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I. FUNDAMENTAL RIGHTS: RIGHT TO AN EFFECTIVE REMEDY

Judgment of the Court of Justice (Grand Chamber), 29 July 2024, protectus, C-185/23

Link to the full text of the judgment

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

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

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

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

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

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

In October 2022, the President of the Chamber seised of the appellant's appeal first ruled out consultation of the classified parts of the file, then rejected the request by the appellant's lawyer to consult the classified documentary evidence, while requesting the NBÚ to examine the possibility of such disclosure. In November 2022, that body granted consent for the disclosure of two pieces of classified documentary evidence, but refused to disclose the other classified documentary evidence at issue, on the ground that to do so would have led to the disclosure of sources of information.

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

In that context, the referring court decided to ask the Court as to the applicability of the Charter to the dispute in the main proceedings. On that matter, it points out, inter alia, that Decision 2013/488 on the protection of EUCI [1] imposes certain specific obligations on the Member States concerning the clearance of individuals or legal entities possessing the legal capacity to undertake contracts, which might imply that the legislation at issue constitutes an implementation of that decision. Secondly, in the event that the Charter is applicable to the dispute, the referring court asks the Court to state to what extent the Slovak legislation and practice on access to classified information in proceedings seeking to challenge the revocation of industrial security clearances or industrial security certificates are compatible with the right to an effective remedy laid down by Article 47 of the Charter.

Findings of the Court

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

Next, as regards the applicability of the Charter to the withdrawal of an industrial security certificate authorising access to EUCI, the Court states that the EU institutions have adopted specific acts intended to govern the protection of such information in the context of their operation. In particular, in the light of the rules thus established by Decision 2013/488, which imposes obligations on the Member States, [2] the measures adopted by those States to ensure industrial security, by regulating access to EUCI linked to contracts concluded by the Council through the granting and monitoring of Facility Security Clearances (FSC), must be regarded as implementing EU law. The withdrawal by a national authority of an FSC, within the meaning of that decision, entails, in particular, such implementation. Such a withdrawal calls into question an authorisation, the granting of which and, at least in part, its effects, are provided for by Decision 2013/488. [3](3)

Consequently, the Court rules that the review by a national court of the lawfulness of a decision withdrawing an industrial security clearance allowing access to information classified by a Member State does not concern an act constituting an implementation of EU law, within the meaning of Article 51(1) of the Charter. On the other hand, the review, by such a court, of the lawfulness of a decision withdrawing, as a result of the withdrawal of that industrial security clearance, an industrial security certificate authorising access to EUCI, in accordance with Article 11 of Decision 2013/488 and Annex V thereto, concerns an act implementing EU law.

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

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

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

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

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

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

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

Consequently, the Court states, first, that Article 47 of the Charter does not preclude national legislation and national practice under which a decision withdrawing an FSC, within the meaning of Decision 2013/488, does not divulge the classified information justifying that withdrawal, on account of overriding considerations relating, for example, to the protection of State security or international relations, while providing that the court with jurisdiction to assess the lawfulness of that withdrawal has access to that information and that the lawyer of the former holder of that FSC may not have access to that information apart from with the consent of the national authorities concerned and on

condition that he or she guarantees the information's confidentiality. That court must however ensure that the non-disclosure of information is limited to what is strictly necessary and that the former holder of that FSC is informed, in any event, of the essence of the grounds for that withdrawal in a manner which takes due account of the necessary confidentiality of the evidence.

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

Judgment of the Court of Justice (Grand Chamber), 11 July 2024, Hann-Invest and Others, C-554/21, C-622/21 and C-727/21

Link to the full text of the judgment

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

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

Questions were referred to the Court on this issue by the Visoki trgovački sud (Commercial Court of Appeal, Croatia), before which three appeals had been brought against orders issued in insolvency proceedings. The referring court, sitting as judicial panels of three judges, examined the three appeals and dismissed them unanimously, thereby upholding the judgments delivered at first instance. The judges of that court signed their judgments and subsequently forwarded them to the Case-law Registration Service. [4]

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

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

stated that he was not in agreement with the legal interpretation adopted by the judicial panel, albeit he did not make reference to any other judicial decision.

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

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

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

Findings of the Court

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

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

In that regard, it points out that, while the registrations judge cannot substitute his or her own assessment for that of the judicial panel responsible for the case, he or she can, in fact, block registration of the judicial decision adopted and thus hinder the completion of the decision-making process and the notification of that decision to the parties. He or she is thus able to refer the case back to that judicial panel for a re-examination of that decision in the light of his or her own legal observations and, if he or she continues to be in disagreement with that judicial panel, invite the president of the relevant section to convene a section meeting for the purpose of adopting a 'legal position', which will be binding, inter alia, on that judicial panel. The effect of such a practice is to allow the registrations judge to intervene in the case in question, and that intervention may lead to that judge influencing the final outcome in that case.

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

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

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

In that regard, it states that intervention in the form of the section meeting in fact allows a group of judges participating in that section meeting to intervene in the final resolution of a case that has previously been deliberated and decided upon by the judicial panel having jurisdiction but that has not yet been registered and sent. The prospect that, in the event that that judicial panel maintains a

legal view that is contrary to that of the registrations judge, its judicial decision will be subject to review by a section meeting, and the obligation on that judicial panel to respect, after deliberations which have concluded, the 'legal position' set out by that section meeting, are likely to influence the final content of that decision.

First, it is not apparent that the power of the section meeting to intervene at issue in the main proceedings is sufficiently circumscribed by objective criteria that are applied as such. In particular, it is not apparent from the provision governing the convening of a section meeting [5] that that meeting may be convened, as in Case C-727/21, simply on the ground that the registrations judge does not share the legal view of the judicial panel having jurisdiction. Second, the convening of a section meeting and the formulation by that section meeting of a 'legal position' that is binding, inter alia, on the judicial panel responsible for that case, are not at any stage brought to the attention of the parties. The parties do not therefore seem to have the possibility of exercising their procedural rights before such a section meeting.

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

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

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

II. INSTITUTIONAL PROVISIONS

1. RIGHT OF PUBLIC ACCESS TO DOCUMENTS

Judgment of the General Court (Ninth Chamber, Extended Composition), 10 July 2024, Hungary v Commission, T-104/22

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the correspondence addressed to the Commission by the Hungarian authorities concerning a draft call for proposals co-financed by the European Union within the framework of European structural and investment funds – Documents originating from a Member State – Objection by the Member State – Objection relating to the protection of the decision-making process – Concept of 'document relating to a matter where the decision has not been taken by the institution' – Obligation to state reasons – Sincere cooperation

In dismissing Hungary's application for annulment of the decision of the European Commission granting a third-party applicant access to the correspondence addressed to the Commission by the Hungarian authorities concerning a draft call for proposals financed by EU funds ('the contested decision'), the General Court clarifies the scope of the exception relating to the protection of the decision-making process provided for in Regulation No 1049/2001, [6] notably with regard to the precise definition of the concept of 'the institution's decision-making process'. Furthermore, this – relatively rare – dispute, in which a Member State objects to the disclosure by an EU institution of documents originating from that Member State's own authorities provides the General Court with the opportunity to rule on the novel question whether that exception may be relied on by a Member State in order to object to the disclosure of documents relating to a call for proposals drawn up by a national authority responsible for managing the European Structural and Investment funds ('the ESI Funds') in the joint management of the budget of the European Union.

In 2021, an application for access was addressed to the Commission, relating to the official correspondence between it and the Hungarian authorities concerning a call for proposals coming under an operational programme funded by ESI Funds [7] pursuant to Regulation No 1303/2013. [8] On being consulted pursuant to Regulation No 1049/2001, [9] the Hungarian authorities objected to the disclosure of the documents originating from them, on the basis of the exception relating to the protection of the decision-making process. They observed that, since the decision-making process regarding the call for proposals at issue was still ongoing, disclosure of those documents might have seriously undermined the principles of equal treatment, non-discrimination and transparency.

The Commission initially granted the third-party applicant access to 6 of the 11 documents identified as being covered by the application for disclosure, but refused to grant it access to the documents originating from the Hungarian authorities. Following a confirmatory application and a fresh consultation of the Hungarian authorities, however, and in spite of their manifest objection, the

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6 Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

7 Call for proposals 'EFOP 2.2.5', entitled 'Improving the transition from institutional care to community-based services – Replacement of institutional accommodation by 2023'.

8 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ 2013 L 347, p. 320, corrigendum OJ 2016 L 200, p. 140).

9 Article 4(4) and (5) of Regulation No 1049/2001.

Commission granted access to the documents originating from the Hungarian authorities, including the newly identified documents.

Findings of the Court

Adjudicating on the plea whereby Hungary takes issue with the Commission for not having applied, in this case, the exception relating to the protection of the decision-making process, the Court finds, in the first place, that no Commission decision-making process was ongoing at the time when the contested decision was adopted.

In that regard, it notes that, while the ESI Funds come under shared management, the provisions of Regulation No 1303/2013 [10] relating to the criteria to be observed with a view to the selection of the operations to be financed by those Funds show that the calls for proposals are within the exclusive responsibility of the Member States. Thus, Regulation No 1303/2013 does not confer any particular competence on the Commission in the process of finalising a call for proposals governed by that regulation.

Furthermore, following a literal, contextual and teleological interpretation of the first subparagraph of Article 4(3) of Regulation No 1049/2001, the Court observes that the application of the exception provided for in that provision is subject to the identification of a process following which an EU institution is authorised by EU law to adopt a specific decision. The mere fact that the Commission participates in a procedure governed by the budgetary rules of shared management does not prove that that procedure comes under its decision-making process. The delegation by the Commission to the national managing authorities, which characterises shared management, has no impact on the respective competences of the Commission and the Member States which are clearly defined by the provisions of Regulation No 1303/2013; consequently, its decision-making process and those of the Member States must not be confused.

The Court therefore concludes that, in this case, the Commission was not required to adopt a decision. Thus, the documents which it received cannot be regarded as relating to an EU institution's ongoing decision-making process. Consequently, they cannot be regarded as 'relat[ing] to a matter where the decision has not been taken by [an EU institution]'. [11]

In the second place, the Court rejects Hungary's argument relating to the applicability of the exception based on the first subparagraph of Article 4(3) of Regulation No 1049/2001 to the national managing authorities' decision-making process.

In that regard, it observes that that provision is not intended to protect the decision-making processes of the Member States or of legal persons other than the EU institutions, as the actual wording of that provision refers solely to documents relating to 'a matter where the decision has not been taken by the institution'. To interpret that exception as also protecting the decision-making process of the national managing authorities would amount to reintroducing in a roundabout way the authorship rule, abolished by the EU legislature, for any document affecting decision-making by a Member State. Such an interpretation would not be compatible with either the object or the purpose of Article 15 TFEU or Regulation No 1049/2001, which is to grant the widest possible public access to institution documents in all areas of EU activity. In addition, any interpretation of that provision going beyond its actual wording would lead to an extensive interpretation of the exception provided for in that provision that would make it impossible to delimit the scope of the ground of refusal in question.

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10 Article 110(2)(a) and Article 125(3) of Regulation No 1303/2013.

11 Within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001.

Judgment of the General Court (Fifth Chamber), 17 July 2024, Auken and Others v Commission, T-689/21

Link to the full text of the judgment

Access to documents – Regulation (EC) No 1049/2001 – Advance purchase agreements and purchase agreements concluded between the Commission and pharmaceutical companies for the purchase of COVID-19 vaccines – Partial refusal of access – Exception relating to the protection of the commercial interests of a third party – Obligation to state reasons – Existence of a foreseeable and not purely hypothetical risk of the interest relied on being undermined – Principle of good administration – Freedom of expression

In this judgment, the General Court upholds, in part, the action for annulment brought by several Members of the European Parliament (MEPs) against the decision of the European Commission granting only partial access to the advance purchase agreements and purchase agreements for COVID-19 vaccines. [12]

At the beginning of 2021, six MEPs requested access [13] to the different agreements concluded between the Commission and pharmaceutical companies for the purchase of COVID-19 vaccines, including the agreements that might have been concluded after the date of the request for access ('the initial request'). The Commission granted partial access to nine documents, stating that the redacted versions of those documents had been made public on the Commission's website and that the passages had been redacted on the basis of the exceptions relating to the protection of privacy and the integrity of the individual, the protection of commercial interests and the protection of the decision-making process of the institutions. [14]

Subsequently, those MEPs made a confirmatory application seeking full disclosure of the nine identified documents, except for the passages covered by the protection of privacy and the integrity of the individual ('the confirmatory application').

In the contested decision, the Commission stated that, following a re-examination of the response to the initial request, thirteen documents had been identified as falling within the scope of the request for access to documents (together, 'the agreements at issue'). It granted wider access to the nine documents which had been identified initially and partial access to the other four documents which, until that point, had not been publicly disclosed. The Commission relied on the exception relating to the protection of privacy and the integrity of the individual and the exception relating to the protection of the commercial interests of the undertakings concerned in order to justify granting only partial access to the agreements at issue.

Findings of the Court

In the first place, the Court upholds, in part, the plea alleging that the Commission misapplied the exception relating to the protection of the commercial interests of the undertakings concerned in so far as that plea refers to the redaction of the definitions of the expressions 'wilful misconduct' and 'best reasonable efforts' in three of the agreements at issue. In that regard, the Court observes that a mere reading of the agreements at issue shows that, although certain definitions are identical, others

12 Decision C(2022) 1038 final of the European Commission of 15 February 2022 ('the contested decision').

13 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).

14 Exceptions provided for in, respectively, Article 4(1)(b), the first indent of Article 4(2), and the first subparagraph of Article 4(3) of Regulation No 1049/2001.

were the subject of individual and specific negotiations. Therefore, their specific wording cannot be regarded, in all cases, as being general and standard.

The Court finds, next, that the contested decision does not expressly indicate, even briefly, the reasons why the definitions of the expressions referred to were redacted. Even though the Commission provided explanations in its pleadings and at the hearing, they were not relied on in the contested decision and cannot be inferred from that decision. The Courts of the European Union are not required to take into account additional explanations provided by the author of the measure in question only during the proceedings in order to assess whether the obligation to state reasons has been satisfied.

Thus, the Court concludes that the grounds of the contested decision do not enable the applicants to understand the specific reasons which led to those redactions or the Courts of the European Union to review the legality of those redactions. By failing to provide sufficient explanations as to how access to those definitions could specifically and actually undermine the commercial interests of the undertakings in question, the Commission infringed the first indent of Article 4(2) of Regulation No 1049/2001.

In the second place, the Court upholds, in part, the plea criticising the way in which the Commission applied the exception relating to the protection of commercial interests in order to redact certain information from the agreements at issue.

The Court rejects as ineffective the applicants' line of argument that disclosure of information on the location of the production sites and subcontractors of the undertakings concerned would not be capable of undermining the undertakings' current commercial interests. In that regard, it points out that the assessment of the justification for applying one of the exceptions provided for in Article 4 of Regulation No 1049/2001 must be made in the light of the available information and the facts existing on the date of adoption of the decision refusing to grant access. Furthermore, it states that the Commission was right to find that the redacted information fell within the scope of the commercial relations and of the industrial and business strategy of the undertakings concerned.

As regards the provisions on intellectual property rights and the provisions on down payments or advance payments, contractual liability, and delivery schedules, the Court concludes that the explanations provided by the Commission in the contested decision concerning the existence of a reasonably foreseeable and not purely hypothetical risk of the protection of the commercial interests of the undertakings concerned being undermined, as regards the full disclosure of those provisions, are well founded.

By contrast, the Court does not endorse the Commission's position regarding the refusal to grant wider access to the provisions on indemnification. In that context, it observes, first, that the mechanism whereby the Member States indemnify the undertakings concerned, set out in the agreements at issue, does not in any way affect the regime of legal liability of those undertakings under Directive 85/374. [15] According to that directive, a producer is liable for damage caused by a defect in its product and its liability to the injured person may not be limited or excluded by a provision limiting its liability or exempting it from liability. Second, it observes that the information on the indemnification mechanism was already in the public domain at the time when the initial request for access was made and when the contested decision was adopted. [16]

The Court finds that, although the agreements at issue all contain a provision on indemnification, the detailed content of those provisions is not identical.

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15 According to Articles 1 and 12 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

16 See, in particular, the third paragraph of Article 6 of the agreement of 16 June 2020 on the procurement of COVID-19 vaccines concluded between the Commission and the Member States, and the Commission Communication of 17 June 2020 entitled 'EU Strategy for COVID-19 vaccines' (COM(2020) 245 final).

Nevertheless, the Court finds that the three grounds relied on by the Commission to refuse wider access to those provisions do not demonstrate the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

First, as regards the ground that precise knowledge of the limits of the liability of the undertaking concerned could expose it to multiple actions for damages, the Court notes that the right of third parties who may have been harmed by a defective vaccine to bring actions for damages is based on the national legislation transposing Directive 85/374. It is therefore independent of the existence and content of the provisions on indemnification. Furthermore, the interest of the undertakings concerned in avoiding such actions for damages and the costs associated with those proceedings cannot be regarded as a commercial interest and does not constitute an interest deserving of protection under Regulation No 1049/2001. Moreover, there is nothing in the contested decision to support the conclusion that the wider disclosure of those provisions could give rise to such actions.

Second, as regards the ground that full disclosure would inevitably reveal to the competitors of the undertaking concerned the 'weak points' of the coverage of its liability, giving them a competitive advantage which they could exploit, for example, in advertisements, the Court notes that the reason why those provisions were incorporated into the agreements at issue, namely to compensate for the risks associated with the shortening of the period for the development of vaccines, was in the public domain before the contested decision was adopted. Moreover, all the undertakings concerned obtained a provision on indemnification.

Third, the Court rejects, for the same reasons, the ground that full disclosure would have repercussions for the reputations of the undertakings concerned.

Similarly, the Court upholds the applicants' line of argument concerning the redaction of the provisions on donations and resales. It observes that the contested decision does not expressly indicate, even briefly, the reasons for those redactions. By failing to provide sufficient explanations as to how access to those provisions could specifically and actually undermine the commercial interests of the undertakings, the Commission infringed the first indent of Article 4(2) of Regulation No 1049/2001.

In the third place, the Court rejects the applicants' plea by which they complain that the Commission redacted, in an inconsistent manner, from some of the agreements at issue, certain provisions and information which are of the same, or even identical, nature. The Court states that, in the case of documents originating from a third party, although it is true that it is mandatory to consult that party, it is for the Commission to assess the risks that may result from disclosure of those documents. In the present case, each agreement constituted an independent document and the applicants adduced no evidence capable of refuting the Commission's explanations, in the contested decision, to the effect that it had relied on an analysis of the specific content of each agreement in question and on an analysis of the individual situation of each undertaking concerned.

Lastly, the Court rejects the applicants' plea alleging that the Commission failed to take into account the overriding public interest in disclosure of the requested information. The Court states that considerations as general as those relied on by the applicants, namely the need to establish public trust in the Commission's actions concerning the purchase of COVID-19 vaccines and in the vaccines themselves, cannot establish that the interest in transparency was of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the redacted parts of the agreements at issue. It also points out that the agreements at issue form part of an administrative, not legislative, activity.

Judgment of the General Court (Fifth Chamber), 17 July 2024, Courtois and Others v Commission, T-761/21

Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the purchase of vaccines by the Commission in the context of the COVID-19 pandemic – Partial refusal of access – Exception relating to the protection of personal data – Exception relating to the protection of the commercial interests of a third party – Obligation to state reasons – Existence of a foreseeable and not purely hypothetical risk of the interest relied on being undermined – Principle of proportionality

In this judgment, the General Court upholds, in part, the action for annulment brought by a number of natural persons against the European Commission decision granting only partial access to the advance purchase agreements and purchase agreements for COVID-19 vaccines and to other documents relating to the purchase of those vaccines. [17]

In 2021, two lawyers representing, among others, the applicants, requested access [18] to certain documents relating to the purchase, by the Commission and on behalf of the Member States, of COVID-19 vaccines, including, in particular, the agreements signed by the Commission, the identity of the EU representatives involved in the negotiation of the agreements and the declarations by those representatives that they had no conflict of interests ('the initial request'). The Commission identified 46 documents corresponding to the request. It granted partial access to four advance purchase agreements and three purchase agreements for vaccines, stating that the redacted versions of those documents had been made public on the Commission's website and that the passages had been redacted on the basis of the exceptions relating to the protection of the privacy and the integrity of the individual, the protection of commercial interests and the protection of the decision-making process of the institutions. [19] It granted partial access to the declarations that there was no conflict of interests, of which only one copy was sent to the applicants, those documents differing only with respect to the name of the signatory, the signature and the date of signature. By contrast, it refused access to 17 documents identified as being 'draft memoranda of understanding'.

Following a confirmatory application for disclosure of the documents to which access had been refused, either in part or in whole, the Commission stated, in an express decision, notified to the applicants first in English and then in French, that, following a re-examination of the response to the initial request, the list of documents corresponding to the request for access to documents had been amended and now consisted of 66 documents. The 17 'draft memoranda of understanding' had been removed, as the Commission considered that they had been included in error. It granted wider access to the four advance purchase agreements and three purchase agreements to which partial access had already been granted, and partial access to new advance purchase agreements and purchase agreements (together 'the agreements at issue'). It also granted partial access to other new documents, including correspondence between the Commission and the Member States. It relied on the exception relating to the protection of privacy and the integrity of the individual and the exception relating to the protection of the commercial interests of the undertakings concerned in order to justify granting only partial access. [20]

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17 Decision C(2022) 1359 final of the European Commission of 28 February 2022 ('the contested decision').

18 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).

19 Exceptions provided for in, respectively, Article 4(1)(b), the first indent of Article 4(2), and the first subparagraph of Article 4(3) of Regulation No 1049/2001.

20 Exceptions provided for in, respectively, Article 4(1)(b) and the first indent of Article 4(2) of Regulation No 1049/2001.

Findings of the Court

As a preliminary point, the Court examines the head of claim whereby the applicants seek the annulment of the French version of the express decision. It holds that there is only a single express decision, namely the contested decision, adopted in two language versions.

In the first place, the Court rejects the plea alleging that the list of documents identified as corresponding to the request for access to documents is incomplete, in that the Commission removed the 17 'draft memoranda of understanding' from that list. It notes that the applicants requested access only to the 'agreements signed' by the Commission. Their request could not be understood as also referring to documents preparatory to the signature of those agreements, which refer to mere drafts or provisional documents relating to the drafting of contractual provisions to be agreed on subsequently. The Commission was thus entitled to remove them from the list.

In the second place, ruling on the first part of the second plea, which alleges that the exception relating to the protection of the privacy and the integrity of the individual is not applicable to the declarations that there was no conflict of interests, the Court annuls the contested decision in so far as the Commission refused wider access to those declarations signed by the members of the joint team who negotiated the purchase of vaccines.

First, the Court considers that the applicants sufficiently indicated the specific public-interest aim which they pursued and also the need to communicate the personal data concerned. It was only by having the names, surnames and professional or institutional roles of the members of the joint negotiating team that the applicants could have ascertained that those members did not have a conflict of interests. Second, it observes that the Commission was correct to take the view that there was a risk that the privacy of the persons concerned would be undermined. It was thus for the Commission to weigh up the interests at issue. The Commission did not take sufficient account of the different circumstances in order to weigh up correctly the interests at issue.

In the third place, the Court upholds, in part, the second part of the second plea, which takes issue with the way in which the Commission applied the exception relating to the protection of commercial interests in order to redact certain information from the agreements at issue.

It rejects the applicants' line of argument that that exception could not be applied because of the context in which the agreements at issue had been concluded. It observes that the pharmaceutical undertakings with which those agreements were concluded are all private companies pursuing commercial activities in the context of which they are subject to competition within the internal market and on the international markets. That context means that they have to preserve their interests on those markets. The mere fact that, by means of down payments or advance payments from public funds, they participated in carrying out tasks in the public interest, namely the development of COVID-19 vaccines, does not as such support the view that their commercial interests cannot be protected.

As regards the partial refusal of access to the provisions on the properties of the vaccines and quality control, and on contractual liability, and also the refusal of access to the list of the manufacturing network partners and subcontractors of the undertakings concerned, the Court finds that the explanations provided by the Commission in the contested decision on the existence of a reasonably foreseeable and not purely hypothetical risk that the protection of the commercial interests of the undertakings concerned would be undermined with respect to the full disclosure of that information are valid.

By contrast, the Court does not endorse the Commission's position regarding the refusal to grant wider access to the provisions on indemnification. In that context, it observes, first, that the mechanism whereby the Member States indemnify the undertakings concerned, set out in the agreements at issue, does not in any way affect the regime of legal liability of those undertakings

under Directive 85/374. [21] According to that directive, a producer is liable for damage caused by a defect in its product and its liability to the injured person may not be limited or excluded by a provision limiting its liability or exempting it from liability. Second, it observes that the information on the indemnification mechanism was already in the public domain at the time when the initial request for access was made and when the contested decision was adopted. [22]

The Court finds that, although the agreements at issue all contain a provision on indemnification, the detailed content of those provisions is not identical.

Nevertheless, the Court finds that the three grounds relied on by the Commission to refuse wider access to those provisions do not demonstrate the existence of a foreseeable and not purely hypothetical risk to the commercial interests of the undertakings concerned.

First, as regards the ground that precise knowledge of the limits of the liability of the undertaking concerned could expose it to multiple actions for damages, the Court notes that the right of third parties who may have been harmed by a defective vaccine to bring actions for damages is based on the national legislation transposing Directive 85/374. It is therefore independent of the existence and content of the provisions on indemnification. Furthermore, the interest of the undertakings concerned in avoiding such actions for damages and the costs associated with those proceedings cannot be regarded as a commercial interest and does not constitute an interest deserving of protection under Regulation No 1049/2001. Moreover, there is nothing in the contested decision to support the conclusion that the wider disclosure of those provisions could give rise to such actions.

Second, as regards the ground that full disclosure would inevitably reveal to the competitors of the undertaking concerned the 'weak points' of the coverage of its liability, giving them a competitive advantage which they could exploit, for example in advertisements, the Court notes that the reason why those provisions were incorporated into the agreements at issue, namely to compensate for the risks associated with the shortening of the period for the development of vaccines, was in the public domain before the contested decision was adopted. Moreover, all the undertakings concerned obtained a provision on indemnification.

Third, the Court rejects, for the same reasons, the ground that full disclosure would have repercussions for the reputations of the undertakings concerned.

Lastly, the Court rejects the applicants' plea alleging that the Commission failed to take into account the overriding public interest in disclosure of the requested information. The Court states that general considerations relating to transparency and good governance cannot establish that the interest in transparency was of particularly pressing concern and capable of prevailing over the reasons justifying the refusal to disclose the redacted parts of the agreements at issue. It also points out that the agreements at issue form part of an administrative, not legislative, activity.

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21 According to Articles 1 and 12 of Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ 1985 L 210, p. 29).

22 See, in particular, the third paragraph of Article 6 of the agreement of 16 June 2020 on the procurement of COVID-19 vaccines concluded between the Commission and the Member States, and the Commission Communication of 17 June 2020, entitled 'EU Strategy for COVID-19 vaccines' (COM(2020) 245 final).

2. NON-CONTRACTUAL LIABILITY OF THE EUROPEAN UNION

Judgment of the General Court (Ninth Chamber), 17 July 2024, Montanari v EUCAP Sahel Niger, T-371/22

Link to the judgment as published in extract form

Common foreign and security policy – EUCAP Sahel-Niger mission – Seconded national staff members – Psychological harassment – Rejection of a claim for compensation – Action for annulment – No interest in bringing proceedings – Inadmissibility – Non-contractual liability – Right to dignity – Articles 1 and 31 of the Charter of Fundamental Rights – Mediation procedure – Failure to send the mediator's report – Failure to implement the mediator's recommendations – Right to good administration – Article 41 of the Charter of Fundamental Rights – Duty to have regard for the welfare of officials – Non-material damage – Material damage – Causal link

The General Court, partially upholding an action for non-contractual liability brought by Mr Montanari, a former national staff member seconded to the European Union Common Security and Defense Policy (CSDP) mission in Niger ('the Mission'), ruled, for the first time, on whether the actions of its Civilian Operation Commander (COC), who is hierarchically attached to the European External Action Service (EEAS), are attributable to the Mission.

In April 2015, the applicant was seconded by the Italian Government to the Mission as a political advisor.

In March 2017, he filed a first complaint of harassment against the Head of the Mission's Press and Public Information Office, followed by a second complaint against the latter and against the Head of Mission for unfair behaviour towards the authority of the Mission and gross negligence involving the duty to have regard for the welfare of officials.

In July 2017, the applicant requested the COC to open an investigation into harassment by the Head of Mission and his deputy. On the same day, the Head of Mission issued a warning to the applicant for disrespecting him at a meeting. On the initiative of the COC, a mediator responsible for examining the situation at first hand issued a report.

In November 2017, the Head of Mission rejected the applicant's request for regularisation of an unauthorised absence and issued him with a second warning. The applicant repeated his request to the COC to open an investigation into harassment by the Head of Mission and his deputy.

By decision of 10 April 2018, the COC definitively rejected the applicant's request to open an administrative investigation.

In that context, the applicant brought before the Court, on the one hand, an action for annulment of the Mission's decision rejecting his claim for compensation for the material, physical and non-material damage resulting from psychological harassment and infringements of the right to good administration and the duty to have regard for the welfare of officials and, on the other hand, an action for damages.

Findings of the Court

As a preliminary point, as regards its jurisdiction, the Court recalls that, by Decision 2012/392, [23] the Mission was created to support the capacity building of Nigerien security actors in the fight against

[23] Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ 2012 L 187, p. 48).

terrorism and organised crime. It consists primarily of staff seconded by Member States, Union institutions and the European External Action Service (EEAS). [24] Article 7(2) of Decision 2012/392 provides that the Member State, Union institution or the EEAS respectively are responsible for answering any claims linked to the secondment and for bringing any action against the staff member concerned.

First, however, as is clear from the case-law relating to provisions governing the activity of other missions covered by the common foreign and security policy and drafted in terms similar to those of Decision 2012/392, since staff members seconded by the Member States and those seconded by the EU institutions are subject to the same rules so far as concerns the performance of their duties at theatre level, the EU judicature has jurisdiction to review the legality of acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level.

Second, the applicant raises the question of the legality of acts of staff management relating to operations at theatre level, and not questions linked to the secondment within the meaning of Article 7(2) of Decision 2012/392. Accordingly, the plea of lack of jurisdiction raised by the Mission is dismissed.

The Court then examined the various pleas of inadmissibility.

It recalls, inter alia, that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in having the contested act annulled. Such an interest presupposes that the annulment of the measure in question is capable, in itself, of having legal consequences and that the action may thus, if successful, procure an advantage for the party who brought it. Furthermore, it is the applicant that must prove that it has an interest in bringing proceedings.

Moreover, according to settled case-law, the action for damages, based on the second paragraph of Article 340 TFEU, was introduced as an autonomous legal remedy. However, submissions seeking either annulment of the refusal of an institution, body, office or agency of the European Union to recognise a right to compensation which an applicant claims under Articles 268 and 340 TFEU, or that the Court find the obligation of the institution, body, office or agency in question to accept the existence of such a right, seek a declaration that the institution, body, office or agency in question is liable to compensation and must be dismissed as inadmissible, since the applicant does not, in principle, demonstrate an interest in submitting such a claim in addition to its claim for compensation.

In the present case, the Court rejects as inadmissible the applicant's claim for annulment, finding that the applicant did not demonstrate an interest in seeking, in addition to his claim for damages, the annulment of the Mission's decision rejecting his third claim for compensation.

Lastly, the Court dismisses one by one the pleas of inadmissibility raised by the Mission.

Thus, in the first place, the Court finds that the acts complained of (including the applicant's exclusion from certain meetings and the warning issued to him) and the breaches attributed to the Mission by the applicant (including the failure to deal with his complaints and reports within a reasonable time) relate respectively to the exercise, by the Head of Mission and the COC, of the powers they derive from Decision 2012/392, and therefore to the Mission's execution of its mandate, for which the latter must be held responsible under Article 13(4) of that decision.

In the second place, the Court emphasises that an action for damages must be declared inadmissible where it is actually aimed at securing the withdrawal, repeal or amendment of an individual decision which has become final and it would, if upheld, have the effect of nullifying in whole or in part the

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24 See Article 7(1) of Decision 2012/392.

legal effects of that decision. Similarly, a claim for compensation which is formulated as an injunction and which is intended not to obtain damages for harm attributable to an unlawful act or an omission, but to amend the act at issue, must be rejected as inadmissible.

In the present case, it does not appear from the applicant's written submissions that he seeks compensation in kind, whereby the Mission would have to commence a preliminary or disciplinary investigation against the Head of Mission and his deputy, which would be tantamount to seeking the annulment of the decision of 10 April 2018. Accordingly, the fact that that individual decision had become final cannot preclude the admissibility of the appeal.

Lastly, the Court finds that the plea of inadmissibility raised by the Mission and based on a five-year or four-year limitation period is not accompanied by sufficient details to assess its merits.

As regards the merits of the actions, the Court first recalls that the non-contractual liability of the European 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. Nevertheless, when it acts as an employer, the European Union is subject to greater liability, the finding of illegality on its own being sufficient for regarding as satisfied the first of the three conditions necessary for it to incur liability for damage caused to its officials and other staff members owing to an infringement of European Civil Service law, and it is not necessary to demonstrate the existence of a 'sufficiently serious' breach of a rule of law conferring rights on individuals. However, although national staff members seconded to the Mission by the Member States are not governed by the Staff Regulations, they are nevertheless subject to the same rules as those applicable to staff members seconded by the institutions of the European Union and whose situation is governed by the Staff Regulations, as regards the performance of their duties at theatre level. Consequently, the finding of illegality is sufficient to regard the first of the three conditions necessary for the liability of the European Union to be incurred in respect of damages caused to a national staff member seconded to the Mission in the course of the performance of his duties at theatre level as having been met.

In that context, examining in turn the breaches alleged by the applicant, the Court considers, in the first place, that the applicant is entitled to maintain that, by failing to conduct an administrative investigation following his allegations of psychological harassment, the Mission infringed Article 1 and Article 31(1) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 12a of the Staff Regulations.

To reach that conclusion, first as regards the applicability of the provisions of the Staff Regulations, and in particular Article 12a(3) thereof, which defines psychological harassment, the Court notes that, by virtue of the principle of equal treatment, it is required to apply to the applicant's situation, by analogy, the provisions of the Staff Regulations relating to psychological harassment and the functional protection of officials and temporary or contract staff, as well as the case-law delivered on the basis of those provisions. In effect, the difference in situation between staff members seconded to the Mission by Member States and those seconded by the institutions cannot objectively justify that the former, when they perform their duties at theatre level and are then placed in a situation comparable to that of the latter, do not benefit from the same level and the same rules of protection against psychological harassment.

The Court further recalls that, when a request for assistance is made and it is accompanied by sufficient prima facie evidence of the alleged facts, it is the responsibility of the authority to which the request is made [25] to respond with the speed and solicitude required. It must take appropriate measures, in particular by having an administrative enquiry carried out, in order to establish the facts giving rise to the complaint, in collaboration with the person making the complaint, and, in the light of the results of the enquiry to adopt the necessary measures, such as the opening of disciplinary

25 Pursuant to Article 90(1) of the Staff Regulations.

proceedings, against the person concerned when the administration concludes, at the end of the administrative investigation, that psychological harassment has occurred.

In the present case, first, the Court considers that the decision of the Head of Mission taken in May 2017 to exclude the applicant from staff meetings cannot be regarded, in isolation, as evidence of psychological harassment towards the applicant. In effect, under the terms of Article 6(2) and (3) of Decision 2012/392, the Head of Mission exercises command and control over personnel, teams and units from contributing States and issues instructions to all Mission staff, assuming its coordination and day-to-day management. In addition, the administration has a wide discretion in relation to its internal organisation.

Second, the Court states that, in the absence of an explanation from the Mission justifying the delay in the formulation of the first warning sent to the applicant, having regard to both the time limit provided for by Article 11 of the Code of Conduct [26] and the amount of time that had elapsed since the events occurred, and in the absence of an indication as to the exact date on which the Head of Mission became aware of the report made by the applicant in July 2017, the notification of the warning less than an hour after that report could be considered excessive or open to criticism. Indeed, it could be interpreted as an attempt to penalise the applicant for that report, contrary to the requirements set out in Article 7 of the Code of Conduct, [27] and thus, considered in isolation, constitutes evidence of psychological harassment.

Third, in the particular circumstances in which it occurred, the decision of the Mission's human resources department ('the HR department') to send a reminder, on 27 July 2017, of the applicant's evaluation procedure the day after the mediator's departure, without awaiting his findings, and more than nine months before the end of the applicant's secondment, is excessive or open to criticism.

In effect, the Mission did not state the reasons why the HR department initiated that administrative procedure on that date, when according to Article 7 of Annex IX of the OPLAN, [28] relating to human resources, the evaluation procedure for staff members applying to extend their secondment to the Mission had to be carried out when they submitted their application to that effect, and at the latest three months before the end of the secondment. Furthermore, the Mission had a duty of care in accordance with the principle of good administration enshrined in Article 41 of the Charter, following the abovementioned report pursuant to Article 7 of the Code of Conduct.

Accordingly, such a reminder may be interpreted as seeking to oust the applicant from the Mission at the end of his secondment without awaiting the mediator's proposals, such that that decision, considered in isolation, constitutes evidence of psychological harassment.

Lastly, the fact that the HR department sent the applicant an updated annual leave record in late July 2017 cannot be considered, in isolation, as excessive or open to criticism, or constituting evidence of psychological harassment. Without prejudice to the Mission's duty to act diligently and, in particular, the duty to have regard for the welfare of officials pending the mediator's findings, neither Articles 1 and 31 of the Charter, nor Article 12a of the Staff Regulations, nor the provisions of Annex IX of the OPLAN and of the Code of Conduct required the Mission to exempt the applicant from the Mission's HR management procedures on the sole ground that he had reported the Head of Mission and his deputy for psychological harassment.

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26 It is clear from Article 11 of the Code of Conduct and Discipline for EU Civilian CSDP Missions ('the Code of Conduct') that, on the basis of a report concerning a possible breach, the decision of the responsible authority on the action to be taken on that breach, which may lead the authority to deal with it as a management issue, must be taken within 10 working days.

27 Article 7(1) of the Code of Conduct provides that Mission members who have reported a possible breach should not suffer any adverse effects as a result of or as a reaction to this reporting, provided they have acted reasonably and in good faith.

28 Article 7 of Annex IX of the Mission's revised operational plan (OPLAN), relating to human resources, makes the extension of the secondment of a seconded staff member subject to the agreement of the Head of Mission, on the basis of a request to that effect from the staff member concerned submitted three months before the end of the secondment period and a favourable performance evaluation report from his or her direct line manager.

Moreover, the Court notes that the general working environment in which the facts relied on by the applicant took place was characterised by the intention of the Head of Mission to remove the applicant from his post without implementing the procedure provided for in Article 8 of Annex IX of the OPLAN aimed at terminating a secondment prematurely.

In the second place, the Court considers that the applicant is entitled to maintain that the Mission breached the right to good administration.

In that regard, it recalls that, in disputes concerning harassment involving EU officials or other staff members, the person who lodged a complaint of harassment is entitled, in order to be able effectively to submit his observations to the institution concerned before it takes a decision, to receive a summary, at the very least, of the statements made by the person accused of harassment and the various witnesses heard during the investigation procedure and that such a summary must be disclosed while respecting, if necessary, the principle of confidentiality. The Court noted that that was the case as the statements had been used in the report which had been submitted to the authority that had taken the decision not to pursue the complaint and included recommendations on the basis of which that authority had made its decision.

In the present case, since in April 2018 the COC rejected the applicant's request for an administrative investigation to be opened on the basis of the mediator's report issued in late July 2017, and taking into account the recommendation contained in that report, it should have ensured respect for the applicant's right to be heard by giving him the opportunity to submit his observations on that report and to provide any additional information before it adopted that decision. In effect, the applicant's hearing could have led the COC to reach a different conclusion, namely the decision to conduct an administrative investigation.

Despite acknowledging that the applicant has established the existence of a direct and certain causal link between the alleged non-material damage and the breaches found, the Court finds that the applicant, owing to his negligent behaviour, is one of the protagonists of the conflict situation which he describes as harassment, having given rise to the non-material damage he claims to have suffered. Therefore, the Court upholds in part his action for damages.

3. PROCEDURE FOR APPOINTING JUDGES OF THE EUROPEAN UNION

Judgment of the Court of Justice (Grand Chamber), 29 July 2024, Valančius, C-119/23

Link to the full text of the judgment

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

Further to a request for a preliminary ruling from the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania), the Grand Chamber of the Court of Justice rules on the effect of the provisions of the Treaties governing the appointment of Judges of the General Court of the European Union [29] on the national procedure for proposing a candidate for the performance of those duties.

In 2016, Mr Valančius was appointed a Judge of the General Court. After his term of office ended in August 2019, he continued to perform his duties. [30] In 2021, a procedure was adopted for the selection of a candidate for the office of Judge of the General Court. [31] In accordance with that procedure, a working group composed mainly of independent experts drew up a merit list of candidates, in descending order in accordance with the score obtained. Mr Valančius was the best-ranked candidate on that list.

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

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

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

Findings of the Court

As regards its jurisdiction to rule on the request for a preliminary ruling, the Court of Justice notes that, under EU law, [32] the procedure for appointing a Judge of the General Court consists of three stages. At the first stage, the government of the Member State concerned proposes a candidate for the office of Judge of the General Court and sends that proposal to the General Secretariat of the Council of the European Union. At the second stage, the panel provided for in Article 255 TFEU gives an opinion on that candidate's suitability to perform the duties of a Judge of the General Court, having regard to the requirements laid down in the second paragraph of Article 254 TFEU. At the third stage, following consultation with that panel, the governments of the Member States, through their representatives, appoint that candidate as a Judge of the General Court, by a decision taken by common accord on a proposal from the government of the Member State concerned. Thus, the decision of the government of a Member State to propose a candidate for the office of Judge of the General Court constitutes the first stage of the appointment procedure governed by the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU and therefore falls, on that basis, within the scope of those provisions. In those circumstances, the interpretation of those provisions clearly falls within the Court of Justice's jurisdiction to rule on requests for a preliminary ruling.

As regards the substance of the questions referred for a preliminary ruling, the Court points out that the requirement of judicial independence gives concrete expression to one of the fundamental values of the European Union and its Member States enshrined in Article 2 TEU, which define the very

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

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

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

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

identity of the European Union as a common legal order and which must be complied with both by the European Union and by the Member States. Since that requirement, which has two aspects, independence in the strict sense and impartiality, is inherent in the task of adjudication and Article 19 TEU jointly entrusts the Court of Justice of the European Union and the national courts with the task of ensuring judicial review in the EU legal order, that requirement applies both at EU level, in particular as regards the Judges of the General Court, and at the level of the Member States as regards national courts.

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

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

Thus, as regards, first of all, the national stage of proposal of a candidate for the office of Judge of the General Court, the Court of Justice notes, on the one hand, that, in the absence of specific provisions to that effect in EU law, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing the proposal of such a candidate, provided that those rules cannot give rise, in the minds of individuals, to reasonable doubts as to whether the proposed candidate meets the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU. In that regard, the fact that representatives of the legislature or executive are involved in the judicial appointment process is not in itself such as to give rise to such reasonable doubts in the minds of individuals. That said, the involvement of independent advisory bodies and the existence, in national law, of an obligation to state reasons may be such as to contribute to rendering the appointment process more objective, by circumscribing the leeway available to the appointing institution.

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

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

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

Finally, the Court notes that the task of ensuring observance of the requirements laid down in the third subparagraph of Article 19(2) TEU and the second paragraph of Article 254 TFEU is also incumbent on the governments of the Member States, through their representatives, if they decide,

having regard to the opinion delivered by the panel provided for in Article 255 TFEU, to appoint as a Judge of the General Court the candidate proposed by one of those governments. Once appointed, that candidate becomes a Judge of the European Union and does not represent the Member State which proposed him or her.

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

III. FREEDOM OF MOVEMENT

1. FREEDOM OF ESTABLISHMENT

Judgment of the Court of Justice (Grand Chamber), 29 July 2024, LivaNova, C-713/22

Link to the full text of the judgment

Reference for a preliminary ruling – Companies – Divisions of public limited liability companies – Sixth Directive 82/891/EEC – Article 3(3)(b) – Division by the formation of new companies – Concept of 'liability … not allocated by the draft terms of division' – Joint and several liability of those new companies for liabilities resulting from the conduct of the company being divided prior to that division

The Court of Justice recalls the circumstances in which it has jurisdiction to answer a question referred for a preliminary ruling which arises in the context of a purely internal situation and specifies, in the context of Sixth Directive 82/891, [33] the extent of the joint and several liability of the recipient companies of a division for debts arising from damage caused by the company being divided which was not determined at the time of that operation.

On 13 May 2003, SNIA SpA was divided by which it transferred part of its assets, namely all its shareholdings in the biomedical sector, to a newly formed company, Sorin SpA, which subsequently became LivaNova plc.

Following that division, the public authorities brought actions for damages against SNIA for the environmental damage which it had allegedly caused in the context of its activities in the chemical

33 Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the [EEC] Treaty, concerning the division of public limited liability companies (OJ 1982 L 378, p. 47) ('the Sixth Directive').

sector. SNIA and those authorities sought a declaration that LivaNova be held jointly and severally liable for all the debts arising from the costs of clean-up and environmental damage for which SNIA was liable prior to the division.

SNIA was found liable for that damage by the Italian courts. However, in so far as the events giving rise to that liability predated 13 May 2003, the date on which the division was carried out, LivaNova's joint and several liability was limited to the transferred assets, in accordance with Italian legislation, [34] on the ground that the debts arising from the costs of clean-up and environmental damage constituted known SNIA's liabilities but whose allocation could not be inferred from the draft terms of division concerned.

In order to determine whether LivaNova may be considered to be jointly and severally liable for the costs of clean-up and environmental damage caused by SNIA, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), before which the dispute was brought by LivaNova, is uncertain as to the scope of the concept of 'liability … not allocated by the draft terms of division', referred to in Article 3(3)(b) of the Sixth Directive, which was transposed into Italian law by the concept of 'liabilities the allocation of which cannot be inferred from the draft terms [of division]'.

In particular, it asks whether that first concept may cover undefined liabilities not allocated in the draft terms of division, such as the costs of clean-up and environmental damage which were established, evaluated or consolidated after the division concerned, which are the result of the conduct of the company being divided prior to the division or from conduct subsequent to that division, the latter conduct which is itself the development of the prior conduct of the company being divided.

The Court considers that the joint and several liability of recipient companies laid down in Article 3(3)(b) of the Sixth Directive applies to such liabilities, in so far as they result from the conduct of the company being divided prior to the division.

Findings of the Court

First of all, the Court notes that the division in the present case does not fall directly within the scope of the Sixth Directive, since SNIA transferred only part of its assets to Sorin, now LivaNova, and not all its assets as provided for in Article 21 of the Sixth Directive, which defines the concept of 'division by the formation of new companies'.

However, the Court recalls that, according to settled case-law, it has jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations where the facts of the cases being considered by the national courts were outside the direct scope of EU law provided that the provisions of EU law whose interpretation is sought have been made applicable directly and unconditionally by national law, in order to ensure that internal situations and situations governed by EU law are treated in the same way, and provided, however, that the referring court indicates the connecting factor between the dispute pending before it and those provisions of EU law. [35](3)

In the present case, the referring court has pointed out that the wording of the national provision at issue, which is applicable to the dispute in the main proceedings, is, in essence, equivalent to that of Article 3(3)(b) of the Sixth Directive, which it transposes into national law. In transposing the Sixth Directive in that manner, the Italian legislature therefore decided to apply Article 3(3)(b) of the Sixth Directive directly and unconditionally also to operations whereby a company limited by shares allocates only a part of its assets to another company.

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34 The third paragraph of Article 2506-bis of the Codice civile (Civil Code).

35 In accordance with Article 94 of the Rules of Procedure of the Court of Justice and the recommendations of the Court of Justice of the European Union to national courts and tribunals in relation to the initiation of preliminary ruling proceedings.

Next, as regards the interpretation of the term 'liability' referred to in Article 3(3)(b) of the Sixth Directive, the Court explains, in the first place, that it is intended, in a broad sense, to cover any debt of the company being divided, whether certain or uncertain, defined or undefined, irrespective of its origin and nature.

In the second place, since, under the Sixth Directive, draft terms of division must set out the precise description and allocation of the liabilities to be transferred, those liabilities must have arisen, in principle, prior to the division concerned. In the case of the costs of clean-up and environmental damage, that requirement therefore implies that the infringement or the event giving rise to that environmental damage occurred prior to the division, but not that, at that date, that damage had been established, evaluated or even consolidated.

In the third place, one of the objectives of the Sixth Directive is, in particular, the protection of third parties. The concept of 'third party' is broader than that of 'creditors, debenture holders, and persons having other claims on the companies involved in a division'. Accordingly, among third parties are those persons which though not yet creditors or persons having other claims at the date of the division concerned may become such after that division as a result of situations antedating the division. This is the case, for instance, for infringements of environmental law provisions which are found to have been committed in a decision adopted after that division.

That interpretation of the concept of 'third parties' supports that of the concept of 'liability', in the sense that it also covers undefined liabilities, but which result from conduct prior to the division.

Thus, the concept of 'liability', referred to in the first sentence of Article 3(3)(b) of the Sixth Directive, covers not only defined liabilities, but also undefined liabilities, such as the costs of clean-up and environmental damage which have been established, evaluated or consolidated subsequent to the division concerned, but which result from conduct prior to that division.

By contrast, the Sixth Directive lays down only a minimum system of protection of the interests of third parties in respect of liability arising only from conduct prior to the division concerned. Therefore, the question whether conduct subsequent to that division, but which is the development of prior conduct on the part of the company being divided, may be imputed to that company, with the result that the obligation to make good the damage thus caused, as part of its liability, will be transferred to the recipient companies in accordance with the detailed rules laid down by the Sixth Directive, must be determined on the basis of national law.

2. FREE MOVEMENT OF CAPITAL

Judgment of the Court of Justice (First Chamber), 29 July 2024, Keva and Others, C-39/23

Link to the full text of the judgment

Reference for a preliminary ruling – Article 63 TFEU – Free movement of capital – Taxation of dividends received by pension funds governed by public law – Difference in treatment between resident and non-resident pension funds governed by public law – Exemption only of resident pension funds governed by public law – Comparability of situations – Whether justified – Need to safeguard the objective pursued by social policy – Need to preserve a balanced allocation of the power of taxation of the Member States

In the context of a reference for a preliminary ruling, the Court of Justice confirms the infringement of the free movement of capital by a national system which establishes a distinction between recipients

in relation to the tax treatment of dividends distributed by resident companies. That distinction is based exclusively on the place of residence of those beneficiaries.

In the present case, the applicants in the main proceedings, three pension funds with various legal forms governed by Finnish public law, had paid tax in Sweden on dividends received from Swedish companies. Since those dividends had not been taxed in Finland, the tax on dividends to which they were subject in Sweden could not be deducted as provided for in the Nordic Tax Convention. [36] However, in Sweden, pension funds governed by public law, which form part of the State, are exempt from tax.

Taking the view that the levying of the tax on dividends in Sweden was contrary to the free movement of capital, within the meaning of Article 63 TFEU, since they were comparable to pension funds governed by Swedish public law, the applicants in the main proceedings applied to the Swedish tax agency for a refund of the tax on dividends paid in Sweden.

Following the rejection of their complaint, the action was brought before the referring court, Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden).

The referring court questions the compatibility with the free movement of capital, within the meaning of Article 63 TFEU, of such a system providing for the taxation of dividends distributed by resident companies to non-resident pension institutions governed by public law, whereas dividends distributed to resident pension funds governed by public law are exempt from that tax.

The Court considers that such a scheme is contrary to Article 63 TFEU.

Findings of the Court

In the first place, the Court states that the scheme at issue constitutes a restriction on the free movement of capital that is prohibited, in principle, by Article 63 TFEU. That scheme creates a difference in tax treatment that leads to a disadvantageous treatment of dividends paid to non-resident pension institutions governed by public law, liable to deter those institutions from investing in companies established in Sweden.

In that regard, as to compliance with its obligations under the Treaty, a State's reliance on points 10 and 12 of the Commentary on Article 24 of the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD) [37](2) – from which it is apparent that a State is not obliged to grant the same tax advantages to public bodies of a State other than those which it grants to its own public bodies – is irrelevant.

In addition, when exercising their power to organise their social security systems, the Member States must comply with EU law and, in particular, with the provisions of the TFEU relating to the fundamental freedoms.

In the second place, the Court finds that the difference in treatment between non-resident pension institutions governed by public law and resident pension funds governed by public law concerns situations that are objectively comparable.

First, the fact that a pension fund governed by public law is part of the Swedish State does not necessarily place it in a different situation from that of a non-resident pension institution governed by public law in the light of the objective of the tax exemption at issue, which is intended to avoid a circular flow of the public resources of the Swedish State. That objective could also be achieved if non-resident pension institutions governed by public law were to benefit in Sweden from the same tax

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36 Convention between the Nordic countries for the avoidance of double taxation with respect to taxes on income and on capital, signed in Helsinki on 23 September 1996.

37 Model convention for the avoidance of double taxation with respect to taxes on income and capital drawn up by the Fiscal Committee of the OECD, annexed to an OECD Recommendation of 30 July 1963 concerning the avoidance of double taxation.

exemption on dividends paid by resident companies as that granted to resident pension funds governed by public law.

Furthermore, the fact that non-resident pension institutions governed by public law are not intended to promote the financial stability and viability of the Swedish social security system, unlike resident pension funds governed by public law, cannot constitute an argument that renders impossible the cross-border comparison of pension funds since, by definition, the objective of each fund is to protect the stability and viability of a separate national pension system.

Second, the only relevant criterion which must be taken into account in order to assess whether the difference in treatment between resident pension funds governed by public law and non-resident pension institutions governed by public law reflects an objective difference in situation is, in the present case, the place of residence of the funds. The differences between the two types of entity relating to their legal form or the nature of their tasks in the collection of pension contributions or the payment of pensions do not appear to have a direct link with the tax treatment of the dividends received from Swedish companies.

In the third and last place, the Court holds that neither the need to safeguard the objective pursued by Swedish social policy nor the need to preserve a balanced allocation of the power of taxation between the Member States as regards the general income-based old-age pension scheme can constitute, in the present case, an overriding reason in the public interest capable of justifying the Swedish scheme at issue with respect to the free movement of capital.

IV. BORDER CONTROLS, ASYLUM AND IMMIGRATION: IMMIGRATION POLICY

Judgment of the Court of Justice (Grand Chamber), 29 July 2024, CU and ND (Social assistance – Indirect discrimination), C-112/22 and C-223/22

Link to the full text of the judgment

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

The Court of Justice, to which the Tribunale di Napoli (District Court, Naples, Italy) referred a request for a preliminary ruling, rules on the principle of equal treatment between third-country nationals who are long-term residents and nationals laid down in Article 11 of Directive 2003/109 [38] and, more specifically, on whether access to a social security, social assistance or social protection measure within the meaning of Article 11(1)(d) may be made subject to the condition of having resided in the Member State concerned for at least 10 years, the final 2 years of which must be uninterrupted.

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

38 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).

for that benefit, including the condition of having resided in Italy for a minimum period of 10 years, the final 2 years of which must be consecutive.

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

Findings of the Court

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

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

The Court goes on to emphasise that the system put in place by Directive 2003/109 makes acquisition of long-term resident status conferred by that directive subject to a specific procedure and, in addition, to fulfilment of certain conditions, including a condition of legal and continuous residence of five years in national territory. In so far as that status corresponds to the highest level of integration for third-country nationals, it justifies them being guaranteed equal treatment with nationals of the host Member State, as regards, in particular, social security, social assistance and social protection.

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

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

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

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

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

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

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

Last, regarding the criminal penalty provided for by national legislation in the event of a false declaration regarding the conditions for accessing the social benefit in question, the Court recalls that a national penalty mechanism is not compatible with the provisions of Directive 2003/109 where it is imposed in order to ensure compliance with an obligation which itself does not comply with those provisions. Having regard to the foregoing, the Court rules that Article 11(1)(d) of Directive 2003/109, read in the light of Article 34 of the Charter, precludes legislation of a Member State which makes access for third-country nationals who are long-term residents to a social security, social assistance or social protection measure conditional on the requirement, which also applies to nationals of that Member State, of having resided in that Member State for at least 10 years, the final 2 years of which must be consecutive, and which provides for a criminal penalty for any false declaration regarding that residency condition.

Judgment of the Court of Justice (Fifth Chamber), 29 July 2024, Perle, C-14/23

Link to the full text of the judgment

Reference for a preliminary ruling – Immigration policy – Directive (EU) 2016/801 – Conditions of entry and residence of third-country nationals for the purposes of studies – Article 20(2)(f) – Application for admission to the territory of a Member State for the purposes of studies – Other purposes – Refusal of a visa – Grounds for rejection of the application – Failure to transpose – General principle that abusive practices are prohibited – Article 34(5) – Procedural autonomy of the Member States – Fundamental right to an effective judicial remedy – Article 47 of the Charter of Fundamental Rights of the European Union

Ruling on a request for a preliminary ruling from the Conseil d'État (Council of State, Belgium), the Court of Justice rules, first, on the power of a Member State to refuse a third-country national a visa for the purposes of studies in the event that that national has no genuine intention to study and, second, on the scope of the judicial review of that decision in the light of the procedural guarantees provided for in Directive 2016/801. [39]

In August 2020, the appellant in the main proceedings, a third-country national, submitted an application for a visa in order to study in Belgium. She was refused that visa on the ground that it was apparent from inconsistencies in her study plan that she did not have any genuine intention of pursuing her studies in Belgium. The appellant in the main proceedings then sought the annulment of that decision before the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium). After that court dismissed her application, she brought an appeal on a point of law before the referring court.

In the context of that appeal, the appellant in the main proceedings claims, inter alia, that the provision of Directive 2016/801 that allows Member States to reject an application for admission where it is established that the third-country national would reside for purposes other than those for which he or she applies to be admitted had not been transposed into Belgian law. [40] Furthermore, she

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39 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (OJ 2016 L 132, p. 21).

40 Under Article 20(2)(f) of Directive 2016/801, a Member State may reject an application where it has evidence or serious and objective grounds to establish that the third-country national would reside for purposes other than those for which he or she applies to be admitted.

maintains that the review procedures implemented by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings), which merely consist in a review of legality, infringe the requirements under EU law. [41]

Since it had doubts as to the possibility of rejecting, in such circumstances, the application for admission to Belgian territory and as to the scope of judicial review of the decision rejecting such an application, the referring court decided to refer the matter to the Court for a preliminary ruling.

Findings of the Court

In the first place, the Court finds that, pursuant to Article 5(3) of Directive 2016/801, Member States are required to issue a residence permit for the purposes of studies to an applicant who has satisfied the requirements set out in that directive. [42] None of those requirements expressly refers to the existence of a genuine intention to study in the territory of the Member State concerned.

That said, according to a general principle of EU law, EU law cannot be relied on for abusive or fraudulent ends. Consequently, a Member State must refuse to grant the benefit of the provisions of that law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.

Thus, although Article 20(2)(f) of Directive 2016/801 provides that the Member State concerned may reject an application for admission to the territory where it has evidence or serious and objective grounds to establish that the third-country national would be staying for purposes other than those for which he or she is seeking admission, that provision does not exclude the application of the general principle of EU law that abusive practices are prohibited, since the application of that principle is not – as the provisions of a directive are – subject to a requirement of transposition.

Therefore, where an application for admission for study purposes is at issue, the finding of an abusive practice requires it to be established that the third-country national concerned submitted his or her application for admission without having a genuine intention to pursue, as a main activity, a full-time course of study leading to a higher education qualification recognised by that Member State.

However, an application for admission can be rejected only if that abuse is sufficiently apparent from all the relevant information available to the competent authorities. In that context, since the circumstances based on which it may be concluded that an application for admission for study purposes is abusive are necessarily specific to each individual case, an exhaustive list of the relevant factors in that regard cannot be established. Accordingly, the potentially abusive nature of such an application cannot be presumed in the light of certain factors, but must be assessed on a case-by-case basis, following an individual assessment of all the circumstances specific to each application. In that regard, it is for the competent authorities to carry out all appropriate checks and to request the evidence in order to carry out an individual assessment of that application, if necessary by requesting the applicant to provide further details and explanations in that regard.

In any event, the fact that the third-country national who has submitted the application for admission for study purposes also intends to pursue another activity in the territory of the Member State concerned, in particular if that activity does not affect the pursuit of studies, as a main activity, justifying that application, cannot necessarily be regarded as indicative of an abusive practice. By contrast, inconsistencies in the applicant's planned studies may constitute one of the objective circumstances contributing to the finding of an abusive practice, on the ground that the applicant's application is, in fact, aimed at purposes other than the pursuit of studies, provided that those inconsistencies are sufficiently apparent and that they are assessed in the light of all the specific

41 Article 34(5) of Directive 2016/801 requires Member States to provide that an action may be brought against decisions rejecting applications for admission.

42 See Articles 7 and 11 of Directive 2016/801.

circumstances of the particular case. Thus, a circumstance which may be regarded as ordinary in the course of higher education, such as a change of direction, is not in itself sufficient to establish the lack of a genuine intention to study in the territory of that Member State. Similarly, the mere fact that the studies envisaged are not directly linked to the professional objectives pursued does not necessarily indicate a lack of intention actually to pursue the studies on which the application for admission is based.

In the second place, as regards judicial review of the decision rejecting an application for admission, the Court recalls, first of all, that the characteristics of the appeal procedure envisaged in Article 34(5) of Directive 2016/801 must be determined in a manner that is consistent with Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). Thus, it is apparent from the need, arising from Article 47 of the Charter, to ensure that the action brought against the initial administrative decision rejecting that application of the party concerned is effective that, in the event of its annulment, a new decision is adopted within a short period of time and that it complies with the assessment contained in the judgment annulling that decision.

It follows that, as regards applications for admission to the territory of a Member State for the purposes of studies, the fact that the court hearing the case has jurisdiction only to rule on the annulment of the decision of the competent authorities rejecting such an application, without being able to substitute its own assessment for that of those authorities or adopt a new decision, is sufficient, in principle, to satisfy the requirements of Article 47 of the Charter, provided that those authorities are bound by the assessment contained in the judgment annulling that decision. Furthermore, in such a situation, it must be ensured that the conditions under which the action is brought and, where appropriate, the judgment adopted at the end of that action are such that they allow, in principle, a new decision to be adopted within a short period of time, in such a way that a sufficiently diligent third-country national can benefit from the full effectiveness of the rights which he or she derives from Directive 2016/801.

V. JUDICIAL COOPERATION IN CRIMINAL MATTERS

1. EUROPEAN ARREST WARRANT

Judgment of the Court of Justice (Fifth Chamber), 29 July 2024, Breian, C-318/24 PPU

Link to the full text of the judgment

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

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

On 17 December 2020 the Curtea de Apel Braşov (Court of Appeal, Braşov) issued an EAW against P.P.R. for the purpose of executing a custodial sentence. P.P.R. was arrested in France in 2020, but was not surrendered to the Romanian authorities. By judgment of 29 November 2023, the cour d'appel de Paris (Court of Appeal, Paris, France) refused to execute the EAW on the ground of a risk of infringement of the fundamental right to a fair trial by an independent and impartial tribunal previously established by law. [43] According to that court, there are systemic and generalised deficiencies in the Romanian judicial system, in so far as the place where the records of the oath of office taken by judges are kept is uncertain, which gives rise to doubts regarding the proper composition of the courts in that Member State. Furthermore, in the present case, the record of the oath taken by one of the judges of the formation which imposed the custodial sentence cannot be found, while another judge of that formation took an oath only as a public prosecutor. Moreover, by a decision of the Requests Chamber of Interpol's Commission for the Control of Files (CCF), the international wanted persons notice in respect of P.P.R. was deleted from the Interpol database on the ground that the data concerning P.P.R. did not comply with Interpol's rules on the processing of personal data. That raised serious concerns, inter alia, regarding respect for fundamental rights in the proceedings against P.P.R. in Romania.

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

Then, on 20 May 2024 the Maltese court decided not to surrender P.P.R. to the Romanian authorities, considering that it was unable to conclude, on the basis of the information on the detention conditions in Romania available to it, that the prohibition of inhuman and degrading treatment or punishment, provided for in Article 4 of the Charter, would be complied with if P.P.R. were to be surrendered to the Romanian authorities.

In those circumstances, the referring court decided to refer to the Court for a preliminary ruling a number of questions concerning, in essence: first of all, the effects produced, for other executing authorities and for the issuing authority, by an executing authority's refusal to execute an EAW; secondly, the reasons underlying the French and Maltese executing authorities' refusals to execute the EAW issued by the issuing authority; and, lastly, its own obligation to make a reference to the Court for a preliminary ruling following such a refusal, and its right to participate in the proceedings for the execution of the EAW before the executing authority.

Findings of the Court

In the first place, as regards the effects that a refusal to execute an EAW has for other executing authorities, the Court observes that the Framework Decision on the EAW [44] does not provide for the possibility, or obligation, for an executing authority of a Member State to refuse to execute an EAW solely on the ground that the executing authority of another Member State has refused to execute it, without examining itself whether there are any grounds for non-execution of that EAW. Thus, the executing authority of a Member State is not obliged to refuse to execute an EAW where the executing authority of another Member State has previously refused to execute it on the ground that the surrender of the person concerned may infringe the fundamental right to a fair trial. Nevertheless, within the framework of its own examination of the existence of a ground for non-execution, that authority must give due consideration to the reasons underlying the refusal decision adopted by the first executing authority.

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

44 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').

As regards the effects of that decision for the issuing authority, the Court points out that Framework Decision 2002/584 does not prevent the issuing authority from maintaining its request for surrender under an EAW despite the refusal to execute it. However, although the issuing authority is not obliged, following such a refusal, to withdraw its EAW, a refusal to execute that EAW must nonetheless prompt it to exercise vigilance. It cannot, especially in the absence of a change in circumstances, maintain an EAW where an executing judicial authority has legitimately refused [45] to give effect to that EAW on the ground of a real risk of infringement of the fundamental right to a fair trial. Conversely, if there is no such risk, following in particular a change in circumstances, the mere fact that the executing authority has refused to execute that EAW cannot prevent the issuing judicial authority from maintaining it. Furthermore, it is for that authority to examine whether, in the light of the particular circumstances of the case, it is proportionate to maintain the EAW.

In the second place, as regards the reasons underlying the French and Maltese executing authorities' decisions to refuse to execute the EAW at issue, the Court recalls, first, that in order to determine whether there is a real risk of infringement of the fundamental right to a fair trial on account of systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State, the executing authority must base its examination both on objective, reliable, specific and properly updated information relating to the operation of that judicial system, and on a specific and precise analysis of the individual situation of the requested person. Therefore, a decision of the CCF concerning the situation of the person in respect of whom an EAW has been issued [46] cannot suffice to justify a refusal to execute that EAW. However, such a decision may be taken into account by the executing judicial authority in order to decide whether it is appropriate to refuse to execute the EAW.

Secondly, the Court holds that a judicial authority executing an EAW issued for the purpose of executing a custodial sentence cannot refuse to execute that EAW on the ground that the record of the oath taken by one of the judges who imposed that sentence cannot be found, or that another judge of the same formation has taken an oath only as a public prosecutor. Not every error that takes place during the procedure for the appointment of a judge, or when a judge takes up office, is of such a nature as to cast doubts on the independence and impartiality of that judge and, accordingly, on whether a formation which includes that judge can be considered to be an 'independent and impartial tribunal previously established by law' within the meaning of EU law. In particular, the fact that the domestic law of a Member State may provide that a public prosecutor who has taken the oath on taking up office does not have to re-take the oath in the event of subsequently taking up the office of judge cannot constitute a systemic or generalised deficiency as regards the independence of the judiciary. In addition, uncertainty as to the place where the records of the oath taken by the judges of a Member State are kept or the fact that those records cannot be located, in particular if several years have elapsed since the judge concerned took the oath, are not, in themselves and in the absence of other relevant evidence, capable of showing that the judges concerned were performing their duties without ever having taken the required oath. In any event, uncertainty as to whether the judges of a Member State have, before taking up office, taken the oath provided for by national law cannot be regarded as constituting a systemic or generalised deficiency as regards the independence of the judiciary in that Member State, if national law provides effective legal remedies which make it possible to invoke a possible failure to take the oath by the judges who have delivered a particular judgment, and thus to obtain the annulment of that judgment. It will be for the referring court to ascertain whether such remedies exist under Romanian law.

Thirdly, the Court rules that, when examining detention conditions in the issuing Member State, the executing judicial authority cannot refuse to execute an EAW on the basis of information concerning

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45 In accordance with Article 1(3) of Framework Decision 2002/584, which provides: 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

46 In the present case, by its decision, the CCF ordered the deletion of the international wanted persons notice in respect of P.P.R. on the ground of an infringement of Interpol's rules on the processing of personal data.

the detention conditions in prisons in the issuing Member State which it has obtained itself, and in respect of which it has not requested supplementary information from the issuing judicial authority. Furthermore, the executing judicial authority cannot apply a higher standard as regards detention conditions than that guaranteed by Article 4 of the Charter. In that regard, the mere absence of a 'precise plan for … execution of the sentence' or 'precise criteria for determining a particular regime of execution' does not fall within the concept of 'inhuman or degrading treatment' within the meaning of Article 4 of the Charter.

Even if the drawing up of such a plan or establishment of such criteria were required in the executing Member State, it should be recalled that, in accordance with the principle of mutual trust, the Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not, in particular, demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law. Therefore, the executing judicial authority cannot refuse to surrender the requested person solely on the ground that the issuing judicial authority has not communicated to it a 'precise plan for … execution of the sentence' or 'precise criteria for determining a particular regime of execution'.

In the third and last place, as regards the obligations and rights of the issuing judicial authority, the Court explains, first, that that authority is not obliged to make a reference to the Court for a preliminary ruling before deciding, in the light of the grounds on the basis of which the executing judicial authority refused to execute an EAW, whether to withdraw or maintain it, unless there is no judicial remedy under national law against the decision it will be called upon to make, in which case it is, in principle, obliged to make a reference to the Court. It cannot be relieved of that obligation unless it has established that the question raised is irrelevant or that the EU law provision in question has been interpreted by the Court or that the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt. Furthermore, the Court considers that the judicial authority issuing an EAW does not have the right to participate, as a party, in the proceedings for the execution of that EAW before the executing judicial authority. Such participation is not essential in order to ensure compliance with the principles of mutual recognition and sincere cooperation which underpin the operation of the EAW mechanism.

2. RIGHT TO BE PRESENT AT THE TRIAL

Judgment of the Court of Justice (First Chamber), 4 July 2024, FP and Others (Trial by videoconference), C-760/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Right to be present at the trial – Possibility for an accused person to participate in the hearings in his or her trial by videoconference

Seised by a request for a preliminary ruling from the Sofiyski gradski sad (Sofia City Court, Bulgaria), the Court of Justice rules on the possibility, for an accused person, to participate in the hearings in his or her criminal trial by videoconference.

FP is accused by the Spetsializirana prokuratura (Specialist Public Prosecutor's Office, Bulgaria) of having participated in a criminal organisation created for the purposes of enrichment and in order to commit tax fraud. On 12 October 2021, FP took part in the first public hearing in his case by means of a videoconference. He declared that he wished to participate in the trial online since he lived and worked in the United Kingdom. His lawyer, who was physically present in the courtroom, stated that his client was familiar with all the documents of the case. Furthermore, at the hearing, any new document could be emailed to FP for his timely inspection and consultations between himself and his lawyer could be organised confidentially by means of a separate connection.

The criminal court hearing that case at that point [47] authorised FP to participate in the trial by videoconference, on the basis of a provision of national law providing for the possibility of holding public hearings remotely during the state of emergency or the extraordinary situation of the epidemic and for two months after the lifting of that state of emergency or extraordinary situation. [48] That provision was applicable only up to and including 31 May 2022. Thus, whereas, before that date, FP had actually participated by videoconference in the majority of the hearings of his trial, at the hearing of 13 June 2022, that court was uncertain as to whether that possibility continued to exist under Bulgarian law.

In the absence of a legal basis in national law expressly allowing the use of videoconferencing, the referring court raises the issue of whether the possibility granted to an accused person to participate in the hearings in his or her trial using that technique is compatible with Directive 2016/343, [49] in particular with Article 8(1) thereof. [50]

Findings of the Court

As a preliminary point, the Court recalls that it is apparent from its case-law that, under the right laid down in Article 8(1) of Directive 2016/343, an accused person must be able to appear in person at the hearings which are held in connection with his or her trial, without that directive imposing an obligation for any suspect or accused person to be present at his or her trial. [51] The Court also observes that it follows from Article 1 of that directive that its purpose is to lay down common minimum rules concerning certain aspects of the presumption of innocence in criminal proceedings and the right of suspects and accused persons to be present at the trial in those proceedings, and not to carry out exhaustive harmonisation of criminal procedure.

It follows from the foregoing that Article 8(1) of Directive 2016/343 does not govern the issue of whether the Member States may provide that the accused person may, at his or her express request, participate in the hearings in his or her criminal trial by videoconference, and such an issue falls within the scope of national law. Consequently, that provision does not preclude an accused person from being able, at his or her express request, to participate in the hearings in his or her trial by videoconference, provided that the right to a fair trial is guaranteed.

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47 The court initially seised of the case was the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria). However, following a legislative amendment which entered into force on 27 July 2022, that court was dissolved and competence to hear and determine certain criminal cases brought before it, including the case in the main proceedings, was transferred to the Sofiyski gradski sad (Sofia City Court, Bulgaria).

48 Article 6a(2) of Zakon za merkite i deystviyata po vreme na izvanrednoto polozhenie, obyaveno s reshenie na Narodnoto sabranie 13.03.2020 g. i za preodolyavane na posleditsite (Law on the measures and actions taken during the state of emergency declared by decision of the National Assembly of 13 March 2020 and on the management of the effects).

49 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

50 Article 8(1) of Directive 2016/343 provides: 'Member States shall ensure that suspects and accused persons have the right to be present at their trial'.

51 See, to that effect, judgments of 15 September 2022, *HN (Trial of an accused person removed from the territory)* (C-420/20, EU:C:2022:679, paragraph 40), and of 8 December 2022, *HYA and Others (Impossibility of questioning prosecution witnesses)* (C-348/21, EU:C:2022:965, paragraphs 34 and 36).

VI. JUDICIAL COOPERATION IN CIVIL MATTERS: REGULATION NO 1215/2012 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

Judgment of the Court of Justice (Second Chamber), 29 July 2024, FTI Touristik (International element), C-774/22

Link to the full text of the judgment

Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of judgments in civil and commercial matters – Regulation (EU) No 1215/2012 – Article 18 – Jurisdiction over consumer contracts – Determination of the international and territorial jurisdiction of the courts of a Member State – International element – Travel in a third State

Having been requested to deliver a preliminary ruling in the course of a dispute between a consumer domiciled in a Member State and a tour operator established in the same Member State, in relation to a trip abroad, booked by the former, the Court of Justice clarifies the scope of the Brussels Ia Regulation, [52] by examining, more specifically the existence of an international element in such a situation.

In December 2021, JX, a private individual domiciled in Nuremberg (Germany), concluded a package travel contract with FTI Touristik GmbH, a tour operator having its registered seat in Munich (Germany), for a trip in a third State.

JX seeks payment of damages in the amount of EUR 1 500, before the Amtsgericht Nürnberg (Local Court, Nuremberg, Germany), the court of the place of his domicile, taking the view that he was not adequately informed of the entry and visa requirements in the country concerned. According to him, the territorial jurisdiction of that court derives from the protective rules of jurisdiction laid down in the Brussels Ia Regulation to the benefit of consumers. [53] FTI Touristik, for its part, contends that that court lacks territorial jurisdiction and maintains that that regulation does not apply to purely internal situations such as that at issue in the present case. In such a situation, the international element required for the application of that regulation is lacking.

By its reference for a preliminary ruling, the referring court asks the Court of Justice to clarify whether the Brussels Ia Regulation determines both the international and the territorial jurisdiction of the court of the Member State in whose judicial district the consumer is domiciled, in a situation such as that at issue in the main proceedings, in which the international element is limited to the destination of that travel, which is abroad.

Findings of the Court

With a view to examining, in the first place, whether the Brussels Ia Regulation applies to a dispute such as that at issue in the main proceedings, in which the applicant and the defendant are domiciled in the same Member State, the Court recalls that the application of the rules of jurisdiction of that regulation require the existence of an international element. Such an element exists, in particular, where the situation of the dispute concerned is such as to raise questions relating to the determination of international jurisdiction. If the international element is manifestly present where at least one of the parties has his or her habitual residence in a Member State other than the Member

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52 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').

53 JX refers, in particular, to Articles 17 and 18 of the Brussels Ia Regulation.

State of the court seised, the international element may also result from various factors related, inter alia, to the subject matter of the proceedings. Accordingly, the involvement of a Member State and a third State, for example, because the applicant and one defendant are domiciled in the first State and the events at issue occurred in the second, would also make the legal relationship at issue international in nature, since that situation is such as to raise questions in the Member State relating to the determination of international jurisdiction. It follows that a dispute relating to contractual obligations supposed to be performed in a third State or in a Member State other than the Member State in which the two parties are domiciled raises questions in relation to the determination of international jurisdiction and, therefore, fulfils the condition of the international element required in order for the dispute to fall within the scope of the Brussels Ia Regulation.

As regards disputes between consumers and traders, that interpretation is supported, first of all, by Article 18(1) of the Brussels Ia Regulation, [54] according to which consumers may rely on the rule laid down in their favour against undertakings domiciled not only in other Member States, including third States, but also in the same Member State as that of their domicile. That interpretation is consistent, furthermore, with the purpose of the Brussels Ia Regulation, the Court having repeatedly held that that regulation pursues an objective of legal certainty, which requires that the national court seised may easily decide on its own jurisdiction, without being obliged to examine the merits of the case. In accordance with that objective, a case involving a traveller's claim concerning problems suffered in relation to a trip abroad, organised and sold by a tour operator, must be treated as international for the purposes of the Brussels Ia Regulation, the destination of the trip being an easy element to check. Finally, that interpretation cannot be called into question by the reference made by the Court to the concept of 'cross-border case' which is defined in Article 3(1) of Regulation No 1896/2006 [55] as a case in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court seised. As that regulation and the Brussels Ia Regulation have neither the same objective nor the same scope, the second regulation does not have to be interpreted in the light of the first.

Consequently, a dispute relating to a travel contract falls within the scope of the Brussels Ia Regulation, even though the contracting parties, namely the consumer and the other party to the contract, are both domiciled in the same Member State whereas the destination of the trip is abroad.

As regards, in the second place, the question of whether Article 18 of the Brussels Ia Regulation determines both the international and the territorial jurisdiction of the court concerned, the Court notes that it follows from the very wording of paragraph 1 of that article that the rules of jurisdiction stipulated in that provision, where the action is brought by a consumer, are aimed at, on the one hand, 'the courts of the Member State in which [that other] party is domiciled' and, on the other hand, 'the courts for the place where the consumer is domiciled'. If the first of the two rules accordingly set out merely confers international jurisdiction on the judicial system of the designated State, taken as a whole, the second rule directly confers territorial jurisdiction on the court for the locality of the consumer's domicile. That second rule accordingly determines not only the international jurisdiction of the court concerned, but also directly designates a precise court within a Member State, without reference to the rules on allocation of territorial jurisdiction in force in that Member State.

The Court concludes from that that Article 18 of the Brussels Ia Regulation determines both the international and the territorial jurisdiction of the court of the Member State in whose judicial district the consumer is domiciled, where such a court is seised, by that consumer, of a dispute between that consumer and a tour operator following the conclusion of a package travel contract, and where those

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54 Under that provision, 'a consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled'.

55 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ 2006 L 399, p. 1).

two contracting parties are both domiciled in that Member State, but where the destination of that travel is abroad.

VII. COMPETITION

1. ARTICLE 101 TFEU

Judgment of the Court of Justice (Fifth Chamber), 29 July 2024, Banco BPN/BIC Português and Others, C-298/22

Link to the full text of the judgment

Reference for a preliminary ruling – Competition – Agreements, decisions and concerted practices – Adverse effect on competition – Prohibition of restrictive practices – Article 101 TFEU – Agreements between undertakings – Restriction of competition by object – Exchanges of information between credit institutions – Information concerning commercial conditions and production values – Strategic information

Having received a reference for a preliminary ruling from the Tribunal da Concorrência, Regulação e Supervisão (Competition, Regulation and Supervision Court, Portugal), the Court of Justice rules on the conditions under which a 'standalone' exchange of information, that is to say an exchange which is not ancillary to a concerted practice restrictive of competition, may be classified as a 'restriction by object' within the meaning of Article 101(1) TFEU.

In the present case, the Autoridade da Concorrência (Competition Authority, Portugal; 'the Competition Authority') found that several credit institutions had infringed national competition law and Article 101 TFEU by participating, between May 2002 and March 2013, in a concerted practice having as its object the restriction of competition on the home loans market, the consumer credit market and the corporate lending market.

That concerted practice took the form of a 'standalone' exchange of information on conditions applicable to credit transactions, in particular current and future credit spreads and risk variables, and on the individual production figures of the participants in that exchange.

As a result, by decision of 9 September 2019, the Competition Authority imposed a fine on those credit institutions. Most of those credit institutions brought an action against that decision before the referring court.

Taking the view that that exchange of information, which took place in markets where concentration is high and there are barriers to entry, could contribute to reducing commercial pressure and uncertainty with regard to the strategic conduct of competitors on the market, which could lead to informal coordination restricting competition, the referring court decided to ask the Court whether such an exchange was compatible with Article 101 TFEU.

Findings of the Court

As a preliminary point, the Court recalls that an exchange of information between competitors may constitute a restriction of competition, including by object, within the meaning of Article 101(1) TFEU, if it constitutes a form of coordination which must be regarded, by its very nature, as harmful to the proper functioning of normal competition in the context of the exchange in question.

First of all, as regards its content, this implies that that exchange has characteristics linking it to a form of coordination between undertakings that is capable of creating conditions of competition which do not correspond to the normal conditions of the market in question. The proper functioning

of normal competition on a market presupposes a degree of transparency with regard to the current market circumstances. It is only then that a market is capable of being efficient. Accordingly, transparency between economic operators is, at least on a non-oligopolistic market, likely to lead to intensification of competition between suppliers. However, in order for a market to operate under normal conditions, each operator must, first, be obliged to determine independently the policy which it intends to adopt on the single market and, second, be uncertain at least as to the timing, extent and details of any future changes in the conduct of its competitors on the market.

Next, regarding the context of the exchange of information at issue, it is necessary that in that context any coordination with characteristics similar to those of that exchange is capable of creating only conditions of competition which do not correspond to the normal operating conditions of the market in question, regard being had to the nature of the products or services in question, the actual conditions in which the market functions and the structure of that market.

Lastly, as regards the 'objective aims' pursued by that exchange, the latter may constitute a restriction by object where, even if it is not formally presented as pursuing an anticompetitive object, that exchange cannot, in the light of its form and the context in which it occurred, be explained other than by the pursuit of an objective contrary to one of the constituent elements of the principle of free competition.

It follows that, in so far as each economic operator is under an obligation to remain uncertain as to the future conduct of other participants on the market, an exchange of information which makes it possible to remove such uncertainty may be regarded as constituting a form of coordination between undertakings which, by its very nature, is harmful to the proper functioning of normal competition.

In that regard, it is not even necessary to establish that, in the context of that exchange, the information exchanged can only lead the participants, who are reasonably active and economically rational, tacitly to follow the same course of conduct with regard to one of the parameters on the basis of which competition on the market in question is established.

It is sufficient for the information exchanged to be, first, confidential, that is to say not already known to any economic operator active on the market concerned and, second, strategic, namely capable of revealing, in some circumstances, once combined with other information already known to the participants in an information exchange, the strategy which some of those participants intend to implement with regard to what constitutes one or more parameters on the basis of which competition on the market in question is established.

More specifically, the concept of 'strategic information' is broad and includes any data not already known to economic operators which, in the context of such an exchange, is likely to reduce the uncertainty as to the future conduct of the other participants on that market with regard to what constitutes, by reason of the nature of the goods or services in question, the actual conditions in which the market functions and the structure of that market, one or more parameters on the basis of which competition on the market in question is established.

Where the information exchanged relates not to the intentions of the participants in the exchange to alter their conduct on the relevant market, but to current or past events, it must also be classified as strategic information if a participant in the exchanges in question may infer with sufficient precision the future conduct of the other participants in that exchange or their reactions to a possible strategic move on the market.

In the light of these considerations, the Court finds that an exchange of information which took place between credit institutions in markets where concentration is high and there are barriers to entry, relating to the conditions applicable to credit transactions carried out on those markets, must be classified as a restriction of competition by object where it involves, inter alia, strategic information relating to the future intentions of other participants in that exchange concerning one of the parameters on the basis of which competition is established on those markets.

2. STATE AID

Judgment of the Court of Justice (Fourth Chamber), 29 July 2024, Koiviston Auto Helsinki v Commission, C-697/22 P

Link to the full text of the judgment

Appeal – State aid – SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Relevant issue post-dating the publication of the decision initiating the formal investigation procedure – Identification of the beneficiary of the aid – Obligation to publish an amending opening decision – Right of the beneficiary of the aid to submit comments – Essential procedural requirement – Incompatibility with the internal market – Recovery of the aid ordered by the European Commission – Amount to be recovered – Competence of the Member State concerned

In upholding the appeal lodged by Koiviston Auto Helsinki Oy (formerly Helsingin Bussiliikenne Oy) against the judgment in *Helsingin Bussiliikenne* v *Commission* ('the judgment under appeal'), [56] the Court of Justice clarifies the procedural obligations incumbent on the European Commission, in the context of the formal investigation procedure provided for in Article 108(2) TFEU, vis-à-vis an entity continuing the economic activity of the initial beneficiary of State aid, which, because of the application of the criterion of economic continuity, is subject to the obligation to repay the aid. Furthermore, it rules on the respective roles of the Commission and the Member State concerned in the calculation of the aid to be recovered from the transferee of the assets of the aid beneficiary. The company Helsingin Bussiliikenne ('the former HelB'), wholly owned by the City of Helsinki (Finland), operated bus routes in the Helsinki area and offered charter transport and bus leasing services. In December 2015, the former HelB was sold to the company Viikin Linja Oy. In accordance with the terms of the deed of sale, Viikin Linja Oy was renamed Helsingin Bussiliikenne Oy ('the new HelB').

Having received a complaint, the Commission initiated a formal investigation procedure concerning several equipment and capital loans granted by the City of Helsinki between 2002 and 2012 in favour of the former HelB and its predecessor HKL-Bussiliikenne ('the measures at issue'). The decision initiating the procedure was published in the *Official Journal of the European Union* on 10 April 2015, [57] and interested parties were invited to submit their comments within one month of that publication. The Commission, which was informed in June 2015 of the imminent sale of the former HelB to the new HelB, received no comments from the new HelB.

By decision of 28 June 2019 ('the decision at issue'), [58] the Commission found that the measures at issue constituted State aid which was incompatible with the internal market and which the Republic of Finland was obliged to recover from the beneficiary. Finding that there was economic continuity between the former HelB and the new HelB, the Commission extended the obligation to repay the unlawful aid to the new HelB.

The action brought by the new HelB against the decision at issue having been dismissed by the General Court, it lodged an appeal against the judgment of that Court.

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56 Judgment of the General Court of 14 September 2022, *Helsingin Bussiliikenne* v *Commission* (T-603/19, EU:T:2022:555).

57 Decision C(2015) 80 final of 16 January 2015 on measure SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) – Finland – Helsingin Bussiliikenne Oy (OJ 2015 C 116, p. 22).

58 Commission Decision (EU) 2020/1814 of 28 June 2019 on State aid SA.33846 (2015/C) (ex 2014/NN) (ex 2011/CP) implemented by Finland for Helsingin Bussiliikenne Oy (OJ 2020 L 404, p. 10).

Findings of the Court

In the first place, the Court of Justice examines the ground of appeal alleging an error of law by the General Court inasmuch as it found that the Commission had not infringed an essential procedural requirement by failing to give the new HelB the opportunity to submit its comments during the formal investigation procedure in respect of the aid at issue.

According to the appellant, the Commission was required, following the transfer of the former HelB, to correct or supplement the decision initiating the formal investigation procedure, since that transfer was a new issue not reflected in that decision.

The Court begins by recalling that, under Article 108(2) TFEU, it is for the Commission, where it decides to initiate the formal investigation procedure in respect of an aid measure, to give interested parties an opportunity to submit their comments. That obligation is in the nature of an essential procedural requirement, since it is intrinsically linked to the correct formation or expression of the intention of the author of the act. In that regard, publication of a notice in the *Official Journal of the European Union* is an appropriate means of informing all the parties concerned that a formal investigation procedure has been initiated and of obtaining from those parties all the information required for the guidance of the Commission with regard to its future action.

However, in order to enable interested parties to submit their comments effectively, the published decision must expressly and clearly mention the relevant issues of fact and law, as provided for in Article 6(1) of Regulation 2015/1589. [59] Those issues are those which the formal investigation procedure is intended to examine with a view to the adoption of the final decision by which the Commission takes a decision on the existence and compatibility of the State aid at issue and, where appropriate, on the obligation to recover that aid.

Where relevant issues of fact or of law arise after the decision initiating the formal investigation procedure, such as, in the present case, the transfer of the former HelB to the new HelB, the Commission's obligation is satisfied only by way of publication of a supplementary opening decision. Thus, by failing to adopt such a decision, the Commission infringed an essential procedural requirement.

In the second place, the Court of Justice analyses the ground of appeal alleging that the General Court failed to observe the principle of proportionality in holding that the Commission was not required to determine to what extent the State aid resulting from the measures at issue had to be recovered from the new HelB.

In that context, the Court of Justice states that the recovery of unlawful aid seeks to re-establish the previous situation and can in principle be regarded as disproportionate to the objectives of the provisions of the FEU Treaty relating to State aid only if the amount that the beneficiary has to repay exceeds the updated amount of aid it received.

Where the company receiving the unlawful aid has been acquired by another company which carries on its economic activity, that aid must be recovered from the latter where it is established that it retains the actual benefit of the competitive advantage associated with the grant of that aid. In that case, the principle of proportionality limits that company's obligation to repay to the amount of the competitive advantage which it has actually retained.

In the present case, although the Commission found, in the decision at issue, that there was economic continuity between the former HelB and the new HelB and concluded from that that the obligation to repay the unlawful aid had to be extended to the new HelB, it did not take a decision on the quantum of the aid granted to the former HelB of which the new HelB had retained the benefit. The Court of Justice notes, as did the General Court, that there is a difference between the establishment of

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59 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).

economic continuity and the determination of the proportion in which the unlawful aid must be recovered from the beneficiaries of that aid.

Therefore, the General Court was entitled to hold that it is for the Republic of Finland to determine the amount of State aid to be recovered from the new HelB.

That being so, the Court of Justice sets aside the judgment under appeal and annuls the decision at issue, since the infringement of the essential procedural requirement found in the context of the first ground of appeal entails the annulment of the act by force of law.

VIII. APPROXIMATION OF LAWS

1. BIOCIDAL PRODUCTS

Judgment of the General Court (Fourth Chamber), 3 July 2024, SBM Développement v Commission, T-667/22

Link to the full text of the judgment

Biocidal products – Authorisation through mutual recognition – Biocidal product Pat'Appât Souricide Canadien Foudroyant – Commission decision on unresolved objections – Articles 35, 36 and 48 of Regulation (EU) No 528/2012 – Cancellation or amendment of marketing authorisations – Action for annulment – Direct concern – Individual concern – Admissibility – Conditions for granting an authorisation – Article 19(1) of Regulation No 528/2012 – Article 19(5) of Regulation No 528/2012 – Competence of the Commission – Concept of 'national authorisation' – Concept of 'reference Member State' – Manifest error of assessment – Proportionality

The General Court dismisses the action for annulment brought by the owner of a marketing authorisation of a biocidal product against a decision of the European Commission on unresolved objections concerning the conditions of authorisation of that product. [60] In doing so, it rules for the first time on the interpretation and application of Articles 35, 36 and 48 of Regulation No 528/2012, [61] concerning the possibility for a Member State to cancel or amend the authorisation of a biocidal product previously granted in accordance with the principle of mutual recognition.

SBM Développement SAS is the holder, in several Member States, of a marketing authorisation for a biocidal product containing the active substance alphachloralose, which is marketed under various names in the European Union and is intended for use indoors and against mice ('the biocidal product at issue'). On 17 June 2013, the biocidal product at issue was approved by the competent authority of the United Kingdom. [62] Between 2014 and 2019 that authorisation was the subject of a mutual

60 Commission Implementing Decision (EU) 2022/1388 of 23 June 2022 on the unresolved objections regarding the terms and conditions of the authorisation of the biocidal product Pat'Appât Souricide Canadien Foudroyant referred by France and Sweden in accordance with Regulation (EU) No 528/2012 of the European Parliament and of the Council (OJ 2022 L 208, p. 7; 'the contested decision').

61 Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).

62 In accordance with the national authorisation procedure laid down by Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market (OJ 1998 L 123, p. 1). That authorisation was maintained following the entry into force of Regulation No 528/2012.

recognition in sequence in several Member States, [63] including the French Republic and the Kingdom of Sweden. In December 2019, those two countries amended the national authorisation for the biocidal product at issue, [64] in response to the communication of several cases of primary poisoning incidents involving dogs and secondary poisoning incidents involving cats linked to alphachloralose. In April 2020, the Kingdom of Denmark and the Federal Republic of Germany referred, to the coordination group, [65] objections to those amendments. As no agreement was reached in the coordination group, the Kingdom of Sweden in August 2020 and the French Republic in October 2020, referred the unresolved objections [66] to the Commission and provided it with a detailed statement of the matters on which Member States were unable to reach an agreement and the reasons for their disagreement.

On 23 June 2022, the Commission adopted an implementing decision concerning the biocidal product at issue, [67] in which it considered that that product did not fully meet the conditions for granting an authorisation laid down in Article 19 of Regulation No 528/2012. [68] In this case, the Commission considered, first, that the biocidal product at issue could be authorised only in the Member States which considered that not authorising it would result in disproportionate negative impacts for society when compared to the risks to human health, animal health or the environment arising from the use of the biocidal product under the conditions laid down in the authorisation. [69] Second, the Commission considered that, if authorised, the use of the biocidal product at issue should be subject to appropriate risk mitigation measures to ensure that the exposure of animals and the environment to that biocidal product is minimised.

Findings of the Court

In the first place, the Court rules on the admissibility of the action. [70] In that context, it examines, first, the question whether the applicant is directly concerned by the contested decision, and more specifically whether that decision directly affected the applicant's situation. In that regard, it points out that the contested measure changes the system of mutual recognition applicable until then to the biocidal product at issue, [71] in that it requires each Member State to review the authorisation granted [72] by weighing up, on the one hand, the disproportionate negative impacts for society of not authorising it and, on the other hand, the risks arising from the use of the product. The Court concludes that, by calling into question the authorisations issued by the Member States for the biocidal product at issue, the contested decision changes the criteria to which those authorisations are subject and the legal rules applicable to the mutual recognition of that product. Therefore, it directly affects the applicant's legal situation.

As to whether the contested decision leaves discretion to the addressees responsible for implementing it, the Court notes that that decision has the effect of automatically subjecting the

63 Pursuant to Article 33 of Regulation No 528/2012.

64 Under Article 48 of Regulation No 528/2012.

65 Set up under Article 35 of Regulation No 528/2012.

66 Pursuant to Article 36(1) of Regulation No 528/2012.

67 That decision was adopted on the basis of Article 36(3) of Regulation No 528/2012.

68 More specifically, Article 19(1)(b)(iii) of Regulation No 528/2012. Pursuant to that provision, a biocidal product is authorised where it 'has no immediate or delayed unacceptable effects itself, or as a result of its residues, on the health of … animals, directly or through drinking water, food, feed, air, or through other indirect effects'.

69 Under Article 19(5) of Regulation No 528/2012.

70 In accordance with the fourth paragraph of Article 263 TFEU.

71 As established by Article 32 of Regulation No 528/2012.

72 Pursuant to Article 36(4) of Regulation No 528/2012.

biocidal product at issue to the comparative assessment procedure [73] which must be carried out by the Member States for all existing or future authorisations for that product. Furthermore, it automatically amends the legal rules applicable to mutual recognition of authorisations for the biocidal product at issue. For those reasons, the contested decision directly affects the applicant's legal situation, as holder of the national authorisations for the biocidal product at issue, and leaves no discretion to the Member States responsible for its implementation, since they are required to review existing authorisations. Consequently, the applicant is directly concerned by the contested decision.

Concerning, second, the question as to whether the applicant is individually concerned by the contested decision, the Court emphasises that the applicant is cited in that decision as the current holder of the authorisation of the biocidal product at issue and that it participated in the conciliation procedure within the coordination group. [74] It follows that the contested decision affects the applicant by reason of certain attributes which are peculiar to it and by reason of circumstances in which it is differentiated from all other persons, so that the applicant is also individually concerned by the contested decision. Accordingly, the Court concludes that the applicant has standing to bring an action for annulment of the contested decision, since it is directly and individually concerned by it.

In the second place, the Court notes, as a preliminary point, that the rules on mutual recognition [75] are one of the cornerstones of Regulation No 528/2012. However, under that regulation, the improvement of the free movement of biocidal products within the European Union, which the mechanism of mutual recognition provided for by that regulation is intended to implement, must be reconciled with the protection of human and animal health and the environment, and with the precautionary principle. In that respect, only products which comply, in particular, with Article 19 of Regulation No 528/2012 may be made available on the market. For those reasons, the rule of mutual recognition [76] is not an absolute principle. That regulation contains exceptions to that rule, provided in the interest of protecting human and animal health and the environment, which are in the general interest. [77]

In the light of the foregoing, the Court rejects, first, the argument that, in accordance with the principle of mutual recognition, only the reference Member State [78] that issued the initial national authorisation in the European Union is entitled to cancel or amend the authorisation which it granted. [79] On the contrary, it is apparent from the use of the expression 'national authorisation' in Regulation No 528/2012 that the use of the term 'national' must be understood as referring to biocidal products authorised at national level, as opposed to biocidal products which are subject to EU authorisation under Chapter VIII of Regulation No 528/2012.

Second, the Court finds that, by adopting the contested decision even though the unresolved objections were referred to it by a State other than the reference Member State within the meaning of Article 33 of Regulation No 528/2012, the Commission did not exceed the powers conferred on it by Articles 35 and 36 of Regulation No 528/2012. In the case of disagreement between competent authorities of certain Member States concerning national authorisations subject to mutual recognition, following the cancellation or amendment of an authorisation by a Member State, [80] the

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73 Laid down in Article 19(5) of Regulation No 528/2012.

74 Provided for in Article 35 of Regulation No 528/2012.

75 As provided for in Articles 32 to 40 of Regulation No 528/2012.

76 As set out in Article 32(2) of Regulation No 528/2012.

77 Article 37 of Regulation No 528/2012 provides for derogations from the rule of mutual recognition of authorisations to place biocidal products on the market on grounds that are exhaustively listed and relate to the general interest.

78 Within the meaning of Article 33(1) of Regulation No 528/2012.

79 On the basis of Article 48(1) of Regulation No 528/2012.

80 Under Article 48(1) of Regulation No 528/2012.

procedures laid down in Articles 35 and 36 of that regulation are to apply '*mutatis mutandis*'. [81] Article 36(1) of that regulation must thus be applied in the specific context of the cancellation or amendment of a national authorisation which had already been granted, which differs from that of the grant of a first authorisation by way of mutual recognition. [82] In that context, the referral to the reference Member State in Article 36(1) of Regulation No 528/2012 cannot be interpreted as meaning that only that Member State can inform the Commission of the disagreement which exists as regards the annulment or amendment decision at issue. In addition, the Court states that the Commission's power to take such a decision thus stems not from the referral by the 'reference Member State' but from Articles 35 and 36 of Regulation No 528/2012, which provide for the Commission to intervene where no agreement could be reached within the coordination group on expiry of the period laid down by that regulation. [83]

Third, the Court considers that the contested decision is not vitiated by a manifest error of assessment and rejects, inter alia, the argument that the Commission did not carry out a detailed examination of whether the biocidal product at issue complied with the conditions laid down in Article 19(1) of Regulation No 528/2012. In that respect, it points out that, although the Commission may request the Chemicals Agency (ECHA) to give an opinion on scientific or technical issues raised by the Member States, [84] that consultation is an option for that institution and not an obligation. In addition, the Court points out that it is at the authorisation stage of a biocidal product, with a view to placing it on the market, that all the intended uses of that product are examined in detail and that an assessment of the product's risks having regard to each of those uses is carried out. In the context of mutual recognition procedures, it is for the reference Member State to carry out such an examination, since the authorisation of biocidal products is then a matter for the Member States concerned, and not for the Commission. It is therefore for each Member State concerned to verify whether a biocidal product may be mutually recognised or whether there are grounds in the public interest, exhaustively listed in Regulation No 528/2012, justifying the refusal to grant an application for such recognition. In that regard, the role conferred on the Commission by Article 36 of that regulation is not to be confused with that of the Member States in the context of their national authorisation procedure. It is solely for the Commission to adopt a decision on the questions referred to it, in order to find a solution to disputes between those States. In that context, although the Commission is required to act in accordance with the principle of sound administration and to examine, carefully and impartially, all the information submitted to it in order to resolve that dispute, it is not for it to carry out a new, exhaustive examination of compliance with all the conditions of Article 19 of Regulation No 528/2012. Therefore, in view of the unacceptable effects on animal health of the biocidal product at issue, reported by several Member States, the Commission has indeed resolved the disagreement between the EU Member States which authorised that product.

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81 Article 48(3) of Regulation No 528/2012.

82 Governed by Articles 32 to 40 of Regulation No 528/2012.

83 In particular, by means of Article 35(3) of Regulation No 528/2012.

84 Under Article 36(2) of Regulation No 528/2012.

2. PACKAGE TRAVEL, PACKAGE HOLIDAYS AND PACKAGE TOURS

Judgment of the Court of Justice (Second Chamber), 29 July 2024, HDI Global and MS Amlin Insurance, C-771/22 and C-45/23

Link to the full text of the judgment

Reference for a preliminary ruling – Directive (EU) 2015/2302 – Package travel and linked travel arrangements – Article 12 – Right to terminate a package travel contract – Entitlement to a full refund of any payments made for the package – Unavoidable and extraordinary circumstances – COVID-19 pandemic – Article 17 – Insolvency of the travel organiser – Security for the refund of all payments made – High level of consumer protection – Principle of equal treatment

Ruling on requests for a preliminary ruling, [85] the Court of Justice clarifies the scope of the security conferred on travellers in the event of the insolvency of a package travel organiser [86] and holds that it applies to a traveller who has terminated his or her package travel contract because of extraordinary circumstances, [87] such as the COVID-19 pandemic, where the travel organiser became insolvent after that termination but that traveller did not receive a full refund of any payments made for the package prior to the occurrence of that insolvency.

The two sets of proceedings at issue are between a body active, inter alia, in the field of consumer protection, to which a consumer assigned his entitlement to a refund of the price of his package travel which he paid to a package travel organiser (Case C-771/22) and travellers who concluded package travel contracts with a travel organiser (C-45/23), on the one hand, and insurance companies insuring those travel organisers in the event of insolvency, on the other. Those insurance companies refused to refund to those consumers the price paid under the contracts concluded, which were terminated due to the COVID-19 pandemic, arguing that the insurance covered only the risk of non-performance of the package as a consequence of the organisers' insolvency.

The referring courts ask the Court about the scope of the security to be conferred on a traveller in the event of the package travel organiser's insolvency, as provided for in Article 17 of the Directive on package travel. In particular, they seek to ascertain whether that guarantee covers refunds to which the traveller is entitled where that traveller terminates his or her package travel contract because of unavoidable and extraordinary circumstances, such as the COVID-19 pandemic, before the travel organiser is declared insolvent.

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85 From the Bezirksgericht für Handelssachen Wien (District Court for Commercial Matters, Vienna, Austria) in Case C-771/22, and from the Nederlandstalige Ondernemingsrechtbank Brussel (Brussels Business Court (Dutch-speaking), Belgium) in Case C-45/23.

86 As provided for in Article 17 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 Directive on package travel').
Under that provision: '1. Member States shall ensure that organisers established in their territory provide security for the refund of all payments made by or on behalf of travellers in so far as the relevant services are not performed as a consequence of the organiser's insolvency. If the carriage of passengers is included in the package travel contract, organisers shall also provide security for the travellers' repatriation. Continuation of the package may be offered.
...
2. The security referred to in paragraph 1 shall be effective and shall cover reasonably foreseeable costs. It shall cover the amounts of payments made by or on behalf of travellers in respect of packages, taking into account the length of the period between down payments and final payments and the completion of the packages, as well as the estimated cost for repatriations in the event of the organiser's insolvency.'

87 Pursuant to Article 12(2) of the Directive on package travel.

Findings of the Court

At the outset, the Court finds that the meaning of Article 17(1) of the Directive on package travel is not absolutely plain from its wording and that it is therefore necessary to examine its context, the objectives of that directive and, where appropriate, its origins.

As regards, in the first place, the context of that article, the Court observes that, having regard to the terms 'when the performance of the package is affected by the organiser's insolvency' and 'travel services that have not been performed' in Article 17(4) and (5) of that directive, those provisions are capable of supporting an interpretation of Article 17(1) of that directive according to which the concept of 'relevant services' covers only travel services. Thus, the security provided for in that article would apply only where there is a causal link between the non-performance of those services and the insolvency of the travel organiser.

However, Article 17(2) of the Directive on package travel provides that that security is to be effective and is to cover reasonably foreseeable costs. More specifically, it is to cover the amounts of payments made by or on behalf of travellers as well as the estimated cost for repatriations in the event of the travel organiser's insolvency.

Any refund of payment which the travel organiser must make following the termination of the package travel contract by that organiser or by the traveller is a foreseeable amount of payment which may be affected by the travel organiser's insolvency.

In the light of the foregoing, Article 17(2) of the Directive on package travel may support an interpretation of paragraph 1 of that article to the effect that the security laid down in that provision applies to any refund owed by the travel organiser to the traveller where the package travel contract has been terminated, in one of the situations referred to in that directive, prior to the occurrence of that organiser's insolvency.

As regards, in the second place, the objective of that directive, it seeks to adapt the scope of the protection conferred on travellers by Directive 90/314 [88] to market developments, as well as to contribute to the attainment of a high level of consumer protection. [89] An interpretation of Article 17(1) of the Directive on package travel excluding from the security against the travel organiser's insolvency refunds owed to travellers following a termination which took place prior to the occurrence of that insolvency would amount to reducing the protection of those travellers as compared with the protection conferred on them by Directive 90/314.

In the light of the foregoing, the Court points out that the wording of Article 17(1) of the Directive on package travel lends itself both to an interpretation that excludes from its scope refund claims that arose following a termination of the package travel contract which took place, in one of the situations referred to in that directive, prior to the occurrence of the travel organiser's insolvency, and to an interpretation that includes such claims within the scope of that provision. If the wording of secondary EU law is open to more than one interpretation, preference should be given to the interpretation which renders the provision concerned consistent with primary law, including with the principle of equal treatment. In order to assess whether that principle has been observed, the assessment as to whether situations are comparable must be made in the light of the objective pursued by the act in question.

In the present case, the objective of the Directive on package travel is to attain a high level of consumer protection, and Article 17 of that directive contributes to the attainment of that objective by seeking to protect the traveller from the financial risk entailed by the travel organiser's insolvency. Therefore, in the light of that objective, the point of reference for comparing the situation of a

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88 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158, p. 59).

89 As required by Article 169 TFEU.

traveller who, after paying all or part of the price of his or her package travel, has terminated his or her package travel contract, but has not received a refund because the travel organiser became insolvent after that termination, on the one hand, and the situation of a traveller whose package travel has not been performed and who has not received a refund as a consequence of that organiser's insolvency, on the other, must be the risk of financial loss incurred by the traveller concerned. Consequently, the situation of those two travellers is comparable. In both cases, the traveller is exposed to the financial risk of not being able to obtain, as a consequence of the travel organiser's insolvency, a refund of the sums which he or she has paid to that organiser.

Therefore, in accordance with the principle of equal treatment, both the traveller whose package travel cannot be performed as a consequence of the travel organiser's insolvency and the traveller who has terminated his or her package travel contract [90] must benefit from the security against the travel organiser's insolvency as regards the refunds owed to them, unless a difference in treatment between those two categories of travellers is objectively justified. In the present case, there appears to be nothing to justify a difference in treatment between those categories of travellers.

3. ADMINISTRATIVE COOPERATION IN THE FIELD OF TAXATION

Judgment of the Court of Justice (Second Chamber), 29 July 2024, Belgian Association of Tax Lawyers and Others, C-623/22

Link to the full text of the judgment

Reference for a preliminary ruling – Administrative cooperation in the field of taxation – Mandatory automatic exchange of information in relation to reportable cross-border arrangements – Directive 2011/16/EU, as amended by Directive (EU) 2018/822 – Article 8ab(1) – Reporting obligation – Article 8ab(5) – Subsidiary obligation to notify – Legal professional privilege – Validity – Articles 7, 20 and 21, and Article 49(1) of the Charter of Fundamental Rights of the European Union – Right to respect for private life – Principles of equal treatment and non-discrimination – Principle of legality in criminal proceedings – Principle of legal certainty

In the context of a reference for a preliminary ruling on validity, the Court of Justice holds that the reporting obligation in respect of potentially aggressive cross-border tax-planning arrangements to the competent authorities laid down by amended Directive 2011/16, [91] does not infringe fundamental rights, in particular the principle of equal treatment and the right to respect for private life, or the principle of legal certainty.

In the present case, a Law of 20 December 2019 had transposed amended Directive 2011/16 into Belgian law.

A number of associations and professionals, active in the field of legal, tax or consultancy services, asked the Cour constitutionnelle (Constitutional Court, Belgium) to annul that law in whole or in part. In essence, they challenged both the lack of precision of that law as regards the breadth of scope and reach of the reporting obligation in respect of the cross-border arrangements which it includes and certain effects of that obligation.

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90 Inter alia, pursuant to Article 12(2) of Directive 2015/2302.

91 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive (EU) 2018/822 of 25 May 2018 (OJ 2018 L 139, p. 1); 'amended Directive 2011/16'.

In so far as the contested national provisions have their origin in the provisions of amended Directive 2011/16, the Cour constitutionnelle (Constitutional Court) referred a number of questions to the Court for a preliminary ruling concerning the assessment of the validity of the reporting obligation in respect of cross-border arrangements, laid down in Article 8ab(1), (6) and (7) of that directive, and of the subsidiary obligation to notify, laid down in Article 8ab(5) of that directive, in the light of Articles 7, 20, 21 and Article 49(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), and of the general principle of legal certainty.

Assessment of the Court

In the first place, as regards the assessment of whether there has been a possible infringement of the principle of equal treatment laid down in Article 20 of the Charter by amended Directive 2011/16, in that that directive does not limit the reporting obligation in respect of cross-border arrangements to the field of corporation tax, but makes it applicable to all taxes falling within its scope, the Court states, first of all, that the reference criterion to be taken into account is that of the risk of aggressive tax planning and of tax avoidance and evasion by the cross-border arrangements concerned which the EU legislature sought, in the present case, to combat. Any type of tax or duty is susceptible to aggressive tax planning, whether it be corporation tax, other direct taxes or indirect taxes which are not the subject of specific EU legislation. [92]

Therefore, the different types of taxes subject to the reporting obligation laid down by amended Directive 2011/16 fall within comparable situations in the light of the objectives pursued by that directive, and being subject to that obligation is not manifestly inappropriate in that respect in the light of those objectives.

In the second place, the Court considers that the concepts [93] and the starting point of the 30-day period prescribed for fulfilling the reporting obligation, which amended Directive 2011/16 uses and lays down in order to determine the scope and reach of that obligation, are sufficiently clear and precise in the light of the requirements stemming from the principle of legal certainty and the principle of legality in criminal matters enshrined in Article 49(1) of the Charter.

Furthermore, since Article 7 of the Charter does not impose any obligation that is stricter than Article 49 of the Charter in terms of the requirement for clarity or precision of the concepts used and the time limits laid down, the interference with the private life of the intermediary and the relevant taxpayer entailed by the reporting obligation is itself defined in a sufficiently precise manner in view of the information that that reporting must contain.

In the third place, as regards a possible breach of legal professional privilege by an intermediary other than a lawyer, resulting from the subsidiary obligation to notify laid down in Article 8ab(5) of amended Directive 2011/16, in that that obligation has the effect of bringing to the attention of a third party, and ultimately the tax authorities, the existence of the consultation link between that intermediary and his or her client, the Court states, first of all, that the power of the Member States to substitute the obligation to notify for the reporting obligation was made available by that article only in respect of professionals who, like lawyers, are authorised under national law to ensure legal representation.

Next, it is only because of the special position occupied by the profession of lawyer within the judicial organisation of the Member States that the Court, in the judgment in *Orde van Vlaamse Balies and Others*, [94] held that the subsidiary obligation to notify, when it is imposed on the lawyer, infringes Article 7 of the Charter.

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92 Value added tax, customs duties and excise duties are excluded from the scope of amended Directive 2011/16.

93 The concepts in respect of which the referring court expressed doubts as to their precision and clarity are 'arrangement', 'cross-border arrangement', 'marketable arrangement', 'bespoke arrangement', 'intermediary', 'participant' and 'associated enterprise', and the description 'cross-border', the various 'hallmarks' defined in Annex IV and the 'main benefit test'.

94 Judgment of 8 December 2022, *Orde van Vlaamse Balies and Others* (C-694/20, EU:C:2022:963).

Thus, the solution adopted in that judgment applies only to persons who pursue their professional activities under one of the professional titles referred to in Article 1(2)(a) of Directive 98/5, [95] and does not extend to other professionals not having those characteristics, even though they are authorised by the Member States to ensure legal representation.

Finally, in the fourth place, as regards the possible infringement, by the reporting obligation, of the right to protection of private life, where that obligation concerns an arrangement pursuing a tax advantage in a lawful and non-abusive manner, which would then limit, as the referring court highlights, the taxpayer's freedom to choose – and the intermediary's freedom to design and advise that taxpayer on – the least taxed route, the Court refers to the case-law of the European Court of Human Rights, [96] from which it is apparent that the concept of private life is a broad concept that includes the concept of personal autonomy, which covers the freedom of any person to organise his or her life and activities, both personal and professional or commercial.

Having regard to that case-law, the Court considers that the reporting obligation in respect of cross-border arrangements constitutes an interference with the right to respect for private life guaranteed in Article 7 of the Charter, in so far as it results in revealing to the administration the result of tax design and engineering work relying on disparities between the various applicable national rules, carried out in the context of personal, professional or business activities by the taxpayer him or herself or by an intermediary, and is therefore liable to deter both that taxpayer and his or her advisers from designing and implementing cross-border tax-planning mechanisms.

However, such an interference, which does not adversely affect the essence of the right to respect for private life, and which is proportionate and does not outweigh the public interest objective of combating aggressive tax planning and preventing the risks of tax avoidance and evasion, pursued in the present case by amended Directive 2011/16, is justified in the light of that objective. It follows that the reporting obligation at issue does not infringe the right to respect for private life, understood as the right of everyone to organise his or her private life, as guaranteed by Article 7 of the Charter.

4. REGULATION OF DIGITAL MARKETS (DMA)

Judgment of the General Court (Eighth Chamber, Extended Composition), 17 July 2024, Bytedance v Commission, T-1077/23

Link to the full text of the judgment

Digital services – Regulation (EU) 2022/1925 – Designation of gatekeepers – Online social networking service – Article 3(1), (2) and (5) of Regulation 2022/1925 – Requirements – Presumptions – Rebuttal of the presumptions – Rights of the defence – Equal treatment

Interpreting for the first time the Digital Markets Regulation [97] ('the DMA'), the General Court dismisses the action for annulment brought by Bytedance Ltd against the decision of the European

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95 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36).

96 See, in particular, ECtHR, 18 January 2018, *FNASS and Others v. France*, ECLI:CE:ECHR:2018:0118JUD 004815111, § 153 and the case-law cited. In that regard, Article 7 of the Charter corresponds to Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in accordance with Article 52(3) of the Charter, the Court takes account, in the interpretation of the rights guaranteed by Article 7, of the corresponding rights guaranteed by Article 8(1), as interpreted by the ECtHR.

97 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ 2022 L 265, p. 1).

Commission [98] designating that undertaking and the companies which it controls directly or indirectly (together, 'ByteDance') as a gatekeeper within the meaning of that regulation.

Since certain digital services, called 'core platform services' ('CPS' or 'CPSs'), often have characteristics which, combined with unfair practices on the part of the undertakings providing those services, can have the effect of substantially undermining the contestability of the CPSs, as well as impacting the fairness of the commercial relationship between undertakings providing such services and their business users and end users, the EU legislature decided to adopt the DMA.

Therefore, the DMA seeks to contribute to the proper functioning of the internal market by laying down rules to ensure the contestability and fairness of markets in the digital sector in general, and for business users and end users of CPSs provided by undertakings designated as 'gatekeepers' in particular. To that end, the DMA provides for a targeted set of obligations that undertakings which have been designated, by the Commission, as gatekeepers must comply with in respect of each of the CPSs listed in the designation decision.

In accordance with Article 3(1) of the DMA, the Commission designates an undertaking as a gatekeeper where it meets the following three cumulative requirements:

(a) it has a significant impact on the internal market;

(b) it provides a CPS which is an important gateway for business users to reach end users ('important gateway'); and

(c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.

Under Article 3(2) of the DMA, an undertaking is presumed to satisfy those requirements where it meets certain quantitative thresholds, based in particular on the Union turnover of the undertaking concerned or its global market value, the number of end users and business users of the CPS concerned which are established or located in the European Union, and the number of years during which the latter threshold relating to the number of users has been met.

Under the first subparagraph of Article 3(5) of the DMA, the undertaking concerned may present, with its notification under the first subparagraph of Article 3(3) of the DMA, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in Article 3(2) of the DMA, due to the circumstances in which the relevant CPS operates, it does not satisfy the requirements listed in paragraph 1 of that article. Where the undertaking does present such sufficiently substantiated arguments manifestly calling into question the presumptions laid down in Article 3(2) of the DMA, the Commission may open a market investigation pursuant to Article 17(3) of the DMA.

Bytedance Ltd, which was established in China in 2012 and incorporated under the law of the Cayman Islands, operates, together with the companies which it controls directly or indirectly, inter alia, the digital platform TikTok. That digital platform which was launched in the European Union, in its current version, in August 2018, allows its users to search for, view and distribute videos, as well as to interact, communicate and share content with other users.

Having received a notification from Bytedance Ltd pursuant to the first subparagraph of Article 3(3) of the DMA, the Commission considered, first, that TikTok was an online social networking service within the meaning of the DMA and, consequently, a CPS. Secondly, the Commission found that ByteDance met the thresholds laid down in Article 3(2) of the DMA, as regards TikTok, so that it could be presumed that the conditions laid down in Article 3(1) of the DMA, relating to its designation as a gatekeeper, were satisfied. Thirdly, the Commission considered that the arguments put forward by

98 Commission Decision C(2023) 6102 final of 5 September 2023 designating ByteDance as a gatekeeper in accordance with Article 3 of the DMA.

Bytedance Ltd to rebut the presumptions laid down in Article 3(2) of the DMA were not sufficiently substantiated so as manifestly to call them into question. Accordingly, the Commission designated ByteDance as a gatekeeper, without opening a market investigation, and considered that the online social networking service TikTok was an important gateway within the meaning of the DMA. [99]

Bytedance Ltd brought an action for the annulment of that decision before the Court. At the request of Bytedance Ltd, the Court decided to adjudicate on the action under the expedited procedure.

Findings of the Court

In support of its action, the applicant raises three pleas in law alleging (i) infringement of Article 3(1) and (5) of the DMA, (ii) infringement of the rights of the defence and (iii) infringement of the principle of equal treatment.

The plea in law alleging infringement of Article 3(1) and (5) of the DMA

As a preliminary point, the Court notes that the applicant does not dispute that TikTok is an online social networking service within the meaning of the DMA. It does not dispute either that the thresholds laid down in Article 3(2)(a) to (c) of the DMA were met and that, consequently, ByteDance was presumed to satisfy the respective requirements of Article 3(1) of the DMA for the purpose of its designation as a gatekeeper.

By contrast, the applicant takes the view that the Commission erred in finding that the arguments it had presented, in accordance with the first subparagraph of Article 3(5) of the DMA, were not sufficiently substantiated so as manifestly to call into question the presumptions laid down in Article 3(2) of the DMA as regards TikTok.

A. The legal standard applied by the Commission when assessing the arguments presented to rebut the presumptions laid down in Article 3(2) of the DMA

First of all, the Court dismisses the complaints that the Commission applied the wrong legal standard in its assessment of the arguments and evidence submitted by the applicant in order to rebut the presumptions laid down in Article 3(2) of the DMA

In that context, the Court notes, first, that while Article 3(5) of the DMA allows the undertaking concerned to submit, in order to rebut the presumptions laid down in Article 3(2) of the DMA, arguments and evidence, whether or not they are expressed in figures, those arguments and that evidence must nevertheless relate directly to one or more of those presumptions, which take the form of quantitative thresholds. In the present case, the Commission was entitled to reject certain of the applicant's arguments consisting, inter alia, of general assertions concerning the objectives pursued by the DMA and the subject matter and effectiveness of Article 3(5) of the DMA, since they were not intended to rebut concretely and specifically one of the three presumptions laid down in Article 3(2) of the DMA and, therefore, were not directly related to them.

Second, the Court states that the standard of proof required to call into question those presumptions derives directly from Article 3(5) of the DMA, which requires that the undertaking concerned – on which the burden of proof lies – submit sufficiently substantiated arguments, manifestly calling into question those presumptions. It follows that the arguments presented by that undertaking must be capable of showing, with a high degree of plausibility, that the presumptions laid down in Article 3(2) of the DMA are called into question. The Court adds that, in the present case, the Commission had asserted that it had applied the standard of proof set out in Article 3(5) of the DMA and that there was nothing in its analysis to suggest that the standard of proof which it had actually applied was higher than that set out in that provision.

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99 Decision of 5 September 2023. See footnote 2.

B. The presumption that ByteDance had a significant impact on the internal market

Next, in the light of that information, the Court examines the applicant's claims that the Commission infringed Article 3(1)(a) and (5) of the DMA by rejecting its arguments seeking to show that ByteDance did not have a significant impact on the internal market. The applicant claimed, in essence, that ByteDance's impact on the internal market was not significant, as demonstrated, inter alia, by the fact that its Union turnover was low and that ByteDance's global market value was mainly attributable to its activities in China, with the result that that value is not representative of its impact on the internal market.

In that context, the Commission had, inter alia, rejected as irrelevant the argument that ByteDance's revenue in the European Union was below the Union turnover threshold laid down in Article 3(2)(a) of the DMA.

On that point, the Court recalls that it can be presumed from Article 3(2)(a) of the DMA that an undertaking has a significant impact on the internal market, within the meaning of paragraph 1(a) of that article, where the undertaking provides the CPS in question in at least three Member States and either its annual Union turnover is equal to or greater than EUR 7.5 billion in each of the last three financial years, or its average market capitalisation or its equivalent fair market value amounts to at least EUR 75 billion in the last financial year.

The Court observes, moreover, that it was not disputed that ByteDance did not meet the Union turnover threshold. On the other hand, it was accepted that ByteDance met the global market value threshold and that, as a result, it was deemed to have a significant impact on the internal market.

As regards the relationship between the two thresholds referred to above, the Court states that they reflect similar, but distinct, situations. While a high Union turnover tends to show that the undertaking in question already has the ability to monetise its users in the internal market, a high global market capitalisation or fair market value rather tends to indicate that that undertaking has the potential to monetise its users in the internal market in the near future. In addition, the Union turnover of the undertaking in question was specifically chosen by the EU legislature as an indicator of its impact on the internal market.

Accordingly, it cannot be ruled out that the undertaking concerned may demonstrate, on the basis of a number of sufficiently substantiated arguments, including its low Union turnover, that, despite its very significant global market value, it has only a limited presence on the internal market, so that that market value does not reflect a potential to monetise its users in the Union in the near future and that, therefore, it does not have a significant impact on the internal market within the meaning of Article 3(1)(a) of the DMA.

In the light of the foregoing, the Court finds that the Commission erred in rejecting as irrelevant, for the purposes of calling into question the presumption relating to ByteDance's significant impact on the internal market, the applicant's argument relating to ByteDance's low Union turnover.

That being so, in accordance with the case-law, that error leads to the annulment of the contested decision only if it could have had a decisive effect, in the particular circumstances of the present case, on the Commission's rejection of the arguments presented by the applicant to rebut the presumption laid down in Article 3(2)(a) of the DMA.

However, that is not so since all the other elements taken into account by the Commission in order to conclude that ByteDance had significant potential to monetise its users in the Union in the near future remain valid. In support of that conclusion, the Commission also recalled that ByteDance's Union turnover, although it did not reach the threshold laid down in Article 3(2)(a) of the DMA, had nonetheless not ceased increasing, that ByteDance's fair market value was significantly above the EUR 75-billion threshold and that the number of TikTok end users and business users in the Union had continued to increase in the last three financial years, far exceeding the thresholds laid down in Article 3(2)(b) of the DMA.

C. The presumption that TikTok is an important gateway

The Court also rejects the applicant's complaints that the Commission infringed Article 3(1)(b) and (5) of the DMA by classifying TikTok as an important gateway pursuant to the presumption laid down in Article 3(2)(b) of the DMA, despite the arguments to the contrary put forward by the applicant.

In accordance with Article 3(2)(b) of the DMA, an undertaking is deemed to provide a CPS constituting an important gateway if it provides a CPS which, in the last financial year, has had at least 45 million monthly active end users established or located in the Union and at least 10 000 yearly active business users established in the Union.

a. The alleged lack of an ecosystem and of significant network effects

In order to challenge TikTok's classification as an important gateway pursuant to the presumption laid down in Article 3(2)(b) of the DMA, the applicant claimed, in the first place, that, unlike other undertakings operating in the digital sector, ByteDance does not have an ecosystem and does not benefit from significant network effects.

First of all, the Court states that a digital platform ecosystem may consist of one or more CPSs and other services connected to them, for example by means of technological links or interoperability; this is liable to exacerbate entry barriers for competitors of those undertakings and increase the cost of switching providers for end users, making it more difficult for existing or new market operators to compete with those undertakings or contest their position.

Next, the Court finds that the applicant has not substantiated its argument that ByteDance did not have an ecosystem.

Lastly, according to the Court, even if ByteDance does not have an ecosystem, the Commission's conclusion regarding TikTok's classification as an important gateway remains valid, since it is apparent from the contested decision that, since the launch of its current version, in 2018, in the European Union, TikTok has succeeded, in a short time, in attracting a very large number of end users and business users, thereby far exceeding the thresholds laid down in that regard in Article 3(2)(b) of the DMA and reaching half of the size of Facebook and of Instagram.

Moreover, contrary to the applicant's claims, there is nothing in the DMA to suggest that a CPS can produce significant network effects only if it is part of an ecosystem. Similarly, the applicant did not put forward any independent argument which may suggest that TikTok lacks significant network effects.

b. The existence of multi-homing and the alleged absence of lock-in effects

In the second place, the Court upholds the Commission's conclusion that the existence of a certain degree of multi-homing [100] by end users and business users in relation to TikTok and other online social networks was insufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

In this respect, the Court notes that, while the existence or absence of multi-homing and lock-in effects can constitute, depending on the case, relevant elements to assess whether that presumption may be manifestly called into question, it is necessary to take into account the specific and concrete characteristics of that multi-homing and of the lock-in effects as they arise in the circumstances in which the relevant CPS operates.

Since the prevalence of multi-homing among users of online social networks is illustrated by the data produced by the applicant itself, the Court finds that, in view of the characteristics of the CPS concerned, the mere existence of multi-homing, even to a significant degree, is not in itself sufficient so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA in the present case.

What is more, the arguments and evidence submitted by the applicant – on which the burden of proof lies – during the administrative procedure concerned only the existence of multi-homing in general, and not the intensity of use of the various online social networking platforms, bearing in mind that

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[100] In the context of digital services in general and online platforms in particular, the concept of 'multi-homing' describes the situation in which users use several competing digital services in parallel; in the present case, those services are online social networking services.

TikTok enjoyed a higher engagement rate than other social networks since end users, in particular young people, spend more time on TikTok than on other social networks.

As regards the applicant's arguments based on the fact that approximately 82% and 77% of TikTok end users also use Instagram and Facebook, respectively, while only 38% of Facebook end users and 48% of Instagram end users also use TikTok, the Court finds that the applicant has not, in any event, demonstrated that the asymmetric nature of multi-homing as practised by TikTok users, on the one hand, and Facebook and Instagram users, on the other, was due not to the economic and historical context in which online social networks operate in the Union, but to the absence of network effects and lock-in effects on TikTok.

c. The smaller scale of TikTok compared with other platforms and the large number of competitors

In the third place, the Court finds that the Commission was correct to consider that the arguments presented by the applicant relating to TikTok's small scale compared to that of certain other online social networking platforms, and to the existence of a large number of competitors, were also not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA.

Among the elements which the Commission may take into account in its assessment of the arguments seeking to rebut the presumption laid down in Article 3(2)(b) of the DMA features, according to recital 23 thereof, the 'importance of the [CPS of the undertaking concerned] considering the overall scale of activities of the respective [CPS]'. However, that recital does not specify the parameters on the basis of which the importance and scale of the CPS at issue must be measured.

In that context, the applicant submitted that TikTok is not an important gateway, within the meaning of Article 3(1)(b) of the DMA, on the ground that TikTok is smaller in size than other well-established platforms, such as Facebook and Instagram, inter alia, in terms of number of end users.

However, since the applicant put forward arguments and figures which it had not submitted during the administrative procedure, in order to demonstrate TikTok's alleged small scale, the Court declares them inadmissible.

It rejects those new arguments as unfounded and, in that context, confirms inter alia that TikTok's size in terms of number of end users cannot be assessed in a static manner, but must take account of the rapid and significant growth in the number of end users in the Union, which has reached approximately half the size of Facebook and of Instagram in a few years.

d. Advertising revenue and the level of engagement of business users registered on TikTok

By contrast, as regards the applicant's arguments alleging that ByteDance's advertising revenue, its average revenue per user or the level of engagement of advertisers and business users registered on TikTok are minimal and lower than those of certain other platforms, the Court finds, in the fourth place, that the Commission erred in rejecting those arguments as irrelevant for the purpose of rebutting the presumption laid down in Article 3(2)(b) of the DMA.

In that regard, the Court points out, first, that although the Commission classified TikTok as an online social networking service and not as an online advertising service within the meaning of the DMA, the fact remains that TikTok is a single platform, on which users interact primarily by sharing and viewing videos, while advertisers pay for advertisements to appear, generally between videos viewed by those users.

Second, it cannot be denied that the advertising revenue or the average revenue per user generated by TikTok could, in principle, constitute an indication among others of the importance which that platform represents for its business users in order to reach end users, in so far as advertising is one of the means commonly used by those business users to reach their customers.

That being so, since the Commission had, in any event, also established that the applicant's arguments and evidence relating to online advertising were not sufficiently substantiated so as manifestly to call into question the presumption laid down in Article 3(2)(b) of the DMA, the Court finds that the error committed by the Commission has no bearing on the lawfulness of the contested decision. On that point, the Court notes in particular that the Commission was right to find that the

arguments and evidence put forward by the applicant were not sufficiently representative of all TikTok business users.

D. The presumption that ByteDance has an entrenched and durable position

Lastly, the Court rejects the applicant's complaints that the Commission infringed Article 3(1)(c) and (5) of the DMA by rejecting its arguments seeking to challenge the finding that, in the light of the presumption laid down in Article 3(2)(c) of the DMA, TikTok enjoys an entrenched and durable position in its operations. The applicant claimed, in essence, that it was a 'challenger' on the market and that its market position had been successfully contested by competitors such as Meta and Alphabet, which had launched new services, such as Reels and Shorts, which, by imitating the main features of TikTok, had enjoyed rapid growth.

After noting, first, that the concept of an 'entrenched and durable' position within the meaning of Article 3(1)(c) of the DMA is intended to capture the low contestability of the position of the undertaking in question and the stability over time of that position and, second, that that concept does not necessarily overlap with that of a 'dominant position' within the meaning of Article 102 TFEU, the Court observes that an undertaking's entrenched and durable position in its operations does not preclude the existence of a certain degree of contestability.

In response to the applicant's arguments based on the fact that other gatekeepers in the same CPS category, namely Meta and Alphabet, have contested ByteDance's position, the Court also finds that the purpose of the DMA is to ensure the contestability of the position of gatekeepers not only by other gatekeepers but also, or even especially, by other operators which are not gatekeepers for a given CPS. It follows that mere references to the activities of Meta and Alphabet do not make it possible to conclude that ByteDance's position is not entrenched and durable within the meaning of the DMA.

Moreover, there is nothing to prevent an undertaking such as ByteDance, which in 2018 was a challenger seeking to contest the position of gatekeepers, from becoming a gatekeeper itself within a few years.

The plea in law alleging infringement of the rights of the defence

In support of its action, the applicant also submits that the Commission infringed Article 41 of the Charter of Fundamental Rights of the European Union on the ground that, in the contested decision, it relied on matters of fact and law in relation to which the applicant had not had the opportunity to submit its observations during the administrative procedure.

In that regard, the Court observes that Article 41 of the Charter of Fundamental Rights guarantees to every person the possibility of making known, in a useful and effective manner, their point of view during the administrative procedure and before the adoption of any decision likely to affect their interests adversely.

In the light of those clarifications, the Court finds that, despite the numerous exchanges between the applicant and the Commission prior to the adoption of the contested decision, the applicant did not have the opportunity to submit its observations, during the administrative procedure, on certain evidence relied on against it by the Commission.

However, according to settled case-law, an infringement of the right to be heard does not automatically imply the annulment of the contested act. It is also necessary for the applicant to show that it cannot be entirely ruled out that the Commission's decision would have been different in the absence of the procedural irregularity in question, since that party would have been better able to defend itself had there been no irregularity. The applicant having failed to show that this was so in the present case, the Court dismisses the applicant's plea alleging infringement of its rights of defence.

The plea in law alleging infringement of the principle of equal treatment

According to the applicant, the Commission also infringed the principle of equal treatment by rejecting, in the contested decision, certain of its arguments, whereas, in other decisions, the Commission had accepted that kind of argument.

On that point, the Court recalls that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other

undertakings or other CPSs and that, in any event, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

Since the recitals of the Commission's decisions cited by the applicant concern other CPS categories and not online social networking services and the applicant does not explain why the circumstances in which those other CPS categories operate are comparable to those in which an online social networking service such as TikTok operates, the Court dismisses as unfounded the plea alleging infringement of the principle of equal treatment.

In the light of all of the foregoing, the Court dismisses the action in its entirety.

IX. ECONOMIC AND MONETARY POLICY

1. BANKING UNION – SINGLE RESOLUTION MECHANISM

Judgment of the General Court (Third Chamber, Extended Composition), 10 July 2024, France v SRB, T-540/22

Economic and monetary policy – Banking Union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Regulation (EU) No 806/2014 – Minimum requirement for own funds and eligible liabilities – Decision of the SRB not to grant a waiver – Appeal before the Appeal Panel of the SRB – Dismissal – Condition that there is no impediment to the prompt transfer of own funds – SRB's margin of discretion – Legal certainty – Obligation to state reasons

Hearing an action for annulment, which it dismisses, brought by the French Republic against a decision of the Appeal Panel of the Single Resolution Board (SRB) ('the Appeal Panel'), [101] the General Court rules for the first time on a decision of the Appeal Panel reviewing the examination carried out by the SRB to determine whether a banking group satisfies the necessary conditions for it to be eligible for waiver of the minimum requirement for own funds. Those conditions are laid down in Article 12h of Regulation No 806/2014. [102]

On 6 November 2020, a banking group had submitted, in respect of one of its subsidiaries, an application to the SRB for waiver of the minimum requirement for own funds and eligible liabilities ('the MREL') applied on an individual basis pursuant to Article 12g of Regulation No 806/2014. Hearing an appeal against the SRB's decision refusing that application, [103] the appeal having been lodged by the Autorité de contrôle prudentiel et de résolution (Authority for Prudential Supervision and Resolution, France) ('the appellant before the Appeal Panel'), the Appeal Panel dismissed that appeal by the contested decision.

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101 Decision No 3/2021 of the Appeal Panel of the Single Resolution Board (SRB) of 8 June 2022 dismissing the appeal lodged against Decision SRB/EES/2021/44 of 4 November 2021 determining the minimum requirement for own funds and eligible liabilities ('the contested decision').

102 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1), as amended by Regulation (EU) 2019/877 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 226).

103 Decision SRB/EES/2021/44 of the Single Resolution Board of 4 November 2021.

Findings of the Court

In the first place, as regards the scope of Article 12h(1) of Regulation No 806/2014 ('the provision concerned'), the Court finds, first of all, based on a literal interpretation, that Article 12h(1)(c) of that regulation does not provide for the possibility of requiring a specific guarantee in order to satisfy the condition that there is no current or foreseen material impediment to the prompt transfer of own funds or repayment of liabilities, and that nor does that provision prohibit the SRB from requiring a specific guarantee in that regard.

Next, as part of a contextual interpretation, the Court takes the view that the requirement of collateralised guarantees between the parent undertaking and its subsidiaries is provided for in Article 12g of Regulation No 806/2014 solely as a means of complying with an internal MREL, and that the condition that a guarantee is provided does not appear in Article 12h of that regulation in the context of a waiver, contrary to what was provided for by the legislature in Directive 2014/59. [104] Thus, the possibility of obtaining a waiver under the provision concerned cannot in any way be made conditional upon the requirement of a collateralised guarantee similar to that provided for in Article 12g(3) of the same regulation. An approach to the contrary would render the provision concerned wholly ineffective and would thus constitute a flagrant infringement of that provision.

However, the Court considers that it cannot be inferred from the contextual interpretation of the provision concerned that the failure to mention a guarantee in the provision relating to the examination of an application for waiver of the internal MREL [105] prevents *ipso jure* the SRB from imposing a requirement of that kind in the context of that examination. Thus, while the SRB is obliged to refuse a waiver application if one of the cumulative conditions laid down in the provision concerned is not satisfied, it does, nevertheless, enjoy a margin of discretion to determine under which circumstances the third of those conditions, concerning the lack of any impediment to the prompt transfer of own funds, is satisfied. Accordingly, it cannot be ruled out, having regard to that discretion, that the SRB may be justified in requiring a guarantee – which is different from that provided for in Article 12g(3) of Regulation No 806/2014 – so as to counteract any impediment to the prompt transfer of own funds.

Lastly, on the basis of a teleological interpretation of the provision concerned, the Court notes that the primary objective common to Regulation No 806/2014 and Directive 2014/59, which is pursued by the legislature by imposing the MREL on all of the institutions in a banking group, is to ensure effective resolution with a minimum detrimental impact on the real economy, the financial system and the public finances. Thus, when the SRB examines an application for waiver of the internal MREL, it falls to it to assess whether there are other arrangements which could act as functional substitutes for the internal MREL. Within the context of its discretion, there is nothing to prevent it from considering that, according to the circumstances specific to each waiver application, a guarantee is necessary in order to satisfy the condition that there is no impediment to the prompt transfer of own funds. However, it may not require a guarantee which is similar in characteristics to that provided for in Article 12g(3) of Regulation No 806/2014.

In that regard, the Court states that it is not apparent from the contested decision that the SRB required the banking group concerned to provide a guarantee corresponding to, or having characteristics similar to, that provided for in Article 12g(3) of Regulation No 806/2014, nor, a fortiori, that the Appeal Panel endorsed such an approach by the SRB.

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104 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), as amended by Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 (OJ 2019 L 150, p. 296).

105 That is to say, Article 12h(1) of Regulation No 806/2014.

In the second place, with regard to the examination by the Appeal Panel solely of the pleas raised before it, the Court recalls, as a preliminary point, that, under Regulation No 806/2014, [106] any natural or legal person may bring an appeal before the Appeal Panel against a decision of the SRB, such as the contested decision, that the appeal is to state the grounds upon which it is based, and that it falls to the Appeal Panel to decide upon that appeal. It follows from the foregoing that the Appeal Panel is to examine the pleas raised before it. Furthermore, the Court observes that the arguments raised by the appellant before the Appeal Panel in support of its first plea did not concern the substantive assessments made by the SRB concerning the 2014 and 2015 guarantees upon which the banking group concerned relied to argue that the condition that there is no impediment to the prompt transfer of own funds was met. The arguments in question concerned the alleged error in law committed by the SRB because it exceeded its powers by applying automatically a condition not contained in Article 12h of Regulation No 806/2014.

Therefore, the Court takes the view that it was for the Appeal Panel to verify that the assessment made by the SRB was not a disguised examination *in abstracto* of the 2014 and 2015 guarantees, but rather a credible examination *in concreto* of the situation of the banking group concerned and of those guarantees put forward in support of its waiver application, and that the limits on the SRB's margin of discretion had thus been observed. The Court therefore dismisses the complaint that the pleas and arguments raised by the appellant before the Appeal Panel, based on the error in law allegedly committed by the SRB because it incorrectly applied the provision concerned and exceeded the limits of its powers, should have necessarily led the Appeal Panel to examine whether the SRB was justified, in the light of all the relevant evidence in the present case, in requiring a specific guarantee.

Lastly, as regards the breach of the principle of legal certainty, the Court observes, first, that Article 12h(1)(c) of Regulation No 806/2014 cannot be required to set out the various specific hypotheses in which the condition laid down in that provision is or is not satisfied, given that not all those hypotheses can be determined in advance by the legislature. It is impossible to list the examples of impediments to the prompt transfer of own funds, just as the legislature cannot be required to set out positively the measures which would ensure compliance with the condition that are no such impediments. Second, the principle of legal certainty does not preclude the relevant authorities from having some discretion in the application of the criteria determined by the legislation. In the present case, the fact that the SRB enjoys a degree of discretion as to whether there is an impediment to the prompt transfer of own funds or as regards the appropriate manner in which that condition is to be satisfied does not mean, however, that there has been a breach of the principle of legal certainty.

Judgment of the General Court (Eighth Chamber, Extended Composition), 17 July2024, Landesbank Baden-Württemberg v SRB, T-142/22

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2017 ex ante contributions – Obligation to state reasons – Effective judicial protection – Equal treatment – Principle of proportionality – SRB's discretion – Plea of illegality – Commission's discretion – Limitation of the temporal effects of the judgment

Hearing an action for annulment – which it upholds – the General Court annuls the decision of the Single Resolution Board ('the SRB') setting the 2017 *ex ante* contributions to the Single Resolution Fund

106 See Article 85(3) and (4) of that regulation.

('the SRF'), in so far as it concerns the applicant, Landesbank Baden-Württemberg, on account of the SRB's failure to fulfil its obligation to state reasons relating to the determination of the annual target level.

In its judgment, the Court provides clarifications as regards balancing the SRB's obligation to state reasons with its obligation to respect the confidentiality of business secrets of the financial institutions concerned for data which were more than five years old at the time of the adoption of the decision setting the *ex ante* contributions.

The applicant is a credit institution governed by public law established in Germany. It is a member of the institutional protection scheme ('the IPS') of the Sparkassen-Finanzgruppe (Savings Banks Finance Group, Germany).

On 15 December 2021, the SRB adopted a decision [107] in which it set [108] the 2017 *ex ante* contributions to the SRF concerning the applicant ('the contested decision'). By that decision, the SRB remedied the procedural defects identified in the judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB*, [109] which resulted in the annulment of the decision [110] on the calculation of the 2017 *ex ante* contributions to the SRF, in so far as it concerned the applicant.

Findings of the Court

First, the Court recalls that the very principle of the method of calculating *ex ante* contributions [111] means that the SRB must use data which are business secrets and cannot be included in the statement of reasons for the decision setting the *ex ante* contributions.

In that regard, it finds that the contested decision provided the reasons why the data of the institutions which had been taken into account for the purposes of calculating the 2017 *ex ante* contribution are business secrets. In particular, the SRB observed, in the contested decision, that the institutions' business secrets were considered to be confidential information. In the context of the calculation of *ex ante* contributions, the information submitted by the institutions via their data reporting forms, which is relied on by the SRB to calculate their *ex ante* contribution, was considered to constitute business secrets.

In addition, in that decision, the SRB stated that it was prohibited from disclosing the institutions' individual data which formed the basis of the calculations in that decision, whereas it was authorised to disclose the institutions' aggregated and common data, in so far as those data were in collective form. That being the case, the institutions had, according to that decision, complete transparency as to the calculation of their basic annual contribution and their risk-adjustment multipliers for the steps involved in calculating that contribution, and they could obtain common data which the SRB uses for all risk-adjusted institutions equally for the steps in the calculation relating to the 'discreti[s]ation of the indicators', the 'inclusion of the assigned sign' and the 'calculation of the annual contributions'.

Secondly, the Court rejects the argument that those explanations are insufficient in that, at the date on which the contested decision was adopted, the data of the other institutions were six years old

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107 Decision SRB/ES/SRF/2021/82 of the Single Resolution Board (SRB) of 15 December 2021 on the calculation of the 2017 *ex ante* contributions to the Single Resolution Fund concerning Landesbank Baden-Württemberg.

108 In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

109 Judgment of 15 July 2021, *Commission* v *Landesbank Baden-Württemberg and SRB* (C-584/20 P and C-621/20 P, EU:C:2021:601).

110 Decision SRB/ES/2017/05 of the Single Resolution Board (SRB) of 11 April 2017 on the calculation of the 2017 *ex ante* contributions to the Single Resolution Fund.

111 As is clear from Regulation No 806/2014 and from 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).

and therefore no longer constituted business secrets, but despite that, the SRB did not provide the reasons why those data were not disclosed.

It observes that, where information that could constitute business secrets at a certain moment in time is at least five years old, that information must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties.

In that regard, although those institutions' individual data on which the contested decision was based were more than five years old, the Court points out, however, that the position of an institution as compared to the position of its competitors may, in the economic conditions of the banking sector, remain the same or similar for a prolonged period, exceeding five years. Some elements, such as the business model or the activities of such an institution, remain stable in the short and medium term, and therefore an institution which has previously had a high risk profile, as regards data more than five years old, may continue to present such a profile at the end of the initial period. Thus, despite its age, that information still constitutes an essential element of the commercial position of the credit institutions. In those circumstances, if such essential data were disclosed in the statement of reasons for the contested decision, economic operators active in the banking sector could use those data to deduce the current commercial position of an institution.

Furthermore, the Court rejects the applicant's argument that, in order to discharge its duty to state reasons, the SRB should have provided it, in anonymised form, with a list of all of the data of the institutions contained in the same bin as it. First, to impose such a requirement on the SRB would go beyond the requirements imposed by the case-law relating to the statement of reasons for SRB decisions setting *ex ante* contributions and, secondly, even a list including anonymised data for a particular bin would risk allowing economic operators active in the banking sector, who are prudent traders, learning the business secrets of certain institutions. Such a risk exists in particular in the case of large institutions and institutions established in Member States in which there are a limited number of institutions liable to the *ex ante* contribution. It cannot be ruled that, in such situations, a prudent trader may be able to identify those institutions, even though they have been anonymised.

The Court therefore holds that the SRB was not required to disclose, in the statement of reasons for the contested decision, the individual data of the other institutions which would enable the calculation of its *ex ante* contribution to be verified, since, even if those data were six years old, they still constitute an essential element of the commercial position of those institutions.

Judgment of the General Court (Eighth Chamber, Extended Composition), 17 July 2024, Deutsche Bank v SRB, T-396/21

Economic and monetary union – Banking union – Single resolution mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 *ex ante* contributions – Obligation to state reasons – Effective judicial protection – Equal treatment – Principle of proportionality – SRB's margin of discretion – Plea of illegality – Commission's margin of discretion – Limitation of the temporal effects of the judgment

Hearing an action for annulment against the decision of the Single Resolution Board (SRB) determining the 2021 *ex ante* contributions to the Single Resolution Fund (SRF) of credit institutions

and certain investment firms ('the contested decision'), [112] the General Court upholds the action and annuls that decision on the basis of a breach of the SRB's obligation to state reasons as regards the determination of the annual target level. Furthermore, the Court rules on the scope of Article 69(1) of Regulation No 806/2014 [113] by defining the dynamic nature of the final target level of the SRF, on the one hand, and by examining its compatibility with the principle of proportionality having regard to the characteristics of the *ex ante* contributions, on the other hand.

Deutsche Bank AG, the applicant, is a credit institution established in Germany.

Findings of the Court

In the first place, with regard to the scope of Article 69(1) of Regulation No 806/2014, the applicant claimed that that provision must be interpreted as meaning that the final target level is to be determined 'statically', that is to say, having regard to the amount of covered deposits when that regulation entered into force and not to the level of those deposits at the end of the initial period.

The Court observes, first of all, that that provision states that, by the end of the initial period, the available financial means of the SRF are to reach at least 1% of the amount of covered deposits of all credit institutions authorised in all of the Member States participating in the Single Resolution Mechanism (SRM) ('the final target level'). It is apparent from that same provision that the end date of the initial period is not decisive solely for the purpose of determining that date on which the final target level is to be reached, but also for that of specifying the amount of those deposits which is to be taken into consideration with a view to calculating that target level.

Next, the *travaux préparatoires* for Regulation No 806/2014 [114] confirm the view that Article 69(1) of that regulation is based on a dynamic approach to the final target level, because that level is to be determined having regard to the amount of covered deposits at the end of the initial period.

Lastly, the Court points out that the need to take account of the evolution of the amount of covered deposits is explained by the objective of raising the *ex ante* contributions, which is to ensure, according to an insurance-based logic, that the financial sector provides adequate financial resources for the SRM to be able to fulfil its functions. The objective of the SRM is to increase the stability of the institutions in the participating Member States and to prevent the spill-over of any crises into non-participating Member States.

In that regard, it is clear from the *travaux préparatoires* [115] that the more the size of the banking sector grows over time, the more the financial resources that must be made available to the SRF will have to increase. An estimate of that size can thus be used to project the amount of the financial means which would have to be provided to the SRF for that fund to be used, in the event of a crisis affecting the banking sector, in order to finance the resolution tools and thus to ensure their effective application. [116] In addition, the EU legislature opted for an approach whereby the purpose of the amount of covered deposits is to estimate the size of the banking sector and thus to calculate the financial resources which must be made available to the SRF. Viewed from such a perspective, any increase in the amount of covered deposits between the start and the end of the initial period

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112 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 *ex ante* contributions to the Single Resolution Fund.

113 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).

114 Proposal for a Regulation of the European Parliament and of the Council 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 Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council (COM/2013/0520 final).

115 Paragraph 4.3.2 of the explanatory memorandum to proposal COM(2013) 520 final.

116 In accordance with Article 76(1) of Regulation No 806/2014, read in the light of recital 101 of that regulation.

represents growth in the size of the banking sector, which means an increase in the financial means required by the SRF at the end of that period.

Article 69(1) of Regulation No 806/2014 must therefore be interpreted as meaning that the amount of the final target level is to be determined having regard to the amount of covered deposits existing at the end of the initial period. Consequently, the SRB was right to take into account the evolution of those deposits in order to determine the final target level and, subsequently, to determine from that level the annual target level.

In the second place, with regard to the compatibility of Article 69(1) of Regulation No 806/2014 with the principle of proportionality, the Court observes that the EU legislature has broad discretion in determining the method of calculating the *ex ante* contributions, given the complex assessments which have to be made. Thus, the Court's review of compliance with the principle of proportionality must be limited to examining whether the measures adopted by the EU legislature are manifestly inappropriate as regards the objective pursued, whether or not they manifestly go beyond what is necessary in order to attain that objective, or whether or not they give rise to disadvantages that are manifestly disproportionate to the objective.

First, with regard to the appropriateness of the rule laid down in Article 69(1) of Regulation No 806/2014, the purpose of which is to provide the SRF with adequate resources to fulfil its function ('the objective pursued'), the Court takes the view, first of all, that, in order to attain the objective pursued, it fell to the EU legislature to provide the SRF with adequate financial resources, [117] which correspond to the final target level and are to be estimated having regard to the size of the banking sector. In that regard, the SRB explained that the covered deposits allowed an approximate estimate to be made of the size of the banking sector and thus enabled the financial resources required by the SRF to be calculated. Those deposits constitute commitments made by the institutions and in fact represent the majority of those commitments, at the very least in the case of large institutions. In those circumstances, it is not established that, as a specific category of commitments entered into by the institutions, covered deposits are manifestly inappropriate for estimating the size of the banking sector and thus for calculating the resources required by the SRF.

That conclusion is not called into question by the argument that, in the case of resolution, covered deposits are protected by the deposit guarantee schemes, and therefore growth in such deposits does not entail an increase in the risk covered by the SRF. The amount of covered deposits held by all of the institutions is therefore capable of reflecting the overall evolution of the banking sector. In particular, there is nothing to indicate that any growth in that amount cannot be accompanied by an increase in other commitments made by those institutions, such as non-covered deposits, which are not protected by the deposit guarantee schemes and which entail, for their part, an increase in the risk covered by the SRF.

Similarly, the applicant cannot claim that covered deposits are a manifestly inappropriate measure for calculating the final target level by relying on recital 105 of Regulation No 806/2014. [118] The mere fact that another criterion may be just as appropriate as that used in the legislation concerned and that the EU legislature states that it is for the European Commission to reassess the application of that criterion in the future does not mean that the criterion used in full knowledge of the facts by the EU legislature is manifestly inappropriate for achieving the objective pursued. In that regard, it does not fall to the Court, in the context of the review of compliance with the principle of proportionality, to

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117 In the context of the tasks assigned to it by Article 76(1) of Regulation No 806/2014.

118 That recital reads as follows: 'The target level of the [SRF] should be established as a percentage of the amount of covered deposits of all credit institutions authorised in the participating Member States. However, since the amount of the total liabilities of those institutions would be, taking into account the functions of the [SRF], a more adequate benchmark, the Commission should assess whether covered deposits or total liabilities is a more appropriate basis and if a minimum absolute amount for the [SRF] should be introduced in the future, maintaining a level playing field with Directive [2014/59].'

determine whether the measure adopted by the legislature was the only one or the best one possible but whether it was manifestly inappropriate.

Next, the Court observes that, in order to enable the SRM to fulfil its functions effectively, the EU legislature provided that the final target level would be calculated on the basis of the amount of covered deposits, as estimated for the end of the initial period. However, by advocating such a method of determining the final target level, the EU legislature did not use a criterion that was manifestly irrelevant for the purpose of reflecting the future size of that sector and thus for guaranteeing adequate funding of the SRF according to the foreseeable situation in that same sector. Furthermore, the Court considers that it is not manifestly inappropriate to take the evolution of covered deposits as a basis for assuming an increase in other commitments made by the institutions and thus to estimate the potential increase in the risk covered by the SRF.

In that context, the Court points out that the argument, based on Articles 428m and 428n of Regulation No 575/2013, [119] that covered deposits reduce the liquidity risk of the institutions, and therefore growth in those deposits does not give rise to any risk of the SRF being used and thus need not entail any increase in the final target level cannot succeed. The legislation concerning prudential requirements [120] pursues a different objective from that of the legislation relating to the resolution of institutions. [121] In those circumstances, those provisions of Regulation No 575/2013 are incapable of establishing that the method of determining the final target level is manifestly inappropriate.

Finally, the fact that taking into account high levels of liquidity in relation to covered deposits when calculating the risk indicator 'liquidity coverage ratio' [122] would lead to a reduction in the adjusting multiplier of the institution concerned is incapable of demonstrating that the development of the amount of covered deposits is manifestly inappropriate for reflecting the evolution in the size of the banking sector and therefore for determining the financial needs of the SRF and, in particular, for estimating the increase in commitments presenting a risk to the SRF and thus for measuring such a risk, which the SRF would be called on to cover in the context of resolution procedures. The Court therefore concludes that the applicant has failed to demonstrate that the method of determining the final target level was manifestly inappropriate for achieving the objective pursued.

Second, the Court finds that the applicant does not explain how the method of determining the final target level [123] goes manifestly beyond what is necessary to achieve the objective pursued, and that nor does it establish how the methodology based on the covered deposits when Regulation No 806/2014 entered into force would be a less burdensome methodology, which would ensure that the SRF has adequate financial resources.

The same is true of the argument based on the account taken, in the calculation of the final target level, of the reduction in the risk of the SRF being used on account of the eligible liabilities held by the institutions, in accordance with the minimum requirement for own funds and eligible liabilities and the requirement of a loss-absorbing capacity. The applicant does not show that taking account of those liabilities would result in lower charges for the institutions concerned whilst ensuring that the SRF has adequate financial resources, or that the calculation of the final target level in the light of those liabilities, assuming it were to constitute an appropriate measure, would mean lower charges for the institutions concerned than the determination of that target level on the basis of the amount of covered deposits at the end of the initial period.

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119 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).

120 See recital 32 of Regulation No 575/2013.

121 See recital 12 of Regulation No 806/2014.

122 Pursuant to Article 6(3)(b) of Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to ex ante contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

123 As it follows from Article 69(1) of Regulation No 806/2014.

Third, the Court considers that no specific evidence was presented to it with a view to demonstrating that, having determined the final target level by reference to the covered deposits existing at the end of the initial period, Article 69(1) of Regulation No 806/2014 had given rise to disadvantages for the institutions that were manifestly disproportionate to the objectives pursued by the EU legislature.

Judgment of the General Court (Eighth Chamber, Extended Composition), 17 July 2024, UniCredit Bank v SRB, T-402/21

Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 *ex ante* contributions – Obligation to state reasons – Right to be heard – Legal certainty – Effective judicial protection – Plea of illegality – Limitation of the temporal effects of the judgment

Hearing an action for annulment – which it upholds – the General Court annuls the decision of the Single Resolution Board ('the SRB') setting the 2021 *ex ante* contributions to the Single Resolution Fund ('the SRF'), in so far as it concerns the applicant, UniCredit Bank, on account of the SRB's failure to fulfil its obligation to state reasons relating to the determination of the annual target level.

In its judgment, the Court rules on the scope of the SRB's obligation to set out the reasons why the Net Stable Funding Ratio risk indicator ('the NSFR indicator') and the 'own funds and eligible liabilities held by the institution in excess of "minimum requirement for own funds and eligible liabilities"' indicator ('the MREL indicator' and 'the MREL'), as well as the 'complexity' and 'resolvability' risk sub-indicators, were not applied to calculate the *ex ante* contributions on both the national base and banking union base. [124] The Court also rules for the first time on the compliance of the non-application of those risk indicators and sub-indicators with Articles 6, 7 and 20 of Delegated Regulation 2015/63. [125]

The applicant is a credit institution which has its registered office in Germany. On 14 April 2021, the SRB adopted a decision in which it set [126] the 2021 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant ('the contested decision'). [127]

Findings of the Court

In the first place, as regards the reasons for the SRB's non-application of the NSFR and MREL risk indicators and of the 'complexity' and 'resolvability' risk sub-indicators referred to in Delegated Regulation 2015/63, [128] for the purposes of calculating the *ex ante* contributions for the 2021 contribution period, the Court notes that Article 20(1) of Delegated Regulation 2015/63 provides that, where the information required by a specific indicator as referred to in Annex II to that regulation is not included in the applicable supervisory reporting requirements referred to in Article 14 for the

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124 On the 'national base' means on the basis of the data communicated by institutions authorised in the territory of the participating Member State concerned. On the 'banking union base' means on the basis of the data communicated by all of the institutions authorised in the territories of all of the Member States participating in the Single Resolution Mechanism (SRM).

125 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

126 In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

127 Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 *ex ante* contributions to the Single Resolution Fund.

128 Point (a) of the first subparagraph of Article 6(5) of Delegated Regulation 2015/63.

reference year, that risk indicator is not to apply until that supervisory reporting requirement becomes applicable.

In the present case, the SRB stated, in the contested decision, that it had not applied the NSFR and MREL indicators or the 'complexity' and 'resolvability' sub-indicators because, when that decision was adopted, the data required for them were not available in a harmonised form for all the institutions.

More specifically, as regards the NSFR indicator, the SRB noted that no binding harmonised NSFR standard had been applied in the European Union and that it had therefore been unable to identify indicators at national level. As regards the MREL indicator, the SRB stated that, because MREL requirements had, by-and-large, been implemented in an incremental manner, it did not have the data to enable it to apply that indicator at the level of each institution contributing to the SRF. As regards the 'complexity' and 'resolvability' sub-indicators, the SRB stated that the data required for those sub-indicators were not available in a harmonised form for all institutions in the participating Member States for the reference year 2019.

Consequently, the Court considers that such a statement of reasons allows the applicant to understand the reasons why the SRB did not apply the risk indicators and sub-indicators concerned and thus satisfies the requirements laid down by the case-law.

As regards the reasons why the SRB did not apply the NSFR and MREL indicators for the purposes of calculating the percentage of the *ex ante* contribution determined on the national base, the Court considers that the SRB provided adequate reasoning explaining that the data required for the application of those indicators were not available at national level. First, as regards the NSFR indicator, the SRB explained that it had not been able to identify indicators at national level, since it had deemed the supervisory reporting requirements in respect of that indicator to be inadequate. Second, as regards the MREL indicator, it is apparent from the contested decision that the SRB did not have data at national level enabling it to apply that indicator, due to the gradual implementation of the MREL-related requirements by the national resolution authorities.

As regards the reasons why the 'complexity' and 'resolvability' sub-indicators were not applied for the purposes of calculating the percentage of the *ex ante* contribution determined on the national base, the Court considers that, as a prudent economic operator, the applicant could understand, in the light of the wording of the contested decision and its context, that, because of the lack of resolution plans drawn up for all the German institutions, the SRB did not have adequate data at national level for the purposes of applying the 'complexity' and 'resolvability' sub-indicators.

In the second place, as regards the compliance of the non-application of those risk indicators and sub-indicators with the provisions of Delegated Regulation 2015/63, the Court points out, first of all, that that delegated regulation makes the possibility of not applying a risk indicator subject to the twofold condition, first, that the information required by such an indicator is not included in the supervisory reporting requirements referred to in Article 14 of that delegated regulation and, second, that that indicator is referred to in Annex II to that delegated regulation, which is entitled 'Data to be submitted to the resolution authorities'.

As regards the first condition, the Court notes that, in order to determine whether [129] the information required by a specific risk indicator is included in the supervisory reporting requirements, it is for the SRB to ascertain whether the institutions were required to report that information for supervisory purposes to the competent authority for the reference year in question, in accordance with Implementing Regulation No 680/2014 [130] or national law. That reference year [131] is the year to which

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129 In accordance with Article 20(1) of Delegated Regulation 2015/63.

130 Commission Implementing Regulation (EU) No 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) No 575/2013 of the European Parliament and of the Council (OJ 2014 L 191, p. 1).

131 According to Article 4(1) of Delegated Regulation 2015/63 read together with Article 14(1) to (4) thereof.

the approved annual financial statements available before 31 December of the year preceding the contribution period relate, that is to say, in the present case, the year 2019 ('the relevant reference year').

As regards the second condition, the Court states that Article 20(1) of Delegated Regulation 2015/63 is intended to apply not only where the data referred to in Annex II thereto are in themselves risk indicators, but also where that annex refers to data which, while not in themselves constituting risk indicators, are decisive for the calculation of such indicators which, for their part, are not mentioned in that annex. Accordingly, a risk indicator need not be applied where the data essential for the calculation of that indicator are included in that annex.

In that regard, the Court recalls that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part and its effectiveness. As regards that provision, it takes into account the fact that the process of establishing the supervisory requirements and the corresponding reporting requirements is gradual and takes place over time. In addition, the Court notes that Delegated Regulation 2015/63 was adopted at a time when those requirements had not yet been definitively adopted or were still subject to adjustments. It follows that those data necessary for the calculation of some of those risk indicators could not be available for all the institutions concerned or, at the very least, for all of the institutions which have their registered office in a Member State, for at least part of the initial period, it being recalled that those data could not be reported by way of supervisory information under EU law or, as the case may be, under national law.

In that context, the purpose of Article 20(1) of Delegated Regulation 2015/63 is to prevent disproportionate or discriminatory charges from being imposed, as the case may be, on institutions when calculating the *ex ante* contributions specifically because of that gradual implementation of the supervisory requirements and the related reporting requirements. Such a risk exists not only where the data in question are in themselves risk indicators, but also where those data, while not in themselves constituting such indicators, are nevertheless necessary for the calculation of those indicators.

Next, in the light of those considerations, the Court examines whether, when calculating the *ex ante* contributions for the 2021 contribution period, the SRB was entitled to refrain from applying two risk indicators, namely the NSFR and MREL indicators, and two risk sub-indicators, namely the 'complexity' and 'resolvability' sub-indicators, without infringing the provisions of Delegated Regulation 2015/63.

As regards the NSFR indicator, first, it follows from Implementing Regulation 2021/451 [132] that the requirement for institutions to report NSFR information for supervisory purposes, on a harmonised basis, was applicable only from 28 June 2021, that is to say, after the relevant reference year. In addition, without it being necessary to rule on whether the existence of an obligation to report NSFR information by way of supervisory information under national law means that the SRB was required to take it into account when determining that indicator, at least when calculating the *ex ante* contribution on the national base, the SRB explained that, in any event, there was no such obligation under the law of the Member State in which the applicant was established in respect of the relevant reference year. Thus, the Court observes that there is nothing in the case file to show that, for the relevant reference year, NSFR data were included in the supervisory reporting requirements under the law of the Member State. Second, the NSFR indicator is included the data expressly listed in Annex II to Delegated Regulation 2015/63. The Court concludes that the SRB did not infringe the provisions of Delegated Regulation 2015/63 by not taking account of the NSFR indicator in the calculation of the *ex ante* contributions for the 2021 contribution period.

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132 Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) No 680/2014 (OJ 2021 L 97, p. 1).

As regards the MREL indicator, no provision of Implementing Regulation No 680/2014 required the institutions to provide, for the relevant reference year, information on their eligible liabilities to the competent authority by way of supervisory information. Such an obligation was introduced only from 28 June 2021, by Implementing Regulation 2021/763. [133] Article 45(1) of Directive 2014/59 [134] does not call that into question, since it does not contain any obligation to report eligible liabilities by way of supervisory information during the relevant reference year. In addition, without it being necessary to rule on whether the existence of an obligation to report eligible liabilities by way of supervisory information under national law means that the SRB was required to take them into account when determining the MREL indicator, at least when calculating the *ex ante* contribution on the national base, the SRB explained that, in any event, there was no such obligation under the law of the Member State in respect of the relevant reference year. Thus, there is nothing in the documents before the Court to show that, under German law, MREL-related information was subject to supervisory reporting requirements during the relevant reference year. Furthermore, although the MREL indicator is not mentioned as such in Annex II to Delegated Regulation 2015/63, that annex nevertheless refers to 'eligible liabilities' among the data to be submitted to the resolution authorities. Moreover, those liabilities constitute data which are decisive for the calculation of that risk indicator, which is based on data such as, inter alia, own funds, eligible liabilities and the MREL, it being understood that, for the purposes of calculating that indicator, the SRB must determine the amount by which own funds and eligible liabilities exceed the MREL.

In those circumstances, the SRB was entitled to refrain from applying the MREL indicator without infringing Delegated Regulation 2015/63.

With regard to the 'complexity' and 'resolvability' risk sub-indicators, it follows from Delegated Regulation 2015/63 [135] that, when determining the 'complexity' sub-indicator, the SRB is required to take into account the extent to which the business model and organisational structure of the institution concerned are deemed to be complex. [136] Similarly, when determining the 'resolvability' sub-indicator, the SRB must take into account the extent to which that institution can be resolved promptly and without legal impediments. According to Directive 2014/59, [137] the resolvability assessment of an institution is to be made by the resolution authority at the same time as and for the purposes of the drawing up and updating of the resolution plan. Furthermore, in order to assess the resolvability of an institution, it is necessary to take into account the complexity of the structure of the institution. In those circumstances, the complexity assessment is also to be made when drawing up the resolution plan. The drawing up of the resolution plan therefore constitutes a prerequisite for the determination by the SRB of the 'complexity' and 'resolvability' sub-indicators. Furthermore, for the purposes of drawing up an institution's resolution plan, the resolution authority is to take into account, as a minimum, the matters provided for in that directive. [138] The matters it must take into consideration include the amount and type of bail-inable liabilities. Those liabilities correspond to 'eligible liabilities' within the meaning of Delegated Regulation 2015/63, which constitute a necessary piece of data to enable the SRB to set the 'complexity' and 'resolvability' risk sub-indicators.

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133 Commission Implementing Regulation (EU) 2021/763 of 23 April 2021 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council and Directive 2014/59/EU of the European Parliament and of the Council with regard to the supervisory reporting and public disclosure of the minimum requirement for own funds and eligible liabilities (MREL) (OJ 2021 L 168, p. 1).

134 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).

135 According to Article 6(6)(a)(iv) of Delegated Regulation 2015/63.

136 In accordance with Chapter II of Title II of Directive 2014/59.

137 In accordance with Article 15(3) of Directive 2014/59.

138 As set out in Section C of the Annex to Directive 2014/59.

In that regard, it is apparent that, first, the institutions were not required, under Implementing Regulation No 680/2014, to report eligible liabilities for supervisory purposes to the competent authority for the relevant reference year. Second, without it being necessary to rule on whether the possible existence of such an obligation to report eligible liabilities means that the SRB was required to take them into account when determining the 'complexity' and 'resolvability' sub-indicators, at least as regards calculating the *ex ante* contribution on the national base, there is nothing before the Court to show that such an obligation existed under national law.

Consequently, the first condition laid down in Article 20(1) of Delegated Regulation 2015/63 is satisfied as regards those risk sub-indicators. As regards the second condition laid down in that article, although those sub-indicators are not included, as such, in Annex II to Delegated Regulation 2015/63, eligible liabilities, which are a necessary piece of data for the determination of those sub-indicators, are expressly referred to therein.

Therefore, the Court finds that the SRB did not infringe Articles 6, 7 and 20 of Delegated Regulation 2015/63 by not taking account of the 'complexity' and 'resolvability' sub-indicators for the 2021 contribution period.

Judgment of the General Court (Eighth Chamber, Extended Composition), 17 July 2024, Norddeutsche Landesbank – Girozentrale v SRB, T-403/21

Link to the judgment as published in extract form

Economic and Monetary Union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Single Resolution Fund (SRF) – Decision of the SRB on the calculation of the 2021 ex ante contributions – Duty to state reasons – Equal treatment – Proportionality – SRB's discretion – Manifest error of assessment – Plea of illegality – Commission's discretion – Limitation of the temporal effects of the judgment

Hearing an action for annulment, which it upholds, the General Court annuls the decision of the Single Resolution Board ('the SRB') setting the 2021 *ex ante* contributions to the Single Resolution Fund ('the SRF'), in so far as it concerns Norddeutsche Landesbank – Girozentrale, the applicant, on account of the SRB's failure to fulfil its duty to state reasons relating to the determination of the annual target level.

In its judgment, the Court provides clarifications on the consistency of the binning method, used for the purpose of adjusting the basic annual contributions to the actual risk profile of taxpaying institutions, with higher-ranking law.

The applicant is a credit institution established in Germany. On 14 April 2021, the SRB adopted a decision in which it set [139] the 2021 *ex ante* contributions to the SRF of credit institutions and certain investment firms, one of which was the applicant. [140]

[139] In accordance with Article 70(2) of Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ 2014 L 225, p. 1).

[140] Decision SRB/ES/2021/22 of the Single Resolution Board of 14 April 2021 on the calculation of the 2021 *ex ante* contributions to the Single Resolution Fund.

Findings of the Court

As regards the illegality of 'Step 2' in Annex I to Delegated Regulation 2015/63 [141] ('the contested provision'), the applicant submits that the Commission made an error of assessment when it adopted the binning method provided for therein, since it prevents the SRB from making appropriate adjustments to the basic annual contributions in line with the institutions' actual risk profile.

In that regard, initially, the Court infers three stages from that method.

First of all, the SRB must determine a number of bins with a view to comparing the institutions in the light of the various risk indicators and sub-indicators, next, it is to assign, in principle, the same number of institutions to each bin, starting by assigning institutions with the lowest values of the raw indicator to the first bin and, finally, it is to assign all the institutions in a particular bin the same score, referred to as the 'discretised indicator', which it must take into account for the remainder of the calculation of their risk adjusting multiplier.

Subsequently, the Court points out that two specific phenomena follow from that method.

First, it cannot be ruled out that the application of that method may lead to situations in which institutions which, for a given risk indicator, have values that show that they have less risky profiles for that indicator than the average value of the institutions concerned are nevertheless assigned, for the indicator at issue, to one of the bins that are composed of relatively riskier institutions. That consequence follows, in particular, from the fact that certain institutions have 'extreme' values, that is to say, values representing a significant departure from the average. Second, on account of the existence of those extreme values, it cannot be ruled out that the application of the binning method may result in situations in which institutions with values for a particular risk indicator that are close to those of institutions assigned to the preceding bin are however assigned to the next bin, containing institutions with values for that same risk indicator which might sometimes be considerably higher.

However, that does not mean that the binning method is vitiated by a manifest error of assessment.

In that regard, the Court recalls, in the first place, that Delegated Regulation 2015/63 laid down [142] a method for adjusting *ex ante* contributions to the risk profile of institutions which is based on a comparison of their risk profiles. As is apparent from the empirical study carried out prior to the adoption of Delegated Regulation 2015/63, the results of which were summarised in the technical study of the Commission's Joint Research Centre ('the JRC'), the binning method is one of the methods which may enable such a comparison to be made and is even considered to be the most appropriate method for that purpose. The binning method is a recognised statistical method for the purposes of treating extreme values, since it avoids, as far as possible, the presence of those values leading to distorted comparisons. In the present case, that method makes it possible to avoid, as is apparent from the JRC technical study, institutions with high values for certain risk indicators nevertheless receiving a score which indicates a low risk profile for those indicators, since there are certain institutions with extreme values.

In the second place, the Court notes that the binning method is an easy method to compare a large amount of data reported by institutions whose *ex ante* contribution is adjusted to their risk profile. In that regard, it states that the contested provision lays down the rule that the number of bins is calculated on the basis of a formula set out therein and the rule that the SRB assigns, in principle, the same number of institutions to each bin, starting by assigning institutions with the lowest values of the raw indicator to the first bin. The Court considers that the binning method lays down objective

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141 Commission Delegated Regulation (EU) 2015/63 of 21 October 2014 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to *ex ante* contributions to resolution financing arrangements (OJ 2015 L 11, p. 44).

142 In accordance with Article 103(7) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (OJ 2014 L 173, p. 190).

rules that are capable of being easily applied by the SRB, which is, moreover, an objective that may legitimately be pursued by the EU rules.

In the third place, the Court considers that the consequences of the two phenomena cited above are to be qualified by the following four circumstances. First, that the *ex ante* contributions can be adjusted only within the range of a coefficient of between 0.8 and 1.5. [143] The basic annual contribution thus remains the primary factor in determining the *ex ante* contribution having regard to the risk profile of the institutions.

Second, the Court notes, in essence, from the JRC technical study that those phenomena are limited in that they tend to occur primarily in the last bins, and not in the vast majority of the bins.

Third, the Court finds that the institutions in those last bins have higher values for the risk indicator concerned than the institutions assigned to the lower bins.

Fourth, the method of adjusting the *ex ante* contributions to the risk profile takes into account a multitude of risk indicators. [144] An institution is thus assigned, ultimately, to a multitude of bins according to its values and those of the other institutions for each risk indicator. As is apparent from the JRC technical study, institutions tend to be placed in different bins for different risk indicators, which allows for a comprehensive comparison to be made of the institutions concerned.

In those circumstances, the Court rejects the argument that, in introducing the binning method, Delegated Regulation 2015/63 is vitiated by a manifest error of assessment.

2. PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Fourth Chamber), 10 July 2024, PH and Others v ECB, T-323/22

Link to the judgment as published in extract form

Economic and monetary policy – Prudential supervision of credit institutions – Opposition of the ECB to the acquisition of qualifying holdings in a credit institution – Action for annulment – Interest in bringing proceedings – Direct concern – Inadmissibility in part – Reputation and professional competence of the proposed acquirer – Financial soundness – Compliance with prudential requirements – Anti-money laundering and counter-terrorist financing – Proportionality

Hearing an action for annulment, which it dismisses, against a decision of the European Central Bank (ECB) in which it refuses to allow the acquisition of a qualifying holding in a credit institution, the General Court rules on the novel issue of the standing of the company that is selling such a holding to bring an action for the annulment of a decision refusing to allow the proposed acquirer to acquire that holding. In addition, it rules on the question whether, in the context of the assessment of the good repute of the proposed acquirer, the ECB may assess the latter's professional competence.

HKB Bank GmbH ('the target bank') is a credit institution described as 'less significant' [145] that is under the direct prudential supervision of the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal

143 Pursuant to Article 9(3) of Delegated Regulation 2015/63.

144 As is apparent from Article 6 of Delegated Regulation 2015/63.

145 Within the meaning of Article 6(4) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

Financial Supervisory Authority, Germany; 'BaFin'). On 9 April 2020 and 9 July 2020, PH, PI and PJ ('the proposed acquirers') notified BaFin of their intention to acquire a qualifying holding and to exceed holding 50% of the capital and voting rights in the target bank ('the proposed acquisition'), as a result of the acquisition of all the shares held by Socrates Capital in the target bank. By the contested decision, of which the proposed acquirers were notified on 22 March 2022, the ECB opposed the proposed acquisition, given that the proposed acquirers did not meet the criteria of good repute, financial soundness and compliance with prudential requirements or anti-money laundering and counter-terrorist financing requirements.

Findings of the Court

As regards the admissibility of the action brought before the Court by Socrates Capital and the proposed acquirers, the Court notes that, since one and the same action is involved, provided that PH, PI and PJ have standing, there is no need to examine Socrates Capital's standing. However, the Court considers it appropriate, in the interests of the proper administration of justice and in view of the particular importance of the question of admissibility raised by the ECB's plea of inadmissibility, to rule on it.

In that regard, after setting out the rules governing which natural or legal persons are to be accorded standing to bring an action against an act which is not addressed to them, the Court finds that, in the present case, the contested decision was not notified to Socrates Capital. Moreover, no provision required such notification to be given to that applicant as the transferor of the qualifying holding at issue. Since the contested decision is not a regulatory act, the Court is then to examine whether the action, in so far as it is brought by Socrates Capital, fulfils the condition of direct concern.

In that regard, first of all, the Court finds that the purpose of the mechanism for monitoring qualifying holdings is to assess, before such holdings are acquired, the suitability of proposed acquirers wishing to gain access to the banking sector as owners. Therefore, opposition to the acquisition of a qualifying holding in a credit institution must be regarded as not altering the legal position of the company selling such a holding. Although such opposition does call into question the possibility for proposed acquirers to enter into a contract with the seller of a qualifying holding, that opposition does not, however, call into question the seller's right to enter into a transaction to transfer the qualifying holding, which it may conclude with another potential acquirer. That opposition is merely a refusal to allow the proposed acquirers to gain access to the banking sector as owners.

The Court then moves on to find that that conclusion is borne out by the legal context of the contested decision. Directive 2013/36 [146] makes no reference either to the publication of the notification of the acquisition of a qualifying holding in a credit institution, or to the possibility of third parties being involved in the administrative procedure, or indeed to the systematic publication of the decision of the competent authority. If the opposition to the acquisition of a qualifying holding is not observed, it provides for penalties only in respect of the exercise of the voting rights corresponding to the shareholding acquired by the proposed acquirers. Thus, in the present case, the contested decision assesses the suitability of the proposed acquirers and not the lawfulness of the sale and purchase agreement.

In addition, the Court observes that the clause in the sale and purchase agreement stipulating that the agreement will not enter into force without the ECB's authorisation was voluntarily inserted by the parties to the agreement. It is true that a contractual clause may reflect legislation. However, in the present case, that clause reflects legislation which makes the proposed acquirer individually subject to an administrative authorisation the purpose of which is to assess whether that acquirer is suitable to access the banking sector as an owner. Accordingly, the ECB is not ruling on the conformity of any

146 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338).

agreement entered into between the proposed acquirers and the seller of a shareholding in a credit institution when it assesses the notification of that acquisition.

Lastly, although the contested decision does constitute an interference with the right to property and the freedom to conduct a business of the proposed acquirers, it cannot be regarded as constituting an interference with the same rights vis-à-vis Socrates Capital. The contested decision does not directly affect Socrates Capital's right to sell its shares in the target bank.

The Court therefore concludes that the contested decision does not amount to a general prohibition on Socrates Capital selling its shares in the target bank and that, therefore, Socrates Capital is not directly concerned by the contested decision. Consequently, it dismisses the action as inadmissible in so far as it concerns Socrates Capital.

As regards whether it is possible for the ECB, as part of the assessment of the good repute of the proposed acquirers, to assess their professional competence, the Court finds that it is true that Article 23(1) of Directive 2013/36 makes reference, in subparagraph (a), only to the reputation of the proposed acquirer, [147] whereas subparagraph (b) of that article makes reference to the reputation, knowledge, [148] competence and experience [149] of any member of the management body who will direct the business of the credit institution as a result of the proposed acquisition.

However, the Court notes that, according to its usual meaning, to be of 'good repute' means being 'worthy of esteem' or being 'known to be respectable'. Such a definition, which refers in particular to public opinion, does not preclude a person's good repute from being dependant on his or her professional competence. In addition, according to recital 8 of Directive 2007/44, [150] the provisions of which were reproduced in Directive 2013/36, the application of the criterion concerning the reputation of the proposed acquirer implies the determination of whether any doubts exist as to the integrity 'and professional competence' of the proposed acquirer and whether those doubts are founded.

The Court also states that taking into consideration professional competence when examining the reputation of the proposed acquirer is consistent with assessing the 'suitability' of the proposed acquirer and with the objective of monitoring the acquisition of qualifying holdings, which is to ensure the sound and prudent management of the credit institution. Given that the holder of a qualifying holding is in a position to influence the credit institution concerned, his or her professional competence contributes to that sound and prudent management of that institution. The Joint Guidelines [151] support that interpretation, since they state that the reputation of the proposed acquirer should cover his or her integrity and his or her professional competence. Moreover, the wording used in German law in that area does not make it possible to preclude such an interpretation, since the explanatory memorandum to the German statute which transposes Directive 2007/44 states that the reliability criterion consists of determining whether there are doubts as to the integrity 'and professional ability' of the proposed acquirer and whether those doubts are well founded.

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147 Article 23(1)(a) of Directive 2013/36.

148 Article 23(1)(b) of Directive 2013/36.

149 Article 91(1) of Directive 2013/36.

150 Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ 2007 L 247, p. 1).

151 Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, adopted by the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), published on 20 December 2016.

The Court concludes from the foregoing that the reputation criterion referred to in Directive 2013/36 must be interpreted as including an assessment of the professional competence of the proposed acquirer.

X. SOCIAL POLICY

1. PROTECTION OF PART-TIME WORKERS

Judgment of the Court of Justice (First Chamber), 29 July 2024, KfH Kuratorium für Dialyse und Nierentransplantation, C-184/22 and C-185/22

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Article 157 TFEU – Equal treatment between men and women in matters of employment and occupation – Directive 2006/54/EC – Article 2(1)(b) and Article 4, first paragraph – Prohibition of indirect discrimination on grounds of sex – Part-time work – Directive 97/81/EC – Framework Agreement on part-time work – Clause 4 – Prohibition on treating part-time workers less favourably than comparable full-time workers – Payment of additional pay only for overtime worked by part-time workers in excess of the normal working hours set for full-time workers

Following a reference for a preliminary ruling from the Bundesarbeitsgericht (Federal Labour Court, Germany), the Court of Justice has clarified the conditions under which the payment of additional pay for overtime, which, in the case of part-time workers, is provided for only in respect of hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation, constitutes 'less favourable' treatment and indirect discrimination on grounds of sex.

IK (Case C-184/22) and CM (Case C-185/22) are employed as part-time care assistants by KfH Kuratorium für Dialyse und Nierentransplantation eV, a provider of out-patient dialysis services operating throughout the Federal Republic of Germany. Under their employment contracts, they are required to work 40% and 80% respectively of the normal working week for a full-time employee, which is set at 38.5 hours by the general collective agreement applicable in the sector concerned.

The applicants in the main proceedings brought an action before the Arbeitsgericht (Labour Court, Germany), seeking to obtain a time credit corresponding to the additional pay payable for overtime worked in excess of the working hours agreed in their employment contract, as well as compensation. They claimed that they were treated less favourably than full-time employees because they worked part-time and they suffered indirect discrimination on grounds of sex in so far as the defendant in the main proceedings predominantly employs women on a part-time basis.

Those actions having been dismissed, IK and CM brought an appeal before the Landesarbeitsgericht Hessen (Higher Labour Court of Hesse, Germany), which ordered the employer to credit their time-savings accounts, but dismissed the claim for payment of compensation.

Hearing an appeal on a point of law, the referring court decided to ask the Court whether IK and CM had been subject to 'less favourable' treatment as part-time workers within the meaning of Clause

4(1) of the Framework Agreement on part-time work [152] and indirect discrimination on grounds of sex, within the meaning of Directive 2006/54. [153]

Findings of the Court

In the first place, the Court finds that national legislation under which additional pay for overtime is payable to part-time workers only in respect of hours worked in excess of the normal working hours laid down for full-time workers in a comparable situation constitutes 'less favourable' treatment of part-time workers within the meaning of Clause 4(1) of the Framework Agreement.

In this respect, it emphasises first of all that that clause must not be interpreted restrictively and that its purpose is to apply the principle of non-discrimination to part-time workers.

Since the fact that the services performed by the applicants in the main proceedings are comparable to those performed by full-time workers does not appear to be disputed in the present case, the Court then turns to the question whether there is a difference in treatment between persons working as part-time care assistants and those working as full-time care assistants.

In that regard, it is apparent from the orders for reference that a person working as a part-time care assistant must work the same number of hours as a person working as a full-time care assistant in order to receive additional pay for overtime, regardless of the normal working hours agreed individually in that person's employment contract. Thus, persons working as full-time care assistants receive additional pay for overtime from the very first hour worked in excess of their normal working hours, i.e. 38.5 hours per week, while persons working as part-time care assistants do not receive additional pay for hours worked in excess of the normal working hours agreed in their employment contracts but below the normal working hours set for persons working as full-time care assistants.

As a result, it appears that persons working as part-time care assistants are subject to 'less favourable' treatment than persons working as full-time care assistants.

Finally, the Court provides the referring court with the necessary information to enable it to assess whether that difference in treatment may be regarded as justified on 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement.

In this respect, it points out that that concept of 'objective grounds' requires the difference in treatment found to exist to be justified by the presence of precise and specific factors, characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria, in order to ensure that that difference in treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose.

As regards the question whether the objective of deterring employers from requiring workers to work overtime in excess of the individually agreed working hours for those workers is capable of constituting 'objective grounds' within the meaning of Clause 4(1) of the Framework Agreement, setting a uniform threshold for part-time workers and full-time workers as regards the grant of additional pay for overtime is not, in the case of part-time workers, capable of achieving that objective.

Furthermore, with regard to the objective of avoiding unfavourable treatment of full-time workers compared to part-time workers, full-time workers would be treated in the same way as part-time workers with regard to overtime, subject to the application of the principle *pro rata temporis*. Thus,

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152 Framework Agreement on part-time work, concluded on 6 June 1997 ('the Framework Agreement'), which is annexed to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

153 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

that second objective is also incapable of justifying the difference in treatment between part-time workers and full-time workers.

In the second place, the Court concludes that the national legislation at issue also constitutes indirect discrimination on grounds of sex within the meaning of Article 157 TFEU and Article 2(1)(b) and the first paragraph of Article 4 of Directive 2006/54.

Although this is an apparently neutral measure, it is apparent from the orders for reference that that measure places a significantly greater proportion of women at a disadvantage compared with male persons without it also being necessary for the group of workers who are not disadvantaged by that legislation, namely full-time workers, to be made up of a considerably higher number of men than women. It is for the referring court to assess to what extent the information available to it concerning the situation of the workforce is valid and whether that information may be taken into account. The national court must also examine all the relevant factors of a qualitative nature in order to determine whether such a disadvantage exists by taking into consideration all the workers subject to the national legislation on which the difference in treatment in question is based.

Moreover, that indirect discrimination is not likely, any more than 'less favourable' treatment of part-time workers compared with full-time workers is, and for the same reasons, to be justified by the pursuit, first, of the objective of deterring employers from requiring workers to work overtime in excess of the working time agreed individually in their employment contracts and, secondly, of the objective of preventing full-time workers from being treated less favourably than part-time workers.

2. COLLECTIVE REDUNDANCIES

Judgment of the Court of Justice (Second Chamber), 11 July 2024, Plamaro, C-196/23

Link to the full text of the judgment

Reference for a preliminary ruling – Social policy – Directive 98/59/EC – Collective redundancies – Article 1(1)(a) and Article 2 – Obligation to inform and consult workers' representatives – Scope – Termination of employment contracts on the ground of the employer's retirement – Articles 27 and 30 of the Charter of Fundamental Rights of the European Union

Hearing a request for a preliminary ruling from the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain), the Court of Justice extends its case-law on collective redundancies to specify that an employer who retires must comply with the provisions of Directive 98/59 [154] and fulfil the obligation to inform and consult workers with a view to avoiding the terminations of employment contracts, reducing their number or, at least, mitigating the effects thereof.

In the present case, the applicants were employed in one of the establishments belonging to FC's undertaking. On 17 June 2020, they were informed by FC of the termination, with effect from 17 July 2020, of their employment contracts, owing to FC's retirement. That retirement resulted in the termination of 54 ongoing employment contracts, which included the 8 contracts of the applicants in the main proceedings.

The applicants therefore brought an action against FC in order to challenge the unlawful dismissal that they considered that they had been subject to. Hearing an appeal against the dismissal of that

[154] Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1998 L 225, p. 16).

action, the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia, Spain) is called upon to rule on whether the terminations of the employment contracts of the applicants in the main proceedings must be held to be dismissals that are null and void as a result of the failure to comply with the procedure of consulting the workers' representatives, provided for in the national Workers' Statute, [155] notwithstanding the fact that those terminations were caused by FC's retirement.

That court wonders whether the exclusion, by that statute, from the scope of the consultation procedure at issue, in cases in which the number of terminations of employment contracts exceeds that provided for in Article 1 of Directive 98/59, where those terminations are the result of the employer's retirement, complies with Directive 98/59 and, if not, whether the workers concerned may rely on that directive against their natural person employer, even though that directive had not been correctly implemented in domestic law.

Findings of the Court

As regards, in the first place, the question of whether the information and consultation procedure provided for in Directive 98/59 must be applied where the termination of employment contracts at issue is the result of the employer's retirement, the Court recalls, first of all, that the concept of 'redundancy', within the meaning of Article 1(1)(a) of that directive, does not require, inter alia, that the underlying causes of the termination of the employment contract reflect the employer's wishes and, secondly, that a termination of an employment contract does not escape the application of the directive just because it depends on external circumstances not contingent on the employer's will.

Furthermore, even in some circumstances in which the definitive termination of the undertaking's activity is not contingent upon the employer's will and where full application of Directive 98/59 is impossible, it remains the case that the application of that directive is not to be excluded in its entirety. In particular, in accordance with the first paragraph of Article 2(2) of that directive, the purpose of consulting the workers' representatives is not only to avoid collective redundancies or to reduce the number of workers affected, but also, inter alia, to mitigate the consequences of such redundancies by recourse to accompanying social measures aimed, in particular, at aid for redeploying or retraining workers made redundant. Those consultations therefore remain relevant where the foreseen terminations of employment contracts are connected with the employer's retirement.

In that regard, the Court also observes that the specific circumstances of a situation in which the natural person employer has died, [156] where there is neither a decision to terminate employment contracts nor a prior intention to carry out those terminations, nor yet the possibility for the employer concerned to carry out the information and consultation procedure provided for in Directive 98/59, are not present in the situation in which the termination of the employment contracts is the consequence of such an employer's retirement. In that latter situation, the employer contemplates those terminations of employment contracts in the light of his or her retirement and, in principle, is capable of conducting consultations seeking, inter alia, to avoid those terminations or to reduce their number or, in any event, to mitigate their consequences.

The termination of the employment contracts of a number of workers greater than that provided for in that Article 1(1) of Directive 98/59, as a result of the retirement of the employer, consequently falls within the concept of 'collective redundancy', within the meaning of that directive, and gives rise to the obligation to inform and consult the workers' representatives provided for in that Article 2.

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155 Article 51 of the Estatuto de los Trabajadores (Workers' Statute) in the version following Real Decreto Legislativo 2/2015, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores (Royal Legislative Decree 2/2015 approving the consolidated text of the Workers' Statute) of 23 October 2015 (BOE No 255 of 24 October 2015, p. 100224) ('the Workers' Statute').

156 The situation at issue in the judgment of 10 December 2009, *Rodríguez Mayor and Others* (C-323/08, EU:C:2009:770), which also concerned the provisions of the Workers' Statute.

As regards, in the second place, the question of whether a national court, hearing proceedings between private individuals, is required to disapply such a national law on the ground that it is contrary to the provisions of Directive 98/59, the Court replies in the negative.

In that regard, it recalls that a directive, which has either not been transposed or has been incorrectly transposed, cannot of itself impose obligations on an individual, and cannot therefore be relied on as such against an individual.

The same applies in respect of Articles 27 [157] and 30 [158] of the Charter of Fundamental Rights of the European Union ('the Charter'), cited by the referring court. It is clear from the wording of those provisions that, for those articles to be fully effective, they must be given more specific expression in provisions of EU or national law. Rules such as those contained in the provisions of Article 1(1) and Article 2 of Directive 98/59, addressed to the Member States and defining the situations in which a procedure of information and consultation of workers' representatives must take place in the event of collective redundancies of those workers, as well as the substantive and procedural conditions that must be satisfied by that information and consultation, cannot be inferred, as directly applicable rules of law, from the wording of Articles 27 or 30 of the Charter. Furthermore, since those articles do not suffice by themselves to confer on individuals a right which they may invoke as such, it could not be otherwise if they are considered in conjunction with the articles concerned of Directive 98/59.

Therefore, Articles 27 and 30 of the Charter cannot be invoked, either by themselves or in conjunction with Article 1(1) and Article 2 of Directive 98/59, in a dispute between individuals, such as that at issue in the main proceedings, in order to conclude that the national provisions which are not in conformity with the provisions of that directive should not be applied.

XI. CONSUMER PROTECTION: UNFAIR TERMS

Judgment of the Court of Justice (Fourth Chamber), 4 July 2024, Caixabank and Others (Review of transparency in collective actions), C-450/22

Link to the full text of the judgment

Reference for a preliminary ruling – Unfair terms in consumer contracts – Directive 93/13/EEC – Mortgage loan agreements – Clauses limiting the variation of the interest rates – 'Floor' clauses – Collective action seeking an order to cease and desist from using those clauses and reimbursement of the payments made in that respect, involving a significant number of sellers or suppliers and consumers – Plain and intelligible nature of those clauses – Concept of the 'average consumer who is reasonably well informed and reasonably observant and circumspect'

Ruling on a request for a preliminary ruling from the Tribunal Supremo (Supreme Court, Spain), the Court of Justice clarifies the scope of the concept of 'average consumer' and identifies the criteria applicable to the examination of the transparency of a contractual term in the light of Directive

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157 Entitled 'Workers' right to information and consultation within the undertaking', which provides that workers must, at different levels, be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices.

158 Entitled 'Protection in the event of unjustified dismissal', which provides that every worker has the right to protection against unjustified dismissal, in accordance with EU law and national laws and practices.

93/13, [159] in the context of a collective action seeking an order to cease and desist from using a 'floor' clause, [160] brought against a significant number of sellers or suppliers from the same economic sector who have used that clause for a very long period.

In November 2010, a Spanish association of users of banks, savings banks and insurance [161] brought, before the Juzgado de lo Mercantil No 11 de Madrid (Commercial Court No 11, Madrid, Spain) a collective action, ultimately against more than one hundred credit institutions, seeking an order to cease and desist from using the floor clause contained in the general conditions of mortgage loan agreements used by those credit institutions, as well as reimbursement of the sums paid on the basis of that clause by the consumers concerned. That court upheld that action in respect of almost all the credit institutions in question, finding that the floor clause was null and void and ordering that that clause cease to be used, while also requiring those institutions to reimburse the sums unduly received pursuant to that clause. [162]

Almost all the appeals brought by those credit institutions were dismissed by the Audiencia Provincial de Madrid (Provincial Court, Madrid, Spain). The credit institutions that were unsuccessful on appeal lodged appeals on a point of law before the referring court, which has doubts concerning two legal issues. The first concerns whether a collective action is an appropriate procedural mechanism for examining the transparency of floor clauses, while the second relates to the difficulty of applying the concept of 'average consumer' in the main proceedings given that those clauses are aimed at various categories of consumers and were used for a very long period during which the degree of awareness of those clauses was developing.

Findings of the Court

The Court examines, in the first place, whether a national court may review the transparency of a contractual term in the context of a collective action brought against a large number of sellers or suppliers operating in the same economic sector, and concerning a very large number of contracts.

In that context, the Court notes, at the outset, that in parallel to the individual right of a consumer to bring an individual action before a court for examination of whether the terms of a contract to which he or she is a party are unfair, Directive 93/13 [163] allows Member States to introduce a check on such terms contained in standard contracts by means of collective actions for an injunction brought in the public interest by consumer-protection associations. While those actions have different purposes and legal effects, the taking into account of all the circumstances attending the conclusion of a contract when assessing of the court's own motion the unfairness of a contractual term, which characterises individual actions, must not preclude the bringing of a collective action. Furthermore, as regards the relationship between individual actions and collective actions, while it is for each internal legal order to establish the rules governing that relationship, under the principle of procedural autonomy, those rules cannot undermine the exercise of the freedom of choice, afforded to consumers under Directive 93/13, to assert their rights either by means of an individual action or by means of a collective action.

Thus, the Court states, first, that the scope of the obligation to draft contractual terms in plain, intelligible language, incumbent on sellers or suppliers, does not depend on the type of action, whether individual or collective, by which a consumer or an organisation having a legitimate interest in protecting him or her seeks to assert the rights recognised by Directive 93/13. To that effect, it

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159 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

160 That clause was used by credit institutions and provided for a minimum rate below which the variable interest rate could not fall ('the floor clause').

161 The Asociación de Usuarios de Bancos, Cajas de Ahorros y Seguros de España (Adicae).

162 The reimbursement concerned the sums unduly received as from 9 May 2013, the date of publication of judgment No 214/2013 of the Supreme Court by which that court decided that the declaration that a floor clause was null and void produced effects *ex nunc*.

163 And, more specifically, the mechanism laid down in Article 7(2) of Directive 93/13.

clarifies that its case-law concerning the scope of the requirement of transparency of contractual terms, arising from individual actions, is transposable to collective actions. For those reasons, judicial review of the transparency of contractual terms cannot be limited solely to terms which form the subject matter of individual actions. Indeed, no provision of Directive 93/13 permits the inference that that review is excluded as regards terms that form the subject matter of collective actions, provided, however, that where a collective action is brought against a number of sellers or suppliers, that action is directed against sellers or suppliers from the same economic sector, which use or recommend the use of the same general contractual terms or similar terms. [164]

Second, the Court observes that, by its very nature, the examination of the transparency of a contractual term, which is carried out by the national court in the context of a collective action, cannot concern circumstances specific to individual situations, but would relate to standardised practices of sellers or suppliers. Thus, when assessing the transparency of a floor clause, it is for the national court to examine, in the light of the nature of the goods or services which are the subject matter of the contracts concerned, whether the average consumer, who is reasonably well informed and reasonably observant and circumspect, is in a position, at the time the contact is concluded, to understand the functioning of that term and to evaluate its potentially significant economic consequences. To that end, that court must take into account all the standard contractual and pre-contractual practices followed by each seller or supplier concerned and any other circumstances which the court might consider relevant in order to exercise its power of review with regard to each of the defendants.

Third, the Court points out that the complexity of a case, as a result of the very large number of defendants and the multiple different wording of the terms concerned, is not a relevant criterion for assessing the national court's obligation to examine the transparency of contractual terms in the context of a collective action, provided that the conditions laid down in Article 7(3) of Directive 93/13 are satisfied. Consequently, Directive 93/13 [165] allows a national court to review the transparency of a contractual term in the context of a collective action brought against a large number of sellers or suppliers operating in the same economic sector and concerning a very large number of contracts, provided that those contracts contain the same term or similar terms.

In the second place, the Court clarifies the concept of 'average consumer who is reasonably well informed and reasonably observant and circumspect', in the context of the examination of the transparency of a contractual term forming part of contracts aimed at specific categories of consumers and which has been used for a very long period of time during which the degree of awareness of that term was developing.

Thus, the Court points out that, in a similar way to the generic concept of 'consumer', [166] which is objective in nature and is distinct from the knowledge and concrete information that the person concerned actually has, the use of an abstract reference criterion, such as that of 'the average consumer', for reviewing the transparency of a contractual term, makes it possible to avoid making that review dependent on the combination of a complex set of subjective factors which it is difficult, if not impossible, to establish. Indeed, since, in the context of an individual action, the specific knowledge that a consumer may be deemed to have is not capable of justifying a deviation from the level of knowledge of the average consumer, the individual characteristics of different categories of consumers cannot, *a fortiori*, be taken into consideration in the context of a collective action. According to the Court, it is precisely the heterogeneity of the public concerned, relating in the present case to various categories of consumers which are difficult to group together, which makes it necessary to have recourse to the legal fiction of the average consumer. This entails understanding

164 Conditions laid down in Article 7(3) of Directive 93/13.

165 And, in particular, Articles 4(1) and 7(3) thereof.

166 As laid down in Article 2(b) of Directive 93/13.

the latter as being a single abstract entity whose overall perception is relevant for the purposes of its examination.

Consequently, in its analysis of the transparency of floor clauses at the time the mortgage loan agreements concerned were concluded, it will be for the referring court to rely on the perception of the average consumer, who is reasonably well informed and reasonably observant and circumspect, irrespective of the differences which may exist between each individual consumer to whom the agreements in question are aimed, in particular as regards the degree of awareness of the floor clause, income level, age, or occupation. The fact that those agreements are aimed at specific categories of consumers is not such as to lead to a different conclusion.

However, it cannot be excluded a priori that, as a result of the occurrence of an objective event or a matter of common knowledge, such as an amendment to the applicable legislation or a development in case-law widely disseminated and discussed, the referring court considers that the average consumer's overall perception of the floor clause was, during the reference period, altered and enabled the latter to become aware of the potentially significant economic consequences entailed by that clause. In such a situation, Directive 93/13 does not preclude account being taken of changes, during that period, in the perception of the average consumer, with the level of information and attention of that consumer thus being able to depend on the time at which the mortgage loan agreements are concluded.

XII. ENVIRONMENT: HABITATS DIRECTIVE

Judgment of the Court of Justice (First Chamber), 11 July 2024, WWF Österreich and Others, C-601/22

Link to the full text of the judgment

Reference for a preliminary ruling – Validity and interpretation – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Article 12(1) – System of strict protection for animal species – Annex IV – *Canis lupus* (wolf) – Equal treatment between Member States – Article 16(1) – National authorisation to take a specimen of a wild animal of the *canis lupus* species – Evaluation of the conservation status of populations of the species concerned – Geographical scope – Determination of the damage – Satisfactory alternative solution

Ruling on a reference for a preliminary ruling from the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria), the Court of Justice, first, confirms the validity of Article 12 of, and Annex IV to, the Habitats Directive, [167] which establish a system of strict protection for certain animal species, and, second, specifies the conditions for the application of the derogation scheme from that protection, as provided for in Article 16 of that directive.

In 2022, a wild animal specimen belonging to the *canis lupus* (wolf) species was found to be the cause of several sheep attacks in the Province of Tyrol. Taking the view that that wolf represented an imminent significant danger to grazing animals and agricultural crops, the Tiroler Landesregierung

[167] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive').

(Provincial Government of Tyrol, Austria) accordingly authorised the removal of that wolf, by excluding it from the strict protection enjoyed by that animal species under Article 12 of, and Annex IV to, the Habitats Directive.

In that context, several animal and environmental protection organisations brought an action before the referring court, claiming that the removal decision did not satisfy the conditions for derogation laid down in Article 16 of that directive.

Taking the view that the wolf population in Austria has developed since the entry into force of the Habitats Directive, that court is uncertain, first, as to the validity of Article 12(1) of that directive, read in conjunction with Annex IV thereto, in the light of the principle of equal treatment between Member States, in so far as that annex excludes certain wolf populations situated on the territory of other Member States from the system of strict protection established in Article 12 of that directive, but does not exclude the wolf population in Austria. Second, the referring court also raises the question of the conditions for granting a derogation from that strict protection under Article 16 of that directive.

Findings of the Court

In the first place, the Court recalls that the validity of an EU act must be assessed in the light of the information available to the EU legislature on the date of adoption of the legislation at issue. In the present case, at the time of its accession to the European Union on 1 January 1995, the Republic of Austria did not make any reservation as regards the inclusion in Annex IV to the Habitats Directive of the wolf population present in its territory, nor did it adduce any evidence to show that it was in a situation comparable to that of the other Member States whose wolf population was, on the same date, excluded from the system of strict protection.

Furthermore, the favourable development of the wolf population on Austrian territory since that accession corresponds precisely to one of the objectives pursued by the Habitats Directive and may be taken into consideration in order to adapt that complex technical framework which is evolving in nature. In that regard, although the Habitats Directive permits the adaptation of Annex IV to that directive to technical and scientific progress [168] and even if the EU legislature was required to do so in order to remove the wolf population in Austria from the system of strict protection, any failure by that legislature to act cannot constitute, in the context of the preliminary ruling mechanism, a ground for invalidity of Article 12 of that directive, read in conjunction with Annex IV thereto.

In any event, wolves are subject to strict protection under the Berne Convention on the Conservation of European Wildlife and Natural Habitats, [169] to which the European Union is a party and which binds it under international law. Furthermore, in so far as the Habitats Directive seeks to ensure the restoration and maintenance of natural habitats and species of wild fauna and flora at a favourable conservation status, the protection provided for in Article 12 of that directive applies even to species which have achieved such a conservation status, which must be protected against any deterioration of that status.

In the light of those considerations, the Court concludes that there are no factors capable of affecting the validity of Article 12(1) of the Habitats Directive, read in conjunction with Annex IV thereto.

In the second place, as regards the conditions for granting a derogation from the system of strict protection established by the Habitats Directive, the Court recalls, first of all, that Article 16(1) of that directive allows Member States to derogate from those conditions provided that that derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

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168 Article 19 of the Habitats Directive.

169 Convention on the Conservation of European Wildlife and Natural Habitats, signed on 19 September 1979 in Berne (OJ 1982 L 38, p. 3).

In that regard, it is for the competent national authority to determine, as a first step, the conservation status of the populations of the species at issue, and, as a second step, the impact that derogation is capable of having on them. The evaluation carried out in the context of those two steps must be done, first, and necessarily, at local and national level, where the consequences of the derogation are generally felt most directly. It is only when the conservation status of the animal species concerned is favourable at local and national level that the assessment may, second, if the available data allow, be considered at cross-border level.

Next, Article 16(1)(b) of the Habitats Directive allows for derogations in order to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property. Although that provision does not require the occurrence of serious damage prior to the adoption of derogating measures, that damage cannot be purely hypothetical and must, be at least largely attributable to the animal species targeted by the derogation. It follows that, in view of the causal link which must exist between, on the one hand, the grant of the derogation and, on the other hand, the damage caused by that animal species, the concept of 'serious damage' within the meaning of that provision does not cover future indirect damage which is not attributable to the specimen of the animal species concerned.

Finally, a derogation under Article 16 of the Habitats Directive presupposes that there is no other satisfactory solution enabling the objectives relied on in support of the derogation to be achieved. That condition, which is a specific expression of the principle of proportionality, thus requires a balance to be struck between all the interests involved and the criteria to be taken into consideration, such as the ecological, economic and social advantages and disadvantages involved. To that end, the competent national authorities must examine the possibility of using non-lethal preventive means consisting, inter alia, in the implementation of preventive measures in respect of herds and the adoption of measures designed to adapt, where possible, the human practices giving rise to the conflicts, in order to promote a culture of coexistence between the wolf population, herds and breeders.

When determining a satisfactory alternative, those authorities are required to assess, on the basis of the best available scientific and technical knowledge, other possible solutions, taking account, in particular, of their economic implications, without those implications being decisive, and balancing them with the general objective of maintaining or restoring the animal species concerned at a favourable conservation status.

Judgment of the Court of Justice (First Chamber), 29 July 2024, ASCEL, C-436/22

Link to the full text of the judgment

Reference for a preliminary ruling – Conservation of natural habitats and of wild fauna and flora – Directive 92/43/EEC – Articles 2, 4, 11, 12, 14, 16 and 17 – System of strict protection for animal species – *Canis lupus* (wolf) – Cynegetic exploitation – Assessment of the conservation status of populations of the species concerned – Conservation status of that species 'unfavourable-poor' – Exploitation incompatible with the maintenance or restoration of the species at a favourable conservation status – Taking into account of all the most recent scientific data

Hearing a request for a preliminary ruling from the Tribunal Superior de Justicia de Castilla y León (High Court of Justice, Castile and Leon, Spain), the Court of Justice rules on whether it is possible to grant hunting permits for the *canis lupus* species, commonly known as 'the wolf', where the

conservation status of that species has been declared 'unfavourable-poor' for the purpose of the Habitats Directive. [170]

In 2019, the report sent by the Kingdom of Spain to the European Commission, pursuant to Article 17 of the Habitats Directive, for the period 2013-2018, stated that the wolf had an 'unfavourable-poor' conservation status in the Mediterranean, Atlantic and Alpine regions, the first two of those regions including the territory of Castile and Leon.

That said, under the national legislation, the wolf was designated as 'a species of game', and therefore 'huntable', north of the River Douro. In particular, by decision of 9 October 2019, the Directorate-General of Natural Heritage and Forestry Policy of Castile and Leon approved the Plan for the local exploitation of wolves in the hunting grounds situated north of the River Douro in Castile and Leon for the period from 2019 to 2022.

Hearing an action brought against that decision, the referring court asks the Court of Justice whether the Habitats Directive, and more specifically Article 14 thereof, [171] precludes legislation of a Member State under which the wolf is designated as a species whose specimens may be hunted in a part of the territory of that Member State where it is not covered by the strict protection provided for in Article 12(1) of that directive, whereas its conservation status has been considered to be unfavourable throughout the territory of that Member State.

Findings of the Court

In the first place, the Court of Justice recalls that, under Article 12 of the Habitats Directive, read in conjunction with Annex IV(a) thereto, the wolf is one of the species 'of Community interest' for which 'strict protection' must be ensured, within the meaning of that article. That strict protection regime covers, in particular, the Spanish wolf populations situated south of the River Douro, which are expressly included in Annex II to the Habitats Directive, as a 'species of Community interest whose conservation requires the designation of special areas of conservation'. The Spanish wolf populations situated north of that river are, for their part, included in Annex V to the Habitats Directive, as an animal species of Community interest whose taking in the wild and exploitation may be subject to management measures and which therefore fall within the scope of Article 14 of that directive.

In that regard, the fact that an animal or plant species of Community interest is included in Annex V to the Habitats Directive does not mean that its conservation status must, in principle, be regarded as favourable. Indeed, apart from the fact that it is the Member States that communicate the status of those species in their territory to the Commission, that inclusion means only that, in the light of the surveillance obligation laid down in Article 11 of that directive and in order to secure its objective, that species 'may' be subject to management measures, unlike the species included in Annex IV(a) to that directive which benefit in any event from the system of strict protection.

In the second place, as regards the management measures to which the species included in Annex V to the Habitats Directive may be subject, cynegetic exploitation may be restricted or prohibited if that is necessary to maintain the species concerned at, or restore it to, a favourable conservation status.

First, those measures may regard access to certain property, the prohibition of the taking of specimens in the wild and exploitation of certain populations, or even the establishment of systems of quotas. Therefore, although they include hunting rules, the aforementioned measures are such as to restrict, and not to extend, the taking of the species concerned.

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170 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) ('the Habitats Directive').

171 See Article 14(1) of the Habitats Directive: 'If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status'.

Second, the discretion of Member States in determining whether it is necessary to adopt such measures is limited by the obligation to ensure that the taking in the wild of specimens of a species and their exploitation are compatible with that species being maintained at a favourable conservation status.

However, where an animal species has an unfavourable conservation status, the competent authorities must take measures, within the meaning of Article 14 of the Habitats Directive, in order to improve the conservation status of the species concerned in such a way that, in future, its populations are sustainably maintained at a favourable status.

The adoption of measures based on that article is, in any event, permissible only if they contribute to the maintenance of the species concerned at, or their restoration to, a favourable conservation status. Thus, if the analyses carried out within the Member State concerned in respect of the species listed in Annex V to the Habitats Directive provide results such as to demonstrate the need for intervention at national level, that Member State may limit, and not extend, the activities referred to in the aforementioned article, in order to ensure that the taking from the wild of specimens of those species is compatible with the objectives of that directive. The restriction or prohibition of hunting may then be regarded as being a necessary measure in that regard. Such a measure is necessary in particular where the conservation status of the species concerned is unfavourable primarily because of the loss of specimens. However, even if these losses are mainly due to other reasons, it may be necessary not to authorise hunting that would cause additional losses.

Indeed, in accordance with the precautionary principle enshrined in Article 191(2) TFEU, if, after examining the best scientific data available, there remains uncertainty as to whether the exploitation of a species of Community interest is compatible with the maintenance of that species at a favourable conservation status, the Member State concerned must refrain from authorising such exploitation.

In the third place, the Court states that, under Article 11 of the Habitats Directive, Member States are required to undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 of that directive, with particular regard to priority natural habitat types and priority species. That surveillance is essential in order to ensure compliance with the conditions laid down in Article 14 of that directive and to determine the need to adopt measures ensuring that the exploitation of that species is compatible with the maintenance at a favourable conservation status, and constitutes in itself one of the measures necessary to ensure the conservation of that species. Consequently, a species cannot be the subject of cynegetic exploitation and hunted if effective surveillance of its conservation status is not ensured.

In that regard, the assessment of the conservation status of a species and of the appropriateness of adopting measures based on Article 14 of the Habitats Directive must be carried out taking into account not only the report drawn up every six years by the Member States pursuant to Article 17 of that directive, but also the most recent scientific data obtained through that surveillance. Those assessments must be made not only at local level, but also at the level of the biogeographical region, and even at cross-border level. In addition, that surveillance must be undertaken with particular care where the species is listed, in connection with certain regions, among the animal species of Community interest whose conservation requires the designation of special areas of conservation, [172] or which are in need of strict protection [173] and, in connection with neighbouring regions, among species of Community interest whose taking and exploitation may be subject to management measures. [174]

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[172] See Annex II to the Habitats Directive.

[173] See Annex IV(a) to the Habitats Directive.

[174] See Annex V to the Habitats Directive.

In the light of all the foregoing considerations, the Court concludes that Article 14 of the Habitats Directive precludes legislation of a Member State authorising the hunting of wolves in a part of the territory of that Member State where it is not covered by strict protection, whereas the conservation status of that species in that Member State is classified as 'unfavourable-poor'. It is appropriate to take into account, in that regard, the report drawn up every six years pursuant to Article 17 of that directive, all the most recent scientific data, including those obtained from the surveillance provided for in Article 11 of that directive, and the precautionary principle enshrined in Article 191(2) TFEU.

XIII. INTERNATIONAL AGREEMENTS: TRADE AND COOPERATION AGREEMENT WITH THE UNITED KINGDOM - SURRENDER OF A PERSON TO THE UNITED KINGDOM FOR CRIMINAL PROSECUTION

Judgment of the Court of Justice (Grand Chamber), 29 July 2024, Alchaster, C-202/24

Link to the full text of the judgment

Reference for a preliminary ruling – Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other – Surrender of a person to the United Kingdom for criminal prosecution – Competence of the executing judicial authority – Risk of breach of a fundamental right – Article 49(1) and Article 52(3) of the Charter of Fundamental Rights of the European Union – Principle that offences and penalties must be defined by law – Changes, to the detriment of that person, to the licence regime

In a reference for a preliminary ruling from the Supreme Court (Ireland), the Court of Justice, sitting as the Grand Chamber, specifies the obligations of the executing judicial authority where a person who is the subject of an arrest warrant issued on the basis of the Trade and Cooperation Agreement concluded with the United Kingdom of Great Britain and Northern Ireland ('the TCA') [175] claims that there is a risk of breach of a fundamental right in the event of surrender to the United Kingdom.

The District Judge of the Magistrates' Courts of Northern Ireland (United Kingdom) issued four arrest warrants against MA for terrorist offences allegedly committed in July 2020, some of which may justify the imposition of a life prison sentence.

In autumn 2022, the High Court (Ireland) ordered MA to be surrendered to the United Kingdom. MA brought an appeal against that decision before the referring court. He submits that his surrender to the United Kingdom is incompatible with the principle that offences and penalties must be defined by law, enshrined, inter alia, in Article 7 ECHR. [176]

The referring court states that, in the event of MA being surrendered to, and sentenced in, the United Kingdom, his possible release on licence will be governed by United Kingdom legislation adopted after the suspected commission of the offences at issue. The release on licence of a person sentenced for offences such as those of which MA is accused must now be approved by a specialised authority and

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

176 Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

may take place only after that person has served two thirds of his or her sentence. That was not the case under the old system, which provided for automatic release on licence after the convicted person had served half of his or her sentence.

In that context, in the light, in particular, of the guarantees provided by the United Kingdom judicial system as regards the application of the ECHR, the failure to demonstrate the existence of a systemic deficiency that would suggest a probable and flagrant violation of the rights guaranteed by the ECHR in the event of MA being surrendered and his ability to bring an action before the European Court of Human Rights, the referring court rejected MA's argument alleging a risk of a breach of Article 7 ECHR.

That court, however, asks whether it is possible to reach a similar conclusion as regards a risk of a breach of Article 49(1) of the Charter, [177] which states, inter alia, that no heavier penalty is to be imposed than that which was applicable at the time the criminal offence was committed. Furthermore, it questions whether that executing State is competent to rule on an argument alleging that provisions relating to sentences that may be imposed in the issuing State are incompatible with Article 49(1) of the Charter, where the latter State is not required to comply with the Charter and the Court has laid down stringent requirements relating to consideration of a risk of a breach of fundamental rights in the issuing Member State.

Assessment of the Court

In the first place, the Court, after ruling out the applicability of Framework Decision 2002/584 [178] to the execution of the arrest warrants at issue in the main proceedings, notes that it follows from the structure of Title VII of Part Three of the TCA, which concerns cooperation in criminal matters, and in particular from the respective functions of Articles 600 to 604 of that agreement, [179] that a Member State may refuse to execute an arrest warrant issued by the United Kingdom only for reasons arising from the TCA.

In that context, as stated in Article 524(2) of the TCA, Member States are obliged to comply with the Charter, given that a surrender decision constitutes an implementation of Union law within the meaning of Article 51(1) of the Charter. The executing judicial authorities of the Member States are therefore required to ensure respect for the fundamental rights afforded, inter alia, by Article 49(1) of the Charter to the person who is the subject of an arrest warrant issued on the basis of the TCA, without the fact that the Charter is not applicable to the United Kingdom being relevant in that regard.

In the second place, the Court points out that the requirement to undertake a two-step examination, which stems from the case-law relating to Framework Decision 2002/584, [180] cannot be transposed to the TCA. The simplified and effective surrender system established by that framework decision is based on the principle of mutual trust which specifically characterises relations between the Member States and from which stems the presumption of respect for fundamental rights by the issuing Member State. It is true that it cannot be ruled out that an international agreement may establish a high level of confidence between the Member States and certain third countries, such as certain

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177 Charter of Fundamental Rights of the European Union ('the Charter').

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).

179 Those articles concern, inter alia, cases of refusal to execute an arrest warrant issued on the basis of the TCA and the guarantees which must be provided by the issuing State in particular cases.

180 As regards the execution of a European arrest warrant, the executing judicial authority must, as a first step, determine whether there is evidence indicating that there is a real risk of a breach, in the issuing Member State, of a relevant fundamental right on account of either systemic or generalised deficiencies, or deficiencies affecting more specifically an objectively identifiable group of persons. In the context of a second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact on the person who is the subject of a European arrest warrant and whether, having regard to his or her personal situation, there are substantial grounds for believing that that person will run a real risk of a breach of a relevant fundamental right if surrendered to the issuing Member State.

Member States of the European Economic Area. That consideration cannot, however, be extended to all third countries and, in particular, to the United Kingdom.

First of all, the TCA does not establish, between the European Union and the United Kingdom, a special relationship capable of justifying that high level of trust. In particular, the United Kingdom is not part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust. Next, although it is apparent from the TCA that cooperation between the United Kingdom and the Member States is based on long-standing respect for the protection of the fundamental rights and freedoms of individuals, [181] that cooperation is not presented as being based on the preservation of mutual trust between the States concerned which existed before the United Kingdom left the European Union on 31 January 2020. Finally, there are substantial differences between the provisions of the TCA relating to the surrender mechanism and the corresponding provisions of Framework Decision 2002/584.

In the third place, the Court specifies, in those circumstances, the examination which the executing judicial authority is required to undertake where the person concerned invokes before it the existence of a risk of breach of Article 49(1) of the Charter in the event of surrender to the United Kingdom. It points out that the obligation to respect fundamental rights requires that executing judicial authority to determine specifically, following an appropriate examination, whether there are valid reasons to believe that that person is exposed to a real risk of such a breach. To that end, the executing judicial authority must examine all the relevant factors in order to assess the foreseeable situation of the requested person if he or she is surrendered to the United Kingdom, which, unlike the two-step examination referred to above, assumes that both the rules and practices that are generally in place in that country and the specific features of that person's individual situation are to be taken into account simultaneously. It may refuse to give effect to an arrest warrant issued on the basis of the TCA only if it has, in the light of the individual situation of the requested person, objective, reliable, specific and properly updated information establishing substantial grounds for believing that there is a real risk of a breach of Article 49(1) of the Charter.

In addition, before being able to refuse to execute an arrest warrant, the executing judicial authority must, in accordance with the obligation of mutual assistance in good faith laid down in Article 3(1) of the TCA, first request from the issuing judicial authority information concerning the rules of law of the issuing State and the manner in which those rules may be applied to the individual situation of the requested person and, where appropriate, additional guarantees to rule out the risk of breach of Article 49(1) of the Charter.

Lastly, as regards the scope of the latter provision, the Court states that a measure relating to the execution of a sentence will be incompatible with that provision only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty. That is not the case where that measure merely delays the eligibility threshold for release on licence. However, the position may be different, in particular if that measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for.

[181] Article 524(1) of the TCA.

XIV. COMMON FOREIGN AND SECURITY POLICY: RESTRICTIVE MEASURES

Judgment of the General Court (Ninth Chamber, Extended Composition), 17 July 2024, Makhlouf v Council, T-208/22

Common foreign and security policy – Restrictive measures taken in view of the situation in Syria – Freezing of funds and economic resources – Restriction on entry into the territory of the Member States – List of persons, entities and bodies subject to the freezing of funds and economic resources or subject to restrictions on entry into the territory of the Member States – Inclusion and maintenance of the applicant's name on the list – Heir of a person already subject to restrictive measures – Rights of the defence – Error of assessment – Proportionality – Right to property – Freedom to move and reside in the Member States – Right to family life – Non-contractual liability

By its judgment, the General Court dismisses the action for annulment brought by Ms Kinda Makhlouf against the acts which included her name on the lists of persons benefiting from or supporting the policies of the Syrian regime and, for that reason, subject to restrictive measures. It clarifies inter alia the scope of the criterion of family membership established by Decision 2013/255 [182] concerning restrictive measures against Syria and the rules concerning the burden of proof and the rebuttal of the presumption established by that decision.

Ms Kinda Makhlouf is one of the daughters of Mr Mohammed Makhlouf, a businessman of Syrian nationality who died on 12 September 2020 and whose name had been included on the lists of persons and entities subject to the restrictive measures taken against Syria by the Council in 2011. [183]

The applicant's name was included on the lists at issue on 21 February 2022 [184] for the following reason: 'daughter of Mohammed Makhlouf and member of the Makhlouf family'. That listing was based on the criterion of membership of the Assad and Makhlouf families established by Article 27(2)(b) and Article 28(2)(b) of Decision 2013/255, as amended by Decision 2015/1836, and by Article 15(1a)(b) of Regulation No 36/2012, [185] as amended by Regulation 2015/1828. To that end, the Council had relied on the decision opening the succession of Mr Mohammed Makhlouf, issued by a Syrian court on 27 September 2020, which was not contested by the applicant, an heir of the deceased. The inclusion of the applicant's name on the lists at issue was maintained, inter alia, on 25 May 2023. [186]

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

183 See Council Implementing Decision 2011/488/CFSP of 1 August 2011 implementing Decision 2011/273/CFSP concerning restrictive measures against Syria (OJ 2011 L 199, p. 74) and Council Implementing Regulation (EU) No 755/2011 of 1 August 2011 implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria (OJ 2011 L 199, p. 33). The name of Mr Mohammed Makhlouf was removed from those lists by Council Implementing Decision (CFSP) 2022/306 of 24 February 2022 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2022 L 46, p. 95) and by Council Implementing Regulation (EU) 2022/299 of 24 February 2022 implementing Regulation (EU) No 36/2012 (OJ 2022 L 46, p. 1).

184 Council Implementing Decision (CFSP) 2022/242 of 21 February 2022 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2022 L 40, p. 26) and Council Implementing Regulation (EU) 2022/237 of 21 February 2022 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2022 L 40, p. 6).

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

186 Council Decision (CFSP) 2023/1035 of 25 May 2023 amending Decision 2013/255 (OJ 2023 L 139, p. 49) and Council Implementing Regulation (EU) 2023/1027 of 25 May 2023 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2023 L 139, p. 1).

Findings of the Court

In the view of the applicant, the mere fact that she is a member of the Makhlouf family should not justify the adoption of restrictive measures against her. In this regard, the Court holds, first, that the specific inclusion criteria in respect of the different categories of persons covered by Decision 2013/255, as amended by Decision 2015/1836, [187] are autonomous of the general criterion of association with the Syrian regime laid down in that decision. [188] Accordingly, merely belonging to one of the categories of persons at issue is a sufficient basis for taking the restrictive measures in question, without there being any need also to provide evidence of the support that the persons concerned provide to the existing Syrian regime or the benefit that they derive from it. The Court infers from this that the criterion of family membership establishes an objective, autonomous and sufficient criterion to justify the adoption of restrictive measures against 'members of the … Makhlouf [family]'. However, the persons at issue must not be included on the lists at issue if there is sufficient information that they are not associated with the Syrian regime, or do not exercise influence over it or do not pose a real risk of circumvention of the restrictive measures. [189] The Court recalls in this respect that it was the task of the applicant, in the context of a challenge to the contested acts, to adduce evidence in order to rebut the rebuttable presumption of association with the Syrian regime based on the criterion of family membership.

The Court finds in the present case, having regard to the arguments put forward by the applicant and the evidence produced by her relating, first, to her private and family life and, second, to the alleged breakdown in relations between the Makhlouf family and the Syrian regime, that those elements are not capable of rebutting the presumption of association with the Syrian regime.

The Court reaches a similar conclusion regarding the inculpatory evidence contained in a supplementary evidence file which the Council sent to the applicant on 31 May 2022. That evidence includes an article from the Financial Times which reports that the applicant, and other members of the Makhlouf family close to her, acquired apartments in Russia by means of loans and financial arrangements which made it possible divert funds outside Syria and thereby circumvent the restrictive measures imposed by the European Union. As the applicant has not contested that information, which also reveals the existence of links between the applicant and other members of the Makhlouf family subject to the same restrictive measures, she has failed to clarify the source of the funds that, among other things, enabled her to acquire the property in Russia. Consequently, the Court finds, first, that the contested acts are taken on a sufficiently solid factual basis and, second, that the applicant has not validly rebutted the presumption of association with the Syrian regime. Since the contested acts are not vitiated by an error of assessment, it concludes that the action must be dismissed.

Judgment of the General Court (Ninth Chamber, Extended Composition), 17 July 2024, Makhlouf v Council, T-209/22

Common foreign and security policy – Restrictive measures taken in view of the situation in Syria – Freezing of funds and economic resources – Restriction on entry into the territory of the Member States – List of persons, entities and bodies subject to the freezing of funds and economic resources or subject to restrictions on entry into the territory of the Member States – Inclusion and maintenance of the applicant's name on the list – Heir of a person already subject to restrictive measures – Rights of the defence – Error of assessment – Non-contractual liability

187 See Article 27(2)(b) of Decision 2013/255, as amended by Decision 2015/1836.

188 See Article 27(1) and Article 28(1) of Decision 2013/255, as amended by Decision 2015/1836.

189 See Article 27(3) and Article 28(3) of Decision 2013/255, as amended by Decision 2015/1836.

By its judgment, the General Court annuls the restrictive measures adopted by the Council of the European Union against Ms Shalaa Makhlouf, clarifying inter alia the scope of the criterion of family membership established by Decision 2013/255 [190] concerning restrictive measures against Syria and the rules concerning the burden of proof and the rebuttal of the presumption established by that decision.

Ms Shalaa Makhlouf is one of the daughters of Mr Mohammed Makhlouf, a businessman of Syrian nationality who died on 12 September 2020 and whose name had been included on the lists of persons and entities subject to the restrictive measures taken against Syria by the Council in 2011. [191]

The applicant's name was included on the lists at issue on 21 February 2022 [192] for the following reason: 'daughter of Mohammed Makhlouf and member of the Makhlouf family'. That listing was based on the criterion of membership of the Assad and Makhlouf families established by Article 27(2)(b) and Article 28(2)(b) of Decision 2013/255, as amended by Decision 2015/1836, and by Article 15(1a)(b) of Regulation No 36/2012, [193] as amended by Regulation 2015/1828. To that end, the Council had relied on the decision opening the succession of Mr Mohammed Makhlouf, issued by a Syrian court on 27 September 2020, which was not contested by the applicant, an heir of the deceased. The inclusion of the applicant's name on the lists at issue was maintained, inter alia, on 25 May 2023. [194]

Findings of the Court

In the view of the applicant, the mere fact that she is a member of the Makhlouf family should not justify the adoption of restrictive measures against her. In this regard, the Court holds, first, that the specific inclusion criteria in respect of the different categories of persons covered by Decision 2013/255, as amended by Decision 2015/1836, [195] are autonomous of the general criterion of association with the Syrian regime laid down in that decision. [196] Accordingly, merely belonging to one of the categories of persons at issue is a sufficient basis for taking the restrictive measures in question, without there being any need also to provide evidence of the support that the persons concerned provide to the existing Syrian regime or the benefit that they derive from it. The Court infers from this that the criterion of family membership establishes an objective, autonomous and sufficient criterion to justify the adoption of restrictive measures against 'members of the … Makhlouf [family]'. However, the persons at issue must not be included on the lists at issue if there is sufficient information that they are not associated with the Syrian regime, or do not exercise influence over it or do not pose a real risk of circumvention of the restrictive measures. [197] The Court recalls in this

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

191 See Council Implementing Decision 2011/488/CFSP of 1 August 2011 implementing Decision 2011/273/CFSP concerning restrictive measures against Syria (OJ 2011 L 199, p. 74) and Council Implementing Regulation (EU) No 755/2011 of 1 August 2011 implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria (OJ 2011 L 199, p. 33). The name of Mr Mohammed Makhlouf was removed from those lists by Council Implementing Decision (CFSP) 2022/306 of 24 February 2022 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2022 L 46, p. 95) and by Council Implementing Regulation (EU) 2022/299 of 24 February 2022 implementing Regulation (EU) No 36/2012 (OJ 2022 L 46, p. 1).

192 Council Implementing Decision (CFSP) 2022/242 of 21 February 2022 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2022 L 40, p. 26) and Council Implementing Regulation (EU) 2022/237 of 21 February 2022 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2022 L 40, p. 6).

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

194 Council Decision (CFSP) 2023/1035 of 25 May 2023 amending Decision 2013/255 (OJ 2023 L 139, p. 49) and Council Implementing Regulation (EU) 2023/1027 of 25 May 2023 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2023 L 139, p. 1).

195 See Article 27(2)(b) of Decision 2013/255, as amended by Decision 2015/1836.

196 See Article 27(1) and Article 28(1) of Decision 2013/255, as amended by Decision 2015/1836.

197 See Article 27(3) and Article 28(3) of Decision 2013/255, as amended by Decision 2015/1836.

respect that it was the task of the applicant, in the context of a challenge to the contested acts, to adduce evidence in order to rebut the rebuttable presumption of association with the Syrian regime based on the criterion of family membership.

The applicant asserts, in the present case, that, as she came from a marriage which lasted only a few months between her mother and Mr Mohammed Makhlouf, never lived in Syria and spent her childhood with her mother in Lebanon, she visited her father only very infrequently. She also maintains that she acquired US nationality after emigrating to the United States in 1990, where she pursued higher education, and that she now resides there with her husband and her children. She produces a set of documents in support of her statements which, according to the Court, corroborate those statements, the centre of the applicant's interests now being in the United States. The Court also finds that the death notice for Mr Mohammed Makhlouf, which mentions the names of five sons and two daughters of the deceased, does not, as is customary, mention either the name of the applicant or the name of her mother, as the former wife of the deceased. It therefore rules that the evidence produced by the applicant is consistent and credible and that, taken as a whole, it supports to the requisite legal standard her claims regarding her distance from the Makhlouf family. Accordingly, that evidence constitutes a body of sufficiently specific, precise and consistent evidence establishing that she was not, or is no longer, associated with the Syrian regime, that she did not exercise influence over the regime and that she did not pose a real risk of circumvention of the restrictive measures. It follows that in this regard the applicant must be considered to have validly rebutted the presumption of association with the Syrian regime based on the criterion of family membership.

The Court therefore concludes that the contested acts are vitiated by an error of assessment and annuls them in so far as they concern the applicant.

XV. JUDGMENTS PREVIOUSLY DELIVERED

1. APPROXIMATION OF LAWS: PUBLIC PROCUREMENT

Judgment of the Court of Justice (Fourth Chamber), 13 June 2024, BibMedia, C-737/22

Link to the full text of the judgment

Reference for a preliminary ruling – Award of public works, public supply and public service contracts – Directive 2014/24/EU – Article 18 – Principles of equal treatment and transparency – Article 46 – Division of a contract into lots – Opportunity for the tenderer which submitted the second most economically advantageous tender to be awarded a lot on the terms of the most economically advantageous tender

Ruling on a question referred for a preliminary ruling by the Østre Landsret (High Court of Eastern Denmark, Denmark), the Court of Justice clarifies, in a procedure for the award of a public contract divided into lots, the scope of the principles of transparency and equal treatment, and of the ban on negotiations which follows therefrom.

Staten og Kommunernes Indkøbsservice A/S ('SKI'), a central purchasing body owned by the Danish State and Kommunernes Landsforening (Association of Danish Municipalities), launched a tendering procedure with a view to concluding a framework agreement relating to the provision of library materials. The tender specifications of that call for tenders provided that the contracts relating to Danish books and sheet music are divided geographically into two lots (West and East). It also indicated that Lot 2 (West) would be awarded to the tenderer which submits the most economically advantageous tender, while Lot 1 (East) would be awarded to the tenderer which submitted the second most economically advantageous tender, on the condition that it accepts to perform that lot

at the price of the tenderer which submitted the most economically advantageous tender. At the end of the period for submitting tenders and in accordance with the abovementioned terms, as set out in the tender specifications, [198] SKI awarded Lot 2 (West) to BibMedia and proposed to award Lot 1 (East) to AVM, on the condition that it accepts to deliver the supplies and perform the services provided for in that lot at the price offered by BibMedia, of which AVM had been informed.

Following an action brought by AVM before the Klagenævnet for Udbud (Public Procurement Complaints Board, Denmark; 'the Complaints Board'), the Complaints Board found that SKI had infringed Danish law on public procurement on the grounds that the tender specifications were contrary to the ban on negotiations resulting from the principles of equal treatment and transparency. SKI brought an action against that decision before the Retten i Glostrup (Glostrup District Court, Denmark), which remitted it to the Østre Landsret (High Court of Eastern Denmark), the referring court.

In that context, the High Court of Eastern Denmark asked the Court, in essence, whether Article 18(1) of Directive 2014/24 [199] must be interpreted as meaning that the principles of equal treatment and transparency laid down in that provision preclude, in a procedure for the award of a public contract divided into lots, the tenderer which submitted the second most economically advantageous tender from being awarded, in accordance with the terms set out in the procurement documents, a lot on the condition that the tenderer accepts to deliver the supplies and perform the services relating to that lot at the same price as that offered by the tenderer which submitted the most economically advantageous tender and which has therefore been awarded another, larger lot of that contract.

Findings of the Court

After recalling that the principles of equal treatment and transparency preclude any negotiation between the contracting authority and a tenderer during a public procurement procedure, which means that, as a general rule, a tender cannot be amended after it has been submitted, whether at the request of the contracting authority or at the request of the tenderer, the Court considers that a method of awarding public contracts such as that set out in the tender specifications for the call for tenders at issue in the main proceedings does not contain any element of negotiation.

In that regard, the Court notes that such a method for awarding public contracts guarantees, for the award of all lots, that the criterion of the lowest price is fulfilled, without the possibility for the contracting authority to derogate from that criterion or to ask a tenderer to amend its tender, since the contracting authority must base its decision on the prices offered before the expiry of the period for submitting tenders and to observe, throughout that procedure, the order of ranking resulting from those tenders.

In such a public procurement procedure, it is the prices offered before the expiry of the period for submitting tenders which directly and definitively determine the ranking of tenderers. In that ranking, the tenderer which offered the lowest price takes the first place and that tenderer's price is that at which the entirety of the contract will be concluded.

The Court clarifies that the opportunity, provided by the tender specifications to the tenderer submitting the second most economically advantageous tender, of being awarded one lot of the contract results solely, as is expressly stated in the contract documents, from the fact that it takes second place in the ranking resulting from the prices offered in the tenders.

Whether use is made of that opportunity depends on the decision of that tenderer whether or not to accept to perform the lot in question at the price of the tenderer which submitted the most economically advantageous tender. That condition forms part of the detailed terms of the award procedure set out in

198 Paragraph 3.1.1 of the tender specifications.

199 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 Directive on public works, public supply and public service contracts').

the tender specifications. Where the tenderer which has submitted the second most economically advantageous tender does not agree to match that price, it falls to the tenderer which is third in the ranking resulting from the prices offered in the tenders to define its position on that point, and so on in the order of ranking of the tenders for as long as none of the tenderers agree to match the price of the tenderer submitting the most economically advantageous tender. If all the tenderers ranked from second place to last place refuse to perform that lot at that price, the tenderer which submitted the most economically advantageous tender is to be awarded all of the lots of the contract.

Thus, none of the decisions which may be taken by the tenderers ranked from second place to last place involve amending the tenders submitted prior to the expiry of the period prescribed for that purpose or negotiation with the contracting authority. No tenderer has the possibility of changing, by amending its tender or by any negotiation, its position in the ranking or the price at which the contract relating to a given lot will be concluded.

The Court concludes that a contract award procedure such as that at issue in the main proceedings comes, without breaching the principles of equal treatment and transparency, within the scenario referred to in the Directive on public works, public supply and public service contracts, namely that in which a contracting authority decides to award a contract in the form of separate lots, specifying in the procurement documents whether a tender may be submitted for a single lot, for several lots or for all of the lots and indicating which objective and non-discriminatory criteria will be applied to determine the award of lots.

In view of the above considerations, the Court rules that the principles of equal treatment and transparency laid down in that directive do not preclude, in a procedure for the award of a public contract divided into lots, the tenderer which submitted the second most economically advantageous tender from being awarded, in accordance with the terms set out in the procurement documents, a lot on the condition that the tenderer accepts to deliver the supplies and perform the services relating to that lot at the same price as that offered by the tenderer which submitted the most economically advantageous tender and which has therefore been awarded another, larger lot of that contract.

2. ECONOMIC AND MONETARY POLICY: PRUDENTIAL SUPERVISION OF CREDIT INSTITUTIONS

Judgment of the General Court (Third Chamber, Extended Composition), 5 June 2024, BNP Paribas v ECB, T-186/22

Link to the full text of the judgment

Economic and monetary policy – Supervision of credit institutions – Specific supervisory tasks conferred on the ECB – Setting of prudential requirements – Irrevocable payment commitments – Force of *res judicata* – Misuse of powers – Manifest error of assessment – Principle of sound administration – Proportionality

Hearing an action for annulment, which it dismisses, the General Court provides clarification, in the light of its 2020 judgments, [200] as to the individual examination of the situation of a credit institution

[200] Judgments of 9 September 2020, *Société générale* v *ECB* (T-143/18, not published, EU:T:2020:389); of 9 September 2020, *Crédit agricole and Others* v *ECB* (T-144/18, not published, EU:T:2020:390); of 9 September 2020, *Confédération nationale du Crédit mutuel and Others* v *ECB* (T-145/18, not published, EU:T:2020:391); of 9 September 2020, *BPCE and Others* v *ECB* (T-146/18, not published, EU:T:2020:392); of 9 September 2020, *Arkéa Direct Bank and Others* v *ECB* (T-149/18, not published, EU:T:2020:393); and of 9 September 2020, *BNP Paribas* v *ECB* (T-150/18 and T-345/18, EU:T:2020:394) ('the 2020 judgments').

carried out by the European Central Bank (ECB) in the exercise of its task of prudential supervision. The Court rules specifically on the prudential and accounting treatment of irrevocable payment commitments (IPCs), [201] which may lead to an overstatement of the Common Equity Tier 1 (CET 1) level, [202] and thus alter the coverage of risk of that credit institution, to the point of leading, at the ECB's request, to the implementation of corrective measures provided for in Regulation No 1024/2013. [203]

BNP Paribas, the applicant, is a French credit institution subject to direct prudential supervision by the ECB.

On 31 March 2021, the ECB sent the applicant a questionnaire relating to its treatment of the IPCs. After receiving the applicant's replies, the ECB sent the latter a draft decision following completion of the Supervisory Review and Evaluation Process (SREP), including, inter alia, a prudential requirement for the cumulative amount of the IPCs to be deducted from the CET 1 capital ('the deduction measure'). Following the applicant's observations, the ECB adopted the decision of 2 February 2022 ('the contested decision'). [204] In that decision, the ECB determined, in essence, that the arrangements implemented and the applicant's own funds and liquidity did not ensure sound management and coverage of its risks, since the level of CET 1 capital was overstated. In order to cover that risk, the ECB imposed, first, the deduction measure and, second, a reporting requirement. [205] Complaining that the ECB had failed to carry out an individual examination of its situation, the applicant brought an action before the Court for annulment of the contested decision.

Findings of the Court

As a preliminary point, it should be noted that the ECB did not appeal against the 2020 judgments which had partially annulled its decisions referred to in those judgments. However, the decisions contested in the present case are not intended to replace the decisions that were annulled in the judgment in *BNP Paribas* v *ECB*. Indeed, the ECB takes a decision each year under the SREP which enters into force on the date specified in that decision. On the same date, the previous year's SREP decision is to cease to apply, unless the new SREP decision provides otherwise. Thus, the alleged infringement of the obligation, under Article 266 TFEU, for an institution whose act has been declared void, to take the necessary measures to comply with the judgment annulling that act cannot succeed. However, the Court assesses whether the ECB exceeded its powers by adopting [206] a deduction measure without actually having carried out an individual examination.

In the first place, as regards the individual examination carried out by the ECB, the Court notes, first of all, that the fact that the ECB did not appeal against the 2020 judgments means that they have acquired the force of *res judicata*. Even though the ECB did not, strictly speaking, replace the annulled decisions with new SREP decisions for the year concerned by the cases, the fact remains that, in the new rounds of SREP decisions, in order to avoid the new decisions being vitiated by the same irregularities as those identified in the 2020 judgments, the ECB is required to respect the terms of the judgments of the Court.

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201 Those commitments constitute an option for discharging the obligation to contribute to resolution funds or guarantee schemes, where the amount due will be paid at first request of the authority responsible for the resolution funds or guarantee schemes. That contract is accompanied by a guarantee that the funds will be made exclusively available in an amount equal to the contribution due.

202 Those funds are intended to ensure continuity of the business of a credit institution and to prevent situations of insolvency.

203 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ 2013 L 287, p. 63).

204 Decision ECB-SSM-2022-FRBNP-7 of the European Central Bank of 2 February 2022 ('the decision of 2 February 2022').

205 Pursuant to Article 16(2)(d) and (j) of Regulation No 1024/2013, respectively.

206 In breach of Article 4(1)(f) and Article 16(1)(c) and (2)(d) and (j) of Regulation No 1024/2013, as clarified in the 2020 judgments.

Next, in the 2020 judgments, the Court found that the decisions contested did not refer to any individual examination by the ECB aimed at verifying whether the applicants had implemented arrangements, strategies, processes and mechanisms in order to address the prudential risks associated with the treatment of IPCs as off-balance-sheet items and, where appropriate, satisfying themselves of their relevance in the light of such risks.

Consequently, the Court states that, in the 2020 judgments, it annulled the decisions referred to it, because the ECB had not carried out the individual supervisory review of the applicants required by the provisions of Regulation No 1024/2013. [207] In that regard, it notes that, following the annulment of the decisions which were the subject of the 2020 judgments, the ECB developed a methodology for carrying out, in the context of its SREP assessment for subsequent years, a more specific examination of the situation of the credit institutions giving IPCs.

In the present case, the examination was carried out in accordance with that methodology of the ECB and consists in a questionnaire which resulted in the ECB examining – having regard to the replies of the institutions subject to prudential supervision and contributing to the financing of the Single Resolution Fund (SRF) and to the deposit guarantee schemes by giving IPCs – whether those institutions were exposed to the risk of overstating CET 1 capital and, if so, whether that risk was covered. To that end, the questions asked concerned the amounts of the IPCs given, the collateral provided, the accounting and prudential treatment of the IPCs and collateral, and possible scenarios for the collateral being retrieved or the IPCs being called, including the relationship between those different scenarios. Furthermore, in order to assess the arrangements, strategies, processes and mechanisms implemented by the credit institution concerned to manage the risk, and the own funds and liquidity held to cover it, the ECB requested further information on, for example, accounting and prudential treatment, risk mitigants, capital and liquidity measures, and any other measures employed in order to mitigate the risk of overstating CET 1 capital.

Thus, in the first stage, the ECB determined whether the applicant faced a risk of an overstatement of the CET 1 capital [208] and, in the second stage, examined the applicant's individual situation, in order to determine whether the arrangements, strategies, processes and mechanisms implemented by it, and the own funds and liquidity it held, ensured a sound management and coverage of the risk of overstatement of the CET 1 capital. The ECB ultimately concluded that those factors, thus examined, did not ensure a sound management and coverage of the risk identified, which justified the deduction measure.

Accordingly, the Court holds that the ECB took into account the relevant factors, as referred to in Article 4(1)(f) and Article 16(1)(c) of Regulation No 1024/2013, and that it carried out an individual examination of the applicant's situation.

In the second place, as regards the argument – which the Court rejects – that the ECB failed to adduce evidence of a risk and that the examination which it carried out was intended to create a rule of general application, the Court observes, first, that the ECB did indeed identify a risk specific to the applicant. In its task of prudential supervision, the ECB took into account, as a starting point, the accounting treatment applied by the applicant, as a factual element, among others, in order to determine whether, and if so how, the applicant managed and covered the prudential risks which it faced as a result of giving IPCs and providing collateral. Thus, the ECB found that the applicant had opted for a combined accounting treatment, consisting in treating the IPCs as off-balance-sheet items, while entering the sums put up as collateral as an asset on its balance sheet, at their full nominal value, in the form of a claim for repayment. Such a choice meant, for the ECB, that the contribution to the financing of the resolution funds and deposit guarantee funds was not reflected in the balance sheet, resulting in a risk of overstatement of the CET 1 capital.

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207 Article 4(1)(f) and Article 16(1)(c) and (2)(d) of Regulation No 1024/2013.

208 In accordance with the powers conferred by Article 16(1)(c) and (2)(d) of Regulation No 1024/2013.

Second, the Court notes that the ECB did not create any rule of general application, since the accounting treatment of IPCs and the associated collateral are specific to each institution and the applicable accounting rules leave a certain margin, or even a certain choice, enjoyed by the applicant.