indicated that, in accordance with Article 52 of Regulation No 1306/2013 [484] and in the light of the information resulting from an investigation by the European Anti-Fraud Office (OLAF), the Commission was examining the possibility of excluding part of that expenditure from EU financing.

An initial bilateral meeting between the Commission and the Bulgarian authorities took place in July 2017. The Commission then sent OLAF's initial final report to the Republic of Bulgaria and then, in May 2018, invited the Republic of Bulgaria to a second bilateral meeting. The summons referred to Article 54 [485] of Regulation No 1306/2013 and recommended that recovery be sought of the payments which the report considered as having been irregularly made. In its observations on the summons, the Republic of Bulgaria expressly informed the Commission that it did not intend to proceed with recovery immediately since a decision had not yet been handed down in the preliminary criminal proceedings opened in that connection. In September 2018, the Commission sent OLAF's second final report on irregularities concerning the expenditure in question.

In August 2020, in its final opinion, the Commission stated that it maintained its position of imposing on the Republic of Bulgaria a financial correction based on Article 54(5)(a) and (c) of Regulation No 1306/2013, on account of the fact that the paying agency was negligent by failing to seek recovery of the expenditure at issue from the beneficiaries within the time limits laid down by those provisions.

In February 2021, by Implementing Decision (EU) 2021/261 [486] ('the contested decision'), the Commission excluded an amount of EUR 7 656 848.97 from EU financing.

The Republic of Bulgaria sought annulment of that decision before the General Court. The pleas which it raises concern, inter alia, infringement of its procedural rights, the incorrect determination of the starting point of the period laid down for the recovery of undue payments, and error of assessment concerning the paying agency's duty of diligence with regard to that recovery.

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484 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). Article 52 sets out the procedure for applying corrections in the context of clearance in the event of deficiencies in the management and control systems of the Member States.

485 This provision concerns the procedure for the recovery of undue payments.

486 Commission Implementing Decision (EU) 2021/261 of 17 February 2021 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 2021 L 59, p. 10).

The Court dismisses the action and rules, in that context, on an unprecedented question of interpretation of Article 52 and Article 54(5)(a) and (c) of Regulation No 1306/2013.

Findings of the Court

First of all, the Court rejects the plea raised by the Republic of Bulgaria that it did not benefit, during the clearance procedure, from the procedural guarantees referred to in Article 52 of Regulation No 1306/2013 and Article 34 of Implementing Regulation No 908/2014. [487]

It is true that the reasons for the financial correction set out in the contested decision correspond only in part to the grounds set out by the Commission in the communication of the findings in order to justify initiating the clearance procedure. However, in the light of the content of the invitation to the second bilateral meeting, in particular the indication of the irregularities capable of justifying a financial correction and the corrective measures to be envisaged, such as the recovery of expenditure, that invitation may be regarded as having, in essence, adapted the communication of the findings.

The Republic of Bulgaria cannot therefore maintain that it was not put in a position to understand that a financial correction could be imposed on it if it failed to initiate a procedure for the recovery of the expenditure at issue, in accordance with Article 54 of Regulation No 1306/2013. Moreover, all matters relating to the application of that provision were discussed later in the subsequent stages of the clearance procedure.

Next, the Court rejects the argument put forward by the Republic of Bulgaria that only the notification of the contested decision, and not of OLAF's final reports, constitutes the time of receipt of a 'control report or similar document' and, consequently, the starting point for the 18-month period for the recovery of the payments concerned. [488]

In that regard, the Court notes that, if the legislature had intended to set the starting point for that period at the time of the formal completion of the clearance procedure, laid down in Article 52 of Regulation No 1306/2013, it would have expressly referred to implementing acts such as the contested decision. Furthermore, it did not refer to a control report or similar document, since the use of those two concepts suggests that they may be documents of various kinds, whereas only decisions may close the clearance procedure.

Moreover, the purpose of a control report or similar document is to indicate the existence of an irregularity and not to determine the amount of expenditure which should be excluded from EU financing. Therefore, contrary to what is claimed by the Republic of Bulgaria, the fact that OLAF's final reports did not allow the amount of expenditure to be excluded from EU financing to be definitively fixed and could not automatically lead to the initiation of administrative or judicial proceedings at national level, does not prejudge their classification as control reports or similar documents.

Finally, the Court rejects the plea that the Commission made an error of assessment in finding that the paying agency of the Republic of Bulgaria did not act with due diligence and acted negligently in failing

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487 Commission Implementing Regulation (EU) No 908/2014 of 6 August 2014 laying down rules for the application of Regulation 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). Article 34 specifies the different stages of the conformity clearance procedure.

488 Under Article 54(1) of Regulation No 1306/2013, 'for any undue payment following the occurrence of irregularity or negligence, Member States shall require recovery from the beneficiary within 18 months of the approval and, where applicable, reception, by the paying agency or body responsible for the recovery, of a control report or similar document, stating that an irregularity has taken place'.

to seek recovery of the expenditure at issue from the beneficiaries within the time limits laid down in Article 54 of Regulation No 1306/2013.

According to the case-law, first, it is for the Member States to choose the appropriate means of ensuring the effectiveness of controls and the prompt recovery of unduly paid aid. However, the initiation of criminal proceedings does not necessarily mean that the competent authorities may refrain, moreover, from any measure aimed, if not at recovery, at least at securing a claim resulting from an undue payment. Second, the length of administrative or legal proceedings initiated by the paying agency cannot justify a failure to comply with the duty of diligence, which requires Member States to take all necessary measures to ensure effective protection of the financial interests of the European Union and to recover sums unduly paid.

However, on the date of adoption of the contested decision, the Republic of Bulgaria had not initiated any civil or administrative proceedings for recovery of the expenditure at issue. The only proceedings brought at that time were of a criminal nature and were at the preliminary investigation stage. The time limit for completion thereof was not indicated.

Furthermore, the orders of the paying agency, which the Republic of Bulgaria claims were annulled by its own national courts, sought to suspend payments linked to the programmes concerned by the fraud referred to in OLAF's final reports, and not to recover the expenditure at issue. Accordingly, the Republic of Bulgaria cannot justify the absence of recovery measures by asserting that the measures taken by the paying agency could be annulled and therefore prove to be ineffective and costly. Moreover, there is nothing to support the assertion that, if measures for the recovery of the expenditure at issue had been adopted, they would all have been the subject of an application for annulment before the national courts or could have been annulled by those courts.

In that context, the Court points out that, under the second subparagraph of Article 54(2) of Regulation No 1306/2013, if the Republic of Bulgaria had adopted administrative recovery measures and, at the same time, the Bulgarian national courts had concluded that there had been no irregularity, it could then have declared the financial burden which it had borne in that regard to the fund at issue as expenditure.

Judgment of 12 July 2023, *Cunsorziu di i Salamaghji Corsi – Consortium des Charcutiers Corses and Others* v *Commission* (T-34/22, EU:T:2023:386)

(Protected geographical indication – Protected designation of origin – Applications for protection of the geographical indications 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' – Earlier protected designations of origin 'Jambon sec de Corse – Prisuttu', 'Lonzo de Corse – Lonzu' and 'Coppa de Corse – Coppa di Corsica' – Eligibility of names – Evocation – Article 7(1)(a) and Article 13(1)(b) of Regulation (EU) No 1151/2012 – Scope of the Commission's control of the applications for registration – Article 50(1) and Article 52(1) of Regulation No 1151/2012 – Error of assessment)

In 2014, the names 'Jambon sec de Corse'/'Jambon sec de Corse – Prisuttu', 'Lonzo de Corse'/'Lonzo de Corse – Lonzu' and 'Coppa de Corse'/'Coppa de Corse – Coppa di Corsica' were registered as protected designations of origin (PDOs). [489]

[489] Respectively, by Commission Implementing Regulation (EU) No 581/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Jambon sec de Corse/Jambon sec de Corse –

In 2015, the Cunsorziu di i Salamaghji Corsi – Consortium des Charcutiers Corses ('the Consortium') applied to the French national authorities, pursuant to Regulation No 1151/2012, [490] to register the names 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' as protected geographical indications (PGIs).

In 2018, those authorities issued decrees approving the corresponding specifications with a view to forwarding them to the European Commission for approval.

The union holding the specifications of the PDOs 'Jambon sec de Corse– Prisuttu', 'Coppa de Corse– Coppa di Corsica' and 'Lonzo de Corse– Lonzu' applied for the annulment of those decrees before the Conseil d'État (Council of State, France). It argued that the term 'Île de Beauté' imitated or evoked the term 'Corsica' and therefore caused confusion with the names already registered as PDOs. The Conseil d'État (Council of State) rejected that application on the ground, inter alia, that the use of different terms and the difference in the protections conferred by a PDO, on the one hand, and by a PGI, on the other, were such as to dispel that likelihood of confusion.

By Implementing Decision 2021/1879, [491] the Commission nevertheless refused to register the names 'Jambon sec de l'Île de Beauté', 'Lonzo de l'Île de Beauté' and 'Coppa de l'Île de Beauté' as PGIs. The Commission considered inter alia that it was well known that the name 'Île de Beauté' was a customary periphrasis which, in the eyes of the French consumer, unequivocally refers to Corsica. Therefore, the names applied for constituted a breach of the protection granted to the PDOs concerned by Article 13(1)(b) of Regulation No 1151/2012. [492] Consequently, they did not comply with the conditions for eligibility for registration, namely Article 7(1)(a) of Regulation No 1151/2012. [493]

The action brought by the Consortium and some of its members against that decision is dismissed by the General Court.

Although both the Court of Justice and the General Court have already had occasion to rule on the extent of the Commission's review of applications for registration, this case leads the General Court to rule for the first time on the eligibility of a name to be registered, a fortiori after national authorities and courts have found that consumers who are reasonably well informed and reasonably observant and circumspect would not, when faced with the PGIs applied for, directly have in mind, as a reference image, the products benefiting from PDOs already registered. In addition, this is also the first time that

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Prisuttu (PDO)) (OJ 2014 L 160, p. 23), Commission Implementing Regulation (EU) No 580/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Lonzo de Corse/Lonzo de Corse – Lonzu (PDO)) (OJ 2014 L 160, p. 21) and Commission Implementing Regulation (EU) No 582/2014 of 28 May 2014 entering a name in the register of protected designations of origin and protected geographical indications (Coppa de Corse/Coppa de Corse – Coppa di Corsica (PDO)) (OJ 2014 L 160, p. 25).

490 Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

491 Commission Implementing Decision (EU) 2021/1879 of 26 October 2021 rejecting three applications for protection of a geographical indication in accordance with Article 52(1) of Regulation (EU) No 1151/2012 of the European Parliament and of the Council 'Jambon sec de l'Île de Beauté' (PGI), 'Lonzo de l'Île de Beauté' (PGI), 'Coppa de l'Île de Beauté' (PGI) (OJ 2021 L 383, p. 1).

492 Article 13 of Regulation No 1151/2012, relating to 'protection', provides, in its paragraph 1(b), that 'registered names shall be protected against … (b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or similar, including when those products are used as an ingredient'.

493 Under Article 7(1)(a) of Regulation No 1151/2012, entitled 'Product specification', '1. A protected designation of origin or a protected geographical indication shall comply with a specification which shall include at least: (a) the name to be protected as a designation of origin or geographical indication, as it is used, whether in trade or in common language'.

the Court has ruled on whether the Commission may refuse to register a name on the basis of a combined reading of Article 7(1)(a) and Article 13(1)(b) of Regulation No 1151/2012.

Findings of the Court

The General Court rejects the plea that the Commission exceeded its powers and infringed the principle of *res judicata*.

As regards the Commission's powers, the Court finds, first, that Article 7(1)(a) of Regulation No 1151/2012, read in conjunction with Article 13(1)(b) of that regulation, may constitute a valid legal basis for refusing to register a name. Admittedly, Article 7(1)(a) relates specifically to the 'product specification' of the name which is the subject of an application for protection. However, the issue of evocation referred to in Article 13 is related to eligibility for registration under that provision. The Commission must assess, under Article 50(1) of Regulation No 1151/2012, read in the light of recital 58 thereof, following a detailed examination, whether the specification which accompanies the application for registration contains the information required by that regulation and whether that information does not appear to be vitiated by manifest errors.

That specification, the preparation of which constitutes a necessary step in the registration procedure, must include, in particular, the name for which protection is sought as it 'is used in trade or in common language'. It follows that the Commission must check that that use does not infringe the protection against evocation provided for in Article 13(1)(b) of Regulation No 1151/2012. To allow the registration of a PGI when it would be evocative of a PDO already registered would render ineffective the protection provided for in Article 13(1)(b), since once that name is registered as a PGI, the name previously registered as a PDO will no longer enjoy the protection provided for in that provision in respect of that PDO.

Accordingly, the Commission cannot be required to allow the registration of a name if it considers its use in trade to be unlawful.

Secondly, the Court clarifies the extent of the Commission's examination of the compliance of the names with the conditions set out in Regulation No 1151/2012.

In that regard, the Commission must [494] scrutinise, by appropriate means, the applications to ensure that there are no manifest errors and that Union law and the interests of stakeholders outside the Member State of application have been taken into account.

Thirdly, the Commission has a different margin of discretion depending on whether it is the first stage of the procedure for registering a name, namely the stage during which the documents constituting the file relating to the application for registration which the national authorities may forward to the Commission are collected, or the second stage of that procedure, namely its own examination of the applications for registration.

While it is apparent from the case-law [495] that, as regards the first of those two stages, the Commission has only 'limited, if any', discretion, it has a margin of independent discretion as regards its decision to

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494 Under recital 58 and Article 50(1) of Regulation No 1151/2012.

495 Judgments of 29 January 2020, ***GAEC Jeanningros*** (C-785/18, EU:C:2020:46), and of 23 April 2018, ***CRM* v *Commission*** (T-43/15, not published, EU:T:2018:208).

register a name as a PDO or PGI in the light of the conditions of eligibility for registration laid down in Article 7(1)(a) of Regulation No 1151/2012, read in conjunction with Article 13(1)(b) of that regulation.

As to an alleged infringement of the principle of *res judicata*, the General Court further states that the decision of a national court which has become *res judicata*, establishing that there was no risk, for reasonably well-informed and reasonably observant and circumspect consumers, of evocation between the registered PDOs and the PGIs applied for, cannot be relied on in order to call into question the Commission's independent assessment of those conditions of eligibility.

VII. Public health

Judgment of 4 October 2023, *Ascenza Agro and Industrias Afrasa* v *Commission* (T-77/20, EU:T:2023:602)

(Plant protection products – Regulation (EC) No 1107/2009 – Implementing Regulation (EU) 2020/17 – Non-renewal of approval of the active substance chlorpyrifos-methyl – Action for annulment – Standing to bring proceedings – Admissibility – Obligation to examine all the conditions and criteria set out in Regulation No 1107/2009 – Absence of an EFSA conclusion – Transparency obligation – Right to be heard – Obligation to state reasons – Divergent risk assessments by the rapporteur Member State and EFSA – Obligation to take into account all the relevant factors of the case – Interim report on an ongoing study – Precautionary principle – Burden of proof and matter to be proved – Manifest error of assessment – Applicability of the read-across approach and of the weight-of-evidence approach – Possibility of relying on the ECHA and EFSA guidelines)

Chlorpyrifos-methyl ('CHP-methyl') is an active substance used in plant protection products to control pests and to treat stored cereal grain and empty warehouses. CHP-methyl belongs to a group of chemicals called organophosphates, to which another active substance named chlorpyrifos also belongs.

Directive 91/414 concerning the placing of plant protection products on the market [496] established the legal regime for authorising the placing of plant protection products on the market in the European Union. CHP-methyl and chlorpyrifos were included in Annex I to that directive by Directive 2005/72. [497] The Commission's approval of CHP-methyl was extended on three occasions before expiring on 31 January 2020.

Ascenza Agro, SA [498] and Dow AgroSciences Ltd, two undertakings producing CHP-methyl ('the applicants for renewal'), each submitted an application for renewal [499] of the approval of CHP-methyl. In its draft assessment report relating to that renewal, the Kingdom of Spain, as rapporteur Member

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496 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).

497 Commission Directive 2005/72/EC of 21 October 2005 amending Council Directive 91/414/EEC to include chlorpyrifos, chlorpyrifos-methyl, mancozeb, maneb, and metiram as active substances (OJ 2005 L 279, p. 63). Directive 91/414 was replaced by Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1), under which the active substances listed in Annex I to Directive 91/414 were deemed to be approved. Those substances are now listed in Part A of the Annex to Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances (OJ 2011 L 153, p. 1).

498 Then called Sapec Agro SA.

499 The approval of an active substance is renewed, on application, where it is established that the approval criteria provided for in Article 4 of Regulation No 1107/2009 and in Annex II thereto, which concern in particular the expected impact of those active substances on human health, are satisfied. The implementation of the renewal procedure for active substances is governed by 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).

State, did not conclude that CHP-methyl had any harmful effects on human health and therefore proposed that the approval of that active substance be renewed.

The European Food Safety Authority (EFSA) organised an initial consultation of experts to assess the risks to human health of CHP-methyl. It reported on those assessments in a statement of 31 July 2019, in which it stated that the approach taken by the experts was largely based on the structural similarities between CHP-methyl and chlorpyrifos.

The experts had, in addition, noted that there was no public literature available on the genotoxic potential of CHP-methyl whereas several publications were available for chlorpyrifos, for which concerns had been raised. They had agreed that those uncertainties had to be considered in the hazard assessment of CHP-methyl and that it therefore could not be ruled out that there was a potential risk of DNA damage. Consequently no reference value could be set for either genotoxicity or developmental neurotoxicity, which made it impossible to assess the risk for consumers, operators, workers, bystanders and residents.

Following a second consultation of experts, EFSA adopted, on 8 November 2019, an updated version of its statement of 31 July 2019, in which it concluded that the criteria applicable to human health as laid down in Article 4 of Regulation No 1107/2009 for the renewal of the approval of CHP-methyl were not met. On that basis, the Commission adopted, on 10 January 2020, Implementing Regulation 2020/17 concerning the non-renewal of the approval of the active substance CHP-methyl, in accordance with Regulation No 1107/2009 [500] ('the contested regulation').

In the contested regulation the Commission based the refusal to renew the approval of CHP-methyl on three grounds. First, the fact that 'a genotoxic potential of [CHP]-methyl cannot be ruled out', second, that 'concerns were identified concerning [its] developmental neurotoxicity' and, third, that 'it may be appropriate to classify [CHP]-methyl as toxic for reproduction, category 1B'.

By their action, the applicants, Ascenza Agro and Industrias Afrasa, SA, seek the annulment of the contested regulation.

The Court, ruling in extended composition, dismisses that action and, on this occasion, rules on a number of novel questions concerning Regulation No 1107/2009 and Implementing Regulation No 844/2012. Thus, as regards procedure, it clarifies the concept of a 'conclusion' within the meaning of Article 13 of Implementing Regulation No 844/2012 and specifies the impact that the reasons for a vote cast by a Member State in the context of the opinion issued by the Standing Committee on Plants, Animals, Food and Feed ('the standing committee'), before the Commission took its decision on the renewal of the active substance in question, has on the lawfulness of the contested regulation. Furthermore, as regards the substance, the Court provides clarification on the application of the transparency obligation and the precautionary principle in the context of plant protection products. It also rules on the scope of the 'read-across' approach and the 'weight-of-evidence' approach in the context of the application of Regulation No 1107/2009.

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500 Commission Implementing Regulation (EU) 2020/17 of 10 January 2020 concerning the non-renewal of the approval of the active substance chlorpyrifos-methyl, 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 2020 L 7, p. 11). The Commission also adopted, on 10 January 2020, Commission Implementing Regulation (EU) 2020/18 concerning the non-renewal of the approval of the active substance chlorpyrifos, in accordance with Regulation No 1107/2009, and amending the Annex to Implementing Regulation No 540/2011 (OJ 2020 L 7, p. 14).

Findings of the Court

- **Existence of a 'conclusion'**

In respect of the applicants' complaint alleging that EFSA did not submit a conclusion, the Court finds that there is no definition of a 'conclusion' in Implementing Regulation No 844/2012 [501] or in Regulation No 1107/2009. [502] Nevertheless, it is apparent from those texts, first, from a procedural point of view, that the conclusion must be adopted by EFSA and communicated to the applicant for renewal, the Member States and the Commission.

Second, as regards the content of the conclusion, EFSA is required, inter alia, to specify 'whether the active substance can be expected to meet the approval criteria provided for in Article 4' of Regulation No 1107/2009. Thus, the decisive factor for establishing the existence of a conclusion is the expression of an opinion by EFSA as to the potential of an active substance to meet the requirements and fulfil the criteria laid down by that regulation.

In the present case, since EFSA took the view, in its two statements of 31 July and 8 November 2019, that CHP-methyl did not meet those requirements with regard to human health, it did indeed adopt a conclusion within the meaning of Article 13 of Implementing Regulation No 844/2012. Such a finding cannot be called into question solely by the name used to describe the documents in question, entitled 'statements', since establishing the existence of a conclusion is dependent, first and foremost, on the content of those documents.

- **Transparency obligation**

The Court recalls that it is incumbent on an affected party who invokes infringement of a transparency obligation in support of an action for annulment brought against an act of the European Union of general application to rely on an express provision conferring on it a procedural right and falling within the legal framework governing the adoption of that act.

The Court holds, first, that the contested regulation constitutes a measure of general application, without the fact that Ascenza Agro is individually concerned by that act being liable to call into question such a classification. Indeed, a distinction must be drawn between, on the one hand, the question of the general or individual application of an act, which depends on the act as such, and, on the other hand, the question of whether an ordinary applicant is individually concerned, which depends on the applicant's situation in relation to that act. Accordingly, although, in the light of the criteria laid down in the fourth paragraph of Article 263 TFEU, certain measures are, as regards their nature and their scope, of a legislative character, inasmuch as they apply to all the economic operators concerned, they may, without losing their regulatory character, in certain circumstances, concern individually certain economic operators who, if they are also directly affected by those measures, have standing to bring an action for annulment against them.

Second, compliance with the transparency obligation is, in the field of plant protection, guaranteed by specific provisions laid down by the legal framework governing the adoption of the contested regulation, namely Regulation No 1107/2009 laying down general provisions relating, in particular, to the procedure for renewal of the approval of an active substance, and Implementing Regulation

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501 See the first subparagraph of Article 13(1) of Implementing Regulation No 844/2012.

502 See the second subparagraph of Article 12(2) of Regulation No 1107/2009.

No 844/2012 laying down specific provisions relating to the implementation of the procedure for renewal of the approval of an active substance.

However, the Court notes that the applicants have not relied, in the present case, on any express provision conferring a procedural right on Ascenza Agro and falling within the legal framework governing the adoption of the contested regulation.

- **Procedure for adopting the opinion of the standing committee**

The Court notes that, in the present case, it is common ground that a favourable opinion from the standing committee on the draft contested regulation was obtained with the vote of the United Kingdom of Great Britain and Northern Ireland. Notwithstanding the foregoing, the Court notes that the applicants are in fact challenging the grounds of the contested regulation and not its adoption procedure.

It is apparent from the grounds of the contested regulation that its adoption was not based on the factors taken into account by the United Kingdom in its voting choice, with the result that the complaint put forward by the applicants is ineffective.

- **Precautionary principle**

The Court recalls that where there is uncertainty as to the existence or extent of risks to human health, the precautionary principle allows protective measures to be taken without it being necessary to wait until the reality and seriousness of those risks become fully apparent. A correct application of the precautionary principle presupposes, inter alia, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because the results of studies conducted are insufficient, inconclusive or imprecise, but the likelihood of real harm to human health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.

In the present case, the experts and EFSA carried out an assessment of the health risk of the proposed use of CHP-methyl, which revealed uncertainties. Such an approach is therefore consistent with the precautionary principle, which requires the authorities responsible for the risk assessment, such as EFSA, to communicate to the Commission not only the firm conclusions they have reached but also the remaining uncertainties, so that it can adopt restrictive measures if necessary.

- **Risk assessment methods used by EFSA and the Commission**

The Court finds, in the first place, that EFSA was fully entitled to use the read-across approach and the weight-of-evidence approach for the purpose of assessing an active substance.

Indeed, as regards, first of all, what the two approaches entail, the read-across approach [503] makes it possible to predict the properties of certain substances from existing data relating to reference substances which are structurally similar to the first substances. As regards the weight-of-evidence

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503 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), Annex XI, Section 1.5.

approach, it makes it possible to predict the properties of certain substances on the basis of data from several independent sources of information. [504]

As regards, next, the purpose of those approaches, the REACH Regulation provides [505] that, with regard to human toxicity, information on intrinsic properties of substances is to be generated as far as possible by means other than vertebrate animal tests. The use of studies and tests can thus be avoided by the use of various methods, [506] including the read-across approach and the weight-of-evidence approach. Accordingly, the read-across approach avoids the need to test every substance for every end point and may be used where there are no data on the substances subject to risk assessment. As for the weight-of-evidence approach, where it makes it possible to gather sufficient evidence to confirm the existence or absence of a particular dangerous property, that approach leads to the omission of further testing on animals. The Court concludes that the two approaches are intended, in particular, to limit the use of testing on vertebrate animals and that they therefore both make it possible to avoid testing every substance for every endpoint.

As regards, moreover, the lawfulness of the use of the two approaches by EFSA, the Court notes that the provisions of Regulation No 1107/2009 [507] and Implementing Regulation No 844/2012 leave EFSA a wide margin of discretion in the choice of assessment methods which it applies, subject to its assessment being scientific in nature. Moreover, the Court points out that the Commission is also recognised as enjoying broad discretion, in view of the complex scientific assessments that have to be made in this area. Thus, where the Commission is moved to rely on the risk assessment carried out by EFSA, the Court's review of that assessment must also be limited to manifest errors of assessment.

In that regard, the Court takes the view that, in so far as the use of the two approaches is provided for in both Regulation No 1272/2008 and the REACH Regulation, the EU legislature considered that those approaches were sufficiently reliable, from a scientific point of view, to be used for the purposes of assessing chemical substances in fields other than that of plant protection products.

Lastly, the two approaches, which make it possible to avoid testing every substance for every effect, both contribute to the reduction of animal testing and thus to the achievement of one of the objectives pursued by Regulation No 1107/2009 and, consequently, by its implementing regulation, Implementing Regulation No 844/2012.

In the second place, as regards the specific rules for applying the two approaches, the Court observes, as regards the read-across approach, that it is not disputed that CHP-methyl and chlorpyrifos belong to the same group of chemical substances and that, overall, those substances have a similar chemical structure.

As regards the weight-of-evidence approach, the Court notes that EFSA merely found that the tests and studies produced by the applicants for renewal did not make it possible to establish the existence of risks to human health, without reference being made to scientific peer-reviewed open literature, within the meaning of Article 7(1)(m) of Implementing Regulation No 844/2012. It therefore did not consider that the data produced by the applicants for renewal were sufficient to enable it to draw adequate and

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504 See Section 1.1.1.3. of Annex I to Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

505 REACH Regulation, Article 13(1).

506 Listed in Section 1 of Annex XI to the REACH Regulation.

507 See Article 4.

definitive conclusions and, in particular, to enable it to conclude that CHP-methyl posed no genotoxic risk.

On the contrary, EFSA noted in its statements of 31 July and 8 November 2019 that the experts had stated that there was no public literature available concerning the genotoxic potential of CHP-methyl whereas several publications were available for chlorpyrifos. It added that, since concerns had been raised for chlorpyrifos with regard to chromosome aberrations and DNA damage, the experts had concluded that there were data gaps for CHP-methyl. It then stated that the experts had agreed that the resulting uncertainties had to be taken into account in the risk assessment of CHP-methyl and that it therefore could not be excluded that there was a potential risk of DNA damage. Furthermore, the experts and EFSA did not consider that the scientific studies relating to the genotoxicity of CHP-methyl should have a greater impact on their conclusions than all of the other elements relating to the genotoxicity of CHP-methyl. Rather than basing the assessment of the risks associated with CHP-methyl solely on the tests and studies which the regulations required the applicant for renewal to submit, they also took account of all the relevant scientific literature available.

VIII. Energy [508]

Judgment of 15 February 2023, *Austrian Power Grid and Others* v *ACER* (T-606/20, EU:T:2023:64)

(Energy – Internal market in electricity – Framework for the implementation of the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation – Procedure for the adoption of terms, conditions and methodologies – Rejection of the joint proposal of the system operators – Competence of ACER – Error of law – Rights of the defence – Obligation to state reasons)

Judgment of 15 February 2023, *Austrian Power Grid and Others* v *ACER* (T-607/20, EU:T:2023:65)

(Energy – Internal market in electricity – Framework for the implementation of the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation – Procedure for the adoption of terms, conditions and methodologies – Rejection of the joint proposal of the system operators – Competence of ACER – Error of law – Rights of the defence – Obligation to state reasons)

European Commission Regulation 2017/2195 on electricity balancing [509] provides for the implementation of several European platforms for the exchange of balancing energy. Those platforms include, first, the European platform for the exchange of balancing energy from frequency restoration reserves with automatic activation ('the aFRR platform') and, secondly, the European platform for the exchange of balancing energy from frequency restoration reserves with manual activation ('the mFRR platform'). [510]

In accordance with the procedure set out in Regulation 2017/2195, [511] all transmission system operators ('TSOs') have submitted for approval by the national regulatory authorities ('the NRAs') [512] common methodology proposals for the implementation of the aFRR platform and the mFRR platform.

Following a joint request by the NRAs, the EU Agency for the Cooperation of Energy Regulators (ACER), under that regulation, [513] took a decision on those proposals, as amended following exchanges and consultations between ACER, the NRAs and the TSOs. Thus, ACER adopted two decisions, one on the aFRR methodology and the other on the mFRR methodology ('the ACER decisions'), to which the methodologies in question, as amended and approved by ACER, were attached as an annex.

Austrian Power Grid, ČEPS, a.s., Polskie sieci elektroenergetyczne S.A., Red Eléctrica de España SA, RTE Réseau de transport d'électricité, Svenska kraftnät, TenneT TSO BV and TenneT TSO GmbH brought an

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508 Joint résumé for cases *Austrian Power Grid and Others* v *ACER* (T-606/20) and *Austrian Power Grid and Others* v *ACER* (T-607/20).

509 Commission Regulation (EU) 2017/2195 of 23 November 2017 establishing a guideline on electricity balancing (OJ 2017 L 312, p. 6).

510 Articles 20 and 21 of Regulation 2017/2195, respectively.

511 Article 20(1) and Article 21(1) of Regulation 2017/2195.

512 Article 5(1) and (2)(a) of Regulation 2017/2195.

513 Article 5(7) of Regulation 2017/2195.

action [514] before the Board of Appeal of ACER ('the Board of Appeal') against those decisions. Their appeals having been dismissed, they brought two actions before the General Court seeking annulment of the decisions of the Board of Appeal, in so far as they concern them, of certain provisions of the ACER decisions and of the methodologies attached to them.

Those actions were dismissed by the Court (Second Chamber, Extended Composition), which, on that occasion, ruled, first, on the division of competences between ACER and the NRAs in the context of the adoption of the aFRR and mFRR methodologies and, secondly, on the functions required for the operation of the aFRR and mFRR platforms under Regulation 2017/2195.

Findings of the Court

As a preliminary point, the Court declares the actions for annulment inadmissible in so far as they are directed against the ACER decisions and their annexes. In that regard, it notes that, in accordance with the fifth paragraph of Article 263 TFEU and the act establishing ACER, namely Regulation 2019/942, [515] the applicants, as non-privileged parties, [516] may only seek annulment before the Court of the decisions adopted by the Board of Appeal, but not of the ACER decisions and their annexes. Consequently, the Court is limited, in the present case, to reviewing the legality of the decisions of the Board of Appeal, in particular in so far as they confirm in their entirety the ACER decisions and the aFRR and mFRR methodologies attached thereto.

In accordance with the determination made above, the Court continues its analysis on the merits. In the first place, it rejects the applicants' argument that the Board of Appeal erred in law by failing to find that ACER had exceeded the limits of its competence in adopting the decisions concerned.

On that point, the Court notes that, under Article 6(10) of Regulation 2019/942 and Article 5(7) of Regulation 2017/2195, as applicable at the time of the adoption of the decisions of the Board of Appeal, ACER is competent to decide or adopt individual decisions on regulatory issues or problems having an effect on cross-border trade or on the security of the cross-border network, such as the aFRR and mFRR methodologies, where, as in the present case, the NRAs make a joint request to that effect. In the Court's view, it does not follow from those provisions that ACER's competence is limited to points of disagreement between the authorities concerned.

That literal interpretation is supported by the context and the objectives pursued by the regulation of which those provisions form part. In that regard, the explanatory memorandum of the proposed Regulation 2019/942 and the previously applicable Regulation No 713/2009 [517] indicate a clear intention of the EU legislator to make decision-making on cross-border issues more efficient and expeditious by strengthening ACER's individual decision-making powers in a way that is consistent with the maintenance of the central role of NRAs in the field of energy regulation, in accordance with the principles of subsidiarity and proportionality. It is also clear from the preamble of Regulation

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514 Under Article 28 of Regulation (EU) 2019/942 of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (OJ 2019 L 158, p. 22).

515 Recital 34, Article 28(1) and Article 29 of Regulation 2019/942.

516 The privileged parties are the parties referred to in the first and second paragraphs of Article 19 of the Statute of the Court of Justice, namely the Member States, the EU institutions, the States other than the Member States which are parties to the Agreement on the European Economic Area, and the EFTA Surveillance Authority referred to in that agreement.

517 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

2019/942 [518] that ACER was established to fill the regulatory vacuum at EU level and to contribute to the efficient functioning of the internal markets in electricity and natural gas.

Therefore, the purpose and context of the relevant provisions of Regulations 2019/942 and 2017/2195, as well as the specific circumstances of the present case, confirm that ACER is empowered to decide on the development of the aFRR and mFRR methodologies, in case of a joint request from the NRAs to do so. Similarly, as ACER has been granted its own decision-making powers to enable it to carry out its regulatory functions independently and effectively, it is entitled to modify the TSOs' proposals in order to ensure their compliance with EU energy law, without being bound by any points of agreement between the competent NRAs.

It follows that the Board of Appeal of ACER did not err in law in upholding ACER's competence to rule on points in the aFRR and mFRR methodologies that were agreed between the NRAs.

In the second place, the Court rejects the applicants' claims that the Board of Appeal erred in law by finding that the inclusion of the capacity management function among the functions required for the operation of the aFRR and mFRR platforms had not been imposed on the TSOs by ACER, but resulted directly from the application of Regulation 2017/2195.

The Court makes clear from the outset that that inclusion is decisive in assessing whether the proposals developed by the TSOs had to comply with the additional requirements set out in Regulation 2017/2195 [519] where, as in the present case, the TSOs envisage designating several entities to perform the different functions required. In that regard, it notes that, in accordance with that regulation, the proposed methodologies submitted by the TSOs must include the definition of the functions required for the operation of the aFRR and mFRR platforms. [520] While it follows from Regulation 2017/2195 that those platforms are to include at least the activation optimisation function and the TSO-TSO settlement function, [521] it is not excluded that another function, such as capacity management, is also considered to be required for the operation of those platforms, in particular if the addition of such a function appears to be necessary to ensure a high-level design of that platform in line with common governance principles and business processes.

An interpretation of the notion of function required for the operation of the aFRR and mFRR platforms, in the light of the context and objectives pursued by Regulation 2017/2195, suggests that it is a function which, both technically and legally, appears to be necessary for the efficient and safe establishment and operation of those platforms.

In the Court's view, the capacity management function meets such a condition of necessity. From a legal point of view, Regulation 2017/2195 requires TSOs to update continuously available cross-zonal transmission capacity for the purpose of balancing energy exchange or imbalance compensation. Technically, as is evident from the proposed aFRR and mFRR methodologies developed in the present case, the continuous updating of that capacity, which underpins the capacity management function, is an essential input to the activation optimisation function. Moreover, the capacity management function has been added to the platforms by the TSOs themselves, in order for them to meet the requirements of a high-level design in terms of efficiency and safety required by Regulation 2017/2195.

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518 Recital 10 of Regulation 2019/942, previously recital 5 of Regulation No 713/2009.

519 Article 20(3)(e)(i) to (iii) and Article 21(3)(e)(i) to (iii) of Regulation 2017/2195.

520 Article 20(3)(c) and Article 21(3)(c) of Regulation 2017/2195.

521 Article 20(2) and Article 21(2) of Regulation 2017/2195.

In the light of the above considerations in particular, the decisions of the Board of Appeal are upheld.

IX. Common commercial policy

1. Anti-dumping

Judgment of 21 June 2023, *Guangdong Haomei New Materials and Guangdong King Metal Light Alloy Technology* v *Commission* (T-326/21, EU:T:2023:347)

(Dumping – Importation of aluminium extrusions originating in China – Implementing Regulation (EU) 2021/546 – Imposition of a definitive anti-dumping duty – Article 1(4) of Regulation (EU) 2016/1036 – Definition of the product concerned – Determination of the normal value – Article 2(6a) of Regulation 2016/1036 – Report finding significant distortions in the exporting country – Burden of proof – Use of a representative country – Article 3(1), (2), (3), (5) and (6) of Regulation 2016/1036 – Injury – Economic factors and indices having a bearing on the state of the Union industry – Rights of the defence – Principle of good administration)

Following a complaint lodged with it by the association European Aluminium, the European Commission adopted Implementing Regulation 2021/546 imposing a definitive anti-dumping duty on imports of aluminium extrusions originating in China. [522]

Guangdong Haomei New Materials Co. Ltd and Guangdong King Metal Light Alloy Technology Co. Ltd, companies governed by Chinese law which produce aluminium extrusions and export them to the European Union, brought an action seeking inter alia the annulment of that implementing regulation. The Italian company Airoldi Metalli SpA ('Airoldi') intervened in the proceedings in support of the applicants.

In dismissing the action for annulment, the General Court provides a number of clarifications regarding the new method of constructing the normal value of the product concerned by an anti-dumping investigation where there are significant distortions of the market in the exporting country, a method introduced by Article 2(6a)(a) of the basic anti-dumping Regulation. [523]

Findings of the Court

In support of their action, the applicants allege, inter alia, that the Commission erred in law in defining the 'product concerned' by the anti-dumping investigation, namely aluminium extrusions originating in China. In that regard, they claim that they produce thousands of types of aluminium extrusions, and therefore the Commission should have made distinctions.

Pointing out that the definition of the product concerned falls within the exercise by the EU institutions of the broad discretion afforded to them in the sphere of measures to protect trade, the General Court finds that, in accordance with relevant case-law, the Commission took account of a number of relevant factors for the purposes of that definition, such as the physical, technical and chemical characteristics

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522 Commission Implementing Regulation (EU) 2021/546 of 29 March 2021 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of aluminium extrusions originating in the People's Republic of China (OJ 2021 L 109, p. 1).

523 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), as amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 (OJ 2017 L 338, p. 1).

of the products in question, their use, interchangeability, customer demand and the manufacturing process.

In addition, even though the burden of proof rested with them, the applicants have failed to demonstrate that the Commission had incorrectly assessed those factors and to indicate which other, more relevant factors should have been used.

Accordingly, the complaint alleging a manifest error of assessment in the definition of the product concerned is dismissed.

Next, the General Court examines the criticisms made by the applicants concerning the Commission's finding of significant distortions on the Chinese market and Airoldi's arguments contesting the legality of the 'report on significant distortions on the Chinese market', [524] drawn up by the Commission in 2017 and taken into account by it for the purpose of adopting Implementing Regulation 2021/546.

With regard to the plea raised by Airoldi, the General Court observes that arguments raised by an intervener are admissible only if they fall within the scope provided by the forms of order sought and pleas in law raised by the main parties. Since the applicants had not called into question the legality of the report on significant distortions on the Chinese market, Airoldi's plea challenging that report is dismissed as inadmissible.

As regards the applicants' arguments criticising the Commission's analysis of the existence of significant distortions on the Chinese market, the General Court observes that the concept of 'significant distortions' in the exporting country and the method of constructing the normal value of the product concerned when such distortions exist were inserted into the basic anti-dumping Regulation by amending Regulation 2017/2321. [525]

In that context, point (a) of the new Article 2(6a) of the basic anti-dumping Regulation provides that, if there are significant distortions in the exporting country, derogation is permitted from the principle that the normal value must be established, primarily, on the basis of the price actually paid or payable in the ordinary course of trade in that country. In accordance with point (c) of that same provision, the Commission may produce a report describing the market circumstances in a certain country or a certain sector where it has well-founded indications of the possible existence of significant distortions in that country or that sector. Such reports and the evidence on which they are based are to be placed on the file of any investigation relating to that country or sector.

Having made those points, the General Court finds that, in the present case, the Commission found there to be significant distortions in the aluminium extrusions sector in China based on an analysis of the various elements that must be taken into account in particular, pursuant to Article 2(6a)(b) of the basic anti-dumping Regulation. In addition, far from conducting merely a vague and hypothetical analysis as the applicants allege, the Commission took into account not only the report on significant distortions on the Chinese market, produced in accordance with point (c) of that same provision, but also a series of reports, documents and data from a considerable variety of sources, including Chinese sources. Moreover, nor did the Commission fail to fulfil its obligation to enable the applicants to make their point of view effectively known as regards the accuracy and relevance of the facts and

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524 Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations of 20 December 2017 (SWD(2017) 483 final/2).

525 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending the basic regulation and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union (OJ 2017 L 338, p. 1).

circumstances alleged and the evidence used by the Commission to support its conclusion regarding the significant distortions on the Chinese market.

Accordingly, the General Court rejects the various complaints calling into question the analysis of the existence of significant distortions on the Chinese market.

In the General Court's opinion, nor did the Commission make a manifest error of assessment in choosing Türkiye as the representative country in order to construct the normal value of the product concerned.

Where it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions, Article 2(6a)(a) of the basic anti-dumping Regulation provides that 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 Commission may use sources that include corresponding costs of production and sale in an appropriate representative country, which has a similar level of economic development as the exporting country.

The criterion that must now be met when selecting the appropriate representative country is, therefore, a similar level of economic development as the exporting country. It is by satisfying that new criterion that the core of the case-law on the replaced provisions of the basic anti-dumping Regulation remains applicable, namely that the Commission must take as a basis a non-member country in which the price of a like product is established in circumstances that are as comparable as possible with those of the exporting country.

In the light of those clarifications, the General Court dismisses, first, the applicants' references to earlier non-transposable case-law and finds, second, that the applicants do not dispute that Türkiye has a similar level of development as China. In addition, in rejecting the arguments based on China's larger population than that of Türkiye and the fact that the domestic demand is different, the General Court concludes that the applicants have failed to demonstrate that the Commission made a manifest error of assessment in the choice of Türkiye as the representative country.

According to the General Court, nor did the Commission make a manifest error of assessment in its finding of injury to the Union industry and of a causal link between that injury and the imports of aluminium extrusions originating in China.

In that regard, the General Court rejects the applicants' argument that the significant market share held by EU producers meant that the Union industry could not have suffered material injury. The General Court also rejects the complaints alleging that the Commission disregarded the significant growth in consumption and in profitability of that industry. On that point, the General Court observes, first, that it is not necessary, in order to find that there is injury to the Union industry such as to justify the adoption of anti-dumping duties, that all the relevant economic factors and indices show a negative trend. Second, the Commission stated that, despite the increase in demand, the Union industry had lost market shares and its profitability had declined over the period considered.

Similarly, nor did the Commission err when it took into consideration the market share of the imports from China which, according to the applicants, is less than 15% in absolute terms. Whilst Article 5(7) of the basic anti-dumping Regulation does provide that proceedings are not to be initiated if the imports from a country represent a market share of below 1%, the market share of the imports of aluminium extrusions from China is considerably higher than that percentage. Since the basic anti-dumping Regulation does not specify another market share threshold for the finding that the imports from a non-member country are incapable of causing injury, the General Court finds that the applicants have not raised other arguments capable of supporting the view that the Commission made a manifest error of assessment.

As the other pleas in law raised have likewise proved to be inadmissible or unfounded, the General Court dismisses the action in its entirety.

2. Extraterritorial application of third-country legislation

Judgment of 12 July 2023, *IFIC Holding* v *Commission* (T-8/21, EU:T:2023:387)

(Commercial policy – Protection against the effects of the extraterritorial application of legislation adopted by a third country – Restrictive measures taken by the United States against Iran – Secondary sanctions preventing natural or legal persons of the European Union from having commercial relationships with undertakings targeted by those measures – Prohibition on complying with such legislation – Second paragraph of Article 5 of Regulation (EC) No 2271/96 – Commission decision authorising a legal person of the European Union to comply with that legislation – Obligation to state reasons – Retroactive effect of authorisation – Account taken of the interests of the undertaking targeted by the restrictive measures of the third country – Right to be heard)

In 2018, the United States of America withdrew from the Iran nuclear deal, signed in 2015, the aim of which was to control the Iranian nuclear programme and lift economic sanctions against Iran. As a result of that withdrawal, on the basis of the Iran Freedom and Counter-Proliferation Act of 2012, the United States again imposed sanctions on Iran and a list of named persons. [526] From that date, it is once again prohibited for any person to trade, outside the territory of the United States, with any person or entity included in the SDN list.

Following that decision, in order to protect its interests, the European Union adopted Delegated Regulation 2018/1100 [527] amending the Annex to Regulation No 2271/96 [528] in order to refer in that annex to the abovementioned 2012 US law on freedom and counter proliferation in Iran. That regulation, which aims to provide protection against the extraterritorial application of the laws annexed thereto, in particular prohibits the persons concerned [529] from complying with the laws in question or actions resulting therefrom (Article 5, first paragraph), unless authorised by the European Commission where non-compliance with those foreign laws would seriously damage the interests of the persons covered by the regulation or those of the European Union (Article 5, second paragraph). It also adopted

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526 Specially Designated Nationals and Blocked Persons List ('the SDN list').

527 Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199 I, p. 1).

528 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 1996 L 309, p. 1), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1) and by Delegated Regulation 2018/1100 ('the regulation').

529 The persons referred to in Article 11 of Regulation No 2271/96 are, inter alia, first, natural persons residing in the European Union who are nationals of a Member State and, second, legal persons incorporated within the European Union (Article 11(1) and (2)).

Implementing Regulation 2018/1101, laying down the criteria for the application of the second paragraph of Article 5 of Regulation No 2271/96. [530]

IFIC Holding AG ('IFIC') is a German company whose shares are held indirectly by the Iranian State and which itself has shareholdings in various German undertakings, by virtue of which it has a right to dividends. Clearstream Banking AG is the only securities depository bank authorised in Germany. After the listing of IFIC, in November 2018, on the SDN list by the United States, Clearstream Banking interrupted payment to IFIC of its dividends and blocked those dividends on a separate account. On 28 April 2020, following an authorisation request, within the meaning of the second paragraph of Article 5 of Regulation No 2271/96, from Clearstream Banking, the Commission adopted Implementing Decision C(2020) 2813 final, by which it authorised that bank to comply with certain US laws concerning the applicant's securities or funds, for a period of 12 months ('the contested authorisation'). That authorisation was then renewed in 2021 and 2022 by Implementing Decisions C(2021) 3021 final and C(2022) 2775 final [531] ('the contested decisions'). In that context, on the basis of Article 263 TFEU, IFIC requested the Court to annul the decisions adopted by the Commission at the request of Clearstream Banking, that bank having intervened in the proceedings.

The General Court dismisses IFIC's action and at the same time rules on novel questions of law concerning Regulation No 2271/96. It considers in particular that the contested decisions do not have retroactive effect and that the Commission did not err in its assessment by not taking into account the applicant's interests or by failing to examine whether less onerous alternatives existed. It also holds that the limitation of the applicant's right to be heard by the Commission in the context of the adoption of those decisions was, in the light of the objectives pursued by Regulation No 2271/96, necessary and proportionate.

Findings of the Court

The Court finds, first, that the contested decisions do not have retroactive effect as those decisions state clearly that they take effect from the date of their notification for a period of 12 months. [532] As a result, the contested authorisation has no retroactive effect and does not cover conduct that took place before the date on which the contested decisions took effect, but only conduct which took place after that date.

Second, concerning the applicant's plea in law based on an error of assessment, according to which the Commission did not, in the first place, take into account the applicant's interests, but only those of Clearstream Banking, the Court held that the Commission was not required to take those interests into account. It observes that Regulation No 2271/96 [533] provides that the grant of authorisation to comply with the laws annexed thereto is subject to the condition that non-compliance with those laws would seriously damage the interests of the person seeking the authorisation or those of the European Union, but that that provision does not refer to the interests of third parties covered by the restrictive measures of the third country. The Court made the same finding concerning the non-cumulative

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530 Commission Implementing Regulation (EU) 2018/1101 of 3 August 2018 laying down the criteria for the application of the second paragraph of Article 5 of Council Regulation (EC) No 2271/96 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ 2018 L 199 I, p. 7).

531 Commission Implementing Decision C(2021) 3021 final of 27 April 2021 and Commission Implementing Decision C(2022) 2775 final of 26 April 2022.

532 See Article 3 of each of the contested decisions.

533 See Article 5, second paragraph, of Regulation No 2271/96.

criteria, set out in Implementing Regulation 2018/1101, [534] which the Commission must take into account when assessing an authorisation request. In addition, none of the criteria in question refers to a balancing of the interests of third parties with those of the applicant or those of the European Union. Moreover, even if the third party referred to in the restrictive measures is covered by Regulation No 2271/96 [535] and therefore falls within the scope of certain provisions of that regulation, that could not lead, in the context of the application of the exception provided for in the second paragraph of Article 5 of that regulation, to taking into account interests other than those provided for by that regulation. As regards, in the second place, the applicant's argument that the Commission failed to take into account the possibility of having recourse to less onerous alternatives or the possibility for the applicant to claim compensation, the Court notes that Implementing Regulation 2018/1101 [536] does not impose such obligations on the Commission. The Commission's assessment consists in ascertaining whether the evidence submitted by the applicant allows the conclusion, in the light of the criteria laid down by Implementing Regulation 2018/1101, [537] that, in the event of non-compliance with the laws annexed thereto, the interests of the applicant or of the European Union would be seriously damaged, within the meaning of the second paragraph of Article 5 of Regulation No 2271/96. The Commission, where it concludes that there is sufficient evidence that serious damage to those interests has occurred, is not therefore required to examine whether there are alternatives to authorisation.

Third, as regards the plea in law relating to infringement of the right to be heard, the Court finds that the EU legislature chose to establish a system in which the interests of third parties referred to in the restrictive measures are not to be taken into account, and those third parties are not to be involved in the procedure under the second paragraph of Article 5 of Regulation No 2271/96. The adoption of a decision under that article meets the general interest objectives of protecting the interests of the European Union or of persons exercising rights under the FEU Treaty system against the serious damage which can result from non-compliance with the laws annexed to the regulation.

In that context, not only is the exercise of a right to be heard by the third parties targeted by the procedure in question not in accordance with the general interest objectives pursued by that legislation, but it also risks jeopardising, through the uncontrolled dissemination of information which could be brought to the attention of the authorities of the third country which enacted the laws annexed to the regulation, the attainment of those objectives. Consequently, those authorities could be aware of the fact that a person sought authorisation and that that person may as a consequence not comply with the extraterritorial legislation of the third country in question, which would entail risks in terms of investigations and sanctions against that person and, therefore, harm to the interests of that person and, as the case may be, to the European Union.

Moreover, no factor inherent in the personal circumstances of such third parties is directly included among the factors which must be included in an application for authorisation [538] or among the criteria

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534 See Article 4 of Implementing Regulation 2018/1101.

535 See Article 11 of Regulation No 2271/96.

536 See Article 3 of Implementing Regulation 2018/1101.

537 See Article 4 of Implementing Regulation 2018/1101.

538 Within the meaning of Article 3(2) of Implementing Regulation 2018/1101: 'applications shall include the name and contact details of the applicants, shall indicate the precise provisions of the listed extra-territorial legislation or the subsequent action at stake, and shall describe the scope of the authorisation that is being requested and the damage that would be caused by non-compliance.'

taken into account by the Commission when assessing such an application. [539] Thus, in the system established by Regulation No 2271/96, the third parties targeted by the restrictive measures do not appear to be able to rely, before the Commission, on errors or factors relating to their personal circumstances. Therefore, a limitation of the right to be heard of third parties targeted by restrictive measures in the context of such a procedure does not appear, having regard to the relevant legal framework and the objectives pursued by that framework, to be disproportionate and to fail to respect the essential content of that right. It follows that, in the specific circumstances of the present case, that limitation of the right to be heard is justified, within the meaning of the case-law, and is necessary and proportionate having regard to the objectives pursued by Regulation No 2271/96 and, in particular, the second paragraph of Article 5 thereof. Therefore, the Commission was not required to hear the applicant in the context of the procedure leading to the adoption of the contested decisions.

Furthermore, the applicant claimed that, in order to comply with its right to be heard, the Commission should have published, at the very least, the operative part of the contested decisions. There is, however, no basis on which it can be found that the Commission has such an obligation to publish. First, that alleged obligation has no legal basis in any relevant provision; second, the publication of the contested decisions after their adoption is not capable of affecting the exercise of any right of the applicant to be heard in the administrative procedure. Finally, the Court dismisses, for the same reasons, the applicant's argument that, in the alternative, the Commission should have communicated the contested decisions to it after their adoption. In the light of the foregoing, it cannot, therefore, be held that, by failing to publish or communicate the contested decisions to the applicant, the Commission infringed the applicant's right to be heard.

539 Within the meaning of the criteria provided for in Article 4 of Implementing Regulation 2018/1101, the objective of which is to assess whether a serious damage to the protected interests as referred to in the second paragraph of Article 5 of Regulation No 2271/96 would arise.

X. Economic and monetary policy [540]

Judgment of 22 November 2023, *Del Valle Ruíz and Others* v *SRB* (T-302/20, T-303/20 and T-307/20, EU:T:2023:735)

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution of Banco Popular Español – Decision of the SRB refusing to grant compensation to the shareholders and creditors affected by the resolution actions – Right to property – Right to be heard – Right to an effective remedy – Valuation of difference in treatment – Independence of the valuer)

Judgment of 22 November 2023, *Molina Fernández* v *SRB* (T-304/20, EU:T:2023:734)

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution of Banco Popular Español – Decision of the SRB refusing to grant compensation to the shareholders and creditors affected by the resolution actions – Valuation of difference in treatment – Independence of the valuer)

Judgment of 22 November 2023, *ACMO and Others* v *SRB* (T-330/20, EU:T:2023:733)

(Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Resolution of Banco Popular Español – Decision of the SRB refusing to grant compensation to the shareholders and creditors affected by the resolution actions – Valuation of difference in treatment – Independence of the valuer)

In Joined Cases T-302/20, T-303/20 and T-307/20 and in Case T-304/20, the applicants are natural and legal persons who were shareholders in Banco Popular Español, SA ('Banco Popular') before the adoption of a resolution scheme in respect of Banco Popular. In Case T-330/20, on the other hand, the applicants are investment funds which, before the adoption of that scheme, owned capital instruments, with the exception of one of the applicants, which was the successor to the rights of an entity holding Banco Popular bonds.

On 7 June 2017, the Executive Session of the Single Resolution Board (SRB) adopted, on the basis of Regulation No 806/2014, [541] a resolution scheme in respect of Banco Popular, [542] which was endorsed on the same day by the European Commission. [543]

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540 Joint résumé for cases *Del Valle Ruíz and Others* v *SRB* (T-302/20, T-303/20 and T-307/20), *Molina Fernández* v *SRB* (T-304/20) and *ACMO and Others* v *SRB* (T-330/20).

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).

542 Decision SRB/EES/2017/08 concerning the adoption of a resolution scheme in respect of Banco Popular ('the resolution scheme').

543 Commission Decision (EU) 2017/1246 endorsing the resolution scheme for Banco Popular Español (OJ 2017 L 178, p. 15).

Prior to the adoption of that scheme, the SRB had engaged Deloitte Reviseurs d'Entreprises as valuer ('the Valuer') in order to carry out a valuation of Banco Popular, in preparation for a potential resolution, and a valuation of the difference in treatment, after a potential resolution. On 6 June 2017, the Valuer submitted to the SRB a valuation ('Valuation 2'), the purpose of which was to estimate the value of Banco Popular's assets and liabilities, to provide an evaluation of the treatment that shareholders and creditors would have received if Banco Popular had entered into normal insolvency proceedings, and to inform the decision to be taken on the shares and instruments of ownership to be transferred and the SRB's understanding of what constitutes commercial terms for the purposes of the sale of business tool. According to the resolution scheme, given that the necessary conditions [544] had been met, the SRB decided to place Banco Popular under resolution. Following an open and transparent sale process conducted by the Spanish resolution authority, the Fund for Orderly Bank Restructuring (FROB), Banco Popular's new shares were transferred to Banco Santander SA.

After the adoption of the resolution scheme, the Valuer submitted to the SRB the valuation of the difference in treatment [545] ('Valuation 3'), seeking to determine whether the affected shareholders and creditors would have received better treatment if Banco Popular had entered into normal insolvency proceedings than that which they received as a result of the resolution. That valuation was carried out in the context of a liquidation scenario, in accordance with Spanish law, at the time the resolution scheme was adopted. The Valuer maintained that the opening of normal insolvency proceedings would have resulted in an unplanned liquidation. It concluded that no recovery would have been expected under such proceedings and that there was therefore no difference in treatment by comparison with the treatment resulting from the resolution action.

Subsequently, in order to be able to take a final decision on whether the affected shareholders and creditors should be granted compensation from the Single Resolution Fund, [546] the SRB invited them to express their interest in exercising their right to be heard with respect to the preliminary decision in that regard, [547] in which it concluded that, in the light of Valuation 3, it was not required to pay them compensation. The right to be heard process was conducted in two successive phases, namely the registration phase, in which the affected shareholders and creditors were invited to express their interest in exercising their right to be heard, and then the consultation phase, during which the affected persons were able to submit their comments on the preliminary decision, to which the non-confidential version of Valuation 3 was annexed.

At the end of the consultation phase, the SRB examined the relevant comments and received from the Valuer a clarification document in which the latter confirmed that the strategy and various hypothetical liquidation scenarios detailed in Valuation 3, as well as the methodologies followed and analyses used, remained valid.

On 17 March 2020, the SRB adopted Decision SRB/EES/2020/52 determining whether compensation needed to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular had been effected ('the contested decision'), in which it considered that the Valuer was independent and that Valuation 3 was in line with the applicable legal framework and was sufficiently reasoned and comprehensive. It also presented the comments submitted by the affected

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544 Under Article 18(1) of Regulation No 806/2014.

545 Under Article 20(16) to (18) of Regulation No 806/2014.

546 Under Article 76(1)(e) of Regulation No 806/2014.

547 Preliminary decision of the SRB on whether compensation needs to be granted to the shareholders and creditors in respect of which the resolution actions concerning Banco Popular have been effected and the launching of the right to be heard process (SRB/EES/2018/132) ('the preliminary decision').

shareholders and creditors and their assessment, and concluded that there was no difference between the actual treatment of the affected shareholders and creditors and the treatment that they would have received if Banco Popular had been subject to normal insolvency proceedings at the resolution date.

By its judgments, in which it dismisses the three actions based on Article 263 TFEU, the General Court rules for the first time on an application for annulment of a decision of the SRB on whether compensation should be granted to the affected shareholders and creditors following a bank resolution. In that regard, the General Court examines a number of novel issues raised in the three actions, in particular concerning the assessment of the situation of the affected shareholders and creditors in the event that Banco Popular had entered into normal insolvency proceedings, the independence of the Valuer, the right to be heard during the proceedings, the right to an effective remedy and the right to property.

Findings of the Court

In the first place, the Court rejects the complaints that the contested decision is unlawful as regards the examination of whether Banco Popular's former shareholders would have received better treatment under normal insolvency proceedings.

First, the Court observes that it is clear from the provisions of Regulation No 806/2014 that the reference [548] to the treatment which the entity's shareholders and creditors would have received if that entity had entered into normal insolvency proceedings refers to their hypothetical treatment in the event of the winding up of that entity. It also observes that the methodology for valuation of that treatment defined in Delegated Regulation 2018/344 [549] consists of the realisation of the institution's assets, and therefore a winding up, as defined in Article 3(1)(42) of Regulation No 806/2014.

Secondly, in order to establish the difference in treatment, the comparison to be made is between the actual treatment of the shareholders and creditors affected as a result of the resolution and the assessment of the situation they would have been in if the resolution action had not been effected, namely in the event of liquidation of the entity.

Thirdly, the Court finds that, in the context of the assessment of difference in treatment following a resolution decided by the FROB, Spanish law provides that the counterfactual scenario is to be based on the entity's liquidation scenario, taking into account the provisions of Spanish law on liquidation. It concludes that the determination of difference in treatment must be based on a liquidation scenario, and therefore may not be based on a going concern scenario or a scenario in which a composition agreement has been concluded with the creditors.

Fourthly, the Court points out that the counterfactual liquidation scenario envisaged in Valuation 3 had to be defined in the light of Banco Popular's situation at the resolution date. On that date, Banco Popular was unable to continue as a going concern on account of its liquidity position, of the assessment that it was failing or likely to fail and of the possible revocation of its banking licence, and for that reason, neither a composition agreement nor an insolvency scenario based on the going concern assumption was conceivable.

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548 Under Article 20(16) to (18) of Regulation No 806/2014.

549 Commission Delegated Regulation (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution (OJ 2018 L 67, p. 3).

Similarly, the Court rejects the argument that the Valuer's valuation of Banco Popular should have taken into account the sale of the institution as a whole or divided into business units, since that implies a continuation of the undertaking's activities. The Valuer did not therefore make an error by using a methodology based on a liquidation scenario and the sale of individual assets or asset portfolios.

Fifthly, the contested decision is not vitiated by any manifest errors of assessment either as regards the taking into account of a maximum liquidation scenario of seven years – having regard, in particular, to the objective of carrying out a liquidation within a reasonable time and to the uncertainties caused by a prolonged liquidation period – or as regards the valuation of the performing and non-performing loans portfolios, Banco Popular's real estate subsidiaries and the legal contingencies.

In the second place, the Court rejects the plea alleging that the Valuer was not independent.

First, the Court notes that the circumstances of the case, on the one hand, do not establish that, in carrying out Valuation 3, the Valuer was influenced by the fact that it had carried out Valuation 2 and, on the other, contradict the argument that the Valuer could reasonably appear not to be objective or impartial.

In Valuation 3, the assessment of difference in treatment is based on the actual treatment of the shareholders and creditors affected as a result of the resolution. The valuation of Banco Popular's assets and liabilities in the first part of Valuation 2 was not taken into account in Valuation 3 and could not therefore influence the Valuer when it carried out Valuation 3.

In addition, Valuation 2 contained several reservations as to the reliability of the liquidation scenario simulation. Accordingly, the Court rejects the complaint that, in an effort to protect its professional reputation, the Valuer considered itself bound by the findings of Valuation 2 when it carried out Valuation 3.

Moreover, the Court rejects the argument that the Valuer had an incentive to avoid any rectification or modification of the findings contained in Valuation 2, on the ground that that argument is contradicted by the circumstances in which Valuations 2 and 3 were carried out. Valuation 3 was performed on the basis of more granular information than the information available to the Valuer at the time of Valuation 2. Furthermore, as soon as it received Valuation 2, the SRB was informed of the fact that the Valuer would have to base Valuation 3 on new data, and therefore modify the assessment carried out in the liquidation scenario simulation. In Valuation 3, the Valuer did not merely confirm the outcome of the simulation set out in Valuation 2. Moreover, the mere fact that the Valuer reached the same conclusion is not sufficient to establish that it considered itself bound by its assessment in Valuation 2 when it carried out Valuation 3.

Lastly, the Court rejects the complaint that the SRB should have appointed another valuer to carry out a valuation using a different methodology, because the assessment of the treatment of the affected shareholders and creditors had to be carried out on the basis of a liquidation scenario. Similarly, no provision of Regulation No 806/2014 or Delegated Regulation 2016/1075 expressly precludes Valuations 2 and 3 from being carried out by the same valuer.

Secondly, the Court rejects the complaints that the Valuer was not independent on account of its alleged links with Banco Popular and Banco Santander.

In that regard, it observes that, on the date that the Valuer was appointed as independent valuer, the identity of the purchaser was unknown, so it was not possible to take into account the links between the Valuer and Banco Santander, and the Valuer was no longer providing auditing services to Banco Santander.

The Court emphasises that, throughout the procedure relating to the resolution of Banco Popular, the SRB ensured, as it was required to do, that the Valuer complied with the requirements of independence

and, in particular, those relating to the absence of a conflict of interest laid down in Delegated Regulation 2016/1075. [550]

Thus, the SRB did not err in finding that the services provided by the Valuer both to Banco Popular and to Banco Santander could not influence the Valuer's judgement in carrying out Valuation 3, and could not therefore establish that there were actual or potential material interests in common or in conflict with Banco Popular or Banco Santander.

Similarly, none of the arguments calls into question the SRB's assessments relating to the absence of a link between, on the one hand, the auditing services and services relating to the integration of Banco Popular provided by the Valuer to Banco Santander and, on the other hand, the elements relevant to Valuation 3, which concerned only the valuation of Banco Popular and not that of Banco Santander.

Furthermore, the applicants do not explain how those services provided by the Valuer could have influenced or could have been reasonably perceived to influence the Valuer's judgement in carrying out Valuation 3.

Moreover, the Court considers that in order to make a finding that the SRB should have taken into consideration an apparent lack of objectivity or impartiality on the part of the Valuer on account of its links with Banco Santander, it would need to be established that by submitting, in Valuation 3, that the affected shareholders and creditors would not have received better treatment under normal insolvency proceedings, the Valuer intended to favour Banco Santander. Furthermore, even if the Valuer had concluded, in Valuation 3, that the affected shareholders and creditors would have received better treatment in the event of Banco Popular's liquidation, the compensation which might have resulted therefrom is paid by the Single Resolution Fund, and not by Banco Santander.

In addition, the Court holds that the outcome of Valuation 3 has no influence on the legality and legitimacy of the decision to place Banco Popular under resolution or on the outcome of that resolution, namely the sale of Banco Popular to Banco Santander, and that it cannot have the effect of granting the affected shareholders and creditors entitlement to compensation from Banco Santander.

The Court concludes that, in so far as Valuation 3, whatever its outcome, could not affect Banco Santander's situation, the Valuer was not in a position to favour Banco Santander. Accordingly, the links between them cannot give rise to a legitimate doubt as to the existence of possible bias, or point to a lack of objectivity or impartiality on the part of the Valuer. Those links did not constitute a circumstance capable of calling into question the Valuer's independence in carrying out Valuation 3 or its appointment by the SRB as an independent valuer.

In the third place, the Court rejects the plea alleging infringement of the right of the shareholders and creditors to be heard, in particular, in so far as the SRB required them to submit their comments on a form.

In that regard, first, it points out that respect for the right to be heard must be ensured even where there is no legislation which expressly provides for the exercise of that right, and that neither Regulation No 806/2014 nor the Charter of Fundamental Rights of the European Union ('the Charter') lays down a

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550 Under Article 41 of Commission Delegated Regulation (EU) 2016/1075 of 23 March 2016 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of recovery plans, resolution plans and group resolution plans, the minimum criteria that the competent authority is to assess as regards recovery plans and group recovery plans, the conditions for group financial support, the requirements for independent valuers, the contractual recognition of write-down and conversion powers, the procedures and contents of notification requirements and of notice of suspension and the operational functioning of the resolution colleges (OJ 2016 L 184, p. 1).

specific procedure for implementing the right to be heard. Thus, the SRB's decision to use a form to collect the comments of the affected shareholders and creditors was within its margin of discretion in organising that procedure, in order to allow the affected shareholders and creditors to exercise their right to be heard, provided that they would be able to exercise their right effectively.

Secondly, in the present case, the Court observes that the SRB examined all the comments received and that it explained, in the contested decision, why certain comments were not relevant for the purpose of adopting the contested decision. The Court rejects the argument alleging infringement of the right to be heard on the ground that the SRB dismissed irrelevant comments.

Thirdly, the Court finds that the questions on the form were drafted in a neutral manner, in the form of a brief presentation of the issue in question with a reference to the relevant parts of the preliminary decision or of Valuation 3, which was followed by an invitation to the affected shareholders and creditors to submit their comments or opinions on that issue.

Fourthly, the Court rejects the argument concerning the limitation of the length of the responses that could be entered on the form, on the ground that it is purely theoretical and does not establish to the requisite legal standard that, in the absence of such a limitation, the outcome of the procedure could have been different.

On the one hand, the comments submitted during the right to be heard process in response to the form were carefully examined in the contested decision and led the Valuer to adopt the clarification document. Thus, even though the length of the comments was limited, the SRB and the Valuer provided detailed responses to those comments.

On the other, the applicants do not indicate which comments, other than those which had been submitted and to which the SRB and the Valuer had responded, they had been prevented from making on account of the length of the form. They also fail to specify which documents they would have liked to be able to attach to the form.

In the fourth place, the Court rejects as ineffective the plea alleging that the basis of Valuation 3 on Banco Popular's financial situation when it was put into resolution is incorrect.

It recalls that the assessment of difference in treatment had to be made at the time the resolution scheme was adopted. However, the Bank of Spain's expert report of 8 April 2019, on which the applicants rely and whose production by way of a measure of inquiry had been requested, concerns events prior to the resolution of Banco Popular, which were not relevant for the purpose of carrying out Valuation 3.

In the fifth place, the Court rejects the plea alleging that the SRB improperly delegated to the Valuer the decision-making powers conferred on it by Regulation No 806/2014.

First, having found that the applicants do not raise a plea of illegality in respect of Regulation No 806/2014, nor claim that the SRB exercised a discretionary power or that its executive powers are not clearly defined in that regulation, or that the SRB infringed Regulation No 806/2014 by exceeding the powers conferred on it by that regulation, the Court holds that the arguments criticising the SRB for conferring a decision-making power on the Valuer cannot establish an infringement of the principles relating to the delegation of powers.

Secondly, the Court points out that the decision not to grant compensation to the affected shareholders and creditors was adopted by the SRB, not by the Valuer.

Furthermore, pursuant to Regulation No 806/2014, the economic and technical aspects of the valuation of the treatment which the affected shareholders and creditors would have received if Banco Popular had been subject to normal insolvency proceedings were to be assessed by an independent valuer and

not by the SRB itself. Thus, the fact that the SRB entrusted the Valuer with carrying out Valuation 3 cannot be construed as a delegation of its power to adopt the decision.

Thirdly, as regards the provisions of Regulation No 806/2014, the fact that the SRB approved the conclusions of Valuation 3 cannot be interpreted as a failure by the SRB to monitor compliance with the requirements with which the independent valuer must comply when carrying out the valuation. Furthermore, it is clear from the content of the contested decision that the SRB did not merely summarise Valuation 3 and the clarification document, but examined whether they remained valid in the light of the comments made by the affected shareholders and creditors.

In the sixth place, the Court rejects the plea alleging infringement of the right to an effective remedy.

As regards the non-disclosure of certain information in the non-confidential version of Valuation 3 annexed to the preliminary decision, the Court observes that the SRB's assessment, according to which the redacted information relating to provisions for legal contingencies set out in Valuation 3 was covered by professional secrecy and was confidential, is not disputed. Nor is it disputed that the SRB is under an obligation to protect confidential information. [551] Furthermore, the applicants do not indicate that the redacted information is required in order to understand the contested decision or to exercise their right to an effective judicial remedy.

In the seventh place, the Court rejects the plea alleging infringement of the right to property.

The Court points out that Regulation No 806/2014 establishes a mechanism to ensure fair compensation for the shareholders or creditors of the entity under resolution, in accordance with the requirements of Article 17(1) of the Charter.

In the present case, having failed to establish that the SRB had made a manifest error of assessment in concluding, on the basis of Valuation 3, that the affected Banco Popular shareholders and creditors would not have received better treatment under normal insolvency proceedings than in the resolution, the applicants have not shown that the contested decision infringes their right to property.

Moreover, it cannot validly be maintained that the SRB infringed Article 17 of the Charter, in so far as the amount of the compensation under the no-creditor-worse-off principle was calculated on the basis of the worst-case scenario for the shareholders, namely proceedings for the liquidation of Banco Popular. The application of a counterfactual liquidation scenario complies with the applicable provisions.

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551 Under Article 88(5) of Regulation No 806/2014.

XI. Public procurement by the EU institutions

Judgment of 26 April 2023, *OHB System* v *Commission* (T-54/21, EU:T:2023:210)

(Public supply contracts – Tendering procedure – Competitive dialogue – Procurement of Galileo transition satellites – Rejection of a tenderer's bid – Exclusion criteria – Serious professional misconduct on the part of a tenderer – Absence of a final judgment or a final administrative decision – Referral to the panel referred to in Article 143 of the Financial Regulation – Equal treatment – Abnormally low offer – Manifest error of assessment)

By contract notice of 15 May 2018, [552] the European Space Agency (ESA), acting in the name and on behalf of the Commission, had launched a tendering procedure for the supply of transition satellites in the context of the Galileo programme, the aim of which is the implementation and exploitation of a European satellite navigation and positioning system for civil purposes. That procedure had been launched in the form of a competitive dialogue, since the Commission had already identified and defined its needs but had not yet determined the most appropriate specific means of meeting those needs. ESA was responsible for organising the tendering procedure, while the Commission remained the contracting authority. [553] It had been decided that two successful tenderers could be selected and that the award of the contract was to be based on the most economically advantageous tender.

At the end of the first phase of the competitive dialogue, inviting the submission of a request to participate, ESA selected three tenderers, namely OHB System AG (the applicant), Airbus Defence and Space GmbH (ADS), and Thales Alenia Space Italia (TASI). Following the second phase, which aimed to identify and determine the appropriate means of meeting the needs of the contracting authority, and the third phase, during which ESA invited the tenderers to submit their 'final offer', those final offers (tenders) were evaluated by an evaluation board which presented its results in an evaluation report. On the basis of that report, the Commission took the decision not to accept the applicant's tender and the decision to award the contract to TASI and ADS (together, 'the contested decisions'), which were communicated to the applicant by letter of 19 January 2021.

Prior to the adoption of the contested decisions, the applicant had, by letter of 23 December 2020, informed the Commission and ESA that one of the applicant's former employees (its former Chief Operating Officer), who had had extensive access to project data and had participated in the preparation of its tender, had been hired by ADS in December 2019. The applicant claimed that there were indications that this former employee had obtained sensitive information and that a national criminal investigation had been opened following a complaint filed by the former against the latter. Accordingly, it had asked the Commission to suspend the competitive dialogue at issue, to inquire into the matter and, if necessary, to exclude ADS from that dialogue. By letter of 20 January 2021, the Commission informed the applicant that there were insufficient grounds for such a suspension and that, as the allegations were the subject of an investigation by the national authorities, in the absence

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552 Contract notice published in the Supplement to the *Official Journal of the European Union* of 15 May 2018 (OJ 2018/S 091-206089).

553 Under Article 15(1) of Regulation (EU) No 1285/2013 of the European Parliament and of the Council of 11 December 2013 on the implementation and exploitation of European satellite navigation systems and repealing Council Regulation (EC) No 876/2002 and Regulation (EC) No 683/2008 of the European Parliament and of the Council (OJ 2013 L 347, p. 1), the Commission had concluded a delegation agreement with ESA for the deployment phase of the Galileo programme.

of a final judgment or a final administrative decision concerning those allegations, there was no ground for excluding ADS from the competitive dialogue at issue.

Hearing an action for annulment – which it dismisses in its entirety – against the contested decisions, the General Court provides, in particular, explanations as regards (i) the application of the criteria for excluding a tenderer and (ii) referring the matter to a panel pursuant to the Financial Regulation of 2018. [554] It also does so with regard to the obligation to check the composition of a tender deemed to be abnormally low and the autonomy of the award decision in cases where the contracting authority merely endorses the reasoning set out in the evaluation report.

Findings of the Court

In the first place, the Court rejects the complaint based on an alleged breach of the criteria for excluding a tenderer which are laid down by the Financial Regulation of 2018.

Before doing so, it recalls that a contracting authority is to exclude a tenderer from participating in a tendering procedure when it finds itself in one or more of the situations corresponding to the three exclusion criteria which are laid down by the Financial Regulation of 2018.

In the present case, the Court finds that, in the absence, at the time of the competitive dialogue, of a final judgment or a final administrative decision establishing serious professional misconduct on the part of the tenderer concerned or on the part of a natural or legal person who was a member of the administrative, management or supervisory body of, or had powers of representation, decision or control with regard to, that tenderer, the first two criteria are not applicable. Pursuant to the third exclusion criterion, which is the only criterion capable of being applied in the present case, in the absence of a final judgment or a final administrative decision, the contracting authority may take a decision to exclude a tenderer from a tendering procedure only on the basis of a preliminary classification, [555] and only after having obtained a recommendation from the panel referred to in Article 143 of the Financial Regulation of 2018, under which it is established, in view of the facts and findings, that there has been serious professional misconduct on the part of the tenderer.

To begin with, the Court examines whether, by failing to refer the matter to that panel in the present case, the Commission failed to fulfil its obligations, in breach of the third exclusion criterion.

In this regard, it notes that the underlying purpose of referring a matter to a panel is the protection of the financial interests of the Union, and that the preliminary classification in law, which is only for the panel, necessarily concerns, first, the conduct of the tenderers themselves and, secondly, the facts or findings established, in essence, in the context of audits or investigations conducted by the competent authorities of the European Union or, where appropriate, of the Member States. The Court concludes from this that the contracting authority must refer the matter to the panel only when the established facts available to it constitute evidence, and not mere suspicions, sufficient to support a presumption of guilt on the part of the tenderer. In the present case, however, it finds that, first, the letter of 23 December 2020 was the only evidence available to the Commission concerning an alleged instance of wrongful conduct on the part of ADS. Secondly, the allegations made by the applicant in that letter were not facts and findings established in the context of audits or investigations conducted by the

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554 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), and more specifically Articles 136 and 145 thereof.

555 Within the meaning of Article 136(2) of the Financial Regulation of 2018.

competent authorities of the European Union or by the Member States. Thirdly, that letter was not accompanied by any evidence capable of supporting the allegations mentioned therein. Fourthly, the complaints made did not concern the conduct of ADS but the alleged behaviour of the applicant's former employee.

The Court concludes from this that those allegations could not be regarded as facts or findings capable of constituting sufficient evidence to support a presumption of guilt on the part of ADS, justifying referring the matter to the panel.

Having reached that conclusion, the Court ascertains whether the Commission was nevertheless required to inquire into those allegations. In that regard, it observes that the only conduct of which ADS was accused was of having hired, during the tendering procedure at issue, one of the applicant's former employees. In principle, that fact does not, in itself, constitute evidence of behaviour capable of constituting serious professional misconduct.

Likewise, as regards the applicant's complaint that its former employee had breached business secrecy inasmuch as he had unlawfully obtained sensitive information concerning the applicant, which was likely to give ADS an unfair advantage during the competitive dialogue at issue, the Court considers that such a breach would not, in any event, constitute evidence of conduct on the part of ADS itself and would therefore not be capable of establishing a presumption of guilt on the latter's part. In addition, in the absence of concrete arguments and evidence produced by the applicant in its letter of December 2020, the Court finds that the allegation as regards the obtaining of sensitive information which was likely to have given ADS an unfair advantage was vague and hypothetical, with the result that it cannot constitute evidence. Moreover, the Court notes that the former employee had left the applicant shortly after the submission of the latter's revised tender in the context of the second phase of the competitive dialogue, with the result that he was not, in any event, in a position to obtain information regarding either the dialogue which took place between the applicant and ESA during the third phase or the content of the applicant's final tender.

Consequently, since the allegations contained in the letter of December 2020 were not capable of constituting sufficient evidence to establish a presumption of guilt on the part of ADS, justifying referring the matter to the panel, the Commission was not required to conduct an investigation in respect of those allegations.

In the second place, the Court rejects the complaint alleging failure to fulfil obligations relating to the examination of abnormally low tenders. It recalls that, under the provisions of the Financial Regulation of 2018, the assessment by the contracting authority of the existence of abnormally low tenders, a concept which is assessed in relation to the composition of the tender and the supply in question, takes place in two stages. [556] First, the contracting authority must assess whether the tenders submitted contain evidence likely to arouse the suspicion that they could be abnormally low. This is, in particular, the case if it appears uncertain (i) that the tender complies with the legislation in force and (ii) that the price proposed includes all the costs associated with the technical aspects of the tender. The same applies when the price proposed is considerably lower than that of other tenders or the usual market price. Secondly, if such evidence exists, the contracting authority must check the composition of the tender, giving the tenderer concerned the opportunity to justify its price. If, despite the explanations provided, the contracting authority determines that the tender is abnormally low, it must reject that tender.

556 Annex I, Chapter 1, Section 2, point 23.1, first paragraph, and point 23.2 of the Financial Regulation of 2018.

In this instance, the Court finds that the difference between the price of ADS' final tender and that of the other tenders cannot, in itself, constitute evidence of the abnormally low nature of that tender, in view of the specificities of the contract in question. First, the tendering procedure was launched in the form of a competitive dialogue, since the Commission had not yet determined the specific means of meeting its needs. Thus, the prices of the tenders depended on the different solutions and technical means proposed by each tenderer. Secondly, it follows from the specific characteristics of the satellites in question that they are not goods for which there is a standard price or a market price. Furthermore, beyond the price difference, the applicant has not put forward any concrete argument in support of its allegation that ADS' tender should have appeared to be abnormally low.

The Court concludes that it has not been established that there was evidence such as to arouse the Commission's suspicion that ADS' tender could be abnormally low. Consequently, the Commission was not required to check the composition of ADS' tender in order to ensure that the tender was not abnormally low.

In the third place, the Court rejects the complaint that, by merely confirming the findings set out in the evaluation report, the Commission failed to fulfil its obligation to adopt an independent decision as to the award of the contract.

First, it is true that the Commission has overall responsibility for the Galileo programme and, for the deployment phase of that programme, must conclude a delegation agreement with ESA specifying the latter's tasks, in particular as regards the award of contracts relating to the system. It is precisely within the framework of the delegation agreement which was concluded between the Commission and ESA that the latter, acting in the name and on behalf of the former, was responsible for organising the competitive dialogue at issue, whereas the Commission remained the contracting authority. However, responsibility for the Galileo programme cannot alter or add to the Commission's obligations as contracting authority.

Secondly, in cases where an evaluation committee has been appointed by the contracting authority, under the Financial Regulation of 2018, it is for that committee to evaluate the tenders in its evaluation report. Although the contracting authority is not bound by that report, it is entitled to rely on it to award the contract in question. Accordingly, the fact that the contested decisions were reasoned by reference to the evaluation report, with the Commission endorsing the opinion of the evaluation board responsible for evaluating the tenders submitted, in no way detracts from the fact that those decisions were adopted independently.

Judgment of 14 June 2023, *Instituto Cervantes* v *Commission* (T-376/21, EU:T:2023:331)

(Public supply contracts – Tendering procedure – Provision of language training for the institutions, bodies and agencies of the European Union – Ranking of a tenderer in the cascade procedure – Obligation to state reasons – Documents in the tender accessible via a hypertext link – Manifest errors of assessment – Misuse of powers)

By a contract notice of 20 November 2020, the European Commission launched an open call for tenders relating to language training for the institutions, bodies and agencies of the European Union. The contract was divided into eight lots, including Lot 3, entitled 'Language learning in Spanish'. According to the specifications for the tendering procedure at issue, the contracting authority would award the contract on the basis of the most economically advantageous tender. The rules on the submission of tenders, in the tender specifications, provided, inter alia, that tenders had to be submitted via the eSubmission application.

On 19 April 2021, pursuant to the recommendations of the evaluation committee, the Commission adopted the contested decision. It accordingly awarded Lot 3 (Spanish language) of the contract in first place to the consortium CLL Centre de Langues-Allingua ('the CLL consortium') and in second place to the applicant, Instituto Cervantes.

In the tendering procedure, the applicant had submitted via the eSubmission platform certain documents which illustrated the technical proposal described in its tender, and which were accessible only via hypertext links incorporated in the tender. In the tender evaluation grid, the Commission informed the applicant that it had rejected those documents and had not evaluated them, on the grounds that they were not compliant with the tender specifications and that there was a risk that the tender could be modified by means of those hypertext links after the deadline for the submission of tenders. The Commission accordingly found that the documents that were accessible only via those hypertext links were missing.

Hearing an action for annulment of the contested decision, which it has dismissed in its entirety, the General Court rules on the novel question of whether tenderers may use hypertext links to submit documents forming part of their tenders, where that method of communication was not provided for in the specifications, and on the consequences of such use at the stage of evaluating the tenders and awarding points.

Findings of the Court

In the first place, the Court rejects the pleas in law alleging breach of the duty to state reasons.

First, it dismisses the argument that it was impossible to ascertain the relative advantages of the successful tender. It finds that, although the evaluations for some of the sub-criteria are succinct, (i) it can be seen that the tender of the CLL consortium contains a number of aspects that are superior to those of the applicant's tender; (ii) the standard of quality of the applicant's tender is knowable, and is lower; (iii) it must be borne in mind that the incomplete documentation, which relates to a key component of a language course, namely the exercises, is presented as a weakness in the applicant's tender which led to a loss of points. Similarly, since the incomplete documentation was not the only shortcoming that justified the loss of points in the evaluation of the applicant's tender, the Court dismisses the argument alleging a manifest error of assessment relating to the lack of a coherent correlation between that assessment and the score awarded.

Second, the Court dismisses the complaint alleging that it was impossible to ascertain the exact number of points deducted as a result of the incomplete documentation. It finds that the tender specifications did not establish a weighting for the various components forming part of the description of each sub-criterion, because these were not 'sub-sub-criteria' intended to be evaluated separately but were descriptive of the content of each sub-criterion. Accordingly, it was not necessary to attach a specific weight to each positive or negative comment in the evaluation, but instead to ensure that the applicant could understand the reasons that led the Commission to award its tender the score given for each sub-criterion, which it was indeed able to do. The Court finds that the evaluation committee indicated the relative advantages of the successful tender under each sub-criterion and that in the present case the Commission cannot be required to assign a specific weight to each positive or negative comment relating to the various components within the description of each sub-criterion.

In the second place, the Court dismisses the plea in law alleging a manifest error of assessment resulting from the fact that the link between the evaluation of certain sub-criteria and the score awarded is irrational, disproportionate and non-transparent. Accordingly, in respect of the allegation that the principle of transparency was breached because the specific weight given to a component of the criterion affected by the incomplete documentation was not indicated in the contract documents, the Court observes that the incomplete documentation was not the only shortcoming justifying the loss of points. The deduction therefore cannot be described as manifestly inconsistent with the shortcomings identified.

Moreover, the specific importance attached to a component of the tender and the award of points for each sub-sub-criterion or each component of a sub-criterion fall within the broad discretion available to the Commission. The Court therefore cannot review the importance, as such, attached to particular components in relation to a sub-sub-criterion, and merely reviews whether a manifest error of assessment has been established. In the present case, the applicant has not demonstrated a manifest error of assessment, since the incomplete documentation identified by the Commission related to a significant component of a language course and could legitimately give rise to a deduction of points, while the deduction of points has not been shown to be manifestly incorrect.

In the third place, the Court dismisses the third plea, alleging a manifest error of assessment as a result of the exclusion of components of the tender that were accessible via a hypertext link.

According to the terms of the tender specifications, the 'tender' had to be uploaded directly to the eSubmission platform and only documents for which that process was followed formed part of the tender. In line with the objective pursued by means of the eSubmission application, of facilitating the submission of tenders via a secure application, the applicant was therefore not entitled to submit certain parts of its tender via hypertext links leading to a document accessible on a website under the control of the tenderer. The Commission cannot therefore be criticised for not taking into account the documents obtained via the hypertext links in question.

Moreover, the Court notes that submission via that secure application enables compliance with the principle of the equal treatment of tenderers since it ensures that the contracting authority can keep control of the documents submitted to it. It therefore guards against any risk of documents being modified where they are accessible only via a hypertext link and therefore have not been uploaded directly in the eSubmission application. The Court accordingly infers that a reasonably well-informed tenderer exercising ordinary care is, in that context, in a position to know that it must submit its tender within the deadline given and that it can no longer modify the tender after that deadline. Such a tenderer cannot therefore infer from the tender specifications in question that it is permissible to include hypertext links in its tender which lead to a document accessible on a website under its control.

Furthermore, since the applicant was not permitted to include hypertext links in its tender, the Commission was not obliged either to verify whether the documents in question had been modified or to accept those documents. In any event, those documents were on a website under the control of the tenderer and the evidence provided by the applicant seeks to demonstrate that the documents in question were not modified, not that they could not be modified.

Lastly, the argument alleging infringement of the right to be heard cannot succeed because, although tenderers must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision, that right is safeguarded at the time they submit their tenders, and by the fact that tenderers can request clarifications about the provisions of the tender specifications. The fact that no subsequent stage is envisaged in which to provide supplementary explanations, after the tenders have been evaluated, therefore cannot amount to an infringement of the right to be heard.

In the fourth place, the Court rejects the plea in law alleging, in essence, that the Commission failed to discharge its obligation to compare the technical proposal of the CLL consortium with the applicant's technical proposal. There is in fact nothing to suggest that the Commission did not comply with the requirement to identify the 'most economically advantageous' tender on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders. The CLL consortium's tender was evaluated by the committee in the light of the technical award criteria contained in the tender specifications, as was the applicant's tender.

In the fifth place, the Court dismisses the plea in law alleging, in essence, that by awarding all the lots of the contract for language training to a single service provider, that is to say, the CLL consortium, the

Commission improperly implemented a practice as a result of which it disregarded the objective pursued by the public procurement legislation of achieving the widest possible opening up of the markets of the EU institutions to competition.

A contracting authority cannot be precluded from awarding all the lots under a public contract to the same tenderer, provided that its tenders were the most economically advantageous compared with all the other tenderers and provided the principle of equal treatment as between tenderers was upheld, with the aim of ensuring healthy and effective competition between the participants in the procurement procedure in question.

The Court also recalls that the requirement of impartiality is twofold. It encompasses, first, the subjective impartiality of the members of a body, in so far as no member of the body concerned may show bias or personal prejudice (impartiality which is presumed in the absence of evidence to the contrary), and, second, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the body concerned. In the present case, first, it has not been claimed that the members of the committee were biased and, second, it has not been shown that the absence of an obligation to evaluate the quality of the technical tender before the price resulted, inter alia, in a breach of the principle of equal treatment.

XII. Access to documents of the institutions

Judgment of 25 January 2023, *De Capitani* v *Council* (T-163/21, EU:T:2023:15)

(Access to documents – Regulation (EC) No 1049/2001 – Documents concerning an ongoing legislative procedure – Council working groups – Documents concerning a legislative proposal to amend Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings – Partial refusal to grant access – Action for annulment – Interest in bringing proceedings – Admissibility – First subparagraph of Article 4(3) of Regulation No 1049/2001 – Exception relating to the protection of the decision-making process)

The applicant, Mr Emilio De Capitani, had submitted a request for access [557] to certain documents exchanged within the Council's 'Company Law' working group relating to the legislative procedure concerning the amendment of Directive 2013/34 on the annual financial statements. [558] The Council had refused access to certain documents on the ground that their disclosure would seriously undermine the Council's decision-making process within the meaning of Regulation No 1049/2001. [559] Following the applicant's confirmatory application concerning access to the undisclosed documents, the Council adopted the contested decision, [560] by which it confirmed its refusal to grant access.

The Council working groups are internal bodies of that institution which prepare the work of the Committee of Permanent Representatives (Coreper) and, subsequently, the ministerial formation with competence of the Council.

The General Court, hearing an action for annulment which it upholds, addresses the question of access to documents relating to legislative procedures from the novel perspective of the relationship between, on the one hand, the principles of publicity and transparency of the legislative procedure, deriving from the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union [561] and, on the other hand, the exception to the disclosure of documents taken from the protection of the decision-making process of an institution, laid down by secondary legislation. [562] In addition, the Court examines for the first time the conditions for access to documents drawn up by the Council's working groups in the context of a legislative procedure.

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557 Under 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).

558 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19).

559 First subparagraph of Article 4(3) of Regulation No 1049/2001.

560 Decision SGS 21/000067 of the Council of the European Union of 14 January 2021.

561 Article 15 TFEU and Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter').

562 Within the meaning of Article 4(3) of Regulation No 1049/2001.

Findings of the Court

First, the Court rejects the applicant's argument that the exception relating to the protection of the decision-making process provided for in Regulation No 1049/2001, interpreted in the light of the FEU Treaty and the Charter, does not apply to legislative documents.

The Court notes that as the principle of openness is of fundamental importance in the European Union legal order, the principles of publicity and transparency are inherent in the legislative procedures of the European Union. [563] Access to legislative documents must therefore be as wide as possible. However, that does not mean that EU primary law provides for an unconditional right of access to legislative documents. In accordance with the FEU Treaty, [564] the right of access to documents of the EU institutions is exercised in accordance with the general principles, limits and conditions laid down by means of regulations. The provisions of the FEU Treaty governing the right of access to documents of the institutions do not exclude legislative documents from its scope.

The Court observes that that conclusion is supported by the legislative context of the right of access to documents. It is apparent from primary law that the principle of openness is not absolute. [565] Furthermore, the Court notes that, in accordance with Regulation No 1049/2001, the EU institutions may refuse access to certain documents of a legislative nature in duly justified cases.

Contrary to the applicant's submissions, the Court finds, first of all, that the continuity of the right of access to documents exists between the Treaty establishing the European Community and the FEU Treaty and concludes that the exception to the obligation to disclose a requested document relating to the protection of the decision-making process of the institution concerned, provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001, remained applicable following the entry into force of the FEU Treaty and the Charter. Next, it considers that there is nothing to support the conclusion that the provisions of the FEU Treaty and of the Charter exclude, as a matter of principle, the possibility that access to documents drawn up by the Council's working groups in the context of a legislative procedure may be refused on the ground that their disclosure would seriously undermine the Council's decision-making process. Lastly, it states that although the provisions of the FEU Treaty according to which the Council is to meet in public when considering and voting on a draft legislative act [566] lay down the principle of publication of legislative debates during Council sessions, they do not concern the right of access to documents or the limits and conditions for the exercise of that right.

Secondly, the Court finds that none of the grounds relied on by the Council in the contested decision supports the conclusion that disclosure of the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the legislative process concerned.

First of all, as regards the ground based on the allegedly sensitive content of the documents at issue, the Court finds that they in fact contain specific textual comments and amendments which form part of the normal legislative process. Although those documents relate to subjects of some importance, possibly characterised by both political and legal difficulty, and may contain elements resulting from 'difficult negotiations' which might reflect the difficulties which it still had to resolve before reaching an agreement, the Council does not identify any concrete and specific aspect of those documents which is particularly sensitive in the sense that a fundamental interest of the European Union or of the Member

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563 Judgment of 22 March 2018, ***De Capitani* v *Parliament*** (T-540/15, EU:T:2018:167, paragraph 81).

564 Article 15(3) TFEU.

565 Article 1 and Article 10(3) TEU and Article 15(1) TFEU.

566 Article 15(2) TFEU.

States would have been called into question in the event of disclosure. Nor does it explain how access to the documents at issue would specifically, effectively and in a non-hypothetical manner seriously undermine the possibilities of reaching an agreement on the legislative proposal in question.

Next, as regards the preliminary nature of the discussions, within the Council working group, relating to the legislative proposal in question, the Court notes that it does not justify, as such, the application of the exception based on the protection of the decision-making process. That exception makes no distinction according to the state of progress of the discussions, but envisages in general the documents relating to a question where a 'decision has not been taken' by the institution concerned. Since a proposal is, by its nature, intended to be discussed, an applicant for access to legislative documents in the context of an ongoing procedure is fully aware that the information contained therein is intended to be amended throughout the discussions in the course of the preparatory work of the working group until agreement on the whole text is reached. That was the objective pursued by the request for access made by the applicant, who sought to ascertain the positions expressed by the Member States within the Council specifically in order to generate a debate in that regard before that institution established its position in the legislative procedure in question.

Furthermore, the Court finds that the Council has produced no tangible evidence to show that access to the documents at issue would have harmed the Member States' cooperation in good faith. It notes that, since the Member States express, in the context of Council working groups, their respective positions on a given legislative proposal, and accept that their position could evolve, the fact that those elements are then disclosed, on request, is not in itself capable of undermining sincere cooperation. [567] In a system based on the principle of democratic legitimacy, co-legislators must be answerable for their actions to the public and if citizens are to be able to exercise their democratic rights they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information. In the present case, there is nothing to suggest that the Council could reasonably expect a risk of external pressure and a reaction beyond what could be expected from the public by any member of a legislative body who proposes an amendment to draft legislation.

Furthermore, the Court notes that it is only if the institution concerned considers that disclosure of a document would specifically and actually undermine the decision-making process in question that it is then required to ascertain whether an overriding public interest nevertheless justifies disclosure of the document. Similarly, the mere fact that access to certain documents relating to the same legislative procedure has been granted cannot justify the refusal of access to other documents.

Lastly, access to documents drawn up by the Council working groups cannot be limited because of their allegedly 'technical' nature. Whether or not a document is 'technical' is not a relevant criterion for the purposes of the application of the exception based on protection of the decision-making process. The members of Council working groups are given a mandate from the Member States that they represent and, at the time of deliberation on a given legislative proposal, they express the position of their Member State within the Council, when the Council acts in its capacity as co-legislator. The fact that the working groups are not authorised to adopt the Council's definitive position does not mean that their work does not form part of the normal legislative process, or that the documents drawn up are 'technical' in nature.

567 Article 4(3) TEU.

XIII. Civil service

1. Orphans' pension

Judgment of 7 June 2023, *OP* v *Parliament* (T-143/22, EU:T:2023:313)

(Civil service – Officials – Survivor's pension – Refusal to grant – Surviving spouse – Eligibility conditions – Duration of the marriage – Plea of illegality – Article 80, first paragraph, of the Staff Regulations – Article 2 of Annex VII to the Staff Regulations – Orphans' pension – Refusal to grant – Concept of 'dependent child' – Error of law)

A, the adult son of B, a former official of the European Parliament, has a disability. Following the death of B, the applicant, A's mother, submitted an application to the Parliament seeking an orphans' pension for her son.

That application was rejected by the Parliament by way of a decision ('the contested decision') on the ground that, at the time of his death, B did not have a child recognised as a dependent child by that institution. The Parliament referred to Article 80 of the Staff Regulations of Officials of the European Union ('the Staff Regulations') and stated that a child could not be recognised as a dependent child within the meaning of Article 2 of Annex VII to the Staff Regulations, or receive an orphans' pension on that basis, unless a request to that effect had been submitted by the official concerned to the administration and the latter had verified compliance with the relevant conditions.

The General Court, before which the applicant brought her action, annuls the contested decision and addresses, for the first time, the substantive and procedural conditions necessary in order to receive an orphans' pension under Article 80 of the Staff Regulations.

Findings of the Court

The Court begins by noting that there are disparities between the different language versions of the first paragraph of Article 80 of the Staff Regulations. While some of them, including the French version, use the wording 'enfants reconnus à … charge' ('children recognised as … dependent'), the other language versions do not use the term 'reconnus' or 'recognised'. Accordingly, the Court interprets that article by taking into account both the purpose of that provision and the context in which it operates.

As regards the definition of those entitled to an orphans' pension, namely the dependent children of a deceased official, the first paragraph of Article 80 of the Staff Regulations refers to Article 2 of Annex VII to the Staff Regulations as a whole. A dependent child, within the meaning of paragraph 2 of that article, whether a legitimate, natural or adopted child of the official or of his or her spouse, is to give rise to entitlement to payment of the dependent child allowance in so far as the child is actually being maintained by the official and satisfies, in addition, one of the conditions set out in paragraphs 3 and 5 of that article. He or she must therefore either be under the age of 18 or be aged between 18 and 26 and undergoing educational or vocational training, or be prevented by serious illness or invalidity from earning a livelihood. In each of those three cases, the Staff Regulations do not confer on the administration any discretionary power as to whether or not to grant the orphans' pension in question, but rather confer on it a limited power, in that it is required to grant that pension if it finds that the conditions are satisfied and not to grant it where they are not.

Thus, entitlement to an orphans' pension in a case such as that of the applicant's son is subject to three conditions being satisfied. The first two conditions are substantive, in that the child concerned must be suffering from a serious illness or invalidity preventing him or her from earning a livelihood and he or she must actually have been maintained by the deceased official. The third condition is temporal, in the

sense that the child must have been dependent on the deceased official at the time of the official's death.

It is true that the dependent child allowance is granted automatically in the case of a child under 18 years of age, but in other cases, it is granted on application by the official concerned. However, the sole purpose of that application is to enable the administration to ascertain whether the substantive and temporal conditions referred to above are satisfied and, if so, to grant a dependent child allowance. The requirement that recognition by the administration ought to have taken place before the death, which is not imposed by Article 80 of the Staff Regulations, read in conjunction with Article 2 of Annex VII thereto, constitutes an additional condition which cannot be followed for that purpose.

Only a combined application of those provisions, which takes account of the general scheme of the rules governing the orphans' pension and the particular situation of the person concerned, namely a child suffering from a serious illness or invalidity, is consistent with the social objective pursued by the payment of an orphans' pension to such a child, who is prevented from earning a livelihood.

Accordingly, the phrase 'at the time of death' used in the first paragraph of Article 80 of the Staff Regulations must be understood as relating to the relevant date for assessing whether the child of the deceased official satisfies the conditions of Article 2 of Annex VII to the Staff Regulations, and not the date on which a decision in that regard must have been taken by the administration. This means that, provided that the substantive conditions for a dependent child were met prior to the official's death, it is not necessary for the administrative steps to have been completed before that death for the purpose of entitlement to a dependent child allowance.

2. Limitation period for the recovery of allowances paid but not due

Judgment of 11 October 2023, *QT* v *EIB* (T-529/22, EU:T:2023:618)

(Civil service – EIB staff – Remuneration – Dependent child allowance – Education allowances – Recovery of sums paid but not due – Lack of competence of the author of the act – Infringement of the limitation period)

The applicant, QT, an employee of the European Investment Bank (EIB), received dependent child allowances and education allowances from July 2014 to June 2017.

Following information received concerning potential irregularities in the award of education allowances and derived entitlements at the EIB, the European Anti-Fraud Office (OLAF) opened an investigation concerning, inter alia, the applicant. Following that investigation, the EIB adopted the decision of 28 September 2021 for the recovery of an amount of EUR 61 186.61 wrongly paid to the applicant towards education allowances, dependent child allowances and related benefits during the period from July 2014 to June 2017 ('the recovery decision').

The General Court, sitting in extended composition, before which the applicant brought her action, annuls that decision and rules, on that occasion, inter alia, on whether the opening of an investigation by OLAF is capable of interrupting or suspending the limitation period laid down for the recovery of allowances paid but not due.

Findings of the Court

In support of her action for annulment, the applicant disputed, inter alia, the competence of the author of the recovery decision, submitting that there was no lawful subdelegation of powers to the Head of the 'Individual Rights and Payment' Unit by the competent authority within the EIB to adopt decisions for the recovery of undue amounts, namely the Director-General of Personnel.

In that regard, the Court points out that a delegation of powers cannot be presumed and that even when entitled to delegate its powers the delegating authority must take an express decision transferring them, since the delegation can relate only to clearly defined executive powers. However, the material in the file does not substantiate that subdelegation. Nor can the reference, in the recovery decision, to the Director-General of Personnel's agreement with that decision be regarded as equivalent to an express decision to transfer to the Head of Unit the power to carry out the recovery procedure. It follows that the recovery decision was adopted by an authority without competence to do so.

In her action for annulment, the applicant also alleged infringement of the limitation period laid down in Article 16.3 of the EIB Staff Rules.

According to the Court, it is apparent from the clear wording of that article that the EIB must recover the sums wrongly paid to its staff within a period of five years from their payment, except where it is established that the member of staff concerned intended to mislead it in order to obtain that payment. The determination of such a limitation period, by preventing situations which arose a long time previously from being indefinitely brought into question, tends to strengthen legal certainty but can also allow the acceptance of situations which at least in the beginning were unlawful. The extent to which provision is made for it is thus the result of a choice between the requirements of legal certainty and those of legality, on the basis of the historical and social circumstances prevailing in a society at a given time. It is accordingly a matter for the legislature alone to decide, and, once a limitation period is adopted by it, the judicature cannot substitute another period in a particular case.

As regards the EIB's argument that the limitation period ceased to run during the OLAF investigation, the Court notes that Article 16.3 of the abovementioned staff rules does not contain any reference to the interruption or suspension of that period in the event of the opening of an investigation by OLAF. Furthermore, although the institutions, bodies, offices and agencies of the European Union must refrain from opening a parallel investigation whilst OLAF conducts an internal investigation into the same facts, [568] the adoption of a decision for the recovery of sums wrongly paid cannot amount to an investigation.

Accordingly, there was nothing to prevent the EIB from recovering the amounts that it considered had been wrongly paid to the applicant before the conclusion of OLAF's investigation concerning her, since the principles of sincere cooperation and sound administration on which it relies cannot justify the recovery of the allowances at issue outside the five-year limitation period, unless the principle of legal certainty is disregarded.

In the light of the foregoing, the Court annuls the recovery decision.

3. Composition of a selection board in an internal competition

Judgment of 18 October 2023, *NZ* v *Commission* (T-535/22, EU:T:2023:653)

[568] Under Article 5(3) of Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by [OLAF] and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999 (OJ 2013 L 248, p. 1).

(Civil service – Officials – Recruitment – Internal competition COM/1/AD 10/18 – Decision not to include the applicant on the reserve list – Equal treatment – Stability in the composition of the selection board – Unlimited jurisdiction – Non-material damage)

In November 2018, the applicant, NZ, applied for internal competition COM/1/AD 10/18, which was intended to draw up a reserve list for the recruitment of administrators at grade AD 10 by the European Commission.

In February 2020, the selection board decided not to include the applicant on the reserve list on the ground that she had obtained an overall mark in the oral test that was below the threshold which had to be achieved in order to be ranked among the best candidates. Following the dismissal, by the selection board, of her request for review of that decision ('the request for review'), the applicant brought an action for annulment before the General Court.

By judgment of 6 October 2021, *NZ* v *Commission*, [569] the Court upheld the action and annulled the decision to dismiss the request for review on the ground that that decision lacked a sufficient statement of reasons.

In compliance with that judgment, the selection board decided in February 2022 to dismiss the request for review on the ground that the mark obtained by the applicant in the oral test was less than the minimum mark required for being placed on the reserve list ('the contested decision').

Consequently, the applicant again brought an action for annulment before the Court.

The Court upholds that action and exercises its unlimited jurisdiction for the purpose of ordering the Commission to pay compensation. In this instance, the Court, ruling on the stability of the composition of a selection board in an internal competition, supplements the case-law related to the arrangements for organising competitions.

Findings of the Court

The Court begins by finding that the selection board did not function in a sufficiently stable manner during the oral tests. However, that circumstance is not capable, by itself, of entailing the annulment of the contested decision.

Maintaining the stability of the composition of the selection board during the tests is not a requirement in itself, but a means of ensuring compliance with the principle of equal treatment, consistent marking and the objectivity of the assessment. Accordingly, the selection board may effectively ensure consistent marking and objectivity of the assessment by other means. In particular, in the light of the way the tests in a competition and the proceedings of the selection board are organised, it may be sufficient that the selection board's composition is kept stable only during certain key stages of the competition. Consequently, even if the composition of the selection board does not remain stable during the tests, equal treatment of the candidates may be ensured if the selection board puts in place the coordination necessary in order to ensure the consistent application of the marking criteria.

In that regard, the institution concerned must show that the planned coordination meetings took place and that all the members of the selection board, namely the chair, the alternate chairs and the assessors, actually attended those meetings.

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569 Judgment of 6 October 2021, ***NZ* v *Commission*** (T-668/20, EU:T:2021:667.

It is apparent from the documents submitted by the Commission and from the attendance sheets for those meetings that such was not the case in this instance. All the members of the selection board did not meet in full composition in order to discuss the comparative assessments of the candidates and to confirm their final marks on the basis of the results of the tests.

The Court thereafter exercises its unlimited jurisdiction. It finds, in that regard, that that jurisdiction, conferred on the Courts of the European Union by Article 91(1) of the Staff Regulations of Officials of the European Union, entrusts those Courts with the task of providing a complete solution to disputes of a financial character brought before them. That jurisdiction is primarily intended to enable the Courts of the European Union to guarantee the effectiveness of the judgments by which they annul decisions in staff cases, so that if the annulment of a decision adopted by the administration which contains errors of law is not sufficient to assist the official concerned in enforcing his or her rights or to protect his or her interests effectively, the Courts of the European Union may award compensation of their own motion. Accordingly, even in the absence of proper claims to that effect, no plea of inadmissibility on the grounds of being out of time may be brought against a question that the Court is led to raise, as necessary, of its own motion.

In the present case, where a candidate contests the rejection of his or her candidature in a selection procedure intended to draw up a list of successful candidates, which prevents that person from subsequently taking up a vacant post within the institution concerned and from receiving the related financial advantages, the dispute is of a financial character.

In the case at hand, the selection board was not able to ensure equal treatment of the candidates interviewed during the oral tests, owing to the instability of its composition. Accordingly, it is the comparative assessment of the merits of all of the candidates that was vitiated by the variation in the composition of the selection board. That illegality consequently affects not only the mark given to the applicant, but also the threshold of the points required as a condition for the inclusion of a candidate on the reserve list.

In the first place, as regards material damage, the Court considers that proof of the existence of actual and certain damage has not been established.

The applicant may not make a claim of material damage on the basis of the fact that, in compliance with the judgment in annulment, she should immediately be included on the reserve list. Including her on that list in that way would actually amount to exempting her from the oral test provided for in the notice of competition, which makes the inclusion of a candidate on the reserve list conditional on obtaining one of the highest marks in that oral test as well as the required minimum thereof. In any event, the inclusion of a candidate on the reserve list does not confer on that person a right to be appointed, but merely makes them eligible to be appointed.

Nor has the applicant, furthermore, definitively lost the actual opportunity of being a successful candidate in the internal competition at issue and, consequently, of being appointed as an official of the European Union at grade AD 10, given that the organisation of a new oral test, conducted independently in relation to the results of the initial oral test, would have the precise purpose of restoring such an opportunity to her.

In the second place, as regards the non-material damage, the Court observes that even if the reopening of the competition in respect of the applicant and the organisation of an oral test conducted independently in relation to the oral test that was vitiated by unlawfulness would constitute an appropriate measure for complying with the present judgment in annulment, it is not possible for the Commission, without cancelling all the results of the competition, to recreate the conditions in which that competition should have been organised in order to ensure equal treatment of all the candidates and the objectivity of the marking.

Consequently, annulment of the contested decision does not suffice to protect the interests of the applicant effectively. That annulment is not capable by itself of making good the certain non-material damage suffered by the applicant owing to the fact that she was unable to take the initial oral test under the proper conditions. In those circumstances, the Court orders the Commission to pay the applicant the sum of EUR 4 000 in respect of the non-material damage caused by the contested decision.

XIV. Applications for interim measures

Order of 2 February 2023, *Nicoventures Trading and Others* v *Commission* (T-706/22 R, EU:T:2023:39)

(Interim relief – Public health – Withdrawal of certain exemptions for heated tobacco products – Application for interim measures – No urgency)

The British American Tobacco group, to which the applicants belong, is a global manufacturer of, inter alia, heated tobacco products. Directive 2014/40 [570] regulates, among other things, the placing on the market of tobacco products. It exempted tobacco products other than cigarettes and roll-your-own tobacco [571] from the prohibition on the placing on the market of tobacco products with a characterising flavour or containing flavourings in any of their components. [572]

However, by Delegated Directive 2022/2100, [573] the European Commission amended Directive 2014/40 so that heated tobacco products would no longer be exempted from the prohibitions relating to flavourings.

Concurrently with the bringing of an action before the General Court seeking the annulment of Delegated Directive 2022/2100, the applicants made an application for interim measures seeking, first, in essence, the suspension of operation of that directive and, second, the grant of any other interim measures as appropriate. Having concluded that there was no urgency, the Vice-President of the General Court dismisses that application.

Findings of the Vice-President of the General Court

As a preliminary point, the Vice-President of the General Court recalls that urgency must in general be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party seeking the interim relief. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

Primarily, in response to the argument that Directive 2022/2100 would cause the applicants to lose their position on the market and their current customers, the Vice-President of the General Court points out that, where the damage is of a financial nature, the interim measure sought is justified only if it appears that, without that measure, the party seeking it would be in a position that could jeopardise its existence before final judgment is given in the main proceedings. In that respect, it is for the party seeking interim measures, in particular when it relies on the occurrence of financial damage, to produce, with supporting documentation, an accurate overall picture of its financial situation. In addition, the essential elements of fact and law enabling the judge hearing the application for interim

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570 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

571 Under Article 7(12) of Directive 2014/40.

572 Under Article 7(1) and (7) of Directive 2014/40.

573 Commission Delegated Directive (EU) 2022/2100 of 29 June 2022 amending Directive 2014/40/EU of the European Parliament and of the Council as regards the withdrawal of certain exemptions in respect of heated tobacco products (OJ 2022 L 283, p. 4).

measures to construct such a picture must be apparent from the text of the application for interim measures; that text must in itself enable the defendant to prepare its observations and the judge hearing the application for interim measures to rule on it, where necessary, without other supporting information.

In the present case, the Vice-President of the General Court notes that the applicants do not claim that, without the interim measures sought, they would be in a position that could imperil their financial viability before final judgment is given in the main action. At most, they assert that Delegated Directive 2022/2100 will lead to a significant loss of revenue. Furthermore, they have not adduced evidence that, having regard, in particular, to the characteristics of the group to which they belong, their market share would be affected substantially, especially since, in accordance with that directive, they have a significant period of time in which to adapt their commercial offer to the new rules.

In addition, the Vice-President of the General Court recalls that, as regards the market for medicinal products for human use, in the context of a highly regulated market in which the competent authorities may intervene rapidly when public health risks become apparent, for reasons which cannot always be foreseen, it is for the undertakings concerned, if they are not to bear themselves the loss resulting from such intervention, to protect themselves against its consequences by adopting an appropriate policy.

Before it was amended by Delegated Directive 2022/2100, Directive 2014/40 authorised the Commission to adopt delegated acts to withdraw the exemption from the prohibitions at issue for a particular product category in the event of a substantial change of circumstances as established in a Commission report. Directive 2014/40 therefore envisaged circumstances in which that exemption could be withdrawn for other products containing flavourings. In any event, the Commission published a report establishing, in accordance with Directive 2014/40, a substantial change of circumstances as regards heated tobacco products. The possibility of withdrawing the exemption from heated tobacco products has therefore existed since the adoption of Directive 2014/40, and, at the very least, since the publication of that report.

The Vice-President of the General Court also recalls that, when suspension of the operation of an EU act is sought, first, the grant of the interim measure requested is justified only where the act at issue constitutes the decisive cause of the alleged serious and irreparable harm, and secondly, that harm must result solely from the effects produced by the act at issue and not from a lack of diligence on the part of the party which has sought the interim measure. If it has not demonstrated the full level of diligence that ought to be demonstrated by a prudent and well-informed undertaking, that party must bear even harm which it claims is liable to jeopardise its existence or to alter irrevocably its position on the market.

In the present case, the applicants do not refer to any steps taken by them to protect themselves against the risks of a possible withdrawal of the exemption which applied to heated tobacco products until the adoption of Delegated Directive 2022/2100.

Order of 1 March 2023, *Mazepin* v *Council* (T-743/22 R, EU:T:2023:102) [574]

[574] Joint résumé for cases *Mazepin* v *Council* (T-743/22 R and T-743/22 R II).

(Interim relief – Common foreign and security policy – Restrictive measures taken in respect of Russian actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – Application for interim measures – Prima facie case – Urgency – Weighing up of interests)

Order of 19 July 2023, *Mazepin* v *Council* (T-743/22 R II, EU:T:2023:406)

(Interim relief – Common foreign and security policy – Restrictive measures taken in respect of Russian actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – Application for interim measures – Prima facie case – Urgency – Weighing up of interests)

Following the military attack launched by the Russian Federation against Ukraine on 24 February 2022, the Council of the European Union adopted, on 9 March 2022, Decision (CFSP) 2022/397 [575] and Regulation 2022/330, [576] by which Nikita Mazepin, who was at the time a driver at Haas F1 Team sponsored by JSC UCC Uralchem, was added to the lists of persons, entities and bodies subject to restrictive measures adopted in 2014 by the Council in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. Since Nikita Mazepin is the son of Dmitry Arkadievich Mazepin, the former General Director of Uralchem, he was added to the lists at issue because he is a natural person associated with a leading businessperson involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation. [577] By Decision (CFSP) 2022/1530 [578] and Implementing Regulation 2022/1529, [579] and then by Decision (CFSP) 2023/572 [580] and Implementing Regulation 2023/571, [581] the Council maintained his name on those lists. By the restrictive measures adopted, Nikita Mazepin's assets were frozen and he was banned from entering the European Union.

Nikita Mazepin brought an action before the General Court of the European Union seeking annulment of the acts adopted by the Council which maintained his name on the lists at issue. He also brought applications for interim measures seeking suspension of the operation of those acts and the grant of interim measures to allow him, inter alia, to enter the European Union in order to negotiate and conclude agreements with race teams and sponsors, to participate in racing and to open a bank account.

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575 Council Decision (CFSP) 2022/397 of 9 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 80, p. 31).

576 Council Regulation (EU) 2022/330 of 25 February 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 51, p. 1).

577 See Article 1(1)(e) and Article 2(1)(g) of 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 Decision (CFSP) 2022/329 of 25 February 2022 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 50, p. 1).

578 Council Decision (CFSP) 2022/1530 of 14 September 2022 amending Decision 2014/145/CFSP (OJ 2022 L 239, p. 149).

579 Council Implementing Regulation (EU) 2022/1529 of 14 September 2022 implementing 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 239, p. 1).

580 Council Decision (CFSP) 2023/572 of 13 March 2023 amending Decision 2014/145/CFSP (OJ 2023 L 75I, p. 134).

581 Council Implementing Regulation (EU) 2023/571 of 13 March 2023 implementing Regulation (EU) No 269/2014 (OJ 2023 L 75 I, p. 1).

By his orders of 1 March and 19 July 2023, the President of the General Court upholds the application for interim measures brought by Nikita Mazepin and orders the Council to suspend operation of those acts subject to certain conditions.

Findings of the President of the General Court

The President of the General Court examines, first of all, the condition relating to the establishment of a prima facie case. In that regard, he considers that it is necessary to examine whether the Council, prima facie, made an error of assessment in considering that, in the present case, there was a sufficiently solid factual basis to justify maintaining the applicant's name on the lists at issue.

As regards the applicant's argument that the Council has not shown that he unduly benefited from his father, the President of the General Court finds, in the first place, that although the Council shows that Uralkali, a company 80% owned by Uralchem, did in fact conclude a sponsorship agreement with Haas F1 Team, it does not substantiate the fact that the applicant could not have obtained that seat as a driver on that team without that sponsorship, and that the conclusion of that agreement ran counter to the financial interests of Uralkali. In the order of 19 July 2023, *Mazepin* v *Council* (T-743/22 R II), the President of the General Court adds that there are also reasons to doubt that the applicant's 'We Compete As One' foundation was actually financed by Uralkali or through its funds, and that the applicant continues, with regard to those alleged new financial links with his father, to benefit unduly from him.

In the second place, the President of the General Court considers, prima facie, that, the Council has not produced conclusive evidence based on the applicant's conduct to explain why, apart from the family connection, he had to be regarded as still being connected with his father, a leading businessman of the Russian Federation, after the termination of his contract as a Formula 1 driver and the sponsorship agreement concluded between Uralkali and Haas F1 Team.

Thus, without prejudging the Court's decision in the main action, the President of the General Court considers that the arguments put forward by the applicant appear, prima facie, not unfounded and therefore call for a detailed examination which cannot be carried out by the judge hearing the application for interim measures, but must be examined in the main proceedings. He therefore concludes that there is a prima facie case.

The President of the General Court then examines the condition relating to urgency and holds that it is satisfied in the present case, since the likelihood of serious and irreparable damage occurring has been established to the requisite legal standard.

In that regard, he observes, in the first place, that in the absence of the suspension sought and having regard to the potential duration of the proceedings in the main action, the possibility of the applicant resuming, at the end of the main proceedings, his career as a Formula 1 driver, which very often requires his presence in the European Union, in particular in order to participate in Grand Prix, appears to be remote or, in any event, severely limited.

In the second place, the President of the General Court finds that, in the absence of that suspension, the damage, consisting in depriving the applicant of the possibility of negotiating his recruitment as a Formula 1 driver or as a professional driver in other motor sport championships, would be irreparable. Should the General Court annul the contested measures at the end of the dispute in the main proceedings, that non-pecuniary damage would become definitive as regards the applicant's period of potential activity up to the date of the decision on the substance of the case.

Lastly, the President of the General Court concludes that the weighing up of interests lies in favour of the applicant. In that regard, he finds, first of all, that any damage which the applicant may have suffered as a result of the harm to his interests cannot subsequently be assessed and made good or compensated. He then finds that the applicant is a young sportsman who is in no way involved in the

aggression suffered by Ukraine and who is not engaged in any activity in economic sectors providing a substantial source of revenue to the Government of the Russian Federation. Lastly, he finds that the applicant seeks suspension of the operation of the contested measures, in so far as they concern him, only to the extent necessary to enable him to negotiate his recruitment, to participate in the next motor sport championships and to pursue his professional career. In those circumstances, suspension of the operation of the contested measures will not prejudge the future decision in the main proceedings or compromise the very purpose of the procedure for interim relief, which is to guarantee the full effectiveness of the future decision in the main action.

In the light of the foregoing, the President of the General Court grants the application for suspension of the operation of the contested measures. However, he considers that suspension of the operation of the contested measures, in so far as they concern the applicant, must be limited to what is strictly necessary to enable him to negotiate his recruitment as a professional Formula 1 driver or as a driver in other motor sport championships taking place also or only in the European Union, as well as to participate in Formula 1 Grand Prix, tests, training sessions and free sessions and in other motor sport championships, races, tests, training sessions and free sessions taking place in the European Union.

Order of 19 April 2023, *UC* v *Council* (T-6/23 R, EU:T:2023:206)

(Interim relief – Common foreign and security policy – Restrictive measures taken in view of the situation in the Democratic Republic of the Congo – Freezing of funds – Application for suspension of operation of a measure – No urgency)

In the context of the worsening of the political situation in the Democratic Republic of the Congo in 2016, on account of the failure to call presidential elections and the deterioration of the security situation that followed, the Council of the European Union adopted restrictive measures freezing funds and banning entry into the territory of the Member States against persons who, inter alia, exploited the armed conflict, instability or insecurity in the country, including through the illicit exploitation or trade of natural resources. [582] On 8 December 2022, by Decision 2022/2398 [583] and Regulation 2022/2397, [584] the Council added UC, a businessman who is the former director and former beneficial owner of African Gold Refinery Ltd., to the lists at issue on the ground that, since 2016, he had inter alia received and traded illicit gold originating from mines in the Congo that are controlled by non-governmental armed groups which are involved in destabilising activities.

UC brought an action before the General Court of the European Union seeking annulment of the acts adopted by the Council. He also lodged an application for interim measures seeking suspension of the operation of those acts.

By order, the President of the General Court dismisses UC's application for interim measures on the grounds that the condition relating to urgency is not satisfied.

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582 In accordance with Article 3(2)(f) of Council Decision 2010/788/CFSP of 20 December 2010 concerning restrictive measures against the Democratic Republic of the Congo and repealing Common Position 2008/369/CFSP (OJ 2010 L 336, p. 30), as amended by Council Decision (CFSP) 2022/2377 of 5 December 2022 (OJ 2022 L 314, p. 97).

583 Council Implementing Decision (CFSP) 2022/2398 of 8 December 2022 implementing Decision 2010/788/CFSP concerning restrictive measures in view of the situation in the Democratic Republic of the Congo (OJ 2022 L 316I, p. 7).

584 Council Implementing Regulation (EU) 2022/2397 of 8 December 2022 implementing Regulation (EC) No 1183/2005 concerning restrictive measures in view of the situation in the Democratic Republic of the Congo (OJ 2022 L 316I, p. 1).

Findings of the President of the General Court

Since the conditions relating to the suspension of operation (the establishment of a prima facie case and urgency) are cumulative, the President of the General Court examines, first of all, whether the condition relating to urgency is satisfied by assessing the arguments and evidence put forward by the applicant to show that, without interim protection, there is a risk of serious and irreparable harm.

Examining, in the first place, the applicant's argument relating to the occurrence of damage as a result of the restrictions placed on the use of his funds and the limitations on exercising his activity as manager and director of three companies in Belgium, the President of the General Court recalls that, in the event of financial damage, an interim measure is justified, first of all, if it appears that, without that measure, the party seeking it would be in a position that could imperil that party's financial viability. Furthermore, financial damage is deemed to be irreparable if it cannot be quantified and if, in practice, it would not be possible to make good that harm by bringing an action for damages under Articles 268 and 340 TFEU. Since the judge hearing the application for interim measures must have specific and precise information, supported by detailed and certified documentary evidence, the party seeking the interim measures must, in principle, when it relies on the occurrence of financial damage, produce, with supporting documentation, an accurate overall picture of its financial situation.

In the present case, the President of the General Court concludes that, as there is no information that enables the extent of the harm, its nature and the likelihood of its occurrence to be assessed, UC has not succeeded in showing the risk of serious and irreparable financial damage on account of the freezing of his funds.

The President of the General Court then notes that UC's argument seeks to obtain an assessment, in the context of the condition relating to urgency, of factors which, in reality, fall within the scope of whether there is a prima facie case. He states, in that regard, that there are, however, two distinct conditions for obtaining a suspension of operation of measures. [585] Thus, the mere demonstration of a prima facie case, even a particularly strong one, cannot make up for a complete failure to demonstrate urgency, save in very specific circumstances. Since, in the present case, the applicant merely describes the legal effects of the restrictive measures as provided for by Regulation No 1183/2005 and Decision 2010/78, as amended, without explaining how his fundamental rights and freedoms have allegedly been infringed and how serious the alleged infringement is, the President of the General Court finds that he is unable to determine whether the damage claimed is serious and reparable only with difficulty, or even irreparable.

Lastly, he recalls that since the fundamental rights relied on by the applicant do not enjoy absolute protection, restrictions may be imposed on the exercise of the freedom to pursue a trade or profession, as on the exercise of the right to property, provided that the restrictions correspond to objectives of general interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed. Accordingly, although restrictive measures may involve, by definition, effects impinging on those fundamental rights, given the importance of the objectives sought by the contested acts concerning the security and political situation in the DRC, the achievement of which is part of the wider objective of maintaining peace and international security, [586] the President of the General Court considers, prima facie, that the pursuit of those objectives is such as to justify the possibility that, for certain parties,

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585 See Article 156(4) of the Rules of Procedure of the General Court.

586 In accordance with the objectives of the Union's external action set out in Article 21 TEU.

which are in no way responsible for the situation which led to the adoption of the sanctions, the consequences may be negative, even significantly so.

As regards, in the second place, the applicant's argument that the prohibition on entry into, or transit through, the European Union, including the territory of the Member State of which he is a national, justifies urgency by definition, the President of the General Court states that the contested acts do not oblige the Kingdom of Belgium, the Member State of which the applicant is a national, to refuse him entry into, or transit through, its territory. [587]

As regards, in the third place, the applicant's argument that the Council did not give sufficient reasons for adding his name to the lists at issue, did not provide him with the information on the basis of which the listing decision was made, and deprived him of the necessary procedural safeguards, the President of the General Court finds that the applicant infers urgency merely from the alleged irregularity of the contested acts, which amounts to confusing the establishment of a prima facie case with the risk of serious and irreparable harm.

The President of the General Court therefore dismisses the application for interim measures, the applicant having failed to demonstrate the urgency of the protection measure sought, without it being necessary, moreover, to rule on the condition relating to the existence of a prima facie case or to weigh up the interests involved.

Order of 21 July 2023, *Arysta Lifescience* v *EFSA* (T-222/23 R, EU:T:2023:417)

(Interim relief – Access to documents – Regulation (EC) No 1049/2001 – Documents related to the procedure for renewing the approval of an active substance – Documents originating from a third party – Decision to grant a third party access to the documents – Application for suspension of operation of a measure – Prima facie case – Urgency – Balancing of competing interests)

The applicant, Arysta Lifescience, is a company which markets plant protection products containing the active substance Captan, in particular Captan 80 WG. In September 2022, an application for access to documents was submitted, by a third party, to the European Food Safety Authority (EFSA), concerning, inter alia, the list of co-formulants present in the formulation for representative uses of Captan 80 WG, submitted in connection with the renewal of the approval of the active substance Captan. Notwithstanding the applicant's objection, EFSA adopted, on 17 February 2023, a decision relating to the full disclosure of that list ('the contested decision').

Hearing an application for interim measures, brought following an action for annulment of that decision, the President of the General Court concludes that the conditions relating to the establishment of a prima facie case and urgency are satisfied and, having weighed the competing interests, decides to grant the application for suspension of the operation of the contested decision.

Findings of the President of the General Court

As a preliminary point, the President of the General Court recalls that the judge hearing the application for interim measures may order suspension of operation of an act and other interim measures if it is established that such an order is justified, prima facie, in fact and in law (*fumus boni juris*), and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must

587 See Article 4(2) of Decision 2010/788.

be made and produce its effects before a decision is reached in the main action. Those conditions are cumulative, with the result that applications for interim measures must be dismissed if any one of them is not satisfied. The judge hearing the application for interim measures must, where appropriate, also weigh up the interests involved.

In the first place, he recalls that the condition relating to the establishment of a prima facie case is satisfied where at least one of the pleas in law raised appears, prima facie, not unfounded. That is the case where one of those pleas reveals the existence of a major legal or factual disagreement whose solution is not immediately obvious and therefore calls for a detailed examination which must be the subject of the main proceedings.

With a view to showing that the contested decision is, prima facie, unlawful, the applicant alleged infringement of Article 4(2) of Regulation No 1049/2001 [588] and of Article 6(1) of Regulation No 1367/2006. [589] In particular, the applicant claimed that EFSA erred in concluding that the list of co-formulants contained information which relates to emissions into the environment within the meaning of Article 6(1) of Regulation No 1367/2006.

In that regard, the President of the General Court observes that establishing the scope of the concept of 'information relating to emissions into the environment' is dependent on a case-by-case assessment. He recalls that, in the case of a product such as a plant protection product, and the substances which that product contains, which, in the course of normal use, are intended to be released into the environment by virtue of their very function, the foreseeable emissions, under normal or realistic conditions of use, into the environment are not hypothetical and are covered by the concept of 'emissions into the environment'.

In the present case, the President of the General Court observes that, first of all, the information concerned by the request for access to the documents at issue is part of the dossier for renewal of the approval of the active substance Captan, which has actually been used in plant protection products and is actually present in the environment. Secondly, the information at issue does not concern the potential effects of the active substance, but is a list of co-formulants submitted for representative uses of Captan 80 WG marketed by the applicant. Lastly, co-formulants are substances or preparations which are used or intended to be used in a plant protection product or adjuvant, but are not active substances, safeners or synergists.

The President of the General Court concludes that he is not permitted to provide a ready response to the question whether the information at issue in the present case is covered by the concept of 'information relating to emissions into the environment'. He concludes that that plea appears, prima facie, not unfounded and therefore calls for a detailed examination which must be undertaken in the main proceedings.

In the second place, the President of the General Court recalls that the condition relating to urgency must in general be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party requesting the interim measure. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

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588 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).

589 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 order to show the urgency of the interim measures applied for, the applicant claimed that disclosure of the information at issue would cause it serious and irreparable damage since it would allow its competitors to recreate Captan 80 WG by re-engineering. According to the applicant, once the information at issue is published and enters the public domain, it will not be possible to remove it and revert to a situation where it is confidential.

In that regard, the President of the General Court recalls that, in a case such as this, where the applicant refers to damage that will be caused by the disclosure of purportedly confidential information, in order to assess whether there is a risk of serious and irreparable damage, the judge hearing the application for interim measures must necessarily start from the premiss that the information at issue is confidential.

As regards the foreseeability of the alleged harm in the present case, he observes that EFSA itself confirms that recreating Captan 80 WG by a process of re-engineering is technically possible by analysing the composition of the product on the market, and it cannot be ruled out that combining the information at issue with data already in the public domain may make that process faster and easier. He concludes that the occurrence of the financial damage that the applicant would sustain as a result of the information at issue being put to use in such a way by its competitors cannot be characterised as purely hypothetical. He adds that since the disclosure of a document under Regulation No 1049/2001 has an *erga omnes* effect, it cannot be ruled out that the persons who applied for access may make it public by publishing it on the Internet. That would thus contribute to weakening the applicant's commercial position and increase the risk of serious and irreparable harm.

As regards the seriousness of the damage, which he finds has been established, the President of the General Court notes that the marketing of Captan 80 WG generates significant turnover for the applicant within the European Union and worldwide. As regards, more specifically, damage connected with the disclosure of confidential information, financial damage which is objectively considerable, or even not insignificant, may be considered 'serious', without it being necessary in every case to relate that damage to the turnover of the undertaking which fears suffering it. In addition, disclosure of the information at issue is likely to facilitate the process of re-creating Captan 80 WG by a process of re-engineering.

As regards whether the damage is irreparable, it is true that the uncertainty of obtaining compensation for pecuniary damage if an action for damages is brought cannot in itself be regarded as a factor capable of establishing that such damage is irreparable. At the interlocutory stage, the possibility of subsequently obtaining compensation for pecuniary damage if an action for damages is brought following annulment of the contested measure is necessarily uncertain. On the other hand, the situation is different where it is already clear, when the assessment is carried out by the judge hearing the application for interim measures, that, in view of its nature and the manner in which it will foreseeably occur, the harm alleged, should it occur, may not be adequately identified or quantified and that, in practice, it will not therefore be possible to make good that harm by bringing an action for damages.

In the present case, the President of the General Court notes that an indeterminate and theoretically unlimited number of actual and potential competitors of the applicant throughout the world could obtain the information at issue following disclosure. From that point of view, having regard to the uncontrollable nature of the multiple uses that the information at issue could be put to on a global scale, respect for the applicant's copyright under Regulation No 1049/2001 is not capable of ruling out the occurrence of the alleged financial damage. Furthermore, having regard to the particular features of proceedings for the protection of allegedly confidential information, the applicant is not required to establish, in addition, that it would be in a position that would imperil its financial viability or that its market shares would be seriously and irreparably affected if the measures applied for were not granted.

In the third place, since the conditions relating to the establishment of a prima facie case and urgency are satisfied, the President of the General Court weighs up the competing interests in order to determine whether or not the applicant's interest in obtaining interim measures outweighs the interest in the immediate application of the contested measure. He examines, more specifically, whether annulment of that measure by the Court when ruling on the main application would allow the situation which would have been brought about by its immediate operation to be reversed, and, conversely, whether suspension of its operation would prevent it from being fully effective in the event of the main application being dismissed. As regards the condition that the legal situation created by an interim order must be reversible, he observes that the purpose of the procedure for interim measures is to guarantee the full effectiveness of the future decision in the main action. Consequently, those proceedings are necessarily an adjunct to the main proceedings.

In the present case, the President of the General Court considers that, in order to maintain the effectiveness of a judgment annulling the contested decision, the applicant must be able to ensure that that information is not unlawfully disclosed. A judgment ordering annulment would be rendered illusory and deprived of practical effect if the present application for interim measures were to be dismissed, since the information at issue could be disclosed immediately, thereby effectively prejudging the future decision on the merits, namely that the action for annulment would be dismissed.

He concludes that, on the one hand, the interest defended by the applicant must prevail over the interest in the dismissal of the application for interim measures, a fortiori since granting the suspension of operation sought would amount to no more than maintaining the status quo for a limited period, and that EFSA did not rely on an overriding need to protect public health.

On the other hand, while it is true that the person who has requested disclosure of the information at issue may invoke a right of access to the documents of the European Union's institutions, bodies, offices and agencies under Article 15(3) TFEU, it must be found that the exercise of that right would merely be delayed if the interim measures were granted, while the applicant's right to protection of the confidentiality of that information would be reduced to nothing if the application for interim relief were dismissed. The applicant's interest must therefore prevail over that of the party seeking access.

Order of 9 August 2023, *Next Media Project* v *EFCA* (T-338/23 R, EU:T:2023:467)

(Interim relief – Public supply contracts – Means of communication – Application for suspension of operation – No prima facie case)

As part of a call for tenders launched by the European Fisheries Control Agency (EFCA), the tenderers were invited to submit their tenders via the 'e-Submission' platform. Their technical tender was to comprise, inter alia, two electronic samples, namely an animated video file of 10 to 15 seconds, in GIF or MP4 format, and a proposal for an interactive map in HTML format. Subsequently, the EFCA informed all tenderers by means of a corrigendum not to use the MP4 format for the first electronic sample. In a second corrigendum amending the tender specifications, the tenderers were requested to send the two electronic samples by email to the email address provided.

The applicant, Next Media Project SLU, submitted a tender under that tendering procedure. However, instead of using email, as indicated by the EFCA, the applicant decided to send those electronic samples using the 'Dropbox' link, a cloud storage service that allows users to save files online and share files and folders with third parties without sending bulky attachments.

Subsequently, the EFCA decided that the applicant's tender did not comply with the legislation in force [590] or with the instructions of the call for tenders, as set out in the second corrigendum. The EFCA added that, since the tender opening committee had only received the electronic samples at the time of the download from 'Dropbox', which had taken place during the opening of the tenders, that is to say, after the submission time limit, it could not guarantee the integrity of the original samples or evidence of the date and time of their receipt.

Hearing an application for interim measures, brought on the same day as an action for annulment of that decision, the President of the General Court, having concluded that there was no prima facie case, dismisses that application.

Findings of the President of the General Court

As a preliminary point, the President of the General Court recalls that, when an unsuccessful tenderer is able, during the pre-contractual phase, provided that the 10-day standstill period laid down in the legislation is respected, [591] to demonstrate the existence of a particularly serious prima facie case, the criteria for assessing the condition relating to urgency must be eased, so that only the risk of serious harm occurring must be demonstrated. That easing of the requirements applicable to assessment of existence of urgency is justified by the requirements which follow from the effective protection which must be guaranteed in public procurement matters. The condition of a particularly serious prima facie case is satisfied where the interim proceedings demonstrate that the defendant has committed an unlawful act which appears, prima facie, to be sufficiently manifest and serious, the production or continuation of the effects of which must, in the interests of the applicant, be prevented as soon as possible.

Primarily, the President of the General Court notes that the EFCA communicated that it had decided to suspend the signing of the contract, and that the applicant brought its application for interim measures before the conclusion of the contract. He therefore examines whether the applicant has been able to demonstrate that there is a prima facie case and, if so, whether that prima facie case is particularly serious.

In that regard, first of all, he observes that it is clear from the tender specifications that the method of transmission of the two electronic samples via email was mandatory and that, by uploading the electronic samples via 'Dropbox', the applicant does not appear to have complied with the method of transmission of the information necessary to participate in the procedure, and has consequently failed to 'supply' the information at issue. The manner in which a tenderer submits information requested, in this case electronic samples, to the contracting authority, forms an integral part of the manner in which the information is supplied.

Next, the President of the General Court recalls that submission by email makes it possible to ensure compliance with the principle of equal treatment of tenderers. To accept the applicant's point of view that the supply of electronic samples by 'Dropbox' instead of by email should not have led to its exclusion could constitute an infringement of the principle of equal treatment with regard to the other tenderers who complied with the tender specifications by using email.

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590 Article 141(1) 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).

591 Under Article 175 of Regulation 2018/1046.

Moreover, the applicant's argument that it has evidence that the electronic samples were not altered is irrelevant. If the use of a link in a tender is not permitted, the contracting authority is not required to check whether the documents to which that link leads have been altered or to accept them.

Lastly, the President of the General Court considers that, by choosing to transmit the two electronic samples by means of the 'Dropbox' link on 13 February 2023, the last day of the time limit for receipt, the applicant presented the EFCA with a fait accompli. Thus, the EFCA did not have the opportunity to rule on the use of that method of transmission before that time limit expired. In that context, the indication of the term 'in order' concerning the result of the opening of the applicant's tender indicates that the applicant formally complied with that time limit as such and that the tender has not already been opened, but cannot be interpreted, prima facie, as a validation of the method of communication of the electronic samples chosen by the applicant.

Since the applicant has not succeeded in establishing a prima facie case and a fortiori a particularly serious prima facie case, the present application for interim measures is rejected.

Order of 25 September 2023, *Terminal Ouest Provence* v *CINEA* (T-504/23 R, EU:T:2023:581)

(Interim measures – Connecting Europe Facility (CEF) – Grant agreement – Arbitration clause – Application for interim measures – Lack of urgency)

In the context of a tender procedure for projects launched by the European Climate, Infrastructure and Environment Executive Agency (CINEA), financed by the Connecting Europe Facility (CEF), Terminal Ouest Provence (the applicant) submitted a proposal for the development of a new combined rail/road transport terminal, namely the Ouest Provence terminal, located in the municipalities of Grans and Miramas, in the Aix-Marseille-Provence metropolitan area, in France. The applicant had been set up, in the form of a holding company, by two shareholder companies, in order to be able to carry out two distinct but indissociable activities that completion of the project entailed, namely the construction of the terminal and its operation.

As the applicant had passed the selection stage, CINEA had begun to prepare the grant agreement. However, it informed the applicant and its majority shareholder that, in its view, the latter could not be classified as a subcontractor and that its costs could not therefore be classified and treated as 'subcontracting costs'. Despite those exchanges, the applicant subsequently signed the grant agreement. The agreement contains an arbitration clause conferring jurisdiction on the Court of Justice of the European Union, in accordance with Article 272 TFEU.

The applicant brought an action before the General Court seeking a declaration, on the basis of that article, that all the costs invoiced by its majority shareholder to CINEA were subcontracting costs and were therefore eligible as such. Also hearing an application for interim measures, lodged by a separate document, seeking (i) a declaration, prima facie, that all the costs invoiced by its majority shareholder to CINEA are subcontracting costs and are therefore eligible as such, and (ii) that CIINEA be prohibited from making decisions regarding the classification of those costs and, a fortiori, regarding their eligibility before the General Court has ruled on the main action, the President of the General Court, having found that there was no urgency, dismisses that application.

Findings of the President of the General Court

As a preliminary point, the President of the General Court recalls that urgency must, as a general rule, be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party seeking the interim relief. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

Primarily, as regards the argument that the amount due in respect of the grant at issue is absolutely necessary to complete the project, the President of the General Court recalls that the grant of an interim measure is justified only where the act at issue constitutes the decisive cause of the alleged serious and irreparable harm. He points out that the applicant does not identify the act or conduct of CINEA constituting the decisive cause of the alleged harm. Indeed, notwithstanding the disagreement regarding the classification of the costs invoiced by the majority shareholder, the applicant signed the grant agreement. Moreover, CINEA's refusal to consider those costs to be eligible did not prevent the applicant from sending it a request for interim payment. Thus, the position taken by CINEA will produce effects only if it serves as a basis for its formal decision to assess the eligible costs in response to the request for interim payment.

Furthermore, the President of the General Court finds that the alleged damage is vague and hypothetical. Moreover, the applicant does not provide any evidence of the serious and irreparable nature of the alleged damage. In the absence of a formal decision taken by CINEA on the eligibility of the subcontracting costs, any identification of damage which may arise can only be hypothetical or, at the very least, premature.

The argument that there is no viable alternative to obtain funding in an amount equivalent to that at issue is rejected by the President of the General Court, on the ground that the damage alleged does not constitute certain damage whose decisive cause is an act or conduct attributable to CINEA.

As regards the argument that the applicant cannot await the outcome of the proceedings on the merits without being declared bankrupt for payment default, the President recalls that purely financial damage cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty. In the event of such harm, the interim measure sought is justified only if it appears that, without such a measure, the applicant would be in a position that would jeopardise its existence before final judgment is given in the main proceedings. In that respect, it is for the party seeking interim measures, in particular when it relies on the occurrence of financial damage, to produce, with supporting documentation, an accurate overall picture of its financial situation.

First of all, it is true that the documents produced by the applicant for the purposes of demonstrating the urgent nature of its application for interim measures show that, without the grants at issue, the applicant would be in payment default, and therefore unable to continue with the construction of the Ouest Provence terminal from October, or at best, in December 2023. However, the President of the General Court finds that the applicant has not provided any evidence to show that its two shareholders are unable to provide it with financial assistance to enable it to deal with any financial difficulties.

Secondly, the alleged damage is hypothetical, in so far as it is based on the assumption that CINEA will reject all the costs of the applicant's majority shareholder, whereas it cannot be ruled out that most of those costs may be considered eligible.

Lastly, the grant of the requested measures would have no impact on the financial situation of the applicant, whose bankruptcy is imminent, regardless of the outcome of the application for interim measures. The applicant is not requesting the President of the General Court to order CINEA to award the grants at issue.

As regards the argument that, if the interim measures sought are not granted, the right to effective judicial protection would be infringed, the President of the General Court points out that the mere interest of litigants in determining as quickly as possible the scope of their rights under EU law is not such as to establish the existence of serious and irreparable urgency. Moreover, the weighing of the competing interests having been taken into account, the applicant has not demonstrated that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

Order of 27 September 2023, *Amazon Services Europe* v *Commission* (T-367/23 R, EU:T:2023:589)

(Interim relief – Digital services – Regulation (EU) 2022/2065 – Very large online platforms – Application for suspension of operation of a measure – Urgency – Prima facie case – Weighing of competing interests)

The applicant, Amazon Services Europe, belongs to the Amazon Group, which is a multinational group of companies. Its business activities comprise online retail and other services such as cloud computing and digital streaming. It provides marketplace services to third-party sellers enabling them to offer products for sale on the Amazon Store, and supports third-party sellers in a variety of ways.

Regulation 2022/2065 provides [592] that the European Commission is to adopt a decision designating as a very large online platform or a very large online search engine the online platform or the online search engine which has a number of average monthly active recipients of the service in the European Union equal to or higher than 45 million. Under that regulation, first, providers of such online platforms that use recommender systems are required to provide at least one option for each of their recommender systems which is not based on profiling [593] and, second, providers that present advertisements on their online interfaces are required to compile and make publicly available a repository containing certain information for the entire period during which they present an advertisement and until one year after the advertisement was presented for the last time on their online interfaces. [594]

On 25 April 2023, the Commission adopted a decision designating Amazon Store as a very large online platform ('the contested decision'). [595]

Hearing an application for interim measures, brought on the same day as an action for annulment of that decision, the President of the General Court concludes that the conditions relating to the establishment of a prima facie case and urgency are satisfied and, having weighed the competing interests, decides to grant in part the application for suspension of the operation of the contested decision, in so far as that decision will impose on Amazon Store the obligation to make publicly available an advertisement repository, without prejudice to the applicant's obligation to compile that repository.

Findings of the President of the General Court

First, the President of the General Court examines the plea of inadmissibility raised by the Commission, whereby it asserts that the action for annulment is to a large extent, manifestly inadmissible on the ground that the applicant challenges the legality of provisions of Regulation 2022/2065 which neither constitute the legal basis for the contested decision nor have a direct legal connection to that decision. First of all, he recalls that, where it is alleged that the main action is manifestly inadmissible, the party seeking the interim measures must establish that there are grounds for concluding prima facie that the main action, to which the application for interim measures relates, is admissible, in order to prevent a situation in which that party is able, by means of an application for interim measures, to obtain suspension of the operation of a measure which the Court subsequently refuses to declare void because, on examination of the substance of the case, the application is declared inadmissible. Thus,

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592 Article 33(4) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ 2022 L 277, p. 1).

593 Article 38 of Regulation 2022/2065.

594 Article 39(1) of Regulation 2022/2065.

595 Commission Decision C(2023) 2746 final of 25 April 2023 designating Amazon Store as a very large online platform in accordance with Regulation (EU) 2022/2065.

in proceedings for interim measures, the admissibility of the main action may be subject only to a prima facie examination, and the judge hearing the application for interim measures should declare that application inadmissible only if the admissibility of the corresponding main action can be wholly excluded.

Moreover, the general act claimed to be illegal must be applicable, directly or indirectly, to the issue with which the act is concerned and there must be a direct legal connection between the contested individual decision and the general act in question. However, Article 277 TFEU must be interpreted sufficiently broadly to enable effective judicial review of the legality of acts of general application adopted by the institutions in favour of persons excluded from direct actions against such acts. Thus, the scope of that article must extend to acts of the institutions which were relevant to the adoption of the decision which is the subject matter of the action for annulment. Furthermore, the rules of what is one single regime cannot be artificially separated for the purposes of examining a plea of illegality.

In the present case, the President of the General Court finds that the applicant has identified with sufficient clarity the provisions against which the plea of illegality is raised and that, prima facie, the rules of what is one single regime would be artificially separated, since the outcome of the contested decision is the applicability of the obligations at issue. He also points out that the present case raises new issues which will have to be resolved by a thorough examination in the main proceedings. He concludes from this that the plea of illegality raised by the applicant cannot be rejected as being manifestly inadmissible.

Secondly, the President of the General Court examines the suspension of operation of the contested decision. As a preliminary point, he recalls that the judge hearing an application for interim relief may order suspension of operation of an act and other interim measures, if it is established that such an order is justified, prima facie, in fact and in law (*fumus boni juris*) and that it is urgent 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. Those conditions are cumulative, with the result that applications for interim measures must be dismissed if any one of them is not satisfied. The judge hearing the application for interim measures must, where appropriate, also weigh up the interests involved.

In the first place, starting his examination with the condition relating to urgency, the President of the General Court points out that urgency must generally be assessed in the light of the need for an interlocutory order to avoid serious and irreparable damage to the party requesting the interim protection. That party must demonstrate that it cannot await the outcome of the main proceedings without suffering serious and irreparable damage.

First, as regards the requirement for providers of very large online platforms that use recommender systems to provide at least one option for each of their recommender systems which is not based on profiling, [596] the President of the General Court concludes that the applicant has not established the existence of serious and irreparable harm.

In the first place, the harm alleged is uncertain, since Regulation 2022/2065 does not prohibit the use of recommender systems, but merely requires the platforms concerned to provide an opt-out for them.

Next, assuming that the implementation of an opt-out option does indeed encourage customers to switch from the Amazon Store to competing platforms, the alleged loss of market share constitutes purely financial harm in that it consists of the loss of revenue from sales on the relevant market.

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596 Article 38 of Regulation 2022/2065.

In the event of such harm, the interim measure sought is justified only if it appears that, without such a measure, the applicant would be in a position that would jeopardise its existence before final judgment is given in the main action, or where its market share would be affected substantially. It is therefore not sufficient that a market share may be irremediably lost by an undertaking; rather, it is necessary for that market share to be sufficiently large in the light of, in particular, the size of that undertaking, regard being had to the characteristics of the group to which it belongs through its shareholders.

The President of the General Court finds that the applicant neither establishes nor even claims that it is in a position that is liable to imperil its financial viability before final judgment is given in the main action, in the light of the size, turnover and characteristics of the group to which it belongs.

Lastly, he rejects the argument that the contested decision would also harm the interests of third-party sellers. An applicant for interim measures cannot, in order to establish urgency, rely on damage caused to the rights of third parties or to the general interest. Any harm which the implementation of the contested decision may cause to a party other than the applicant for interim measures may be taken into consideration by the judge hearing the application for interim measures only when weighing up the interests at stake.

Secondly, as regards the requirement for providers of very large online platforms to compile and make available an advertisement repository which, according to the applicant, contains confidential information, the President of the General Court concludes, on the other hand, that the applicant has established the existence of serious and irreparable harm and that, therefore, the condition relating to urgency is satisfied in the present case.

Having held that, for the purposes of examining the condition relating to urgency, the information at issue must be regarded as being confidential, he recalls that the question of the extent to which the disclosure of such information will cause serious and irreparable harm depends on a combination of circumstances, such as, inter alia, the professional and commercial importance of the information for the undertaking seeking its protection and the utility of that information for other market participants.

In the present case, as regards the question whether the harm is sufficiently serious, the President of the General Court finds that, first, the obligations relating to the advertisement repository, which provides information about the advertisements on the applicant's platform, enable third parties to access significant trade secrets concerning the advertising strategies of the applicant's advertising customers. Therefore, the applicant cannot await the outcome of the main proceedings without suffering serious harm. Secondly, in so far as disclosure of the information at issue, taken together, would make it extremely sensitive as it would give the general public a comprehensive insight, with a very high level of detail, into the applicant's sensitive commercial dealings with the majority of its customers, that could also increase exponentially and artificially transparency in the market.

As regards the question of whether that harm is irreparable, the President of the General Court considers that is indeed clear that annulment of the contested decision could not undo the effects of disclosure of the information at issue, since once a person has acquired knowledge of that information by reading it, that knowledge cannot be taken back.

In the second place, the President of the General Court examines whether there is a prima facie case for the interim measures as regards the obligation for providers of very large online platforms to compile and make available an advertisement repository. He recalls that that condition is satisfied where at least one of the pleas put forward appears, prima facie, to be not unfounded. That is the case where one of those pleas reveals the existence of a major legal or factual disagreement whose solution is not immediately obvious and therefore calls for a detailed examination which must be the subject of the main proceedings.

In the present case, it appears, prima facie, that some of the information which the applicant is required to publicise in its advertisement repository has not yet been made publicly available. That is the case as regards, in particular, the information relating to the period during which the advertisement was presented and to the aggregate numbers broken down by Member State for the group or groups of recipients that the advertisement specifically targeted.

In the third place, the President of the General Court weighs up the interests involved in order to determine whether or not the interest of the applicant in obtaining interim measures outweighs the interest in the immediate implementation of the contested act. He examines, more specifically whether annulment of that act by the court hearing the main application would make it possible to reverse the situation which would have arisen if it had been implemented immediately and, conversely, whether the suspension of operation of the act would prevent it from taking full effect if the main action were dismissed. As regards the condition that the legal situation created by an interim order must be reversible, he observes that the purpose of the procedure for interim measures is to guarantee the full effectiveness of the future decision in the main action. Consequently, those proceedings are necessarily an adjunct to the main proceedings.

In the present case, the President of the General Court considers that, in order to retain the practical effect of a judgment annulling the contested decision, the applicant must be in a position to prevent the unlawful disclosure of that information. A judgment ordering annulment would be rendered illusory and deprived of practical effect if the present application for interim measures were to be dismissed, since that dismissal would have the effect of allowing the immediate disclosure of the information at issue, thereby effectively prejudging the future decision in the main action, namely that the action for annulment would be dismissed. He concludes from this that the interest defended by the applicant must prevail over the interest in the dismissal of the application for interim measures, a fortiori where the grant of the interim measures requested amounts to no more than maintaining the status quo for a limited period.

Order of 29 September 2023, *Red Bull and Others* v *Commission* (T-306/23 R, EU:T:2023:590)

(Application for interim measures – Competition – Commission decision ordering an inspection – Application for suspension of operation – No urgency)

On the basis of suspicions of anticompetitive behaviour in the context of the marketing of energy drinks, by decision of 8 March 2023 [597] ('the contested decision'), the European Commission ordered an inspection of Red Bull GmbH, Red Bull France SASU and Red Bull Nederland BV. The contested decision was adopted pursuant to Article 20(4) of Regulation No 1/2003 on the implementation of the rules on competition ('Regulation No 1/2003'), [598] which determines the power of the Commission as regards inspections.

As part of the inspection, the Commission carried out simultaneous visits to the premises of the companies in question in Austria, France and the Netherlands, where it copied 'en masse' a large number of electronic documents and requested to be provided, subsequently, with other electronic

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597 Commission Decision C(2023) 1689 final of 8 March 2023 (Case AT.40819 – Red Bull – Inspection).

598 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).

data from, inter alia, mobile phones, email boxes and data located in the cloud or on company servers, which were then provided to it. Subsequently, the Commission examined a first package of data at those premises, in the presence of representatives from the companies concerned.

The latter brought an action for annulment against the inspection decision. They also lodged an application for interim measures seeking suspension of the operation of that decision. By his order, the President of the General Court dismisses that application.

Findings of the President of the General Court

As a preliminary-point, the President of the General Court recalls that the judge hearing the application for interim measures may order suspension of operation of an act and other interim measures if it is established that such an order is justified, prima facie, in fact and in law, and that it is urgent.

Examining at the outset the condition relating to the urgency of the interim measures sought, the President of the General Court considers that the condition is not satisfied, in so far as, in the specific circumstances of the present case, the serious and irreparable harm alleged by the applicants must be regarded as hypothetical, since, contrary to the applicants' claims, the implementing measures for the inspection decision do not entail a disproportionate interference with the rights of the employees and the applicants, referred to in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

There is urgency only if the serious and irreparable harm feared by the party seeking the interim measures is so imminent that its occurrence can be foreseen with a sufficient degree of probability. However, the harm alleged by the applicants, resulting from the future examination of the data, has not been established with a sufficient degree of probability in the light of the procedural guarantees implemented by the Commission for the examination of those data.

First of all, only the Commission officials charged with the investigation, who are subject to strict obligations of professional secrecy, may, where appropriate, access personal data. Secondly, the applicants' representatives are to be present throughout the relevance review of the documents. Lastly, the Commission has provided both for a procedure to carry out, at the premises, an examination of documents that contain sensitive personal data, involving in particular an inner circle composed of equal numbers of Commission officials and company representatives, and for an arbitration procedure to settle any dispute regarding the relevance of the documents.

Similarly, the damage resulting from the unreasonable length of time taken to complete the inspection is also hypothetical, since the period of six weeks which the Commission has allowed for the examination of the remaining documents cannot be considered disproportionate in view, in particular, of the volume of information at issue.

In the light of the foregoing, the application for interim measures is rejected.

COURT OF JUSTICE
OF THE EUROPEAN UNION

Research and Documentation Directorate

February 2024

Printed on eco-friendly paper