COURT OF JUSTICE
OF THE EUROPEAN UNION

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SELECTION OF MAJOR JUDGMENTS

YEAR 2022

COLLECTION OF RÉSUMÉS
BY THE RESEARCH AND DOCUMENTATION DIRECTORATE

Preface

The *Selection of major judgments* is a new annual publication which is intended to make the case-law of the Courts of the European Union more visible and accessible. It contains a collection of résumés of the main decisions of the Court of Justice and the General Court of the European Union, produced by the Research and Documentation Directorate.

As part of a new approach to disseminating case-law, the *Selection of major judgments* is designed to meet the new requirements of communication on court activity and highlights, for legal professionals, the main developments in case-law over the past year.

Based on a selection of decisions by the Court of Justice and the General Court, this edition provides a summary analysis of the main developments in case-law over the last year. Those developments are presented in the form of the aforementioned summaries, grouped by subject matter and inspired by the structure of the Treaties of the European Union. For each résumé, a hyperlink is provided to the text of the decision.

The *Selection of major judgments*, which is available in its entirety in digital format, was designed from the outset as a tool for use within a digital context, as part of the Institution's policy of digitalisation.

Celestina Iannone
Director
Research and Documentation

Chapter 1 – The Court of Justice

I. Values of the European Union

Judgment of 16 February 2022 (Full Court), Hungary v Parliament and Council (C-156/21, EU:C:2022:97)

(Action for annulment – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States – Legal basis – Article 322(1)(a) TFEU – Alleged circumvention of Article 7 TEU and Article 269 TFEU – Alleged infringements of Article 4(1), Article 5(2) and Article 13(2) TEU and of the principles of legal certainty, proportionality and equality of Member States before the Treaties)

Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 [1] established a 'horizontal conditionality mechanism' intended to protect the budget of the European Union in the event of a breach of the principles of the rule of law in a Member State. To that end, that regulation allows the Council of the European Union, on a proposal from the European Commission, to adopt, under the conditions set out in the regulation, appropriate protective measures such as the suspension of payments to be made from the Union budget or the suspension of the approval of one or more programmes to be paid from that budget. The contested regulation makes the adoption of such measures subject to the submission of specific evidence capable of establishing not only that there has been a breach of the principles of the rule of law, but also the impact of that breach on the implementation of the Union budget.

The contested regulation follows on from a series of initiatives which concern, more generally, the protection of the rule of law in the Member States [2] and which are intended to provide answers, at EU level, to increasing concerns relating to the compliance by several Member States with the common values of the European Union as set out in Article 2 TEU. [3]

Hungary, supported by the Republic of Poland, [4] brought an action seeking, principally, annulment of the contested regulation and, in the alternative, annulment of certain of its provisions. In support of its claims, it submitted, in essence, that that regulation, although formally presented as an act which falls within the scope of the financial rules referred to in Article 322(1)(a) TFEU, is in fact intended to penalise as such all breaches by a Member State of the principles of the rule of law, the requirements

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1 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, p. 94, 'the contested regulation').

2 See, in particular, the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 July 2019, 'Strengthening the rule of law within the Union – A blueprint for action', COM(2019) 343 final, following the Communication from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU framework to strengthen the rule of law', COM(2014) 158 final.

3 The founding values of the European Union, common to the Member States, which are set out in Article 2 TEU, include the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

4 The Republic of Poland also brought an action for the annulment of Regulation 2020/2092 (Case C-157/21).

of which are, in any event, insufficiently precise. Hungary therefore bases its action, inter alia, on the EU's lack of competence to adopt such a regulation owing to both the lack of a legal basis and the circumvention of the procedure laid down in Article 7 TEU, and on a failure to comply with the requirements of the principle of legal certainty.

The Court, thus called upon to rule on the EU's powers to defend its budget and its financial interests against effects that may result from breaches of the values contained in Article 2 TEU, considered that the present case is of fundamental importance which justified it being referred to the full Court. For the same reasons, the Court granted the European Parliament's request that the case be dealt with pursuant to the expedited procedure. In its judgment, the Court dismisses Hungary's action for annulment in its entirety.

Findings of the Court

Prior to examining the substance of the action, the Court rules on the Council's request that various passages of Hungary's application be disregarded in so far as they are based on material taken from a confidential opinion of the Council Legal Service which had been disclosed without the required authorisation. In that regard, the Court confirms that it is, in principle, permissible for the institution concerned to make production for use in legal proceedings of such an internal document subject to prior authorisation. Nonetheless, where the legal opinion in question relates to a legislative procedure, as in the present case, account should be taken of the principle of openness, since the disclosure of such an opinion increases the transparency and openness of the legislative process. Thus, the overriding public interest in transparency and openness of the legislative process outweighs, in principle, the interest of the institutions as regards the disclosure of an internal legal opinion. In the present case, since the Council did not prove that the opinion concerned is of a particularly sensitive nature or has a particularly wide scope that goes beyond the context of the legislative process in question, the Court therefore refuses the Council's request.

As regards the substance, the Court, in the first place, examines the pleas relied on in support of the principal claim for annulment of the contested regulation in its entirety, alleging, first, that the European Union lacked competence to adopt that regulation and, secondly, breach of the principle of legal certainty.

As regards, first, the legal basis for the contested regulation, the Court points out that the procedure laid down by that regulation can be initiated only where there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way. Furthermore, the measures that may be adopted under the contested regulation relate exclusively to the implementation of the Union budget and are all such as to limit the financing from that budget according to the impact on the budget of such an effect or serious risk. Therefore, the contested regulation is intended to protect the European Union from effects resulting from breaches of the principles of the rule of law in a sufficiently direct way, and not to penalise those breaches as such.

In response to Hungary's line of argument that a financial rule cannot have the objective of defining the scope of the requirements inherent in the values referred to in Article 2 TEU, the Court points out that compliance by the Member States with the common values on which the European Union is founded – which have been identified and are shared by the Member States and which define the very identity of the European Union as a legal order common to those States – such as the rule of law and solidarity, justifies the mutual trust between those States. Since that compliance is thus a condition for the enjoyment of all the rights deriving from the application of the Treaties to the Member State concerned, the European Union must be able to defend those values, within the limits of its powers.

On that point, the Court specifies, first, that compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it

may disregard after its accession. Secondly, it points out that the Union budget is one of the principal instruments for giving practical effect, in the EU's policies and activities, to the fundamental principle of solidarity between Member States and that the implementation of that principle, through the Union budget, is based on the Member States' mutual trust in the responsible use of the common resources included in that budget.

The sound financial management of the Union budget and the financial interests of the European Union may be seriously compromised by breaches of the principles of the rule of law committed in a Member State. Those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.

Accordingly, a 'horizontal conditionality mechanism', such as that established by the contested regulation, which makes the receipt of financing from the Union budget subject to the respect by a Member State for the principles of the rule of law, is capable of falling within the scope of the power conferred by the Treaties on the European Union to establish 'financial rules' relating to the implementation of the Union budget. The Court makes clear that the provisions of the contested regulation which identify those principles, which list cases that may be indicative of breaches of those principles, which specify the situations or conduct that such breaches must concern and which define the nature and scope of the protective measures that may, where appropriate, be adopted, are constituent elements of that mechanism and thus form an integral part of it.

Next, as regards the complaint alleging circumvention of the procedure laid down in Article 7 TEU and the provisions of Article 269 TFEU, the Court rejects Hungary's line of argument that only the procedure laid down in Article 7 TEU grants the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values contained in Article 2 TEU in a Member State. In addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.

Furthermore, the Court observes that the purpose of the procedure laid down in Article 7 TEU is to allow the Council to penalise serious and persistent breaches of each of the common values on which the European Union is founded and which define its identity, in particular with a view to compelling the Member State concerned to put an end to those breaches. By contrast, the contested regulation is intended to protect the Union budget, and only in the event of a breach of the principles of the rule of law in a Member State which affects or seriously risks affecting the efficient implementation of that budget. Furthermore, the procedure laid down in Article 7 TEU and that established by the contested regulation differ as regards their subject matter, the conditions for initiating them, the conditions for the adoption and lifting of the measures provided for and the nature of those measures. Consequently, those two procedures pursue different aims and each has a clearly distinct subject matter. It follows, moreover, that the procedure established by the contested regulation cannot be regarded as intended to circumvent the limitation on the Court's general jurisdiction, provided for by Article 269 TFEU, since its wording refers only to the review of the legality of an act adopted by the European Council or by the Council under Article 7 TEU.

Lastly, since the contested regulation allows the Commission and the Council to examine only situations or conduct attributable to the authorities of a Member State which appear relevant to the efficient implementation of the Union budget, the powers granted to those institutions by that regulation do not go beyond the limits of the powers conferred on the European Union.

Secondly, in its examination of the plea alleging breach of the principle of legal certainty, the Court holds that Hungary's line of argument concerning the lack of precision in the contested regulation is wholly unfounded, both as regards the criteria relating to the conditions for initiating the procedure and as regards the choice and scope of the measures to be adopted. In that regard, the Court observes at the outset that the principles set out in the contested regulation, as constituent elements

of the concept of 'the rule of law', [5] have been developed extensively in its case-law, that those principles have their source in common values which are also recognised and applied by the Member States in their own legal systems and that they stem from a concept of 'the rule of law' which the Member States share and to which they adhere, as a value common to their constitutional traditions. Consequently, the Court finds that the Member States are in a position to determine with sufficient precision the essential content and the requirements flowing from each of those principles.

As regards, more specifically, the criteria relating to the conditions for initiating the procedure and the choice and scope of the measures to be adopted, the Court specifies that the contested regulation requires, for the adoption of the protective measures which it lays down, that a genuine link be established between a breach of a principle of the rule of law and an effect or serious risk of effect on the sound financial management of the Union or the financial interests of the Union and that such a breach must concern a situation or conduct that is attributable to an authority of a Member State and relevant to the efficient implementation of the Union budget. In addition, the Court notes that the concept of 'serious risk' is clarified in the EU financial legislation and points out that the protective measures that may be adopted must be strictly proportionate to the impact of the breach found on the Union budget. In particular, according to the Court, those measures may target actions and programmes other than those affected by such a breach only where that is strictly necessary to achieve the objective of protecting the Union budget as a whole. Lastly, the Court finds that the Commission must comply, subject to review by the EU judicature, with strict procedural requirements involving inter alia several consultations with the Member State concerned, and concludes that the contested regulation meets the requirements of the principle of legal certainty.

In the second place, the Court examines the alternative claims for partial annulment of the contested regulation. In that regard, the Court decides, first, that the annulment of Article 4(1) of the contested regulation would cause the substance of that regulation to be altered, since that provision sets out the conditions for the adoption of the protective measures provided for by that regulation, with the result that the claim for annulment of that provision alone must be regarded as inadmissible. Secondly, the Court holds as unfounded the complaints directed against a series of other provisions of the contested regulation, alleging lack of a legal basis and infringements of the provisions of EU law relating to public deficits and of the principles of legal certainty, proportionality and equality of Member States before the Treaties. It therefore rejects all of the alternative claims and therefore Hungary's action in its entirety.

Judgment of 16 February 2022 (Full Court), Poland v Parliament and Council (C-157/21, EU:C:2022:98)

(Action for annulment – Regulation (EU, Euratom) 2020/2092 – General regime of conditionality for the protection of the European Union budget – Protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States – Legal basis – Article 322(1)(a) TFEU – Article 311 TFEU – Article 312 TFEU – Alleged circumvention of Article 7 TEU and Article 269 TFEU – Alleged infringements of Article 4(1), Article 5(2) and Article 13(2) TEU, of the second paragraph of Article 296 TFEU, of Protocol (No 2) on the application of the principles of subsidiarity and proportionality and of the principles of conferral,

[5] Under Article 2(a) of the contested regulation, the concept of 'the rule of law' includes 'the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law'.

legal certainty, proportionality and equality of the Member States before the Treaties – Alleged misuse of powers)

Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 [6] is part of the continuance of a series of initiatives covering, more generally, the protection of the rule of law in Member States [7] which are designed to provide a response, at EU level, to growing concerns regarding respect by a number of Member States for the common values of the Union as set out in Article 2 TEU. [8]

The Republic of Poland, supported by Hungary, [9] brought an action seeking the annulment of the contested regulation. In support of its claim, it argued, in essence, that that regulation, whilst formally presented as an act forming part of the financial rules referred to in Article 322(1)(a) TFEU in actual fact seeks to penalise any interference by a Member State with the principles of the rule of law, the requirements of which are, in any event, insufficiently precise. Poland therefore founded its action, inter alia, on the European Union lacking competence to adopt such a regulation, on account of an absence of legal basis and circumvention of the procedure laid down in Article 7 TEU, together with disregard for the limits inherent in the competences of the European Union and disregard for the principle of legal certainty.

Having been called upon to give a ruling on the competences of the European Union to protect its budget and its financial interests against effects which may result from breaches of the values set out in Article 2 TEU, the Court found that the present case is of fundamental importance, justifying it being attributed to the full formation of the Court. For the same reasons, the European Parliament's request for the case to be dealt with pursuant to the expedited procedure was granted. In its judgment, the Court dismisses in its entirety the action for annulment brought by Poland.

Findings of the Court

Prior to examining the substance of the action, the Court gives a ruling on the request by the Council for various extracts from Poland's application to be disregarded, in so far as they are based on material taken from a confidential opinion of the legal service of the Council, thereby disclosed without the necessary authorisation. In that regard, the Court confirms that it is, in principle, permissible for the institution concerned to make production for use in legal proceedings of such an internal document subject to prior authorisation. Nonetheless, in the situation where the legal opinion in question relates to a legislative procedure, as in the present case, consideration must be given to the principle of transparency, since the disclosure of such an opinion increases the transparency and openness of the legislative process. Accordingly, the overriding public interest in the transparency and openness of the legislative process prevails, as a rule, over the interest of the

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6 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, p. 94; 'the contested regulation').

7 See, in particular, the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 July 2019, 'Strengthening the rule of law within the Union – A blueprint for action', COM(2019) 343 final, following the Communication from the Commission to the European Parliament and the Council of 11 March 2014, 'A new EU framework to strengthen the rule of law', COM(2014) 158 final.

8 The founding values of the European Union, common to the Member States, set out in Article 2 TEU, include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

9 Hungary also brought an action seeking the annulment of Regulation 2020/2092 (Case C-156/21).

institutions in relation to the disclosure of an internal legal opinion. In the present case, given that the Council did not establish that the opinion concerned was particularly sensitive in nature or particularly wide in scope, going beyond the context of the legislative process at issue, the Court accordingly rejects the Council's request.

As regards the substance of the matter, in the first place, the Court examines together the pleas alleging that the European Union lacked competence to adopt the contested regulation.

So far as concerns, first of all, the legal basis of the contested regulation, the Court finds that the procedure laid down by that regulation can be initiated only where there are reasonable grounds for considering not only that there have been breaches of the principles of the rule of law in a Member State, but, in particular, that those breaches affect, or seriously risk affecting, in a sufficiently direct way, the sound financial management of the Union or the protection of its financial interests. In addition, the measures which may be adopted under the contested regulation relate exclusively to the implementation of the Union budget and are all such as to limit the financing from that budget according to the impact on the budget of such an effect or serious risk. Accordingly, the regulation is intended to protect the Union budget from effects resulting, in a sufficiently direct way, from breaches of the principles of the rule of law and not to penalise those breaches as such.

In response to Poland's line of argument that the purpose of a financial rule cannot be to clarify the extent of the requirements inherent in the values referred to in Article 2 TEU, the Court points out that compliance by the Member States with the common values on which the European Union is founded – which have been identified and are shared by the Member States and which define the very identity of the European Union as a legal order common to those States – such as the rule of law and solidarity, justifies the mutual trust between those States. Since that compliance is a condition for the enjoyment of all the rights deriving from the application of the Treaties to the Member State concerned, the European Union must be able to defend those values, within the limits of its powers.

On that point, the Court specifies, first, that compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession. Secondly, the Court states that the Union budget is one of the principal instruments for giving practical effect, in the EU's policies and activities, to the fundamental principle of solidarity between Member States and that the implementation of that principle, through the Union budget, is based on the Member States' mutual trust in the responsible use of the common resources included in that budget.

The sound financial management of the Union budget and the financial interests of the Union may be seriously compromised by breaches of the principles of the rule of law committed in a Member State. Those breaches may result, inter alia, in there being no guarantee that expenditure covered by the Union budget satisfies all the financing conditions laid down by EU law and therefore meets the objectives pursued by the European Union when it finances such expenditure.

Accordingly, a 'horizontal conditionality mechanism', such as that established by the contested regulation, which makes receipt of financing from the Union budget subject to the respect by a Member State for the principles of the rule of law, is capable of falling within the power conferred by the Treaties on the European Union to establish 'financial rules' relating to the implementation of the Union budget. The Court clarifies that the provisions of the contested regulation which identify those principles, which set out situations which may be indicative of a breach of those principles, which clarify the situations or conduct which must be concerned by such breaches and which define the nature and scope of protective measures which may, where necessary, be adopted are constituent elements forming an integral part of such a mechanism.

Next, as regards the complaint alleging circumvention of the procedure laid down in Article 7 TEU, the Court rejects Poland's line of argument that only the procedure laid down in Article 7 TEU grants the institutions of the Union the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values contained in Article 2 TEU in a Member State. Indeed, in

addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.

Furthermore, the Court finds that the purpose of the procedure laid down in Article 7 TEU is to allow the Council to penalise serious and persistent breaches of each of the common values on which the European Union is founded and which define its identity, in particular with a view to compelling the Member States concerned to put an end to those breaches. By contrast, the contested regulation is intended to protect the Union budget, and applies only in the event of a breach of the principles of the rule of law in a Member State which affects or seriously risks affecting the proper implementation of that budget. In addition, the procedure laid down in Article 7 TEU and the procedure established by the contested regulation differ as regards their purpose, conditions for initiation, conditions for adoption and for lifting of the measures envisaged and the nature of those measures. Therefore, those two procedures pursue different aims and each has a clearly distinct subject matter. It follows, moreover, that the procedure established by the contested regulation cannot be regarded as seeking to circumvent the limitation on the general jurisdiction of the Court laid down in Article 269 TFEU, since its wording concerns only the review of the legality of an act adopted by the European Council or by the Council under Article 7 TEU.

In the second place, the Court examines the other substantive complaints put forward by Poland against the contested regulation.

In that context, the Court finds, first of all, that Poland's claims alleging breach of the principle of conferral and of the duty to respect the essential functions of the Member States are without foundation. The Court points out that the Member States' free exercise of the competences available to them in their reserved areas is conceivable only in compliance with EU law. For that reason, by requiring that the Member States thus comply with their obligations deriving from EU law, the European Union is not in any way claiming to exercise those competences itself nor is it, therefore, arrogating them.

Next, in the examination of the pleas alleging failure to respect the national identity of Member States, on the one hand, and breach of the principle of legal certainty, on the other, the Court rules that there is no substantive basis for Poland's line of argument regarding the lack of precision vitiating the contested regulation, both as regards the conditions for initiating the procedure and the choice and scope of the measures to be adopted. In that regard, the Court observes at the outset that the principles set out in the contested regulation, as constituent elements of the concept of the 'rule of law', [10] have been developed extensively in its case-law, that those principles have their source in common values which are also recognised and applied by the Member States in their own legal systems and that they stem from a concept of the 'rule of law' which the Member States share and to which they adhere, as a value common to their constitutional traditions. Consequently, the Court finds that the Member States are in a position to determine with sufficient precision the essential content and the requirements flowing from each of those principles.

As regards, specifically, the conditions for initiating the procedure and the choice and scope of the measures to be adopted, the Court clarifies that the contested regulation requires, for the adoption of the protective measures which it lays down, that a genuine link be established between a breach of a

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10 According to Article 2(a) of the contested regulation, the concept of 'the rule of law' includes 'the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law'.

principle of the rule of law and an effect or serious risk of effect on the sound financial management of the Union or the financial interests of the Union and that such a breach must concern a situation or conduct that is attributable to an authority of a Member States and relevant to the proper implementation of the Union budget. In addition, the Court notes that the concept of 'serious risk' is clarified in the EU financial legislation and states that the protective measures which may be adopted must be strictly proportionate to the impact of the breach found on the Union budget. In particular, those measures may target actions and programmes other than those affected by such a breach only where that is strictly necessary to achieve the objective of protecting the Union budget as a whole. Lastly, the Court finds that the Commission must comply, subject to review by the EU judicature, with strict procedural requirements involving, inter alia, several consultations with the Member State concerned, and concludes that the contested regulation meets the requirements arising from respect for the national identity of Member States and the principle of legal certainty.

Finally, in so far as Poland disputes the very need to adopt the contested regulation, in the light of the requirements of the principle of proportionality, the Court finds that Poland has not put forward any evidence capable of demonstrating that the EU legislature exceeded the broad discretion available to it in that regard The Court rejects that final complaint and is, accordingly, entitled to dismiss the action in its entirety.

II. Withdrawal of a Member State from the European Union [11]

Judgment of 9 June 2022 (Grand Chamber), Préfet du Gers and Institut national de la statistique et des études économiques (C-673/20, EU:C:2022:449)

(Reference for a preliminary ruling – Citizenship of the Union – National of the United Kingdom of Great Britain and Northern Ireland residing in a Member State – Article 9 TEU – Articles 20 and 22 TFEU – Right to vote and to stand as a candidate in municipal elections in the Member State of residence – Article 50 TEU – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Consequences of the withdrawal of a Member State from the Union – Removal from the electoral roll in the Member State of residence – Articles 39 and 40 of the Charter of Fundamental Rights of the European Union – Validity of Decision (EU) 2020/135)

EP, a United Kingdom national residing in France since 1984, was removed from the French electoral roll following the entry into force, on 1 February 2020, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'). [12]

EP challenged that removal before the tribunal judiciaire d'Auch (Court of Auch, France) on the ground that she was no longer entitled to vote either in France, on account of the loss of her status as a citizen of the Union following the withdrawal of the United Kingdom from the Union, or in the United Kingdom, on account of the fact that she no longer enjoyed the right to vote and to stand as a candidate in that State. [13] According to EP, that loss infringes the principles of legal certainty and proportionality and also constitutes discrimination between Union citizens and an infringement of her freedom of movement.

The referring court considers that the application of the provisions of the Withdrawal Agreement to EP constitutes a disproportionate breach of her fundamental right to vote. It asks in that regard whether Article 50 TEU [14] and the Withdrawal Agreement must be interpreted as repealing the EU citizenship of nationals of the United Kingdom, who, while remaining nationals of that State, have resided in the territory of another Member State for more than 15 years and are, accordingly, deprived entirely of the right to vote. If that question is answered in the affirmative, it asks to what extent the relevant provisions of the Withdrawal Agreement [15] and of the TFEU [16] must be regarded as allowing such nationals to retain the rights to EU citizenship that they enjoyed before the withdrawal of the United Kingdom from the Union. It also raises a question concerning the validity of

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11 The judgment of 24 March 2022, ***Galapagos BidCo***. (C-723/20, EU:C:2022:209), must also be mentioned under this heading. That judgment is presented under heading XI.3 'Regulation 2015/848 on insolvency proceedings'.

12 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7).

13 By virtue of a legal rule of the United Kingdom, under which a national of that State who has resided abroad for more than 15 years is no longer entitled to take part in elections in the United Kingdom.

14 Article 50 TEU relates to the right of and arrangements for the withdrawal of a Member State from the European Union.

15 Articles 2, 3, 10, 12 and 127 of the Withdrawal Agreement.

16 Articles 18, 20 and 21 TFEU.

the Withdrawal Agreement and, accordingly, the validity of Council Decision 2020/135 on the conclusion of that agreement. [17]

In its judgment, the Court holds, first, that the relevant provisions of the TEU [18] and of the TFEU, [19] read in conjunction with the Withdrawal Agreement, must be interpreted as meaning that, as from the withdrawal of the United Kingdom from the European Union, nationals of that State who exercised their right to reside in a Member State before the end of the transition period laid down in that agreement no longer enjoy the status of citizen of the Union. More particularly, they no longer enjoy the right to vote and to stand as a candidate in municipal elections in their Member State of residence, including where they are also deprived, by virtue of the law of the State of which they are nationals, of the right to vote in elections held by that State. Second, the Court has not identified any factor capable of affecting the validity of Decision 2020/135.

Findings of the Court

In the first place, the Court recalls that Union citizenship requires, in accordance with Article 9 TEU and Article 20(1) TFEU, possession of the nationality of a Member State and that there is an indissociable and exclusive link between the possession of the nationality of a Member State and the acquisition, and retention, of the status of citizen of the Union.

A series of rights attaches to Union citizenship, [20] including the fundamental and individual right to move and reside freely within the territory of the Member States. In particular, as regards Union citizens residing in a Member State of which they are not nationals, those rights include the right to vote and to stand as a candidate in municipal elections in the Member State where they reside, a right which is also recognised by the Charter of Fundamental Rights of the European Union ('the Charter'). [21] By contrast, none of those provisions enshrines that right for nationals of third States. Consequently, the fact that an individual has, where the State of which he or she is a national used to be a Member State, exercised his or her right to move and reside freely in the territory of another Member State is not such as to enable him or her to retain the status of citizen of the Union and all the rights attached thereto by the TFEU, if, following the withdrawal of his or her State of origin from the European Union, he or she no longer holds the nationality of a Member State.

In the second place, the Court recalls that, by virtue of its sovereign decision, taken under Article 50(1) TEU, to leave the European Union, the United Kingdom has no longer been a member of the European Union since 1 February 2020, so that its nationals now have the nationality of a third State and no longer that of a Member State. The loss of the nationality of a Member State entails, for any person who does not also hold the nationality of another Member State, the automatic loss of his or her status as a citizen of the Union. Accordingly, that person no longer enjoys the right to vote and to stand as a candidate in municipal elections in his or her Member State of residence.

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17 Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1).

18 Article 9 TEU on Union citizenship and Article 50 TEU on the right of and arrangements for the withdrawal of a Member State from the European Union.

19 Article 20 TFEU on Union citizenship, Article 21 TFEU on the freedom of movement and freedom to reside of Union citizens, and Article 22 TFEU on the rights to vote and to stand as a candidate of citizens of the Union.

20 By virtue of Article 20(2) and Articles 21 and 22 TFEU.

21 Article 40 of the Charter.

In that regard, the Court states that, since the loss of Union citizenship for a United Kingdom national is an automatic consequence of the United Kingdom's sovereign decision to withdraw from the European Union, neither the competent authorities of the Member States nor their courts may be required to carry out an individual examination of the consequences of the loss of the status of Union citizens for the persons concerned, in the light of the principle of proportionality.

In the third place, the Court notes that the Withdrawal Agreement contains no provision which maintains, beyond the withdrawal of the United Kingdom from the European Union, in favour of United Kingdom nationals who have exercised their right to reside in a Member State before the end of the transition period, the right to vote and to stand as a candidate in municipal elections in their Member State of residence.

Although that agreement sets out the principle of maintaining the applicability of EU law in the United Kingdom during the transition period, Article 127(1)(b) of that agreement however expressly excludes, by way of derogation from that principle, the application in the United Kingdom and in its territory of the provisions of the TFEU and the Charter [22] relating to the right of citizens of the Union to vote and to stand as a candidate in the European Parliament and in municipal elections in their Member State of residence during that period. Admittedly, the wording of that exclusion refers to the United Kingdom and 'the territory of that State' without expressly referring to its nationals. However, having regard to Article 127(6) of the Withdrawal Agreement, that exclusion must be understood as also applying to United Kingdom nationals who exercised their right to reside in a Member State in accordance with EU law before the end of the transition period. The Member States were therefore no longer required, as from 1 February 2020, to treat United Kingdom nationals residing in their territory as nationals of a Member State as regards the grant of the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections.

An interpretation to the contrary of Article 127(1)(b) of the Withdrawal Agreement, consisting of limiting the application of that agreement solely to the territory of the United Kingdom and therefore solely to Union citizens who resided in that State during the transition period, would create an asymmetry between the rights conferred by that agreement on United Kingdom nationals and Union citizens. That asymmetry would be contrary to the purpose of that agreement, which is to ensure mutual protection for citizens of the Union and for United Kingdom nationals who exercised their respective rights of free movement before the end of the transition period.

As regards the period, which began at the end of the transition period, the Court notes that the right of United Kingdom nationals to vote and to stand as a candidate in municipal elections in the Member State of residence does not fall within the scope of Part Two of the Withdrawal Agreement, which lays down rules designed to protect, after 1 January 2021, on a reciprocal and equal basis, Union citizens and United Kingdom nationals [23] who exercised their rights to freedom of movement before the end of the transition period.

Finally, the first paragraph of Article 18 TFEU and the first paragraph of Article 21 TFEU, [24] which the Withdrawal Agreement renders applicable during the transition period and subsequently, cannot be interpreted as requiring Member States to continue to grant, after 1 February 2020, to United

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22 Articles 20(2)(b) and 22 TFEU and Articles 39 and 40 of the Charter.

23 Article 10(a) and (b) of the Withdrawal Agreement.

24 Article 18 TFEU concerns the prohibition of any discrimination on grounds of nationality and Article 21 TFEU concerns the freedom of movement and the freedom of establishment of citizens of the Union.

Kingdom nationals who reside in their territory the right to vote and to stand as a candidate in municipal elections held in that territory which they grant to Union citizens.

In the fourth and last place, as regards the validity of Decision 2020/135, the Court holds that that decision is not contrary to EU law. [25] In particular, there is no factor that permits the view that the European Union, as a contracting party to the Withdrawal Agreement, exceeded the limits of its discretion in the conduct of external relations, by not requiring that a right to vote and to stand as a candidate in municipal elections in the Member State of residence be provided for United Kingdom nationals who exercised their right to reside in a Member State before the end of the transition period.

25 In the present case, Article 9 TEU, Articles 18, 20, 21 and 22 TFEU and Article 40 of the Charter.

III. Fundamental rights [26]

1. Right to an effective remedy and right to a fair trial [27]

Judgment of 29 March 2022 (Grand Chamber), Getin Noble Bank (C-132/20, EU:C:2022:235)

(Reference for a preliminary ruling – Admissibility – Article 267 TFEU – Concept of 'court or tribunal' – Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Rule of law – Effective judicial protection – Principle of judicial independence – Tribunal previously established by law – Judicial body, a member of which was appointed for the first time to the position of judge by a political body within the executive branch of an undemocratic regime – Way in which the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland) operates – Unconstitutionality of the law on the basis of which that council was composed – Possibility of regarding that body as an impartial and independent court or tribunal within the meaning of EU law)

In 2017, in Poland, several consumers had brought an action before the competent regional court concerning the allegedly unfair nature of a term in the loan agreement which they had concluded with Getin Noble Bank, a bank. Since they did not obtain full satisfaction either at first instance or on appeal, the appellants brought an appeal before the Sąd Najwyższy (Supreme Court, Poland), the referring court.

In order to examine the admissibility of the appeal brought before it, that court is required, in accordance with national law, to determine whether the composition of the panel of judges which delivered the judgment under appeal was lawful. In that context, sitting as a single judge, the referring

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[26] The following judgments must also be mentioned under this heading: judgment of 9 June 2022, ***Préfet du Gers and Institut national de la statistique et des études économiques*** (C-673/20, EU:C:2022:449), on the right to vote in elections to the European Parliament and in municipal elections, presented under heading II. 'Withdrawal of a Member State from the European Union'; judgments of 5 May 2022, ***Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources)*** (C-451/19 and C-532/19, EU:C:2022:354), relating to respect for family life and the rights of the child, presented under heading IV.3. 'Derived right of residence of third-country nationals who are family members of a Union citizen', and of 22 December 2022, ***Generalstaatsanwaltschaft München (Request for extradition to Bosnia and Herzegovina)*** (C-237/21, EU:C:2022:1017), on protection in the event of extradition, presented under heading IV.4. 'Discrimination on grounds of nationality'; judgment of 7 September 2022, ***Cilevičs and Others*** (C-391/20, EU:C:2022:638), relating to cultural and linguistic diversity, presented under heading VIII.2. 'Freedom of establishment'; judgment of 14 July 2022, ***Procureur général près la cour d'appel d'Angers*** (C-168/21, EU:C:2022:558), relating to the principle of proportionality of offences and penalties, presented under heading X.1. 'European arrest warrant'; judgments of 22 February 2022, ***Stichting Rookpreventie Jeugd and Others*** (C-160/20, EU:C:2022:101), relating to the protection of health and the rights of the child, presented under heading XIII.2. 'Tobacco products', and of 8 December 2022, ***Orde van Vlaamse Balies and Others*** (C-694/20, EU:C:2022:963), relating to respect for family life, presented under heading XIII.5. 'Administrative cooperation in the field of taxation', as well as the judgment of 24 February 2022, ***Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto'*** (C-262/20, EU:C:2022:117), concerning fair and equitable working conditions, presented under heading XV.1. 'Organisation of working time'.

[27] The following judgments must also be mentioned under this heading: judgment of 10 March 2022, ***Grossmania*** (C-177/20, EU:C:2022:175), presented under heading VII. 'EU law and national law'; judgment of 8 November 2022, ***Staatssecretaris van Justitie en Veiligheid (Ex officio review of detention)*** (C-704/20 and C-39/21, EU:C:2022:858), presented under heading IX.1. 'Asylum policy'; judgments of 22 February 2022, ***Openbaar Ministerie (Tribunal established by law in the issuing Member State)*** (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100), presented under heading X.1. 'European arrest warrant', of 19 May 2022, ***Spetsializirana prokuratura (Trial of an absconded accused person)*** (C-569/20, EU:C:2022:401), presented under heading X.2. 'Right to be present at the trial', and of 1 August 2022, ***TL (Lack ofinterpretion and translation)*** (C-242/22 PPU, EU:C:2022:611), presented under heading X.3. 'Right to interpretation and translation in criminal proceedings'.

court raises the question whether the composition of the appellate court is consistent with EU law. In its view, the independence and impartiality of the three appeal judges could be called into question by reason of the circumstances in which they were appointed to the office of judge.

In that regard, the referring court, first, refers to the circumstance that the initial appointment of one of the judges (FO) to such a position was by decision of a body of the undemocratic regime that was in Poland before its accession to the European Union and that that judge was kept in that position after the end of that regime, without having sworn a new oath and still benefiting from the length of service acquired when that regime was in place. [28] Second, the referring court claims that the judges concerned were appointed to the appellate court on a proposal of the Krajowa Rada Sądownictwa (National Council of the Judiciary, Poland; 'the KRS'): one of them, in 1998, when the resolutions of the body were not substantiated and no legal remedy was available against them, and the other two, in 2012 and 2015, when, according to the Trybunał Konstytucyjny (Constitutional Court, Poland), the KRS did not operate transparently and its composition was contrary to the Constitution.

By its Grand Chamber judgment, the Court holds, in essence, that the principle of effective judicial protection of the rights which individuals derive from EU law [29] must be interpreted as meaning that the irregularities alleged by the referring court with regard to the appeal judges at issue are not in themselves such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of those judges, nor, therefore, to call into question the status of an independent and impartial tribunal, previously established by law, of the panel of judges in which they sit.

Findings of the Court

As a preliminary point, the Court rejects the plea of inadmissibility according to which the single judge of the Polish Supreme Court, called upon to examine the admissibility of the appeal brought before that court, was not entitled to refer questions to the Court of Justice for a preliminary ruling in view of the flaws in his own appointment, which call into question his independence and impartiality. In so far as a reference for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it meets the requirements laid down by the Court to constitute a 'court or tribunal' within the meaning of Article 267 TFEU. Such a presumption may nevertheless be rebutted where a final judicial decision handed down by a national or international court would lead to the conclusion that the court constituting the referring court is not an independent and impartial tribunal established by law. Since the Court has no information to rebut such a presumption, the request for a preliminary ruling is therefore admissible.

Next, the Court examines the two parts of the questions referred.

By the first part, the referring court asks whether the second subparagraph of Article 19(1) TEU and Article 47 of the Charter preclude a panel of judges in which a judge who, like FO, began their career under the communist regime and was kept in their post after the end of that regime from being considered to be an independent and impartial tribunal.

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28 It will be referred to below as 'circumstances predating accession'.

29 Principle to which the second subparagraph of Article 19(1) TEU refers, according to which 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', and which is affirmed in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), and by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). The latter reaffirms, in Article 7(1) and (2), the right to an effective remedy to which consumers who consider themselves wronged by those terms are entitled.

In that regard, after acknowledging that it has jurisdiction to rule on that question, [30] the Court states that, although the organisation of justice in the Member States falls within the competence of the latter, they are required, in the exercise of that competence, to comply with their obligations under EU law, including the obligation to ensure observance of the principle of effective judicial protection.

As regards the impact on a judge's independence and impartiality of the circumstances prior to accession, relied on by the referring court vis-à-vis judges such as FO, the Court points out that, at the time of Poland's accession to the European Union, it was considered that, in principle, its judicial system was consistent with EU law. In addition, the referring court has provided no specific explanation as to how the conditions for FO's initial appointment would enable undue influence to be exercised on him currently. Thus, the circumstances surrounding his initial appointment could not in themselves be considered to be such as to give rise to reasonable and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge, in the subsequent exercise of his judicial duties.

By their second part, the questions referred seek to ascertain, in essence, whether the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Article 7(1) and (2) of Directive 93/13 preclude a panel of judges connected with the court or tribunal of a Member State in which a judge sits whose initial appointment to a judicial position or subsequent appointment to a higher court occurred either upon selection as a candidate for the position of judge by a body composed on the basis of legislative provisions subsequently declared unconstitutional by the constitutional court of that Member State ('the first circumstance at issue') or after selection as a candidate for the position of judge by a body lawfully composed but following a procedure that was neither transparent nor public and no legal remedy was available against it ('the second circumstance at issue') from being considered to be an independent and impartial tribunal previously established by law.

In that regard, the Court observes that not every error that may take place during the procedure for the appointment of a judge is of such a nature as to cast doubts on the independence and impartiality of that judge.

In the present case, as regards the first circumstance at issue, the Court notes that the Constitutional Court did not rule on the independence of the KRS when it declared unconstitutional the composition of that body at the time of the appointment of the two judges other than FO in the panel of judges who delivered the judgment under appeal before the referring court. That declaration of unconstitutionality is therefore not capable, per se, of calling into question the independence of that body or raising doubts, in the minds of individuals, as to the independence of those judges, with regard to external factors. Moreover, no specific evidence capable of substantiating such doubts was put forward by the referring court to that effect.

The same conclusion must be drawn in the case of the second circumstance at issue. It is not apparent from the order for reference that the KRS, in its composition after the end of the Polish undemocratic regime, lacked independence from the executive and the legislature.

In those circumstances, those two circumstances do not establish an infringement of the fundamental rules applicable to the appointment of judges. Thus, provided that the irregularities relied on do not create a real risk that the executive could exercise undue discretion undermining the integrity of the

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30 According to settled case-law, the Court has jurisdiction to interpret EU law only as regards its application in a new Member State with effect from the date of that State's accession to the European Union. In the present case, even though it relates to circumstances predating accession to the European Union by Poland, the question referred concerns a situation which did not produce all its effects before that date since FO, appointed as a judge before accession, is currently a judge and performs duties corresponding to that office.

outcome of the judicial appointment process, EU law does not preclude a panel of judges in which the judges concerned sit from being considered to be an independent and impartial tribunal established by law.

Judgment of 8 November 2022 (Grand Chamber), Deutsche Umwelthilfe (Approval of motor vehicles) (C-873/19, EU:C:2022:857)

(Reference for a preliminary ruling – Environment – Aarhus Convention – Access to justice – Article 9(3) – Charter of Fundamental Rights of the European Union – Article 47, first paragraph – Right to effective judicial protection – Environmental association – Standing of such an association to bring an action before a national court against EC type-approval granted to certain vehicles – Regulation (EC) No 715/2007 – Article 5(2)(a) – Motor vehicles – Diesel engine – Pollutant emissions – Valve for exhaust gas recirculation (EGR valve) – Reduction of nitrogen oxide (NOx) emissions limited by a 'temperature window' – Defeat device – Authorisation of such a device where the need is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle – State of the art)

Volkswagen AG is a car manufacturer which marketed motor vehicles equipped with a Euro 5 generation EA 189-type diesel engine and with a valve for exhaust gas recirculation ('the EGR valve'), one of the technologies used by car manufacturers to control and reduce emissions of nitrogen oxide (NOx). The software operating the exhaust gas recirculation system was programmed in such a way that, under normal conditions of use, the exhaust gas recirculation rate was reduced. Thus, the vehicles concerned did not comply with the NOx emission limit values laid down by Regulation No 715/2007 on type-approval of motor vehicles. [31]

In the EC type-approval procedure [32] for one of those vehicle models, the Kraftfahrt-Bundesamt (Federal Motor Transport Authority, Germany; 'the KBA') found that the software at issue constituted a defeat device [33] which was not consistent with that regulation. [34]

Volkswagen therefore updated the software by setting the EGR valve so that exhaust gas purification was fully effective only when the outside temperature was greater than 15 °C and lower than 33 °C ('the temperature window'). By decision of 20 June 2016 ('the contested decision'), the KBA granted authorisation for the software at issue.

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31 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

32 Under Article 3(5) of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), 'EC type-approval' means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements of EU law.

33 Within the meaning of Article 3(10) of Regulation No 715/2007. That provision defines a defeat device as 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

34 Article 5 of Regulation No 715/2007.

Deutsche Umwelthilfe, an environmental association which is authorised to bring legal proceedings, in accordance with German law, brought an action against the contested decision before the Schleswig-Holsteinisches Verwaltungsgericht (Administrative Court, Schleswig-Holstein, Germany).

That court notes that, under German law, Deutsche Umwelthilfe does not have standing to bring legal proceedings against the contested decision. It is, however, uncertain whether that association can derive such standing directly from EU law. If so, it raises the question whether the temperature window is compatible with Regulation No 715/2007. Having found that that window constitutes a defeat device within the meaning of that regulation, it asks whether the software in question may be authorised on the basis of the exception to the prohibition of such devices laid down in that regulation, [35] which requires that 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'.

On a request for a preliminary ruling from that court, the Court of Justice, sitting as the Grand Chamber, rules on the standing of an environmental association to challenge before a national court an administrative decision granting an authorisation which may be contrary to EU law, in the light of the Aarhus Convention [36] and the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). It also specifies the circumstances in which a defeat device may be justified under Regulation No 715/2007. [37]

Findings of the Court

First of all, the Court recalls that under Article 9(3) of the Aarhus Convention, each party must ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

In that regard, the Court finds, in the first place, that an administrative decision relating to EC type-approval which may be contrary to Regulation No 715/2007 falls within the material scope of Article 9(3) of the Aarhus Convention, since it constitutes an act of a public authority which is alleged to contravene the provisions of national law relating to the environment. In pursuing the objective of ensuring a high level of environmental protection by reducing NOx emissions from diesel vehicles, Regulation No 715/2007 forms part of 'national law relating to the environment' within the meaning of the aforementioned provision. That finding is in no way affected by the fact that the regulation at issue was adopted on the basis of Article 95 EC (now Article 114 TFEU) and not on a specific legal basis for the environment, since, in accordance with Article 114(3) TFEU, the Commission, in its proposals for measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States concerning environmental protection, is to take as a base a high level of protection, taking account in particular of any new development based on scientific facts.

In the second place, the Court points out that an environmental association authorised to bring legal proceedings falls within the personal scope of Article 9(3) of the Aarhus Convention, inasmuch as it is part of the public concerned by that provision and meets the criteria, if any, laid down in national law.

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35 Article 5(2)(a) of Regulation No 715/2007.

36 Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1; 'the Aarhus Convention').

37 Article 5(2)(a) of Regulation No 715/2007.

In the third place, as regards the concept of criteria laid down in national law within the meaning of that provision, the Court clarifies that although it follows from Article 9(3) of the Aarhus Convention that Member States may, in the context of the discretion they have in that regard, establish procedural rules setting out conditions that must be satisfied in order to be able to pursue the review procedures referred to in that provision, such criteria relate only to the determination of those persons entitled to bring an action. It follows that Member States may not reduce the material scope of Article 9(3) by excluding from the subject matter of the action certain categories of provisions of national environmental law. Furthermore, Member States must comply with the right to an effective remedy, enshrined in Article 47 of the Charter, when establishing the applicable procedural rules and cannot impose criteria so strict that it would be impossible for environmental associations to challenge the acts or omissions that are the subject of the Aarhus Convention. [38] The Court concludes from this that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, precludes a situation where such an association is unable to challenge a decision granting or amending EC type-approval which may be contrary to Regulation No 715/2007. [39] That situation would indeed constitute an unjustified limitation of the right to an effective remedy.

Consequently, it is for the referring court to interpret national procedural law in a manner consistent with the Aarhus Convention and with the right to an effective remedy enshrined in EU law, in order to enable an environmental association to challenge such a decision before a national court. If a consistent interpretation to that effect were to prove impossible and in the absence of direct effect of Article 9(3) of the Aarhus Convention, Article 47 of the Charter confers on individuals a right which they may rely on as such, with the result that it may be relied on as a limit on the discretion left to the Member States in that regard. In such a case, it will be for the referring court to disapply the national provisions precluding an environmental association, such as Deutsche Umwelthilfe, from exercising any right to bring an action against a decision granting or amending EC type-approval which may be contrary to Regulation No 715/2007. [40]

Lastly, the Court finds that the use of a defeat device can be justified by a need to protect the engine against damage or accident and for safe operation of the vehicle, within the meaning of Regulation No 715/2007, [41] only where that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of a component of the exhaust gas recirculation system, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. Furthermore, the need for such a defeat device exists only where, at the time of the EC type-approval of that device or of the vehicle equipped with it, no other technical solution makes it possible to avoid the abovementioned risks.

2. *Ne bis in idem* principle

Judgment of 22 March 2022 (Grand Chamber), bpost (C-117/20, EU:C:2022:202)

(Reference for a preliminary ruling – Competition – Postal services – Tariff system adopted by a universal service provider – Fine imposed by a national postal regulator – Fine imposed by a national competition

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38 Article 9(3) of the Aarhus Convention.

39 Article 5(2) of Regulation No 715/2007.

40 Article 5(2)(a) of Regulation No 715/2007.

41 Article 5(2)(a) of Regulation No 715/2007.

authority – Charter of Fundamental Rights of the European Union – Article 50 – Non bis in idem *principle – Existence of the same offence – Article 52(1) – Limitations to the non bis in idem principle – Duplication of proceedings and penalties – Conditions – Pursuit of an objective of general interest – Proportionality)*

In 2010, the incumbent postal services provider in Belgium, bpost SA, established a new tariff system.

By decision of 20 July 2011, the Belgian postal regulator [42] imposed a fine of EUR 2.3 million on bpost for infringement of the applicable sectoral rules inasmuch as that new system was allegedly based on an unjustified difference in treatment as between consolidators and direct clients.

That decision was annulled by the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium), on the ground that the pricing practice at issue was not discriminatory. That judgment, which has become final, was delivered following a reference for a preliminary ruling which gave rise to the Court's judgment in *bpost*. [43]

In the meantime, by decision of 10 December 2012, the Belgian competition authority determined that bpost had committed an abuse of a dominant position prohibited by the Law on the protection of competition [44] and by Article 102 TFEU. That abuse consisted in the adoption and implementation of the new tariff system in the period between January 2010 and July 2011. Accordingly, the Belgian competition authority fined bpost EUR 37 399 786, the fine previously imposed by the postal regulator having been taken into account in the calculation of that amount.

That decision was also annulled by the cour d'appel de Bruxelles (Court of Appeal, Brussels) because it was contrary to the *non bis in idem* principle. In that regard, that court found that the proceedings conducted by the postal regulator and by the competition authority concerned the same facts.

The Cour de cassation (Court of Cassation, Belgium), however, set aside that judgment and referred the case back to the cour d'appel de Bruxelles (Court of Appeal, Brussels).

In the subsequent proceedings, the cour d'appel de Bruxelles (Court of Appeal, Brussels) decided to refer two questions to the Court of Justice for a preliminary ruling to establish, in essence, whether the *non bis in idem* principle, as affirmed by Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), precludes a postal services provider from being fined for an infringement of EU competition law where, on the same facts, that provider has already been the subject of a final decision relating to an infringement of the rules governing the postal sector.

In answer to those questions, the Court, sitting as the Grand Chamber, specifies both the scope and the limits of the protection conferred by the *non bis in idem* principle guaranteed by Article 50 of the Charter.

Findings of the Court

The Court begins by recalling that the *non bis in idem* principle, as affirmed by Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature for the purposes of that article for the same acts and against the same person.

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42 Institut belge des services postaux et des télécommunications (IBPT) (Belgian Institute for Postal Services and Telecommunications).

43 Judgment of 11 February 2015, *bpost* (C-340/13, EU:C:2015:77).

44 Loi du 10 juin 2006 sur la protection de la concurrence économique (Law of 10 June 2006 on the protection of economic competition) (*Moniteur belge*, 29 June 2006, p. 32755), coordinated by the Royal Decree of 15 September 2006 (*Moniteur belge*, 29 September 2006, p. 50613).

The criminal nature of the proceedings instituted against bpost by the Belgian postal regulator and by the Belgian competition authority having been confirmed by the referring court, the Court goes on to note that the application of the *non bis in idem* principle is subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the '*idem*' condition).

Since the Belgian postal regulator's decision was annulled by a judgment which has acquired the force of *res judicata* and according to which bpost was acquitted in the proceedings brought against it under rules governing the postal sector, it appears that the proceedings instituted by that regulator were disposed of by a final decision, meaning that the '*bis*' condition is satisfied in the present case.

As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, regardless of their legal classification under national law or the legal interest protected. In that regard, identity of the material facts must be understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space.

Consequently, it is for the referring court to determine whether the facts in respect of which the two sets of proceedings were instituted against bpost on the basis, respectively, of rules governing the postal sector and of competition law are identical. Should that be the case, the duplication of the two sets of proceedings brought against bpost would constitute a limitation of the *non bis in idem* principle guaranteed by Article 50 of the Charter.

Such a limitation of the *non bis in idem* principle may nevertheless be justified on the basis of Article 52(1) of the Charter. In accordance with that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. That provision also states that, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In that regard, the Court notes that the possibility, provided for by law, of duplication of the proceedings conducted by two different national authorities and the penalties imposed by them respects the essence of Article 50 of the Charter, provided that the national legislation does not allow for proceedings and penalties in respect of the same facts on the basis of the same offence or in pursuit of the same objective, but provides only for the possibility of a duplication of proceedings and penalties under different legislation.

As regards the question whether such duplication can meet an objective of general interest recognised by the European Union, the Court finds that the two sets of legislation under which proceedings were brought against bpost have distinct legitimate objectives. While the object of the rules governing the postal sector is the liberalisation of the internal market for postal services, the rules relating to the protection of competition pursue the objective of ensuring that competition in the internal market is not distorted. It is thus legitimate, for the purposes of guaranteeing the ongoing liberalisation of the internal market for postal services, while ensuring the proper functioning of that market, for a Member State to punish infringements both under sectoral rules concerning the liberalisation of the relevant market and under national and EU competition rules.

As regards compliance with the principle of proportionality, this requires that the duplication of proceedings and penalties provided for by national legislation does not exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation, it being understood that, when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.

In that regard, the Court states that the fact that two sets of proceedings are pursuing distinct objectives of general interest which it is legitimate to protect cumulatively can be taken into account, in an analysis of the proportionality of the duplication of proceedings and penalties, as a factor that would justify that duplication, provided that those proceedings are complementary and that the additional burden which that duplication represents can accordingly be justified by the two objectives pursued.

With regard to the strict necessity of such duplication of proceedings and penalties, it is necessary to assess whether the resulting burden, for the persons concerned, of such duplication is limited to what is strictly necessary and whether the overall penalties imposed correspond to the seriousness of the offences committed. To that end, it is necessary to examine whether there are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and also to predict that there will be coordination between the two competent authorities; whether the two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe; and whether the overall penalties imposed correspond to the seriousness of the offences committed.

Accordingly, any justification for a duplication of penalties is subject to conditions which, when satisfied, are intended in particular to limit, albeit without calling into question the existence of '*bis*' as such, the functionally distinct character of the proceedings in question and therefore the actual impact on the persons concerned of the fact that those proceedings against them are brought cumulatively.

Judgment of 22 March 2022 (Grand Chamber), Nordzucker and Others (C-151/20, EU:C:2022:203)

(Reference for a preliminary ruling – Competition – Article 101 TFEU – Cartel prosecuted by two national competition authorities – Charter of Fundamental Rights of the European Union – Article 50 – Ne bis in idem *principle – Existence of the same offence – Article 52(1) – Limitations to the* ne bis in idem *principle – Conditions – Pursuit of an objective of general interest – Proportionality)*

Nordzucker AG and Südzucker AG are two German sugar producers which, together with a third major producer, dominate the German sugar market. That market was traditionally divided into three main geographical areas, each controlled by one of those three major producers.

Agrana Zucker GmbH ('Agrana'), which is a subsidiary of Südzucker, is the main sugar producer in Austria.

From no later than 2004, Nordzucker and Südzucker agreed not to compete with each other by penetrating their traditional core sales areas. It was in that context that, at the beginning of 2006, Südzucker's sales director called Nordzucker's sales director to complain about deliveries of sugar on the Austrian market by a Slovak subsidiary of Nordzucker, suggesting that this could have consequences on the German sugar market ('the 2006 telephone conversation').

In order to benefit from the national leniency programmes, Nordzucker subsequently warned both the Bundeskartellamt (Federal Competition Authority, Germany) and the Bundeswettbewerbsbehörde (Federal Competition Authority, Austria) of its participation in an agreement on the German and Austrian sugar markets. Those two authorities initiated investigation procedures at the same time.

In 2014, the German competition authority found, by a decision which has become final, that Nordzucker, Südzucker and the third German producer had participated in an anticompetitive agreement in breach of Article 101 TFEU and the corresponding provisions of German law, and, in particular, imposed a fine of EUR 195 500 000 on Südzucker. That decision also reproduces the content of the 2006 telephone conversation concerning the Austrian sugar market.

By contrast, the Austrian competition authority's application seeking, first, a declaration that Nordzucker, Südzucker and Agrana had infringed Article 101 TFEU and the corresponding provisions of Austrian law and, secondly, the imposition of two fines on Südzucker, one of which to be imposed jointly and severally on Agrana, was dismissed by the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria).

The Austrian competition authority brought an appeal against that decision before the Oberster Gerichtshof (Supreme Court, Austria), the referring court. In that context, the referring court is unsure whether the *ne bis in idem* principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), precludes it from taking account of the 2006 telephone conversation in the proceedings pending before it, since that conversation was expressly referred to in the German competition authority's decision of 2014. That court is also unsure whether, in the light of the Court of Justice's case-law, the *ne bis in idem* principle applies in proceedings finding an infringement, which, owing to an undertaking's participation in a national leniency programme, do not result in the imposition of a fine

In answer to those questions, the Court, sitting as the Grand Chamber, clarifies the relationship with the *ne bis in idem* principle in parallel or successive proceedings under competition law in respect of the same anticompetitive conduct in several Member States.

Findings of the Court

The Court begins by recalling that the *ne bis in idem* principle, as enshrined in Article 50 of the Charter, prohibits a duplication both of proceedings and of penalties of a criminal nature, for the purposes of that article, as regards the same acts and against the same person.

In competition law matters, that principle precludes, specifically, an undertaking's being found liable or the bringing of proceedings against it afresh on the grounds of anticompetitive conduct for which it has been penalised or declared not to be liable by a prior decision that can no longer be challenged. The application of the *ne bis in idem* principle in proceedings under competition law is, therefore, subject to a twofold condition, namely, first, that there must be a prior final decision (the '*bis*' condition) and, secondly, that the prior decision and the subsequent proceedings or decisions concern the same conduct (the '*idem*' condition).

Since the German competition authority's decision of 2014 constitutes a prior final decision which had been given after a determination had been made as to the merits of the case, the '*bis*' condition is met as regards the proceedings conducted by the Austrian competition authority.

As regards the '*idem*' condition, the relevant criterion for the purposes of assessing the existence of the same offence is identity of the material facts, whatever their legal classification under national law or the legal interest protected. The identity of anticompetitive practices must be examined in the light of the territory and the product market concerned and the period during which those practices had as their object or effect the prevention, restriction or distortion of competition.

Accordingly, it is for the referring court to ascertain, by assessing all the relevant circumstances, whether the German competition authority's decision of 2014 found that the cartel at issue existed, and penalised it, as a result of the cartel's anticompetitive object or effect not only in German territory, but also Austrian territory. If that were the case, further proceedings and, as the case may be, further penalties for infringement of Article 101 TFEU and the corresponding provisions of Austrian law, as a result of the cartel in Austrian territory, would constitute a limitation of the fundamental right guaranteed in Article 50 of the Charter.

Such a limitation could not, moreover, be justified under Article 52(1) of the Charter. Article 52(1) provides, inter alia, that any limitation on the exercise of the rights and freedoms recognised by the Charter must genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

Admittedly, since the prohibition of cartels laid down in Article 101 TFEU pursues the general interest objective of ensuring undistorted competition in the internal market, the limitation of the *ne bis in idem* principle, guaranteed in Article 50 of the Charter, resulting from a duplication of proceedings and penalties of a criminal nature by two national competition authorities, may be justified under Article 52(1) of the Charter where those proceedings and penalties pursue complementary aims relating, as the case may be, to different aspects of the same unlawful conduct. However, if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Article 101 TFEU and the corresponding provisions of their respective national law prohibiting agreements which may affect trade between Member States within the meaning of Article 101 TFEU, those two authorities would pursue the same objective of ensuring that competition in the internal market is not distorted. Such a duplication of proceedings and penalties would not meet an objective of general interest recognised by the European Union, with the result that it could not be justified under Article 52(1) of the Charter.

As regards the proceedings conducted by the Austrian competition authority with regard to Nordzucker, the Court confirms, ultimately, that such proceedings for the enforcement of competition law, in which, owing to Nordzucker's participation in the national leniency programme, only a declaration of the infringement of that law can be made, are also liable to be covered by the *ne bis in idem* principle.

As a corollary to the *res judicata* principle, the *ne bis in idem* principle aims to ensure legal certainty and fairness; in ensuring that once a natural or legal person has been tried and, as the case may be, punished, that person has the certainty of not being tried again for the same offence. It follows that the initiation of criminal proceedings is liable, as such, to fall within the scope of the *ne bis in idem* principle, irrespective of whether those proceedings actually result in the imposition of a penalty.

Judgment of 28 October 2022 (Grand Chamber), Generalstaatsanwaltschaft München (Extradition and ne bis in idem) (C-435/22 PPU, EU:C:2022:852)

*(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Charter of Fundamental Rights of the European Union – Article 50 – Convention implementing the Schengen Agreement – Article 54 –*Ne bis in idem *principle – Extradition agreement between the European Union and the United States of America – Extradition of a third-country national to the United States under a bilateral treaty concluded by a Member State – National who has been convicted by final judgment for the same acts and has served his sentence in full in another Member State)*

In January 2022, HF, a Serbian national, was temporarily arrested in Germany on the basis of a red notice published by the International Criminal Police Organisation (Interpol) at the request of the authorities of the United States of America. The latter request the extradition of HF with a view to criminal proceedings for offences consisting of a conspiracy to participate in racketeer-influenced corrupt organisations and conspiracy to commit bank fraud and fraud by means of telecommunication, committed between September 2008 and December 2013. When he was arrested, HF stated that he was resident in Slovenia and produced, inter alia, a Slovenian residence permit which had expired in November 2019.

The person concerned has already been convicted by final judgment in Slovenia for the same acts as those referred to in the extradition request, as regards the offences committed up to June 2010. In addition, he has already served his sentence in full.

Accordingly, the Oberlandesgericht München (Higher Regional Court, Munich, Germany), called upon to rule on HF's extradition request, decided to ask the Court of Justice whether the principle *ne bis in idem* requires it to refuse that extradition for offences for which final judgment has been passed in Slovenia. That principle, which is enshrined in both Article 54 of the Convention implementing the

Schengen Agreement ('the CISA') [45] and Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), prohibits, inter alia, a person against whom final judgment has been passed in a Member State from being tried again in another Member State for the same offence. In that context, the referring court also asks whether the extradition treaty concluded between Germany and the United States, [46] in so far as it allows extradition to be refused on the basis of the principle *ne bis in idem* only in the case of a conviction in the requested State (here, Germany), is likely to affect the application of that principle in the dispute in the main proceedings.

By its judgment, delivered in the context of the urgent preliminary ruling procedure, the Court, sitting as the Grand Chamber, rules that Article 54 of the CISA, read in the light of Article 50 of the Charter, precludes the extradition, by the authorities of a Member State, of a third-country national to another third country, where final judgment has been passed in another Member State, as regards that national, in respect of the same acts as those referred to in the extradition request and he or she has served the sentence which has been imposed there. The fact that the extradition request is based on a bilateral extradition treaty limiting the scope of the principle *ne bis in idem* to judgments delivered in the requested Member State is irrelevant in that regard.

Findings of the Court

In the first place, as regards whether the concept of 'person' referred to in Article 54 of the CISA includes a third-country national, the Court observes first of all that that article guarantees the protection of the principle *ne bis in idem* where a person's trial has been finally disposed of in a Member State. Accordingly, the wording of that provision does not establish a condition relating to possession of the nationality of a Member State. Next, the context of that article supports such an interpretation. Article 50 of the Charter, [47] in the light of which Article 54 of the CISA must be interpreted, also does not establish a link with the status of citizen of the European Union. Finally, the objectives pursued by that provision, namely, in particular, to ensure legal certainty through respect for decisions of public bodies which have become final, and fairness, support the interpretation that the application of that provision is not limited solely to nationals of a Member State. In that regard, the Court also states that there is nothing in Article 54 of the CISA to suggest that enjoyment of the fundamental right provided for therein is subject, as regards third-country nationals, to compliance with conditions relating to the lawful nature of their stay or to a right to freedom of movement within the Schengen area. In a case such as that in the main proceedings, irrespective of the lawful nature of his or her stay, the person concerned must therefore be regarded as falling within the scope of Article 54 of the CISA.

In the second place, the Court finds that the Agreement on extradition between the European Union and the United States of America ('the EU-USA Agreement'), [48] which applies to relations existing

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45 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013.

46 Auslieferungsvertrag zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika (Extradition Treaty between the Federal Republic of Germany and the United States of America) of 20 June 1978 (BGBl. 1980 II, p. 647; 'the Germany-USA Extradition Treaty').

47 Article 50 of the Charter provides that 'no one' is to be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the European Union in accordance with the law.

48 Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27).

between the Member States and that third State on extradition, is applicable to the dispute in the main proceedings, since the extradition request was made, on the basis of the Germany-USA Extradition Treaty, after the entry into force of that EU-USA Agreement. While it is true that the latter does not expressly provide that the applicability of the principle *ne bis in idem* may allow a Member State to refuse extradition requested by the United States, however, Article 17(2) thereof, [49] which in principle allows a Member State to prohibit the extradition of persons who have already been finally judged in respect of the same offence for which extradition is sought, constitutes an autonomous and subsidiary legal basis for the application of that principle where the applicable bilateral treaty does not enable that question to be resolved. However, the Germany-USA Extradition Treaty settles prima facie the question raised in the dispute in the main proceedings since it does not envisage that extradition can be refused if the person prosecuted has been finally judged, for the offence referred to in the request for extradition, by the competent authorities of a State other than the requested State. [50] On this point, the Court nevertheless recalls that, as required by the principle of primacy, it is for the referring court to ensure the full effect of Article 54 of the CISA and Article 50 of the Charter in the dispute in the main proceedings, by disapplying, of its own motion, any provision of the Germany-USA Extradition Treaty which proves to be incompatible with the principle *ne bis in idem* enshrined in those articles. Although the provisions of the Germany-USA Extradition Treaty relating to the application of the principle *ne bis in idem* are set aside on the ground that they are contrary to EU law, that treaty no longer allows the question of extradition raised in the dispute in the main proceedings to be resolved, so that the application of that principle may be based on the autonomous and subsidiary legal basis of Article 17(2) of the EU-USA Agreement.

In the last place, although it finds that the first paragraph of Article 351 TFEU [51] is not a priori applicable to the dispute in the main proceedings having regard to the date on which the Germany-USA Extradition Treaty was concluded, the referring court wonders whether that provision should not be interpreted broadly as also referring to agreements concluded by a Member State after 1 January 1958 or the date of its accession, but before the date on which the European Union became competent in the field covered by those agreements. In that regard, noting in particular that exceptions must be interpreted strictly so that general rules are not negated, the Court specifies that that derogating provision must be interpreted as applying only to agreements concluded before 1 January 1958 or, in the case of acceding States, before the date of their accession, so that it is not applicable to the Germany-USA Extradition Treaty.

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49 Article 17 of that EU-USA Agreement, headed 'Non-derogation', provides, in paragraph 2 thereof, that 'where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States'.

50 Under Article 8 of the Germany-USA Extradition Treaty, extradition is not to be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the requested State for the offence for which his or her extradition is requested. However, that provision does not provide for such a possibility where a final judgment has been passed in another State.

51 Under that provision, 'the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties'.

3. Freedom of expression and right to information [52]

Judgment of 26 April 2022 (Grand Chamber), Poland v Parliament and Council (C-401/19, EU:C:2022:297)

(Action for annulment – Directive (EU) 2019/790 – Article 17(4), point (b), and point (c), in fine – Article 11 and Article 17(2) of the Charter of Fundamental Rights of the European Union – Freedom of expression and information – Protection of intellectual property – Obligations imposed on online content-sharing service providers – Prior automatic review (filtering) of content uploaded by users)

Directive 2019/790 on copyright and related rights in the digital single market [53] established a new specific liability mechanism in respect of online content-sharing service providers ('the providers'). Article 17 of that directive lays down the principle that the providers are directly liable where works and other protected subject matter are unlawfully uploaded by users of their services. The providers concerned may nevertheless be exempted from that liability. To that end, they are, inter alia, required, in accordance with the provisions of that article, [54] actively to monitor the content uploaded by users, in order to prevent the placing online of the protected subject matter which rightholders do not wish to make available on those services.

The Republic of Poland brought an action seeking, principally, the annulment of point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 and, in the alternative, annulment of that article in its entirety. It submits, in essence, that those provisions require the providers to carry out – by means of IT tools for automatic filtering – preventive monitoring of all the content which their users wish to upload, without providing safeguards to ensure that the right to freedom of expression and information is respected. [55]

The Court of Justice, sitting as the Grand Chamber, gives a ruling for the first time on the interpretation of Directive 2019/790. It dismisses Poland's action, holding that the obligation of the providers, laid down by that directive, to carry out a prior automatic review of the content uploaded by users, is accompanied by appropriate safeguards in order to ensure respect for the right to freedom of expression and information of those users and a fair balance between that right and the right to intellectual property.

Findings of the Court

Examining, first of all, the admissibility of the action, the Court finds that point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790 are not severable from the remainder of Article 17 and that, consequently, the head of claim seeking annulment of point (b) and point (c), *in fine*, only is inadmissible. Article 17 of Directive 2019/790 establishes a new liability regime in respect of the providers, the various provisions of which form a whole and seek to strike a balance between the

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52 The judgment of 15 March 2022, ***Autorité des marchés financiers*** (C-302/20, EU:C:2022:190), must also be mentioned under this heading. That judgment is presented under heading XIII.4 'Dissemination of inside information in the financial sector'.

53 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92).

54 See Article 17(4), point (b), and point (c), *in fine*, of Directive 2019/790.

55 As guaranteed in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').

rights and interests of those providers, those of users of their services and those of rightholders. Consequently, such partial annulment would alter the substance of Article 17.

As to the substance of the case itself, next, the Court examines Poland's single plea in law, alleging a limitation on the exercise of the right to freedom of expression and information, arising from the liability regime introduced by Article 17 of Directive 2019/790. First of all, the Court points out that the sharing of information on the internet via online content-sharing platforms falls within the scope of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the Charter. It observes that, in order to avoid liability where users upload unlawful content to the platforms of the providers for which the latter have no authorisation from the rightholders, those providers must demonstrate that they meet all the conditions for exemption from liability, laid down in Article 17(4), points (a), (b) and (c) of Directive 2019/790, namely that they have:

– made their best efforts to obtain such an authorisation (point (a)); and

– acted expeditiously to bring to an end, on their platforms, specific copyright infringements after they have occurred and after receiving a sufficiently substantiated notice from rightholders (point (c)); and

– made their best efforts, after receipt of such a notice or where those rightholders have provided them with the relevant and necessary information prior to the occurrence of a copyright infringement, 'in accordance with high industry standards of professional diligence' to prevent such infringements from occurring or reoccurring (points (b) and (c)).

Those obligations therefore require de facto the providers to carry out a prior review of the content that users wish to upload to their platforms, provided that they have received from the rightholders the information or notices provided for in points (b) and (c) of Article 17(4) of Directive 2019/790. In order to carry out such a review, the providers must use automatic recognition and filtering tools. Such a prior review and prior filtering are liable to restrict an important means of disseminating online content and thus to constitute a limitation on the right to freedom of expression and information guaranteed in Article 11 of the Charter. In addition, that limitation is attributable to the EU legislature, since it is the direct consequence of the specific liability regime. Accordingly, the Court concludes that that regime entails a limitation on the exercise of the right to freedom of expression and information of the users concerned.

Lastly, as regards the question whether the limitation at issue is justified in the light of Article 52(1) of the Charter, the Court notes, first, that that limitation is provided for by law, since it results from the obligations imposed on the providers of the abovementioned services by a provision of an EU act, namely point (b) and point (c), *in fine*, of Article 17(4) of Directive 2019/790, and respects the essence of the right to freedom of expression and information of internet users. Secondly, in the context of the review of proportionality, the Court finds that that limitation meets the need to protect intellectual property guaranteed in Article 17(2) of the Charter, that it appears necessary to meet that need and that the obligations imposed on the providers do not disproportionately restrict the right to freedom of expression and information of users.

First, the EU legislature laid down a clear and precise limit on the measures that may be taken in implementing those obligations, by excluding, in particular, measures which filter and block lawful content when uploading. Secondly, Directive 2019/790 requires Member States to ensure that users are authorised to upload and make available content generated by themselves for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. Furthermore, the providers must inform their users that they can use works and other protected subject matter under exceptions

or limitations to copyright and related rights provided for in EU law. [56] Thirdly, the liability of the providers can be incurred only on condition that the rightholders concerned provide them with the relevant and necessary information with regard to that content at issue. Fourthly, Article 17 of that directive, the application of which does not lead to any general monitoring obligation, means that the providers cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them. [57] In that regard, it may be that availability of unauthorised content can only be avoided upon notification of rightholders. Fifthly, Directive 2019/790 introduces several procedural safeguards, in particular the possibility for users to submit a complaint where they consider that access to uploaded content has been wrongly disabled, as well as access to out-of-court redress mechanisms and to efficient judicial remedies. [58] Sixthly, that directive requires the European Commission to organise stakeholder dialogues to discuss best practices for cooperation between the providers and rightholders, and also to issue guidance on the application of that regime. [59]

Accordingly, the Court concludes that the obligation on the providers to review, prior to its dissemination to the public, the content that users wish to upload to their platforms, resulting from the specific liability regime established in Article 17(4) of Directive 2019/790, has been accompanied by appropriate safeguards by the EU legislature in order to ensure respect for the right to freedom of expression and information of users, and a fair balance between that right, on the one hand, and the right to intellectual property, on the other. It is for the Member States, when transposing Article 17 of that directive, to take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter. Further, when implementing the measures transposing that article, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that article but also make sure that they do not act on the basis of an interpretation of the article which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality.

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56 Article 17(7) and (9) of Directive 2019/790.

57 Article 17(8) of Directive 2019/790.

58 The first and second subparagraphs of Article 17(9) of Directive 2019/790.

59 Article 17(10) of Directive 2019/790.

4. Protection of personal data

a. Retention of personal data

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

(Reference for a preliminary ruling – Processing of personal data in the electronic communications sector – Confidentiality of the communications – Providers of electronic communications services – General and indiscriminate retention of traffic and location data – Access to data – Subsequent court supervision – Directive 2002/58/EC – Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – Possibility for a national court to restrict the temporal effect of a declaration of the invalidity of national legislation that is incompatible with EU law –Excluded)

In recent years, the Court of Justice has ruled, in several judgments, on the retention of and access to personal data in the field of electronic communications. [60]

In particular, by two judgments of the Grand Chamber of 6 October 2020, [61] the Court confirmed its case-law resulting from the judgment in *Tele2 Sverige* as to the disproportionate nature of the general and indiscriminate retention of traffic and location data. It also clarified inter alia the extent of the powers that the Directive on privacy and electronic communications recognises Member States have in respect of the retention of those data for the purposes of safeguarding of national security and combating crime.

In this case, the request for a preliminary ruling was submitted by the Supreme Court (Ireland) in the context of civil proceedings brought by a person sentenced to life imprisonment for a murder committed in Ireland. That person challenged the compatibility with EU law of certain provisions of national law on the retention of data generated in the context of electronic communications. [62]

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60 Thus, in the judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, ECLI:EU:C:2014:238), the Court declared Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54) invalid on the ground that the interference with the rights to respect for private life and to the protection of personal data, recognised by the Charter of Fundamental Rights of the European Union ('the Charter'), which resulted from the general obligation to retain traffic and location data laid down by that directive was not limited to what was strictly necessary. Next, in the judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, ECLI:EU:C:2016:970), the Court held that Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) ('the Directive on privacy and electronic communications'), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11), precludes national legislation providing for the general and indiscriminate retention of traffic and location data for the purposes of combating crime. Finally, in the judgment of 2 October 2018, *Ministerio Fiscal* (C-207/16, EU:C:2018:788), the Court interpreted Article 15(1) in a case which concerned access by public authorities to data relating to the civil identity of users of electronic communications systems.

61 Judgments of 6 October 2020, *Privacy International* (C-623/17, EU:C:2020:790), and *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

62 Communications (Retention of Data) Act 2011. That law was enacted in order to transpose into Irish law Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54).

Pursuant to that law, [63] traffic and location data relating to the telephone calls of the person charged had been retained by providers of electronic communications services and made accessible to the police authorities. The referring court's doubts related in particular to the compatibility with the Directive on privacy and electronic communications, [64] read in the light of the Charter, [65] of a system of the general and indiscriminate retention of those data, in connection with combating serious crime.

In its judgment, the Court, sitting as the Grand Chamber, confirms, while also providing detail as to its scope, the case-law resulting from the judgment in *La Quadrature du Net and Others* by recalling that the general and indiscriminate retention of traffic and location data relating to electronic communications is not permitted for the purposes of combating serious crime and preventing serious threats to public security. It also confirms the case-law resulting from the judgment in *Prokuratuur (Conditions of access to data relating to electronic communications)*, [66] in particular as regards the obligation to make access by the competent national authorities to those retained data subject to a prior review carried out either by a court or by an administrative body that is independent in relation to a police officer.

Findings of the Court

The Court holds, in the first place, that the Directive on privacy and electronic communications, read in the light of the Charter, precludes legislative measures which, as a preventive measure, for the purposes of combating serious crime and preventing serious threats to public security, provide for the general and indiscriminate retention of traffic and location data. Having regard, first, to the dissuasive effect on the exercise of fundamental rights [67] which is liable to result from the retention of those data, and, second, to the seriousness of the interference entailed by such retention, it is necessary for that retention to be the exception and not the rule in the system established by that directive, such that those data should not be retained systematically and continuously. Crime, even particularly serious crime, cannot be treated in the same way as a threat to national security, since to treat those situations in the same way would be likely to create an intermediate category between national security and public security for the purpose of applying to the latter the requirements inherent in the former.

However, the Directive on privacy and electronic communications, read in the light of the Charter, does not preclude legislative measures which provide, for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security, for the targeted retention of traffic and location data which is limited, on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion, for a period that is limited in time to what is strictly necessary, but which may be extended. It adds that such a retention measure covering places or infrastructures that regularly receive a very high volume of visitors, or strategic locations, such as airports, stations, maritime ports or tollbooth areas, may allow the competent authorities to obtain information as to the presence in those places or geographical areas of persons using a means of electronic communication within those areas and to

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63 The law permits, for reasons going beyond those inherent to the protection of national security, the preventative, general and indiscriminate retention of traffic and location data of all subscribers for a period of two years.

64 More specifically, Article 15(1) of Directive 2002/58.

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

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

67 Enshrined in Articles 7 to 11 of the Charter.

draw conclusions as to their presence and activity in those places or geographical areas for the purposes of combating serious crime. In any event, the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which targeted retention may be carried out is no reason for the Member States, by turning the exception into a rule, to provide for the general retention of traffic and location data.

That directive, read in the light of the Charter, also does not preclude legislative measures that provide, for the same purposes, for the general and indiscriminate retention of IP addresses assigned to the source of an internet connection for a period that is limited in time to what is strictly necessary, as well as data relating to the civil identity of users of electronic communications systems. As regards that latter aspect, the Court holds more specifically that neither the Directive on privacy and electronic communications nor any other act of EU law precludes national legislation, which has the purpose of combating serious crime, pursuant to which the purchase of a means of electronic communication, such as a pre-paid SIM card, is subject to a check of official documents establishing the purchaser's identity and the registration, by the seller, of that information, with the seller being required, should the case arise, to give access to that information to the competent national authorities.

The same is the case for legislative measures which allow, also for the purposes of combating serious crime and preventing serious threats to public security, recourse to an instruction requiring providers of electronic communications services by means of a decision of the competent authority that is subject to effective judicial review, to undertake, for a specified period of time, the expedited retention (*quick freeze*) of traffic and location data in their possession. Only actions to combat serious crime and, a fortiori, to safeguard national security are such as to justify that retention, on the condition that the measure and access to the retained data comply with the limits of what is strictly necessary. The Court recalls that such a retention measure may be extended to traffic and location data relating to persons other than those who are suspected of having planned or committed a serious criminal offence or acts adversely affecting national security, provided that those data can, on the basis of objective and non-discriminatory factors, shed light on such an offence or acts adversely affecting national security, such as data concerning the victim thereof, and his or her social or professional circle.

However, the Court indicates next that all the abovementioned legislative measures must ensure, by means of clear and precise rules, that the retention of data at issue is subject to compliance with the applicable substantive and procedural conditions and that the persons concerned have effective safeguards against risks of abuse. The various measures for the retention of traffic and location data may, at the choice of the national legislature and subject to the limits of what is strictly necessary, be applied concurrently.

In addition, the Court states that to authorise, for the purposes of combating serious crime, access to those data retained generally and indiscriminately in order to address a serious threat to national security would be contrary to the hierarchy of objectives of public interest which may justify a measure taken pursuant to the Directive on privacy and electronic communications. [68] That would be to allow access to be justified for an objective of lesser importance than that which justified its retention, namely the safeguarding of national security, which would risk depriving of any effectiveness the prohibition on a general and indiscriminate retention for the purpose of combating serious crime.

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68 That hierarchy is set out in the case-law of the Court, and in particular in the judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791), paragraphs 135 and 136. Under that hierarchy, combating serious crime is of lesser importance than safeguarding national security.

In the second place, the Court holds that the Directive on privacy and electronic communications, read in the light of the Charter, precludes national legislation pursuant to which the centralised processing of requests for access to data retained by providers of electronic communications services, issued by the police in the context of the investigation or prosecution of serious criminal offences, is the responsibility of a police officer, who is assisted by a unit established within the police service which enjoys a degree of autonomy in the exercise of its duties, and whose decisions may subsequently be subject to judicial review. First, such a police officer does not fulfil the requirements of independence and impartiality which must be met by an administrative body carrying out the prior review of requests for access issued by the competent national authorities, as he or she does not have the status of a third party in relation to those authorities. Second, while the decision of that officer may be subject to subsequent judicial review, that review cannot be substituted for a review which is independent and, except in duly justified urgent cases, undertaken beforehand.

In the third place, lastly, the Court confirms its case-law according to which EU law precludes a national court from limiting the temporal effects of a declaration of invalidity which, pursuant to national law, it is bound to make as regards national legislation requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data, owing to the incompatibility of that legislation with the Directive on privacy and electronic communications. However, the Court recalls that the admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member States, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness.

Judgment of 21 June 2022 (Grand Chamber), Ligue des droits humains (C-817/19, EU:C:2022:491)

(Reference for a preliminary ruling – Processing of personal data – Passenger Name Records (PNR) – Regulation (EU) 2016/679 – Article 2(2)(d) – Scope – Directive (EU) 2016/681 – Use of PNR data of air passengers of flights operated between the European Union and third countries – Power to include data of air passengers of flights operated within the European Union – Automated processing of that data – Retention period – Fight against terrorist offences and serious crime – Validity – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 21 as well as Article 52(1) – National legislation extending the application of the PNR system to other transport operations within the European Union – Freedom of movement within the European Union – Charter of Fundamental Rights – Article 45)

PNR (Passenger Name Record) data are reservation information stored by air carriers in their reservation and departure control systems. The PNR Directive [69] requires those carriers to transfer the data of any passenger on an extra-EU flight operated between a third country and the European Union to the Passenger Information Unit ('PIU') of the Member State of destination or departure of the flight concerned, in the fight against terrorist offences and serious crime. The PNR data thus transferred are subject to advance assessment by the PIU [70] and are then retained for the purposes of a possible subsequent assessment by the competent authorities of the Member State concerned or

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69 Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (OJ 2016 L 119, p. 132) ('the PNR Directive').

70 The purpose of that advance assessment is to identify persons who require further examination by the competent authorities, in view of the fact that such persons may be involved in a terrorist offence or serious crime. It is to be carried out systematically and by automated means, by comparing PNR data against 'relevant' databases or by processing them against pre-determined criteria in Article 6(2) (a) and (3) of the PNR Directive.

those of another Member State. A Member State may decide to apply that directive also to intra-EU flights. [71]

The Ligue des droits humains brought an action before the Cour constitutionnelle (Constitutional Court, Belgium) seeking annulment of the Law of 25 December 2016, [72] which transposes both the PNR Directive and the API Directive into Belgian law. [73] According to the applicant, that law infringes the right to respect for private life and to the protection of personal data. It criticises, first, the very broad nature of PNR data and, second, the general nature of the collection, transfer and processing of those data. The law also infringes the free movement of persons in that it indirectly restores border controls by extending the PNR system to intra-EU flights and to transport operations carried out by other means within the European Union.

In that context, the Belgian Constitutional Court referred 10 questions to the Court of Justice for a preliminary ruling relating, inter alia, to the validity and interpretation of the PNR Directive as well as to the applicability of the GDPR. [74]

Those questions result in the Court taking another look at the processing of PNR data with regard to the fundamental rights to respect for private life and the protection of personal data [75] enshrined in the Charter of Fundamental Rights of the European Union. [76] By its judgment, delivered by the Grand Chamber, the Court confirms that the PNR Directive is valid in so far as it can be interpreted consistently with the Charter and clarifies the interpretation of some of its provisions. [77]

Findings of the Court

After having specified which of the data processing operations provided for by national legislation, such as that at issue, intended to transpose both the API Directive and the PNR Directive are those to which the GDPR's general rules apply, [78] the Court verifies the validity of the PNR Directive.

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71 Making use of the possibility provided for in Article 2 of the PNR Directive.

72 Loi du 25 décembre 2016 relative au traitement des données des passagers (Law of 25 December 2016 on the processing of passenger data) (*Moniteur belge* of 25 January 2017, p. 12905).

73 Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data (OJ 2004 L 261, p. 24) ('the API Directive'). That directive regulates the transfer of advance passenger information data by air carriers to the competent national authorities (such as the number and type of travel document used as well as nationality) for the purpose of improving border controls and combating illegal immigration.

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

75 'The fundamental rights guaranteed in Articles 7 and 8 of the Charter'. The Court has already examined the compatibility with those rights of the system for the collection and processing of PNR data envisaged by the draft agreement between Canada and the European Union on the transfer and processing of passenger name record data (Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017 (EU:C:2017:592)).

76 'The Charter.'

77 In particular, Article 2 ('Application of [the Directive] to intra-EU flights'), Article 6 ('Processing of PNR data') and Article 12 ('Period of data retention and depersonalisation') of the PNR Directive.

78 The Court clarifies that the GDPR is applicable to the processing of personal data provided for by such legislation, as regards, on the one hand, data processing operations carried out by private operators and, on the other hand, data processing operations carried out by public authorities covered, solely or in addition, by the API Directive. By contrast, the GDPR does not apply to the operations envisaged by such legislation which are covered only by the PNR Directive, and are carried out by the PIU or by the competent authorities in order to combat terrorist offences and serious crime.

- **The validity of the PNR Directive**

In its judgment, the Court holds that, since the Court's interpretation of the provisions of the PNR Directive in the light of the fundamental rights guaranteed in Articles 7, 8 and 21 as well as Article 52(1) of the Charter [79] ensures that that directive is consistent with those articles, the examination of the questions referred has revealed nothing capable of affecting the validity of the said directive.

As a preliminary point, it recalls that an EU act must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter, and the Member States must thus ensure that they do not rely on an interpretation thereof that would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles recognised by EU law. As regards the PNR Directive, the Court states that many recitals and provisions of that directive require such a consistent interpretation, stressing the importance that the EU legislature, by referring to the high level of data protection, gives to the full respect for the fundamental rights enshrined in the Charter.

The Court finds that the PNR Directive entails undeniably serious interferences with the rights guaranteed in Articles 7 and 8 of the Charter, in so far, inter alia, as it seeks to introduce a surveillance regime that is continuous, untargeted and systematic, including the automated assessment of the personal data of everyone using air transport services. It points out that the question whether Member States may justify such an interference must be assessed by measuring its seriousness and by verifying that the importance of the objective of general interest pursued is proportionate to that seriousness.

The Court concludes that the transfer, processing and retention of PNR data provided for by that directive may be considered to be limited to what is strictly necessary for the purposes of combating terrorist offences and serious crime, provided that the powers provided for by that directive are interpreted restrictively. In that regard, the judgment delivered today states, inter alia, that:

– The system established by the PNR Directive must cover only clearly identifiable and circumscribed information under the headings set out in Annex I to that directive, which relates to the flight operated and the passenger concerned, which means, for some of the headings set out in that annex, that only the information expressly referred to is covered. [80]

– Application of the system established by the PNR Directive must be limited to terrorist offences and only to serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air. As regards such serious crime, the application of that system cannot be extended to offences which, although meeting the criterion laid down by that directive relating to the threshold of severity and being referred to in, inter alia, Annex II to that directive, amount to ordinary crime having regard to the particular features of the domestic criminal justice system.

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79 In accordance with that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. In addition, limitations may be made to those rights and freedoms only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

80 Thus, in particular, 'forms of payment information' (heading 6 of the annex) must be limited to the payment methods and billing of the air ticket, to the exclusion of any other information not directly relating to the flight, and the 'general remarks' (heading 12) can relate only to the information expressly listed in that heading, relating to passengers who are minors.

– Any extension of the application of the PNR Directive to selected or all intra-EU flights, which a Member State may decide by exercising the power provided for in that directive, must be limited to what is strictly necessary. For that purpose, it must be open to effective review either by a court or by an independent administrative body whose decision is binding. In that regard, the Court states:

  - Only in a situation where that Member State finds that there are sufficiently solid grounds for considering that it is confronted with a terrorist threat which is shown to be genuine and present or foreseeable, the application of that directive to all intra-EU flights from or to the said Member State, for a period of time that is limited to what is strictly necessary but may be extended, does not exceed what is strictly necessary. [81]

  - In the absence of such a terrorist threat, the application of that directive cannot cover all intra-EU flights, but must be limited to intra-EU flights relating, inter alia, to certain routes or travel patterns or to certain airports in respect of which there are, according to the assessment of the Member State concerned, indications that are such as to justify that application. The strictly necessary nature of that application to intra-EU flights thus selected must be reviewed regularly, in accordance with changes in the circumstances that justified their selection.

– For the purposes of the advance assessment of PNR data, the objective of which is to identify persons who require further examination before their arrival or departure and is carried out, as a first step, by means of automated processing, the PIU may, on the one hand, compare those data only against the databases on persons or objects sought or under alert. [82] Those databases must be non-discriminatory and exploited, by the competent authorities, in relation to the fight against terrorist offences and serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air. As regards, on the other hand, the advance assessment against pre-determined criteria, the PIU cannot use artificial intelligence technology in self-learning systems ('machine learning'), capable of modifying, without human intervention and review, the assessment process and, in particular, the assessment criteria on which the result of the application of that process is based, as well as the weighting of those criteria. Those criteria must be determined in such a way that their application targets, specifically, individuals who might be reasonably suspected of involvement in terrorist offences or serious crime and takes into consideration both 'incriminating' as well as 'exonerating' circumstances, while not giving rise to direct or indirect discrimination. [83]

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81 The existence of that threat is, in itself, capable of establishing a connection between, on the one hand, the transfer and processing of the data concerned and, on the other, the fight against terrorism. Therefore, making provision for the application of the PNR Directive to all intra-EU flights from or to the said Member State, for a limited period of time, does not go beyond what is strictly necessary, and the decision providing for that application must be open to effective review either by a court or by an independent administrative body.

82 Namely databases concerning persons or objects sought or under alert within the meaning of Article 6(3)(a) of the PNR Directive By contrast, analyses using various databases could take the form of 'data mining' and could lead to a disproportionate use of those data, providing the means of establishing a detailed profile of the individuals concerned solely because they intend to travel by air.

83 Pre-determined criteria must be targeted, proportionate and specific, and be regularly reviewed (Article 6(4) of the PNR Directive). The advance assessment against pre-determined criteria must be carried out in a non-discriminatory manner. According to the fourth sentence of Article 6(4) of the PNR Directive, the criteria are in no circumstances to be based on a person's race or ethnic origin, political opinions, religion or philosophical beliefs, trade union membership, health, sexual life or sexual orientation.

– In view of the margin of error inherent in such automated processing of PNR data and the fairly substantial number of 'false positives', resulting from the application thereof in 2018 and 2019, the appropriateness of the system established by the PNR Directive for the purpose of attaining the objectives pursued essentially depends on the proper functioning of the verification of positive results obtained under those processing operations, which the PIU carries out, as a second step, by non-automated means. In that regard, the Member States must lay down clear and precise rules capable of providing guidance and support for the analysis carried out by the PIU agents in charge of that individual review for the purposes of ensuring full respect for the fundamental rights enshrined in Articles 7, 8 and 21 of the Charter and, in particular, guarantee a uniform administrative practice within the PIU that observes the principle of non-discrimination. In particular, they must ensure that the PIU establishes objective review criteria enabling its agents to verify, on the one hand, whether and to what extent a positive match ('hit') concerns effectively an individual who may be involved in terrorist offences or serious crime, as well as, on the other hand, the non-discriminatory nature of automated processing operations. In that context, the Court also points out that the competent authorities must ensure that the person concerned is able to understand how those pre-determined assessment criteria and programs applying those criteria work, so that it is possible for that person to decide with full knowledge of the relevant facts, whether or not to exercise his or her right to a judicial redress. Similarly, in the context of such an action, the court responsible for reviewing the legality of the decision adopted by the competent authorities as well as, except in the case of threats to State security, the persons concerned themselves must have an opportunity to examine both all the grounds and the evidence on the basis of which the decision was taken, including the pre-determined assessment criteria and the operation of the programs applying those criteria.

– The subsequent disclosure and assessment of PNR data, that is to say, after the arrival or departure of the person concerned, may be made only on the basis of new circumstances and objective evidence capable of either giving rise to a reasonable suspicion that that person is involved in serious crime having an objective link, even if only an indirect one, with the carriage of passengers by air, or from which it can be inferred that those data could, in a given case, contribute effectively to the fight against terrorist offences having such a link. The disclosure of PNR data for the purposes of such a subsequent assessment must, as a general rule, except in the event of duly justified urgency, be subject to a prior review carried out either by a court or by an independent administrative authority, upon reasoned request by the competent authorities and irrespective of whether that request was introduced before or after the expiry of the six-month time limit after the transfer of those data to the PIU. [84]

- **Interpretation of the PNR Directive**

After establishing the validity of the PNR Directive, the Court provides further clarification as to the interpretation of that directive. First, it points out that the directive lists exhaustively the objectives pursued by the processing of PNR data. Therefore, that directive precludes national legislation which authorises PNR data to be processed for purposes other than the fight against terrorist offences and serious crime. Thus, national legislation that includes, among the purposes for which PNR data are to be processed, monitoring activities within the remit of the intelligence and security services is liable to disregard the exhaustive nature of that list. Likewise, the system established by the PNR Directive cannot be provided for the purposes of improving border controls and combating illegal

84 Under Article 12(1) and (3) of the PNR Directive, such control is expressly provided for only in respect of requests for disclosure of PNR data made after the six-month time limit after the transfer of those data to the PIU.

immigration. [85] It also follows that PNR data may not be retained in a single database that may be consulted both for the purposes of the PNR Directive as well as for other purposes.

Second, the Court explains the concept of an independent national authority, competent to verify whether the conditions for the disclosure of PNR data, for the purposes of their subsequent assessment, are met and to approve such disclosure. In particular, the authority put in place as the PIU cannot be classified as such since it is not a third party in relation to the authority which requests access to the data. Since the members of its staff may be agents seconded from the authorities entitled to request such access, the PIU appears necessarily linked to those authorities. Accordingly, the PNR Directive precludes national legislation pursuant to which the authority put in place as the PIU is also designated as a competent national authority with power to approve the disclosure of PNR data upon expiry of the period of six months after the transfer of those data to the PIU.

Third, as regards the retention period of PNR data, the Court holds that Article 12 of the PNR Directive, read in the light of Articles 7 and 8 as well as Article 52(1) of the Charter, precludes national legislation which provides for a general retention period of five years for PNR data, applicable indiscriminately to all air passengers.

According to the Court, after expiry of the initial retention period of six months, the retention of PNR data does not appear to be limited to what is strictly necessary as regards air passengers for whom neither the advance assessment nor any verification carried out during the initial retention period of six months, nor any other circumstance, have revealed the existence of objective evidence – such as the fact that the PNR data of the passengers concerned have given rise to a verified positive match in the context of the advance assessment – capable of establishing a risk that relates to terrorist offences or serious crime having an objective link, even if only an indirect one, with those passengers' air travel. By contrast, it takes the view that, during the initial period of six months, the retention of the PNR data of all air passengers subject to the system established by that directive does not appear, as a matter of principle, to go beyond what is strictly necessary.

Fourth, the Court provides guidance on the possible application of the PNR Directive, for the purposes of combating terrorist offences and serious crime, to other modes of transport carrying passengers within the European Union. The directive, read in the light of Article 3(2) TEU, Article 67(2) TFEU and Article 45 of the Charter, precludes a system for the transfer and processing of the PNR data of all transport operations carried out by other means within the European Union in the absence of a genuine and present or foreseeable terrorist threat with which the Member State concerned is confronted. In such a situation, as in the case of intra-EU flights, the application of the system established by the PNR Directive must be limited to PNR data of transport operations relating, inter alia, to certain routes or travel patterns, or to certain stations or certain seaports for which there are indications that are such as to justify that application. It is for the Member State concerned to select the transport operations for which there are such indications and to review regularly that application in accordance with changes in the circumstances that justified their selection.

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85 That is to say, the objective of the API Directive.

b. Processing of personal data in the financial sector

Judgment of 20 September 2022 (Grand Chamber), VD and SR (C-339/20 and C-397/20, EU:C:2022:703)

(References for a preliminary ruling – Single market for financial services – Market abuse – Insider dealing – Directive 2003/6/EC – Article 12(2)(a) and (d) – Regulation (EU) No 596/2014 – Article 23(2)(g) and (h) – Supervisory and investigatory powers of the Autorité des marchés financiers (AMF) – General interest objective seeking to protect the integrity of financial markets in the European Union and public confidence in financial instruments – Option open to the AMF to require the traffic data records held by an operator providing electronic communications services – Processing of personal data in the electronic communications sector – Directive 2002/58/EC – Article 15(1) – Charter of Fundamental Rights of the European Union – Articles 7, 8 and 11 and Article 52(1) – Confidentiality of the communications – Restrictions – Legislation providing for the general and indiscriminate retention of traffic data by operators providing electronic communications services – Option for a national court to restrict the temporal effects of a declaration of invalidity in respect of provisions of national law that are incompatible with EU law – Precluded)

Following an investigation by the Autorité des marchés financiers (Financial Markets Authority, France; 'the AMF'), [86] criminal proceedings were brought against VD and SR, two natural persons charged with insider dealing, concealment of insider dealing, aiding and abetting, corruption and money laundering. In the course of that investigation, the AMF had used personal data from telephone calls made by VD and SR, generated on the basis of the code des postes et des communications électroniques (French Post and Electronic Communications Code), [87] in connection with the provision of electronic communications services.

In so far as the respective investigations into them was based on the traffic data provided by the AMF, VD and SR each brought an action before the cour d'appel de Paris (Court of Appeal, Paris, France), relying, inter alia, on a plea alleging infringement of Article 15(1) of the Directive on privacy and electronic communications, [88] read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). Specifically, VD and SR, relying on the case-law arising from the judgment in *Tele2 Sverige and Watson and Others*, [89] challenged the fact that the AMF took the national provisions at issue as its legal basis for the collection of those data, whereas, according to them, those provisions, first, did not comply with EU law in so far as they provided for general and indiscriminate retention of connection data and, second, laid down no restrictions on the powers of the AMF's investigators to require the retained data to be provided to them.

By two judgments of 20 December 2018 and 7 March 2019, the cour d'appel de Paris (Court of Appeal, Paris) rejected the actions brought by VD and SR. When it rejected the plea referred to above, the

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86 Investigation carried out under Article L.621-10 of the code monétaire et financier (French Monetary and Financial Code), in the version applicable to the disputes in the main proceedings.

87 Specifically, on the basis of Article L.34-1 of the Post and Electronic Communications Code, in the version applicable to the disputes in the main proceedings.

88 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11).

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

court adjudicating on the substance of the case relied, inter alia, on the fact that the Market Abuse Regulation [90] allows the competent authorities to require, in so far as permitted by national law, existing data traffic records held by operators providing electronic communications services, where there is a reasonable suspicion of an infringement of the prohibition on insider dealing and where such records may be relevant to the investigation of that infringement.

VD and SR then brought an appeal before the Cour de cassation (Court of Cassation, France), the referring court in the present cases.

In that context, that court is uncertain how to reconcile Article 15(1) of the Directive on privacy and electronic communications, read in the light of the Charter, with the requirements under Article 12(2)(a) and (d) of the Market Abuse Directive [91] and Article 23(2)(g) and (h) of the Market Abuse Regulation. That uncertainty arises from the legislative measures at issue in the main proceedings, which provide, as a preventive measure, that operators providing electronic communications services are to retain traffic data generally and indiscriminately for one year from the day of recording for the purposes of combating market abuse offences including insider dealing. Should the Court of Justice find that the legislation on the retention of the connection data at issue in the main proceedings does not comply with EU law, the referring court is uncertain as to whether that legislation retains its effects provisionally, in order to avoid legal uncertainty and to allow the data previously collected and retained to be used for the purpose of detecting insider dealing and bringing criminal proceedings in respect of it.

By its judgment, the Court, sitting as the Grand Chamber, holds that the general and indiscriminate retention of traffic data for a year from the date on which they were recorded by operators providing electronic communications services is not authorised, as a preventive measure, in order to combat market abuse offences. Furthermore, it confirms its case-law to the effect that EU law precludes a national court from restricting the temporal effects of a declaration of invalidity which it is required to make with respect to provisions of national law that are incompatible with EU law.

Findings of the Court

The Court notes, first of all, that, in interpreting a provision of EU law, it is necessary not only to refer to its wording but also to consider its context and the objectives of the legislation of which it forms part.

As regards the wording of the provisions that are the subject of the reference for a preliminary ruling, the Court states that, while Article 12(2)(d) of the Market Abuse Directive refers to the AMF's power to 'require existing telephone and existing data traffic records', Article 23(2)(g) and (h) of the Market Abuse Regulation refers to the power of that authority to require, first, 'data traffic records held by investment firms, credit institutions or financial institutions' and, second, to require, 'in so far as permitted by national law, existing data traffic records held by a telecommunications operator'. According to the Court, it is clear from the wording of those provisions that they merely provide a framework for the AMF's power to 'require' the data available to those operators, which corresponds to access to those data. Furthermore, the reference made to 'existing' records, such as those 'held' by those operators, suggests that the EU legislature did not intend to lay down rules governing the

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90 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

91 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16).

option open to the national legislature to impose an obligation to retain such records. According to the Court, that interpretation is, moreover, supported both by the context of those provisions and by the objectives pursued by the rules of which those same provisions form part.

As regards the context of the provisions that are the subject of the questions referred, the Court observes that, although, under the relevant provisions of the Market Abuse Directive [92] and the Market Abuse Regulation, [93] the EU legislature intended to require the Member States to take the necessary measures to ensure that the competent financial authorities have a set of effective tools, powers and resources as well as the necessary supervisory and investigatory powers to ensure the effectiveness of their duties, those provisions make no mention of any option open to Member States of imposing, for that purpose, an obligation on operators providing electronic communications services to retain generally and indiscriminately traffic data, nor do they set out the conditions in which those data must be retained by those operators so that they can be submitted to the competent authorities where appropriate.

As regards the objectives pursued by the legislation at issue, the Court finds that it is apparent, first, from the Market Abuse Directive [94] and, second, from the Market Abuse Regulation [95] that the purpose of those instruments is to protect the integrity of EU financial markets and to enhance investor confidence in those markets, a confidence which depends, inter alia, on investors being placed on an equal footing and being protected against the improper use of inside information. The purpose of the prohibition on insider dealing laid down in those instruments [96] is to ensure equality between the contracting parties in stock-market transactions by preventing one of them that possesses inside information and that is, therefore, in an advantageous position vis-à-vis other investors, from profiting from that information, to the detriment of those that are unaware of it. Although, according to the Market Abuse Regulation, [97] connection data records constitute crucial, and sometimes the only, evidence to detect and prove the existence of insider dealing and market manipulation, the fact remains that that regulation makes reference only to records 'held' by operators providing electronic communications services and to the power of that competent financial authority to 'require' those operators to send 'existing' data. Thus, it is in no way apparent from the wording of that regulation that the EU legislature intended, by that regulation, to give Member States the power to impose on operators providing electronic communications services a general obligation to retain data. It follows that neither the Market Abuse Directive nor the Market Abuse Regulation can constitute the legal basis for a general obligation to retain the data traffic records held by operators providing electronic communications services for the purposes of exercising the powers conferred on the competent financial authority under those measures.

The Court then notes that the Directive on privacy and electronic communications is the measure of reference on the retention and, more generally, the processing of personal data in the electronic communications sector, which means that the Court's interpretation, given in respect of that directive, also governs the traffic data records held by operators providing electronic communications services,

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92 Article 12(1) of Directive 2003/6.

93 Article 23(3) of Regulation No 596/2014, read in the light of recital 62 of that regulation.

94 Recitals 2 and 12 of Directive 2003/6.

95 Article 1 of Regulation No 596/2014, read in the light of recitals 2 and 24 of that regulation.

96 Article 2(1) of Directive 2003/6 and Article 8(1) of Regulation No 596/2014.

97 Recital 62 of Regulation No 596/2014.

which the competent financial authorities, within the meaning of the Market Abuse Directive [98] and the Market Abuse Regulation, [99] may require from those operators. The assessment of the lawfulness of the processing of records held by operators providing electronic communications services [100] must, therefore, be carried out in the light of the conditions laid down by the Directive on privacy and electronic communications and of the interpretation of that directive in the Court's case-law.

The Court finds that the Market Abuse Directive and the Market Abuse Regulation, read in conjunction with the Directive on privacy and electronic communications and in the light of the Charter, preclude legislative measures which, as a preventive measure, in order to combat market abuse offences including insider dealing, provide for the temporary, albeit general and indiscriminate, retention of traffic data, namely for a year from the date on which they were recorded, by operators providing electronic communications services.

Lastly, the Court confirms its case-law according to which EU law precludes a national court from restricting the temporal effects of a declaration of invalidity which it is required to make, under national law, with respect to provisions of national law which, first, require operators providing electronic communications services to retain generally and indiscriminately traffic data and, second, allow such data to be submitted to the competent financial authority, without prior authorisation from a court or independent administrative authority, owing to the incompatibility of those provisions with the Directive on privacy and electronic communications read in the light of the Charter. However, the Court recalls that the admissibility of evidence obtained by means of such retention is, in accordance with the principle of procedural autonomy of the Member States, a matter for national law, subject to compliance, inter alia, with the principles of equivalence and effectiveness. The latter principle requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of data in breach of EU law if the persons concerned are not in a position to comment effectively on that information and that evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact.

Judgment of 22 November 2022 (Grand Chamber), Luxembourg Business Registers (C-37/20 and C-601/20, EU:C:2022:912)

(Reference for a preliminary ruling – Prevention of the use of the financial system for the purposes of money laundering or terrorist financing – Directive (EU) 2018/843 amending Directive (EU) 2015/849 – Amendment to Article 30(5), first subparagraph, point (c), of Directive 2015/849 – Access for any member of the general public to the information on beneficial ownership – Validity – Articles 7 and 8 of the Charter of Fundamental Rights of the European Union – Respect for private and family life – Protection of personal data)

For the purposes of combating and preventing money laundering and terrorist financing, the anti-money-laundering directive [101] requires Member States to keep a register containing information on

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98 Article 11 of Directive 2003/6.

99 Article 22 of Regulation No 596/2014.

100 As provided for in Article 12(2)(d) of Directive 2003/6 and Article 23(2)(g) and (h) of Regulation No 596/2014.

101 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ 2015 L 141, p. 73; 'the anti-money-laundering directive').

the beneficial ownership [102] of companies and of other legal entities incorporated within their territory. Following an amendment of that directive by Directive 2018/843, [103] some of that information must be made accessible in all cases to any member of the general public. In accordance with the anti-money-laundering directive as thus amended ('the amended anti-money-laundering directive'), Luxembourg legislation [104] established a Register of Beneficial Ownership (RBO) designed to retain and make available a series of information on the beneficial ownership of registered entities, access to which is open to any person.

In that context, the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg) was seised of two actions, brought by WM and Sovim SA, respectively, challenging the rejection by Luxembourg Business Registers, the administrator of the RBO, of their applications seeking to preclude the general public's access to information relating, in the first case, to WM as the beneficial owner of a real estate company and, in the second case, to the beneficial owner of Sovim SA. In those two cases, since it had doubts in particular as to the validity of the provisions of EU law establishing the system of public access to information relating to beneficial ownership, the Tribunal d'arrondissement de Luxembourg (District Court) made a reference to the Court of Justice for a preliminary ruling on validity.

By its judgment, the Court, sitting as the Grand Chamber, declares Directive 2018/843 invalid in so far as it amended the anti-money-laundering directive in such a way that Member States must ensure that information on the beneficial ownership of companies and of other legal entities incorporated within their territory is accessible in all cases to any member of the general public. [105]

Findings of the Court

In the first place, the Court finds that the general public's access to information on beneficial ownership, provided for in the amended anti-money-laundering directive, constitutes a serious interference with the fundamental rights to respect for private life and to the protection of personal data, enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

In that regard, the Court observes that, since the data concerned include information on identified individuals, namely the beneficial owners of companies and other legal entities incorporated within the Member States' territory, the access of any member of the general public to those data affects the fundamental right to respect for private life. In addition, making available those data to the general public constitutes the processing of personal data. It adds that making personal data available to the general public in that manner constitutes an interference with the abovementioned fundamental rights, whatever the subsequent use of the information communicated. [106]

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102 Under Article 3(6) of the anti-money-laundering directive, beneficial owners are any natural persons who ultimately own or control the customer and/or the natural persons on whose behalf a transaction or activity is being conducted.

103 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ 2018 L 156, p. 43).

104 Loi du 13 janvier 2019 instituant un Registre des bénéficiaires effectifs (Mémorial A 2019, no 15) (Law of 13 January 2019 establishing a Register of Beneficial Ownership).

105 Invalidity of Article 1(15)(c) of Directive 2018/843, amending point (c) of the first subparagraph of Article 30(5) of the anti-money-laundering directive.

106 Judgment of 21 June 2022, *Ligue des droits humains* (C-817/19, EU:C:2022:491, paragraph 96 and the case-law cited).

As regards the seriousness of that interference, the Court notes that, in so far as the information made available to the general public relates to the identity of the beneficial owner as well as to the nature and extent of the beneficial interest held in corporate or other legal entities, that information is capable of enabling a profile to be drawn up concerning certain personal identifying data, the state of the person's wealth and the economic sectors, countries and specific undertakings in which he or she has invested. In addition, that information becomes accessible to a potentially unlimited number of persons, with the result that such processing of personal data is liable to enable that information to be freely accessed also by persons who, for reasons unrelated to the objective pursued by that measure, seek to find out about, inter alia, the material and financial situation of a beneficial owner. That possibility is all the easier when the data in question can be consulted on the internet. Furthermore, the potential consequences for the data subjects resulting from possible abuse of their data are exacerbated by the fact that, once those data have been made available to the general public, they can not only be freely consulted, but also retained and disseminated and that it thereby becomes increasingly difficult, or even illusory, for those data subjects to defend themselves effectively against abuse.

In the second place, as part of the examination of the justification for the interference at issue, first, the Court notes that, in the present case, the principle of legality is respected. The limitation on the exercise of the abovementioned fundamental rights, resulting from the general public's access to information on beneficial ownership, is provided for by a legislative act, namely the amended anti-money-laundering directive. In addition, that directive specifies that those data must be adequate, accurate and current, and expressly lists certain data to which the public must be allowed access. It also lays down the conditions under which Member States may provide for exemptions from such access.

Secondly, the Court clarifies that the interference in question does not undermine the essence of the fundamental rights guaranteed in Articles 7 and 8 of the Charter. While it is true that the amended anti-money-laundering directive does not contain an exhaustive list of the data which any member of the general public must be permitted to access, and that Member States are entitled to provide for access to additional information, the fact remains that only adequate information on beneficial owners and beneficial interests held may be obtained, held and, therefore, potentially made accessible to the public, which excludes, inter alia, information which is not adequately related to the purposes of the amended anti-money-laundering directive. As it is, it does not appear that making available to the general public information which is so related would in any way undermine the essence of the fundamental rights referred to.

Thirdly, the Court points out that, by providing for the general public's access to information on beneficial ownership, the EU legislature seeks to prevent money laundering and terrorist financing by creating, by means of increased transparency, an environment less likely to be used for those purposes, which constitutes an objective of general interest that is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Fourthly, in the context of the examination of whether the interference at issue is appropriate, necessary and proportionate, the Court holds that, admittedly, the general public's access to information on beneficial ownership is appropriate for contributing to the attainment of that objective.

However, it finds that that interference cannot be considered to be limited to what is strictly necessary. First, the strict necessity of that interference cannot be demonstrated by relying on the fact that the criterion of the 'legitimate interest' – which, according to the anti-money-laundering directive, in the version prior to its amendment by Directive 2018/843, any person wishing to access information on beneficial ownership had to have – was difficult to apply and that its application could give rise to arbitrary decisions. The fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which the public may access information on beneficial ownership is no reason for the EU legislature to provide for the general public to access that information.

Secondly, nor can the explanations set out in Directive 2018/843 establish that the interference at issue is strictly necessary. [107] To the extent that, according to those explanations, the general public's access to beneficial ownership information is intended to allow greater scrutiny of information by civil society, in particular by the press and civil society organisations, the Court finds that both the press and civil society organisations that are connected with the prevention and combating of money laundering and terrorist financing have a legitimate interest in accessing the information concerned. The same is true of the persons who wish to know the identity of the beneficial owners of a company or other legal entity because they are likely to enter into transactions with them, or of the financial institutions and authorities involved in combating offences of money laundering or terrorist financing.

Nor, moreover, is the interference in question proportionate. In that regard, the Court finds that the substantive rules governing that interference do not meet the requirement of clarity and precision. The amended anti-money-laundering directive provides that any member of the general public may have access to 'at least' the data referred to therein, and provides that Member States may provide for access to additional information, including 'at least' the date of birth or the contact details of the beneficial owner concerned. However, by using the expression 'at least', that directive allows for data to be made available to the public which are not sufficiently defined and identifiable.

Furthermore, as regards the balancing of the seriousness of that interference against the importance of the objective of general interest referred to, the Court recognises that, in view of its importance, that objective is capable of justifying even serious interferences with the fundamental rights enshrined in Articles 7 and 8 of the Charter.

Nevertheless, first, combating money laundering and terrorist financing is as a priority a matter for the public authorities and for entities such as credit or financial institutions which, by reason of their activities, are subject to specific obligations in that regard. For that reason, the amended anti-money-laundering directive provides that information on beneficial ownership must be accessible, in all cases, to competent authorities and Financial Intelligence Units, without any restriction, as well as to obliged entities, within the framework of customer due diligence. [108]

Secondly, in comparison with the former regime – which provided, in addition to access by the competent authorities and certain entities, for access by any person or organisation capable of demonstrating a legitimate interest – the regime introduced by Directive 2018/843 amounts to a considerably more serious interference with the fundamental rights guaranteed in Articles 7 and 8 of the Charter, without that increased interference being capable of being offset by any benefits which might result from the latter regime as compared against the former regime, in terms of combating money laundering and terrorist financing.

c. Request for de-referencing in a search engine

Judgment of 8 December 2022 (Grand Chamber), Google (De-referencing of allegedly false information) (C-460/20, EU:C:2022:962)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Directive 95/46/EC – Article 12(b) – Point (a) of the first paragraph of Article 14 – Regulation (EU)

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107 The explanations set out in recital 30 of Directive 2018/843 are referred to here.

108 Article 30(5), first subparagraph, points (a) and (b) of the amended anti-money laundering directive.

2016/679 – Article 17(3)(a) – Operator of an internet search engine – Research carried out on the basis of a person's name – Displaying a link to articles containing allegedly inaccurate information in the list of search results – Displaying, in the form of thumbnails, photographs illustrating those articles in the list of results of an image search – Request for de-referencing made to the operator of the search engine – Weighing-up of fundamental rights – Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights of the European Union – Obligations and responsibilities of the operator of the search engine in respect of processing a request for de-referencing – Burden of proof on the person requesting de-referencing)

The applicants in the main proceedings, TU, who occupies leadership positions and holds shares in various companies, and RE, who was his cohabiting partner and, until May 2015, held general commercial power of representation in one of those companies, were the subject of three articles published on a website in 2015 by G-LLC, the operator of that website. Those articles, one of which was illustrated by four photographs of the applicants and suggested that they led a life of luxury, criticised the investment model of a number of their companies. It was possible to access those articles by entering into the search engine operated by Google LLC ('Google') the surnames and forenames of the applicants, both on their own and in conjunction with certain company names. The list of results provided a link to those articles and to photographs in the form of thumbnails.

The applicants in the main proceedings requested Google, as the controller of personal data processed by its search engine, first, to de-reference the links to the articles at issue from the list of search results, on the ground that they contained inaccurate claims and defamatory opinions, and, second, to remove the thumbnails from the list of search results. Google refused to accede to that request.

Since they were unsuccessful at first instance and on appeal, the applicants in the main proceedings brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany), in the context of which the Bundesgerichtshof (Federal Court of Justice) made a request to the Court of Justice for a preliminary ruling on the interpretation of the GDPR [109] and Directive 95/46. [110]

By its judgment, delivered by the Grand Chamber, the Court develops its case-law on the conditions which apply to requests for de-referencing addressed to the operator of a search engine based on rules regarding the protection of personal data. [111] It examines, in particular, first, the extent of the obligations and responsibilities incumbent on the operator of a search engine in processing a request for de-referencing based on the alleged inaccuracy of the information in the referenced content and, second, the burden of proof imposed on the data subject as regards that inaccuracy. The Court also gives a ruling on the need, for the purposes of examining a request to remove photographs displayed in the form of thumbnails in the list of results of an image search, to take account of the original context of the publication of those photographs on the internet.

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109 Article 17(3)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ('the GDPR') (OJ 2016 L 119, p. 1).

110 Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

111 Judgments of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317), and of 24 September, *GC and Others* (De-referencing of sensitive data) (C-136/17, EU:C:2019:773) and *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772).

Findings of the Court

In the first place, the Court rules that, in the context of striking a balance between, on the one hand, the right to respect for private life and the protection of personal data, and on the other hand, the right to freedom of expression and information, [112] for the purposes of examining a request for de-referencing made to the operator of a search engine seeking the removal from the list of search results of a link to content containing allegedly inaccurate information, such de-referencing is not subject to the condition that the question of the accuracy of the referenced content has been resolved, at least provisionally, in an action brought by the person making that request against the content provider.

As a preliminary point, in order to examine the conditions in which the operator of a search engine is required to accede to a request for de-referencing and thus to remove from the list of results displayed following a search on the basis of the data subject's name, the link to an internet page on which allegations appear which that person regards as inaccurate, the Court stated, in particular, as follows:

– inasmuch as the activity of a search engine is liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of that search engine, as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the guarantees laid down by Directive 95/46 and the GDPR may have full effect and that effective and complete protection of data subjects may actually be achieved;

– where the operator of a search engine receives a request for de-referencing, it must ascertain whether the inclusion of the link to the internet page in question in the list of results is necessary for exercising the right to freedom of information of internet users potentially interested in accessing that internet page by means of such a search, a right protected by the right to freedom of expression and of information;

– the GDPR expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data, on the one hand, and the fundamental right of freedom of information on the other.

First of all, the Court finds that while the data subject's rights to respect for private life and the protection of personal data override, as a general rule, the legitimate interest of internet users who may be interested in accessing the information in question, that balance may, however, depend on the relevant circumstances of each case, in particular on the nature of that information and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

The question of whether or not the referenced content is accurate also constitutes a relevant factor when making that assessment. Accordingly, in certain circumstances, the right of internet users to information and the content provider's freedom of expression may override the rights to private life and to protection of personal data, in particular where the data subject plays a role in public life. However, that relationship is reversed where, at the very least, a part – which is not minor in relation to the content as a whole – of the information referred to in the request for de-referencing proves to

112 Fundamental rights guaranteed by Articles 7, 8 and 11, respectively, of the Charter of Fundamental Rights of the European Union.

be inaccurate. In such a situation, the right to inform and the right to be informed cannot be taken into account, since they cannot include the right to disseminate and have access to such information.

Next, as regards, first, the obligations relating to establishing whether or not the information found in the referenced content is accurate, the Court clarifies that the person requesting the de-referencing on account of the inaccuracy of such information is required to establish the manifest inaccuracy of such information or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information. However, in order to avoid imposing on that person an excessive burden which is liable to undermine the practical effect of the right to de-referencing, that person has to provide only evidence that, in the light of the circumstances of the particular case, can reasonably be required of him or her to try to find. In principle, that person cannot be required to produce, as from the pre-litigation stage, in support of his or her request for de-referencing, a judicial decision made against the publisher of the website, even in the form of a decision given in interim proceedings.

Second, as regards the obligations and responsibilities imposed on the operator of the search engine, the Court points out that the operator of a search engine must, in order to determine whether content may continue to be included in the list of search results carried out using its search engine following a request for de-referencing, take into account all the rights and interests involved and all the circumstances of the case. However, that operator cannot be obliged to investigate the facts and, to that end, to organise an adversarial debate with the content provider seeking to obtain missing information concerning the accuracy of the referenced content. An obligation to contribute to establishing whether or not the referenced content is accurate would impose on that operator a burden in excess of what can reasonably be expected of it in the light of its responsibilities, powers and capabilities. That solution would entail a serious risk that content meeting the public's legitimate and compelling need for information would be de-referenced and would thereby become difficult to find on the internet. There would, accordingly, be a real risk of a deterrent effect on the exercise of freedom of expression and of information if such an operator undertook such de-referencing quasi-systematically, in order to avoid having to bear the burden of investigating the relevant facts for the purpose of establishing whether or not the referenced content was accurate.

Therefore, where the person who has made a request for de-referencing submits evidence establishing the manifest inaccuracy of the information found in the referenced content or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information, the operator of the search engine is required to accede to that request. The same applies where the person making that request submits a judicial decision made against the publisher of the website, which is based on the finding that information found in the referenced content – which is not minor in relation to that content as a whole – is, at least prima facie, inaccurate. By contrast, where the inaccuracy of such information is not obvious, in the light of the evidence provided by the person making the request, the operator of the search engine is not required, where there is no such judicial decision, to accede to such a request for de-referencing. Where the information in question is likely to contribute to a debate of public interest, it is appropriate, in the light of all the circumstances of the case, to place particular importance on the right to freedom of expression and of information.

Lastly, the Court adds that, where the operator of a search engine does not grant a request for de-referencing, the data subject must be able to bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders that controller to adopt the necessary measures. In that regard, the judicial authorities must ensure a balance is struck between competing interests, since they are best placed to carry out a complex and detailed balancing exercise, which takes account of all the criteria and all the factors established by the relevant case-law.

In the second place, the Court rules that, within the context of weighing up fundamental rights mentioned above, for the purposes of examining a request for de-referencing seeking the removal from the results of an image search carried out on the basis of the name of a natural person of photographs displayed in the form of thumbnails representing that person, account must be taken of the informative value of those photographs regardless of the original context of their publication on

the internet page from which they are taken. However, it is necessary to take into consideration any text element which accompanies directly the display of those photographs in the search results and which is capable of casting light on the informative value of those photographs.

In reaching that conclusion, the Court notes that image searches carried out by means of an internet search engine on the basis of a person's name are subject to the same principles as those which apply to internet page searches and the information contained in them. It states that displaying, following a search by name, photographs of the data subject in the form of thumbnails, is such as to constitute a particularly significant interference with the data subject's rights to private life and that person's personal data.

Consequently, when the operator of a search engine receives a request for de-referencing which seeks the removal, from the results of an image search carried out on the basis of the name of a person, of photographs displayed in the form of thumbnails representing that person, it must ascertain whether displaying the photographs in question is necessary for exercising the right to freedom of information of internet users who are potentially interested in accessing those photographs by means of such a search.

In so far as the search engine displays photographs of the data subject outside the context in which they are published on the referenced internet page, most often in order to illustrate the text elements contained in that page, it is necessary to establish whether that context must nevertheless be taken into consideration when striking a balance between the competing rights and interests. In that context, the question whether that assessment must also include the content of the internet page containing the photograph displayed in the form of a thumbnail, the removal of which is sought, depends on the purpose and nature of the processing at issue.

As regards, first, the purpose of the processing at issue, the Court notes that the publication of photographs as a non-verbal means of communication is likely to have a stronger impact on internet users than text publications. Photographs are, as such, an important means of attracting internet users' attention and may encourage an interest in accessing the articles they illustrate. Since, in particular, photographs are often open to a number of interpretations, displaying them in the list of search results as thumbnails may result in a particularly serious interference with the data subject's right to protection of his or her image, which must be taken into account when weighing-up competing rights and interests. A separate weighing-up exercise is required depending on whether the case concerns, on the one hand, articles containing photographs which are published on an internet page and which, when placed into their original context, illustrate the information provided in those articles and the opinions expressed in them, or, on the other hand, photographs displayed in the list of results in the form of thumbnails by the operator of a search engine outside the context in which they were published on the original internet page.

In that regard, the Court recalls that not only does the ground justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing-up of the rights and interests at issue may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of that internet page is at issue. The legitimate interests justifying such processing may be different and, also, the consequences of the processing for the data subject, and in particular for his or her private life, are not necessarily the same. [113]

113 See judgment in *Google Spain and Google*, paragraph 86.

As regards second, the nature of the processing carried out by the operator of the search engine, the Court observes that, by retrieving the photographs of natural persons published on the internet and displaying them separately, in the results of an image search, in the form of thumbnails, the operator of a search engine offers a service in which it carries out autonomous processing of personal data which is distinct both from that of the publisher of the internet page from which the photographs are taken and from that, for which the operator is also responsible, of referencing that page.

Therefore, an autonomous assessment of the activity of the operator of the search engine, which consists of displaying results of an image search, in the form of thumbnails, is necessary, as the additional interference with fundamental rights resulting from such activity may be particularly intense owing to the aggregation, in a search by name, of all information concerning the data subject which is found on the internet. In the context of that autonomous assessment, account must be taken of the fact that that display constitutes, in itself, the result sought by the internet user, regardless of his or her subsequent decision to access the original internet page or not.

The Court observes, however, that such a specific weighing-up exercise, which takes account of the autonomous nature of the data processing performed by the operator of the search engine, is without prejudice to the possible relevance of text elements which may directly accompany the display of a photograph in the list of search results, since such elements are capable of casting light on the informative value of that photograph for the public and, consequently, of influencing the weighing-up of the rights and interests involved.

d. Actions against data processing contrary to the GDPR

Judgment of 28 April 2022, Meta Platforms Ireland (C-319/20, EU:C:2022:322)

(Reference for a preliminary ruling – Protection of natural persons with regard to the processing of personal data – Regulation (EU) 2016/679 – Article 80 – Representation of the data subjects by a not-for-profit association – Representative action brought by a consumer protection association in the absence of a mandate and independently of the infringement of specific rights of a data subject – Action based on the prohibition of unfair commercial practices, the infringement of a consumer protection law or the prohibition of the use of invalid general terms and conditions)

Meta Platforms Ireland manages the provision of services of the online social network Facebook and is the controller of the personal data of users of that social network in the European Union. The Facebook internet platform contains, at the internet address www.facebook.de, an area called 'App-Zentrum' ('App Center') on which Meta Platforms Ireland makes available to users free games provided by third parties. When viewing some of those games, the user is informed that use of the application concerned enables the gaming company to obtain a certain amount of personal data and gives it permission to publish data on behalf of that user. By using that application, the user accepts its general terms and conditions and data protection policy. In addition, in the case of a specific game, the user is informed that the application has permission to post photos and other information on his or her behalf.

The German Federal Union of Consumer Organisations and Associations [114] considered that the information provided by the games concerned in the App Center was unfair. Therefore, as a body

[114] Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. ('the Federal Union').

with standing to bring proceedings seeking to end infringements of consumer protection legislation, [115] the Federal Union brought an action for an injunction against Meta Platforms Ireland. That action was brought independently of a specific infringement of the right to data protection of a data subject and without a mandate from a data subject. The decision upholding that action was the subject of an appeal brought by Meta Platforms Ireland which, after that appeal was dismissed, then brought a further appeal before the Bundesgerichtshof (Federal Court of Justice, Germany). Since it had doubts as to the admissibility of the action brought by the Federal Union, and in particular as to its standing to bring proceedings against Meta Platforms Ireland, that court referred the matter to the Court of Justice.

By its judgment, the Court finds that Article 80(2) of the General Data Protection Regulation [116] does not preclude a consumer protection association from being able to bring legal proceedings, in the absence of a mandate granted to it for that purpose and independently of the infringement of the specific rights of the data subjects, against the person allegedly responsible for an infringement of the laws protecting personal data, on the basis of the infringement of the prohibition of unfair commercial practices, a breach of a consumer protection law or the prohibition of the use of invalid general terms and conditions. Such an action is possible where the data processing concerned is liable to affect the rights that identified or identifiable natural persons derive from that regulation.

Findings of the Court

First of all, the Court notes that while the GDPR [117] seeks to ensure harmonisation of national legislation on the protection of personal data which is, in principle, full, Article 80(2) of that regulation is amongst the provisions which leaves the Member States a discretion with regard to its implementation. [118] Therefore, in order for it to be possible to proceed with the representative action without a mandate provided for in that provision, Member States must make use of the option made available to them by that provision to provide in their national law for that mode of representation of data subjects. However, when exercising that option, the Member States must use their discretion under the conditions and within the limits laid down by the provisions of the GDPR and must therefore legislate in such a way as not to undermine the content and objectives of that regulation.

Next, the Court points out that, by making it possible for Member States to provide for a representative action mechanism against the person allegedly responsible for an infringement of the laws protecting personal data, Article 80(2) of the GDPR lays down a number of requirements to be complied with. Thus, first, standing to bring proceedings is conferred on a body, organisation or association which meets the criteria set out in the GDPR. [119] A consumer protection association, such

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115 Under German law, the laws on consumer protection also include rules defining the lawfulness of the collection or processing or use of a consumer's personal data by an undertaking or entrepreneur.

116 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) ('the GDPR'). Under Article 80(2), 'Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority … pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing [of personal data concerning him or her]'.

117 As is apparent from Article 1(1) of that regulation, read in the light of recitals 9, 10 and 13 thereof.

118 Pursuant to the 'opening clauses'.

119 In particular, Article 80(1) of the GDPR. That provision refers to 'a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public

as the Federal Union, which pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers, since the attainment of such an objective is likely to be related to the protection of the personal data of those persons, may fall within the scope of that concept. Second, the exercise of that representative action presupposes that the entity in question, independently of any mandate conferred on it, considers that the rights which a data subject derives from the GDPR have been infringed as a result of the processing of his or her personal data.

Thus, first, the bringing of a representative action [120] does not require prior individual identification by the entity in question of the person specifically concerned by data processing that is allegedly contrary to the provisions of the GDPR. For that purpose, the designation of a category or group of persons affected by such treatment may also be sufficient. [121]

Second, the bringing of such an action does not require there to be a specific infringement of the rights which a person derives from the GDPR. In order to recognise that an entity has standing to bring proceedings, it is sufficient to claim that the data processing concerned is liable to affect the rights which identified or identifiable natural persons derive from that regulation, without it being necessary to prove actual harm suffered by the data subject, in a given situation, by the infringement of his or her rights. Thus, in the light of the objective pursued by the GDPR, authorising consumer protection associations, such as the Federal Union, to bring, by means of a representative action mechanism, actions seeking to have processing contrary to the provisions of that regulation brought to an end, independently of the infringement of the rights of a person individually and specifically affected by that infringement, undoubtedly contributes to strengthening the rights of data subjects and ensuring that they enjoy a high level of protection.

Finally, the Court states that the infringement of a rule relating to the protection of personal data may at the same time give rise to an infringement of rules on consumer protection or unfair commercial practices. The GDPR [122] allows the Member States to exercise their option to provide for consumer protection associations to be authorised to bring proceedings against infringements of the rights provided for by the GDPR through rules intended to protect consumers or combat unfair commercial practices.

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interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data'.

120 Under Article 80(2) of the GDPR.

121 In particular, in the light of the scope of the concept of 'data subject' in Article 4(1) of the GDPR, which covers both an 'identified natural person' and an 'identifiable natural person'.

122 In particular, Article 80(2) of the GDPR.

IV. Citizenship of the Union [123]

1. Loss of citizenship of the Union on account of loss of nationality of a Member State

Judgment of 18 January 2022 (Grand Chamber), Wiener Landesregierung (Revocation of an assurance of naturalisation) (C-118/20, EU:C:2022:34)

(Reference for a preliminary ruling – Citizenship of the Union – Articles 20 and 21 TFEU – Scope – Renunciation of the nationality of one Member State in order to obtain the nationality of another Member State in accordance with the assurance given by the latter to naturalise the person concerned – Revocation of that assurance on grounds of public policy or public security – Principle of proportionality – Statelessness)

In 2008 JY, who was then an Estonian national residing in Austria, applied for Austrian nationality. By decision of 11 March 2014, the then competent Austrian administrative authority [124] assured her that she would be granted that nationality if she could prove, within two years, that she had relinquished her Estonian nationality. JY provided confirmation within the prescribed period that she had relinquished her Estonian nationality on 27 August 2015. JY has been stateless since.

By decision of 6 July 2017, the Austrian administrative authority which had become competent [125] revoked the decision of 11 March 2014, in accordance with national law, and rejected JY's application for Austrian nationality. In order to justify its decision, that authority stated that JY no longer satisfied the conditions for grant of nationality laid down by national law. JY had committed, since receiving the assurance that she would be granted Austrian nationality, two serious administrative offences, namely failing to display a vehicle inspection disc and driving while under the influence of alcohol. She had also committed eight administrative offences before that assurance was given to her.

Following the dismissal of her action against that decision, JY lodged an appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria). That court states that, in view of the administrative offences committed by JY before and after she was given assurance as to the grant of Austrian nationality, the conditions for revocation of that assurance were fulfilled under Austrian law. It asks, however, whether JY's situation falls within EU law and whether, in order to adopt its decision revoking the assurance given as to naturalisation, which prevents JY from recovering her citizenship of the Union, the competent administrative authority was required to have due regard to EU law, in particular the principle of proportionality enshrined in EU law, given the consequences of such a decision for the situation of the person concerned.

In those circumstances, the referring court decided to seek a ruling from the Court of Justice on the interpretation of EU law. In its Grand Chamber judgment, the Court interprets Article 20 TFEU in the

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[123] The judgment of 9 June 2022, ***Préfet du Gers and Institut national de la statistique et des études économiques*** (C-673/20, EU:C:2022:449), must also be mentioned under this heading. That judgment is presented under heading II. 'Withdrawal of a Member State from the European Union'.

[124] The Niederösterreichische Landesregierung (Government of the Province of Lower Austria, Austria).

[125] The Wiener Landesregierung (Government of the Province of Vienna, Austria).

context of its case-law [126] concerning the obligations of Member States with regard to the acquisition and loss of nationality under EU law.

Findings of the Court

In the first place, the Court rules that the situation of a person who, having the nationality of one Member State only, renounces that nationality and loses, as a result, his or her status of citizen of the Union with a view to obtaining the nationality of another Member State, following the assurance given by the authorities of the latter Member State that she or he will be granted that nationality, falls, by reason of its nature and its consequences, within the scope of EU law where that assurance is revoked with the effect of preventing that person from recovering the status of citizen of the Union.

In that regard, the Court finds, first, that, when that assurance was revoked, JY was stateless and had lost her status of citizen of the Union. Since the application for dissolution of the bond of nationality with her Member State of origin was made in the context of a naturalisation procedure seeking to obtain Austrian nationality and was a consequence of the fact that JY, taking into account the assurance given to her, complied with the requirements of that procedure, a person such as JY cannot be considered to have renounced voluntarily the status of citizen of the Union. On the contrary, having received from the host Member State the assurance that the nationality of the latter would be granted, the application for dissolution is to intended to fulfil a condition for the acquisition of that nationality and, once obtained, to continue to enjoy the status of citizen of the Union and the rights attaching thereto.

Next, where, in the context of a naturalisation procedure, the competent authorities of the host Member State revoke the assurance as to naturalisation, the person concerned who was a national of one other Member State only and renounced his or her original nationality in order to comply with the requirements of that procedure is in a situation in which it is impossible for that person to continue to assert the rights arising from the status of citizen of the Union. Such a procedure, taken as a whole, affects the status conferred by Article 20 TFEU on nationals of the Member States. It may result in a person in JY's situation being deprived of the rights attaching to that status, although, at the start of that procedure, that person was a national of a Member State and thus had the status of citizen of the Union.

Finally, noting that JY, as an Estonian national, has exercised her freedom of movement and residence by settling in Austria, where she has been living for several years, the Court points out that the underlying logic of gradual integration in the society of the host Member State that informs Article 21(1) TFEU requires that the situation of citizens of the Union, who acquired rights under that provision as a result of having exercised their right to free movement within the European Union and are liable to lose not only their entitlement to those rights but also the very status of citizen of the Union, even though they have sought, by becoming naturalised in the host Member State, to become more deeply integrated in the society of that Member State, falls within the scope of the FEU Treaty provisions relating to citizenship of the Union.

In the second place, the Court interprets Article 20 TFEU as meaning that the competent national authorities and the national courts of the host Member State are required to ascertain whether the decision to revoke, which makes the loss of the status of citizen of the Union permanent for the person concerned, is compatible with the principle of proportionality in the light of the consequences it entails for that person's situation. That requirement of compatibility with the principle of

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126 Arising from the judgments of 2 March 2010, *Rottmann* (C-135/08, ECLI:EU:C:2010:104), and of 12 March 2019, *Tjebbes and Others* (C-221/17, EU:C:2019:189).

proportionality is not satisfied where such a decision is based on administrative traffic offences which, under the applicable provisions of national law, give rise to a mere pecuniary penalty.

In order to reach that conclusion, the Court states that, where, in the context of a naturalisation procedure initiated in a Member State, that State requires a citizen of the Union to renounce the nationality of his or her Member State of origin, the exercise and effectiveness of the rights which that citizen of the Union derives from Article 20 TFEU require that that person should not at any time be liable to lose the fundamental status of citizen of the Union by the mere fact of the implementation of that procedure. Any loss, even temporary, of that status means that the person concerned is deprived, for an indefinite period, of the opportunity to enjoy all the rights conferred by that status.

It follows that, where a national of a Member State applies to relinquish his or her nationality in order to be able to obtain the nationality of another Member State and thus continue to enjoy the status of citizen of the Union, the Member State of origin should not adopt, on the basis of an assurance given by that other Member State that the person concerned will be granted the nationality of that State, a final decision concerning the deprivation of nationality without ensuring that that decision enters into force only once the new nationality has actually been acquired.

That said, in a situation where the status of citizen of the Union has already been temporarily lost because, in the context of a naturalisation procedure, the Member State of origin withdraws the nationality of the person concerned before that person has actually acquired the nationality of the host Member State, the obligation to ensure the effectiveness of Article 20 TFEU falls primarily on the latter Member State. That obligation arises, in particular, in respect of a decision to revoke the assurance as to naturalisation which may make the loss of the status of citizen of the Union permanent. Such a decision can therefore be made only on legitimate grounds and subject to the principle of proportionality.

Under the examination of proportionality it is necessary to establish, in particular, whether that decision is justified in relation to the gravity of the offences committed by the person concerned. As regards JY, since the offences committed prior to the assurance as to naturalisation did not preclude that assurance being given, they can no longer be taken into account as a basis for the decision to revoke that assurance. As for those committed after receiving the assurance as to naturalisation, in view of their nature and gravity as well as the requirement that the concepts of public policy and public security be interpreted strictly, they do not show that JY represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society or a threat to public security in Austria. Traffic offences, punishable by mere administrative fines, cannot be regarded as capable of demonstrating that the person responsible for those offences is a threat to public policy and public security which may justify the permanent loss of his or her status of citizen of the Union.

2. Right to move and reside freely within the territory of the Member States

Judgment of 10 March 2022, Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance cover) (C-247/20, EU:C:2022:177)

(Reference for a preliminary ruling – Right to move and reside freely within the territory of the Member States – Article 21 TFEU – Directive 2004/38/EC – Article 7(1)(b) and Article 16 – Child who is a national of a Member State residing in another Member State – Right of residence derived from the parent who is the primary carer of that child – Requirement of comprehensive sickness insurance cover – Child having a permanent right of residence for part of the periods concerned)

VI and her husband are Pakistani nationals who live in Northern Ireland (United Kingdom) with their children. Their son, born in 2004, of Irish nationality, acquired a right of permanent residence in the United Kingdom on account of his legal residence for a continuous period of five years.

Although VI, who initially looked after their children, works and has been subject to tax only since April 2016, her husband worked and was subject to tax for all the periods at issue in the main proceedings, since both spouses had sufficient resources to maintain their family.

The Commissioners for Her Majesty's Revenue & Customs took the view that, from May to August 2006 and from August 2014 to September 2016, VI was not covered by comprehensive sickness insurance and, consequently, did not have a right of residence in the United Kingdom, so that she was not entitled, in respect of those two periods, to either Child Tax Credit or Child Benefit.

The Social Security Appeal Tribunal (Northern Ireland), before which two appeals were brought in relation to those rights, asks the Court of Justice to determine to what extent the requirement to have comprehensive sickness insurance cover in the host Member State, laid down in Article 7(1)(b) of Directive 2004/38, [127] was applicable to VI and her son during the periods concerned and, if the requirement is met, whether affiliation, free of charge, to the public health insurance system of the host State, which they had, was sufficient to satisfy that requirement.

The Court holds that Article 21 TFEU, which enshrines the freedom of movement and residence of Union citizens, and Article 16(1) of Directive 2004/38, which covers the acquisition of a right to permanent residence, must be interpreted as meaning that neither the child, a Union citizen, who has acquired a right of permanent residence, nor the parent who is the primary carer of that child is required to have comprehensive sickness insurance cover, within the meaning of Article 7(1)(b) of that directive, in order to retain their right of residence in the host State. In contrast, as regards periods prior to the acquisition by a child, a Union citizen, of a right of permanent residence in the host State, both that child, where a right of residence is claimed for him or her on the basis of that Article 7(1)(b), and the parent who is the primary carer of that child must have comprehensive sickness insurance cover within the meaning of that directive.

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127 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35). Article 7(1)(b) of that directive states that all Union citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State.

Findings of the Court

As regards, first, periods after a child, a Union citizen, has acquired a right of permanent residence after residing legally for a continuous period of five years in the host Member State, the Court points out that that right is no longer subject [128] to the conditions of having, for himself or herself and his or her family, sufficient resources and comprehensive sickness insurance cover, applicable before the acquisition of such a right of permanent residence. [129]

As regards the parent who is a third-country national who is the primary carer of that child, the Court finds that he or she is not a 'family member', within the meaning of Directive 2004/38, and cannot therefore derive from it [130] a right of permanent residence in the host Member State where that child is dependent on his or her parent. The concept of 'family member', within the meaning of that directive, is limited, [131] as regards the relatives in the ascending line of a Union citizen, to 'dependent direct relatives in the ascending line' of that citizen.

That said, the right of permanent residence in the host Member State, conferred by EU law on a minor national of another Member State, must, for the purposes of ensuring the effectiveness of that right of residence, be considered as necessarily implying, under Article 21 TFEU, a right for the parent who is the primary carer of that minor Union citizen to reside with him or her in the host Member State, regardless of the nationality of that parent. It follows that the inapplicability of the conditions set out, inter alia, in Article 7(1)(b) of Directive 2004/38, following the acquisition by that minor of a right of permanent residence under Article 16(1) of that directive, extends, pursuant to Article 21 TFEU, to that parent.

Second, as regards periods before a child who is a Union citizen has acquired a right of permanent residence in the host State, it follows from the wording of Article 7(1)(b) of Directive 2004/38 and from the general scheme and purpose of that directive that not only the Union citizen but also his or her family members who live with that child in the host State, and the parent who is the primary carer of such a child, must be covered by comprehensive sickness insurance.

In that regard, it follows from that article, read in conjunction with recital 10 and Article 14(2) of the same directive, that, throughout the period of residence in the host Member State of more than three months and less than five years, economically inactive Union citizens must, inter alia, have comprehensive sickness insurance cover for themselves and their family members so as not to become an unreasonable burden on the public finances of that Member State. In the case of a child, a Union citizen, who resides in the host State with a parent who is his or her primary carer, this requirement is satisfied both where this child has comprehensive sickness insurance which covers his or her parent, and in the inverse case where this parent has such insurance covering the child.

In the case of a minor Union citizen, one of whose parents, a third-country national, has worked and was subject to tax in the host State during the period concerned, it would be disproportionate to deny that child and the parent who is his or her primary carer a right of residence on the sole ground that, during that period, they were affiliated free of charge to the public sickness insurance system of the

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128 Under the last sentence of Article 16(1) of Directive 2004/38.

129 Laid down under Article 7(1)(b) of Directive 2004/38.

130 Article 16(2) of Directive 2004/38 provides that paragraph 1 thereof is to apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

131 Under Article 2(2) of Directive 2004/38.

host State. It cannot be considered that that affiliation free of charge constitutes, in the circumstances which characterise the case in the main proceedings, an unreasonable burden on the public finances of that State.

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

Judgment of 5 May 2022, Subdelegación del Gobierno en Toledo (Residence of a family member – Insufficient resources) (C-451/19 and C-532/19, EU:C:2022:354)

(Reference for a preliminary ruling – Article 20 TFEU – Citizenship of the European Union – Union citizen who has never exercised his or her right of free movement – Application for a residence card for his or her family member who is a third-country national – Refusal – Requirement that the Union citizen has sufficient resources – Obligation for spouses to live together – Minor child who is a Union citizen – National legislation and practice – Genuine enjoyment of the substance of the rights conferred on EU nationals – Deprivation)

XU is a child who was born in Venezuela to a Venezuelan mother who has sole custody of him. He resides in Spain with his mother, with the Spanish national whom she married and with the child whom she had with that Spanish national. The latter child is a Spanish national. QP, who is a Peruvian national, married a Spanish national with whom he had a child who is a Spanish national. XU and QP each are family members of a Union citizen who is a national of the State in which they reside and who has never exercised his or her right of free movement in another Member State.

XU and QP had their applications for a residence card as a family member of a Union citizen [132] refused on the ground that that Union citizen did not have, for himself or herself and for the members of his or her family, sufficient financial resources. [133] Only the economic situation of the stepfather, in XU's case, and the spouse, in QP's case, was taken into account by the competent authority, namely the Subdelegación del Gobierno en Toledo (Provincial Office of the Government, Toledo, Spain).

As the actions brought against those decisions were upheld, the authority brought an appeal before the referring court against the judgments given in that regard.

The referring court is uncertain as to whether a practice of automatically refusing the family reunification of a third-country national with a Spanish national, who has never exercised his or her right to move freely, solely on the ground of his or her economic situation is compatible with EU law. [134] Such a practice could lead to that Spanish national having to leave the territory of the European Union. According to that court, that could be the situation in both cases, in view of the obligation to live together imposed by the Spanish legislation applicable to marriage. [135]

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132 In the present case, for XU, his stepfather and, for QP, his wife.

133 So as not to become a burden on the Spanish social assistance system, as provided for by Spanish legislation.

134 Article 20 TFEU relating to Union citizenship.

135 In Case C-532/19, the refusal to grant a right of residence to QP would force his wife to leave the territory of the European Union. In Case C-451/19, the refusal to grant a right of residence to XU would lead to the departure of XU and his mother from the territory of the European Union, and would force not only her husband, but also the minor child, a Spanish national born to them, to leave that territory.

In its judgment, the Court of Justice holds, in essence, that EU law precludes a Member State from refusing an application for family reunification made for the benefit of a third-country national, who is a family member of a Union citizen, the latter being a national of that Member State and who has never exercised his or her right of freedom of movement, solely on the ground that that Union citizen does not have, for himself or herself and that family member, sufficient resources, without there having been an examination of whether there exists, between that Union citizen and his or her family member, a relationship of dependency of such a nature that, in the event of a refusal to grant a derived right of residence to that third-country national family member, the Union citizen would be forced to leave the territory of the European Union as a whole and would thereby be deprived of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen. The Court then provides a number of clarifications in order to determine whether, in each case, there is a relationship of dependency capable of justifying the grant to the third-country national of a derived right of residence under EU law.

Findings of the Court

As regards family reunification and the requirement to have sufficient resources, as a preliminary point, the Court states that EU law does not apply, in principle, to an application for family reunification of a third country national with a member of his or her family who is a national of a Member State and who has never exercised his or her right of freedom of movement, and that EU law therefore does not preclude, in principle, legislation of a Member State which makes such family reunification subject to a condition of sufficient resources. However, the systematic imposition of such a condition, without exception, may infringe the derived right of residence which must be granted, in very specific situations, under Article 20 TFEU, to a third-country national who is a family member of a Union citizen, in particular if the refusal of such a right forced that citizen to leave the territory of the European Union, thereby depriving him or her of the genuine enjoyment of the substance of the rights conferred by his or her status as a Union citizen. That is the case if there exists, between that third-country national and the Union citizen, who is a member of his or her family, a relationship of dependency of such a nature that it would lead to the Union citizen being forced to accompany the third-country national in question and to leave the territory of the European Union as a whole.

As regards the existence of a relationship of dependency in Case C-532/19, the Court states, first, that a relationship of dependency, capable of justifying the grant of a derived right of residence under Article 20 TFEU, does not exist solely on the ground that the national of a Member State who is an adult and who has never exercised his or her right of freedom of movement, and his or her spouse, an adult and third-country national, are required to live together, in accordance with the rules of the Member State of which the Union citizen is a national and in which the marriage was entered into.

The Court then goes on to examine whether such a relationship of dependency may exist where that national and his or her spouse, a national of a Member State who has never exercised his or her right of freedom of movement, are the parents of a minor who is a national of the same Member State and who has not exercised his or her right of freedom of movement.

In order to assess the risk that the child concerned, a Union citizen, might be forced to leave the territory of the European Union if his or her parent, a third-country national, were to be refused a derived right of residence in the Member State concerned, it must be determined whether that parent is the primary carer of the child and whether there is an actual relationship of dependency between

them, taking into account the right to respect for family life [136] and the obligation to take into consideration the child's best interests. [137]

The fact that the other parent, a Union citizen, is genuinely able and willing to assume sole responsibility for the actual day-to-day care of the child is not a sufficient ground for a finding that there does not exist, between the third-country national parent and the child, a relationship of dependency of such a nature that the child would be forced to leave the territory of the European Union if that third-country national were refused a right of residence. Such a finding must be based on the taking into account, in the best interests of the child concerned, of all the circumstances of the case. [138]

Thus, the fact that the parent, who is a third-country national, lives with the minor child who is a Union citizen, is relevant for a determination as to whether there is a relationship of dependency between them, but is not a necessary condition. Furthermore, where the Union citizen minor lives on a stable basis with both of his or her parents, and the custody of that child and the legal, emotional and financial burden in relation to that child are therefore shared on a daily basis by those two parents, there is a rebuttable presumption that there is a relationship of dependency between that Union citizen minor and his or her parent, who is a third-country national, irrespective of the fact that the other parent of that child has, as a national of the Member State in which that family is established, an unconditional right to remain in that Member State.

As regards the existence of a relationship of dependency in Case C-451/19, in the first place, the Court points out that, since the derived right of residence which may be granted to a third-country national under Article 20 TFEU is subsidiary in scope, the referring court must examine, inter alia, whether XU, who was a minor on the date on which the application for a residence permit was refused and whose mother, a third-country national, held such a permit on Spanish territory, was entitled, on that date, to a right of residence in that territory under Directive 2003/86. [139]

In the second place, in the event that XU does not hold any residence permit under secondary EU law or national law, the Court examines whether Article 20 TFEU may permit the grant of a derived right of residence to that third-country national.

In that regard, it is necessary to determine whether, on the date on which the application for a residence permit for XU was refused, his forced departure could, in practice, have required his mother to leave the territory of the European Union because of the relationship of dependency between them and, if so, whether the departure of XU's mother would also, in practice, have forced her minor child, a Union citizen, to leave the territory of the European Union because of the relationship between that Union citizen and his mother.

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136 Set out in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter').

137 Recognised in Article 24(2) of the Charter, which includes the right for that child to maintain on a regular basis a personal relationship and direct contact with both parents, enshrined in Article 24(3) of the Charter.

138 Including the child's age, physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.

139 Article 4(1)(c) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12). Even though that directive provides that it does not apply to family members of a Union citizen, in view of its objective, which is to promote family reunification, and in view of the protection which it seeks to grant to third country nationals, in particular minors, its application in favour of a third-country national minor cannot be excluded merely because his or her parent, who is a third-country national, is also the parent of a Union citizen who was born to that third-country national and a national of a Member State.

The assessment, for the purposes of the application of Article 20 TFEU, of the existence of a relationship of dependency between a parent and his or her child, both being third-country nationals, is based, *mutatis mutandis*, on the same criteria as those set out above. Where it is a third-country national minor who is refused a residence permit and is likely to be forced to leave the territory of the European Union, the fact that his or her other parent could actually take care of him or her from a legal, financial and emotional point of view, including in his or her country of origin, is relevant, but is not sufficient to conclude that the parent who is a third-country national and resident in the territory of that Member State would not be forced, in practice, to leave the territory of the European Union.

If, on the date on which the application for a residence permit for XU was refused, his forced departure from the Spanish territory would, in practice, have forced not only his mother, a third-country national, but also her other child, who is a Union citizen, to leave the territory of the European Union, which it is for the referring court to ascertain, a derived right of residence should have been granted to his half-brother, XU, under Article 20 TFEU, in order to prevent that Union citizen from being deprived, by his departure, of the enjoyment of the essence of the rights which he holds by way of his status.

4. Discrimination on grounds of nationality

Judgment of 22 December 2022 (Grand Chamber), Generalstaatsanwaltschaft München (Request for extradition to Bosnia and Herzegovina) (C-237/21, EU:C:2022:1017)

(Reference for a preliminary ruling – Citizenship of the European Union – Articles 18 and 21 TFEU – Request sent to a Member State by a third State for the extradition of a Union citizen who is a national of another Member State and who has exercised his right to free movement in the first of those Member States – Request made for the purpose of enforcing a custodial sentence – Prohibition on extradition applied solely to own nationals – Restriction of freedom of movement – Justification based on the prevention of impunity – Proportionality)

S.M., who has Croatian, Bosnian and Serbian nationality, has lived in Germany since 2017 and has been working there since 2020. In November 2020, the authorities of Bosnia and Herzegovina requested that the Federal Republic of Germany extradite S.M. for the purpose of enforcing a custodial sentence that was imposed on him by a Bosnian court.

The Generalstaatsanwaltschaft München (Munich Public Prosecutor's Office, Germany) applied, referring to the judgment in *Raugevicius*, [140] for the extradition of S.M. to be declared inadmissible.

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140 In the judgment of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898; 'the judgment in *Raugevicius*'), the Court interpreted Article 18 TFEU (which sets out the principle of non-discrimination on grounds of nationality) and Article 21 TFEU (which guarantees, in paragraph 1, the right to move and reside freely within the territory of the Member States) as meaning that, where an extradition request has been made by a third State for a Union citizen who has exercised his or her right to free movement, for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the European Union for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served in its territory, is required to ensure that that Union citizen, provided that he or she resides permanently in the territory of the Member State in question, receives the same treatment as that accorded to its own nationals in relation to extradition (paragraph 50 and the operative part).

According to the Oberlandesgericht München (Higher Regional Court, Munich, Germany), which is the referring court, the validity of that application depends on whether Articles 18 and 21 TFEU are to be interpreted as providing for the non-extradition of a Union citizen even if, under the international treaties, the requested Member State [141] is required to extradite that Union citizen.

That question was not answered in the judgment in *Raugevicius*, since, in the case which gave rise to that judgment, the requested Member State was authorised, under the international treaties applicable, not to extradite the Lithuanian national in question out of the European Union. In the present case, however, Germany is under an obligation to Bosnia and Herzegovina to extradite S.M. pursuant to the European Convention on Extradition, signed in Paris on 13 December 1957. In accordance with Article 1 of that convention, Germany and Bosnia and Herzegovina are required to surrender to each other persons who are wanted by the judicial authorities of the requesting State for the carrying out of a sentence. In that regard, the declaration made by Germany under Article 6 of that convention, concerning the protection of its 'nationals' against extradition, restricts that term solely to persons possessing German citizenship.

Thus, the Court of Justice did not address in the judgment in *Raugevicius* the question whether the need to contemplate measures that are less restrictive than extradition may mean that the requested Member State infringes its obligations under international law.

The referring court therefore asks the Court about the interpretation of Articles 18 and 21 TFEU. It asks, in essence, whether, where a request for extradition has been made to a Member State by a third State for the purpose of enforcing a custodial sentence imposed on a national of another Member State residing permanently in the first Member State, the national law of which prohibits only the extradition of its own nationals out of the European Union and makes provision for the possibility that that sentence may be enforced in its territory provided that the third State consents to it, Articles 18 and 21 TFEU preclude that first Member State from extraditing that Union citizen, in accordance with its obligations under an international convention, if it cannot actually assume responsibility for enforcing that sentence in the absence of such consent.

In its judgment, the Court replies that Articles 18 and 21 TFEU must be interpreted as meaning that:

– the requested Member State is, in such circumstances, required by those provisions actively to seek consent from the third State, which made the extradition request, for the sentence imposed on the national of another Member State, residing permanently in the requested Member State, to be enforced in the latter's territory, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State;

– in the absence of such consent, the requested Member State is not precluded by those provisions, in such circumstances, from extraditing that Union citizen, in accordance with its obligations under an international convention, in so far as that extradition does not infringe the rights guaranteed by the Charter of Fundamental Rights of the European Union. [142]

Findings of the Court

In the first place, the Court recalls that, in the judgment in *Raugevicius*, which, like the case in the main proceedings, concerned an extradition request from a third State which had not concluded an extradition agreement with the European Union, it held that although, in the absence of EU legal

141 The Member State to which an extradition request was submitted.

142 'The Charter'.

provisions on the extradition of nationals of Member States to third States, Member States have the power to adopt such provisions, that power must be exercised in accordance with EU law and, in particular, with Article 18 and Article 21(1) TFEU.

As a Croatian national who is lawfully resident in Germany, S.M. is entitled, as a Union citizen, to rely on Article 21(1) TFEU and falls within the scope of the Treaties, within the meaning of Article 18 TFEU. Holding also the nationality of the third country which made the extradition request cannot prevent him from asserting the rights and freedoms conferred by Union citizenship, in particular those guaranteed by Articles 18 and 21 TFEU.

In the second place, the Court notes that a Member State's rules on extradition which give rise, as in the main proceedings, to different treatment, depending on whether the requested person is a national of that Member State or of another Member State, are liable to affect the freedom of movement and residence of nationals of other Member States who are lawfully resident in the territory of the requested State, in so far as they have the consequence that such nationals are not afforded the protection against extradition reserved for nationals of the latter Member State.

Consequently, in a situation such as that in the main proceedings, the unequal treatment involved in permitting the extradition of a national of a Member State other than the requested Member State constitutes a restriction on that freedom, which can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of national law.

The legitimate objective of averting the risk that persons who have committed an offence should go unpunished may justify a measure that restricts the freedom laid down in Article 21 TFEU, provided that that measure is necessary for the protection of the interests which it is intended to secure and those objectives cannot be attained by less restrictive measures.

In the case of an extradition request for the purpose of enforcing a custodial sentence, the possibility, where available under the law of the requested Member State, of the sentence to which the extradition request relates being enforced in the territory of the requested Member State constitutes an alternative to extradition which is less prejudicial to the exercise of the right to free movement and residence of a Union citizen who is permanently resident in that Member State. Therefore, under Articles 18 and 21 TFEU, such a national of another Member State, residing permanently in the requested Member State, should be able to serve a sentence in the territory of that Member State under the same conditions as nationals of that Member State.

In the third place, the Court points out, however, that the case-law arising from the judgment in *Raugevicius* did not establish an automatic and absolute right for Union citizens not to be extradited out of the European Union. The Court also states that, where a national rule introduces, as in the case in the main proceedings, a difference in treatment between nationals of the requested Member State and Union citizens who reside there permanently, by prohibiting only the extradition of the former, that Member State is obliged actively to seek to ascertain whether there is an alternative to extradition that is less prejudicial to the exercise of the rights and freedoms which such Union citizens derive from Articles 18 and 21 TFEU, when they are the subject of an extradition request that has been issued by a third State.

Thus, where the application of such an alternative to extradition consists in Union citizens who reside permanently in the requested Member State being able to serve their sentence in that Member State under the same conditions as nationals of that Member State, but such application is subject to the consent of the third State which made the extradition request, Articles 18 and 21 TFEU require the requested Member State actively to seek the consent of that third State, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State.

If that third State consents to the sentence being enforced in the territory of the requested Member State, that Member State will be in a position to allow the Union citizen whose extradition has been

requested and who resides permanently in its territory to serve in that Member State the sentence that was imposed on that Union citizen in the third State which made the extradition request, and to ensure that that Union citizen is treated in the same way as that Member State's own nationals.

In such a case, that alternative to extradition could also allow the requested Member State to exercise its powers in accordance with its contractual obligations to that third State. The consent of that third State to the full sentence referred to in the extradition request being enforced in the requested Member State could render the execution of that request superfluous.

If, on the other hand, the consent of that third State is not obtained, the alternative to extradition required by Articles 18 and 21 TFEU could not be applied. In that situation, that Member State can extradite the person concerned in accordance with its obligations under the European Convention on Extradition, since a refusal to extradite would not enable the risk of that person going unpunished to be averted.

In that case, since the extradition of the person concerned constitutes, in the light of that objective, a necessary and proportionate measure, the restriction of the right to movement and residence stemming from extradition for the purpose of enforcing a sentence is justified. Nevertheless, the requested Member State must check that that extradition will not undermine the protection afforded by Article 19(2) of the Charter against any serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in the third State which made the extradition request.

V. Institutional provisions

1. Seat of Union institutions and bodies

Judgment of 14 July 2022 (Grand Chamber), Italy and Comune di Milano v Council (Seat of the European Medicines Agency) (C-59/18 and C-182/18, EU:C:2022:567)

(Action for annulment – Law governing the institutions – EU bodies, offices and agencies – European Medicines Agency (EMA) – Competence to determine the location of the seat – Article 341 TFEU – Scope – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting – Jurisdiction of the Court under Article 263 TFEU – Author and legal nature of the act – Absence of binding effects in the EU legal order)

Judgment of 14 July 2022 (Grand Chamber), Italy and Comune di Milano v Council and Parliament (Seat of the European Medicines Agency) (C-106/19 and C-232/19, EU:C:2022:568)

(Action for annulment – Law governing the institutions – Regulation (EU) 2018/1718 – Location of the seat of the European Medicines Agency (EMA) in Amsterdam (Netherlands) – Article 263 TFEU – Admissibility – Interest in bringing proceedings – Locus standi – Direct and individual concern – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting in order to determine the location of the seat of an EU agency – Absence of binding effects in the EU legal order – Prerogatives of the European Parliament)

Judgment of 14 July 2022 (Grand Chamber), Parliament v Council (Seat of the European Labour Authority) (C-743/19, EU:C:2022:569)

(Action for annulment – Law governing the institutions – Bodies, offices and agencies of the European Union – European Labour Authority (ELA) – Competence to determine the location of the seat – Article 341 TFEU – Scope – Decision adopted by the Representatives of the Governments of the Member States in the margins of a Council meeting – Jurisdiction of the Court under Article 263 TFEU – Author and legal nature of the act – Absence of binding effects in the EU legal order)

Five actions were brought before the Court for annulment of various measures adopted, first, by the Representatives of the Governments of the Member States and, secondly, by the Council and the European Parliament, concerning the determination of the seat of two European agencies.

Two actions were brought by the Italian Republic and the Comune di Milano (Municipality of Milan, Italy), respectively, against (i) the Council for the annulment of the decision of 20 November 2017 [143] adopted by the Representatives of the Governments of the Member States (Joined Cases C-59/18 and

[143] Decision adopted in the margins of a meeting of the Council designating the city of Amsterdam as the new seat of the European Medicines Agency (EMA) ('the decision determining the new seat of the EMA').

C-182/18) and (ii) the Parliament and the Council for the annulment of Regulation (EU) 2018/1718 [144] (Joined Cases C-106/19 and C-232/19) concerning the designation of the city of Amsterdam (Netherlands) as the new seat of the European Medicines Agency (EMA) following Brexit. Another action was brought by the Parliament against the Council for annulment of the decision of 13 June 2019 [145] taken by common accord between the Representatives of the Governments of the Member States and determining the seat of the European Labour Authority (ELA) in Bratislava (Slovakia) (Case C-743/19).

In the cases concerning the seat of the EMA, the Heads of State or Government had approved, following Brexit, a procedure for adopting a decision on the transfer of that seat, which had until then been established in London (United Kingdom). At the end of that procedure, the offer of the Kingdom of the Netherlands had prevailed over the offer of the Italian Republic (Milan). Consequently, the Representatives of the Governments of the Member States had, by the decision of 20 November 2017, designated, in the margins of a meeting of the Council, the city of Amsterdam as the new seat of the EMA. That designation had been confirmed by the contested regulation at the end of the ordinary legislative procedure, involving the participation of the Parliament. The Italian Republic and the municipality of Milan maintained, however, that the decision determining the new seat of the EMA, in so far as it concerned the designation of the seat of an agency of the Union and not of an institution of the Union, fell within the exclusive competence of the European Union and that it had, in fact, to be attributed to the Council. They therefore disputed the lawfulness of that decision as the basis for the contested regulation and maintained, moreover, that the Parliament had not fully exercised its legislative prerogatives when adopting that regulation.

In the case concerning the seat of the ELA, the Representatives of the Governments of the Member States had approved by common accord the procedure and the criteria for deciding on the seat of that agency. In accordance with that procedure, they adopted, in the margins of a meeting of the Council, the decision fixing the seat of the ELA in Bratislava. The Parliament maintained that the actual author of that decision was in fact the Council and that, since it was a legally binding act of the European Union, it could be challenged before the Court in an action for annulment.

By three Grand Chamber judgments, the Court develops its case-law on the legal framework applicable to the determination of the seat of bodies, offices and agencies of the Union. It considers, inter alia, that decisions determining the new seat of the EMA and the seat of the ELA are political acts, adopted by the Member States alone in that capacity, and not as members of the Council, with the result that those acts are not subject to the review of legality provided for under Article 263 TFEU. Those decisions cannot be treated in the same way as those taken under Article 341 TFEU, [146] which concerns only the determination of the seat of the institutions of the Union. [147] That provision cannot, therefore, constitute the legal basis for those decisions.

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144 Regulation (EU) 2018/1718 of the European Parliament and of the Council of 14 November 2018 amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency (OJ 2018 L 291, p. 3; 'the contested regulation').

145 Decision (EU) 2019/1199 taken by common accord between the Representatives of the Governments of the Member States of 13 June 2019 on the location of the seat of the European Labour Authority (OJ 2019 L 189, p. 68; 'the decision determining the seat of the ELA').

146 Article 341 TFEU lays down that 'the seat of the institutions of the Union shall be determined by common accord of the governments of the Member States'.

147 As referred to in Article 13(1) TEU.

Findings of the Court

- **Admissibility of an action brought by a regional or local entity against a regulation determining the location of the seat of a body, office or agency of the Union (Joined Cases C-106/19 and C-232/19)**

The Court notes, first of all, that an action brought by a regional entity cannot be treated in the same way as an action brought by a Member State within the meaning of Article 263 TFEU and that, consequently, such an entity must establish both an interest and standing to bring proceedings. After finding that the municipality of Milan had an interest in bringing proceedings, in so far as the possible annulment of the contested regulation would entail the resumption of the legislative procedure for determining the seat of the EMA in which it was a candidate, the Court holds that that entity is directly and individually concerned by that regulation and, therefore, has standing to seek its annulment. In that regard, it states, first, that that regulatory act leaves no discretion to its addressees and, secondly, that the municipality of Milan actually participated in the selection procedure for the seat of the EMA, which placed it in a situation which distinguished it individually in a similar manner to that of an addressee of the act.

- **The jurisdiction of the Court to hear and determine proceedings concerning decisions of the Member States on the location of the seat of a body, office or agency of the Union (Joined Cases C-59/18 and C-182/18 and Case C-743/19)**

The Court notes, as a preliminary point, that, in the context of an action for annulment, the EU Courts have jurisdiction only to review the legality of acts attributable to the institutions, bodies, offices and agencies of the Union. Acts adopted by the Representatives of the Governments of the Member States, acting in that capacity and thus collectively exercising the powers of the Member States, are therefore not subject to judicial review by the EU Courts, except where, having regard to its content and the circumstances in which it was adopted, the act in question is in reality a decision of the Council. The Court states, consequently, that the decisions determining the new seat of the EMA and the seat of the ELA can be understood only in the light of the legal framework applicable to the location of the seat of the bodies, offices and agencies of the Union.

In that regard, the Court examines, as part of a textual, contextual and teleological analysis, whether Article 341 TFEU may validly be relied on as the basis for those decisions. [148]

In the first place, it points out that the wording of Article 341 TFEU refers formally only to 'the institutions of the Union'.

In the second place, as regards the context of that provision, the Court considers, in particular, that the broad interpretation it gave to that term in relation to non-contractual liability [149] cannot usefully be relied on for the purposes of defining, by analogy, the scope of that provision. Furthermore, the Court notes that the previous institutional practice relied on by the Council, in accordance with which the seats of bodies, offices and agencies of the Union were determined on the basis of a political choice made solely by the Representatives of the Governments of the Member States, is far from being generalised, does not enjoy institutional recognition and, in any event, cannot create a precedent which is binding on the institutions.

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148 The Court, on the merits, follows similar reasoning in Joined Cases C-106/19 and C-232/19.

149 Under the second paragraph of Article 340 TFEU.

In the third place, as regards the objective of Article 341 TFEU, the Court states, first of all, that that article preserves the decision-making powers of the Member States in determining the seat of the institutions of the Union only. It notes, next, that the establishment of the bodies, offices and agencies of the Union is the result of an act of secondary legislation adopted on the basis of the substantive provisions implementing the EU policy in which the body, office or agency is involved. However, the decision on the location of the seat of those bodies, offices or agencies is consubstantial with the decision on their establishment. Accordingly, the EU legislature has, in principle, exclusive competence to determine the location of the seat of a body, office or agency of the Union, just as it has to define its powers and organisation. Lastly, the Court points out that the fact that the decision determining the location of the seat of a body, office or agency of the Union may have an important political dimension does not preclude that decision from being taken by the EU legislature in accordance with the procedures laid down by the substantively relevant provisions of the Treaties.

In the light of the foregoing, the Court concludes that Article 341 TFEU cannot be interpreted as governing the designation of the location of the seat of a body, office or agency of the Union, such as the EMA or the ELA, and that the competence to determine the location of the seat of those agencies lies not with the Member States but with the EU legislature, in accordance with the ordinary legislative procedure.

The Court then examines whether it has jurisdiction to rule on the validity of the decisions determining the location of the new seat of the EMA and the seat of the ELA under Article 263 TFEU. In that regard, it notes that the relevant criterion to exclude the jurisdiction of the EU Courts to hear and determine an action brought against acts adopted by the Representatives of the Governments of the Member States is solely that relating to their author, irrespective of their binding legal effects. To extend the concept of a challengeable act under Article 263 TFEU to acts adopted, even by common accord, by the Member States would amount to allowing the EU Courts to carry out a direct review of the acts of the Member States and, thus, to circumventing the remedies specifically provided for in the event of failure to fulfil their obligations under the Treaties.

Lastly, the Court states that it is for the EU legislature, for reasons of both legal certainty and effective judicial protection, to adopt an act of the European Union ratifying or, on the contrary, departing from the political decision adopted by the Member States. Since that act necessarily precedes any measure for the actual implementation of the location of the seat of the agency concerned, only that act of the EU legislature is capable of producing binding legal effects under EU law.

The Court concludes that the decisions of the Representatives of the Governments of the Member States determining the location of the new seat of the EMA and of the seat of the ELA (Joined Cases C-59/18 and C-182/18 and Case C-743/19) are not acts of the Council but acts of a political nature without any binding legal effects, taken by the Member States collectively, with the result that those decisions cannot be the subject of an action for annulment under Article 263 TFEU. Accordingly, it dismisses the actions in question as being directed against acts the legality of which it does not have jurisdiction to review.

- **The validity of the legislative act determining the location of the seat of a body, office or agency of the Union (Joined Cases C-106/19 and C-232/19)**

As regards the contested regulation, by which the Council and the Parliament confirmed, by means of the ordinary legislative procedure, the decision of the Representatives of the Governments of the Member States determining the location of the new seat of the EMA, the Court points out that it is for those institutions alone, in accordance with the principles of conferred powers and institutional

balance enshrined in the EU Treaty, [150] to determine its content. In that regard, it points out that that decision cannot be given any binding force capable of limiting the EU legislature's discretion. That decision therefore has the force of a measure of political cooperation which cannot in any event encroach on the powers conferred on the institutions of the Union in the context of the ordinary legislative procedure. The fact that the Parliament was not involved in the process which led to that decision does not therefore constitute, in any event, an infringement or circumvention of the Parliament's prerogatives as co-legislator, and the political impact of that decision on the legislative power of the Parliament and the Council cannot constitute a ground for annulment by the Court of the contested regulation. Since the decision of 20 November 2017 has no binding legal effect under EU law, the Court concludes that that decision cannot constitute the legal basis of the contested regulation, with the result that the lawfulness of that regulation cannot be affected by any unlawfulness vitiating the adoption of that decision.

2. Powers of the European institutions

Judgment of 22 November 2022 (Grand Chamber), Commission v Council (Accession to the Geneva Act) (C-24/20, EU:C:2022:911)

(Action for annulment – Council Decision (EU) 2019/1754 – Accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications – Article 3(1) TFEU – Exclusive competence of the European Union – Article 207 TFEU – Common commercial policy – Commercial aspects of intellectual property – Article 218(6) TFEU – Right of initiative of the European Commission – Modification by the Council of the European Union of the proposal from the Commission – Article 293(1) TFEU – Applicability – Article 4(3), Article 13(2) and Article 17(2) TEU – Article 2(1) TFEU – Principles of conferral of powers, of institutional balance and of sincere cooperation)

By Decision 2019/1754, [151] the Council of the European Union approved the accession of the European Union to the Geneva Act [152] of the Lisbon Agreement [153] on Appellations of Origin and Geographical Indications.

The Lisbon Agreement constitutes a special agreement within the meaning of the Paris Convention for the Protection of Industrial Property, [154] to which any State party to that convention may accede. Seven Member States of the European Union are parties to that agreement. Under that agreement, the States to which it applies constitute a Special Union within the framework of the Union for the Protection of Industrial Property established by the Paris Convention. The Geneva Act made it

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150 Article 13(2) TEU.

151 Council Decision (EU) of 7 October 2019 on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271; p. 12; 'the contested decision').

152 Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271, p. 15; 'the Geneva Act').

153 The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration was signed on 31 October 1958, revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaty Series*, vol. 828, No 13172, p. 205; 'the Lisbon Agreement').

154 The Paris Convention for the Protection of Industrial Property was signed in Paris on 20 March 1883, last revised in Stockholm on 14 July 1967 and amended on 28 September 1979 (*United Nations Treaties Series*, vol. 828, No 11851, p. 305).

possible for the European Union to become a member of the same Special Union as the States which were parties to the Lisbon Agreement whereas the latter allowed only States to accede

The accession of the European Union to the Geneva Act was approved on behalf of the European Union in accordance with Article 1 of the contested decision. Articles 2 and 5 of that decision make practical arrangements for the said accession. Article 3 of the contested decision authorises Member States which wish to do so to ratify or accede to the Geneva Act. As for Article 4 of that decision, it provides details concerning the representation, within the Special Union, of the European Union and of any Member State which ratifies or accedes to the Geneva Act and concerning the responsibilities which are incumbent on the European Union as regards the exercise of the rights and fulfilment of the obligations of the European Union and of those Member States arising from that act.

The Commission brought an action seeking partial annulment of the contested decision, namely of Article 3 and of Article 4 thereof to the extent that the latter article contains references to the Member States. It criticises the Council for amending its proposal [155] by introducing a provision authorising Member States which wish to do so to ratify or accede to the Geneva Act. The Commission's proposal, submitted on the basis of the provisions of the FEU Treaty concerning the implementation of the common commercial policy [156] and the procedure for the adoption of a decision concluding an international agreement in that area, [157] provided, in view of the EU's exclusive competence, that the European Union alone would accede to the Geneva Act.

The Court of Justice, sitting as the Grand Chamber, rules on the admissibility of the action, in the light of the criteria concerning the author of the contested decision and whether the parts whose annulment is sought can be severed from the remainder of the act. Moreover, in the context of the examination of the main plea, which it upholds, the Court gives a ruling on the issue of the Member States being empowered by the Council to adopt legally binding acts, such as the accession to an international agreement, in an area falling under the exclusive competence of the European Union. The Court annuls in part the contested decision by finding that it was adopted in breach of Article 293(1) TFEU, read in conjunction with Article 13(2) TEU.

Findings of the Court

The Court of Justice rejects at the outset the argument put forward by the Italian Republic that the action is inadmissible on the ground that it is directed solely against the Council and not also against the European Parliament. It states that, under Article 218(6) TFEU, notwithstanding prior consent by the European Parliament, the Council alone is empowered to adopt a decision concluding an international agreement. The contested decision was therefore correctly signed by the President of the Council alone, that signature thus identifying the author of that decision, against which the action was to be brought.

Moreover, the Court rejects the plea of inadmissibility raised by the Council, which maintained that the provisions of the contested decision which the Commission seeks to have annulled cannot be severed from the remainder of that decision and that it is therefore not possible to annul it in part.

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155 Commission Proposal of 27 July 2018 for a Council Decision on the accession of the European Union to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (document COM(2018) 350 final).

156 Article 207 TFEU.

157 Article 218(6)(a) TFEU.

In that context, the Court recalls that review of whether the contested provisions are severable requires consideration of their scope, in order to be able to assess objectively whether their annulment would alter the spirit and substance of the act at issue. In that regard, it notes that the substance of the contested decision consists of the accession of the European Union to the Geneva Act, approved on behalf of the European Union pursuant to Article 1 of that decision. By contrast, the provisions which the Commission seeks to have annulled intend to enable Member States which wish to do so to ratify or accede to the Geneva Act alongside the European Union. The Court notes that neither the situation where no Member State exercises that option nor the consequences flowing from it affects the legal scope of Article 1 of the contested decision or calls into question the accession of the European Union to the Geneva Act. The Court states that the fact that the Commission requested the temporary maintenance, from the date of delivery of the judgment to be delivered, of the effects of the parts of the contested decision which it seeks to have annulled as regards the Member States which are parties to the Lisbon Agreement has no bearing on the severability of the provisions of the contested decision whose annulment is sought.

As to the substance, the Court examines the main plea, alleging that, in amending the Commission's proposal by adding a provision authorising Member States which wish to do so to ratify or accede to the Geneva Act, the Council acted outside any Commission initiative, thereby infringing Article 218(6) and Article 293(1) TFEU and distorting the institutional balance established by Article 13(2) TEU.

In the first place, the Court concludes that Article 293(1) TFEU is applicable where the Council, acting on a proposal from the Commission as negotiator designated by it pursuant to Article 218(3) TFEU, adopts a decision concluding an international agreement under Article 218(6) TFEU.

In the second place, the Court examines the argument alleging breach of Article 293(1) TFEU.

To that end, it recalls, first, that that provision must be read in the light of the principle of institutional balance, characteristic of the institutional structure of the European Union, which requires that each of the institutions must exercise its powers with due regard for the powers of the other institutions, as well as the principle of mutual sincere cooperation between those institutions. [158] In that regard, EU acts other than legislative acts, such as the contested decision concluding the international agreement at issue, are adopted on the basis of a Commission proposal. Under that power of initiative, the Commission promotes the general interest of the European Union and takes appropriate initiatives to that end. Article 293 TFEU, by providing, on the one hand, for a power of amendment of the proposal by the Council requiring unanimity, subject to certain exceptions, and, on the other hand, for the Commission's power to amend its proposal as long as the Council has not acted, ensures observance of the principle of institutional balance between the Commission's powers and those of the Council. Thus, the Council's power of amendment cannot extend to enabling it to distort the Commission's proposal in a manner which would prevent the objectives pursued from being achieved and deprive it of its *raison d'être*.

Accordingly, the Court then ascertains whether the amendment made by the Council has distorted the subject matter or objective of the Commission's proposal in a manner which would prevent the objectives pursued by it from being achieved.

It recalls in that regard that the subject matter of that proposal consisted of the accession of the European Union alone to the Geneva Act and that its objective was to enable the European Union to exercise properly its exclusive competence for the area covered by that act, namely the common

158 Principles set out in Article 13(2) TEU.

commercial policy, based on uniform principles and conducted within the framework of the principles and objectives of the EU's external action, which covers the negotiation of the Geneva Act.

The Court states, moreover, that when the Treaties confer on the European Union exclusive competence in a specific area, only the European Union may legislate and adopt legally binding acts, expect where the Member States are empowered to do so by the European Union. [159] In addition, the principle of conferral of powers and the institutional framework defined in the EU Treaty to enable the European Union to exercise the powers conferred on it by the Treaties are specific characteristics of the European Union and of its law relating to the constitutional structure of the European Union.

The Court finds that, by deciding to empower Member States to ratify or accede to the Geneva Act, the Council expressed a political choice alternative to the Commission's proposal, which affects the modalities for the exercise of an exclusive competence conferred on the European Union, while such a choice forms part of the Commission's assessment of the general interest of the European Union, an assessment to which the Commission's power of initiative is inextricably linked.

The Court concludes that that empowerment by the Council distorts the subject matter and objective of the Commission's proposal, expressing its political choice to allow the European Union alone to accede to the Geneva Act and thus to exercise alone its exclusive competence in the area covered by that act.

In addition, it adds that that conclusion cannot be called into question by the fact that the authorisation provided for in Article 3 of the contested decision was granted subject to full respect of the exclusive competence of the European Union and that, in accordance with Article 4 of that decision, in order to ensure unity in the international representation of the European Union and its Member States, the Council had entrusted the Commission with the representation of the European Union and that of any Member State wishing to avail itself of that authorisation. Despite that framework, by availing themselves of that authorisation, those States, as independent subjects of international law alongside the European Union, would exercise an exclusive competence of the latter, precluding it from exercising that competence alone.

Finally, the arguments relating to the need to ensure that the European Union has voting rights in the Assembly of the Special Union and to preserve the seniority and continuity of the protection of appellations of origin registered under the Lisbon Agreement in the seven Member States which were already parties thereto cannot justify the Council's amendment. The Court holds that any difficulty which the European Union may encounter at international level in the exercise of its exclusive competence or the consequences of that exercise on the international commitments of the Member States would not, as such, authorise the Council to amend a Commission proposal to the point that it distorts its subject matter or objective, thereby infringing the principle of institutional balance which Article 293 TFEU seeks to ensure.

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159 Article 2(1) TFEU.

VI. Financial provisions

Judgment of 8 March 2022 (Grand Chamber), Commission v United Kingdom (Action to counter undervaluation fraud) (C-213/19, EU:C:2022:167)

(Failure of a Member State to fulfil obligations – Article 4(3) TEU – Article 310(6) and Article 325 TFEU – Own resources – Customs duties – Value added tax (VAT) – Protection of the financial interests of the European Union – Combating fraud – Principle of effectiveness – Obligation for Member States to make own resources available to the European Commission – Financial liability of Member States in the event of losses of own resources – Imports of textiles and footwear from China – Large-scale and systematic fraud – Organised crime – Missing importers – Customs value – Undervaluation – Taxable amount for VAT purposes – Lack of systematic customs controls based on risk analysis and carried out prior to the release of the goods concerned – No systematic provision of security – Method used to estimate the amount of traditional own resources losses in respect of imports presenting a significant risk of undervaluation – Statistical method based on the average price determined at EU level – Whether permissible)

The European Union has abolished all quotas on imports of textiles and clothing, including from China, since 1 January 2005.

In 2007, 2009 and 2015, the European Anti-Fraud Office (OLAF) sent mutual assistance messages to Member States, informing them in particular of the risk of extreme undervaluation of imports of textiles and footwear from China by shell companies registered for the sole purpose of giving fraudulent transactions the appearance of legitimacy. OLAF asked all Member States to monitor their imports of such products, to carry out appropriate customs checks and to take adequate safeguard measures if there was any suspicion of artificially low invoiced prices.

To that end, OLAF developed a risk assessment tool based on EU-wide data. That tool, involving the calculation of an average derived from 'cleaned average prices', produces a 'lowest acceptable price' that is used as a risk profile or threshold enabling Member States' customs authorities to detect values declared on importation that are particularly low, and thus imports presenting a significant risk of undervaluation.

In 2011 and 2014, the United Kingdom participated in monitoring operations conducted by the Commission and OLAF to counteract certain risks of undervaluation fraud, without however applying the lowest acceptable prices calculated in accordance with OLAF's method or enforcing the additional payment demands issued by the United Kingdom authorities following such operations.

In several bilateral meetings, OLAF recommended that the competent United Kingdom authorities use EU-wide risk indicators, namely the lowest acceptable prices. According to OLAF, fraudulent imports were increasing significantly in the United Kingdom on account of the inadequate nature of the checks carried out by the United Kingdom customs authorities, encouraging the shift of fraudulent operations from other Member States to the United Kingdom. However, according to OLAF, the United Kingdom did not follow its recommendations, instead releasing the products concerned for free circulation in the internal market without conducting appropriate customs controls, with the result that a substantial proportion of the customs duties due were not collected or made available to the European Commission.

Consequently, taking the view that the United Kingdom had failed to enter in the accounts the correct amounts of customs duties and to make available to the Commission the correct amount of traditional own resources and own resources accruing from value added tax (VAT) in respect of certain imports of textiles and footwear from China, the Commission brought an action for a declaration that the United Kingdom had failed to fulfil its obligations under EU legislation on control and supervision in relation to the recovery of own resources and under EU legislation on customs duty and on VAT.

By its judgment, the Grand Chamber of the Court of Justice upholds the Commission's action in part, ruling, in essence, that the United Kingdom has failed to fulfil its obligations under EU law by failing to apply effective customs control measures or to enter in the accounts the correct amounts of customs duties and accordingly to make available to the Commission the correct amount of traditional own resources in respect of certain imports of textiles and footwear from China, [160] and by failing to provide the Commission with all the information necessary to calculate the amounts of duty and own resources remaining due. [161]

Findings of the Court

At the outset, the Court rejects all of the objections of inadmissibility raised by the United Kingdom in relation in particular to a breach by the Commission of the principle of the protection of legitimate expectations on account of certain statements made by Commission or OLAF agents during meetings with its administration concerning measures taken by the United Kingdom to counter the undervaluation fraud at issue.

In that regard, the Court recalls that a person may not plead breach of the principle of the protection of legitimate expectations unless he or she has been given assurances that have led him or her to entertain well-founded expectations. Even if such expectations have arisen, that principle cannot be relied on by a Member State in order to preclude an objective finding by the Court of a failure to fulfil the Member State's obligations under the FEU Treaty.

With regard to the substance, in the first place, in upholding the plea relating to the failure to fulfil obligations imposed by EU law to protect the financial interests of the European Union and to counter fraud, and failure to fulfil obligations under EU customs law, the Court emphasises first of all the precise obligations of the Member States, under Article 325(1) TFEU, as to the result to be achieved. In order to counter infringements that are liable to impede the effective and comprehensive collection of traditional own resources in the form of customs duties and that are, therefore, likely to affect the financial interests of the European Union, the Member States must provide for the application not only of appropriate penalties, and in particular criminal penalties in cases of serious fraud or any other serious illegal activity, but also of effective and dissuasive customs control measures. The nature of the customs control measures to be adopted by the Member States in order to comply with the requirements of that provision cannot be determined in an abstract and fixed manner, since it depends on the characteristics of that fraud or other illegal activity, which may change over time.

Accordingly, while Article 325(1) TFEU allows Member States a certain latitude and freedom of choice as to customs control measures, in the present case, having regard to the particular features of the undervaluation fraud at issue, the system of customs controls put in place by the United Kingdom to combat that fraud, limited as it was with very few exceptions to post-clearance action to recover duties, manifestly failed to respect the principle of effectiveness laid down in Article 325(1) TFEU. Furthermore, the Court acknowledges that the common risk criteria recommended to the Member States by OLAF and the Commission and which form part of the common risk management

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160 This failure to fulfil obligations concerns the United Kingdom's obligations under, in particular, Article 310(6) and Article 325 TFEU, Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1), Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), and Council Directive 2006/112/EC of 28 November 2006 on the common system of [VAT] (OJ 2006 L 347, p. 1, and corrigendum OJ 2007 L 335, p. 60).

161 Specifically, the United Kingdom has failed to fulfil its obligations under Article 4(3) TEU (principle of sincere cooperation) by failing to provide the Commission with all the information necessary to determine the amount of traditional own resources losses and by not providing as requested the reasons for the decisions cancelling the customs debts established.

framework are not binding. However, Article 325(1) and (3) TFEU entails close cooperation between, on the one hand, the Member States and the European Union and, on the other, the Member States themselves, which are thus required to take due account of those criteria or to follow them if they have not developed national criteria that are at least as effective as those recommended by the European Union.

Under EU customs legislation, read in conjunction with Article 325 TFEU, the United Kingdom should therefore, at the very least, when establishing its system of risk analysis and risk management during the infringement period, have taken due account of the risk profiles and types of customs control which OLAF and the Commission were recommending to it. In those circumstances, in connection with customs controls taking place before the release of goods for free circulation, the United Kingdom could not, pending the establishment of its own allegedly more effective risk thresholds, refuse to apply any risk profile that would make it possible to identify, before clearance of the goods concerned, very low-priced imports presenting a significant risk of undervaluation. The Court states that, in the context of a massive undervaluation fraud such as that at issue, effective protection of the financial interests of the European Union called not only for the establishment of a risk profile but also for the provision of a security to be systematically demanded in respect of the imports at issue. In the present case, however, the United Kingdom required securities to be provided only very exceptionally, and those securities were, moreover, repaid after the demand notes to which they related were cancelled. The Court also finds that, by calculating customs duty on the basis of incorrect values, these being manifestly too low, then by entering those amounts of duty in the accounts, contrary to EU customs law, the United Kingdom failed to enter in the accounts in an effective manner the full customs duty due.

In the second place, in upholding in part the plea relating to the failure to fulfil obligations imposed by EU law on the making available of traditional own resources consisting in customs duties, the Court notes first of all that the Member States are required to establish the EU's entitlement to own resources as soon as their authorities are in a position to calculate the duties arising from a customs debt and to determine who is liable for them, and then to make the EU's own resources available to the Commission, taking all measures that are necessary in that respect. The management of the system of the EU's own resources is therefore entrusted to the Member States and is their responsibility alone. The direct link between the collection of revenue deriving from customs duties and the availability to the Commission of the corresponding resources obliges the Member States to protect the financial interests of the European Union and to adopt the measures necessary to guarantee the effective and comprehensive collection of those duties.

In the present case, the Court finds an infringement of Article 325(1) TFEU and of EU customs law in so far as the United Kingdom did not adopt measures during the infringement period that would ensure that the correct level of the customs values of the relevant imports would be established, such as pre-clearance controls and the obligation to provide guarantees for imports presenting a significant risk of undervaluation. Thus, the customs debts were calculated by the United Kingdom on the basis of inaccurate values and, as a result of the inadequacy of the controls carried out, the full own resources relating to the imports concerned were not made available to the Commission. By failing to verify the accuracy of the values of the goods in question, declared in accordance with the rules of EU law before the release of the goods for free circulation, the United Kingdom created an irreversible situation leading to considerable losses of own resources for the European Union, for which the United Kingdom must be held liable.

Next, the Court upholds the Commission's complaint that the United Kingdom infringed EU customs law by failing to make available to it the traditional own resources that were due in respect of the imports within the scope of joint customs operation 'Operation Snake', coordinated by OLAF. The additional customs duties claimed in the demand notes issued by the United Kingdom had been entered in the accounts and notified to their debtors in accordance with EU law. However, those entitlements had not yet been recovered and no security had been provided for them when the United Kingdom decided to cancel those demand notes and remove the entry of the relevant amounts from the accounts.

In that regard, the Court recalls that, under EU customs law, the Member States are obliged to take all requisite measures to ensure that the amounts corresponding to the entitlements established are made available to the Commission. However, in the present case, the calculation of those amounts is vitiated by an administrative error by the United Kingdom customs authorities, which were obliged to correct that error by re-determining the customs value, on the basis of one of the methods prescribed for that purpose by EU customs law. That conclusion applies equally to their decision not to reissue those demand notes after having corrected them. In that regard, the application of EU customs law is a matter for the Member States, which are exclusively responsible for doing so, and, by deciding to cancel the aforementioned demand notes rather than reissue them after correcting them on the basis of calculations that accord with EU customs law, the United Kingdom did not, contrary to that law, take the requisite measures to ensure that the amounts established would be made available to the Commission. The Court also finds that the United Kingdom did not comply with the procedure provided for by EU customs law for a Member State to be released from the obligation to place at the disposal of the Commission the amounts concerned. In addition, in rejecting the reasons relied on by the United Kingdom with a view to its being released from its obligation to place at the disposal of the Commission the own resources derived from the customs duties established in the aforementioned demand notes and relating to the fact that the debtors of those entitlements were undertakings that were missing or insolvent, the Court states that if those duties have proved not to be recoverable from the undertakings concerned, that is due to a double administrative error attributable to the United Kingdom authorities. Lastly, the Court finds that the United Kingdom also failed to fulfil its ancillary obligation to pay default interest in relation to the own resources that were not made available to the Commission.

As regards the question whether the United Kingdom failed more specifically to fulfil its obligations under EU law on own resources by not making available to the Commission traditional own resources corresponding to a specific amount for each year of the infringement period, that is a total of EUR 2 679 637 088.86, the Court finds that it is the exclusive competence and responsibility of Member States to ensure that declared customs values are established in accordance with the rules of EU customs law on customs valuation. In the present case, since the United Kingdom customs authorities had failed to take the appropriate measures in a sufficiently systematic manner, significant quantities of manifestly undervalued imported goods were released for free circulation and could not be recalled for the purposes of physical controls. Since those failures to act made it impossible to establish the customs value on the basis of one of the methods prescribed by EU customs law, the Commission, correctly, used other methods for that purpose. The Court also finds that the Commission was fully entitled to avail itself of the ability that is inherent in the system of the EU's own resources to submit to review by the Court, in infringement proceedings, the dispute between the Commission and the United Kingdom regarding the latter's obligation to make a certain amount of own resources available to the Commission.

Lastly, as regards the quantification of own resources losses, the Court makes clear that where the fact that it is impossible to carry out checks is the consequence of the failure of the customs authorities to carry out checks to verify the actual value of the goods, a method based on statistical data, rather than a method intended to determine the customs value of the goods concerned on the basis of direct evidence, is permitted. The Court's examination in the present proceedings must essentially aim to verify, first, that that method was justified in the light of the particular circumstances of the case and, secondly, that it was sufficiently precise and reliable. In that regard, the Court partly rejects the Commission's calculation, finding that, because of an inconsistency between the form of order sought in the application and the grounds set out in it, as well as the considerable uncertainty, as a result, regarding the accuracy of the amounts of own resources claimed by the Commission, the Commission has not established the full amounts to the requisite legal standard. In the light of the particular circumstances of the case, the Court does however endorse the method used by the Commission to estimate the amount of traditional own resources losses for part of the infringement period, since that method has proved to be sufficiently precise and reliable to ensure that it does not lead to a clear overestimate of the amount of those losses. The Court also makes clear that it is not for the Court to take the place of the Commission by calculating

the precise amounts of traditional own resources payable by the United Kingdom. It can either grant or reject, in whole or in part, the claims set out in the form of order sought in the Commission's application, without modifying the scope of those claims. It is, however, for the Commission to recalculate the losses of EU own resources remaining due by taking account of the findings in the judgment of the Court regarding the quantum of the losses and the value to be attributed to them.

VII. EU law and national law

Judgment of 22 February 2022 (Grand Chamber), RS (Effect of decisions of a constitutional court) (C-430/21, EU:C:2022:99)

(Reference for a preliminary ruling – Rule of law – Independence of the judiciary – Second subparagraph of Article 19(1) TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Primacy of EU law – Lack of jurisdiction of a national court to examine the conformity with EU law of national legislation found to be constitutional by the constitutional court of the Member State concerned – Disciplinary proceedings)

The Court of Justice is called upon to rule on the principle of judicial independence, enshrined in the second subparagraph of Article 19(1) TEU, read in conjunction with the principle of the primacy of EU law in particular, in a context in which an ordinary court of a Member State has no jurisdiction, under national law, to examine the conformity with EU law of national legislation that has been held to be constitutional by the constitutional court of that Member State, and the national judges adjudicating are exposed to disciplinary proceedings and penalties if they decide to carry out such an examination.

In the present case, RS was convicted on foot of criminal proceedings in Romania. His wife then lodged a complaint concerning, inter alia, several judges in respect of offences allegedly committed during those criminal proceedings. Subsequently, RS brought an action before the Curtea de Apel Craiova (Court of Appeal, Craiova, Romania) seeking to challenge the excessive duration of the criminal proceedings instituted in response to that complaint.

In order to rule on that action, the Court of Appeal, Craiova, considers that it must assess the compatibility with EU law [162] of the national legislation establishing a specialised section of the Public Prosecutor's Office responsible for investigations of offences committed within the judicial system, such as that commenced in the present case. However, in the light of the judgment of the Curtea Constituțională (Constitutional Court, Romania), [163] delivered after the Court's judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, [164] the Court of Appeal, Craiova, would not have jurisdiction, under national law, to carry out such an examination of compatibility. By its judgment, the Romanian Constitutional Court rejected as unfounded the plea of unconstitutionality raised in respect of several provisions of the abovementioned legislation, while emphasising that, when that court declares national legislation consistent with the provision of the Constitution which requires compliance with the principle of the primacy of EU law, [165] an ordinary court has no jurisdiction to examine the conformity of that national legislation with EU law.

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162 Specifically, the compatibility with the second subparagraph of Article 19(1) TEU and the annex to Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354. p. 56).

163 Judgment No 390/2021 of 8 June 2021.

164 Judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor Din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393; 'judgment in *Asociația "Forumul Judecătorilor din România" and Others*'), in which the Court held, inter alia, that the legislation at issue is contrary to EU law where the creation of such a specialised section is not justified by objective and verifiable requirements relating to the sound administration of justice and is not accompanied by specific guarantees identified by the Court (see point 5 of the operative part of that judgment).

165 In its judgment No 390/2021, the Romanian Constitutional Court held that the legislation at issue complied with Article 148 of the Constituția României (Romanian Constitution).

In that context, the Court of Appeal, Craiova, decided to refer the matter to the Court of Justice in order to clarify, in essence, whether EU law precludes a national judge of the ordinary courts from having no jurisdiction to examine whether legislation is consistent with EU law, in circumstances such as those of the present case, and disciplinary penalties from being imposed on that judge on the ground that he or she has decided to carry out such an examination.

The Court, sitting as the Grand Chamber, finds such national rules or practices to be contrary to EU law. [166]

Findings of the Court

First of all, the Court finds that the second subparagraph of Article 19(1) TEU does not preclude national rules or a national practice under which the ordinary courts of a Member State, under national constitutional law, are bound by a decision of the constitutional court of that Member State finding that national legislation is consistent with that Member State's constitution, provided that national law guarantees the independence of that constitutional court from, in particular, the legislature and the executive. However, the same cannot be said where the application of such national rules or a national practice entails excluding any jurisdiction of those ordinary courts to assess the compatibility with EU law of national legislation which such a constitutional court has found to be consistent with a national constitutional provision providing for the primacy of EU law.

Next, the Court points out that compliance with the obligation of national courts to apply in full any provision of EU law having direct effect is necessary, in particular, in order to ensure respect for the equality of Member States before the Treaties – which precludes the possibility of relying on, as against the EU legal order, a unilateral measure, whatever its nature – and constitutes an expression of the principle of sincere cooperation set out in Article 4(3) TEU, which requires any provision of national law which may be to the contrary to be disapplied, whether the latter is prior to or subsequent to the EU legal rule having direct effect.

In that context, the Court recalls that it has already held, first, that the legislation at issue falls within the scope of Decision 2006/928 [167] and that it must, therefore, comply with the requirements arising from EU law, in particular from Article 2 and Article 19(1) TEU. [168] Secondly, both the second subparagraph of Article 19(1) TEU and the specific benchmarks in the areas of judicial reform and the fight against corruption set out in the annex to Decision 2006/928 are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect. [169] It follows that if it is not possible to interpret the national provisions in a manner consistent with the second subparagraph of Article 19(1) TEU or those benchmarks, the ordinary Romanian courts must disapply those national provisions of their own motion.

In that regard, the Court points out that the ordinary Romanian courts have as a rule jurisdiction to assess the compatibility of Romanian legislative provisions with those provisions of EU law, without having to make a request to that end to the Romanian Constitutional Court. However, they are

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166 In the light of the second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law.

167 See footnote 162 for the full reference to Decision 2006/928.

168 Judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, cited above, paragraphs 183 and 184.

169 Judgment in *Asociaţia 'Forumul Judecătorilor din România' and Others*, cited above, paragraphs 249 et 250, and judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 253.

deprived of that jurisdiction where the Romanian Constitutional Court has held that those national legislative provisions are consistent with a national constitutional provision providing for the primacy of EU law, in that those ordinary courts are required to comply with that judgment of that constitutional court. However, such a national rule or practice would preclude the full effectiveness of the rules of EU law at issue, in so far as it would prevent the ordinary court called upon to ensure the application of EU law from itself assessing whether those national legislative provisions are compatible with EU law.

In addition, the application of such a national rule or practice would undermine the effectiveness of the cooperation between the Court of Justice and the national courts established by the preliminary-ruling mechanism, by deterring the ordinary court called upon to rule on the dispute from submitting a request for a preliminary ruling to the Court of Justice, in order to comply with the decisions of the constitutional court of the Member State concerned.

The Court emphasises that those findings are all the more relevant in a situation in which a judgment of the constitutional court of the Member State concerned refuses to give effect to a preliminary ruling given by the Court, on the basis, inter alia, of the constitutional identity of that Member State and of the contention that the Court has exceeded its jurisdiction. The Court points out that it may, under Article 4(2) TEU, be called upon to determine that an obligation of EU law does not undermine the national identity of a Member State. By contrast, that provision has neither the object nor the effect of authorising a constitutional court of a Member State, in disregard of its obligations under EU law, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court. Thus, if the constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, it must make a reference to the Court for a preliminary ruling, in order to assess the validity of that provision in the light of Article 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid.

In addition, the Court emphasises that since the Court alone has exclusive jurisdiction to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.

Furthermore, on the basis of its earlier case-law, [170] the Court makes clear that Article 2 and the second subparagraph of Article 19(1) TEU preclude national rules or a national practice under which a national judge may incur disciplinary liability for any failure to comply with the decisions of the national constitutional court and, in particular, for having refrained from applying a decision by which that court refused to give effect to a preliminary ruling delivered by the Court.

Judgment of 10 March 2022, Grossmania (C-177/20, EU:C:2022:175)

(Reference for a preliminary ruling – Principles of EU law – Primacy – Direct effect – Sincere cooperation – Article 4(3) TEU – Article 63 TFEU – Obligations on a Member State as a result of a preliminary ruling – Interpretation of a provision of EU law given by the Court in a preliminary ruling – Obligation to give full effect to EU law – Obligation for a national court to disapply national legislation which is contrary to EU law as interpreted by the Court – Administrative decision which became final in the absence of a challenge before the courts – Principles of equivalence and effectiveness – Liability of the Member State)

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170 Judgment in *Euro Box Promotion and Others*, cited above.

'Grossmania' Mezőgazdasági Termelő és Szolgáltató Kft. ('Grossmania'), a company established in Hungary, but whose members are nationals of other Member States, held rights of usufruct over agricultural land in Hungary. On 1 May 2014, its rights were deleted from the land register pursuant to Hungarian legislation providing for the extinguishment by operation of law on that date of the rights of usufruct over agricultural land previously created by contract between persons who were not close members of the same family. In 2018, by its judgment in *SEGRO and Horváth*, [171] the Court held that the free movement of capital, within the meaning of Article 63 TFEU, precludes such national legislation. Following that judgment, Grossmania applied to the competent authorities for the reinstatement of its rights of usufruct. However, its application was rejected.

Called upon to assess the legality of that refusal to reinstate those rights, the Győri Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Győr, Hungary) decided to ask the Court for a ruling on the scope of the mandatory effects of preliminary rulings. According to that court, it follows from the judgment in *SEGRO and Horváth* that the Hungarian legislation on which Grossmania's application was rejected is contrary to EU law. In contrast to the situations which gave rise to that judgment, Grossmania had not contested before the courts the deletion of its rights of usufruct. The referring court therefore asks whether, in the light of the judgment in *SEGRO and Horváth*, it may nevertheless disregard the national legislation at issue on the ground that it contravenes EU law and order the competent authorities to reinstate the rights of usufruct which have been deleted.

In its judgment, the Court sets out the obligations of the Member States, in particular of the national courts and tribunals, arising from a preliminary ruling with regard to national legislation that contravenes EU law in the case of a decision which has become final implementing that legislation, and the measures which they must take in order to nullify the unlawful consequences caused by that legislation.

Findings of the Court

First of all, the Court points out that, where its case-law provides a clear answer to a question concerning the interpretation of EU law, the national courts must do everything necessary in order to implement that interpretation. In accordance with the principle of the primacy of EU law, national courts must disapply any national legislation that contravenes a provision of EU law having direct effect, where it is not possible to interpret that legislation in accordance with EU law. That direct effect is attributed in particular to Article 63 TFEU which guarantees the free movement of capital. Therefore, since it follows from the judgment in *SEGRO and Horváth* that the Hungarian legislation at issue is incompatible with Article 63 TFEU, a referring court hearing an action for annulment of a decision based on that legislation is required to ensure that that article is fully effective by disapplying that national legislation.

Next, the Court states that, in accordance with the principles of effectiveness and sincere cooperation arising from Article 4(3) TEU, particular circumstances may require a national administrative body to review a decision that has become final. In that context, a balance must be struck between the requirement for legal certainty and the requirement for legality under EU law. The latter requirement matters greatly in the present case, given the far-reaching adverse consequences arising from the national legislation at issue and the deletion of the rights of usufruct implementing that legislation. As is also apparent from the judgment in *Commission* v *Hungary (Usufruct over agricultural land)*, [172] that legislation constitutes a manifest and serious breach both of the fundamental freedom provided for in Article 63 TFEU and of the right to property guaranteed in Article 17(1) of the Charter of

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171 Judgment of 6 March 2018, *SEGRO and Horváth* (C-52/16 and C-113/16, EU:C:2018:157).

172 Judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432).

Fundamental Rights of the European Union, since that breach affected more than 5 000 nationals of Member States other than Hungary.

Consequently, in so far as the national legislation is, moreover, liable to give rise to confusion as to the need to contest the deletion decisions adopted under that legislation, the requirement for legal certainty cannot justify the fact that, in some circumstances, it is impossible under Hungarian law to contest, in an action brought against the refusal to reinstate rights of usufruct, the deletion of those rights which has since become final. The national court hearing the case should therefore reject that impossibility as being contrary to the principles of effectiveness and sincere cooperation.

Finally, the Court considers that, in the absence of specific rules in EU law on how to nullify the unlawful consequences of an infringement of Article 63 TFEU in the circumstances of the present case, measures intended to ensure compliance with EU law may consist, inter alia, in the reinstatement of unlawfully deleted rights of usufruct in the land register. The referring court must, however, ascertain, in the light of the legal and factual situation existing at the time of ruling, whether it is appropriate to order the competent authority to reinstate those rights or whether objective and legitimate obstacles preclude this, such as the acquisition in good faith by a new owner of the land affected by those rights of usufruct. Where such reinstatement proves impossible, it would be necessary, in order to nullify the unlawful consequences of the infringement of EU law, to award the former holders of the cancelled rights of usufruct appropriate compensation to remedy the economic loss resulting from the cancellation of those rights.

Furthermore, independently of the measures referred to above, the full effectiveness of EU law means that individuals harmed by a breach of that law must, by virtue of the principle of State liability for loss or damage caused by such a breach, also have a right to compensation in accordance with the conditions laid down by the case-law of the Court, which appear to be satisfied in the present case.

Judgment of 28 June 2022 (Grand Chamber), Commission v Spain (Breach of EU law by the legislature) (C-278/20, EU:C:2022:503)

(Failure of a Member State to fulfil obligations – Liability of Member States for harm caused to individuals by infringements of EU law – Infringement of EU law attributable to the national legislature – Infringement of the Constitution of a Member State attributable to the national legislature – Principles of equivalence and effectiveness)

The principle of State liability for loss or harm caused to individuals by breaches of EU law for which the State can be held responsible is inherent in the system of the Treaties. [173] That principle applies irrespective of the body of the Member State whose action or omission is the cause of that infringement. [174] Where the three conditions for establishing the liability of the State for loss or harm caused to individuals have been met, [175] they have a right to compensation under EU law. [176]

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173 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 29 and the case-law cited), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 42 and the case-law cited).

174 To that effect, judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraphs 32 and 36), and of 25 November 2010, *Fuß* (C-429/09, EU:C:2010:717, paragraph 46 and the case-law cited).

175 The three conditions are as follows: the rule of EU law infringed must be intended to confer rights on individuals, the breach of that rule must be sufficiently serious and there must be a direct causal link between that breach and the loss or harm sustained by the individuals.

However, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of loss and damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it, in practice, impossible or excessively difficult to obtain reparation (principle of effectiveness). [177]

Those two principles lie at the heart of the present case in which the European Commission has brought an action against the Kingdom of Spain for failure to fulfil its obligations. Following complaints lodged by individuals, the Commission initiated an EU Pilot procedure [178] against that Member State. That procedure concerned certain national provisions aligning the rules on the liability of the State legislature for infringements of EU law with the rules on the liability of the State legislature for infringements of the Spanish Constitution. [179] That procedure, which proved unsuccessful, was closed and the Commission initiated infringement proceedings against the Kingdom of Spain.

By its application, the Commission requested the Court of Justice to declare that, by adopting and maintaining in force those national provisions, the Kingdom of Spain has failed to fulfil its obligations under the principles of effectiveness and equivalence.

Sitting as the Grand Chamber, the Court upholds the Commission's action in part, finding that the Kingdom of Spain has failed to fulfil its obligations under the principle of effectiveness by adopting and maintaining in force the contested provisions, in that they make compensation for the loss or harm caused to individuals by the Spanish legislature as a result of an infringement of EU law subject to:

– the condition that there is a decision of the Court declaring that the statutory provision applied is incompatible with EU law;

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176 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 30 and the case-law cited), and of 18 January 2022, *Thelen Technopark Berlin* (C-261/20, EU:C:2022:33, paragraph 44 and the case-law cited)).

177 Judgments of 26 January 2010, *Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 31 and the case-law cited), and of 4 October 2018, *Kantarev* (C-571/16, EU:C:2018:807, paragraph 123).

178 System used at an early stage by the Commission to attempt to clarify or resolve problems in order to avoid, where possible, the initiation of infringement proceedings against the Member State concerned.

179 Article 32(3) to (6) and the second subparagraph of Article 34(1) of Ley 40/2015 de Régimen Jurídico del Sector Público (Law 40/2015 on the legal system governing the public sector) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89411), and the third subparagraph of Article 67(1) of Ley 39/2015 del Procedimiento Administrativo Común de las Administraciones Públicas (Law 39/2015 on the common administrative procedure of the public authorities) of 1 October 2015 (BOE No 236 of 2 October 2015, p. 89343).

– the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge;

– a limitation period of one year from the publication in the *Official Journal of the European Union* of the decision of the Court declaring that the statutory provision applied is incompatible with EU law, without covering cases in which such a decision does not exist, and

– the condition that compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date of that publication, unless otherwise provided for in that decision.

Findings of the Court

The first complaint, alleging breach of the principle of effectiveness, is upheld in part by the Court.

First of all, the Court recalls that making reparation, by a Member State, of loss or harm which it caused to an individual in breach of EU law conditional on the requirement that there must have been a prior finding by the Court of an infringement of EU law attributable to that Member State is contrary to the principle of the effectiveness of that law. Similarly, compensation for the loss or harm caused by a breach of EU law attributable to a Member State cannot be conditional on the requirement that the existence of such a breach must be clear from a preliminary ruling delivered by the Court. Consequently, in order to find that the Commission's arguments are well founded, it is not necessary to determine whether the contested provisions require a decision of the Court finding that the Kingdom of Spain has failed to fulfil one of its obligations under EU law or whether those provisions must be understood as referring to any decision of the Court from which it may be inferred that an act or omission on the part of the Spanish legislature is incompatible with EU law. Compensation for loss or damage caused by a Member State, including the national legislature, as a result of an infringement of EU law cannot, in any event and without infringing the principle of effectiveness, be made subject to the prior delivery of such a decision by the Court.

Next, the Court finds that, although EU law does not preclude the application of national legislation which provides that an individual cannot obtain compensation for loss or harm which he or she has failed to prevent by exercising a legal remedy, it is only on condition that the use of that remedy does not give rise to undue hardship or may reasonably be required of the injured party. That condition is not satisfied by the contested provisions in so far as they make compensation for loss or harm caused by the legislature subject to the condition that the individual harmed has obtained, before any court, a final decision dismissing an action brought against the administrative act which caused the loss or harm, without providing for an exception for cases in which the loss or harm stems directly from an act or omission on the part of the legislature, contrary to EU law, without there being any administrative act open to challenge. In addition, the Court states that requiring the individual harmed, at the stage prior to the action being brought against the administrative act giving rise to the loss or harm, to have pleaded the infringement of EU law which is subsequently recognised, failing which he or she will not be able to obtain compensation for the loss or harm suffered, may amount to an excessive procedural complication, contrary to the principle of effectiveness. At such a stage, it may be excessively difficult, or even impossible, to anticipate what infringement of EU law will ultimately be recognised by the Court. However, the Court rejects the Commission's arguments in so far as it maintains that only provisions of EU law having direct effect may be properly relied on in such an action.

Finally, according to the contested provisions, first, the limitation period for actions to establish the liability of the State legislature for infringements of EU law attributable to it begins to run on the date of publication in the Official Journal of the Court's decision finding that the Kingdom of Spain has failed to fulfil its obligations under EU law or from which it is apparent that the act or omission on the

part of the legislature giving rise to that loss or harm is incompatible with EU law and, second, compensation may be awarded only in respect of loss or harm which occurred within five years preceding the date. In that regard, the Court finds, first, that the publication of such a decision in the Official Journal cannot, without infringing the principle of effectiveness, be the only possible starting point for that limitation period, since compensation for the loss or harm caused as a result of an infringement of EU law cannot be made subject to the condition that such a decision of the Court exists and the cases in which such a decision does not exist are not covered. Secondly, the Court points out that, in the absence of relevant provisions of EU law, it is for the domestic legal system of each Member State to establish the extent of the compensation and the rules relating to the assessment of the loss or harm caused by an infringement of EU law. However, national legislation setting out the criteria for determining that extent and those rules must, in particular, respect the principle of effectiveness and therefore allow compensation for loss or harm which is commensurate with the loss or harm sustained, in that it must enable the loss or harm actually sustained to be made good in full, which the contested provisions do not allow in all cases.

Examining the second complaint, alleging infringement of the principle of equivalence, the Court holds that this is based on a misreading of its case-law and must therefore be rejected as unfounded.

The Court points out that that principle seeks to circumscribe the procedural autonomy enjoyed by the Member States when they implement EU law and EU law makes no provision in that regard. Accordingly, that principle is intended to apply, as regards State liability for infringements of EU law attributable to it, only where that liability is established on the basis of EU law. In the present case, the Commission seeks, by its second complaint, to call into question, not the conditions under which the principle of State liability for infringements of EU law attributable to that State is implemented in Spain, but the actual conditions under which the State legislature may incur liability for infringements of EU law attributable to it, as they are defined in Spanish law, which faithfully reproduces the conditions laid down in the case-law of the Court. Therefore, even if the conditions for establishing the liability of the State for infringements of EU law attributable to it are less favourable than the conditions for establishing the liability of the State legislature in the event of an infringement of the Constitution, the principle of equivalence is not intended to apply to such a situation.

The Court has, moreover, made it clear that, if Member States can make provision for their liability to be established under less restrictive conditions than those laid down by the Court, then that liability must be regarded as being established not on the basis of EU law but on the basis of national law.

VIII. Freedoms of movement

1. Freedom of movement for workers

Judgment of 16 June 2022, Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists) (C-577/20, EU:C:2022:467)

(Reference for a preliminary ruling – Recognition of professional qualifications – Directive 2005/36/EC – Article 2 – Scope – Article 13(2) – Regulated professions – Conditions governing the right to take up the profession of psychotherapist in a Member State based on a degree in psychotherapy awarded by a university established in another Member State – Articles 45 and 49 TFEU – Freedom of movement and establishment – Assessment of the equivalence of training – Article 4(3) TEU – Principle of sincere cooperation between Member States – Doubts of the host Member State as to the level of knowledge and qualifications that can be presumed from a degree awarded in another Member State – Conditions)

A, a Finnish national, took a course in psychology organised in Finland and in Finnish by a university in the United Kingdom, in partnership with a Finnish company, at the end of which, in November 2017, she was awarded a postgraduate degree by that university. She then applied to the Sosiaali- ja terveysalan lupa- ja valvontavisasto (Social and Health Supervisory Authority, Finland; 'Valvira') for the right to use the professional title of psychotherapist, which is protected under Finnish law. Earlier in the year, Valvira had been contacted by former students on that course who had raised concerns about the adequacy of the course content.

In 2018, Valvira rejected A's application on the ground that it was not satisfied that the course met the requirements for psychotherapist training in Finland. In April 2019, the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) dismissed A's appeal against that decision, upholding Valvira's interpretation.

A then appealed the judgment before the referring court, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland). That court observes that the profession of psychotherapist is not regulated in the United Kingdom and that the person concerned, who has not practised as a psychotherapist in another Member State in which that profession is unregulated, as required by Article 13(2) of Directive 2005/36, [180] cannot claim the right to access that profession in Finland on the basis of that directive. However, the referring court is uncertain whether A's situation should also be examined in the light of the principles of freedom of movement for workers [181] and the freedom of establishment [182] and, if so, whether the competent authority of the host Member State, when examining the equivalence of the knowledge acquired and qualifications obtained, may rely on information other than that provided by the university which awarded the degree in question

The Court of Justice answers the first of those questions in the affirmative, taking the view that an application for access to a regulated profession, submitted in circumstances such as those of the present case, must be examined in the light of Article 45 or 49 TFEU. It also holds that the competent authority of the host Member State to which such an application has been made must consider a

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180 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22).

181 The principle of freedom of movement for workers is provided for in Article 45 TFEU.

182 The principle of freedom of establishment is governed by Article 49 TFEU.

degree awarded by the authority of another Member State as bona fide. Only where that first authority has serious doubts, based on concrete evidence, the scope of which is clarified by Court, may it request the issuing authority to review the grounds for the award of that degree and, where appropriate, to withdraw it. If the degree is not withdrawn, it is only in exceptional cases, where it is clear from the individual circumstances that the degree in question is not credible, that the authority of the host Member State may challenge the grounds for awarding the degree.

Findings of the Court

In the first place, the Court clarifies that the situation at issue falls within the scope of Directive 2005/36, since the evidence of formal qualifications was issued in a Member State other than the host Member State. However, it appears that the person concerned does not meet the requirement laid down in Article 13(2) of Directive 2005/36 of having practised the profession of psychotherapist for the minimum period referred to in that provision. As a result, she cannot rely on any system for the recognition of professional qualifications established by that directive.

Examining A's situation in the light of Articles 45 and 49 TFEU, the Court notes that the free movement of persons means that Member States may not deny the benefit of the freedoms recognised by those two provisions to their nationals who have obtained professional qualifications in another Member State. Furthermore, the authorities of a Member State to whom an application has been made for authorisation to practise a regulated profession must take into consideration all the diplomas, certificates and other evidence of formal qualifications held by the person concerned and his or her relevant experience, by comparing the skills attested by such qualifications and experience with the knowledge and qualifications required by the national legislation. Since that principle is inherent in the fundamental freedoms enshrined in the FEU Treaty, the adoption of directives on the mutual recognition of qualifications – including Directive 2005/36 – cannot have the effect of making it more difficult to recognise diplomas, certificates and other evidence of formal qualifications in situations they do not cover. Thus, in a situation in which none of the systems for the recognition of professional qualifications established by Directive 2005/36 may be relied on, it is in the light of Articles 45 and 49 TFEU that the host Member State must comply with its obligations with regard to the recognition of professional qualifications.

In the second place, the Court states that the abovementioned comparative examination procedure for the various qualifications and experience must enable the authorities of the host Member State to verify, on an objective basis, whether the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those attested by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications that its holder can be assumed to possess under that diploma, having regard to the nature and duration of the studies and the practical training to which the diploma relates. Since that comparison presupposes mutual trust between Member States in the qualifications issued, the authority of the host Member State is obliged in principle to consider a diploma issued by the authority of another Member State as bona fide. Only where the authority has serious doubts, based on concrete elements forming a consistent body of evidence suggesting that the diploma relied on by the applicant does not reflect the level of knowledge and qualifications that the applicant can be presumed to have acquired, may that authority request the issuing authority to review, in the light of that evidence, the grounds for awarding that diploma and, where appropriate, to withdraw it. Such concrete evidence may include, inter alia, information provided by persons other than the course organisers. Where the issuing authority has reviewed the grounds for awarding the diploma in the light of that evidence but has not withdrawn it, it is only in exceptional cases, where it is clear from the circumstances that the diploma is not credible, that the authority of the host Member State may challenge the grounds for awarding the diploma.

2. Freedom of establishment [183]

Judgment of 7 September 2022 (Grand Chamber), Cilevičs and Others (C-391/20, EU:C:2022:638)

(Reference for a preliminary ruling – Article 49 TFEU – Freedom of establishment – Restriction – Justification – The organisation of education systems – Institutions of higher education – Obligation to provide courses of study in the official language of the Member State concerned – Article 4(2) TEU – National identity of a Member State – Defence and promotion of the official language of a Member State – Principle of proportionality)

The Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) has been seised of an action by 20 members of the Latvijas Republikas Saeima (Parliament, Latvia), seeking a review of the constitutionality of certain provisions of the Latvian Law on higher education institutions.

As amended in 2018, that law seeks to promote the official language of the Republic of Latvia by requiring higher education institutions to provide their courses of study in that language. However, that law provides for four exceptions to that obligation. In the first place, courses of study pursued by foreign students in Latvia and courses of study organised as part of the cooperation provided for by EU programmes and international agreements may be taught in the official languages of the European Union. In the second place, classes may be taught in the official languages of the European Union, but may only account for one fifth of the number of credits. In the third place, linguistic and cultural studies and language courses may be taught in a foreign language. In the fourth and final place, joint courses of study may be taught in the official languages of the European Union.

In addition, the Latvian Law on higher education institutions does not apply to two private institutions, which are governed by special laws and may continue to offer courses of study in other official languages of the European Union.

By their action, the applicants submit in particular that by creating a barrier to entry to the higher education market and preventing the nationals and undertakings from other Member States from providing higher education services in foreign languages, the law in question undermines, inter alia, the freedom of establishment guaranteed by Article 49 TFEU.

The Latvian Constitutional Court expresses doubts as to whether legislation of a Member State that makes obligatory the use of the official language of that Member State in the field of higher education, including in private higher education institutions, while providing for certain exceptions to that obligation, constitutes a restriction on the freedom of establishment. It therefore decided to make a reference to the Court of Justice for a preliminary ruling in order to enable it to rule on the compatibility of the Law on higher education institutions with EU law.

In its judgment, the Grand Chamber of the Court finds that Article 49 TFEU does not preclude legislation of a Member State which, in principle, obliges higher education institutions to provide courses of study solely in the official language of that Member State. Such legislation must, however, be justified on grounds related to the protection of the national identity of that Member State, that is to say, that it must be necessary and proportionate to the protection of the legitimate aim pursued.

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[183] The judgment of 16 June 2022, ***Sosiaali- ja terveysalan lupa- ja valvontavirasto (Psychotherapists)*** (C-577/20, EU:C:2022:467), must also be mentioned under this heading. That judgment is presented under heading VIII.1 'Freedom of movement for workers'.

Findings of the Court

As a preliminary point, the Court notes that, in accordance with Article 6 TFEU, the European Union is to have competence to carry out actions to support, coordinate or supplement the actions of the Member States, including in the area of education. While EU law does not detract from the power of those Member States as regards, first, the content of education and the organisation of education systems and their cultural and linguistic diversity and, secondly, the content and organisation of vocational training, the Member States must, however, comply with EU law when exercising that power, in particular the provisions on freedom of establishment.

In the present case, the Court observes that even if nationals of other Member States may establish themselves in Latvia and provide higher education courses, such a possibility is in principle made subject to the obligation to provide those courses solely in the official language of that Member State. An obligation of that kind is such as to render less attractive the establishment of those nationals in Latvia and therefore constitutes a restriction on the freedom of establishment.

The Court, following the well-established model arising from its case-law, then examines whether there is a justification for the restriction that has been found to exist and carries out a review of compliance with the principle of proportionality. As regards the existence of an overriding reason in the public interest, the obligation at issue seeks to defend and promote the use of the official language of the Republic of Latvia, which is a legitimate objective that, in principle, justifies a restriction on the freedom of establishment. According to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union, the European Union must respect its rich cultural and linguistic diversity. In accordance with Article 4(2) TEU, the European Union must also respect the national identity of its Member States, which includes protection of the official language of the Member State concerned. The importance of education for the implementation of such an objective must be recognised.

As regards the proportionality of the restriction found to exist, that restriction must, in the first place, be suitable for securing the attainment of the legitimate objective pursued by the legislation at issue. To that end, that legislation can be regarded as capable of ensuring the objective of defending and promoting the Latvian language only if it genuinely reflects a concern to attain it and is implemented in a consistent and systematic manner. In view of their limited scope, the exceptions to the obligation at issue, in particular for the two higher education institutions whose operation is governed by special laws, are not such as to hinder attainment of the objective in question. In allowing certain higher education institutions to benefit from a derogation arrangement, the exceptions form part of a special kind of international university cooperation and are, therefore, not such as to render the legislation at issue in the main proceedings inconsistent.

In the second place, the restriction may not go beyond what is necessary to attain the objective pursued. Member States may thus introduce, in principle, an obligation to use their official language in higher education courses of study, provided that such an obligation is accompanied by exceptions that ensure that a language other than the official language may be used in the context of university education. In the present case, such exceptions should, in order not to exceed what is necessary for that purpose, allow the use of a language other than Latvian, at least as regards education provided in the context of European or international cooperation, and education relating to culture and languages other than Latvian.

IX. Border control, asylum and immigration

1. Asylum policy

Judgment of 1 August 2022 (Grand Chamber), Bundesrepublik Deutschland (Child of refugees, born outside the host State) (C-720/20, EU:C:2022:603)

(Reference for a preliminary ruling – Common policy on asylum – Criteria and mechanisms for determining the Member State responsible for examining an application for international protection – Regulation (EU) No 604/2013 (Dublin III) – Application for international protection lodged by a minor in his or her Member State of birth – Parents of that minor who have previously obtained refugee status in another Member State – Article 3(2) – Article 9 – Article 20(3) – Directive 2013/32/EU – Article 33(2)(a) – Admissibility of the application for international protection and responsibility for examining it)

The applicant, a national of the Russian Federation, was born in Germany in 2015. In March 2012, her parents and her five siblings, who also have Russian nationality, had obtained refugee status in Poland. In December 2012, they had left Poland for Germany, where they had made applications for international protection. The Republic of Poland refused to allow the German authorities' request to take back those persons on the ground that they were already beneficiaries of international protection in its territory. Subsequently, the German authorities rejected the applications for international protection as inadmissible on account of the refugee status which those persons had already obtained in Poland. Nevertheless, the applicant's family continued to reside in Germany.

In March 2018, the applicant lodged an application for international protection with the German authorities. That application was rejected as inadmissible, on the basis, inter alia, of the Dublin III Regulation. [184]

The referring court, before which an appeal against that rejection decision has been brought, has doubts as to whether the Federal Republic of Germany is the Member State responsible for examining the applicant's application and whether, if so, that Member State is entitled to reject that application as inadmissible under the Procedures Directive. [185]

Specifically, that court is uncertain as to the application by analogy of certain provisions of the Dublin III Regulation and the Procedures Directive to the applicant's situation. In that regard, it seeks to ascertain, first, whether – in order to prevent secondary movements – Article 20(3) of the Dublin III Regulation, concerning, inter alia, the situation of children born after the arrival of an applicant for international protection, [186] applies to an application for international protection lodged by a minor in

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

185 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60) ('the Procedures Directive').

186 Under that provision, which relates to the procedure for taking charge, the situation of a minor who is accompanying the applicant for international protection and meets the definition of family member is to be indissociable from that of his or her family member and is to be a matter for the Member State responsible for examining the application for international protection of that family member, even if the minor is not individually an applicant, provided that it is in the minor's best

his or her Member State of birth where his or her parents are already beneficiaries of international protection in another Member State. Second, it is unsure whether Article 33(2)(a) of the Procedures Directive [187] applies to a minor whose parents are beneficiaries of international protection in another Member State but who is not a beneficiary of such protection himself or herself.

The Court, sitting as the Grand Chamber, answers those questions in the negative. By its judgment, it clarifies the scope of the Dublin III Regulation and the Procedures Directive in the context of secondary movements of families which are already beneficiaries of international protection in one Member State to another Member State where a new child is born.

Findings of the Court

In the first place, the Court finds that Article 20(3) of the Dublin III Regulation is not applicable by analogy to a situation in which a minor and his or her parents lodge applications for international protection in the Member State in which that minor was born, in circumstances where his or her parents are already the beneficiaries of international protection in another Member State. First, that provision presupposes that the minor's family members still have the status of 'applicant' with the result that it does not govern the situation of a minor who was born after those family members obtained international protection in a Member State other than that in which the minor was born and resides with his or her family. Second, the situation of a minor whose family members are applicants for international protection and that of a minor whose family members are already beneficiaries of such protection are not comparable in the context of the scheme established by the Dublin III Regulation. The concepts of an 'applicant' [188] and that of a 'beneficiary of international protection' [189] cover separate legal statuses governed by different provisions of that regulation. Consequently, an application by analogy of Article 20(3) to the situation of a minor whose family members are already beneficiaries of international protection would mean that both that minor and the Member State that has granted that protection to the members of his or her family would not be subject to the application of the mechanisms provided for by that regulation. The consequence of this, inter alia, would be that such a minor could be the subject of a transfer decision without a procedure for taking charge being initiated for him or her.

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interests. The same treatment is to be applied to children born after the applicant arrives on the territory of the Member States, without the need to initiate a new procedure for taking charge of them.

187 Under that provision, the Member States may consider an application for international protection as inadmissible if another Member State has granted international protection.

188 Within the meaning of Article 2(c) of the Dublin III Regulation.

189 Within the meaning of Article 2(f) of the Dublin III Regulation.

Furthermore, the Dublin III Regulation lays down specific rules for situations in which the procedure initiated in respect of the applicant's family members has been concluded and they are therefore allowed to reside as beneficiaries of international protection in a Member State. Specifically, Article 9 of the Dublin III Regulation provides that, in such a situation, the latter Member State is to be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing. Admittedly, that condition precludes the application of Article 9 where no such desire is expressed. That situation is likely to arise in particular where the application for international protection of the minor concerned is made following an unlawful secondary movement of his or her family from one Member State to the Member State in which that application is lodged. However, that fact in no way detracts from the fact that the EU legislature laid down, in that article, a provision which specifically covers the situation concerned. Furthermore, in the light of the clear wording of Article 9, that requirement that the desire be expressed in writing cannot be derogated from.

In those circumstances, in a situation in which the persons concerned have not expressed, in writing, the desire that the Member State responsible for examining a child's application for international protection should be the Member State in which that minor's family members were allowed to reside as beneficiaries of international protection, the Member State responsible will be determined pursuant to Article 3(2) of the Dublin III Regulation. [190]

In the second place, the Court finds that Article 33(2)(a) of the Procedures Directive does not apply by analogy to an application for international protection lodged by a minor in a Member State where it is not that child himself or herself, but his or her parents, who are beneficiaries of international protection in another Member State. In that regard, the Court notes that that directive sets out an exhaustive list of the situations in which the Member States may consider an application for international protection to be inadmissible. Moreover, the provisions laying down those grounds of inadmissibility constitute a derogation from the obligation on Member States to examine the substance of all applications for international protection. It follows from the exhaustive and derogating nature of that provision that it must be interpreted strictly and cannot therefore be applied to a situation which does not correspond to its wording. The scope *ratione personae* of that provision cannot, consequently, extend to an applicant for international protection who is not himself or herself a beneficiary of such protection.

Judgment of 8 November 2022 (Grand Chamber), Staatssecretaris van Justitie en Veiligheid (Ex officio review of detention) (C-704/20 and C-39/21, EU:C:2022:858)

(References for a preliminary ruling – Area of freedom, security and justice – Detention of third-country nationals – Fundamental right to liberty – Article 6 of the Charter of Fundamental Rights of the European Union – Conditions governing the lawfulness of detention – Directive 2008/115/EC – Article 15 – Directive 2013/33/EU – Article 9 – Regulation (EU) No 604/2013 – Article 28 – Review of the lawfulness of detention and of the continuation of a detention measure – Ex officio review – Fundamental right to an effective judicial remedy – Article 47 of the Charter of Fundamental Rights)

B, C and X, three third-country nationals, were detained in the Netherlands in the context of procedures for the purposes, respectively, of the examination of an application for international

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190 In accordance with that provision, where no Member State can be designated as responsible on the basis of the criteria listed in the Dublin III Regulation, the first Member State in which the application for international protection was lodged is to be responsible for examining it.

protection, of a transfer to the Member State responsible for such an examination and of a return linked to the illegal nature of the stay in the Netherlands.

The persons concerned challenged before the courts the detention measures adopted in respect of them or the continuation of those measures. Ruling at first or second instance, the referring courts raise the question of the scope of the review of the lawfulness of the measures concerned.

Any detention measure provided for by EU law – namely, by the 'Reception' Directive, [191] the Dublin III Regulation [192] and the 'Return' Directive [193] respectively – falls, in the Netherlands, within the scope of administrative procedural law, which does not in principle allow the courts to examine of their own motion whether the detention measure in question satisfies a condition of lawfulness which the person concerned has not claimed to have been infringed.

The referring courts are unsure however whether such a situation is compatible with EU law and, in particular, with the fundamental rights to liberty and an effective remedy. [194] Consequently, those courts referred questions to the Court of Justice for a preliminary ruling in order to ascertain, in essence, whether EU law requires them to examine of their own motion all the conditions that a detention measure must satisfy in order to be lawful, including those whose infringement has not been raised by the person concerned.

The Court, sitting as the Grand Chamber, holds that, under the 'Return' Directive, [195] the 'Reception' Directive [196] and the Dublin III Regulation, [197] read in conjunction with the Charter, [198] a judicial authority's review of compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law must lead that authority to raise of its own motion, on the basis of the material in the file brought to its attention, as supplemented or clarified during the adversarial proceedings before it, any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned.

Findings of the Court

In that regard, the Court states, in the first place, that detention, which constitutes a serious interference with the right to liberty, may be ordered or extended only in compliance with the general and abstract rules laying down the conditions and procedures governing such detention. Those rules,

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191 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180, p. 96; 'the Reception Directive').

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

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

194 As enshrined in Article 6 and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

195 Article 15(2) and (3) of the 'Return' Directive.

196 Article 9(3) and (5) of the 'Reception' Directive.

197 Article 28(4) of the Dublin III Regulation.

198 Articles 6 and 47 of the Charter.

contained in acts of EU law, [199] on the one hand, and in the provisions of national law implementing them, on the other, are the rules which determine the conditions governing the lawfulness of detention, including from the point of view of the right to liberty. In accordance with those rules, where it is apparent that the conditions governing the lawfulness of detention have not been or are no longer satisfied, the person concerned must be released immediately.

As regards, in the second place, the right of third-country nationals detained by a Member State to effective judicial protection, the Court notes that, according to the relevant rules of EU law, [200] each Member State must provide, where detention has been ordered by an administrative authority, for a 'speedy' judicial review, either *ex officio* or at the request of the person concerned, of the lawfulness of that detention. As regards the continuation of a detention measure, EU law [201] requires periodic review or supervision which must occur 'at reasonable intervals of time' and concern whether the conditions governing the lawfulness of the detention continue to be met. Thus, since EU law requires, without exception, that supervision that the conditions governing the lawfulness of the detention are satisfied must be effected 'at reasonable intervals of time', the competent authority is required to carry out that supervision of its own motion, even if the person concerned does not request it.

The EU legislature has thus not confined itself to establishing common substantive standards, but has also established common procedural standards, the purpose of which is to ensure that, in each Member State, there is a system which enables the competent judicial authority to release the person concerned, where appropriate after an examination of its own motion, as soon as it is apparent that his or her detention is not, or is no longer, lawful.

In order that such a system of protection effectively ensures compliance with the strict conditions which a detention measure is required to satisfy in order to be lawful, the competent judicial authority must be in a position to rule on all matters of fact and of law relevant to the review of that lawfulness. To that end, it must be able to take into account (i) the facts stated and the evidence adduced by the administrative authority which ordered the initial detention and (ii) any facts, evidence and observations which may be submitted to it by the person concerned. Furthermore, that authority must be able to consider any other element that is relevant for its decision by adopting, on the basis of its national law, the procedural measures which it deems necessary.

On the basis of these elements, that authority must raise, where appropriate, the failure to comply with a condition governing lawfulness arising from EU law, even if that failure has not been raised by the person concerned. That requirement is without prejudice to the obligation to invite each party to express its views on that condition in accordance with the adversarial principle.

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199 See Article 15(1), (2), second subparagraph, (4), (5) and (6) of the 'Return' Directive, Article 8(2) and (3) and Article 9(1), (2) and (4) of the 'Reception' Directive and Article 28(2), (3) and (4) of the Dublin III Regulation.

200 See the third subparagraph of Article 15(2) of the 'Return' Directive and Article 9(3) of the 'Reception' Directive, which is also applicable, on the basis of Article 28(4) of the Dublin III Regulation, in the context of the transfer procedures governed by that regulation.

201 Article 15(3) of the 'Return' Directive and Article 9(5) of the 'Reception' Directive, which is also applicable, on the basis of Article 28(4) of the Dublin III Regulation, in the context of the transfer procedures governed by that regulation.

2. Border controls

Judgment of 26 April 2022 (Grand Chamber), Landespolizeidirektion Steiermark (Maximum duration of internal border control) (C-368/20 and C-369/20, EU:C:2022:298)

(Reference for a preliminary ruling – Area of freedom, security and justice – Free movement of persons – Regulation (EU) 2016/399 – Schengen Borders Code – Article 25(4) – Temporary reintroduction of border control at internal borders for a maximum total duration of six months – National legislation providing for a number of successive periods of border control resulting in that duration being exceeded – Non-compliance of such legislation with Article 25(4) of the Schengen Borders Code where the successive periods are based on the same threat or threats – National legislation requiring, on pain of a penalty, a passport or identity card to be presented when the internal border control is carried out – Non-compliance of such an obligation with Article 25(4) of the Schengen Borders Code when the border control itself is contrary to that provision)

From September 2015 to November 2021, the Republic of Austria reintroduced border control at its borders with Hungary and Slovenia a number of times. In order to justify the reintroduction of the border control, it relied upon various provisions of the Schengen Borders Code. [202] In particular, from 11 November 2017 it relied upon Article 25 of that code, headed 'General framework for the temporary reintroduction of border control at internal borders', which provides for the possibility for a Member State to reintroduce border control at its internal borders if there is a serious threat to public policy or internal security, and sets maximum periods in which such border control may be reintroduced.

In August 2019, NW, who was coming from Slovenia, was subject to a border check at the border crossing point at Spielfeld (Austria). Having refused to present his passport, he was declared guilty of having crossed the Austrian border without being in possession of a travel document and was ordered to pay a fine. In November 2019, NW was subject to another border check at the same border crossing point. He contested the legality of those two checks before the referring court.

The referring court questions whether the checks to which NW was subject and the penalty that was imposed upon him are compatible with EU law. When the contested border control measures were carried out, the reintroduction by Austria of border control at its border with Slovenia had already, through the cumulative effect of the application of successive periods of border control, exceeded the maximum total duration of six months laid down by Article 25 of the Schengen Borders Code.

By its judgment, the Court of Justice, sitting as the Grand Chamber, rules that the Schengen Borders Code precludes border control at internal borders from being temporarily reintroduced by a Member State on the basis of a serious threat to its public policy or internal security where the duration of its reintroduction exceeds the maximum total duration of six months and no new threat exists that would justify applying afresh the periods provided for by the code. The code precludes national legislation by which a Member State obliges a person, on pain of a penalty, to present a passport or identity card on entering the territory of that Member State via an internal border, when the

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202 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77, p. 1), as amended by Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 (OJ 2016 L 251, p. 1). That regulation replaced Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

reintroduction of the internal border control in relation to which that obligation is imposed is itself contrary to the code.

Findings of the Court

So far as concerns the temporary reintroduction of internal border control by a Member State on the basis of a serious threat to its public policy or internal security, [203] the Court recalls, first of all, that it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part.

As regards, first of all, the wording of Article 25 of the Schengen Borders Code, the Court observes that the words 'shall not exceed six months' would indicate that any possibility of that duration being exceeded is precluded.

So far as concerns, next, the context of Article 25 of the Schengen Borders Code, the Court notes, first, that that provision lays down clearly and precisely the maximum durations both for the initial reintroduction of internal border control and for any prolongation thereof, including the maximum total duration applicable to such border control. Second, that provision constitutes an exception to the principle that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. [204] Since exceptions to the free movement of persons are to be interpreted strictly, the reintroduction of internal border control should remain an exception and should only be effected as a measure of last resort. Thus, that requirement for strict interpretation militates against an interpretation of Article 25 of the code under which the persistence of the threat initially identified [205] would be sufficient to justify such border control being reintroduced beyond the period of a maximum total duration of six months that is laid down in that provision. Such an interpretation would in practice effectively allow its reintroduction on account of the same threat for an unlimited period, thereby compromising the very principle that there is to be no internal border control. Third, to interpret Article 25 of the Schengen Borders Code as meaning that, where there is a serious threat, a Member State could exceed the maximum total duration of six months for internal border control would render pointless the distinction drawn by the EU legislature between, on the one hand, internal border control reintroduced under that article and, on the other, internal border control reintroduced under Article 29 of the code, [206] the maximum total duration of the reintroduction of which cannot exceed two years. [207]

Finally, the Court points out that the aim pursued by the rule relating to the maximum total duration of six months falls within the general objective consisting in reconciling the principle of free

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203 More specifically, the Court examines Articles 25 and 27 of the Schengen Borders Code. Article 27 of that code lays down the procedure for the temporary reintroduction of border control at internal borders under Article 25.

204 See, to that effect, Article 22 of the Schengen Borders Code, as well as Article 3(2) TEU and Article 67(2) TFEU.

205 Even when assessed in the light of new elements, or of a reappraisal of the necessity and proportionality of the border control established to respond to it.

206 Where exceptional circumstances put at risk the overall functioning of the area without internal border control, Article 29 of the code provides for the possibility for the Member States to reintroduce internal border control on the basis of a Council recommendation.

207 That said, the Court explains that the reintroduction of internal border control under Article 29 of the code for a maximum total duration of two years does not prevent the Member State concerned, in the event of a new serious threat to its public policy or internal security arising, from reintroducing, directly after those two years have come to an end, border control under Article 25 of the code for a maximum total duration of six months, provided that the conditions imposed in the latter provision are met.

movement with the Member States' interest in safeguarding the security of their territories. Whilst it is true that in the area without internal border control a serious threat to public policy or internal security in a Member State is not necessarily limited in time, the EU legislature considered that a period of six months was sufficient for the Member State concerned to adopt measures enabling such a threat to be met while maintaining, after that six-month period, the principle of free movement.

Consequently, the Court holds that that period of a maximum total duration of six months is mandatory, with the result that any internal border control reintroduced under Article 25 after it has elapsed is incompatible with the Schengen Borders Code. Such a period may be applied afresh only where the Member State concerned demonstrates the existence of a new serious threat affecting its public policy or internal security. In order to assess whether a given threat is new in relation to the threat identified initially, reference should be made to the circumstances giving rise to the need to reintroduce border control at internal borders and to the circumstances and events that constitute a serious threat to the public policy or internal security of the Member State concerned. [208]

Furthermore, the Court holds that Article 72 TFEU [209] does not permit a Member State to reintroduce, in order to meet such a threat, temporary internal border control founded on Articles 25 and 27 of the Schengen Borders Code for a period exceeding the maximum total duration of six months. In the light of the fundamental importance that the free movement of persons possesses among the objectives of the European Union and of the detailed way in which the EU legislature circumscribed the Member States' ability to interfere with that freedom by temporarily reintroducing internal border control, the EU legislature, in laying down that rule relating to the maximum total duration of six months, took due account of the exercise of the responsibilities incumbent upon the Member States in relation to public policy and internal security.

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208 Article 27(1)(a) of the Schengen Borders Code.

209 That provision states that Title V of the FEU Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

3. Humanitarian assistance operations at sea

Judgment of 1 August 2022 (Grand Chamber), Sea Watch (C-14/21 et C-15/21, EU:C:2022:604)

(Reference for a preliminary ruling – Activities relating to the search for and rescue of persons in danger or distress at sea carried out by a humanitarian non-governmental organisation (NGO) – Regime applicable to ships – Directive 2009/16/EC – United Nations Convention on the Law of the Sea – International Convention for the Safety of Life at Sea – Respective competences and powers of the flag State and the port State – Inspection and detention of ships)

Sea Watch is a humanitarian non-profit organisation registered in Berlin (Germany). It carries out activities relating to the search for and rescue of persons in danger or distress in the Mediterranean Sea, using ships in respect of which it is both the owner and the operator. Those ships include, in particular, the ships known as '*Sea Watch 3*' and '*Sea Watch 4*' ('the ships in question'), which fly the German flag and which have been certified in Germany as 'general cargo/multipurpose' ships.

During the summer of 2020, following search and rescue operations in the international waters of the Mediterranean Sea and then the transhipment and disembarking of the rescued persons in the ports of Palermo (Italy) and Porto Empedocle (Italy), towards which the Italian authorities had requested that the ships in question be directed, those ships were subject to inspections carried out by the harbour master's offices of the ports of those two municipalities, which subsequently ordered that they be detained. Those harbour master's offices considered that the ships in question were engaged in search and rescue activities at sea although they were not certified in respect of those activities and had, as a result, taken persons on board in greater numbers than they were authorised to accommodate. In addition, they noted a number of technical and operational deficiencies, some of which, in their view, fell to be regarded as giving rise to a clear risk to safety, health or the environment and as being sufficiently serious to warrant the detention of those ships.

Following the detention of the ships in question, Sea Watch brought two actions before the Tribunale amministrativo regionale per la Sicilia (Regional Administrative Court, Sicily, Italy) for annulment of (i) the detention orders and (ii) the inspection reports which preceded those orders. In support of those actions, it claimed, in essence, that the harbour master's offices responsible for those measures had exceeded the powers conferred on the port State, as derived from Directive 2009/16, [210] interpreted in the light of the relevant rules of international law, and that the inspections carried out by those harbour master's offices in fact constituted a roundabout means of frustrating the search and rescue operations at sea to which it is dedicated.

In that context, the Regional Administrative Court, Sicily, considered that the disputes before it raised important and unprecedented issues concerning the legal framework and regime applicable to ships which are operated by humanitarian non-governmental organisations in order systematically to carry out activities relating to the search for and rescue of persons in danger or distress at sea ('private humanitarian assistance ships').

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210 Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ 2009 L 131, p. 57), as amended by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017 (OJ 2017 L 315, p. 61).

By its judgment, delivered by the Grand Chamber, the Court of Justice interprets Directive 2009/16 for the first time, in particular in the light of the United Nations Convention on the Law of the Sea [211] and the SOLAS Convention. [212] It holds that that directive also applies to ships that systemically carry out activities relating to the search for and rescue of persons in danger or distress at sea and that the national rules transposing that directive cannot limit its applicability to ships used for commercial activities. In addition, the Court clarifies the extent and the conditions of implementation of the powers of control that can be exercised by the port State, as well as the powers of inspection and detention of ships.

Findings of the Court

As regards the applicability of Directive 2009/16, the Court holds that that directive is applicable to ships which, although classified and certified as cargo ships by the flag State, are in practice being systematically used by a humanitarian organisation for non-commercial activities relating to the search for and rescue of persons in danger or distress at sea. That directive applies, first, to any seagoing vessel which flies a flag other than that of the port State, [213] with the exception of specific categories of ships which are expressly excluded from its scope. [214] Those categories, which thus constitute exceptions, must be regarded as exhaustive and must be interpreted strictly. From that point of view, the fact that the activities actually carried out by a ship do not coincide with those in respect of which it was classified and certified has no bearing on the applicability of the directive; this is also true of the fact that those actual activities are commercial or non-commercial in nature. Secondly, Directive 2009/16 applies to such a ship when it is located, inter alia, in a port or anchorage of a Member State for the purpose of engaging in a ship/port interface there. [215]

In the light of that interpretation, the Court points out that Directive 2009/16 precludes national legislation ensuring its transposition into domestic law from limiting its applicability only to ships which are used for commercial activities. In particular, all ships which may fall within the scope of that directive, including private humanitarian assistance ships, must be able to benefit from the monitoring, inspection and detention mechanism provided for therein.

As regards the conditions for implementing the monitoring, inspection and detention mechanism [216] in respect of ships subject to the jurisdiction of the port Member State and, more specifically, private humanitarian assistance ships, the Court finds, in the first place, that Directive 2009/16 must be interpreted by taking account of the Convention on the Law of the Sea and the SOLAS Convention. It follows, in particular, that, in a situation where the master of a ship flying the flag of a State that is a party to the SOLAS Convention has implemented the duty to render assistance at sea enshrined in the Convention on the Law of the Sea, neither the coastal State, which is also a party to the first of those two conventions, nor the flag State can make use of their respective powers to ascertain

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211 United Nations Convention on the Law of the Sea, concluded in Montego Bay on 10 December 1982 (*United Nations Treaty Series*, Vols 1833, 1834 and 1835, p. 3) ('the Convention on the Law of the Sea'), which entered into force on 16 November 1994. Its conclusion was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1).

212 International Convention for the Safety of Life at Sea, concluded in London on 1 November 1974 (*United Nations Treaty Series*, Vol. 1185, No 18961, p. 3) ('the SOLAS Convention').

213 First subparagraph of Article 3(1) of Directive 2009/16.

214 Article 3(4) of Directive 2009/16.

215 First subparagraph of Article 3(1) of Directive 2009/16.

216 Articles 11 to 13 and 19 of Directive 2009/16.

whether the rules on safety at sea have been complied with in order to verify whether the presence on board of persons to whom assistance has been rendered may result in the ship in question infringing any of the provisions of that convention. [217]

In the second place, the Court holds that the port State may subject ships which systematically carry out search and rescue activities and which are located in one of its ports or in waters falling within its jurisdiction, having entered those waters and after all the operations relating to the transhipment or disembarking of persons to whom their masters have decided to render assistance have been completed, to an additional inspection if that State has established, on the basis of detailed legal and factual evidence, that there are serious indications capable of proving that there is a danger to health, safety, on-board working conditions or the environment in view of the relevant legal provisions, having regard to the specific conditions under which those ships operate. [218] In the event of an appeal, compliance with those requirements can thus be verified by the national court. In that regard, the Court sets out the factors which may be taken into account for the purposes of that verification, namely the activities for which the ship in question is used in practice, any difference between those activities and the activities in respect of which the ship is certified and equipped, how frequently those activities are carried out, and the equipment of that ship with regard to the expected (but also the actual) number of persons on board. The Court adds that, when circumscribed in this way, the inspection of the ship concerned by the port State falls within the framework laid down by the Convention on the Law of the Sea and the SOLAS Convention.

In the third place, the Court states that, during more detailed inspections, [219] the port State has the power to take account of the fact that ships which have been classified and certified as cargo ships by the flag State are, in practice, being systematically used for activities relating to the search for and rescue of persons in danger or distress at sea in the context of a control intended to assess, on the basis of detailed legal and factual evidence, whether there is a danger to persons, property or the environment, in view of the relevant provisions of international and EU law, having regard to the conditions under which those ships operate. The act of thus making the control which may be carried out by the port State conditional upon the existence of clear grounds for believing that a ship or its equipment does not comply with the rule that a ship must be maintained in conditions such as to ensure that it will remain fit to proceed to sea without danger to itself or to the persons on board is consistent with the rules of international law governing the division of powers between that State and the flag State. By contrast, the port State does not have the power to demand proof that those ships hold certificates other than those issued by the flag State or that they comply with all the requirements applicable to another classification. That would call into question the way in which the flag State has exercised its powers in the area of conferring its nationality on ships, as well as the area of classifying and certifying those ships.

In the fourth and last place, the Court holds that the port State may not detain a ship unless the deficiencies confirmed or revealed by a more detailed inspection, first, pose a clear risk to safety, health or the environment and, second, individually or together, make it impossible for the ship concerned to sail under conditions capable of ensuring safety at sea. In addition, that State may impose predetermined corrective measures relating to safety, pollution prevention and on-board living and working conditions, if they are warranted in order to rectify the deficiencies found. That being so, such corrective measures must, in each individual case, be suitable, necessary and proportionate to that end. Moreover, the adoption and implementation of those measures by the

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217 Article IV(b) of the SOLAS Convention.

218 Article 11(b) of Directive 2009/16, read in conjunction with Part II of Annex I to that directive.

219 Article 13 of Directive 2009/16.

port State must be the result of cooperation between that State and the flag State, having due regard to the respective powers of those two States and, where the flag State is also a Member State, to the principle of sincere cooperation.

X. Judicial cooperation in criminal matters [220]

1. European arrest warrant

Judgment of 22 February 2022 (Grand Chamber), Openbaar Ministerie (Tribunal established by law in the issuing Member State) (C-562/21 PPU and C-563/21 PPU, EU:C:2022:100)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – European arrest warrant – Framework Decision 2002/584/JHA – Article 1(3) – Surrender procedures between Member States – Conditions for execution – Charter of Fundamental Rights of the European Union – Second paragraph of Article 47 – Fundamental right to a fair trial before an independent and impartial tribunal previously established by law – Systemic or generalised deficiencies – Two-step examination – Criteria for application – Obligation of the executing judicial authority to determine, specifically and precisely, whether there are substantial grounds for believing that the person in respect of whom a European arrest warrant has been issued, if surrendered, runs a real risk of breach of his or her fundamental right to a fair trial before an independent and impartial tribunal previously established by law)

Two European arrest warrants ('EAWs') [221] were issued in April 2021 by Polish courts against two Polish nationals for the purposes, respectively, of executing a custodial sentence and of conducting a criminal prosecution. Since the persons concerned are in the Netherlands and did not consent to their surrender, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) received requests to execute those EAWs.

That court has doubts concerning its obligation to uphold those requests. In that respect, it notes that since 2017 there have been in Poland systemic or generalised deficiencies affecting the fundamental right to a fair trial, [222] and in particular the right to a tribunal previously established by law, resulting, inter alia, from the fact that Polish judges are appointed on application of the Krajowa Rada Sądownictwa (the Polish National Council of the Judiciary; 'the KRS'). According to the resolution adopted in 2020 by the Sąd Najwyższy (Supreme Court, Poland), the KRS, since the entry into force of a law on judicial reform on 17 January 2018, is no longer an independent body. [223] In so far as the judges appointed on application of the KRS may have participated in the criminal proceedings that led to the conviction of one of the persons concerned or may be called upon to hear the criminal case of the other person concerned, the referring court considers that there is a real risk that those persons, if surrendered, would suffer a breach of their right to a tribunal previously established by law.

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220 The judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)* (C-435/22 PPU, EU:C:2022:852), must also be mentioned under this heading. That judgment is presented under heading III.2. '*Ne bis in idem* principle'.

221 Within the meaning of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

222 Guaranteed in the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

223 The referring court refers also to the judgment of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596, paragraphs 108 and 110).

In those circumstances, that court asks the Court of Justice whether the two-step examination, [224] enshrined by the Court in the context of a surrender on the basis of the EAWs, under the guarantees of independence and impartiality inherent in the fundamental right to a fair trial, is applicable where the guarantee, also inherent in that fundamental right, of a tribunal previously established by law is at issue.

The Court, sitting as the Grand Chamber and ruling under the urgent preliminary ruling procedure, answers in the affirmative and specifies the detailed rules for applying that examination.

Findings of the Court

The Court holds that, where the executing judicial authority called upon to decide on the surrender of a person in respect of whom an EAW has been issued has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, it may refuse that surrender, under Framework Decision 2002/584, [225] only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach – or, in the event of surrender, there is a real risk of breach – of the fundamental right of the person concerned to a fair trial before an independent and impartial tribunal previously established by law.

In that regard, the Court states that the right to be judged by a tribunal 'established by law' encompasses, by its very nature, the judicial appointment procedure. Thus, as a first step in the examination seeking to assess whether there is a real risk of breach of the fundamental right to a fair trial, connected in particular with a failure to comply with the requirement for a tribunal previously established by law, the executing judicial authority must carry out an overall assessment, on the basis of any factor that is objective, reliable, specific and properly updated concerning the operation of the judicial system in the issuing Member State and, in particular the general context of judicial appointment in that Member State. The information contained in a reasoned proposal addressed by the European Commission to the Council on the basis of Article 7(1) TEU, the abovementioned resolution of the Sąd Najwyższy (Supreme Court) and the relevant case-law of the Court [226] and of the European Court of Human Rights [227] are such factors. By contrast, the fact that a body, such as the KRS, which is involved in the judicial appointment procedure, is made up, for the most part, of members representing or chosen by the legislature or the executive, is not sufficient to justify a refusal to surrender.

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224 As a first step in that examination, the executing judicial authority must assess whether there is a real risk of breach of the fundamental rights in the light of the general situation of the issuing Member State; as a second step, that authority must determine, specifically and precisely, whether there is a real risk that the requested person's fundamental right will be undermined, having regard to the circumstances of the case. See judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), and of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033).

225 See, to that effect, Article 1(2) and (3) of Framework Decision 2002/584, under which, first, the Member States are to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision and, second, the framework decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.

226 Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982); of 2 March 2021, *A. B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153); of 15 July 2021, *Commission* v *Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596); and of 6 October 2021, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (C-487/19, EU:C:2021:798).

227 ECtHR, 22 July 2021, *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719.

As a second step in that examination, it is for the person in respect of whom an EAW has been issued to adduce specific evidence to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case or are liable, in the event of surrender, to have such an influence. Such evidence can be supplemented, as appropriate, by information provided by the issuing judicial authority.

In that respect, as regards, first, an EAW issued for the purposes of executing a custodial sentence or detention order, the executing judicial authority must take account of the information relating to the composition of the panel of judges who heard the criminal case or any other circumstance relevant to the assessment of the independence and impartiality of that panel. It is not sufficient, in order to refuse surrender, that one or more judges who participated in those proceedings were appointed on application of a body such as the KRS. The person concerned must, in addition, provide information relating to, inter alia, the procedure for the appointment of the judges concerned and their possible secondment, which would lead to a finding that the composition of that panel of judges was such as to affect that person's fundamental right to a fair trial. Furthermore, account must be taken of the fact that it may be possible, for the person concerned, to request the recusal of the members of the panel of judges for breach of his or her fundamental right to a fair trial, the fact that that person may exercise that option as well as the outcome of the request for recusal.

Second, where an EAW has been issued for the purposes of conducting a criminal prosecution, the executing judicial authority must take account of the information relating to the personal situation of the person concerned, the nature of the offence for which that person is prosecuted, the factual context surrounding that EAW or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person. Such information may also relate to statements made by public authorities which could have an influence on the specific case. By contrast, the fact that the identity of the judges who will be called upon eventually to hear the case of the person concerned is not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS is not sufficient to refuse that surrender.

Judgment of 14 July 2022, Procureur général près la cour d'appel d'Angers (C-168/21, EU:C:2022:558)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – Article 2(4) – Condition of double criminality of the act – Article 4(1) – Ground for optional non-execution of the European arrest warrant – Verification by the executing judicial authority – Acts some of which constitute an offence under the law of the executing Member State – Article 49(3) of the Charter of Fundamental Rights of the European Union – Principle of proportionality of criminal offences and penalties)

In June 2016, the Italian judicial authorities issued a European arrest warrant (EAW) against KL for the purpose of enforcing a custodial sentence of 12 years and 6 months. This is a cumulative sentence representing four sentences handed down for four offences, one of which is classified as 'devastation and looting'. The cour d'appel d'Angers (Court of Appeal, Angers, France) refused to surrender KL on the ground that two of the acts underlying that offence did not constitute an offence in France. In that regard, the referring court, hearing an appeal on a point of law against that refusal to surrender, states that the constituent elements of the offence of 'devastation and looting' are different in the two Member States concerned, since, under Italian law (unlike French law), a breach of the public peace is an essential element for the purposes of the classification of that offence.

Accordingly, the referring court questions whether the condition of double criminality of the act, as laid down in Framework Decision 2002/584 [228] and to which the surrender of KL is subject, is fulfilled in the case at hand. If that condition does not prevent the surrender of KL, the referring court considers that the question then arises as to whether, in such circumstances, there should be a refusal to execute the EAW in the light of the principle of proportionality of penalties, laid down in Article 49(3) of the Charter of Fundamental Rights of the European Union. [229] Consequently, that court has referred those questions to the Court of Justice.

The Court holds that the condition of double criminality of the act laid down in Framework Decision 2002/584 [230] is met where an EAW is issued for the purpose of enforcing a custodial sentence handed down for acts which relate, in the issuing Member State, to a single offence requiring that those acts impair a legal interest protected in that Member State when such acts also constitute a criminal offence, under the law of the executing Member State, of which the impairment of that protected legal interest is not a constituent element. In addition, the Court holds that, in the light of that condition and of the principle of proportionality of penalties, the executing judicial authority may not refuse to execute an EAW issued for the purpose of enforcing a custodial sentence where that sentence was imposed in the issuing Member State for the commission, by the requested person, of a single offence consisting of multiple acts, only some of which constitute a criminal offence in the executing Member State.

Findings of the Court

In the first place, as regards the scope of the condition of double criminality of the act, the Court states, first of all, that, in order to determine whether that condition is met, it is necessary and sufficient that the acts giving rise to the issuing of the EAW also constitute an offence under the law of the executing Member State. Thus, the offences do not need to be identical in the two Member States concerned. It follows that, when assessing the condition referred to above, in order to establish whether there are grounds for non-execution of the EAW, [231] the executing judicial authority is required to verify whether the factual elements underlying the offence which gave rise to the issuing of that EAW would also, per se, constitute an offence under the law of the executing Member State if they were present in that State.

Next, the Court notes that, as an exception to the rule that the EAW must be executed, the ground for optional non-execution of the EAW which the condition of double criminality of the act constitutes must be interpreted strictly and, therefore, cannot be interpreted in a way which would frustrate the objective of facilitating and accelerating surrenders between judicial authorities. If that condition were to be interpreted as requiring there to be an exact match between the constituent elements of the offence as defined in the law of the issuing Member State and those of the offence as provided for in the law of the executing Member State, as well as between the legal interests protected under the laws of those two Member States, the effectiveness of the surrender procedure would be

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228 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'). The condition of double criminality of the act is laid down in Article 2(4) of that framework decision.

229 According to that principle, the severity of penalties must not be disproportionate to the criminal offence.

230 See Article 2(4) of that framework decision, which provides for the possibility of making surrender subject to that condition for offences other than those covered by Article 2(2), and Article 4(1) thereof, under which the executing judicial authority may refuse to execute the EAW if, in one of the cases referred to in Article 2(4), the act on which the EAW is based does not constitute an offence under the law of the executing Member State.

231 See Article 4(1) of Framework Decision 2002/584.

undermined. Indeed, given the minimal harmonisation in the field of criminal law at EU level, it is likely that there will be no exact match for a large number of offences. The interpretation envisaged above would therefore considerably limit the situations in which the condition referred to above could be met, thereby jeopardising the objective pursued by Framework Decision 2002/584. Moreover, such an interpretation would also disregard the objective of combating the impunity of a requested person who is present in a territory other than that in which he or she has committed an offence.

In the second place, the Court notes, first of all, that, unless the ground for non-execution relating to the condition of double criminality of the act is transposed to those acts which constitute an offence under the law of the executing Member State and which thus fall outside the scope of that ground, the fact that only some of the acts constituting an offence in the issuing Member State also constitute an offence under the law of the executing Member State does not permit the executing judicial authority to refuse to execute the EAW. Framework Decision 2002/584 [232] does not lay down any condition that the person concerned must not serve the sentence in the issuing Member State for those acts which do not constitute an offence in the executing Member State. The execution of the EAW may be made subject only to one of the conditions exhaustively laid down in that framework decision.

In addition, the Court states that interpreting the condition of double criminality of the act as meaning that execution of the EAW may be refused on the ground that some of the elements of the offence in the issuing Member State do not constitute an offence in the executing Member State would create an obstacle to the effective surrender of the person concerned and would lead to the impunity of that person for all the acts concerned. Accordingly, in such circumstances, that condition is met. Lastly, the Court states that it is not for the executing judicial authority, when assessing the condition referred to above, to assess the sentence handed down in the issuing Member State in the light of the principle of proportionality of penalties.

2. Right to be present at the trial

Judgment of 19 May 2022, Spetsializirana prokuratura (Trial of an absconded accused) (C-569/20, EU:C:2022:401)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Directive (EU) 2016/343 – Article 8 – Right to be present at the trial – Information regarding the holding of the trial – Inability to locate the accused person notwithstanding the reasonable efforts of the competent authorities – Possibility of a trial and a conviction in absentia – Article 9 – Right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case)

Criminal proceedings were brought in Bulgaria against IR, who was accused of having participated in a criminal organisation with a view to committing tax offences punishable by custodial sentences. A first indictment was served on IR in person and he indicated an address at which he could be contacted. When the judicial stage of the proceedings commenced, he could not, however, be found there, with the result that the Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria; 'the referring court') could not summon him to the hearing. Nor did the lawyer appointed by that court of its own motion enter into contact with him. Furthermore, as the indictment that had been served on IR was

[232] See Article 5 of Framework Decision 2002/584, which lays down the conditions to which, by the law of the executing Member State, the execution of the EAW may be made subject.

vitiated by an irregularity, it was declared void and the proceedings were closed. After a new indictment had been drawn up and the proceedings had been reopened, IR, once again, was sought but could not be located. The referring court finally inferred from this that IR had absconded and that, in those circumstances, the case could be heard in his absence.

However, in order that the person concerned be correctly informed of the procedural safeguards available to him, the referring court enquires as to which case provided for by Directive 2016/343 [233] covers the situation of IR who absconded after having been notified of the first indictment and before the commencement of the judicial stage of the criminal proceedings. [234]

The Court of Justice states in reply that Articles 8 and 9 of Directive 2016/343 must be interpreted as meaning that an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information regarding his or her trial may be tried and, as the case may be, convicted *in absentia*. In that case, that person must nevertheless, in principle, be able, after notification of the conviction, to rely directly on the right, conferred by that directive, to secure the reopening of the proceedings or access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case. The Court makes clear, however, that that person may be denied that right if it is apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial.

Findings of the Court

The Court points out, first of all, that Article 8(4) and Article 9 of Directive 2016/343, concerning the field of application and the extent of the right to a new trial, must be regarded as having direct effect. That right is restricted to persons whose trial is conducted *in absentia* even though the conditions laid down in Article 8(2) of the directive are not met. On the other hand, the power given to the Member States by Directive 2016/343 to conduct a trial *in absentia* when the conditions laid down in Article 8(2) are met and to enforce the decision without providing for the right to a new trial is based on the premiss that the person concerned, having been duly informed, has voluntarily and unequivocally foregone exercise of the right to be present at the trial.

That interpretation ensures observance of the aim of Directive 2016/343, which consists in enhancing the right to a fair trial in criminal proceedings, so as to increase the trust of Member States in each other's criminal justice systems, and to ensure that the rights of the defence are respected, while preventing a person who, although informed of a trial, has unequivocally foregone being present at it

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233 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).

234 More specifically, Article 8 of Directive 2016/343 deals with the right to be present at one's own trial. Under Article 8(2), Member States may provide that a trial which can result in a decision on the guilt or innocence of the person concerned can be held in his or her absence, provided that he or she has been informed, in due time, of the trial and of the consequences of non-appearance or, having been informed of the trial, is represented by a lawyer mandated by him or her or appointed by the State. Under Article 8(4) of the directive, where Member States provide for the possibility of holding trials in the absence of the person concerned but it is not possible to comply with the conditions laid down in Article 8(2) because he or she cannot be located despite reasonable efforts having been made, Member States may nevertheless provide that a decision can be taken and enforced. In such cases, Member States are to ensure that when the persons concerned are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9 of the directive. In particular, under Article 9, suspects or accused persons must have the right to a new trial where they were not present at their trial and the conditions laid down in Article 8(2) of the directive were not met.

from being able, after a conviction *in absentia*, to claim a new trial and thereby improperly hinder the effectiveness of the prosecution and the sound administration of justice. As for the information relating to the holding of the trial and to the consequences of non-appearance, the Court states that it is for the national court concerned to check whether an official document, referring unequivocally to the date and place fixed for the trial and, in the absence of representation by a mandated lawyer, to the consequences of any non-appearance, has been issued for the attention of the person concerned. It is, in addition, incumbent upon that court to check whether that document has been served in due time so as to enable the person concerned, if he or she decides to take part in the trial, to prepare his or her defence effectively.

As regards, more specifically, accused persons who have absconded, the Court holds that Directive 2016/343 precludes national legislation which rules out the right to a new trial solely on the ground that the person concerned has absconded and the authorities have not succeeded in locating him or her. It is only where it is apparent from precise and objective indicia that the person concerned, while having been officially informed that he or she is accused of having committed a criminal offence, and therefore aware that he or she is going to be brought to trial, takes deliberate steps to avoid receiving officially the information regarding the date and place of the trial that that person may be deemed to have been informed of the trial and to have voluntarily and unequivocally foregone exercise of the right to be present at it, a situation which is covered by Article 8(2) of Directive 2016/343. [235] Such precise and objective indicia may, inter alia, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated. Furthermore, in considering whether the information which has been provided to the person concerned has been sufficient, particular attention is to be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the latter in order to receive that information.

The Court states, furthermore, that that interpretation upholds the right to a fair trial, laid down in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

235 Subject to the particular needs of the vulnerable persons referred to in recitals 42 and 43 of Directive 2016/343.

3. Right to interpretation and translation in criminal proceedings

Judgment of 1 August 2022, TL (Lack of interpretion and translation) (C-242/22 PPU, EU:C:2022:611)

(Reference for a preliminary ruling – Urgent preliminary ruling procedure – Judicial cooperation in criminal matters – Directive 2010/64/EU – Right to interpretation and translation – Article 2(1) and Article 3(1) – Concept of an 'essential document' – Directive 2012/13/EU – Right to information in criminal proceedings – Article 3(1)(d) – Scope – Not implemented in domestic law – Direct effect – Charter of Fundamental Rights of the European Union – Article 47 and Article 48(2) –Convention for the Protection of Human Rights and Fundamental Freedoms – Article 6 – Suspended prison sentence with probation – Breach of the probation conditions – Failure to translate an essential document and absence of an interpreter when that document was being drawn up – Revocation of the suspension of the prison sentence – Failure to translate the procedural acts relating to that revocation – Consequences for the validity of that revocation – Procedural defect resulting in relative nullity)

In 2019, TL, a Moldovan national who does not have a command of the Portuguese language, was sentenced in Portugal to a period of imprisonment, suspended with probation. At the time he was placed under judicial investigation, TL was subject to the coercive measure provided for in the Portuguese Code of Criminal Procedure which consists of a declaration of identity and residence ('the DIR') [236] and which is accompanied by a series of obligations, including that of informing the authorities of any change of residence. TL was not assisted by an interpreter when the DIR was drawn up, nor was that document translated into a language he speaks or understands. With a view to implementing the probation scheme, the competent authorities tried unsuccessfully to contact TL at the address indicated in the DIR.

On 7 January 2021, the court that sentenced TL issued an order summoning him to appear in court to be heard in respect of his failure to comply with the conditions of the probation scheme. The notifications of that order were made in Portuguese, at the address indicated in the DIR.

Since TL did not appear on the date indicated, that court revoked, by order of 9 June 2021, the suspension of the prison sentence. That order was also served in Portuguese at the address indicated in the DIR. Subsequently, TL was arrested at another address and imprisoned in order to serve his sentence.

In November 2021, TL brought an action seeking a declaration that the DIR and the orders relating to the revocation of the suspension of his sentence were invalid. He claimed that he could not have been contacted at the address indicated in the DIR due to a change of residence. He did not notify that change of residence because he was not aware of the obligation to do so, since he had not been provided with an interpreter when the DIR was drawn up or with a translation of that document into a language he spoke or understood. Furthermore, neither the order of 7 January 2021 nor that of 9 June 2021 were translated into such a language.

The court of first instance dismissed that action, on the ground that, although those procedural defects concerning translation and interpretation were established, they had been rectified, since TL

236 A DIR is established for every person under investigation. It contains that person's place of residence, place of work or any other address of that person and indicates that certain information and obligations have been communicated to him or her, such as the obligation not to change residence without notifying the new address.

had not invoked them within the prescribed periods. [237] The referring court, hearing an appeal against that decision, has doubts as to whether such a procedural provision is compatible with, inter alia, Directives 2010/64 [238] and 2012/13. [239]

In the context of the urgent preliminary ruling procedure, the Court of Justice holds that those directives, read in the light of the fundamental rights to a fair trial and to respect for the rights of the defence, [240] and the principle of effectiveness, preclude national legislation under which infringement of the rights to information, interpretation and translation provided for by those directives must be invoked by the beneficiary of those rights within a prescribed period, failing which that challenge will be time-barred, where that period begins to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question and the effects thereof.

Findings of the Court

The Court examines the question referred in the light of Article 2(1) [241] and Article 3(1) [242] of Directive 2010/64 and Article 3(1)(d) [243] of Directive 2012/13, read in the light of Article 47 and Article 48(2) of the Charter. These provisions give specific expression to the fundamental rights to a fair trial and to respect for the rights of the defence.

In the first place, even if these provisions have not been transposed or have not been fully transposed into the national legal system, individuals may rely on the rights arising from these provisions, since they have direct effect. Those provisions state, in a precise and unconditional manner, the content and scope of the rights of every suspected or accused person to receive interpretation services and the translation of essential documents, and to be informed of those rights.

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237 Under Article 120 of the Código do Processo Penal (Code of Criminal Procedure), nullities such as the failure to appoint an interpreter must be invoked within prescribed periods, failing which the challenge will be time-barred. Thus, in the case of the nullity of an act drawn up in the presence of the person concerned, the nullity must be invoked before the finalisation of that act. According to the Portuguese Government, that article is also applicable to the invocation of defects arising from the infringement of the right to translation of essential documents in criminal proceedings.

238 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

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

240 As guaranteed by Article 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union ('the Charter') respectively.

241 That provision requires Member States to ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities.

242 In accordance with that provision, Member States are to ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

243 This provision requires Member States to ensure that suspects or accused persons are provided promptly with information concerning the right to interpretation and translation, in order to allow for those rights to be exercised effectively.

In the second place, as regards a possible infringement of those provisions in the present case, the Court finds that the three procedural acts at issue, namely the DIR, the order of 7 January 2021 summoning TL to appear and the order of 9 June 2021 revoking the suspension of the prison sentence, fall within the scope of Directives 2010/64 and 2012/13 and constitute essential documents of which a written translation should have been provided. In particular, the translation of the DIR into a language understood or spoken by TL would have been essential, since the breaches of the obligations set out in that document indirectly led to the revocation of the suspended prison sentence imposed on him.

In that respect, the application of these directives to a procedural act, the content of which determines the maintenance or revocation of a suspended sentence of imprisonment, is necessary in the light of the objective of these directives to ensure respect for the right to a fair trial, as enshrined in Article 47 of the Charter, and respect for the rights of the defence, as guaranteed by Article 48(2) of the Charter. Those fundamental rights would be infringed if a person who has been sentenced to a suspended term of imprisonment were unable to ascertain – because of the failure to translate that act or the absence of an interpreter when it was drawn up – the consequences of failing to comply with the obligations imposed on him or her by that act.

In the third place, as regards the consequences of an infringement of the rights in question, Directives 2010/64 and 2012/13 do not set out the detailed rules for the implementation of the rights which they lay down. Accordingly, those rules are a matter for the domestic legal system of the Member States in accordance with the principle of procedural autonomy, provided that they comply with the principle of equivalence and the principle of effectiveness.

As regards the principle of effectiveness, the rules laid down in national law cannot undermine the objective of these directives. First, the obligation to inform suspects and accused persons of their rights to interpretation and translation is of essential importance in order effectively to guarantee those rights. Without that information, the person concerned could not know the existence and scope of these rights or demand that they be respected. Thus, to require the person concerned by criminal proceedings conducted in a language which he or she does not speak or understand to plead that he or she has not been informed of his or her rights to interpretation and translation within a prescribed period, failing which that challenge will be time-barred, would have the effect of rendering meaningless the right to be informed and would consequently undermine that person's rights to a fair trial and to respect for the rights of the defence. That conclusion also applies, as regards the rights to interpretation and translation, where the person concerned has not been informed of the existence and scope of those rights.

Secondly, even where the person concerned has actually received that information in good time, it is also necessary that he or she be aware of the existence and content of the essential document in question and of the effects arising from it, in order to be able to invoke an infringement of his or her right to the translation of that document or of his or her right to the assistance of an interpreter when that document is being drawn up.

Accordingly, the principle of effectiveness would be undermined if the period in which, under a national procedural provision, an infringement of the rights granted by Directives 2010/64 and 2012/13 may be invoked began to run before the person concerned has been informed, in a language which he or she speaks or understands, first, of the existence and scope of his or her right to interpretation and translation and, secondly, of the existence and content of the essential document in question as well as its effects.

XI. Judicial cooperation in civil matters

1. Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Judgment of 20 June 2022 (Grand Chamber), London Steam-Ship Owners' Mutual Insurance Association (C-700/20, EU:C:2022:488)

(Reference for a preliminary ruling – Judicial cooperation in civil and commercial matters – Regulation (EC) No 44/2001 – Recognition of a judgment given in another Member State – Grounds for non-recognition – Article 34(3) – Judgment irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought – Conditions – Whether the prior judgment entered in the terms of an arbitral award complies with the provisions and fundamental objectives of Regulation (EC) No 44/2001 – Article 34(1) – Recognition manifestly contrary to public policy in the Member State in which recognition is sought – Conditions)

In 2002, following a storm, the oil tanker *Prestige* sank off the coast of Spain, causing significant environmental damage. A criminal investigation was subsequently initiated in Spain against, amongst others, the master of that vessel.

In the course of those proceedings, civil claims were brought by several legal persons, including the Spanish State, against the master and owners of the *Prestige* and the London P&I Club, the insurer of the ship and its owners. All of those defendants were declared civilly liable by the Spanish courts. By order of 1 March 2019, the Audiencia Provincial de A Coruña (Provincial Court, Corunna, Spain) set out the amounts that each of the claimants, including the Spanish State, was entitled to obtain from the respective defendants.

After the introduction of those civil claims before the Spanish courts, the London P&I Club commenced arbitration proceedings in the United Kingdom seeking a declaration that, pursuant to the arbitration clause in the insurance contract concluded with the owners of the *Prestige*, the Kingdom of Spain was required to pursue its claims in those arbitration proceedings, rather than in Spain, and that, in any event, it could not be liable, as the insurer, to the Kingdom of Spain in respect of those claims. The insurance contract stipulated that, in accordance with the 'pay to be paid' clause, the insured party must first pay the injured party the compensation due before recovery from the insurer is permissible. The arbitral tribunal upheld that claim, taking the view that the law to be applied to the contract was English law. On 22 October 2013, the High Court of Justice, [244] to which the London P&I Club applied pursuant to the national law on arbitration, [245] authorised the enforcement of the arbitral award in the United Kingdom and, on the same day, handed down a judgment in the terms of that award. The Kingdom of Spain's appeal against that decision was dismissed.

The Kingdom of Spain then applied for and obtained recognition in the United Kingdom, on the basis of Article 33 of Regulation No 44/2001, [246] of the enforcement order of 1 March 2019 of the Audiencia

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244 High Court of Justice (England & Wales), Queen's Bench Division (Commercial Court) ('the High Court of Justice').

245 Arbitration Act 1996.

246 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Provincial de A Coruña (Provincial Court, Corunna). The London P&I Club nevertheless appealed against that recognition to the High Court of Justice.

Having received a request for a preliminary ruling from the latter court, the Court of Justice specifies, inter alia, the circumstances in which a judgment delivered by a court of a Member State in the terms of an arbitral award may constitute a judgment, within the meaning of Article 34(3) of Regulation No 44/2001, [247] capable of preventing, in that Member State, the recognition of a judgment given by a court in another Member State.

Findings of the Court

The Court holds that a judgment in the terms of an arbitration award falls within the scope of the arbitration exclusion laid down in Regulation No 44/2001 [248] and cannot enjoy mutual recognition between the Member States and circulate within the EU judicial area in accordance with the provisions of that regulation.

That being said, such a judgment is capable of being regarded as a judgment, within the meaning of Article 34(3) of that regulation, which may preclude, in the Member State in which it was given, the recognition of a judgment given by a court in another Member State if those two judgments are irreconcilable. The concept of 'judgment' is given a broad definition in Regulation No 44/2001. Moreover, Article 34(3) of that regulation pursues a specific objective, namely to protect the integrity of a Member State's internal legal order and ensure that its rule of law is not disturbed by the obligation to recognise a judgment from another Member State which is inconsistent with a decision given, in a dispute between the same parties, by its own courts.

The position is different however where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of Regulation No 44/2001, of a judicial decision falling within the scope of that regulation.

All of the objectives pursued by that regulation are reflected in the principles which underlie judicial cooperation in civil matters within the European Union, including, in particular, legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and mutual trust in the administration of justice. Furthermore, mutual trust in the administration of justice in the European Union, on which the rules on the recognition of judicial decisions laid down by that regulation are based, does not extend to decisions made by arbitral tribunals or to judicial decisions entered in their terms.

The Court finds that the content of the arbitral award at issue in the main proceedings could not have been the subject of a judicial decision falling within the scope of Regulation No 44/2001 without infringing two fundamental rules of that regulation concerning the relative effect of an arbitration clause included in an insurance contract and *lis pendens*.

As regards the relative effect of an arbitration clause included in an insurance contract, a jurisdiction clause agreed between an insurer and an insured party cannot be invoked against a victim of insured damage who, where permitted by national law, wishes to bring an action directly against the insurer, in tort, delict or quasi-delict, before the courts for the place where the harmful event occurred or

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247 Under Article 34(3) of Regulation No 44/2001, a judgment is not to be recognised if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.

248 Article 1(2)(d) of Regulation No 44/2001.

before the courts for the place where the victim is domiciled. Consequently, a court other than that already seised of that direct action should not declare itself to have jurisdiction on the basis of such an arbitration clause, the aim being to guarantee the objective pursued by Regulation No 44/2001, namely the protection of injured parties vis-à-vis the insurer concerned. That objective would be compromised if a judgment entered in the terms of an arbitral award by which an arbitral tribunal declared itself to have jurisdiction on the basis of such an arbitration clause, included in the insurance contract concerned, could be regarded as a 'judgment given in a dispute between the same parties in the Member State in which recognition is sought', within the meaning of Article 34(3) of that regulation.

As regards *lis pendens*, the circumstances characterising the two sets of proceedings at issue, in Spain and in the United Kingdom, precisely amount to a situation in which any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised has been established and then, where the jurisdiction of the court first seised is established, decline jurisdiction in favour of that court. [249] On the date on which the arbitration proceedings were commenced, proceedings were already pending before the Spanish courts. Those proceedings involved the same parties, in particular the Spanish State and the London P&I Club, and the civil claims brought before the Spanish courts had already been notified to the London P&I Club. Furthermore, those proceedings had the same cause of action, namely the London P&I Club's potential liability in respect of the Spanish State. The Court therefore concludes that it is for the court seised with a view to entering a judgment in the terms of an arbitral award to verify that the provisions and fundamental objectives of Regulation No 44/2001 have been complied with, in order to prevent a circumvention of those provisions and objectives. The completion of arbitration proceedings in disregard of both the relative effect of an arbitration clause included in an insurance contract and the rules on *lis pendens* constitutes such a circumvention. Since no such verification took place before the United Kingdom courts concerned, the judgment entered in the terms of the arbitral award cannot, in the dispute at issue in the main proceedings, prevent the recognition of a judgment from another Member State.

The Court was also questioned as to whether, alternatively, in circumstances such as those at issue in the main proceedings, an obstacle to the recognition in the United Kingdom of the enforcement order of 1 March 2019 could arise from Article 34(1) of Regulation No 44/2001. [250] The Court holds that that provision does not permit the recognition or enforcement of a judgment from another Member State to be refused as being contrary to public policy on the ground that it would disregard the force of *res judicata* acquired by the judgment entered in the terms of an arbitral award. The EU legislature has exhaustively regulated the issue of the force of *res judicata* acquired by a judgment given previously by means of Article 34 (3) and (4) of that regulation.

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249 In accordance with Article 27 of Regulation No 44/2001.

250 In accordance with that provision, a judgment is not to be recognised if that recognition is manifestly contrary to public policy in the Member State in which recognition is sought.

2. Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

Judgment of 1 August 2022, MPA (Habitual residence – Third State) (C-501/20, EU:C:2022:619)

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Jurisdiction, recognition and enforcement of decisions in matrimonial matters and in the matters of parental responsibility – Regulation (EC) No 2201/2003 – Articles 3, 6 to 8 and 14 – Definition of 'habitual residence' – Jurisdiction, recognition, enforcement of decisions and cooperation in matters relating to maintenance obligations – Regulation (EC) No 4/2009 – Articles 3 and 7 – Nationals of two different Member States residing in a third State as members of the contract staff working in the EU Delegation to that third State – Determination of jurisdiction – Forum necessitatis)

In 2015, two members of the contract staff of the European Commission, who were previously resident in Guinea-Bissau, moved to Togo with their minor children on account of their assignment to the EU delegation to that third State. As the mother is a Spanish national and the father a Portuguese national, the children, born in Spain, have dual Spanish and Portuguese nationality. Since the couple's de facto separation in 2018, the mother and the children have continued to reside in the matrimonial home in Togo and the father has lived in a hotel in that State.

In 2019, the mother brought divorce proceedings before a Spanish court, together with, inter alia, applications for the determination of the arrangements for exercising custody and parental responsibility in respect of the couple's minor children, as well as maintenance payments for them. However, that court declared that it lacked territorial jurisdiction since, in its view, the parties did not have their habitual residence in Spain.

On appeal by the mother, the Audiencia Provincial de Barcelona (Provincial Court, Barcelona, Spain) decided to refer several questions to the Court of Justice for a preliminary ruling in order to enable it to rule, in the light of the particular situation of the spouses and their children, on the jurisdiction of the Spanish courts under Regulations No 2201/2003 [251] and No 4/2009. [252]

In its judgment, the Court clarifies the factors relevant to the determination of the habitual residence of the parties which is set out as a criterion for determining jurisdiction in those regulations. It also sets out the conditions under which a court seised may recognise its jurisdiction in matters relating to divorce, parental responsibility and maintenance obligations where no court of a Member State usually has jurisdiction.

Findings of the Court

The concept of the 'habitual residence' of the spouses, which is set out in the alternative heads of jurisdiction provided for in Article 3(1)(a) of Regulation No 2201/2003, must be given an autonomous and uniform interpretation. It is characterised not only by the intention of the person concerned to

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251 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

252 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1).

establish the habitual centre of his or her life in a particular place, but also by a presence which is sufficiently stable in the Member State concerned. The same definition also applies to the concept of 'habitual residence' in matters relating to maintenance obligations, within the meaning of the criteria for jurisdiction under Article 3(a) and (b) of Regulation No 4/2009; that definition must be guided by the same principle and characterised by the same elements as in the Hague Protocol on the Law Applicable to Maintenance Obligations. The status of the spouses concerned as members of the contract staff of the European Union, who are part of an EU delegation to a third State and who are alleged to enjoy diplomatic status in that third State, is not capable of constituting a decisive factor for the purposes of determining habitual residence within the meaning of the aforementioned provisions.

As to the habitual residence of the child, within the meaning of Article 8(1) of Regulation No 2201/2003 in matters of parental responsibility, this is also an autonomous concept. It requires, at the very least, physical presence in a given Member State which is not in any way temporary or intermittent and reflects some degree of integration of the child into a social and family environment. In that regard, the connecting factor of the mother's nationality and her residence, before her marriage, in the Member State of the court seised in matters of parental responsibility is not relevant for the purposes of recognising the jurisdiction of that court, whereas the fact that the minor children were born in that Member State and have the nationality of that Member State is insufficient.

That interpretation of the concept of 'habitual residence' could lead, in the light of the facts of the case, to no court of a Member State having jurisdiction, under the general rules on jurisdiction contained in Regulation No 2201/2003, to rule on an application for the dissolution of matrimonial ties and in matters of parental responsibility. In such a case, Articles 7 and 14 of that regulation may allow a court seised to apply, in respect of each matter, the rules on jurisdiction under domestic law, albeit with a different scope. In matrimonial matters, such residual jurisdiction of the court of the Member State seised is excluded where the defendant is a national of another Member State, without, however, preventing the courts of the latter Member State from having jurisdiction under its domestic law. By contrast, in matters of parental responsibility, the fact that the defendant is a national of another Member State does not prevent the court of the Member State seised from recognising its jurisdiction.

Another framework is laid down in matters relating to maintenance obligations, where all the parties to the dispute do not habitually reside in a Member State. In that case, Article 7 of Regulation No 4/2009 lays down four cumulative conditions to be satisfied in order for a court of a Member State seised of an application relating to maintenance obligations to be able, on an exceptional basis, to establish that it has jurisdiction by reason of the state of necessity (*forum necessitatis*). First, the court seised must find that no court of a Member State has jurisdiction under Articles 3 to 6 of Regulation No 4/2009. Second, the dispute in question must be closely connected with a third State, which is the case where all the parties habitually reside there. Third, the condition that the proceedings in question cannot reasonably be brought or conducted or would be impossible in that third State requires that, in the light of the particular case, access to justice in the third State must be, in law or in fact, impeded, inter alia by procedural conditions that are discriminatory or contrary to the guarantees of a fair trial. Lastly, the dispute must have a sufficient connection with the Member State of the court seised, which connection may consist, inter alia, of the nationality of one of the parties.

3. Regulation 2015/848 on insolvency proceedings

Judgment of 24 March 2022, Galapagos BidCo. (C-723/20, EU:C:2022:209)

(Reference for a preliminary ruling – Regulation (EU) 2015/848 – Insolvency proceedings – Article 3(1) – International jurisdiction – Moving of the centre of a debtor's main interests to another Member State after a request to open main insolvency proceedings has been lodged)

Galapagos, a holding company with its registered office in Luxembourg, moved its central administration to Fareham (United Kingdom) in June 2019. On 22 August 2019, its directors lodged a request to open insolvency proceedings before a court of the United Kingdom. [253] The following day, those directors were replaced by a new director, who set up an office in Düsseldorf (Germany) for Galapagos and sought, unsuccessfully, to have that request withdrawn.

Subsequently, Galapagos lodged another request to open insolvency proceedings in respect of itself, this time before the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany), which was held to be inadmissible on the ground that that court did not have international jurisdiction. Another request to open insolvency proceedings, this time from two other companies that are creditors of Galapagos, was then lodged with that same court. Further to that request, the Amtsgericht Düsseldorf (Local Court, Düsseldorf) appointed a temporary insolvency administrator and ordered interim measures, taking the view that the centre of Galapagos' main interests was in Düsseldorf when that request was lodged.

Galapagos Bidco., which is both a subsidiary and a creditor of Galapagos, brought an immediate appeal before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) seeking to have the order of the Amtsgericht Düsseldorf (Local Court, Düsseldorf) set aside on the ground that the German courts did not have international jurisdiction. That appeal having been dismissed, Galapagos BidCo. brought an appeal before the Bundesgerichtshof (Federal Court of Justice, Germany), the referring court.

The referring court states that the outcome of the appeal before it depends on the interpretation of Regulation 2015/84 [254] and, in particular, on the article thereof relating to the rules covering the international jurisdiction of the courts of Member States to hear and determine insolvency proceedings. [255] Stating that, on the date on which it lodged the request for a preliminary ruling with the Court, the court of the United Kingdom was still yet to deliver its decision on the first request, the referring court is uncertain, in particular, whether the court of a Member State initially seised continues to have exclusive jurisdiction over a request to open main insolvency proceedings where the centre of the debtor's main interests is moved to another Member State after that request is lodged, but before that court has delivered a decision on it.

By its judgment, the Court interprets Regulation 2015/848 as meaning that the court of a Member State with which a request to open main insolvency proceedings has been lodged retains exclusive

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253 In the present case, the High Court of Justice (England and Wales), Chancery Division (Business and Property Courts, Insolvency and Companies List), United Kingdom.

254 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19).

255 Article 3(1) of Regulation 2015/848. In essence, that provision provides that the courts with jurisdiction to open main insolvency proceedings are the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.

jurisdiction to open such proceedings where the centre of the debtor's main interests is moved to another Member State after that request has been lodged, but before that court has delivered a decision on it. Thus, in so far as that regulation is still applicable to the first request, a court of another Member State with which another request is lodged subsequently for the same purpose cannot, in principle, declare that it has jurisdiction to open main insolvency proceedings until the first court has delivered its decision and declined jurisdiction.

Findings of the Court

At the outset, the Court finds, as regards the international jurisdiction of the courts of Member States to hear and determine insolvency proceedings, that Regulation 2015/848, which is applicable in the present case, pursues in the same terms the same objectives as the preceding Regulation No 1346/2000. [256] Consequently, the Court's case-law on the interpretation of the rules established by Regulation No 1346/2000 regarding international jurisdiction remains relevant for the purpose of interpreting the corresponding article of Regulation 2015/848, which is the subject of the reference for a preliminary ruling.

Thus, the exclusive jurisdiction conferred by those regulations on the courts of the Member State within the territory of which the debtor has the centre of its main interests remains with those courts where that debtor moves the centre of its main interests to another Member State after a request has been lodged, but before the proceedings are opened. The Court arrives at that conclusion by making reference to the findings made in its earlier case-law. [257]

Next, the Court examines the consequences of the court of a Member State initially seised continuing to have jurisdiction on the jurisdiction of the courts of another Member State to hear and determine further requests to open main insolvency proceedings. It states that it is apparent from Regulation 2015/848 that only one set of main insolvency proceedings may be opened and that they are effective in all the Member States in which that regulation is applicable. Moreover, it is for the court initially seised to examine of its own motion whether it has jurisdiction and, for that purpose, to verify that the centre of the debtor's main interests is situated within the territory of its own Member State. If it is not, the court initially seised must not open main insolvency proceedings. On the other hand, if that verification confirms that it does have jurisdiction, any decision to open insolvency proceedings delivered by that court is, in accordance with the principle of mutual trust, to be recognised in all the other Member States from the moment that it becomes effective in the Member State of the opening of proceedings. Therefore, the courts of those Member States cannot, in principle, declare that they have jurisdiction to open such proceedings until the first court has delivered its decision and declined jurisdiction.

However, where the court initially seised is a court in the United Kingdom, if, at the end of the transition period provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [258] that court has not yet delivered its decision, Regulation 2015/848 no longer requires a court of a Member State, within the territory of which the centre of Galapagos' main interests is situated, to refrain from declaring that it has jurisdiction to open such proceedings.

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256 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), which was repealed by Regulation 2015/848.

257 Judgment of 17 January 2006, *Staubitz-Schreiber* (C-1/04, EU:C:2006:39).

258 OJ 2020 L 29, p. 7.

XII. Competition [259]

1. Abuse of a dominant position (Article 102 TFEU) [260]

Judgment of 12 May 2022, Servizio Elettrico Nazionale and Others (C-377/20, EU:C:2022:379)

(Reference for a preliminary ruling – Competition – Dominant position – Abuse – Article 102 TFEU – Effect of a practice on the well-being of consumers and on the structure of the market – Abusive exclusionary practice – Whether the practice is capable of producing an exclusionary effect – Use of means other than those coming within the scope of competition on the merits – Hypothetical as-efficient competitor unable to replicate the practice – Existence of an anticompetitive intent – Opening up of the market for the sale of electricity to competition – Transfer of commercially sensitive information within a group of undertakings in order to preserve a dominant position inherited from a statutory monopoly – Imputability of a subsidiary's conduct to the parent company)

This case has arisen in the context of the progressive liberalisation of the market for the sale of electricity in Italy.

Although, since 1 July 2007, all users of the Italian electricity network, including households and small and medium-sized enterprises, have been able to choose their supplier, a distinction was drawn initially between, on the one hand, customers that were eligible to choose a supplier on the free market and, on the other, customers in the protected market, the latter consisting of private individuals and small businesses that continued to be covered by a regulated regime referred to as the servizio di maggior tutela (enhanced protection service), which included special protection of prices in particular. It was only subsequently that customers in the latter category were allowed access to the free market.

For the purposes of that liberalisation of the market, ENEL, an undertaking that, until that point, had been vertically integrated, had held the monopoly in electricity generation in Italy and had also been active in the distribution of electricity, underwent an unbundling of its distribution and sales activities and its trade marks. Following that procedure, the activities relating to the various stages of the distribution process were attributed to separate subsidiaries. Thus, E-Distribuzione was entrusted with the distribution service, Enel Energia was entrusted with the supply of electricity on the free market and Servizio Elettrico Nazionale ('SEN') was awarded the task of managing the enhanced protection service.

Following an investigation conducted by the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority) (AGCM) as national competition authority, that authority adopted, on 20 December 2018, a decision in which it held that, during the period from January 2012 to May 2017, SEN and Enel Energia, coordinated by their parent company, ENEL, had abused their dominant position in breach of Article 102 TFEU and consequently imposed a fine of over EUR 93 million jointly and severally on those companies. The conduct complained of consisted in an exclusionary strategy intended to transfer the customer base of SEN, as incumbent manager of the protected market, to

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[259] The judgment of 22 March 2022, ***Nordzucker and Others*** (C-151/20, EU:C:2022:203), must also be mentioned under this heading. That judgment is presented under heading III.2 *'Ne bis in idem* principle'.

[260] The judgment of 22 March 2022, ***bpost*** (C-117/20, EU:C:2022:202), must also be mentioned under this heading. That judgment is presented under heading III.2 '*Ne bis in idem* principle'.

Enel Energia, which operates on the free market, in order to mitigate the risk of a large-scale departure of SEN's customers to new suppliers on the subsequent opening to competition of the market concerned. To that end, according to the AGCM's decision, the customers in the protected market were, inter alia, asked by SEN to give their consent to receive commercial offers relating to the free market using discriminatory methods with respect to the offers of ENEL's competitors.

The fine was reduced to approximately EUR 27.5 million in compliance with judgments delivered at first instance in the context of actions brought by ENEL and its two subsidiaries against the AGCM's decision. Those companies have brought appeals against those judgments before the Consiglio di Stato (Council of State, Italy), which has asked the Court questions relating to the interpretation and application of Article 102 TFEU in cases relating to exclusionary practices.

By its judgment, the Court sets out the conditions under which the conduct of an undertaking can be regarded, on the basis of its anticompetitive effects, as constituting abuse of a dominant position when such conduct stems from the use of resources or means inherent to the holding of such a position in the context of the liberalisation of a market. In that judgment, the Court defines the relevant assessment criteria and the scope of the burden of proof on the relevant national competition authority that has adopted a decision under Article 102 TFEU.

Findings of the Court

Answering the questions relating to the interest protected by Article 102 TFEU, the Court sets out, in the first place, the elements constituting abuse of a dominant position. To that end, it observes, first, that the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position within the internal market or a substantial part of that market. Therefore, a competition authority discharges its burden of proof if it shows that a practice of an undertaking in a dominant position could adversely affect, by using resources or means other than those governing normal competition, the effective competition structure, without it being necessary for that authority to prove that that practice may also cause direct harm to consumers. The dominant undertaking concerned can nevertheless escape the prohibition laid down in Article 102 TFEU by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects on consumers.

Second, the Court recalls that the conduct of an undertaking in a dominant position is to be characterised as abusive only if that conduct is shown to be capable of restricting competition and, in the case in question, of producing the alleged exclusionary effects. However, that characterisation does not require it to be proved that the desired result of such conduct seeking to exclude the undertaking's competitors from the market concerned has been achieved. In those circumstances, evidence produced by an undertaking in a dominant position demonstrating that there are no actual exclusionary effects cannot be regarded as sufficient in itself to preclude the application of Article 102 TFEU. However, that factor can constitute evidence that the conduct at issue is incapable of producing the alleged exclusionary effects, provided that it is supported by other evidence seeking to demonstrate such incapability.

In the second place, as regards the doubts expressed by the national court as to whether the intention of the undertaking in question should be taken into consideration, the Court recalls that the existence of an abusive exclusionary practice by an undertaking in a dominant position must be assessed on the basis of whether that practice is capable of producing anticompetitive effects. It follows that a competition authority is not required to demonstrate that the undertaking in question has the intention of excluding its competitors by means or by making use of resources other than those governing competition on the merits. The Court does, however, specify that evidence of such intention is nevertheless a factor that may be taken into account for the purposes of establishing abuse of a dominant position.

In the third place, the Court provides interpretative guidance requested by the national court for the purpose of applying Article 102 TFEU in order to distinguish, among the practices implemented by an undertaking holding a dominant position which are based on lawful use, outside of the domain of competition law, of resources or means inherent to the holding of such a position, between those which are potentially not covered by the prohibition laid down in that article because they are characteristic of normal competition and those which, by contrast, are to be regarded as 'abusive' within the meaning of that provision.

In that connection, the Court recalls, first of all, that the abusive nature of those practices presupposes that they are capable of producing the exclusionary effects described in the decision at issue. Admittedly, undertakings in a dominant position, irrespective of the reasons for which they have such a position, may defend themselves against their competitors, but they must nonetheless do so by using means of 'normal' competition alone, that is to say, competition on the merits. A practice that could not be adopted by a hypothetical competitor that is as efficient on the market in question because it relies on the use of resources or means inherent to the holding of a dominant position cannot be regarded as competition on the merits. In those circumstances, when an undertaking loses the legal monopoly it had previously held on a market, that undertaking must refrain, during the entire liberalisation phase of the market, from using means available to it on account of its former monopoly and which, on that basis, are not available to its competitors for the purposes of maintaining, other than by its own merits, a dominant position on the recently liberalised market in question.

That said, such a practice can nevertheless escape the prohibition laid down in Article 102 TFEU if the relevant undertaking in a dominant position proves that that practice was either justified objectively by circumstances external to the undertaking and is proportionate to that justification, or that it is counterbalanced or even outweighed by advantages in terms of efficiency that also benefit consumers.

In the fourth and last place, the Court, having been asked by the national court to set out the conditions for imputing liability for the conduct of a subsidiary to its parent company, holds that, when a dominant position is abused by one or several subsidiaries belonging to one economic unit, the existence of that unit is sufficient to regard the parent company as being also liable for that abuse. There must be a presumption that such a unit exists if, at the material time, almost all of the capital of those subsidiaries was held, directly or indirectly, by the parent company. In such circumstances, the competition authority is not required to provide any additional evidence unless the parent company shows that, despite holding such a percentage of the capital of those companies, it did not have the power to define their conduct and those companies were acting independently.

2. State aid

Judgment of 25 January 2022 (Grand Chamber), Commission v European Food and Others (C-638/19 P, EU:C:2022:50)

(Appeal – State aid – Articles 107 and 108 TFEU – Bilateral Investment Treaty – Arbitration clause – Romania – Accession to the European Union – Repeal of a tax incentives scheme prior to accession – Arbitral award granting payment of damages after accession – European Commission decision declaring that payment to be State aid incompatible with the internal market and ordering its recovery – Competence of the European Commission – Application ratione temporis *of EU law – Determination of the date at which the right to receive aid is conferred on the beneficiary – Article 19 TEU – Articles 267 and 344 TFEU – Autonomy of EU law)*

On 29 May 2002, the Kingdom of Sweden and Romania concluded a bilateral investment treaty on the promotion and reciprocal protection of investments ('the BIT'), Article 2(3) of which provides that each contracting party would at all times ensure fair and equitable treatment of the investments by investors of the other contracting party. The BIT provides, in addition, that disputes between investors and the contracting countries are to be settled by an arbitral tribunal.

In 2005, in the context of the negotiations for Romania's accession to the European Union, the Romanian Government repealed a national tax incentives scheme for the benefit of certain investors in disadvantaged regions ('the tax incentives scheme').

Considering that, by repealing the tax incentives scheme, Romania had breached its obligation to ensure fair and equitable treatment of the investments in accordance with the BIT, several Swedish investors requested the establishment of an arbitral tribunal with a view to obtaining compensation for the damage caused. By arbitral award of 11 December 2013, that tribunal ordered Romania to pay those investors damages in the sum of approximately EUR 178 million.

Notwithstanding various warnings by the European Commission as to the necessity of complying in this case with the rules and procedures applicable to State aid, the Romanian authorities paid the compensation awarded by the arbitral tribunal in favour of the Swedish investors.

By decision of 30 March 2015 ('the decision at issue'), [261] the Commission classified the payment of that compensation as State aid incompatible with the internal market, prohibited its implementation and ordered the recovery of the sums already paid.

Hearing a number of actions, the General Court annulled that decision [262] on the ground, in essence, that the Commission had retroactively applied its competences to facts predating the accession of Romania to the European Union on 1 January 2007. The General Court started from the premiss that the aid referred to had been granted by Romania on the date of repeal of the tax incentives scheme, namely in 2005.

On appeal, the Court of Justice, sitting as the Grand Chamber, sets aside that judgment of the General Court and confirms the Commission's competence to adopt the decision at issue, whilst referring the

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261 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (OJ 2015 L 232, p. 43).

262 Judgment of 18 June 2019, *European Food and Others* v *Commission* (T-624/15, T-694/15 and T-704/15, EU:T:2019:423).

case back to the General Court for it to rule on the pleas and arguments raised before it as regards the merits of that decision.

Findings of the Court

As the Commission had acquired competence to control, pursuant to Article 108 TFEU, aid measures granted by Romania with effect from its accession to the European Union, the Court of Justice recalls that State aid must be regarded as being granted, within the meaning of Article 107(1) TFEU, on the date on which the right to receive it is conferred on the beneficiary under the applicable national legislation. The decisive factor for establishing that date is acquisition by those beneficiaries of a definitive right to receive the aid in question and the corresponding commitment, by the State, to grant that aid. It is at that date that such a measure is liable to distort competition and affect trade between Member States, within the meaning of Article 107(1) TFEU.

In the present case, the Court finds that the right to compensation for the damage alleged by the Swedish investors, even though it was the result of the repeal by Romania, allegedly in breach of the BIT, of the tax incentives scheme, was only granted by the arbitral award of 11 December 2013, which not only upheld that right, but also quantified its amount. It was only upon the conclusion of that arbitration procedure that those investors were able to obtain actual payment of compensation, even if it was intended to make good, in part, the damage that they alleged they had suffered in a period before the accession of Romania to the European Union.

Thus, having regard to the fact that the aid measure in question was granted after Romania's accession to the European Union, the General Court erred in law in holding that the Commission lacked competence *ratione temporis* to adopt the decision at issue under Article 108 TFEU.

The Court states that the question of whether the compensation granted by the arbitral award is capable of constituting State aid, within the meaning of Article 107(1) TFEU, falls outside its jurisdiction on an appeal, in so far as it was not examined by the General Court. However, the Commission's competence under Article 108 TFEU cannot in any case depend on the outcome of the examination of that question as the prior control by the Commission pursuant to that article is intended to determine, inter alia, whether the compensation in question constitutes State aid.

Finally, the Court finds that the General Court also erred in law in finding that the judgment of the Court of Justice in *Achmea* [263] is irrelevant to the present case.

In the judgment in *Achmea*, the Court of Justice held that Articles 267 and 344 TFEU preclude an international agreement concluded between two Member States which provides that an investor from one of those Member States, in the event of a dispute concerning investments in the other Member State, may bring proceedings against that other Member State before an arbitral tribunal whose jurisdiction that other Member State has undertaken to accept. By the conclusion of such an agreement, Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of that law.

In the present case it is common ground that the compensation sought by the Swedish investors also related to alleged damage suffered after Romania's accession to the European Union, with effect from which EU law, including Articles 107 and 108 TFEU, applied to that Member State. To that extent, the dispute brought before the arbitral tribunal could not be regarded as being confined in all respects to

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263 Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158).

a period during which Romania, having not yet acceded to the European Union, was not yet bound by the rules and principles stemming from the judgment in *Achmea*. It is also common ground that the arbitral tribunal does not form part of the EU judicial system which the second subparagraph of Article 19(1) TEU requires the Member States to establish in fields covered by EU law.

Accordingly, Romania's consent to the arbitration system laid down in the BIT became inapplicable following the accession of that Member State to the European Union.

In the light of all those considerations, the Court sets aside the judgment under appeal and refers the case back to the General Court to adjudicate on the pleas and arguments raised before it concerning the merits of the decision at issue, in particular the question whether the measure referred to in that decision satisfies, from a substantive point of view, the conditions laid down in Article 107(1) TFEU. [264]

Judgment of 8 November 2022 (Grand Chamber), Fiat Chrysler Finance Europe v Commission (C-885/19 P and C-898/19 P, EU:C:2022:859)

(Appeal – State aid – Aid implemented by the Grand Duchy of Luxembourg – Decision declaring the aid incompatible with the internal market and unlawful and ordering its recovery – Tax ruling – Advantage – Selectivity – Arm's length principle – Reference framework – National law applicable – 'Normal' taxation)

Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd ('FFT'), is part of the Fiat/Chrysler automobile group and provides treasury and financing services to the Fiat/Chrysler group companies established in Europe. With its head office located in Luxembourg, FFT had requested from the Luxembourg tax authorities approval of an advance transfer pricing agreement. Following that request, the Luxembourg tax authorities issued a tax ruling endorsing a method for the determination of FFT's remuneration, as an integrated company, for the financial services provided to other Fiat/Chrysler group companies, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis.

By decision of 21 October 2015 [265] ('the decision at issue'), the Commission found that that tax ruling constituted operating aid incompatible with the internal market within the meaning of Article 107 TFEU. Moreover, it found that the Grand Duchy of Luxembourg had not notified it, in accordance with Article 108(3) TFEU, of the plan relating thereto and therefore had not complied with the standstill obligation laid down in Article 108(3) TFEU. Accordingly, the Commission ordered the recovery of that unlawful and incompatible aid.

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264 See also the order of 21 September 2022, *Romatsa* (C-333/19, EU:C:2022:749), in which the Court, when requested to give a preliminary ruling, was asked about the scope of the same arbitral award of 11 December 2013, which is the subject of Commission Decision (EU) 2015/1470. In that order, the Court holds that EU law, in particular Articles 267 and 344 TFEU, must be interpreted as meaning that a court of a Member State hearing the enforcement of the arbitral award which was the subject of Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award in Micula v Romania of 11 December 2013 is required to disregard that award and, therefore, cannot under any circumstances proceed to enforce it in order to enable the beneficiaries to obtain payment of the damages that it grants to them.

265 Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1).

The Grand Duchy of Luxembourg and FFT both brought an action for the annulment of that decision. In dismissing those actions, [266] the General Court upheld, in particular, the Commission's approach, according to which, in the case of a tax system which pursues the objective of taxing the profits of all resident companies, whether integrated or not, the application of the arm's length principle for the purposes of defining the reference system is justified independently of whether that principle has been incorporated into national law.

Hearing two appeals, brought this time by FFT and Ireland, the Court of Justice, sitting as the Grand Chamber, sets aside the judgment of the General Court, then, giving final judgment in the matter, also annuls the decision at issue. In that context, it provides further clarification as to whether tax rulings granted by the tax authorities of the Member States endorsing methodologies for determining transfer pricing may constitute State aid within the meaning of Article 107(1) TFEU.

Findings of the Court

As a preliminary point, the Court recalls that, in the context of the analysis of tax measures from the perspective of EU State aid law, the examination of the condition relating to selective advantage involves, as a first step, identifying the reference system, that is the 'normal' tax regime applicable in the Member State concerned, then demonstrating, as a second step, that the tax measure at issue is a derogation from that system, in so far as it differentiates between economic operators which, in the light of the objective pursued by that system, are in a comparable factual and legal situation, without finding any justification with regard to the nature or scheme of the system in question.

More specifically, the determination of the reference system, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under national law and, outside the spheres in which EU law has been harmonised, it must be done, as is the case for direct taxation, solely in the light of the national law applicable in the Member State concerned. It is the Member State concerned which determines, by exercising its own competence in the matter of direct taxation and with due regard for its fiscal autonomy, the characteristics constituting the tax, which define, in principle, the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity. This includes, in particular, the determination of the basis of assessment and the taxable event.

It is in the light of those considerations that the Court of Justice examines whether, in the present case, by endorsing the Commission's methodology, the General Court erred in law in determining the reference system.

In the first place, the Court of Justice specifies that the question whether the General Court adequately defined the relevant reference system and, by extension, correctly applied a legal test, such as the arm's length principle, is a question of law which can be reviewed by the Court of Justice on appeal.

In the second place, the Court of Justice finds that, when defining the reference system in order to determine whether the tax ruling at issue confers a selective advantage on its beneficiary, the Commission did not carry out a comparison with the tax system normally applicable in the Member State concerned, following an objective examination of the content, interaction and concrete effects of the rules applicable under the national law of that State. It applied an arm's length principle different from that defined by Luxembourg law, confining itself to identifying the abstract expression

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266 Judgment of 24 September 2019, *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (T-755/15 and T-759/15, EU:T:2019:670).

of that principle in the objective pursued by the general system of corporate income tax in Luxembourg, and to examining the tax ruling at issue without taking into account the way in which the said principle has actually been incorporated into that law with regard to integrated companies in particular.

It follows that, first, by endorsing such an approach, the General Court erred in law in the application of Article 107(1) TFEU and, second, by accepting that the Commission may rely on rules which are not part of Luxembourg law, it infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular Article 114(2) TFEU and Article 115 TFEU.

In that regard, the Court notes, first of all, that, without harmonisation in EU law in that regard, any fixing of the methods and criteria for determining an 'arm's length' outcome falls within the discretion of the Member States. It follows that only the national provisions are relevant for the purposes of analysing whether transactions must be examined in the light of the arm's length principle and, if so, whether or not transfer prices, which form the basis of a taxpayer's taxable income and its allocation among the States concerned, deviate from an arm's length outcome.

Next, the Court notes that the Grand Duchy of Luxembourg laid down specific rules for determining an arm's length remuneration for intra-group financing companies, such as FFT, which were not however taken into account by the Commission in its analysis of the reference system and, by extension, of the existence of a selective advantage granted to FFT.

Last, the Court specifies that, contrary to what the General Court held at first instance, the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, [267] does not support the position that the arm's length principle is applicable where national tax law is intended to tax integrated companies and stand-alone companies in the same way, irrespective of whether, and in what way, that principle has been incorporated into that law. In that case, it was in the light of the rules on taxation laid down in the relevant national law, namely Belgian law, that the Court concluded that it was appropriate to use the arm's length principle.

Having regard to the foregoing, the Court sets aside the judgment under appeal, considers that the state of the proceedings so permits and, giving final judgment in the matter, annuls the decision at issue in so far as the error committed by the Commission in determining the rules actually applicable under the relevant national law and, therefore, in identifying the 'normal' taxation in the light of which the tax ruling at issue had to be assessed invalidates the entirety of the reasoning relating to the existence of a selective advantage. The Court of Justice finds in particular that the setting aside of the judgment of the General Court on account of the error of law committed by the latter cannot be avoided on account of the fact that the Commission also included in the decision at issue, as a subsidiary point, a line of reasoning based on Article 164(3) of the Luxembourg Tax Code and the related Circular No 164/2. The Court of Justice holds that that line of reasoning merely refers to the Commission's principal analysis of the correct reference system, so that it rectifies only in a superficial manner the Commission's error in the identification of the reference system that should have formed the basis of its analysis relating to the existence of a selective advantage.

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267 Judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416).

XIII. Approximation of laws

1. Intellectual and industrial property [268]

Judgment of 24 March 2022, Austro-Mechana (C-433/20, EU:C:2022:217)

(Reference for a preliminary ruling – Harmonisation of certain aspects of copyright and related rights in the information society – Directive 2001/29/EC – Article 2 – Reproduction – Article 5(2)(b) – Private copying exception – Concept of 'any medium' – Servers owned by third parties made available to natural persons for private use – Fair compensation – National legislation that does not make the providers of cloud computing services subject to the private copying levy)

Austro-Mechana [269] is a copyright collecting society which exercises the legal rights to the remuneration that is due under the private copying exception. [270] It brought a claim for payment of that remuneration before the Handelsgericht Wien (Commercial Court, Vienna, Austria) that was directed against Strato AG, a provider of cloud storage services. That court dismissed the claim on the ground that Strato does not supply storage media to its customers, but provides them with an online storage service.

Hearing the case on appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) asked the Court of Justice whether the storage of content in the context of cloud computing comes within the scope of the private copying exception provided for in Article 5(2)(b) of Directive 2001/29. [271]

The Court of Justice holds that the private copying exception applies to copies of works on a server in storage space made available to a user by the provider of a cloud computing service. However, Member States are not obliged to make the providers of cloud storage services subject to the payment of fair compensation under that exception, in so far as the payment of fair compensation to rightholders is provided for in some other way.

Findings of the Court

In the first place, Directive 2001/29 provides that the private copying exception applies to reproductions on any medium. [272] The Court rules on the applicability of that exception to copies of works in the cloud.

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268 The judgment of 26 April 2022, *Poland* v *Parliament and Council* (C-401/19, EU:C:2022:297), must also be mentioned under this heading. That judgment is presented under heading III.3 'Freedom of expression and right to information'.

269 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH.

270 The private copying exception is an exception to the exclusive right of authors to authorise or prohibit the reproduction of their works. It concerns reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.

271 Member States have the option to provide for such an exception under Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). In that case, those States must ensure that rightholders receive fair compensation.

272 Article 5(2)(b) of Directive 2001/29.

As regards the concept of 'reproduction', the Court states that the saving of a copy of a work in storage space in the cloud constitutes a reproduction of that work. The upload of a work to the cloud consists in storing a copy of it.

As regards the words 'any medium', the Court observes that these refer to all of the media on which a protected work may be reproduced, including the servers used in cloud computing. In that regard, the fact that the server belongs to a third party is not decisive. Accordingly, the private copying exception may apply to reproductions made by a natural person with the aid of a device belonging to a third party. In addition, one of the objectives of Directive 2001/29 is to prevent copyright protection in the European Union from becoming outdated or obsolete as a result of technological developments. That objective would be undermined if the exceptions and limitations to copyright protection were interpreted in such a way as to exclude digital media and cloud computing services.

Consequently, the concept of 'any medium' covers a server on which storage space is made available to a user by the provider of a cloud computing service.

In the second place, the Court rules on the subjection of providers of cloud storage services to the payment of fair compensation and takes the view, in essence, that, as EU law currently stands, such an imposition is within the discretion conferred on the national legislature to determine the various elements of the system of fair compensation.

In that regard, it points out that Member States which implement the private copying exception are required to provide for a system of fair compensation intended to compensate rightholders.

As regards the person liable to pay the fair compensation, it is in principle for the person carrying out the private copying, namely the user of cloud computing storage services, to finance that compensation.

However, in the event of practical difficulties related to the identification of end users, Member States may introduce a private copying levy chargeable to the producer or importer of the servers by means of which the cloud computing services are offered to natural persons. That levy will be passed on economically to the purchaser of such servers and will ultimately be borne by the private user who uses that equipment or to whom a reproduction service is provided.

When setting the private copying levy, Member States may take account of the fact that certain devices and media may be used for private copying in connection with cloud computing. However, they must ensure that the levy thus paid, in so far as it affects several devices and media in the single process of private copying, does not exceed the possible harm to the rightholders.

Consequently, Directive 2001/29 does not preclude national legislation that does not make the providers of cloud storage services subject to the payment of fair compensation, in so far as that legislation provides for the payment of fair compensation in some other way.

Judgment of 22 December 2022 (Grand Chamber), Louboutin (Use of an infringing sign on an online market) (C-148/21 and C-184/21, EU:C:2022:1016)

(Reference for a preliminary ruling – EU trade mark – Regulation (EU) 2017/1001 – Article 9(2)(a) – Rights conferred by an EU trade mark – Concept of 'use' – Operator of an online sales website incorporating an online marketplace – Advertisements published on that marketplace by third-party sellers using, in those advertisements, a sign which is identical with a trade mark of another person for goods which are identical with those for which that trade mark is registered – Perception of that sign as forming an integral part of the commercial communication of that operator – Method of presenting the advertisements which does not make it possible to distinguish clearly the offerings of that operator from those of the third-party sellers)

Since 2016, Mr Louboutin, a French designer of luxury footwear and handbags, has registered the colour red, applied to the outer sole of a high-heeled shoe, as an EU trade mark.

Amazon operates websites selling various goods which it offers both directly, in its own name and on its own behalf, and indirectly, by providing a sales platform for third-party sellers. That operator also offers third-party sellers the additional services of stocking and shipping their goods.

Mr Louboutin stated that those websites regularly display advertisements for red-soled shoes which, in his view, relate to goods which have been placed on the market without his consent. Then, alleging an infringement of the exclusive rights conferred by the mark at issue, he brought two actions for infringement against Amazon before the tribunal d'arrondissement de Luxembourg (District Court, Luxembourg, Luxembourg) [273] and the tribunal de l'entreprise francophone de Bruxelles (Brussels Companies Court (French-speaking), Belgium). [274]

Each of those courts then decided to refer a number of questions to the Court of Justice for a preliminary ruling.

In essence, they asked the Court whether the EU trade mark regulation [275] must be interpreted as meaning that the operator of an online sales website incorporating, as well as that operator's own sales offerings, an online marketplace may be regarded as itself using a sign which is identical with an EU trade mark of another person for goods which are identical with those for which that trade mark is registered where third-party sellers offer goods bearing that sign for sale on that marketplace without the consent of the trade mark proprietor.

They are unsure, inter alia, whether the following are relevant in that regard: the fact that that operator uses a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace; the fact that it places its own logo as a renowned distributor on all those advertisements; and the fact that it offers third-party sellers, in connection with the marketing of their goods, additional services consisting in providing them support in the presentation of their advertisements and in storing and shipping goods offered on the same marketplace. In that context, the referring courts also ask whether it is necessary to take into consideration, where appropriate, the perception of the users of the website in question.

The Court, sitting as the Grand Chamber, had the opportunity to provide important clarifications on the issue of the direct liability of the operator of an online sales website incorporating an online marketplace for infringements of the rights of the proprietor of an EU trade mark resulting from the fact that a sign which is identical with that mark appears in advertisements from third-party sellers on that marketplace.

Findings of the Court

It must be recalled that, under the EU trade mark regulation, the registration of an EU trade mark confers on its proprietor the right to prevent all third parties from using, in the course of trade, any sign which is identical with that trade mark in relation to goods or services which are identical with those for which the mark is registered.

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273 Case C-148/21.

274 Case C-184/21.

275 More specifically, Article 9(2)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).

The Court notes at the outset that the concept of 'using' is not defined by the EU trade mark regulation. Nevertheless, that expression involves active behaviour and direct or indirect control of the act constituting the use. Only a third party which has such control is effectively able to stop the use of a trade mark without the consent of its proprietor.

The use, by a third party, of a sign which is identical with or similar to the proprietor's trade mark also implies, at the very least, that that third party uses the sign in its own commercial communication. A person may thus allow its clients to use signs which are identical with or similar to trade marks without itself using those signs. The Court thus considered that, with regard to the operator of an online marketplace, the use of signs which are identical with or similar to trade marks in offers for sale displayed on that marketplace is made only by the sellers which are customers of that operator and not by the operator itself, since the latter does not use that sign in its own commercial communication.

The Court observes, however, that, in its earlier case-law, it was not asked about the impact of the fact that the online sales website in question incorporates, as well as the online marketplace, sales offers of the operator of that site itself, whereas the present cases specifically raise the issue of that impact. Accordingly, in the present case, the referring courts are uncertain whether, in addition to the third-party seller, the operator of an online sales website incorporating an online marketplace, such as Amazon, also uses, in its own commercial communication, a sign which is identical with a trade mark of another person for goods which are identical with those for which that trade mark is registered, and may thus be held liable for the infringement of the rights of the proprietor of that trade mark where that third-party seller offers goods bearing that sign for sale on that marketplace.

The Court finds that that issue arises irrespective of the fact that the role of that operator may, where appropriate, also be examined from the point of view of other rules of law and that, although the assessment of such use by the operator is ultimately a matter for the national court, it may provide elements of interpretation under EU law which may be useful in that regard.

In that connection, as regards commercial communication, the Court states that the use of a sign which is identical with another person's trade mark by the operator of a website incorporating an online marketplace in its own commercial communication presupposes that that sign appears, in the eyes of third parties, to be an integral part of that communication and, consequently, a part of its activity.

In that context, the Court notes that, in a situation in which the operator of a service uses a sign which is identical with or similar to the trade mark of another person in order to promote goods which one of its customers is marketing with the assistance of that service, that operator does itself make use of that sign if it uses it in such a way that it establishes a link between the sign and the services provided by that operator.

Accordingly, the Court has held that such an operator does not itself make use of a sign which is identical with or similar to a trade mark of another person when the service it provides is not comparable to a service aimed at promoting the marketing of goods bearing that sign and does not imply the creation of a link between the service and that sign, since the operator in question is not apparent to the consumer, which excludes any association between its services and the sign at issue.

On the other hand, the Court has held that such a link does exist where the operator of an online marketplace, by means of an internet referencing service and on the basis of a keyword which is identical with a trade mark of another person, advertises goods bearing that trade mark which are offered for sale by its customers on its online marketplace. For internet users carrying out a search on the basis of a keyword, such advertising creates an obvious association between those trade-marked goods and the possibility of buying them through that marketplace. That is why the proprietor of that trade mark is entitled to prohibit that operator from such use, where that advertising infringes the trade mark right owing to the fact that it does not enable well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether those goods originate from

the proprietor of that trade mark or from an undertaking economically linked to that proprietor or, on the contrary, from a third party.

The Court concluded from this that, in order to determine whether the operator of an online sales website incorporating an online marketplace does itself make use of a sign which is identical with a trade mark of another person, which appears in the advertisements relating to goods offered by third-party sellers on that marketplace, it is necessary to assess whether a well-informed and reasonably observant user of that website establishes a link between that operator's services and the sign in question.

From that point of view, in order to determine whether an advertisement, published on that marketplace by a third-party seller active on that marketplace, using a sign which is identical with a trade mark of another person may be regarded as forming part of the commercial communication of the operator of that website, it is necessary to ascertain whether it is capable of establishing a link between the services offered by that operator and the sign in question, on the ground that a user might believe that the operator is marketing, in its own name and on its own behalf, the goods for which the sign in question is being used.

The Court highlights that, in the overall assessment of the circumstances of the present case, the method of presenting the advertisements, both individually and as a whole, on the website in question and the nature and scope of the services provided by the operator of the website are particularly important.

As regards, first, the method of presenting the advertisements, EU law requires transparency in the display of advertisements on the internet, so that a well-informed and reasonably observant user can distinguish easily between offers originating from the operator of the website and from third-party sellers active on the online marketplace. However, the Court considers that the operator's use of a uniform method of presenting the offers published, displaying both its own advertisements and those of third-party sellers and placing its own logo as a renowned distributor on its own website and on all of the advertisements may make it difficult to draw such a distinction and thus give the impression that that operator is marketing, in its own name and on its own behalf, the goods offered for sale by those third-party sellers.

Second, the nature and scope of the services provided by the operator of an online marketplace to sellers, and in particular the services consisting of the storage, shipping and management of returns of those goods, are also likely to give the impression, to a well-informed and reasonably observant user, that those same goods are being marketed by that operator and thus establish a link, in the eyes of those users, between those services and the signs placed on those goods and in the advertisements of third-party sellers.

In conclusion, the Court rules that the operator of an online sales website incorporating, as well as that operator's own sales offers, an online marketplace may be regarded as itself using a sign which is identical with an EU trade mark of another person for goods which are identical with those for which that trade mark is registered, where third-party sellers offer for sale, on that marketplace, without the consent of the proprietor of that trade mark, such goods bearing that sign, if a well-informed and reasonably observant user of that site establishes a link between the services of that operator and the sign at issue, which is in particular the case where, in view of all the circumstances of the situation in question, such a user may have the impression that that operator itself is marketing, in its own name and on its own behalf, the goods bearing that sign. The Court adds that the following are relevant in that regard:

– the fact that that operator uses a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the goods which it sells in its own name and on its own behalf and those relating to goods offered by third-party sellers on that marketplace;

– the fact that it places its own logo as a renowned distributor on all those advertisements; and

– the fact that it offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods.

2. Tobacco products

Judgment of 22 February 2022 (Grand Chamber), Stichting Rookpreventie Jeugd and Others (C-160/20, EU:C:2022:101)

(Reference for a preliminary ruling – Directive 2014/40/EU – Manufacture, presentation and sale of tobacco products – Products not complying with the maximum emission levels – Prohibition on placing on the market – Measurement method – Filter cigarettes with small ventilation holes – Measurement of the emissions on the basis of ISO standards – Standards not published in the Official Journal of the European Union *– Compliance with the publication requirements laid down in Article 297(1) TFEU read in the light of the principle of legal certainty – Compliance with the principle of transparency)*

In July and August 2018, the Stichting Rookpreventie Jeugd (Youth Smoking Prevention Foundation, Netherlands) and 14 other entities ('the applicants') made a request for an order to the Nederlandse Voedsel - en Warenautoriteit (Netherlands Food and Consumer Product Safety Authority). They requested that authority, first, to ensure that filter cigarettes offered for sale to consumers in the Netherlands comply, when used as intended, with the maximum emission levels for tar, nicotine and carbon monoxide prescribed by Directive 2014/40 [276] and, second, to order manufacturers, importers and distributors of tobacco products to withdraw from the market filter cigarettes allegedly not complying with those emission levels.

The applicants challenged the decision rejecting that request by bringing an administrative objection before the State Secretary. After that objection was rejected, the applicants brought an action before the Rechtbank Rotterdam (District Court, Rotterdam, Netherlands). They submitted that Article 4(1) of Directive 2014/40 [277] does not require recourse to a particular method of measuring emission levels and that it is clear, inter alia, from several studies that another measurement method (the 'Canadian Intense' method) should be applied in order to determine the precise emission levels for filter cigarettes used as intended.

The District Court, Rotterdam, made a reference to the Court of Justice for a preliminary ruling concerning, inter alia, the validity of Article 4(1) of Directive 2014/40 having regard to the principle of

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276 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1). Article 3(1) of that directive lays down the maximum emission levels for tar, nicotine and carbon monoxide in respect of cigarettes placed on the market or manufactured in the Member States ('the maximum emission levels prescribed by Directive 2014/40').

277 Under Article 4(1) of Directive 2014/40, 'the tar, nicotine and carbon monoxide emissions from cigarettes shall be measured on the basis of ISO standard 4387 for tar, ISO standard 10315 for nicotine, and ISO standard 8454 for carbon monoxide. The accuracy of the tar, nicotine and carbon monoxide measurements shall be determined in accordance with ISO standard 8243'.

transparency, [278] to a number of provisions of EU law [279] and to the World Health Organisation Framework Convention on Tobacco Control. [280]

By its judgment, delivered by the Grand Chamber, the Court confirms that that provision is valid, holding that it complies in particular with the principles and provisions of EU and international law mentioned by the reference for a preliminary ruling. [281]

Findings of the Court

First, the Court holds that, pursuant to Article 4(1) of Directive 2014/40, the maximum emission levels prescribed by that directive for cigarettes intended to be placed on the market or manufactured in the Member States must be measured in accordance with the measurement methods arising from the ISO standards to which that provision refers. That provision refers in mandatory terms to those ISO standards and does not mention any other measurement method.

Second, the Court analyses first of all the validity of Article 4(1) of Directive 2014/40 having regard to the principle of transparency. It points out that, whilst that provision refers to ISO standards which have not been published in the Official Journal, it does not lay down any restriction concerning access to those standards, including by making that access subject to the submission of a request pursuant to the provisions regarding public access to documents of the European institutions. [282] So far as concerns, next, the validity of Article 4(1) of Directive 2014/40 having regard to Regulation No 216/2013, [283] the Court observes that under the case-law the substantive legality of that directive cannot be examined in the light of that regulation. As regards, finally, the validity of Article 4(1) of Directive 2014/40 having regard to Article 297(1) TFEU [284] read in the light of the principle of legal certainty, the Court states that the EU legislature, in the light of the broad discretion that it has in the exercise of the powers conferred on it where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations, may refer, in the acts that it adopts, to technical standards determined by a standards body, such as the International Organisation for Standardisation (ISO).

However, the Court points out that the principle of legal certainty requires that the reference to such standards be clear and precise and predictable in its effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law. In the present instance, the Court holds that, since the reference made by Article 4(1) of Directive 2014/40 to the ISO standards complies with that requirement and the directive was published in the Official Journal, the mere fact

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278 The principle of transparency is laid down in the second paragraph of Article 1 and Article 10(3) TEU, Article 15(1) and Article 298(1) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union ('the Charter').

279 Article 114(3) and Article 297(1) TFEU, Council Regulation (EU) No 216/2013 of 7 March 2013 on the electronic publication of the *Official Journal of the European Union* (OJ 2013 L 69, p. 1) and Articles 24 and 35 of the Charter.

280 World Health Organisation Framework Convention on Tobacco Control ('the FCTC'), concluded in Geneva on 21 May 2003, to which the European Union and its Member States are party.

281 Inter alia, Article 5(3) of the FCTC.

282 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).

283 Regulation No 216/2013 lays down inter alia the rules relating to the publication of acts of EU law in the Official Journal.

284 Pursuant to that provision, 'legislative acts shall be published in the *Official Journal of the European Union*. They shall enter into force on the date specified in them or, in the absence thereof, on the 20th day following that of their publication'.

that that provision refers to ISO standards that have not, at this juncture, been so published is not capable of calling the validity of that provision into question.

Nevertheless, as regards the ability of ISO standards to bind individuals, the Court states that, in accordance with the principle of legal certainty, such standards made mandatory by a legislative act of the European Union are binding on the public generally only if they themselves have been published in the Official Journal. In the absence of publication in the Official Journal of the standards to which Article 4(1) of Directive 2014/40 refers, the public is thus unable to ascertain the methods of measuring the emission levels prescribed by that directive for cigarettes. On the other hand, regarding the ability of ISO standards to bind undertakings, the Court states that, in so far as undertakings have access to the official and authentic version of the standards referred to in Article 4(1) of Directive 2014/40 through the national standards bodies, those standards are binding on them.

Third, as to the validity of Article 4(1) of Directive 2014/40 having regard to Article 5(3) of the FCTC, [285] the Court observes that the latter provision does not prohibit all participation of the tobacco industry in the establishment and implementation of rules on tobacco control, but is intended solely to prevent the tobacco control policies of the parties to the Convention from being influenced by that industry's interests. Therefore, the mere fact that the tobacco industry participated in the determination at ISO of the standards in question is not capable of calling into question the validity of Article 4(1) of Directive 2014/40.

Fourth, as to the validity of Article 4(1) of Directive 2014/40 having regard to the requirement for a high level of protection of human health [286] and to Articles 24 and 35 of the Charter, [287] the Court points out that, in accordance with settled case-law, the validity of that provision of Directive 2014/40 cannot be assessed on the basis of the studies mentioned by the referring court in the request for a preliminary ruling, as those studies postdate 3 April 2014, the date on which that directive was adopted.

Fifth and finally, the Court specifies the characteristics that must be displayed by the method of measuring emissions to be used for cigarettes in order to verify compliance with the maximum emission levels prescribed by Directive 2014/40, should the reference made in Article 4(1) of the directive to ISO standards not be binding on individuals. Thus, it holds that that method must be appropriate, in the light of scientific and technical developments or internationally agreed standards, for measuring the levels of emissions released when a cigarette is consumed as intended, and must take as a base a high level of protection of human health, especially for young people. The accuracy of the measurements obtained by means of that method must be verified by laboratories approved and monitored by the competent authorities of the Member States as referred to in Article 4(2) of Directive 2014/40. It is for the national court to determine whether the methods actually used to measure the emission levels comply with Directive 2014/40, without taking account of Article 4(1) thereof.

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285 That provision states that, in setting and implementing their public health policies with respect to tobacco control, the parties to the convention are to act to protect those policies from interests of the tobacco industry in accordance with national law.

286 That requirement is laid down in particular in Article 114(3) TFEU.

287 Article 24 of the Charter relates to the rights of the child, while Article 35 of the Charter concerns health care.

3. Motor vehicles [288]

Judgment of 14 July 2022 (Grand Chamber), GSMB Invest (C-128/20, EU:C:2022:570)

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 3(10) – Article 5(1) and (2) – Defeat device – Motor vehicles – Diesel engines – Pollutant emissions – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition)

Judgment of 14 July 2022 (Grand Chamber), Volkswagen (C-134/20, EU:C:2022:571)

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 3(10) – Article 5(1) and (2) – Defeat device – Motor vehicles – Diesel engines – Pollutant emissions – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve (EGR valve) – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Article 3(2) – Device installed during the repair of a vehicle)

Judgment of 14 July 2022 (Grand Chamber), Porsche Inter Auto and Volkswagen (C-145/20, EU:C:2022:572)

(Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 715/2007 – Approval of motor vehicles – Article 5(2) – Defeat device – Motor vehicles – Diesel engines – Emission control system – Software installed in the electronic engine controller – Exhaust gas recirculation valve ('EGR valve') – Reduction in nitrogen oxide (NOx) emissions limited by a 'temperature window' – Prohibition on the use of defeat devices that reduce the effectiveness of emission control systems – Article 5(2)(a) – Exception to that prohibition – Consumer protection – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Article 2(2)(d) – Concept of 'goods which show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods' – Vehicle covered by an EC type-approval – Article 3(6) – Concept of a 'minor lack of conformity')

The objective of ensuring a high level of environmental protection within the European Union is reflected, inter alia, by the adoption of measures to limit pollutant emissions. Accordingly, motor vehicles have been the subject of increasingly restrictive legislation, in particular with the adoption of Regulation No 715/2007 on type approval of motor vehicles. [289] That regulation aims, inter alia, to reduce significantly the nitrogen oxide (NOx) emissions from diesel vehicles in order to improve air quality and comply with limit values for pollution.

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[288] The judgment of 8 November 2022, ***Deutsche Umwelthilfe (Approval of motor vehicles)*** (C-873/19, EU:C:2022:857), must also be mentioned under this heading. That judgment is presented under heading III.1 'Right to an effective remedy and right to a fair trial'.

289 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ 2007 L 171, p. 1).

These three cases concern the purchase of vehicles equipped with software installed in the electronic engine controller which, outside certain temperature conditions and above a certain driving altitude, reduces the effectiveness of the exhaust gas recirculation system (EGR), which results in the NOx emission limit values laid down in Regulation No 715/2007 being exceeded.

Following an update of the software installed in the electronic engine controller, the purification of exhaust gases is deactivated at an external temperature of below 15 °C and above 33 °C, and at a driving altitude above 1 000 metres. Exhaust gas recirculation was thus fully effective only when the outside temperature was between 15 and 33 °C ('the temperature window').

These three cases follow on from the judgment of 17 December 2020, *CLCV and Others* (*Defeat device on diesel engines)* ('the judgment in *CLCV*'), [290] where the Court of Justice interpreted, for the first time, the concept of a 'defeat device', within the meaning of Regulation No 715/2007, [291] and determined the extent to which such a device is unlawful in the light of that regulation, [292] which provides for exceptions to the prohibition on defeat devices, which include the need to protect the engine against damage or accident and for safe operation of the vehicle.

It was in that context that the three Austrian referring courts asked the Court whether software, such as that at issue, constitutes a 'defeat device' within the meaning of Regulation No 715/2007. If so, those courts are uncertain whether that software can be authorised on the basis of the exception to the prohibition of such devices based on the need to protect the engine against damage or accident and for the safe operation of the vehicle. Lastly, if the software is not authorised, those courts want to know if its use can entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees. [293]

By three judgments delivered by the Grand Chamber, the Court determines, first of all, that the software at issue reduces the effectiveness of the emission control system in normal vehicle operation and use and that it, therefore, constitutes a 'defeat device' within the meaning of Regulation No 715/2007. Next, it concludes that a defeat device which serves primarily to protect components, such as the EGR valve, the EGR cooler and the diesel particulate filter, does not fall within the exception to the prohibition on such devices. It then specifies the conditions under which a defeat device is or is not covered by the exception based on the need to protect the engine against damage or accident and the safe operation of the vehicle. Lastly, the Court states that a vehicle equipped with such a device is not in conformity with the contract of sale, within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees, even if it is covered by a valid EC type-approval, and that the fault affecting such a vehicle cannot be classified as 'minor', which would in principle preclude the buyer from having the contract declared void.

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290 Judgment of 17 December 2020, *CLCV and Others (Defeat device on diesel engines)* (C-693/18, EU:C:2020:1040).

291 Within the meaning of Article 3(10) of Regulation No 715/2007. That provision defines a 'defeat device' as being 'any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'.

292 Article 5(2)(a) of Regulation No 715/2007.

293 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (OJ 1999 L 171, p. 12; 'the directive on certain aspects of the sale of consumer goods and associated guarantees').

Findings of the Court

In the first place, in order to determine whether the software at issue constitutes a 'defeat device' within the meaning of Regulation No 715/2007, the Court interprets the concept of 'normal … operation and use' of a vehicle.

In that regard, it notes that it is apparent not only from the wording of the provision of Regulation No 715/2007, which defines such a device, [294] but also from the context of that provision, and from the objective pursued by that regulation, that that concept refers to the use of a vehicle under normal driving conditions, that is to say, not only its use under the conditions laid down for the approval test, applicable at the time of the facts in the main proceedings. That concept thus refers to the use of that vehicle under real driving conditions, such as are usually present in the territory of the European Union. The Court points out in that regard that, as it held in the judgment in *CLCV*, the use of a device that would make it possible to ensure compliance with the emission limits laid down by Regulation No 715/2007 only during the approval test phase, even though that test phase does not make it possible to reproduce the normal conditions of use of the vehicle, would run counter to the obligation to ensure that emissions are effectively limited under such conditions of use. The same applies to the use of a device that would make it possible to ensure such compliance only within a temperature window which, although covering the conditions in which the approval test phase takes place, does not correspond to normal driving conditions.

In those circumstances, the Court holds that software, such as that at issue, which ensures compliance with the emission limit values laid down by Regulation No 715/2007 only where the outside temperature is in the temperature window reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, within the meaning of Regulation No 715/2007. That software therefore constitutes a 'defeat device' within the meaning of that regulation. [295]

In the second place, the Court examines the question whether a device, such as that at issue, can fall within the exception to the prohibition on the use of defeat devices which relates to the need to protect the engine against damage or accident and for the safe operation of the vehicle, provided for by Regulation No 715/2007, [296] in so far as that device contributes to protecting components such as the EGR valve, the EGR exchanger and the diesel particulate filter.

In that regard, the Court points out that Regulation No 715/2007 provides for exceptions to the prohibition on the use of defeat devices, in particular where 'the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle'. As regards, first of all, the concept of an 'engine', the Court notes that EU law [297] draws a clear distinction between, on the one hand, the engine covered by that exception and, on the other hand, the pollution control system parameters, which include the particulate filters and the EGR. Consequently, the EGR valve, the EGR exchanger and the diesel particulate filter constitute components that are distinct from the engine. As regards, next, the concepts of 'accident' and 'damage', the Court concludes that the clogging up or ageing of the engine cannot be regarded as an 'accident' or 'damage', within the

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294 Article 3(10) of Regulation No 715/2007.

295 Article 3(10) of Regulation No 715/2007.

296 Article 5(2)(a) of Regulation No 715/2007.

297 Annex I of Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending [Regulation No 715/200] (OJ 2008 L 199, p. 1), as amended by Commission Regulation (EU) No 566/2011 of 8 June 2011 (OJ 2011 L 158, p. 1).

meaning of Regulation No 715/2007, [298] since such occurrences are, in principle, foreseeable and inherent in the normal operation of the vehicle. According to the Court, only immediate risks of damage or accident to the engine which create a specific hazard when the vehicle is driven are, therefore, such as to justify the use of a defeat device under Regulation No 715/2007.

In view of the fact that the exception to the prohibition on the use of defeat devices must be interpreted strictly, the Court holds that the 'need' for such a device within the meaning of Regulation No 715/2007, exists only where, at the time of the EC type-approval of that device or vehicle equipped with it, no other technical solution makes it possible to avoid immediate risks of damage or accident to the engine which give rise to a specific hazard when driving the vehicle.

Consequently, the Court finds that a defeat device which guarantees compliance with the emission limits laid down by Regulation No 715/2007 only where the external temperature is in the temperature window cannot fall within the exception to the prohibition on the use of such devices, laid down in that regulation, solely because that device contributes to protecting parts, such as the EGR valve, the EGR exchanger and the diesel particulate filter. The position is different, however, if it is established that that device strictly meets the need to avoid immediate risks of damage or accident to the engine, caused by a malfunction of one of those parts, of such a serious nature as to give rise to a specific hazard when a vehicle fitted with that device is driven. In any event, a defeat device which, under normal driving conditions, operates during most of the year in order to protect the engine from damage or accident and ensure the safe operation of the vehicle could not fall within the exception provided for by Regulation No 715/2007.

Furthermore, the Court states that the fact that a defeat device, within the meaning of Regulation No 715/2007, was installed after a vehicle was put into service, in the course of a repair, [299] is irrelevant for the purposes of assessing whether the use of that device is prohibited under that regulation. [300]

In the third and last place, the Court examines the question of whether the use of prohibited software can entail the cancellation of the sale by virtue of a minor lack of the vehicle's conformity with the contract on the basis of the directive on certain aspects of the sale of consumer goods and associated guarantees.

In that regard, the Court notes, first, that vehicles falling within the scope of Directive 2007/46 [301] are to be EC type-approved and, second, that such approval may be granted only if the type of vehicle in question satisfies the provisions of Regulation No 715/2007, in particular those relating to emissions of pollutants. Furthermore, under Directive 2007/46, [302] the manufacturer in its capacity as the holder of an EC type-approval of a vehicle, is to deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type. That certificate is required for the purposes of registration and sale or entry into service

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298 Article 5(2)(a) of Regulation No 715/2007.

299 Within the meaning of Article 3(2) of Directive 1999/44.

300 Article 5(2) of Regulation No 715/2007.

301 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ 2007 L 263, p. 1), as amended by Commission Regulation (EU) No 1229/2012 of 10 December 2012 (OJ 2012 L 353, p. 1).

302 Pursuant to Article 18(1) of Directive 2007/46.

of a vehicle. [303] When acquiring a vehicle model of a type that has been approved and is, consequently, accompanied by a certificate of conformity, a consumer can reasonably expect that Regulation No 715/2007 has been complied with in respect of that vehicle, even in the absence of specific contractual clauses.

Consequently, the Court finds that a motor vehicle falling within the scope of Regulation No 715/2007 does not show the 'quality which is normal in goods of the same type and which the consumer can reasonably expect', within the meaning of the directive on certain aspects of the sale of consumer goods and associated guarantees, [304] where, although it is covered by a valid EC type-approval and may, consequently, be used on the road, that vehicle is fitted with a defeat device, the use of which is prohibited under Regulation No 715/2007. [305]

Lastly, the Court states that a lack of conformity consisting in the presence, in the vehicle concerned, of a defeat device the use of which is prohibited under Regulation No 715/2007 is not to be classified as 'minor' [306] even if the consumer would still have purchased that vehicle if he or she had been aware of the existence and operation of that device.

4. Dissemination of inside information in the financial sector [307]

Judgment of 15 March 2022 (Grand Chamber), Autorité des marchés financiers (C-302/20, EU:C:2022:190)

(Reference for a preliminary ruling – Single Market for financial services – Market abuse – Directives 2003/6/EC and 2003/124/EC – 'Inside information' – Concept – Information 'of a precise nature' – Information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments – Unlawfulness of the disclosure of inside information – Exceptions – Regulation (EU) No 596/2014 – Article 10 – Disclosure of inside information in the normal exercise of a profession – Article 21 – Disclosure of inside information for the purpose of journalism – Freedom of the press and freedom of expression – Disclosure by a journalist, to a usual source, of information relating to the forthcoming publication of a press article)

For many years, Mr A worked as a journalist for various British daily newspapers. As part of his work, he wrote articles reporting market rumours. Two of those articles – which were published on the website of the Daily Mail newspaper – related specifically to securities admitted to trading on Euronext.

Thus, the first article referred to a possible takeover bid by the company LVMH for the shares of the company Hermès. The day after that publication, the price of those shares increased during the course of the trading session. The second article stated that the shares of the company Maurel &

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303 In accordance with Article 26(1) of Directive 2007/46.

304 Article 2(2)(d) of Directive 1999/44.

305 Article 5(2) of Regulation No 715/2007.

306 Pursuant to Article 3(6) of Directive 1999/44.

307 The judgment of 20 September 2022, ***VD and SR*** (C-339/20 and C-397/20, EU:C:2022:703), must also be mentioned under this heading. That judgment is presented under heading III.4.b 'Processing of personal data in the financial sector'.

Prom could be the subject of a takeover bid. The day after that article was published, the price of those shares had increased significantly at the close of the stock exchange.

In the course of an investigation carried out by the Autorité des marchés financiers (AMF) (Financiers Markets Authority, France), it was revealed that, shortly before the publication of the two articles at issue, purchase orders had been made for shares of the companies Hermès and Maurel & Prom, respectively, by British residents who sold their shares following the publication of those articles. The Penalties Commission of the AMF found that Mr A had disclosed to two persons inside information concerning the forthcoming publication of two articles reporting rumours about the launch of takeover bids for the shares of the abovementioned companies and imposed a fine of EUR 40 000 on him.

By its judgment, delivered by the Grand Chamber, the Court rules on the concept of 'inside information', within the meaning of the directives on insider dealing and market manipulation, [308] with regard to information relating to the forthcoming publication of a press article reporting a market rumour concerning an issuer of financial instruments, in particular as regards the requirement of precision necessary for the classification of inside information. It also sets out the circumstances in which it may be considered that the disclosure of such information, by a journalist, to one of his or her usual sources of information is made, lawfully, for the purpose of journalism, within the meaning of the market abuse regulation. [309]

Findings of the Court

First of all, as regards the requirement of precision necessary for information to be classified as inside information, the Court notes that information is deemed to be precise if it is apparent from an examination carried out on a case-by-case basis that it refers, inter alia, to an event which may reasonably be expected to occur and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that event on the prices of the financial instruments concerned. Moreover, that nature cannot, as a matter of principle, be excluded merely because the information in question falls within a particular category of information such as information relating to the forthcoming publication of an article reporting a market rumour. In that regard, given that a rumour is characterised by a degree of uncertainty, it is necessary to take into account the degree of precision of the content of that rumour and the reliability of the source relaying it. Similarly, the reputation of the journalist who authored the press articles and that of the media organisation publishing those articles may be regarded as decisive, depending on the circumstances of the case, since those factors make it possible to assess the credibility of the rumours concerned.

Accordingly, information relating to the forthcoming publication of a press article reporting a market rumour about an issuer of financial instruments is capable of constituting information 'of a precise nature'. The reference in that press article to the price at which the issuer's securities would be purchased, in the context of a possible takeover bid, as well as the identity of the journalist who authored that article and of the media organisation publishing it are relevant to the assessment of that nature, in so far as those factors were disclosed before that publication. As regards the actual effect of that publication on the prices of the securities to which it relates, while it may constitute ex

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308 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (OJ 2003 L 96, p. 16), Article 1(1); Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation (OJ 2003 L 339, p. 70), Article 1(1).

309 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ 2014 L 173, p. 1).

post evidence of the precise nature of that information, it is not sufficient, in itself, in the absence of an examination of other factors known or disclosed prior to that publication, to establish that precise nature.

Next, as regards the disclosure by a journalist of inside information to one of his or her usual sources of information, the Court points out that the words 'for the purpose of journalism' [310] refer not only to disclosures of information by the publication of information but also to those which form part of the process leading to that publication. In order to take account of the importance, in every democratic society, of the freedom of press and the freedom of expression, enshrined in Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter'), those words must be interpreted broadly. Accordingly, disclosure made in the context of investigative work carried out by a journalist in preparation for publication may constitute a disclosure of information for the purpose of journalism.

Consequently, the disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of a press article authored by him or her reporting a market rumour is made 'for the purpose of journalism' where that disclosure is necessary for the purpose of carrying out a journalistic activity, which includes investigative work in preparation for publication.

Lastly, the Court notes that the provision in the market abuse regulation concerning the disclosure or dissemination of information in the media [311] does not constitute an independent basis, derogating from the provision of that regulation concerning the unlawful disclosure of inside information, [312] for determining whether the disclosure of inside information for the purpose of journalism is lawful or unlawful. The exception to the prohibition on the disclosure of such information laid down in the latter provision must, however, be interpreted in such a way as to safeguard the effectiveness of the former provision, having regard to its purpose, namely the observance of the freedom of the press and the freedom of expression in other media, as guaranteed, in particular, by Article 11 of the Charter. Accordingly, the disclosure of inside information by a journalist is lawful where it is regarded as being necessary for the exercise of his or her profession and as complying with the principle of proportionality. The assessment of the necessity and proportionality of such a disclosure must comply with the requirements imposed by the Charter. [313]

Therefore, as regards, in the first place, the requirement that such disclosure must be necessary for the performance of a journalistic activity, it is necessary to examine whether that disclosure went beyond what was necessary in order to verify the information contained in the publication at issue. In particular, as regards the verification of information relating to a market rumour, it must be examined whether it was necessary for the journalist to disclose to a third party, in addition to the content of the rumour in question, the specific information relating to the forthcoming publication of an article reporting that rumour.

In the second place, in order to determine whether that disclosure is proportionate, it is necessary to take into account the potentially dissuasive effect of such a prohibition on the exercise of journalistic activity, including preparatory investigations and to ascertain whether, in making the disclosure concerned, the journalist acted in compliance with the rules and codes governing his or her

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310 Article 21 of Regulation No 596/2014.

311 Article 21 of Regulation No 596/2014.

312 Article 10 of Regulation No 596/2014.

313 Article 52(1) of the Charter.

profession. [314] It is also necessary to take into consideration the negative effects of the disclosure of the inside information in question on the integrity of the financial markets. In particular, in so far as insider dealing occurred following that disclosure, that insider dealing is liable to lead to financial losses for other investors and, in the medium term, a loss of confidence in the financial markets.

It follows that the disclosure of inside information undermines not only the private interests of certain investors but also, more generally, the public interest in ensuring full and adequate transparency of the market, in order to protect its integrity and to ensure the confidence of all investors. Accordingly, it is also for the referring court to take into account the fact that the public interest which may have been pursued by that disclosure is in opposition, not only to private interests, but also to a public interest.

5. Administrative cooperation in the field of taxation

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

(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(5) – Validity – Lawyer's legal professional privilege – Exemption from the reporting obligation for lawyer-intermediaries subject to legal professional privilege – Obligation on that lawyer-intermediary to notify any other intermediary who is not his or her client of that intermediary's reporting obligations – Articles 7 and 47 of the Charter of Fundamental Rights of the European Union)

As regards the administrative cooperation of Member States' national tax authorities, an amendment to Directive 2011/16 [315] by Directive 2018/822 introduced a reporting obligation to the competent authorities on intermediaries participating in potentially aggressive tax-planning cross-border tax arrangements. [316] Thus, all those who are involved in designing, marketing, organising or managing the implementation of such arrangements, and all those who provide assistance or advice in relation thereto and, if there are no such persons, the taxpayer him- or herself, are subject to that reporting obligation.

According to another provision of amended Directive 2011/16, [317] each Member State may take the necessary measures to give intermediaries bound by legal professional privilege who participate in those arrangements the right to a waiver from the reporting obligation where that obligation would breach that legal professional privilege under national law. In such circumstances, the Member State concerned is to ensure that those intermediaries are required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations.

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314 Article 21 of Regulation No 596/2014.

315 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 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (OJ 2018 L 139, p. 1) ('amended Directive 2011/16').

316 Article 8ab(1) of amended Directive 2011/16, as inserted by Directive 2018/822.

317 Article 8ab(5) of amended Directive 2011/16, as inserted by Directive 2018/822.

However, intermediaries bound by legal professional privilege may be entitled to a waiver from the reporting obligation only to the extent that they operate within the limits of the relevant national laws that define their profession.

In order to satisfy the requirements introduced by Directive 2018/822 and to ensure that legal professional privilege does not prevent the necessary reporting, the provisions of the Flemish legislation on administrative cooperation in the field of taxation transposing that directive provide, inter alia, that where an intermediary is bound by legal professional privilege, he or she must notify the other intermediary or other intermediaries in writing, giving reasons, that he or she cannot comply with the reporting obligation, transferring that obligation automatically to the other intermediary or other intermediaries.

The Orde van Vlaamse Balies (Flemish Bar Association), the Belgian Association of Tax Lawyers [318] and three lawyers dispute that notification obligation on lawyers acting as intermediaries. In their submission, it is impossible to comply with that obligation to notify without infringing the legal professional privilege by which lawyers are bound. Moreover, that obligation to notify is not necessary, since the client, whether or not assisted by the lawyer, can him- or herself inform the other intermediaries and ask them to comply with their reporting obligation. The applicants thus brought an action before the Grondwettelijk Hof (Constitutional Court, Belgium) seeking suspension of the provisions of national law concerned and their annulment in whole or in part.

The referring court asks the Court about the validity of the provision of amended Directive 2011/16 [319] which imposes an obligation to notify.

By its judgment, the Court, sitting as the Grand Chamber, holds that that provision is invalid in the light of Article 7 of the Charter of Fundamental Rights of the European Union, [320] in so far as the Member States' application of that provision has the effect of requiring a lawyer acting as an intermediary, where he or she is exempt from the reporting obligation on account of the legal professional privilege by which he or she is bound, to notify without delay any other intermediary who is not his or her client of that intermediary's reporting obligations.

Findings of the Court

The Court specifies, as a preliminary point, that the question concerns the validity, in the light of Articles 7 and 47 of the Charter, of the obligation to notify laid down in amended Directive 2011/16 only in so far as the notification must be made, by a lawyer acting as an intermediary, to another intermediary who is not his or her client. Where the notification is made by the lawyer-intermediary to his or her client, whether that client is another intermediary or the relevant taxpayer, that notification is not capable of calling into question respect for the rights and freedoms concerned, which are guaranteed by the Charter.

In order to determine whether the obligation to notify is valid, the Court interprets Article 7 of the Charter in the light of the case-law of the European Court of Human Rights on the corresponding provision, namely Article 8 of the European Convention on Human Rights. [321] According to that case-

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318 A professional association of lawyers.

319 Article 8ab(5) of amended Directive 2011/16.

320 'The Charter'.

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

law, that Article 8 protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients. The Court concludes from this that Article 7 of the Charter guarantees not only the activity of defence but also the secrecy of legal advice, as regards both its content and its existence. Therefore, other than in exceptional situations, persons who consult a lawyer must have a legitimate expectation that their lawyer will not disclose to anyone, without their consent, that they are consulting him or her.

That protection afforded to lawyers' legal professional privilege is justified by lawyers' fundamental role in a democratic society, that of defending litigants. That role entails the requirement that any person must be able, without constraint, to consult a lawyer in order to obtain independent legal advice whilst relying on his or her good faith.

The obligation expressly laid down by amended Directive 2011/16 for a lawyer-intermediary exempt from the reporting obligation to notify without delay other intermediaries who are not his or her clients of their reporting obligations necessarily means that those other intermediaries become aware of the identity of the notifying lawyer-intermediary, of his or her assessment that the arrangement at issue is reportable and of his or her having been consulted in connection with the arrangement. The Court finds that this entails an interference with the right to respect for communications between lawyers and their clients, guaranteed in Article 7 of the Charter. Furthermore, that obligation to notify leads, indirectly, to another interference with that right, resulting from the disclosure, by the third-party intermediaries thus notified, to the tax authorities of the identity of the lawyer-intermediary and of his or her having been consulted.

As regards a possible justification for those interferences, the Court recalls that the right to respect for communications between lawyers and their clients may be limited provided that those limitations are provided for by law, that they respect the essence of those rights and that, in compliance with the principle of proportionality, they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

In the present case, the Court finds that both the principle of legality and the essence of the right to respect for communications between lawyers and their clients have been satisfied.

As regards the proportionality of the interference, the Court recalls that the amendment made in 2018 to Directive 2011/16 forms part of international tax cooperation, the objective of which is to contribute to the prevention of the risk of tax avoidance and evasion, which constitute objectives of general interest recognised by the European Union.

However, even if the obligation to notify on the lawyer subject to legal professional privilege is indeed capable of contributing to the combating of aggressive tax planning and the prevention of the risk of tax avoidance and evasion, it is not necessary in order to attain those objectives and, in particular, to ensure that the information concerning the cross-border arrangements is filed with the competent authorities. All intermediaries are, in principle, required to file that information with those authorities. No intermediary can therefore usefully argue that he or she was unaware of the reporting obligations, which are clearly set out in the Directive, to which he or she is directly and individually subject.

Furthermore, since each intermediary is exempt from the reporting obligation only if he or she has proof that it has already been discharged by another intermediary, there is no reason to fear that the intermediaries would rely, without verification, on the lawyer-intermediary making the required report. Furthermore, by expressly providing that legal professional privilege may lead to a waiver from the reporting obligation, the Directive makes a lawyer-intermediary a person from whom other intermediaries cannot, a priori, expect any initiative capable of relieving them of their own reporting obligations.

As regards the disclosure, by notified third-party intermediaries, of the identity of the lawyer-intermediary and of his or her having been consulted to the tax authorities, that disclosure also does not appear to be necessary for the pursuit of the objectives of the Directive. The reporting obligation

on other intermediaries not subject to legal professional privilege and, if there are no such intermediaries, that obligation on the relevant taxpayer ensure, in principle, that the tax authorities are informed. In addition, the tax authorities may, after receiving such information, request additional information directly from the relevant taxpayer, who will then be able to consult his or her lawyer for assistance, or they may conduct an audit of that taxpayer's tax situation.

The Court therefore holds that the obligation to notify laid down in amended Directive 2011/16 infringes the right to respect for communications between a lawyer and his or her client, guaranteed in Article 7 of the Charter, in so far as it provides that a lawyer-intermediary, who is subject to legal professional privilege, is required to notify any other intermediary who is not his or her client of that other intermediary's reporting obligations.

Moreover, the Court finds in the present case that Article 47 of the Charter is not applicable given that that article presupposes a link with judicial proceedings. However, there is no such link in the present case, given that the obligation to notify arises at an early stage, at the latest when the reportable cross-border arrangement has just been finalised and is ready to be implemented, and thus outside the framework of legal proceedings or their preparation. Accordingly, the obligation to notify replacing, for the lawyer-intermediary bound by legal professional privilege, the reporting obligation laid down in Article 8ab(1) of amended Directive 2011/16 does not entail any interference with the right to a fair trial, guaranteed in Article 47 of the Charter.

XIV. Economic and monetary policy

Judgment of 13 September 2022, Banka Slovenije (C-45/21, EU:C:2022:670)

(Reference for a preliminary ruling – European System of Central Banks – National Central Bank – Directive 2001/24/EC – Reorganisation and winding up of credit institutions – Compensation for damage resulting from the adoption of reorganisation measures – Article 123 TFEU and Article 21.1 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank – Prohibition of monetary financing of Member States in the euro area – Article 130 TFEU and Article 7 of that protocol – Independence – Disclosure of confidential information)

Following the global financial crisis, national legislative provisions authorised the Banka Slovenije (Central Bank of Slovenia) to cancel certain financial instruments where to maintain them would lead to the likelihood of insolvency for a credit institution and threaten the financial system as a whole. [322] Subsequently, a law established two separate and alternative liability regimes in respect of that central bank for damage caused to former holders of cancelled financial instruments.

First, that liability may be incurred where it is established that the cancellation of a financial instrument did not constitute a necessary measure or where the principle that no creditor may be more disadvantaged than in the event of failure has been infringed. The Central Bank of Slovenia may however be discharged of its liability by establishing that it or the persons it authorised to act on its behalf acted with due care. Second, natural persons who hold a cancelled financial instrument and whose annual income is below a certain threshold may obtain flat-rate compensation from that central bank.

The law provides that the costs arising from the application of those liability regimes are to be financed, first, through recourse to special reserves into which the profits made by the Central Bank of Slovenia as from 1 January 2019 are to be paid, then through the use of up to 50% of its general reserves and finally, through borrowing from the Slovenian authorities.

The Central Bank of Slovenia lodged an application for review of the constitutionality of that law with the Ustavno sodišče (Constitutional Court, Slovenia), claiming, inter alia, that the liability regimes it introduces are incompatible with EU law. It is in that context that the referring court decided to ask the Court, inter alia, whether those regimes are compatible with two fundamental principles governing the action of the European System of Central Banks (ESCB), namely the prohibition of monetary financing [323] and the principle of independence of central banks. [324]

By its Grand Chamber judgment, the Court holds that the prohibition of monetary financing does not preclude a liability regime linked to the infringement, by a central bank, of rules governing the exercise of a function conferred on it by national law, to the extent that that central bank is held liable

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322 This concerns reorganisation measures under Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ 2001 L 125, p. 15). The Court has previously ruled on two occasions in a context relating to those Slovenian reorganisation measures and their implementation, but on questions that are very different from those raised in the present case (judgments of 19 July 2016, *Kotnik and Others* (C-526/14, EU:C:2016:570), and of 17 December 2020, *Commission* v *Slovenia (ECB Archives)* (C-316/19, EU:C:2020:1030).

323 Set out in Article 123 TFEU and Article 21 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank ('the Protocol on the ESCB and the ECB').

324 Deriving from Article 130 TFEU and Article 7 of the Protocol on the ESCB and the ECB.

only where it or the persons authorised to act on its behalf acted in serious breach of their duty to exercise due care. By contrast, that prohibition precludes a regime under which a central bank incurs liability solely on account of the cancellation of financial instruments. Furthermore, the principle of independence precludes a liability regime which may mean that a national central bank is held liable for such sums as might impair its ability to perform its tasks effectively and which are financed in accordance with the abovementioned arrangements.

Findings of the Court

In the first place, the Court examines the compatibility of liability regimes such as those referred to in the request for a preliminary ruling with the prohibition of monetary financing. In that regard, it notes at the outset that the implementation of measures for the reorganisation of credit institutions, within the meaning of Directive 2001/24, does not constitute a task for the ESCB, in general, or for the national central banks, in particular. That being so, the ESCB represents, in EU law, a novel legal construct which brings together national institutions, namely the national central banks, and an EU institution, namely the European Central Bank, and causes them to cooperate closely with each other. In that highly integrated system in which they constitute both national authorities and authorities acting under the ESCB, the national central banks may perform functions other than those specified in the Protocol on the ESCB and the ECB. [325] Such functions are however performed under their own liability, since the specific rules for incurring that liability are determined in accordance with national law. Accordingly, it is for the Member State concerned to define the conditions in which the liability of its central bank may be incurred as a result of the implementation by that bank of a reorganisation measure, within the meaning of Directive 2001/24, where that central bank has been designated as the authority empowered to implement such a measure. However, in exercising that power, the Member States are required to comply with the obligations arising under EU law.

In that regard, EU law prohibits national central banks from any financing of public sector obligations in respect of third parties.

Thus, the liability of a national central bank where that bank has infringed the rules governing the exercise of a function conferred on it by national law cannot, in principle, be regarded as involving the financing of public sector obligations vis-à-vis third parties. In that situation, the compensation of injured third parties is the consequence of the actions of that central bank and not the assumption of a pre-existing obligation towards third parties incumbent on the other public authorities. Moreover, such financing does not normally result directly from measures adopted by those other public authorities and does not therefore allow them, in principle to incur expenditure by avoiding the impetus to comply with a sound budgetary policy. [326] That being so, in view of the high degree of complexity and urgency characterising the implementation of reorganisation measures within the meaning of Directive 2001/24, such liability cannot be incurred without requiring that the infringement of the duty to exercise due care alleged against that central bank be serious.

By contrast, a liability regime which applies solely because the national central bank has exercised a function conferred on it by national law, even if it has complied fully with the rules imposed on it, entails the financing of a public sector obligation vis-à-vis third parties. While it is open to the national legislature to guarantee compensation for the inevitable consequences of decisions taken by its central bank in accordance with the choices made by that legislature, it must be stated that it thus establishes a payment obligation which derives directly from its political choices, and not from the way in which the central bank performs its functions. The payment, from its own funds, of such

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325 In accordance with Article 14.4 of the Protocol on the ESCB and the ECB.

326 Contrary to the objective of Article 123(1) TFEU.

compensation by the central bank must therefore be regarded as leading it to be responsible, in place of the other public authorities, for the financing of public sector obligations under the national legislation of that Member State.

In the second place, the Court clarifies the scope of the principle of the independence of national central banks in the event of liability being incurred for such sums as might impair their ability to perform their tasks effectively. It is true that the establishment of a liability regime in the context of the exercise of a function conferred on them by national law is not, in itself, incompatible with the independence of the central banks. However, the national rules put in place for that purpose cannot place the central bank concerned in a situation which in any way undermines its ability to carry out independently a task falling within the scope of the ESCB.

In order to participate in one of the ESCB's fundamental tasks, namely the implementation of the EU's monetary policy, the establishment of reserves by the national central banks appears essential. In that context, a levy on the general reserves of a national central bank, in an amount likely to affect its ability to carry out its tasks effectively under the ESCB, combined with an inability to restore those reserves independently, because all its profits are systematically allocated to reimbursement of damage which it has caused, is liable to place that central bank in a situation of dependence on political authorities, in breach of EU law. That is thus particularly true where a national central bank has a legal obligation to take out a loan from other public authorities of the Member State to which it belongs, where sources of financing linked to reserves have been exhausted.

Since the legislation such as that at issue in the main proceedings has precisely those characteristics, it potentially exposes the central bank to political pressure, whereas Article 130 TFEU and Article 7 of the Protocol on the ESCB and the ECB are intended, on the contrary, to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives ascribed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law.

XV. Social policy [327]

1. Organisation of working time

Judgment of 24 February 2022, Glavna direktsia 'Pozharna bezopasnost i zashtita na naselenieto' (C-262/20, EU:C:2022:117)

(Reference for a preliminary ruling – Social policy – Organisation of working time – Directive 2003/88/EC – Article 8 – Article 12(a) – Articles 20 and 31 of the Charter of Fundamental Rights of the European Union – Reduction of the normal duration of night work in relation to day work – Public-sector workers and private-sector workers – Equal treatment)

VB, an agent in the fire service of the Directorate-General for Fire Safety and Civil Protection, under the Bulgarian Ministry of the Interior, carried out night work for a number of years. Taking the view that he is entitled to seven hours of night work being treated as equivalent to eight hours of day work, VB applied to his employer for overtime pay.

His application was refused on the ground that no provision in force requires hours of night work to be converted into hours of day work for agents of the Ministry of the Interior. The normal duration of night work of seven hours for one week of five working days, provided for by the Bulgarian Labour Code for private-sector workers, does not apply to such agents. The Law on the Ministry of the Interior defines only the working hours of night work and merely states that the working time of those employees must not exceed, on average, eight hours in any 24-hour period, without, however, specifying the normal and maximum length of night work. VB challenged that refusal before the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria).

Following a reference for a preliminary ruling from that court, which considers that the normal duration of night work for agents of the Ministry of the Interior should be seven hours so that they are no less favourably treated than other workers, the Court of Justice sets out the obligations of the Member States concerning measures for the protection of the safety and health of night workers to be taken pursuant to Directive 2003/88, [328] and rules on the compatibility of the Bulgarian legislation at issue with the principle of equal treatment, enshrined in Article 20 of the Charter of Fundamental Rights of the European Union ('the Charter') and with the right of every worker to fair and just working conditions, enshrined in Article 31 of the Charter.

Findings of the Court

As regards the relationship between the normal duration of night work and that of day work, the Court notes, first of all, that Directive 2003/88 contains no indication in that regard. That directive lays down only minimum requirements, including the maximum duration of night work being eight hours in a 24-hour period. [329] That directive also provides for the obligation to take the necessary measures

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327 The judgment of 10 March 2022, ***Commissioners for Her Majesty's Revenue and Customs (Comprehensive sickness insurance)*** (C-247/20, EU:C:2022:177), must also be mentioned under this heading. That judgment is presented under heading IV.2 'Right to move and reside freely within the territory of the Member States'.

328 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

329 Article 8(b) of Directive 2003/88.

to ensure that night workers enjoy a level of protection appropriate to the nature of their work, [330] leaving a certain margin of discretion to the Member States in that respect.

Accordingly, Article 8 and Article 12(a) of Directive 2003/88 do not impose an obligation to adopt national legislation which provides that the normal duration of night work for public-sector workers, such as police officers and fire fighters, is less than their normal duration of day work.

However, the Member States must ensure that such workers benefit from other protective measures relating to working hours, wages, allowances or similar benefits which make it possible to compensate for how strenuous the night work they perform is. Although reducing the normal duration of night work in comparison with that of day work may constitute an appropriate solution for ensuring protection of the health and safety of the workers concerned, that reduction is not the only possible solution.

Next, after finding that the provisions of the Bulgarian Labour Code and the Law on the Ministry of the Interior at issue constitute an implementation of Directive 2003/88 and, therefore, fall within the scope of EU law, the Court rules on the compatibility of that legislation with the Charter.

In that regard, the Court holds that Articles 20 and 31 of the Charter do not preclude the normal duration of night work, which is fixed at seven hours for workers in the private sector, from not applying to public-sector workers, in particular to police officers and fire fighters, if such a difference in treatment is based on an objective and reasonable criterion, that is to say, that it relates to a legally permitted objective pursued by that legislation and is proportionate to that objective.

The Court notes, first of all, that it is for the referring court to identify the categories of persons in comparable situations and to compare them in a specific and concrete manner, including with regard to conditions for night work. In the present case, the referring court has analysed abstract categories of workers, such as that of private-sector workers who benefit from the rules laid down by the Labour Code and that of public-sector workers, such as the agents of the Ministry of the Interior, who do not benefit from them.

As regards the justification for any difference in treatment, the Court observes that the absence of a mechanism for converting hours of night work into hours of day work for agents of the Ministry of the Interior cannot be justified on budgetary grounds alone, without other political, social or demographic considerations.

If it is not based on an objective and reasonable criterion, that is to say, that it relates to a legally permitted objective and is proportionate to that objective, a difference, established by provisions of national law as regards night work, between different categories of workers in comparable situations is incompatible with EU law and will, as the case may be, require the national court to interpret the national law, as far as possible, in the light of the wording and purpose of the provision of primary law concerned, taking into consideration the whole body of national law and applying the interpretative methods recognised by national law, with a view to ensuring that that provision is fully effective and to achieving an outcome consistent with the objective which it pursues.

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330 Article 12(a) of Directive 2003/88.

2. Protection of temporary agency workers

Judgment of 15 December 2022, TimePartner Personalmanagement (C-311/21, EU:C:2022:983)

(Reference for a preliminary ruling – Employment and social policy – Temporary agency work – Directive 2008/104/EC – Article 5 – Principle of equal treatment – Need to respect, in the event of derogation from that principle, the overall protection of temporary agency workers – Collective agreement providing for lower pay than that of staff recruited directly by the user undertaking – Effective judicial protection – Judicial review)

Between January and April 2017, TimePartner Personalmanagement GmbH, a temporary-work agency, employed CM as a temporary agency worker under a fixed-term contract. For the duration of her assignment, CM worked at a retail user undertaking as an order handler.

For that work, she received a gross hourly wage of EUR 9.23, in accordance with the collective agreement applicable to temporary agency workers concluded between two trade unions, of which TimePartner Personalmanagement and CM were members respectively.

That collective agreement derogated from the principle of equal treatment recognised in German law, [331] by establishing, for temporary agency workers, a lower pay than that granted to the workers of the user undertaking pursuant to the provisions of a collective agreement for retail workers in the Land of Bavaria (Germany), namely, a gross hourly wage of EUR 13.64.

CM brought a claim before the Arbeitsgericht Würzburg (Labour Court, Würzburg, Germany) seeking additional pay of EUR 1 296.72, a sum equivalent to the difference in pay between the temporary agency workers and comparable workers recruited directly by the user undertaking. In that regard, she relied on a breach of the principle of equal treatment of temporary agency workers enshrined in Article 5 of Directive 2008/104. [332] After that claim was rejected in the first instance and on appeal, CM lodged an appeal on a point of law before the Bundesarbeitsgericht (Labour Federal Court, Germany), which referred five questions to the Court of Justice for a preliminary ruling on the interpretation of that provision.

The Court defines the conditions to be met by a collective agreement concluded by the social partners in order to be able to derogate from the principle of equal treatment of temporary agency workers under Article 5(3) of Directive 2008/104. [333] It specifies, inter alia, the scope of the concept of 'overall protection of temporary agency workers', which collective agreements must respect in accordance with that provision, and provides criteria to assess whether that overall protection is effectively respected. The Court also concludes that such collective agreements must be amenable to effective judicial review.

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331 For the time between January and March 2017, in the first sentence of Paragraph 10(4) of the Arbeitnehmerüberlassungsgesetz (Law on temporary agency work) of 3 February 1995 (BGBl. 1995 I, p. 158), in its version applicable until 31 March 2017 and, for April 2017, in Paragraph 8(1) of that law in its version applicable as from 1 April 2017.

332 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work (OJ 2008 L 327, p. 9).

333 Under that paragraph 3, Member States may give the social partners the option of upholding or concluding collective agreements which authorise differences in treatment with regard to basic working and employment conditions of temporary agency workers, provided that the overall protection of temporary agency workers is respected.

Findings of the Court

After recalling the dual objective of Directive 2008/104 to ensure the protection of temporary agency workers and respect for the diversity of labour markets, the Court states that Article 5(3) of that directive, by referring to the concept of 'overall protection of temporary agency workers', does not require any account to be taken of a level of protection specific to temporary agency workers that is greater than that laid down for workers in general by provisions on basic working and employment conditions under national and EU law.

However, where the social partners, by means of a collective agreement, authorise differences in treatment with regard to basic working and employment conditions to the detriment of temporary agency workers, that collective agreement must, in order to respect the overall protection of the temporary agency workers concerned, afford them, in return, advantages in terms of basic work and employment conditions [334] which are such as to compensate for the difference in treatment they suffer.

If such an agreement serves only to weaken one or more of those basic conditions with regard to temporary agency workers, the overall protection of those workers would necessarily be diminished.

Moreover, pursuant to the derogation contained in Article 5(3) of Directive 2008/104, it is necessary to assess compliance with the obligation to respect the overall protection of temporary agency workers in concrete terms by comparing, for a given job, the basic working and employment of conditions applicable to workers recruited directly by the user undertaking with those applicable to temporary agency workers, in order thus to be able to determine whether the countervailing benefits afforded in respect of those basic conditions can counterbalance the effects of the difference in treatment suffered.

That obligation to respect the overall protection of temporary agency workers does not require the temporary agency worker concerned to have a permanent contract of employment with the temporary-work agency since Article 5(3) of Directive 2008/104 allows derogation from the principle of equal treatment with regard to any temporary agency worker, irrespective of whether their contract of employment with a temporary-work agency is a fixed-term contract or a contract of indefinite duration.

In addition, that obligation does not require Member States to prescribe in detail the conditions and criteria with which collective agreements must comply.

That being said, while they enjoy a broad discretion in the negotiation and conclusion of collective agreements, the social partners must act in accordance with EU law in general and Directive 2008/104 in particular.

Thus, while the provisions of that directive do not require Member States to adopt specific legislation designed to respect the overall protection of temporary agency workers, within the meaning of Article 5(3) thereof, the fact remains that the Member States, including their courts, must ensure that collective agreements which authorise differences in treatment with regard to basic working and employment conditions ensure, inter alia, the overall protection of temporary agency workers.

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334 The basic working and employment conditions are defined in Article 3(1)(f) of Directive 2008/104 They concern the conditions relating to the duration of working time, overtime, breaks, rest periods, night work, holidays, public holidays and pay.

Accordingly, those collective agreements must be amenable to effective judicial review in order to determine whether the social partners have complied with their obligation to respect that protection.

3. Involvement of employees within a European company

Judgment of 18 October 2022 (Grand Chamber), IG Metall and ver.di (C-677/20, EU:C:2022:800)

(Reference for a preliminary ruling – Social policy – European company – Directive 2001/86/EC– Involvement of employees in decision-making within the European company – Article 4(4) – European company established by means of transformation – Content of the negotiated agreement – Election of employees' representatives as members of the Supervisory Board – Election procedure providing for a separate ballot in respect of the trade union representatives)

Before being transformed into a European company (SE) in 2014, SAP, a public limited-liability company governed by German law, had a supervisory board consisting, in accordance with German law, [335] of representatives of the shareholders and of the employees. Among the latter, the representatives nominated by the trade unions were elected on the basis of a ballot that was separate from that established for the election of the other Supervisory Board members representing the employees. [336] The agreement on arrangements for the involvement of employees within SAP, following the company's transformation into an SE, provides, in turn, for different rules in cases where a reduced supervisory board is established. In that case, the trade unions may nominate candidates for some of the seats for representatives of the employees allotted to the Federal Republic of Germany and elected by the employees employed in Germany, but without a separate ballot being envisaged for the election of those candidates.

Industriegewerkschaft Metall (IG Metall) and ver.di – Vereinte Dienstleistungsgewerkschaft, two trade union organisations, brought an action challenging that absence of such a separate ballot. Seised of an appeal on a point of law lodged by those trade unions, the Bundesarbeitsgericht (Federal Labour Court, Germany) decided to refer a question to the Court concerning the interpretation of Directive 2001/86. [337] According to the referring court, the agreement at issue does not meet the requirements under German law. [338] That court has doubts, however, as to whether Article 4(4) of Directive 2001/86 [339] provides a lower level of protection than that provided for under German law and which

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335 Paragraph 7 of the Gesetz über die Mitbestimmung der Arbeitnehmer (Law on employee participation) of 4 May 1976 (BGBl. 1976 I, p. 1153), as amended by the Law of 24 April 2015 (BGBl. 2015 I, p. 642) ('the MitbestG').

336 Pursuant to Paragraph 16(1) of the MitbestG, the representatives of the trade unions in the Supervisory Board are to be elected by the delegates by secret ballot and in accordance with the principles of a proportional ballot.

337 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees (OJ 2001 L 294, p. 22).

338 In particular, Paragraph 21(6) of the Gesetz über die Beteiligung der Arbeitnehmer in einer Europäischen Gesellschaft (Law on the involvement of employees in a European company) of 22 December 2004 (BGBl. 2004 I, p. 3675, 3686), in the version in force since 1 March 2020, pursuant to which, in the case of an SE established by means of transformation, the agreement on participation is to provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

339 Article 4(4) of Directive 2001/86, relating to the content of the agreement on arrangements for the involvement of employees within the SE, provides that, in the case of an SE established by means of transformation, the involvement agreement is to provide for at least the same level of all elements of employee involvement as those existing within the company to be transformed into an SE.

applies, as the case may be, to all the Member States. If so, it is required to interpret the national law in a manner consistent with EU law.

The Court, sitting as the Grand Chamber, rules that the agreement on arrangements for the involvement of employees applicable to an SE established by means of transformation, as referred to in that provision, must provide for a separate ballot with a view to electing, as employees' representatives within the SE's Supervisory Board, a certain proportion of candidates nominated by the trade unions, where the applicable national law requires such a separate ballot as regards the composition of the Supervisory Board of the company to be transformed into an SE. In the context of that ballot, it is necessary to ensure that the employees of that SE, of its subsidiaries and of its establishments are treated equally and that the trade unions represented therein are treated equally.

Findings of the Court

In the present case, the Court begins with a literal interpretation of Article 4(4) of Directive 2001/86 and concludes from this that, as regards the definition of employees' representatives and the level of their involvement that must be preserved, the EU legislature referred to the national law and/or practice of the Member State in which the company to be transformed into an SE has its registered office.

Thus, as regards, in particular, the participation of employees' representatives, in order to determine both the persons empowered to represent the employees and the elements that characterise the participation enabling those representatives to exercise an influence on the decisions to be taken within the company, it is necessary to refer to the assessments made in that regard by the national legislature and to the relevant national practice.

Accordingly, if a procedural element established by national law, such as a separate ballot for the election of representatives of the trade unions, constitutes an element that characterises the national system of participation of employees' representatives and is mandatory in nature, that element must be taken into account for the purposes of the involvement agreement referred to in Article 4(4) of Directive 2001/86.

According to the Court, the context of that provision bears out the literal interpretation. The EU legislature sought to reserve special treatment to SEs established by means of transformation in order to ensure that the rights as regards involvement enjoyed by employees of the company which is to be transformed into an SE under national law and/or practice would not be undermined.

The Court considers that that reading of Directive 2001/86 is also consistent with its objective. As is apparent from that directive, [340] the securing of acquired rights as regards involvement sought by the EU legislature implies not only the preservation of employees' acquired rights in the company to be transformed into an SE, but also the extension of those rights to all the employees of the SE, even in the absence of any indication to that effect in the national law.

According to the Court, the interpretation thus adopted is also borne out by the origins of Directive 2001/86. It is apparent from those origins that the system applicable to SEs established by means of transformation was the main point of controversy in the negotiations. It was only with the introduction of a provision, reproduced in Article 4(4) of that directive, covering specifically the case of the establishment of an SE by means of transformation with a view to avoiding a weakening of the

340 In particular from recital 18 thereof, which states, inter alia, that the securing of employees' acquired rights as regards involvement in company decisions is a fundamental principle and stated aim of that directive.

level of employee involvement in the company to be transformed, that the process for the adoption of that directive was able to continue.

Lastly, the Court states that the right to nominate a certain proportion of candidates for election as employees' representatives within a supervisory board of an SE established by means of transformation, such as SAP, cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries and establishments, in such a way as to ensure that those trade unions are treated equally in respect of that right.

XVI. Public health

Judgment of 22 December 2022 (Grand Chamber), EUROAPTIEKA (C-530/20, EU:C:2022:1014)

(Reference for a preliminary ruling – Medicinal products for human use – Directive 2001/83/EC – Article 86(1) – Concept of 'advertising of medicinal products' – Article 87(3) – Rational use of medicinal products – Article 90 – Prohibited advertising methods – Advertising of medicinal products neither subject to medical prescription nor reimbursed – Advertising on the basis of price – Advertising of special sales – Advertising of bundled sales – Prohibition)

'EUROAPTIEKA' SIA is a company operating a pharmaceutical business in Latvia. It is part of a group that owns a network of pharmacies and companies distributing medicinal products for retail in that country. In 2016, the Veselības inspekcijas Zāļu kontroles nodaļa (Medicinal Product Control Section of the Health Inspectorate, Latvia) banned EUROAPTIEKA from the dissemination of advertising relating to a promotional sale offering a reduction of 15% off the purchase price of any medicinal product when at least three articles were purchased. That decision was taken on the basis of a national provision that prohibited the inclusion in advertising to the general public of a medicinal product, which is neither subject to medical prescription nor reimbursed, of any information which encourages the purchase of the medicinal product by justifying the need to purchase that medicinal product on the basis of its price, by announcing a special sale, or by indicating that the medicinal product is sold as a bundle together with other medicinal products (including at a reduced price) or other types of product. [341]

In 2020, hearing an appeal brought by EUROAPTIEKA against that provision, the Latvijas Republikas Satversmes tiesa (Constitutional Court, Latvia) made a request to the Court of Justice for a preliminary ruling on the interpretation of Directive 2001/83. [342]

By its judgment, the Court of Justice, sitting as the Grand Chamber, clarifies the scope of the concept of 'advertising of medicinal products', within the meaning of that directive, in particular as regards content that refers not to a specific medicinal product but to unspecified medicinal products. Furthermore, it rules on the compatibility with that directive of a national provision providing for prohibitions such as those at issue in the main proceedings, including as to whether those prohibitions seek to promote the rational use of medicinal products, within the meaning of that same directive.

Findings of the Court

In the first place, the Court rules that the dissemination of information that encourages the purchase of medicinal products by justifying the need for that purchase on the basis of price, by announcing a special sale, or by indicating that the medicinal products are sold together with other medicinal

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341 Subparagraph 18.12 of the Ministru kabineta noteikumi Nr. 378 « Zāļu reklamēšanas kārtība un kārtība, kādā zāļu ražotājs ir tiesīgs nodot ārstiem bezmaksas zāļu paraugus » (Decree No 378 of the Council of Ministers on 'the detailed rules for the advertising of medicinal products and detailed rules pursuant to which a medicinal product manufacturer may give free samples of medicinal products to medical practitioners') of 17 May 2011 (Latvijas Vēstnesis, 2011, No 78).

342 More specifically, the provisions referred to are Articles 86(1), 87(3) and Article 90 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136, p. 34).

products, including at a reduced price, or with other products, falls within the concept of 'advertising of medicinal products', within the meaning of Directive 2001/83, even where that information does not refer to a specific medicinal product, but to unspecified medicinal products.

First of all, from a textual perspective, the Court recalls that Article 86(1) of that directive, which contains the concept of 'advertising of medicinal products' systematically refers to 'medicinal products' in the plural. In addition, that provision defines that concept broadly, as covering 'any form' of door-to-door information, canvassing activity or inducement, including, inter alia 'advertising of medicinal products to the general public'.

Next, from a contextual perspective, the Court finds that the provisions of Title VIII of Directive 2001/83, of which Article 86 is part, set out the general and fundamental rules relating to advertising of medicinal products and that, therefore, they apply to any activity seeking to promote the prescription, supply, sale or consumption of medicinal products.

Finally, as regards the objectives pursued by Directive 2001/83, the Court considers that the essential aim of safeguarding public health pursued by that directive would be greatly compromised if an activity of door-to-door information, canvassing or inducement seeking to promote the prescription, supply, sale or consumption of medicinal products without making reference to a specific medicinal product did not fall within the concept of 'advertising of medicinal products' and therefore escaped the prohibitions, conditions and restrictions laid down by that directive as regards advertising.

To the extent that advertising for non-specified medicinal products, such as the advertising of an entire class of medicinal products intended to treat the same pathology, may relate equally to medicinal products subject to medical prescription and to medicinal products the cost of which may be reimbursed, to exclude that advertising from the scope of the provisions of Directive 2001/83 on the subject of advertising would result in the prohibitions laid down by that directive [343] being deprived of their effectiveness to a large extent, by allowing any advertising that does not refer to a specific medicinal product within that class to escape those prohibitions.

In addition, the Court considers that advertising made with regard to a set of unspecified medicinal products that are neither subject to medical prescription nor reimbursed may, in the same way as advertising in respect of a single specific medicinal product, be excessive and ill-considered and, therefore, harmful to public health, by inducing the irrational use or overconsumption by consumers of the medicinal products concerned.

The Court concludes that, notwithstanding the decisions in the judgment in *A (Advertising and sale of medicinal products online)* [344] and the judgment in *DocMorris*, [345] the concept of 'advertising of medicinal products', for the purposes of Directive 2001/83, covers any form of door-to-door information, canvassing activity or inducement designed to promote the prescription, supply, sale or consumption of specified or unspecified medicinal products.

The Court adds that, since the purpose of the message constitutes the fundamental defining characteristic of that concept and the decisive factor for distinguishing advertising from mere information and that the activities of disseminating information covered by the national provision,

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343 Article 88(1)(a) and (3) of Directive 2001/83.

344 Judgment of 1 October 2020, *A (Advertising and sale of medicinal products online)* (C-649/18, EU:C:2020:764, paragraph 50).

345 Judgment of 15 July 2021, *DocMorris* (C-190/20, EU:C:2021:609, paragraph 20).

such as that at issue in the main proceedings, appear to have such a promotional purpose, those activities fall within that concept.

In the second place, the Court holds that the provisions of Directive 2001/83 [346] do not preclude a national provision that imposes restrictions not laid down by that directive but which meet the essential aim of safeguarding public health pursued by that directive, by prohibiting the inclusion, in advertising to the general public of medicinal products not subject to medical prescription and not reimbursed, of information that encourages the purchase of medicinal products by justifying the need for such a purchase on the basis of the price of those medicinal products, by announcing a special sale or by indicating that those medicinal products are sold together with other medicinal products, including at a reduced price, or with other products.

In support of that interpretation, the Court recalls, first, that, as regards the relationship between the requirement that that advertising promotes the rational use of medicinal products [347] and the restrictions referred to in Directive 2001/83 in the form of a list of banned advertising methods, [348] the fact that that directive does not contain any specific rules concerning certain advertising material does not preclude that, with the aim of preventing any excessive and ill-considered advertising of medicinal products which could affect public health, Member States may prohibit [349] that material to the extent that it encourages the irrational use of medicinal products.

Consequently, and notwithstanding the fact that Directive 2001/83 permits advertising of medicinal products not subject to medical prescription, in order to prevent risks to public health in accordance with the essential aim of safeguarding public health, Member States must prohibit the inclusion, in advertising to the public of medicinal products which are neither subject to medical prescription nor reimbursed, of material which is of such a nature as to promote the irrational use of such medicinal products.

Secondly, as regards whether that is the case for the material covered by prohibitions such as those at issue in the main proceedings, the Court observes that, as regards medicinal products that are not subject to medical prescription and not reimbursed, it is frequently the case that the end consumer himself or herself evaluates, without the assistance of a doctor, the usefulness or need to purchase such medicinal products. That consumer does not necessarily have the specific and objective knowledge enabling him or her to evaluate their therapeutic value. Advertising may therefore exercise a particularly strong influence on the evaluation and choice made by that consumer, both as regards the quality of the medicinal product and the amount to purchase.

In that context, advertising methods such as those referred to in the national provision at issue in the main proceedings are of such a nature as to encourage consumers to purchase medicinal products which are neither subject to medical prescription nor reimbursed according to an economic criterion connected with the price of those medicinal products and, therefore, are likely to lead consumers to purchase and consume those medicinal products without carrying out an objective evaluation based on the therapeutic properties of those products and on specific medical needs.

According to the Court, advertising that distracts the consumer from an objective evaluation of the need to take such medicine encourages the irrational and excessive use of that medicinal product.

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346 More specifically, Articles 87(3) and 90 of Directive 2001/83.

347 Requirement laid down by Article 87(3) of Directive 2001/83.

348 Restrictions set out in Article 90 of Directive 2001/83.

349 On the basis of Article 87(3) of Directive 2001/83.

Such irrational and excessive use of medicinal products may also arise as a result of advertising material that, like that referring to promotional offers or bundled sales of medicinal products and other products, treats medicinal products in the same way as other consumer goods, which are in general the subject of discounts and price reductions where a certain level of expenditure is exceeded.

The Court concludes that, by prohibiting the dissemination of advertising material that encourages the irrational and excessive use of medicinal products that are neither subject to medical prescription nor reimbursed – without prejudice to the possibility for pharmacies to grant discounts and price reductions when selling medicinal products and other health products – a national provision such as that at issue in the main proceedings meets the essential aim of safeguarding public health and is therefore compatible with Directive 2001/83.

XVII. Consumer protection [350]

Judgment of 17 May 2022 (Grand Chamber), Ibercaja Banco (C-600/19, EU:C:2022:394)

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Mortgage enforcement proceedings – Unfairness of the term setting the nominal rate for default interest, and of the advanced repayment term in the loan agreement – Force of res judicata *and time-barring – Loss of the possibility of relying on the unfairness of a contractual term before a court – Power of review by the national court of its own motion)*

Judgment of 17 May 2022 (Grand Chamber), SPV Project 1503 and Others (C-693/19 and C-831/19, EU:C:2022:395)

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Payment order and attachment proceedings against third parties – Force of res judicata *implicitly covering the validity of the terms of an enforceable instrument – Power of the court hearing the enforcement proceedings to examine of its own motion the potential unfairness of a term)*

Judgment of 17 May 2022 (Grand Chamber), Impuls Leasing România (C-725/19, EU:C:2022:396)

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Enforcement proceedings in respect of a leasing contract constituting an enforceable instrument – Objection to enforcement – National legislation not allowing the court hearing that objection to determine whether the terms of an enforceable instrument are unfair – Power of the court hearing the enforcement proceedings to examine of its own motion whether a term is unfair – Existence of an action under ordinary law allowing the review of whether those terms were unfair – Requirement of a security in order to suspend the enforcement proceedings)

Judgment of 17 May 2022 (Grand Chamber), Unicaja Banco (C-869/19, EU:C:2022:397)

(Reference for a preliminary ruling – Directive 93/13/EEC – Unfair terms in consumer contracts – Principle of equivalence – Principle of effectiveness – Mortgage agreement – Unfairness of the 'floor clause' in the agreement – National rules concerning the judicial appeal procedure – Limitation of the temporal effects of the declaration that an unfair term is void – Restitution – Power of review by the national appeal court of its own motion)

The Court has received five requests for a preliminary ruling, from Spanish courts (*Ibercaja Banco*, C-600/19, and *Unicaja Banco*, C-869/19), an Italian court (*SPV Project 1503*, C-693/19 and C-831/19) and

[350] The judgment of 28 April 2022, ***Meta Platforms Ireland*** (C-319/20, EU:C:2022:322), must also be mentioned under this heading. That judgment is presented under heading III.4.d 'Actions against data processing contrary to the GDPR'.

a Romanian court (*Impuls Leasing România*, C-725/19), all concerning the interpretation of the Directive on unfair terms. [351]

Those requests form part of different types of proceedings. Thus, the request in *Ibercaja Banco* concerns mortgage enforcement proceedings in which the consumer did not lodge any objection and the right of ownership of the mortgaged property had already been transferred to a third party. In *Unicaja Banco*, the request was made in appeal proceedings brought following the judgment in *Gutiérrez Naranjo and Others*. [352] For their part, the requests for a preliminary ruling in Joined Cases *SPV Project 1503 and Others* concern enforcement proceedings based on enforceable instruments which have acquired the force of *res judicata*. Lastly, the request in *Impuls Leasing România* has been made in the context of enforcement proceedings on the basis of a leasing contract forming an enforceable instrument.

By its four Grand Chamber judgments, the Court of Justice develops its case-law on the obligation and power of national courts to examine of their own motion whether contractual terms are unfair under the Directive on unfair terms. In that regard, the Court clarifies the interaction between the principle of *res judicata* and time-barring, on the one hand, and the review of unfair terms by the courts, on the other. The Court also rules on the scope of that review in accelerated proceedings for the recovery of consumer debt and on the relationship between certain procedural principles enshrined in national law relating to appeals and the power of a national court to examine of its own motion whether contractual terms are unfair.

Findings of the Court

In the first place, the Court clarifies the relationship between the principle of *res judicata* and the power of the court hearing the enforcement proceedings to examine of its own motion, in the course of order for payment proceedings, whether a contractual term forming the basis of that order is unfair.

In that regard, the Court finds that the Directive on unfair terms [353] precludes national legislation under which, where an order for payment has not been the subject of an objection lodged by the debtor, the court hearing the enforcement proceedings may not review the potential unfairness of the contractual terms on which that order is based, on the ground that the force of *res judicata* of that order applies by implication to the validity of those terms. More specifically, legislation under which an examination of the court's own motion of the unfairness of contractual terms is deemed to have taken place and to have the force of *res judicata*, even where there is no statement of reasons to that effect in the decision issuing the order for payment, is liable to render meaningless the national court's obligation to examine of its own motion the potential unfairness of those terms. In such a case, the requirement of effective judicial protection necessitates that the court hearing the enforcement proceedings is able to assess, including for the first time, whether the contractual terms which served as the basis for the order for payment are unfair. The fact that, at the time when the

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

352 Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C-154/15, C-307/15 and C-308/15, EU:C:2016:980). In that judgment, the Court of Justice essentially held that the case-law of the Tribunal Supremo (Supreme Court, Spain) imposing a temporal limitation on the repayment of amounts that consumers wrongly paid to banks on the basis of an unfair term known as a 'floor clause', was contrary to Article 6(1) of the Directive on unfair terms and that those consumers are, therefore, entitled to repayment in full of those amounts pursuant to that provision.

353 In particular, Article 6(1) and Article 7(1) of that directive.

order became final, the debtor was unaware that he or she could be classified as a 'consumer', within the meaning of that directive, is irrelevant in that regard.

In the second place, the Court examines the interaction between the principle of *res judicata*, time-barring and the power of a national court to examine of its own motion whether a contractual term is unfair in the course of mortgage enforcement proceedings.

First, the Court finds that the Directive on unfair terms [354] precludes national legislation which, by virtue of the effect of *res judicata* and time-barring, neither allows a court to examine of its own motion whether contractual terms are unfair in the course of mortgage enforcement proceedings, nor a consumer, after the expiry of the period for lodging an objection, to raise the unfairness of those terms in those proceedings or in subsequent declaratory proceedings. That interpretation of the directive is applicable where those terms have already been examined by the court of its own motion, at the stage when the mortgage enforcement proceedings were initiated, but the decision authorising the mortgage enforcement does not contain any express reference or grounds concerning that examination, nor state that such an examination could no longer be called into question if an objection were not lodged. Since the consumer was not informed of the existence of an examination by the court of its own motion of the unfairness of the contractual terms, in the decision authorising the mortgage enforcement, he or she was unable to assess, with full knowledge of the facts, whether it was necessary to bring proceedings against that decision. An effective review of the possible unfairness of contractual terms could not be guaranteed if the force of *res judicata* extended also to judicial decisions which do not indicate such a review.

Secondly, the Court finds, on the other hand, that national legislation which does not allow a national court, acting of its own motion or at the request of the consumer, to examine the possible unfairness of contractual terms once the mortgage security has been realised, the mortgaged property sold and the ownership rights in that property transferred to a third party, is compatible with the Directive on unfair terms. [355] That conclusion is, however, subject to the condition that the consumer whose mortgaged property has been sold can assert his or her rights by means of subsequent proceedings with a view to obtaining compensation for the financial damage caused by the application of the unfair terms.

In the third place, the Court examines the relationship between certain national procedural principles governing appeal proceedings, such as the principle of the delimitation of the subject matter of an action by the parties, the principle of the correlation between the claims put forward in the action and the rulings contained in the operative part, and the principle of the prohibition of *reformatio in peius*, and the national court's power to examine of its own motion whether a term is unfair.

In that regard, the Court considers that the Directive on unfair terms [356] precludes the application of such national procedural principles, under which a national court, hearing an appeal against a judgment temporally limiting the repayment of sums wrongly paid by the consumer under a term declared to be unfair, cannot raise of its own motion a ground relating to the infringement of a provision of that directive and order the repayment of those sums in full, where the failure of the consumer concerned to challenge that temporal limitation cannot be attributed to his or her complete inaction. As regards the case in the main proceedings before the referring court, the Court states that the fact that the consumer concerned did not bring an appeal within an appropriate

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354 Idem.

355 Idem.

356 In particular, Article 6(1) of that directive.

period might be attributable to the fact that the period within which she could bring an appeal had already expired when the Court delivered the judgment in *Gutiérrez Naranjo and Others*, by which it held that national case-law temporally limiting the restitutory effects connected with the finding of unfairness of a contractual term by a court was incompatible with that directive. Consequently, in the case in the main proceedings, the consumer concerned had not displayed complete inaction in failing to bring an appeal. In those circumstances, the application of the national procedural principles depriving her of the means enabling her to assert her rights under the Directive on unfair terms is contrary to the principle of effectiveness, since it is liable to make the protection of those rights impossible or excessively difficult.

In the fourth and last place, the Court considers the power of the national court to examine of its own motion whether the terms of an enforceable instrument are unfair when hearing an objection to enforcement of that instrument.

In that regard, the Court finds that the Directive on unfair terms [357] and the principle of effectiveness preclude national legislation which does not allow the court hearing the enforcement proceedings in respect of a debt, before which an objection to enforcement has been lodged, to assess, of its own motion, or at the request of the consumer, whether the terms of a contract which constitutes an enforceable instrument are unfair, where the court having jurisdiction to rule on the substance of the case, which may be seised of a separate action under the ordinary law with a view to an assessment as to whether the terms of that contract are unfair, may only suspend the enforcement proceedings until a decision has been given on the substance if a security is paid, calculated for example on the basis of the value of the subject matter of the action, at a level that is likely to dissuade the consumer from bringing and maintaining such an action. As regards that security, the Court states that the costs which legal proceedings would entail in relation to the amount of the disputed debt must not be such as to discourage the consumer from bringing an action before the court. However, it is likely that a debtor in default does not have the financial resources necessary to provide the guarantee required. That is all the more so if the value of the actions brought greatly exceeds the total value of the contract, as would appear to be the case in the action in the main proceedings.

357 In particular, Article 6(1) and Article 7(1) of that directive.

XVIII. Environment [358]

1. Waste electrical and electronic equipment

Judgment of 25 January 2022 (Grand Chamber), VYSOČINA WIND (C-181/20, EU:C:2022:51)

(Reference for a preliminary ruling – Environment – Directive 2012/19/EU – Waste electrical and electronic equipment – Obligation to finance the costs relating to the management of waste from photovoltaic panels – Retroactive effect – Principle of legal certainty – Incorrect transposition of a directive – Liability of the Member State)

Vysočina Wind is a Czech company which operates a solar power plant equipped with photovoltaic panels that were placed on the market after 13 August 2005.

In accordance with the obligation laid down by Czech Law No 185/2001 on waste ('the Law on waste'), [359] it participated in the financing of the costs relating to the management of waste from photovoltaic panels and, for that purpose, paid contributions in the course of 2015 and 2016.

Since Vysočina Wind took the view, however, that that obligation to pay contributions resulted from an incorrect transposition of Directive 2012/19 on waste electrical and electronic equipment (WEEE) [360] and that the payment of those contributions constituted harm, it brought before the Czech courts an action for damages against the Czech Republic. In that context, Vysočina Wind submitted that the provision of the Law on waste laying down the obligation on users of photovoltaic panels to pay contributions is contrary to Article 13(1) of the WEEE Directive, which makes producers of electrical and electronic equipment, and not its users, responsible for the financing of the costs relating to the management of waste from equipment placed on the market after 13 August 2005.

After the action brought by Vysočina Wind was upheld, both at first instance and on appeal, the Czech Republic brought an appeal on a point of law before the Nejvyšší soud (Supreme Court, Czech Republic).

Having been requested by that court to give a preliminary ruling, the Court of Justice, sitting as the Grand Chamber, rules on the interpretation and validity of Article 13(1) of the WEEE Directive and also explains the conditions under which a Member State may be liable for infringement of EU law in the context of transposition of a directive.

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358 The following judgments must also be mentioned under this heading: judgments of 14 July 2022, ***GSMB Invest*** (C-128/20, EU:C:2022:570), of 14 July 2022, ***Volkswagen*** (C-134/20, EU:C:2022:571), and of 14 July 2022, ***Porsche Inter Auto and Volkswagen*** (C-145/20, EU:C:2022:572), presented under heading XIII.3. 'Motor vehicles', as well as the judgment of 8 November 2022, ***Deutsche Umwelthilfe (Type approval of motor vehicles)*** (C-873/19, EU:C:2022:857), presented under heading III.1. 'Right to an effective remedy and right to a fair trial'.

359 Paragraph 37p of the zákon č. 185/2001 Sb., o odpadech a o změně některých dalších zákonů (Law No 185/2001 on waste and amending certain other laws).

360 Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE) (OJ 2012 L 197, p. 38) ('the WEEE Directive').

Findings of the Court

On the basis of a literal interpretation of the WEEE Directive, the Court confirms, first, that photovoltaic panels constitute electrical and electronic equipment within the meaning of that directive, so that, in accordance with Article 13(1) of the directive, the financing of the costs relating to the management of waste from such panels placed on the market from 13 August 2012, the date on which the directive entered into force, must be borne by their producers and not, as the Czech legislation provides, their users.

Second, the Court examines the validity of Article 13(1) of the WEEE Directive, in so far as that provision applies to photovoltaic panels placed on the market after 13 August 2005, that is to say, on a date before the date on which the directive entered into force.

In that regard, the Court notes first of all that, whilst the principle of legal certainty precludes a new legal rule from applying to a situation established prior to its entry into force, it also follows from the Court's case-law that a new legal rule applies immediately to the future effects of a situation which arose under the old law, as well as to new legal situations.

Thus, the Court determines whether application of the legal rule laid down in Article 13(1) of the WEEE Directive, that producers, and not users, are required to provide for the financing of the costs relating to the management of waste from photovoltaic panels placed on the market after 13 August 2005, where those panels have, or will, become waste from the date of the directive's entry into force, is such as to affect adversely a situation established before the directive entered into force or whether its application serves, on the contrary, to govern the future effects of a situation which arose before the directive entered into force.

Since the EU legislation which existed before the WEEE Directive was adopted left the Member States the choice of requiring the costs of management of waste from photovoltaic panels to be borne either by the current or previous waste holders or by the producer or distributor of the panels, the WEEE Directive affected situations established before it entered into force, in the Member States which had decided to impose those costs on the users of photovoltaic panels and not their producers, as was the case in the Czech Republic.

In this respect, the Court explains that a new legal rule which applies to previously established situations cannot be regarded as complying with the principle of the non-retroactivity of legal acts where it alters, subsequently and unforeseeably, the allocation of costs the incurring of which can no longer be avoided. In the present instance, producers of photovoltaic panels were unable to foresee, when designing the panels, that they would subsequently be required to provide for the financing of the costs relating to the management of waste from those panels.

In the light of those considerations, the Court declares Article 13(1) of the WEEE Directive invalid in so far as it imposes on producers the obligation to finance the costs relating to the management of waste from photovoltaic panels placed on the market between 13 August 2005 and 13 August 2012.

Third, the Court states that the insertion in the Law on waste of a provision obliging users of photovoltaic panels to pay contributions which is contrary to the WEEE Directive, more than a month before the directive was adopted, does not constitute, in itself, a breach of EU law by the Czech Republic, since the achievement of the result prescribed by the directive cannot be regarded as seriously compromised before the directive formed part of the EU legal order.

2. Air quality

Judgment of 22 December 2022 (Grand Chamber), Ministre de la Transition écologique and Premier ministre (State liability for air pollution) (C-61/21, EU:C:2022:1015)

(Reference for a preliminary ruling – Environment – Directives 80/779/EEC, 85/203/EEC, 96/62/EC, 1999/30/EC and 2008/50/EC – Air quality – Limit values for microparticles (PM10) and nitrogen dioxide (NO2) – Exceeded – Air quality plans – Damage caused to an individual on account of deterioration of the air resulting from the exceedance of those limit values – Liability of the Member State concerned – Conditions for establishing that liability – Requirement that the rule of EU law infringed be intended to confer rights on the individuals who have been harmed – No such intention)

In an action brought before the tribunal administratif de Cergy-Pontoise (Administrative Court, Cergy-Pontoise, France), JP, a resident in part of the agglomeration of Paris, sought, inter alia, compensation from the French Republic for damage related to the deterioration of his health alleged to have been caused by the deterioration of the ambient air quality in that agglomeration. That deterioration resulted from exceedances of the nitrogen dioxide (NO_2) and microparticles (PM_{10}) concentration limit values, fixed by Directive 2008/50 on ambient air quality, [361] owing to the failure of the French authorities to fulfil their obligations under Articles 13 [362] and 23 [363] of that directive.

His action having been dismissed on the ground, in essence, that the provisions relied on by him of Directive 2008/50 on ambient air quality do not confer any right on individuals to obtain compensation for any damage suffered as a result of the deterioration of air quality, JP brought an appeal against that judgment before the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France).

Giving a ruling on a preliminary reference from that court, the Court of Justice, sitting as the Grand Chamber, clarifies the conditions under which a Member State incurs liability for damage caused to an individual by the deterioration of air quality as a result of the limit values for pollutants in the ambient air being exceeded.

Findings of the Court

First of all, the Court notes that Directive 2008/50 on ambient air quality, relied on by JP, entered into force on 11 June 2008, namely later, in part, than the damage to health that he alleges was caused, which began in 2003. Thus, in order to assess the potential liability on the part of the French Republic for the damage at issue, it considers it necessary to take into account not only the relevant provisions

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361 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

362 Under Article 13(1) of that directive, 'Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead, and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI' and 'in respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein'.

363 Under Article 23(1) of the same directive, 'where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV'.

of that directive, but also those of the directives that preceded it [364] and which laid down analogous obligations.

Next, the Court recalls that the engagement of State liability by individuals requires three cumulative conditions to be satisfied, namely that: the rule of EU law infringed must be intended to confer rights on them; the infringement of that rule must be sufficiently serious; and there must be a direct causal link between that infringement and the loss or damage sustained by those individuals.

As regards the first condition requiring that the rule infringed must be intended to confer rights on individuals, those rights arise not only where they are expressly granted by provisions of EU law, but also by reason of positive or negative obligations which those provisions impose in a clearly defined manner, whether on individuals, on the Member States or on the EU institutions. The breach of such positive or negative obligations by a Member State is liable to hinder the exercise of rights implicitly conferred on individuals by the provisions in question and thus to alter the legal situation which those provisions seek to establish for them. That is the reason why the full effectiveness of those rules and the protection of the rights that they confer require that individuals have the possibility of obtaining redress, irrespective of whether the provisions in question have direct effect, the quality of direct effect being neither necessary nor sufficient in itself for that first condition to be satisfied.

In the present case, Article 13(1) and Article 23(1) of Directive 2008/50 on ambient air quality, like the analogous provisions of the preceding directives, oblige Member States, in essence, first, to ensure that the levels of, inter alia, NO_2 and PM_{10} do not exceed, in their respective territories and with effect from certain dates, the limit values set by those directives and, second, where those limit values are nonetheless exceeded, an obligation to provide for appropriate measures to remedy those exceedances, inter alia by means of air quality plans. It follows that those provisions lay down sufficiently clear and precise obligations as to the result to be achieved by Member States. However, those obligations pursue a general objective of protecting human health and the environment as a whole and it cannot be inferred that they implicitly confer rights on individuals, the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to them. Therefore, the first of the three conditions, which are cumulative, for State liability to be incurred is not satisfied.

That finding cannot be altered as a result of the right that individuals are recognised as having, under the Court's case-law, to require the national authorities, if necessary by bringing an action before the courts having jurisdiction, to adopt an air quality plan in the event that the limit values referred to in Directive 2008/50 and the previous directives are exceeded. That right, which stems in particular from the principle of effectiveness of EU law, effectiveness to which affected individuals are entitled to contribute by bringing administrative or judicial proceedings based on their own particular situation, does not mean that the obligations resulting from Article 13(1) and Article 23(1) of Directive 2008/50 and the analogous provisions of the earlier directives were intended to confer individual rights on interested persons, for the purpose of the first of the three conditions referred to above.

Having regard to all of those considerations, the Court concludes that Article 13(1) and Article 23(1) of Directive 2008/50 on ambient air quality, as well as the analogous provisions of the preceding directives, must be interpreted as meaning that they are not intended to confer rights on individuals

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364 Namely, Articles 3 and 7 of Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates (OJ 1980 L 229, p. 30), Articles 3 and 7 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1), Articles 7 and 8 of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55), and Article 4(1) and Article 5(1) of Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air (OJ 1999 L 163, p. 41).

capable of entitling them to compensation from a Member State under the principle of State liability for loss and damage caused to individuals as a result of breaches of EU law attributable to that Member State.

Chapter 2 – The General Court

I. Proceedings of the European Union

1. Representation by a lawyer authorised to practise solely before the courts or tribunals of the United Kingdom

Order of 20 June 2022, Natixis v Commission (T-449/21, EU:T:2022:394)

(Action for annulment – Preliminary issue – Lack of representation by a lawyer authorised to practise solely before the courts or tribunals of the United Kingdom in one of the situations exhaustively provided for by Article 91(2) of the Agreement on the withdrawal of the United Kingdom from the Union and from Euratom – Lack of representation by a lawyer authorised to practise before the courts or tribunals of a Member State or of another State which is a party to the EEA Agreement – Article 19 of the Statute of the Court of Justice of the European Union)

By application lodged on 30 July 2021, the company Natixis brought an action for annulment of the decision of the European Commission of 20 May 2021 relating to a proceeding under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area, [365] in so far as it concerns Natixis. The applicant stated that it was represented by, inter alia, two barristers and two solicitors authorised to practise before the courts of the United Kingdom.

The agreement on the United Kingdom's withdrawal from the European Union [366] provides for a transition period which ended on 31 December 2020.

By its order, the General Court dismissed the applicant's application to recognise a barrister and a solicitor as its representatives. This case thus gives the Court the opportunity to examine the various texts and provisions which must be taken into consideration in order to determine whether a lawyer authorised to practise solely before the courts of the United Kingdom may represent a party before the General Court

Findings of the Court

In the first place, the Court recalls that, according to the third and fourth paragraphs of Article 19 of the Statute of the Court of Justice of the European Union, only a lawyer authorised to practise before the courts or tribunals of a Member State or of another State which is a party to the EEA Agreement may represent or assist a party in proceedings before the Courts of the European Union. [367] However, as regards the particular case of lawyers entitled to practise before the courts of the United Kingdom, account should be taken, beforehand, of any relevant provisions of the international agreements

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365 Agreement on the European Economic Area (OJ 1994 L 1, p. 3; 'the EEA Agreement').

366 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7; 'the Withdrawal Agreement').

367 Fourth paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

between the United Kingdom and the European Union, namely the Withdrawal Agreement and the Trade and Cooperation Agreement. [368]

In that regard, the Withdrawal Agreement provides for exhaustively listed cases in which a lawyer authorised to practise before the courts or tribunals of the United Kingdom may represent or assist a party before the Courts of the European Union. [369] In the current state of the division of competencies between the Court of Justice and the General Court, such a lawyer who represented a party on 31 December 2020 may continue to represent or assist that party in an action brought before the General Court. [370] Such a lawyer may also represent or assist a party before the General Court in actions for annulment brought against decisions adopted by the EU institutions, bodies, offices and agencies before 31 December 2020 and addressed to the United Kingdom or to natural or legal persons residing or established in the United Kingdom. [371] The same applies to such decisions adopted after 31 December 2020, inter alia in the context of proceedings applying Article 101 or 102 TFEU initiated before 31 December 2020 and addressed to the United Kingdom or to natural or legal persons residing or established in the United Kingdom. Finally, a lawyer authorised to practise before the courts or tribunals of the United Kingdom may represent or assist that State before the General Court [372] in proceedings in which that State has decided to intervene. [373]

In the present case, the Court finds that the present action does not fall within any of those situations exhaustively provided for by the Withdrawal Agreement. The applicant is a company established in France and incorporated under French law. The fact that other addressees of the decision at issue are, for their part, established in the United Kingdom is irrelevant in that regard. In that regard, the Court notes that, according to settled case-law, a decision adopted by the Commission on the basis of Article 101 TFEU, although drafted and published as a single decision, must be regarded as a group of individual decisions establishing, in relation to each of the undertakings to which it is addressed, the breach or breaches which that undertaking has been found to have committed and, where appropriate, imposing a fine on it. Furthermore, as regards the applicant's claim that it is 'established' in the United Kingdom as an 'overseas company', it is apparent from the documents provided by the applicant that it is solely registered and not established in that State. The Court also notes that the right of representation or assistance conferred by the Withdrawal Agreement [374] on lawyers authorised to practise before the courts or tribunals of the United Kingdom applies only in the context of administrative procedures [375] to the exclusion of any subsequent court proceedings. [376]

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

369 Articles 87, 90 to 92 and 95 of the Withdrawal Agreement read together.

370 In accordance with Article 91(1) of the Withdrawal Agreement.

371 In accordance with the first sentence of Article 91(2) of the Withdrawal Agreement, read in conjunction with Article 95(1) and (3) thereof.

372 In accordance with the second sentence of Article 91(2) of the Withdrawal Agreement, read in conjunction with Article 90 thereof

373 Pursuant to the point (c) of the second paragraph of Article 90 of the Withdrawal Agreement.

374 Article 94(2) of the Withdrawal Agreement.

375 Referred to in Articles 92 and 93 of the Withdrawal Agreement

376 Laid down by Article 91 of the Withdrawal Agreement

In the second place, the Court states that the applicant cannot rely on the Trade and Cooperation Agreement between the European Union and the United Kingdom either. That agreement does not provide [377] that a party to that agreement authorises a lawyer of the other party to that agreement to supply in its territory legal services relating to EU law, which covers Article 101 TFEU, or to supply legal representation before, inter alia, the courts and other duly constituted official tribunals of a party to that agreement, including the General Court.

In the third and last place, the Court observes that the action was brought on 30 July 2021, that is to say after the expiry, on 31 December 2020, of the transition period during which EU law continued to apply to and in the United Kingdom despite its status as a third State. Consequently, the question whether lawyers designated by the applicant authorised to practise only before the courts and tribunals of the United Kingdom must be considered to be entitled to practise before a court of a Member State or of another State which is a party to the EEA Agreement [378] can now no longer be examined having regard to the provisions or acts of EU law. [379] Therefore, such an examination must be carried out in the light of any specific legislation of a Member State unilaterally authorising those lawyers to practise before its courts and tribunals, which does not, however, exist in the present case in France.

2. Actions to establish non-contractual liability

Judgment of 23 February 2022, United Parcel Service v Commission (T-834/17, EU:T:2022:84)

(Non-contractual liability – Competition – Markets for international express small package delivery services in the EEA – Concentration – Decision declaring the concentration incompatible with the internal market – Annulment of the decision by a judgment of the Court – Rights of the defence – Sufficiently serious breach of a rule of law intended to confer rights on individuals – Causal link)

By decision of 30 January 2013 ('the decision at issue'), [380] the European Commission declared incompatible with the internal market a notified concentration between United Parcel Service, Inc. ('UPS') and TNT Express NV ('TNT'), two undertakings present on the markets for international express small package delivery services.

While publicly announcing that it would not go ahead with that concentration, UPS brought an action before the General Court for annulment of the decision at issue. By judgment of 7 March 2017, [381] the

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377 Article 193(a) and (g) of the Trade and Cooperation Agreement.

378 Fourth paragraph of Article 19 of the Statute of the Court of Justice of the European Union.

379 Including those applicable to the profession of lawyer, such as 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), or Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services (OJ 1977 L 78, p. 17).

380 Decision C(2013) 431 declaring a concentration incompatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6570 – UPS/TNT Express).

381 Judgment of 7 March 2017, *United Parcel Service* v *Commission* (T-194/13, EU:T:2017:144).

General Court upheld that action and, by judgment of 16 January 2019, [382] the Court of Justice dismissed the appeal brought by the Commission against that judgment of the General Court.

In the meantime, the Commission had declared compatible with the internal market a notified concentration between TNT and FedEx Corp. ('FedEx'), a competitor of UPS. [383]

At the end of 2017, UPS brought an action for damages against the Commission, seeking compensation for the economic damage allegedly suffered as a result of the unlawfulness of the decision at issue. [384] In 2018, an action for damages was also brought by ASL Aviation Holdings DAC and ASL Airlines (Ireland) Ltd (together; 'the ASL companies'), which, before the adoption of the decision at issue, had concluded commercial agreements with TNT that were to be implemented following clearance of the concentration between UPS and TNT. [385]

Those two actions for damages are dismissed by the Seventh Chamber (Extended Composition) of the General Court.

Findings of the Court

- **Dismissal of the action for damages brought by UPS (Case T-834/17)**

By its action for damages, UPS claimed that, by adopting the decision at issue, the Commission had committed sufficiently serious breaches of EU law capable of giving rise to non-contractual liability on the part of the European Union. According to UPS, the Commission had, first, infringed its procedural rights during the administrative procedure, second, failed to fulfil the obligation to state reasons and, third, erred in its substantive assessment of the notified concentration.

As a preliminary point, the Court recalls that in order for the European Union to incur non-contractual liability, three cumulative conditions must be satisfied: there must be a sufficiently serious breach of a rule of law conferring rights on individuals; actual damage must be shown to have occurred; and there must be a direct causal link between the breach and the damage sustained.

As regards, in the first place, the alleged infringement of UPS' procedural rights during the administrative procedure, UPS claimed, first, that the Commission failed to communicate the final version of the econometric model used to analyse the effects of the notified concentration on prices and the criteria for assessing the efficiencies deriving from that concentration. Second, UPS claimed that the Commission had infringed its right of access to information provided by FedEx during the administrative procedure.

With regard to the failure to communicate the final version of the econometric model used by the Commission, the Court observes that, under the applicable legislation, the Commission was under an obligation to bring that final version to UPS' attention. Since the Commission had considerably reduced, or even no, discretion in that regard, it committed a sufficiently serious breach of UPS' rights

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382 Judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23).

383 Decision of 8 January 2016 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M.7630 – FedEx/TNT Express), a summary of which was published in the *Official Journal of the European Union* (OJ 2016 C 450, p. 12).

384 Case T-834/17, *United Parcel Service* v *Commission.*

385 Case T-540/18, *ASL Aviation Holdings and ASL Airlines (Ireland)* v *Commission*.

of defence by failing to communicate that model to UPS. In the light of the case-law on observance of the rights of the defence and the judgment of the Court of Justice of 16 January 2019, that infringement of UPS' rights was not, moreover, excusable on account of an alleged lack of clarity of EU law, as contended by the Commission.

The General Court also rejects the Commission's argument in its defence based on the fact that the finalisation of the econometric model had been preceded by numerous exchanges with UPS. By failing to communicate the final version of the econometric model, the Commission not only avoided a procedural constraint intended to safeguard the legitimacy and fairness of the EU's procedure for the control of concentrations, but also placed UPS in a position where it was unable to understand part of the grounds of the decision at issue.

By contrast, as regards the failure to communicate to UPS the criteria for assessing the efficiencies deriving from the notified concentration, the Court observes that no provision of EU law applicable to the control of concentrations requires the Commission to define in advance, in the abstract, the specific criteria on the basis of which it intends to accept that an efficiency may be regarded as verifiable. In those circumstances, UPS' line of argument seeking to show that the Commission was required to communicate to it the specific criteria and standards of proof which it intended to apply in order to determine whether each of the efficiencies relied on was verifiable is unfounded in law.

The Court also rejects the argument that the Commission had infringed UPS' right of access to certain documents provided to the Commission by FedEx during the administrative procedure. Since UPS had not exercised its rights of access in due time and in the manner prescribed by the applicable legislation (failure to refer the matter to the hearing officer), it did not meet the conditions for obtaining compensation for alleged damage resulting from the infringement of those rights.

Regarding, in the second place, the alleged failure by the Commission to fulfil the obligation to state reasons, the Court recalls that an inadequacy in the statement of reasons for an EU measure is not, in principle, in itself such as to give rise to liability on the part of the European Union.

As regards, in the third place, UPS' argument alleging errors in the substantive assessment of the notified concentration, the Court, while confirming that the Commission made certain errors, observes that those errors do not constitute sufficiently serious breaches of EU law to be capable of giving rise to non-contractual liability on the part of the European Union. In that regard, the Court states that, even though the Commission used, in disregard of its own rules (Best practices for the submission of economic evidence), an econometric model that departs significantly from standard economic practice, it enjoyed considerable discretion in defining that model. Moreover, in order to carry out its analysis of the effects of the notified concentration, the Commission did not rely exclusively on that econometric model, but also carried out a general analysis of the characteristics of the market in question, highlighting the nature and characteristics of that market and the consequences flowing from the proposed transaction.

In the last place, the Court concludes that UPS has failed to demonstrate the existence of manifest and serious errors in the assessment of the verifiability of the efficiencies and of FedEx's competitive situation in the proposed concentration, and to provide any indication of unequal treatment between the decision relating to the transaction between FedEx and TNT and the decision at issue.

After thus establishing that the sufficiently serious breach of UPS' procedural rights during the administrative procedure was limited to the failure to communicate the final version of the econometric model used by the Commission to analyse the effects of the notified concentration on prices, the Court examines, next, whether there is a direct causal link between that illegality and the types of damage relied on by UPS, namely, first, the costs associated with its participation in the procedure for the control of the notified concentration between FedEx and TNT, second, the payment to TNT of a contractual termination fee following the termination of the merger protocol concluded with TNT and, third, the loss of profit on account of the fact that it was impossible to implement that merger protocol.

As regards, first of all, the costs associated with UPS' participation in the procedure for the control of the notified concentration between FedEx and TNT, the Court holds that that participation was clearly the result of UPS' free choice. Thus, the infringement of UPS' procedural rights during the procedure for the control of the concentration between itself and TNT cannot be regarded as the determining cause of the costs associated with its participation in the procedure for the control of the concentration between FedEx and TNT. Likewise, given that the payment of a termination fee to TNT stemmed from a contractual obligation arising from the terms of the merger protocol between UPS and TNT, the illegalities vitiating the decision at issue could not constitute the determining cause of the payment of that fee to TNT.

Regarding, lastly, the alleged loss of profit sustained by UPS, the Court observes that it cannot be presumed that, had UPS' procedural rights not been infringed in the procedure for the control of the concentration between itself and TNT, that concentration would have been declared compatible with the internal market. Furthermore, UPS has neither proved nor provided the Court with evidence which would enable it to conclude that, without that infringement, the Commission would have declared that transaction compatible with the internal market. Moreover, the fact that UPS decided not to go ahead with the proposed concentration as soon as the decision at issue was announced had the effect of breaking any direct causal link between the illegality identified and the damage alleged.

In the light of the foregoing, the Court concludes that UPS failed to establish that the infringement of its procedural rights in the procedure for the control of the concentration between itself and TNT constituted the determining cause of the types of damage alleged. Thus, it dismisses the action for damages in its entirety.

- **Dismissal of the action for damages brought by the ASL companies (Case T-540/18)**

The action for damages brought by the ASL companies sought compensation for the alleged loss of profit resulting from the fact that it was impossible to implement the commercial agreements concluded with TNT on account of the decision at issue. In support of that application, the ASL companies relied on a breach of their fundamental rights and those of UPS by the Commission, as well as the existence of serious and manifest errors in the Commission's assessment of the notified concentration between UPS and TNT.

In the first place, the Court holds that the ASL companies cannot rely, as the basis for their own claim for compensation, on a breach of UPS' rights of defence in the procedure for the control of the concentration between UPS and TNT. In accordance with the settled case-law of the Court, it is necessary that the protection afforded by the rule of law relied on in support of an action for damages is effective as regards the person who relies on it and, therefore, that that person is among those on whom the rule in question confers rights.

In the second place, the Court rejects as unfounded the line of argument put forward by the ASL companies based on the fact that the Commission infringed, in the procedure for the control of the concentration between UPS and TNT, their fundamental rights and in particular their right to sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. In that regard, the Court states that, in so far as the ASL companies had freely chosen not to participate in that procedure, they could not rely on an alleged infringement by the Commission of their fundamental rights in the context of that procedure.

In the third place, the Court rejects as inadmissible the plea alleging the existence of serious and manifest errors committed by the Commission in the assessment of the concentration between UPS and TNT, given that the ASL companies confined themselves to referring in that regard to the application lodged by UPS in Case T-834/17.

In the light of those considerations, the Court, finding that the ASL companies have not established the existence of sufficiently serious breaches of EU law vitiating the decision at issue, dismisses their action as unfounded.

3. Proceedings relating to a contract

Judgment of 13 July 2022, JF v EUCAP Somalia (T-194/20, EU:T:2022:454).

(Arbitration clause – International contract staff of EUCAP Somalia – Common foreign and security policy mission – Non-renewal of employment contract following the United Kingdom's withdrawal from the European Union – Right to be heard – Equal treatment – Non-discrimination on grounds of nationality – Transition period provided for in the Agreement on the withdrawal of the United Kingdom from the European Union – Action for annulment – Action for damages – Acts inseparable from the contract – Inadmissibility)

The applicant, JF, a United Kingdom national, signed several successive fixed-term employment contracts with EUCAP Somalia, an EU mission to assist Somalia in building its maritime security capacity, [386] under which he was recruited as an international contract staff member.

His last contract of employment, which ended on 31 January 2020, provided that it could be terminated early if the United Kingdom ceased to be a member of the European Union.

By a note dated 18 January 2020, the Head of Mission of EUCAP Somalia informed the international contract staff who were nationals of the United Kingdom in that mission, including the applicant, that, owing to the probable withdrawal of the United Kingdom from the Union on 31 January 2020, their employment contracts would end on that date. Subsequently, by letter dated 29 January 2020, he confirmed to JF that his contract would not be renewed beyond its term and would end on 31 January 2020 due to the withdrawal of the United Kingdom from the Union.

By his action, JF sought, principally, on the basis of Articles 263 and 268 TFEU, that the note of 18 January 2020 and the letter of 29 January 2020 (together, 'the contested acts') be annulled and that the damage which he allegedly suffered as a result of those acts by virtue of EUCAP Somalia's non-contractual liability be made good, and, in the alternative, on the basis of Article 272 TFEU, that the disputed acts be declared unlawful and that the same losses by virtue of the contractual liability of that mission also be made good.

By its judgment, delivered in an enlarged chamber, the General Court dismisses the action brought by JF in its entirety. On that occasion, it supplements the case-law by ruling, in particular, on the admissibility and nature of the action and on the possibility, under certain conditions, of not determining the applicable national law to resolve a dispute in contractual matters. It also examines the pleas alleging infringements of Union law in the context of such a contractual dispute and clarifies the application of the principle of non-discrimination on grounds of nationality in this case.

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386 EUCAP Somalia was established by Council Decision 2012/389/CFSP of 16 July 2012 on the European Union capacity building mission in Somalia (EUCAP Somalia) (OJ 2012 L 187, p. 40), as amended by Council Decision (CFSP) 2018/1942 of 10 December 2018 (OJ 2018 L 314, p. 56).

Findings of the Court

As regards the admissibility of the action, first, the Court rejects as inadmissible the application for annulment of the contested acts based on Article 263 TFEU. In that regard, it observes in particular that the conditions of employment and the rights and obligations of EUCAP Somalia's international staff are defined by contract, so that the employment relationship between the applicant and EUCAP Somalia was contractual in nature. The Court further finds that, by the contested acts, the Head of Mission of EUCAP Somalia confirmed to the applicant the date of termination of his contract as provided for therein, following the withdrawal of the United Kingdom from the European Union, which was a contractual cause for termination of the contract. It concludes that those acts are not intended to produce binding legal effects outside the contractual relationship between the applicant and EUCAP Somalia and involving the exercise by the latter of prerogatives of public authority. Thus, those acts are contractual in nature and their annulment cannot be sought on the basis of Article 263 TFEU.

Second, the Court dismisses as inadmissible the claim for damages for the non-contractual liability of the Union for the actions of EUCAP Somalia, based on Article 268 TFEU. A genuine contractual context surrounds that claim, so that it falls within the contractual liability of the Union.

Third, the Court finds that the action is admissible in so far as it is based, in the alternative, on Article 272 TFEU. It states that, in support of his claims under that provision, the applicant relies on rules which the Union administration is required to observe in a contractual context, since he puts forward pleas alleging, in particular, infringements of the right to be heard and of the principles of equal treatment and non-discrimination, [387] as well as a plea alleging infringement of the principle of the protection of legitimate expectations, which constitutes a general principle of Union law. Consequently, unless the principle of effective judicial protection is disregarded, the applicant cannot be prevented from relying on infringement of those principles in support of his claims, on the ground that he can validly invoke only a failure to perform the terms of his contract or an infringement of the law applicable to it. [388]

As regards the applicable law, the Court notes the principle that the Union's contractual liability is governed by the law applicable to the contract concerned. [389] However, it considers that it is not necessary to determine the national law applicable to the present dispute, which can be resolved on the basis of the contract at issue, the EUCAP Somalia standard operating procedures to which it refers and the Charter and general principles of Union law. In that context, the Court observes, in particular, that in support of his subsidiary claims, based on Article 272 TFEU, the applicant relies exclusively on pleas in law alleging infringements of Union law, in particular of the general principles of that law and of the Charter. Furthermore, it does not appear that, in order to resolve the dispute, it is necessary to apply mandatory provisions of national law.

As to the merits of the case, the Court notes, first, that as regards the breach of the right to be heard, it is not apparent from the terms of the contract at issue, nor from EUCAP Somalia's standard operating procedures, to which that contract refers, that EUCAP Somalia's Head of Mission was required to hear JF before issuing the note of 18 January 2020. Furthermore, the Court considers that

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387 Guaranteed respectively by Article 41(2)(a) and Articles 20 and 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

388 Within the meaning of the judgment of 16 July 2020, *ADR Center* v *Commission* (C-584/17 P, EU:C:2020:576, paragraphs 85 to 89).

389 Article 340, first paragraph, TFEU.

EUCAP Somalia's decision not to avail itself of the possibility of renewing the applicant's contract, as is apparent from the contested acts, was not a measure taken against him which adversely affected him within the meaning of Article 41(2)(a) of the Charter. Thus, the right to be heard as guaranteed by that provision did not require EUCAP Somalia to hear the applicant prior to drafting the note of 18 January 2020. Moreover, the Court points out, in the context of an action of a contractual nature, that even supposing that the applicant had had the right to be heard prior to the drafting of that note, the procedure could not have led to a different result if he had been able to exercise that right.

Second, as regards alleged discrimination on grounds of nationality, the Court points out that the applicant, as a national of a Member State which has initiated the procedure for withdrawal from the European Union, was not objectively in a situation comparable to that of international contract staff who are nationals of another Member State within EUCAP Somalia, so that the head of that mission could decide not to renew his contract of employment after 31 January 2020, without that constituting discrimination on grounds of nationality.

Third and finally, as regards an alleged infringement, by the contested acts, of the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom, [390] the Court observes, in the context of an action of a contractual nature, that the provisions of the latter, which are relevant to the present case, govern the conditions in which Union law applies to the United Kingdom during the transitional period and therefore constitute substantive rules. However, since those rules do not apply to legal situations arising before the date of entry into force of that agreement and since the acts at issue predate that date, such an infringement cannot be found.

390 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 7), which entered into force on 1 February 2020.

II. Law governing the institutions – European Public Prosecutor's Office

Judgment of 12 January 2022, Verelst v Council (T-647/20, EU:T:2022:5)

(Law governing the institutions – Enhanced cooperation on the establishment of the European Public Prosecutor's Office – Regulation (EU) 2017/1939 – Appointment of the European Prosecutors of the European Public Prosecutor's Office – Appointment of one of the candidates nominated by Belgium – Rules applicable to the appointment of European Prosecutors)

On 12 October 2017, the Council of the European Union adopted Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office. [391] That regulation establishes the European Public Prosecutor's Office as a body of the European Union and sets out rules concerning its functioning.

Under Article 16(1) of Regulation 2017/1939, each Member State which participates in enhanced cooperation on the establishment of the European Public Prosecutor's Office is to nominate three candidates for the position of European Prosecutor. Article 16(2) of that regulation provides that, after receiving the reasoned opinion of the selection panel, which is responsible for drawing up a shortlist of candidates for the position of European Chief Prosecutor, [392] the Council is to select and appoint one of the candidates to be the European Prosecutor of the Member State in question and that, if the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion shall be binding on the Council. Under Article 16(3) of that regulation, the Council, acting by simple majority, is to select and appoint the European Prosecutors for a non-renewable term of six years and may decide to extend the mandate for a maximum of three years at the end of the six-year period.

Under Article 14(3) of Regulation 2017/1939, the Council establishes the selection panel's operating rules and adopts a decision appointing its members on a proposal from the European Commission. On 13 July 2018, the Council adopted Implementing Decision 2018/1696 on the operating rules of the selection panel. [393] In particular, according to the third paragraph of point VII.2 of those rules, found in the annex: 'the selection panel shall rank the candidates according to their qualifications and experience', a ranking which 'shall indicate the selection panel's order of preference and [which] shall not be binding on the Council'.

On 25 January 2019, for the purpose of nominating three candidates for the position of European Prosecutor under Regulation 2017/1939, the Belgian authorities published a call for applications, to which six candidates responded, one of which was the applicant, Mr Jean-Michel Verelst, who, since 2010, has held the position of Deputy Public Prosecutor, Brussels (Belgium), specialising in taxation.

On 27 July 2020, at the end of the various stages of the selection procedure laid down by Regulation 2017/1939, the Council adopted Implementing Decision 2020/1117 appointing the European

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

392 As provided under Article 14(3) of Regulation 2017/1939.

393 Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation 2017/1939 (OJ 2018 L 282, p. 8)

Prosecutors of the European Public Prosecutor's Office, which appointed Mr Yves van den Berge with effect from 29 July 2020. [394] By letter of 7 October 2020, the Council notified the applicant, and all the other unsuccessful candidates, of that decision and provided them with relevant information about the reasons behind its decision to appoint another candidate, namely Mr van den Berge.

The applicant then asked the Council to send him all documents relating to the conduct of the selection procedure in so far as it affected him. He then brought an action for the annulment of that decision, in so far as it appoints Mr van den Berge as European Prosecutor of the European Public Prosecutor's Office and rejects his own application.

By its judgment, the Court dismisses the applicant's action. For the first time, the Court examines the legality of Implementing Decision 2020/1117 appointing the European Prosecutors of the European Public Prosecutor's Office, adopted pursuant to Regulation 2017/1939

Findings of the Court

In the first place, the Court examines whether the Council was able to depart from the order of preference drawn up by the selection panel responsible for assessing the abilities of the candidates nominated by the Member States. In that regard, having recalled the wording of the provisions of the procedure which led to the adoption of the contested decision – the actual conduct of which is not disputed by the applicant – the Court notes, first, that, according to the third paragraph of point VII.2 of the operating rules of the selection panel, the ranking drawn up by that panel on the basis of the qualifications and experience of the three candidates nominated by the Member State in question is not binding on the Council. Secondly, the Court observes that neither Article 16(2) and (3) of Regulation 2017/1939, nor the operating rules of the selection panel precludes the Council, when selecting between the three candidates nominated by a Member State as part of the authority granted to it by Article 16(2) and (3), from taking account of information provided to it by the governments of its Member State representatives, or indeed by the Member State in question itself. Consequently, the Court considers that the contested decision was adopted in compliance with the procedural rules governing the adoption of that decision [395] and with the principle of non-discrimination.

In the second place, the Court examines whether the Council complied with its obligation to state reasons with regard to the applicant whose candidature was rejected. Having recalled the scope of the obligation to state reasons [396] and having examined the legal nature of the contested decision, the Court considers that the reasoning underlying the contested decision, to the extent that it implicitly rejects the applicant's candidature for the position of European Prosecutor for the Kingdom of Belgium, should, in principle, have been sent to him at the same time as the contested decision.

In that regard, the Court notes that the only statement of reasons contained in the contested decision, as published in the *Official Journal of the European Union*, is to be found in recital 13 thereof, which states: 'as regards the candidates nominated by Belgium, Bulgaria and Portugal, the Council did not follow the non-binding order of preference of the selection panel, on the basis of a different assessment of the merits of those candidates which was carried out in the relevant preparatory bodies of the Council'. The Court recalls that it is clear from the third paragraph of point VII.2 of the

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394 Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office (OJ 2020 L 244, p. 18).

395 In particular, with Articles 14 and 16 of Regulation 2017/1939 and points VI.2 and VII.2 of the operating rules of the selection panel.

396 Obligation laid down in Article 296 TFEU and in Article 41(2)(c) of the Charter of Fundamental Rights of the European Union.

operating rules of the selection panel that the ranking given by the panel to the three candidates nominated by the Kingdom of Belgium on the basis of the candidates' qualifications and experience was not binding on the Council. The Council was therefore free either to use that ranking or to base its decision on a different assessment of the candidates' merits. Therefore, according to the Court, the applicant is wrong to submit that the statement of reasons in the contested decision should have allowed him to understand why the Council had decided not to follow the order of preference drawn up by the selection panel.

Nonetheless, the Court notes that the statement of reasons contained in recital 13 of the contested decision is not, in itself, such as to allow either the applicant or the Court to understand why the Council considered that the candidature of the candidate appointed to the position of European Prosecutor of the Kingdom of Belgium was of greater merit than that of the applicant. However, the Court finds that, in its letter of 7 October 2020, the Council set out in sufficient detail the reasons why it considered the appointed candidate better suited to the performance of the duties of a European Prosecutor than the other two candidates.

Therefore, according to the Court, while it would have been desirable for the applicant to be informed of the supplemental reasons for the rejection of his candidacy at the same time that the contested decision was published in the Official Journal, the Court notes that the applicant was apprised of those reasons by means of the letter from the Council of 7 October 2020, that is, before he brought his action, and that, in the circumstances, a communication of that sort allowed him to understand the justification for the decision and to defend his rights.

In the third and last place, the Court addresses the applicant's arguments in which he alleges that the contested decision is affected by a manifest error of assessment. In that regard, the Court recalls that an institution has a wide discretion when assessing and comparing the merits of the candidates for a vacant post and that the factors on which that assessment is based cover not only the efficiency and vocational aptitude of the applicants but also their character, behaviour and general personality. That is all the more true where the post involves significant responsibilities, such as those undertaken by the European Prosecutors under Regulation 2017/1939. [397]

The Court points out that the European Prosecutors are required to undertake significant responsibilities, which is also confirmed by the fact they are appointed at grade AD 13, which corresponds, according to Annex I to the Staff Regulations of Officials of the European Union, to the function of adviser or equivalent. The function of European Prosecutor therefore sits between the functions of director (AD 15-AD 14) and those of head of unit or equivalent (AD 9-AD 14). Therefore, according to the Court, the Council has a wide discretion when assessing and comparing the merits of the candidates for the position of European Prosecutor of a Member State.

Examining, one by one, the arguments put forward by the applicant concerning the Council's wide power of discretion, the Court finds that the applicant has failed to show that, in the present case, the Council exceeded the limits on its wide power of discretion by selecting and appointing Mr van den Berge to the position of European Prosecutor.

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397 Recital 24, Article 9, Article 12(1), (3) and (5) and Article 104 of Regulation 2017/1939

III. Competition

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

Judgment of 2 February 2022, Scania and Others v Commission (T-799/17, EU:T:2022:48)

(Competition – Agreements, decisions and concerted practices – Truck manufacturers' market – Decision finding an infringement of Article 101 TFEU and of Article 53 of the EEA Agreement – Agreements and concerted practices in relation to the prices of trucks, the timing for the introduction of emission technologies and the passing on to customers of the costs relating to those technologies – 'Hybrid' procedure staggered over time – Presumption of innocence – Principle of impartiality – Charter of Fundamental Rights – Single and continuous infringement – Restriction of competition by object – Geographic scope of the infringement – Fine – Proportionality – Equal treatment – Unlimited jurisdiction)

By decision of 27 September 2017 ('the contested decision), [398] the European Commission found that the companies Scania AB, Scania CV AB and Scania Deutschland GmbH, three entities of the Scania group, which produce and sell heavy trucks used for long-haulage transport (together, 'Scania'), had infringed EU rules prohibiting cartels, [399] by participating, from January 1997 to January 2011, with their competitors, in collusive arrangements aimed at restricting competition on the market for medium and heavy trucks in the EEA. The Commission imposed a fine of EUR 880 523 000 on Scania.

The contested decision was adopted following a 'hybrid' procedure combining the settlement procedure [400] and the standard administrative procedure in cartel matters.

In the present case, each undertaking to which a statement of objections was addressed, including Scania, confirmed to the Commission its willingness to participate in settlement discussions. However, following discussions with the Commission, Scania decided to withdraw from that procedure. The Commission thus adopted a settlement decision in respect of the undertakings which had submitted a formal request in that regard, [401] and continued the investigation concerning Scania.

By its judgment of 2 February 2022, the Court dismisses the action brought by Scania seeking annulment of the contested decision, and provides clarifications regarding the legality of a 'hybrid' procedure in cartel matters and the concept of a single and continuous infringement.

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398 Commission Decision C(2017) 6467 final of 27 September 2017, relating to proceedings under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) (Case AT.39824 – Trucks).

399 Article 101 TFEU and Article 53 of the EEA Agreement.

400 That procedure is governed by Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18). It enables the parties in cartel cases to acknowledge their liability and, in exchange, to receive a reduction in the amount of the fine imposed.

401 Decision C(2016) 4673 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39824 – Trucks). That decision was adopted on the basis of Article 7 and Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

Findings of the Court

As regards the legality of the 'hybrid' procedure followed by the Commission, the Court begins by observing that, contrary to what Scania submitted, the Commission's decision to follow such a procedure does not, in itself, entail an infringement of the presumption of innocence, the rights of the defence or the duty of impartiality. The provisions governing the settlement procedure do not preclude the Commission from being able to follow such a procedure in the context of the application of Article 101 TFEU. Furthermore, under the case-law, in such procedures, the Commission is entitled, initially, to adopt a settlement decision and then go on to adopt a decision following the standard procedure, provided that it ensures observance of the abovementioned principles and rights.

That being so, the Court examines whether, in the circumstances of the present case, the Commission observed those principles.

As regards the complaint alleging infringement of the principle of the presumption of innocence, Scania submitted that the settlement decision had defined the Commission's final decision as regards the same facts as those set out in the statement of objections and had concluded, on the basis of the same evidence used in the contested decision, that those facts, in which Scania had also participated, constituted an infringement.

In that regard, the Court notes, in the first place, that none of the passages of the statement of reasons for the settlement decision, read in its entirety, in the light of the particular circumstances in which the settlement decision had been adopted, was likely to be understood as a premature expression of Scania's liability. In the second place, the Court clarifies that the acknowledgement by the addresses of a settlement decision of their liability cannot lead to the implicit acknowledgement of the liability of the undertaking which decided to withdraw from that procedure, on account of its possible participation in the same facts regarded as an infringement in the settlement decision. In the context of the standard administrative procedure which follows the adoption of such a decision, the undertaking concerned and the Commission are, in relation to the settlement procedure, in a situation known as 'tabula rasa', where liabilities have yet to be determined. Thus, the Commission, first, is bound solely by the statement of objections and, secondly, is required to review the file in the light of all the relevant circumstances, including all the information and arguments put forward by the undertaking concerned when exercising its right to be heard. Consequently, the Commission's legal classification of the facts with regard to the settling parties does not in itself presuppose that the same legal classification of the facts was necessarily adopted by the Commission with respect to the undertaking which withdrew from such a procedure. In that context, there is nothing to prevent the Commission from relying on evidence used in both decisions of the hybrid procedure.

In the light of those considerations and in view of the fact that Scania did not deny that it had had the opportunity to submit all the evidence to challenge the facts and evidence on which the Commission relied in the standard administrative procedure, including the evidence added to the file after the statement of objections, the Court finds that there was no infringement of the principle of the presumption of innocence in the present case.

As regards the complaint alleging infringement of the rights of defence, the Court found that, in the settlement decision, the Commission had in no way prejudged Scania's liability for the infringement. Consequently, the fact that Scania was not heard in the context of that procedure could not result in there being an infringement of its rights of defence.

As regards the complaint alleging infringement of the principle of impartiality, the Court found that Scania had not established that the Commission had not offered, during the investigation procedure, all the guarantees to exclude any legitimate doubt as regards its impartiality in the examination of the case. When the Commission examines, in the context of the standard procedure, the evidence submitted by the parties which have chosen not to settle, it is in no way bound by the factual findings and legal classifications which it adopted in the settlement decision. Furthermore, given that the principle which prevails in EU law is that evidence may be freely adduced and that the Commission

has discretion as to whether it is appropriate to adopt investigative measures, its refusal to adopt new investigative measures is not contrary to the principle of impartiality, unless it is demonstrated that the absence of such measures is due to the Commission's bias.

As regards the concept of a single and continuous infringement, the Court examines the conditions relating to the existence of such an infringement in the present case and its imputability to Scania.

As regards the finding that there was a single and continuous infringement, the Court observes that, contrary to what Scania argued, such a finding does not necessarily presuppose that a number of infringements have been established, each of which falls within Article 101 TFEU, but rather the demonstration that the various instances of conduct identified form part of an overall plan designed to achieve a single anticompetitive objective

In the present case, the Court finds that the Commission had established to the requisite legal standard that the collusive contacts which took place over time at different levels, in particular at top management level between 1997 and 2004, at lower headquarters level between 2000 and 2008, and at German level between 2004 and 2011, taken together, formed part of an overall plan aimed at achieving the single anticompetitive objective of restricting competition on the market for medium and heavy trucks in the EEA.

More specifically, the existence of links between the three levels of the collusive contacts was apparent from the fact that the participants in the meetings were always employees of the same undertakings, there was a temporal overlap between the meetings held at the different levels and there were contacts between employees at the lower level of the respective headquarters of the parties to the cartel and the employees at German level. Furthermore, the nature of the information shared, the participating undertakings, the objectives and the products concerned remained the same throughout the infringement period. Thus, even though the collusive contacts at top management level had been interrupted in September 2004, the same cartel, which had the same content and scope, was continued after that date, the only difference being that the employees involved were from different organisational levels within the undertakings involved, and not from top management level. In that context, the alleged fact that the Scania employees at German level did not know that they were involved in the continuation of the practices that had taken place at the other two levels, or that the Scania employees who participated in the meetings at lower headquarters level were not aware of the meetings at top management level was of no relevance to the finding that there was an overall plan. Awareness of the existence of such a plan must be assessed at the level of the undertakings involved and not at the level of their employees.

As regards the imputability of the infringement, the Court finds that, similarly, the factors determining the imputability of the single and continuous infringement must also be assessed at the level of the undertaking. In the present case, since Scania directly participated in all the relevant aspects of the cartel, the Commission was entitled to impute the infringement as a whole to Scania, without the Commission being required to demonstrate that the criteria of interest, knowledge and acceptance of the risk were satisfied.

2. Abuse of dominant position (Article 102 TFEU)

Judgment of 19 January 2022, Deutsche Telekom v Commission (T-610/19, EU:T:2022:15)

(Action for annulment and for damages – Competition – Abuse of dominant position – Slovak market for broadband telecommunications services – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Judgment annulling the decision in part and reducing the amount of the fine imposed – Refusal of the Commission to pay default interest – Article 266 TFEU – Article 90(4)(a) of

Delegated Regulation (EU) No 1268/2012 – Sufficiently serious breach of a rule of law conferring rights on individuals – Loss of use of the amount of the fine that had been unduly paid – Loss of profits – Default interest – Rate – Harm)

By decision of 15 October 2014, [402] the European Commission imposed on Deutsche Telekom AG ('Deutsche Telekom') a fine of EUR 31 070 000 for abuse of its dominant position on the Slovak market for broadband telecommunications services, in infringement of Article 102 TFEU and Article 54 of the EEA Agreement.

Deutsche Telekom brought an action for annulment of that decision but paid the fine on 16 January 2015. By its judgment of 13 December 2018, [403] the General Court upheld Deutsche Telekom's action in part and, exercising its unlimited jurisdiction, reduced the amount of the fine by EUR 12 039 019 On 19 February 2019, the Commission repaid that amount to Deutsche Telekom.

However, by letter of 28 June 2019 ('the contested decision'), the Commission refused to pay default interest to Deutsche Telekom for the period between the date of payment of the fine and the date of reimbursement of the portion of the fine held not to be due ('the period in question').

Deutsche Telecom accordingly brought an action before the Court seeking annulment of the contested decision and an order directing the Commission to pay compensation for lost revenue as a result of the loss of use, during the period in question, of the principal amount of the portion of the fine unduly paid or, in the alternative, compensation for the harm suffered as a result of the Commission's refusal to pay default interest on that amount.

By its judgment, the Seventh Chamber, Extended Composition, of the General Court upholds in part Deutsche Telekom's action for annulment and compensation. In that respect, it provides clarifications with regard to the Commission's obligation to pay default interest on the portion of a fine which, following a judgment of the EU Courts, must be reimbursed to the undertaking concerned.

Findings of the Court

In the first place, the Court rejects Deutsche Telekom's claim for compensation, on the basis of the non-contractual liability of the European Union, for the alleged loss of revenue which it claims resulted from the loss of use, during the period in question, of the portion of the fine that had been unduly paid and which corresponds to the annual return on its invested capital or to the weighted average cost of its capital.

In that regard, the Court notes that, in order for the European Union to incur non-contractual liability, a number of cumulative conditions must be satisfied: there must be a sufficiently serious breach of a rule of law conferring rights on individuals; the damage must actually have occurred; and there must be a causal link between the breach and the harm suffered, these being matters which the applicant must prove.

In the present case, however, Deutsche Telekom failed to adduce conclusive proof of the actual and certain nature of the harm alleged. More specifically, Deutsche Telekom demonstrated neither that it would necessarily have invested the amount of the fine that had been unduly paid in its business nor

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402 Decision C(2014) 7465 final relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39523 – Slovak Telekom), rectified by Commission Decision C(2014) 10119 final of 16 December 2014, and also by Commission Decision C(2015) 2484 final of 17 April 2015.

403 Judgment of 13 December 2018, *Deutsche Telekom* v *Commission* (T-827/14, EU:T:2018:930).

that the loss of the use of that amount led it to abandon specific and actual projects. Deutsche Telekom had also failed in this context to demonstrate that it did not have the necessary funds to take advantage of an investment opportunity.

In the second place, the Court addresses Deutsche Telekom's claim, put forward in the alternative, for compensation for infringement of Article 266 TFEU, the first paragraph of which provides for the obligation on institutions whose act has been declared void by a judgment of the EU Courts to take all necessary measures to comply with that judgment.

The Court notes, first, that, by imposing on the institutions the obligation to take all necessary measures to comply with the judgments of the EU Courts, the first paragraph of Article 266 TFEU confers rights on the individuals who have been successful in their actions before those Courts. Second, the Court notes that default interest represents an essential component of the obligation on the institutions under that provision to restore an applicant to his, her or its original position. It therefore follows from that provision that, in the event of cancellation and reduction of a fine imposed on an undertaking for infringement of competition rules, there is an obligation on the Commission to repay the amount of the fine unduly paid together with default interest.

The Court clarifies that, since the applicable financial legislation [404] gives companies which have provisionally paid a fine that is later cancelled and reduced a right to claim restitution, and since the cancellation and reduction of the amount of the fine made by the EU Courts have retroactive effect, Deutsche Telekom's claim existed and was certain as to its maximum amount at the date of the provisional payment of the fine. The Commission was therefore required, under the first paragraph of Article 266 TFEU, to pay default interest on the portion of the fine held not to be due by the Court, for the entire period in question. That obligation is designed to provide compensation at a standard rate for the loss of use of the monies owed in connection with an objective delay and to encourage the Commission to exercise particular care when adopting a decision involving the payment of a fine.

The Court adds that, contrary to what the Commission has submitted, the obligation to pay default interest does not conflict with the deterrent function of fines in competition cases, since that deterrent function is necessarily taken into account by the EU Courts when exercising their unlimited jurisdiction to reduce, with retroactive effect, the amount of a fine. Moreover, the deterrent function of fines must be reconciled with the principle of effective judicial protection set out in Article 47 of the Charter of Fundamental Rights of the European Union, compliance with which is ensured by means of judicial review as provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine.

The Court also rejects the other arguments put forward by the Commission.

First, even if the amount of the fine paid by the applicant did not yield interest while it was in the Commission's possession, the Commission was required, following the judgment of the Court of 13 December 2018, to reimburse to the applicant the portion of the fine held to have been unduly paid, together with default interest, without this being precluded by Article 90 of Delegated Regulation No 1268/2012, which deals with the recovery of fines. In addition, the obligation to pay default interest follows directly from the first paragraph of Article 266 TFEU and the Commission is not entitled to determine, by way of an individual decision, the conditions under which it will pay default

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404 Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ 2012 L 362, p. 1) and Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1).

interest in the event of annulment of a decision imposing a fine and a reduction in the amount of that fine.

Second, the interest due in the present case is default interest, not compensatory interest. Deutsche Telekom's principal claim was a claim for restitution, relating to the payment of a fine that had been made provisionally. That claim existed and was certain as to its maximum amount or at least could be determined on the basis of established objective factors at the date of that payment.

Since the Commission was required to repay to Deutsche Telekom the portion of the fine that had been unduly paid, together with default interest, and since the Commission had no discretion in that regard, the Court concludes that the refusal to pay that interest to Deutsche Telekom constitutes a serious breach of the first paragraph of Article 266 TFEU, which results in the European Union incurring non-contractual liability. Given the direct link between the infringement that occurred and the harm consisting in the loss, during the period in question, of default interest on the portion of the fine that had been unduly paid, the Court awards Deutsche Telekom compensation in the amount of EUR 1 750 522.38, calculated by application, by analogy, of the rate provided for in Article 83(2)(b) of Delegated Regulation No 1268/2012, namely the rate applied by the European Central Bank in January 2015 to its principal refinancing operations, that being 0.05%, increased by three and a half percentage points.

Judgment of 26 January 2022, Intel Corporation v Commission (T-286/09 RENV, EU:T:2022:19)

(Competition – Abuse of dominant position – Microprocessors market – Decision finding an infringement of Article 102 TFEU and of Article 54 of the EEA Agreement – Loyalty rebates – 'Naked' restrictions – Characterisation as abuse – As-efficient-competitor analysis – Overall strategy – Single and continuous infringement)

By decision of 13 May 2009, [405] the European Commission imposed on the microprocessor manufacturer Intel a fine of EUR 1.06 billion for having abused its dominant position on the worldwide market for x86 [406] processors [407] between October 2002 and December 2007, by implementing a strategy intended to exclude competitors from the market.

According to the Commission, that abuse was characterised by two types of commercial conduct engaged in by Intel vis-a-vis its trading partners, namely naked restrictions and conditional rebates. As regards conditional rebates more specifically, Intel was found to have granted to four strategic original equipment manufacturers ('OEMs') (Dell, Lenovo, Hewlett-Packard (HP) and NEC), rebates which were conditional on those OEMs purchasing all or almost all of their x86 central processing units (CPUs) from Intel. Similarly, Intel was found to have awarded payments to a European retailer of microelectronic devices (Media-Saturn-Holding; 'MSH') which were conditional on MSH selling exclusively computers containing Intel's x86 CPUs. Those rebates and payments ('the rebates at issue')

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405 Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 – Intel).

406 The processor is a key component of any computer, both in terms of overall performance and cost of the system.

407 Microprocessors used in computers can be subdivided into two categories, namely x86 processors and processors based on another architecture. The x86 architecture is a standard designed by Intel which can run both Windows and Linux operating systems.

ensured the loyalty of the four OEMs and MSH and thereby significantly diminished the ability of competitors to compete on the merits of their own x86 processors. According to the Commission, Intel's anticompetitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

The action brought by Intel against that decision was dismissed in its entirety by the General Court by judgment of 12 June 2014. [408] By judgment of 6 September 2017, on the appeal brought by Intel, the Court of Justice set aside that judgment and referred the case back to the General Court. [409]

In support of its claim for annulment of the initial judgment, Intel criticised the General Court in particular for having erred in law on account of the failure to examine the rebates at issue in the light of all the relevant circumstances. In that regard, the Court of Justice noted that the General Court, like the Commission, had relied on the assumption that the fidelity rebates granted by an undertaking in a dominant position were by their very nature capable of restricting competition, with the result that it was not necessary to analyse all the circumstances of the case or to carry out an as-efficient-competitor ('AEC') test. [410] Nevertheless, the Commission did carry out, in its decision, an in-depth examination of those circumstances, which led it to conclude that an as-efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor. The Court of Justice concluded that the AEC test had played an important role in the Commission's assessment of whether the scheme at issue was capable of having foreclosure effects on competitors, with the result that the General Court was required to examine all of Intel's arguments concerning that test and how the Commission had applied it. Since the General Court had failed to conduct such an examination, the Court of Justice set aside the initial judgment and referred the case back to the General Court in order for it to examine, in the light of the arguments put forward by Intel, the capability of the rebates at issue to restrict competition.

By its judgment of 26 January 2022, the General Court, giving a ruling on the referral back, sets aside in part the contested decision in so far as it characterises the rebates at issue as abusive within the meaning of Article 102 TFEU and imposes a fine on Intel in respect of all of its actions characterised as abusive.

Findings of the Court

As a preliminary point, the General Court provides clarification regarding the scope of the dispute following the referral back. In that regard, it observes that the setting aside of the initial judgment was justified only by one single error resulting from the failure to take into consideration, in the initial judgment, Intel's line of argument seeking to challenge the Commission's AEC analysis. Accordingly, the General Court takes the view that it can accept, for the purposes of its examination, all the findings not vitiated by the error thus found by the Court of Justice, in the present case being the findings in the initial judgment concerning the naked restrictions and their unlawfulness under Article 102 TFEU. According to the General Court, the Court of Justice did not invalidate, even in principle, the distinctions established in the contested decision between practices constituting such

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408 Judgment of 12 June 2014, *Intel* v *Commission* (T-286/09, EU:T:2014:547; 'the initial judgment').

409 Judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632; 'the judgment on the appeal').

410 The economic analysis carried out in this test concerns, in the present case, the capability of the rebates to foreclose a competitor which is as efficient as Intel, albeit not dominant. More precisely, the analysis seeks to establish at what price a competitor as efficient as Intel and facing the same costs as Intel would have had to offer processors in order to compensate an OEM or retailer of microelectronic devices for the loss of the rebates at issue, in order to determine whether, in such a situation, that competitor can still cover its costs.

restrictions and Intel's other actions which alone are the subject of the AEC analysis in question. Second, the General Court accepted the findings in the initial judgment according to which the Commission had established the existence of the rebates at issue in the contested decision.

Having provided that clarification, the General Court then commences, in the first place, the examination of the forms of order seeking the annulment of the contested decision by setting out the method defined by the Court of Justice for assessing whether a system of rebates has the capacity to restrict competition. In that respect, it recalls that, although a system of rebates set up by an undertaking in a dominant position on the market may be characterised as a restriction of competition, since, given its nature, it may be assumed to have restrictive effects on competition, what is involved, in the present case, is a mere presumption, which cannot relieve the Commission, in any event, of the obligation to conduct an analysis of anticompetitive effects. Accordingly, where an undertaking in a dominant position submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, was not capable of producing the foreclosure effects alleged against it, the Commission must analyse the foreclosure capacity of the scheme of rebates. In the context of that analysis, it is for the Commission not only to analyse, first, the extent of the undertaking's dominant position on the relevant market, and, second, the share of the market covered by the contested practice, together with the conditions and arrangements for granting the rebates in question, their duration and their amount, but also to assess the possible existence of a strategy intended to exclude at least as-efficient competitors. In addition, where the Commission has carried out an AEC test, that test is one of the factors which must be taken into account by the Commission in order to assess whether the rebate scheme is capable of restricting competition.

In the second place, the General Court reviews, first of all, whether the Commission's assessment of the capability of the rebates at issue to restrict competition relies on the method thereby defined. In that regard, it finds at the outset that the Commission erred in law in the contested decision in concluding that the AEC test, which it nevertheless carried out, was not necessary to enable it to establish that Intel's rebates at issue were abusive. That being the case, the General Court takes the view that it cannot agree with that finding. Since the judgment on the appeal states that the AEC test played an important role in the Commission's assessment as to whether the rebate scheme at issue was capable of having foreclosure effects, the General Court was required to examine Intel's arguments concerning that test.

In the third place, given that the analysis of the capacity of the rebates at issue to restrict competition forms part of demonstrating the existence of an infringement of competition law, in the present case an abuse of a dominant position, the General Court sets out the rules concerning the apportionment of the burden of proof and the standard of proof required. Accordingly, the principle of the presumption of innocence, which also applies in that field, requires the Commission to establish the existence of such an infringement, where necessary by means of a precise and consistent body of evidence, so as to leave no residual doubt in that regard. Where the Commission maintains that the established facts can be explained only by anticompetitive behaviour, it must be found that the infringement at issue has not been sufficiently demonstrated if the undertakings concerned put forward a separate plausible explanation of the facts. However, where the Commission relies on evidence which is, in principle, capable of demonstrating the existence of an infringement, it is for the undertakings concerned to demonstrate that the probative value of that evidence is insufficient.

In the fourth place, it is in the light of those rules that the General Court examines the arguments regarding the errors allegedly made by the Commission in its AEC analysis. In that regard, the General Court finds that the Commission has not established to the requisite legal standard the capacity of

each of the rebates at issue to have a foreclosure effect, in the light of the arguments put forward by Intel regarding the Commission's assessment of the relevant analysis criteria.

Indeed, first, as regards the application of the AEC test to Dell, the General Court takes the view that, in the circumstances of the present case, the Commission could, admittedly, reasonably rely, for the purposes of assessing the 'contestable share', [411] on data known to economic operators other than the dominant undertakings. However, having examined the evidence put forward by Intel in that regard, the General Court concluded that that evidence is capable of giving rise to doubt in the mind of the Court as to the result of that assessment, finding, therefore, the evidence relied on by the Commission to conclude that the rebates granted to Dell were capable of having a foreclosure effect throughout the whole of the relevant period to be insufficient. Second, the same applies, according to the General Court, to the analysis of the rebate granted to HP, since the foreclosure effect found was not, in particular, demonstrated for the entire infringement period. Third, as regards the rebates granted on different terms to companies within the NEC group, the General Court finds two errors which vitiate the Commission's analysis: one affecting the value of the conditional rebates and the other relating to an extrapolation of the results for one single quarter-year period to the entire infringement period, which was not sufficiently substantiated. Fourth, the General Court also concludes that there was insufficient evidence regarding the capacity of the rebates granted to Lenovo to have a foreclosure effect, on account of errors made by the Commission in the quantified assessment of the non-cash advantages at issue. Fifth, the General Court makes the same finding regarding the AEC analysis for MSH, considering, in particular, that the Commission provided no explanation at all of the reasons which led it, in the analysis of the payments made to that retailer, to extrapolate the results obtained, for the purposes of analysing the rebates granted to NEC, for a one-quarter-year period to the entire infringement period.

In the fifth and last place, the General Court reviews whether the contested decision took proper account of all the criteria making it possible to determine the capacity of the pricing practices to have a foreclosure effect, in accordance with the case-law of the Court of Justice. In that regard, it finds that the Commission did not consider properly the criterion relating to the share of the market covered by the contested practice and also did not analyse correctly the duration of the rebates.

It follows, therefore, from all of the foregoing considerations that the analysis carried out by the Commission is incomplete and, in any event, does not make it possible to establish to the requisite legal standard that the rebates at issue were capable of having, or were likely to have, anticompetitive effects, which is why the General Court annuls the decision, in so far as it finds that those practices constitute an abuse within the meaning of Article 102 TFEU.

Finally, as regards the effect of such setting aside in part of the contested decision on the amount of the fine imposed by the Commission on Intel, the General Court considers that it is not in a position to identify the amount of the fine which relates solely to the naked restrictions. Accordingly, it annuls in its entirety the article of the contested decision which imposes on Intel a fine of EUR 1.06 billion in respect of the infringement found.

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411 This term refers, in the present case, to the share of demand which Intel's customers were willing and able to switch to another supplier, which is necessarily limited given, in particular, the nature of the product and Intel's brand image and profile.

Judgment of 15 June 2022, Qualcomm v Commission (Qualcomm – Exclusivity payments) (T-235/18, EU:T:2022:358)

(Competition – Abuse of a dominant position – LTE chipsets market – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Exclusivity payments – Rights of the defence – Article 19 and Article 27(1) of Regulation (EC) No 1/2003 – Foreclosure effects)

The applicant, Qualcomm Inc., is a US company which develops and supplies baseband chipsets ('chipsets') intended for use in smartphones and tablets to enable them to connect to cellular networks, [412] according to the respective standard. Chipsets are therefore sold to original equipment manufacturers, including Apple, who incorporate them into their devices.

By decision of 24 January 2018, [413] the Commission imposed on the applicant a fine of close to EUR 1 billion for having abused its dominance on the worldwide market for chipsets compatible with the LTE standard, for a period lasting from February 2011 to September 2016.

According to the Commission, that abuse was characterised by incentive payments being made, under agreements concluded between the applicant and Apple. Those agreements provided for incentive payments to be made by the applicant to Apple on condition that Apple source all of its LTE chipsets from the applicant. In those circumstances, the Commission took the view that those payments, which it characterises as exclusivity payments, were capable of having anticompetitive effects, in that they had reduced Apple's incentives to switch to competing LTE chipset providers, which was confirmed by Apple's internal documents and explanations.

By its judgment, the General Court annuls in its entirety the contested decision, basing its conclusions on, first, the finding of a number of procedural irregularities which affected the applicant's rights of defence, and, second, an analysis of the anticompetitive effects of the incentive payments, which it found to be incomplete and unfit to bear out such payments as being capable of having anticompetitive effects. In so doing, it provides clarification of the scope of the obligations on the Commission concerning, first, the putting together of the administrative case file in order to enable any undertaking under investigation to assert its rights of defence properly and, second, its analysis of the foreclosure capability of at least as efficient competitors.

Findings of the Court

As a preliminary point, the Court gives its ruling on the admissibility of certain further evidence adduced by the applicant after closure of the written part of the judicial proceedings. That evidence consists, in essence, of two sets of documents stemming from two sets of legal proceedings in the United States. Pointing out that it is admissible to lodge evidence late only if justified by exceptional circumstances, such as it having been impossible to produce the documents concerned earlier, the Court finds that, in the present case, contrary to the Commission's arguments, taking account, in particular, of the circumstances in which the applicant obtained them, the applicant did not have those documents when it lodged its written submissions. Accordingly, the Court finds that the further evidence so produced is admissible.

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412 Chipsets are used both for voice services and data transmission. Chipsets are made up of a number of components. Their compatibility with one or more cellular communication standards, such as the GSM, UMTS or LTE standards, is one of their essential characteristics.

413 Commission Decision C(2018) 240 final of 24 January 2018 relating to proceedings under Article 102 [TFEU] and Article 54 of the [EEA Agreement] (Case AT.40220 – Qualcomm (Exclusivity payments)).

As regards substance, the Court examines, first of all, the plea alleging manifest procedural errors, choosing to begin by examining the complaint regarding infringement of the rights of the defence concerning the putting together of the case file, then the differences between the statement of objections and the contested decision.

As regards, on the one hand, the putting together of the case file, the Court points out at the outset that it is for the Commission to record, in a form of its choosing, the precise content of all interviews conducted, under Article 19 of Regulation No 1/2003, for the purposes of collecting information relating to the subject matter of an investigation.

In the present case, the Court finds, first that the information provided to the applicant, on its request, by the Commission after receipt of the contested decision discloses that meetings and conference calls had been held with third parties, in their position as competitors or customers of the applicant. In that regard, the Court takes the view that the evidence concerning the purpose of those exchanges makes it possible to characterise them as interviews subject, as such, to the recording requirement referred to above. In the light of the evidence placed on the file, the Court observes that the notes sent by the Commission give no indication as to the content of the discussions which took place during those interviews, in particular regarding the nature of the information provided on the subjects addressed. Accordingly, the Court finds the first failure on the part of the Commission to fulfil its obligations to record the interviews concerned and to include those recordings in the case file.

Second, the same goes, according to the Court, for the exchanges with a third party, the existence of which was disclosed even later, during the judicial proceedings. Having observed that it was common ground that the Commission had not documented those exchanges, the Court bases its findings on the evidence placed on the file, and on a detailed analysis of their procedural context, to find that they had involved, at least in part, information concerning the purpose of the investigation at issue, and, consequently, that they are interviews which had to be recorded.

Third, the Court finds a further failure on the part of the Commission to fulfil its obligations in putting together the administrative case file. In that regard, it states that the evidence adduced by the Commission before the Court referred to a meeting with a third-party informant which took place before the Commission had commenced its investigation, and to allegations made by that third-party informant at that meeting. After having stated that the Commission had not documented that meeting in any way, the Court considers that such an omission is a procedural defect. Even though there is no requirement to make a record referred to above in relation to interviews before the first investigative act, as in the present case, the Commission nevertheless remains bound, more generally, to enable undertakings under investigation to gain proper access to inculpatory evidence contained in its case file. From that, it follows, in particular, that it is for the Commission to document, in a written document placed in the case file any meeting with a third-party informant which made it possible for it to gather, orally, inculpatory evidence which it intends to use, which, in the present case, it failed to do.

As regards the consequences to be drawn from the three sets of procedural errors thereby established, it is settled case-law that, where such errors exist, an infringement of the rights of the defence can be found only if the applicant undertaking demonstrates that it could have been better able to ensure its defence had those errors not occurred. In the present case, the Court observes that the evidence submitted by the applicant tends to demonstrate that those meetings and those conference calls could have provided information essential to the further course of the proceedings which might have been relevant to the applicant, by making it better able to ensure its defence, in the light, in particular, of the nature of the third parties in question.

As regards, on the other hand, the differences between the statement of objections and the contested decision, the Court observes, first of all, that the contested decision limits itself to finding abuse solely on the market for LTE chipsets, whereas the statement of objections contemplated abuse both on the LTE chipsets market and the UMTS chipsets market. In response to the statement of objections, the applicant sought to demonstrate, by means of an economic analysis known as ‘critical margin

analysis', [414] that the payments at issue were not capable of having foreclosure effects on those two markets. In the contested decision, the Commission rejected that analysis. However, the Court considers that, in so far as the alteration of the objections concerning the scope of the abuse had an effect on the relevance of the data which formed the basis of the applicant's analysis seeking to challenge the capability of its conduct to have foreclosure effects, the Commission ought to have given it the opportunity to be heard and, where necessary, to adapt its analysis in order to take into account the withdrawal of the objections relating to UMTS chipsets, the supply of which was no longer criticised by the Commission. Accordingly, having failed to hear the applicant on that point, the Court finds that the Commission infringed the rights of defence of the applicant.

Stating that the infringements of the rights of defence of the applicant which had been observed are sufficient to justify setting aside the contested decision, the Court finds it nevertheless useful to continue its examination even after having upheld the plea alleging infringement of the rights of defence.

Accordingly, second, the Court examines the plea alleging manifest errors of law and of assessment seeking to challenge the finding that the payments concerned were capable of having potential anticompetitive effects.

In that regard, the Court points out first of all that, according to established case-law, when an undertaking, relying on evidence, challenges the capability of the conduct alleged against it to restrict competition and, in particular, to have foreclosure effects, it is for the Commission to carry out an analysis of the foreclosure capacity of competitors that are at least as efficient, in order to establish that the conduct alleged is abusive.

As a preliminary point, the Court states that the conduct alleged against the applicant falls solely within the scope of its contractual relations with Apple during the period concerned. The Court, following a detailed analysis of the contested decision and of the information provided by the Commission, observes that, first, the Commission found that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors to source LTE chipsets for all its devices, namely iPhones and iPads, basing its conclusions on an analysis of the capability of those payments to have anticompetitive effects. Second, the Commission took the view that those payments had actually reduced Apple's incentives to switch to the applicant's competitors to obtain supplies of LTE chipsets for certain of its devices, namely certain iPad models which Apple intended to launch in 2014 and 2015, based on an analysis of the actual effect of those payments.

In that context, the Court examines the applicant's complaints concerning those two aspects of the Commission's analysis.

In the first place, the Court finds that, in concluding that the payments at issue were capable of restricting competition for all of Apple's LTE chipset demand for both iPhones and iPads, the Commission failed to take account of all of the relevant factual circumstances. The Commission had taken the view, in that regard, that the payments at issue had reduced Apple's incentive to switch to the applicant's competitors to obtain supplies of LTE chipsets, whereas, as is apparent from the contested decision, Apple had no technical alternative to the applicant's LTE chipsets for the majority of its requirements during the period concerned, namely that part corresponding, in essence, to iPhones. The Court recalls that, since all the relevant circumstances surrounding the conduct

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414 Such analysis sought to demonstrate that a hypothetical competitor as efficient as the applicant could have competed with the applicant to supply chipsets compatible with the two standards concerned to Apple, and would have been in a position to offer a price covering its costs while also compensating Apple for the loss of the incentive payments at issue.

complained of must be taken into account, the analysis of the anticompetitive capability of that conduct cannot be purely hypothetical.

In the second place, the Court observes that the conclusion that the payments at issue had actually reduced Apple's incentives to switch to the applicant's competitors to obtain supplies of LTE chipsets in respect of its requirements for certain iPad models to be launched in 2014 and 2015 is not sufficient to determine that they were anticompetitive. In that regard, the Court considers that an analysis of that nature cannot remedy the failure to take account of all the relevant factual circumstances in the Commission's general demonstration of the capability of the payments at issue to have anticompetitive effects during the period concerned in relation to all of Apple's LTE chipset requirements. In any event, the Court finds that the analysis of those actual effects in relation to certain iPad models to be launched in 2014 and 2015, first of all, is vitiated by a lack of consistency in the evidence relied on in support of its findings, next, was carried out without taking account of all the relevant factors for that purpose and, finally, was carried out relying on evidence which did not make it possible to support its findings.

Observing, accordingly, that the Commission failed to characterise to the requisite legal standard the payments at issue as constituting an abuse of dominant position, the Court upholds the plea and sets aside, also on that basis, the contested decision.

Judgment of 14 September 2022, Google and Alphabet v Commission (Google Android) (T-604/18, EU:T:2022:541)

(Competition – Abuse of dominant position – Smart mobile devices – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Concepts of multi-sided platform and market ('ecosystem') – Operating system (Google Android) – App store (Play Store) – Search and browser applications (Google Search and Chrome) – Agreements with device manufacturers and mobile network operators – Single and continuous infringement – Concepts of overall plan and conduct implemented in the context of the same infringement (product bundles, exclusivity payments and anti-fragmentation obligations) – Exclusionary effects – Rights of the defence – Unlimited jurisdiction)

Google, [415] an undertaking in the information and communications technology sector specialising in internet-related products and services, derives most of its revenue from its flagship product, the search engine Google Search. Google's business model is based on the interaction between, on the one hand, a number of products and services offered to users for the most part free of charge and, on the other hand, online advertising services using data collected from those users. Google also offers the Android operating system (OS), which, according to the European Commission, was installed on approximately 80% of smart mobile devices used in Europe in July 2018.

Various complaints were submitted to the Commission regarding some of Google's business practices in the mobile internet, leading the Commission to initiate a procedure against Google in relation to Android on 15 April 2015. [416]

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415 In this case, 'Google' refers jointly to Google LLC, formerly Google Inc., and to its parent company, Alphabet, Inc.

416 In June 2017, the Commission had already imposed a fine on Google of EUR 2.42 billion for abuse of its dominant position on the market for search engines by conferring an unlawful advantage on its own comparison shopping service. That decision was largely upheld by the General Court by judgment of 10 November 2021, *Google and Alphabet* v *Commission (Google Shopping)*,(T-612/17, EU:T:2021:763). Google's appeal against that judgment is currently pending before the Court of Justice (C-48/22 P).

By decision of 18 July 2018, [417] the Commission fined Google for having abused its dominant position by imposing anticompetitive contractual restrictions on manufacturers of mobile devices and on mobile network operators, in some cases since 1 January 2011. Three types of restriction were identified:

– those contained in 'distribution agreements', requiring manufacturers of mobile devices to pre-install the general search (Google Search) and (Chrome) browser apps in order to be able to obtain a licence from Google to use its app store (Play Store);

– those contained in 'anti-fragmentation agreements', under which the operating licences necessary for the pre-installation of the Google Search and Play Store apps could be obtained by mobile device manufacturers only if they undertook not to sell devices running versions of the Android operating system not approved by Google;

– those contained in 'revenue share agreements', under which the grant of a share of Google's advertising revenue to the manufacturers of mobile devices and the mobile network operators concerned was subject to their undertaking not to pre-install a competing general search service on a predefined portfolio of devices.

According to the Commission, the objective of all those restrictions was to protect and strengthen Google's dominant position in relation to general search services and, therefore, the revenue obtained by Google through search advertisements. The common objective and the interdependence of the restrictions at issue therefore led the Commission to classify them as a single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement.

Consequently, the Commission imposed a fine of almost EUR 4.343 billion on Google, the largest fine ever imposed by a competition authority in Europe.

The action brought by Google is largely dismissed by the General Court, which confines itself to annulling the decision only in so far as it finds that the portfolio-based revenue share agreements referred to above constitute, in themselves, an abuse. In the light of the particular circumstances of the case, the General Court also considers it appropriate, in the exercise of its unlimited jurisdiction, to set the amount of the fine imposed on Google at EUR 4.125 billion.

Findings of the Court

As a first step, the General Court examines the plea alleging errors of assessment in the definition of the relevant markets and in the subsequent assessment of Google's dominant position on some of those markets. In that context, the General Court states that it is required, essentially, to ascertain, in the light of the parties' arguments and of the reasoning set out in the contested decision, whether Google's exercise of its power on the relevant markets enabled it to act to an appreciable extent independently of the various factors likely to constrain its behaviour.

In the present case, the General Court notes at the outset that the Commission identified, first of all, four types of relevant market: (i) the worldwide market (excluding China) for the licensing of smart mobile device operating systems; (ii) the worldwide market (excluding China) for Android app stores; (iii) the various national markets, within the European Economic Area (EEA), for the provision of general search services; and (iv) the worldwide market for non OS-specific mobile web browsers. The Commission went on to find that Google held a dominant position on the first three of those markets.

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417 Commission Decision C(2018) 4761 final of 18 July 2018 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT 40099 – Google Android).

The General Court observes however that, in the Commission's presentation of the different relevant markets, it duly mentioned their complementarity, presenting them as being interconnected, particularly in the light of the overall strategy implemented by Google to promote its search engine by integrating it into an 'ecosystem'.

Having been called upon, specifically, to rule on the definition of the boundaries of the market for the licensing of smart mobile device operating systems and the associated assessment of the position held by Google in that market, the General Court establishes, first of all, that the Commission found without objection from Google that the 'non-licensable' operating systems exclusively used by vertically integrated developers, like Apple's iOS or Blackberry, are not part of the same market, given that third-party manufacturers of mobile devices cannot obtain licences for them. Nor did the Commission err in also finding that Google's dominant position on that market was not called into question by the indirect competitive constraint exerted on that market by Apple's non-licensable operating system. The Commission also rightly concluded that the open-source nature of the licence to use the Android source code did not constitute a sufficient competitive constraint to counterbalance that dominant position.

As a second step, the General Court examines the various pleas alleging that the finding that the restrictions at issue were abusive was incorrect.

First, as regards the pre-installation conditions imposed on manufacturers of mobile devices, [418] the Commission concluded that they were abusive, distinguishing, on the one hand, the Google Search and Play Store apps bundle from the Chrome browser, Google Search and Play Store apps bundle, and finding, on the other hand, that those bundles had restricted competition during the infringement period, for which Google had been unable to demonstrate any objective justification.

In that regard, the General Court notes that, in order to substantiate the claim that a significant competitive advantage was conferred by the pre-installation conditions at issue, the Commission found that such pre-installation could give rise to a 'status quo bias' as a result of the tendency of users to use the search and browser apps available to them and apt to increase significantly and on a lasting basis the usage of the service concerned, an advantage which could not be offset by Google's rivals. According to the General Court, none of the criticisms put forward by Google can be levelled against the Commission's analysis in that respect.

Next, addressing complaints regarding the finding that the means available to Google's competitors did not enable them to counterbalance the competitive advantage derived by Google from the pre-installation conditions in question, the General Court observes that, while those conditions do not prohibit the pre-installation of competing apps, the fact remains that there is provision for such a prohibition, in respect of the devices covered, in the revenue share agreements – whether portfolio-based or the device-based revenue share agreements that replaced them – that is, more than 50% of Google Android devices sold in the EEA from 2011 to 2016, which the Commission was able to take into account as the combined effects of the restrictions in question. In addition, the Commission was also legitimately able to rely on its observation of the actual situation to support its findings, noting in that respect the limited use in practice of pre-installation or downloading of competing apps or of access to competing search services through browsers. Lastly, deeming Google's criticisms of the considerations that led the Commission to find that there was no objective justification for the bundles examined also to be ineffective, the General Court rejects in its entirety the plea by which it is alleged that the finding that the pre-installation conditions were abusive is incorrect.

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418 In view of the similarities between the cases, the General Court refers in that respect to the judgment of 17 September 2007, *Microsoft* v *Commission* (T-201/04, EU:T:2007:289) referred to by the Commission in the contested decision.

Second, as regards the assessment of the sole pre-installation condition included in the portfolio-based revenue share agreements, the General Court finds, first of all, that the Commission was justified in considering the agreements at issue to constitute exclusivity agreements, in so far as the payments provided for were subject to there being no pre-installation of competing general search services on the portfolio of products concerned.

That being so, in view of the fact that, in finding them to be abusive, the Commission considered that those agreements were apt to encourage the manufacturers of mobile devices and the mobile network operators concerned not to pre-install such competing services, it was required, according to the case-law applicable to that type of practice, [419] to carry out an analysis of their capability to restrict competition on the merits in the light of all the relevant circumstances, including the share of the market covered by the contested practice and its intrinsic capacity to foreclose competitors at least as efficient as the dominant undertaking.

The Commission's analysis was based essentially on two elements: examination of the coverage of the contested practice, and the results of the 'as efficient competitor' [420] test which it applied. In so far as the Commission found, in relation to the first element, that the agreements in question covered a 'significant part' of the national markets for general search services, irrespective of the type of device used, the General Court considers that statement to be unsupported by the evidence which the Commission set out in the contested decision. There is a similar deficiency as regards one of the premisses of the AEC test, namely, the search query share that might be contested by a hypothetically at least as efficient competitor whose app would have been pre-installed alongside Google Search. The General Court also identifies a number of errors of reasoning relating to the assessment of essential variables of the AEC test applied by the Commission, namely, the estimate of the costs attributable to such a competitor; the assessment of the competitor's ability to obtain pre-installation of its app; and the estimate of likely revenues on the basis of the age of mobile devices in use. It follows that, as conducted by Commission, the AEC test does not support the finding of abuse resulting from the portfolio-based revenue share agreements in themselves, and the corresponding plea is accordingly upheld by the General Court.

Third, as regards the assessment of the restrictions contained in the anti-fragmentation agreements, the General Court observes, as a preliminary point, that the Commission considers such a practice to be abusive in so far as it seeks to prevent the development and market presence of devices running a non-compatible Android fork, [421] although the Commission does not dispute Google's right to impose compatibility requirements in respect only of devices on which its apps are installed. Having established the material existence of the practice in question, the General Court also considers that the Commission was justified in accepting the ability of non-compatible Android forks to exert competitive pressure on Google. In those circumstances, in the light of the matters set out by the Commission that are relevant to establishing the impediment to the development and marketing of competing products on the market for licensable operating systems, the Commission was entitled, according to the General Court, to find that the practice in question had led to the strengthening of Google's dominant position on the market for general search services, while deterring innovation, in so far as it had limited the diversity of the offers available to users.

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419 See judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632).

420 'The AEC test'.

421 These are, in this instance, operating systems developed by third parties from the Android source code released by Google under an open-source licence, which covers the basic features of such a system, but not the Android apps and services owned by Google. In that context, the anti-fragmentation agreements in question defined a minimum compatibility standard for implementation of the Android source code.

As a third step, the General Court examines the plea alleging infringement of the rights of the defence, by which Google seeks a declaration that its right of access to the file was infringed and that its right to be heard was not respected.

Examining, in the first place, the alleged infringement of the right of access to the file, the General Court makes clear, as a preliminary point, that Google's complaints in this respect relate to the content of a set of notes sent by the Commission in February 2018 regarding meetings which the Commission held with third parties throughout its investigation. Since those meetings were all interviews conducted for the purpose of collecting information relating to the subject matter of the investigation, within the meaning of Article 19 of Regulation No 1/2003, [422] the Commission was consequently required to ensure that a record was drawn up that would enable the undertaking in question, when the time came, to acquaint itself with that record and to exercise the rights of the defence. In the present case, the General Court finds that the requirements thus outlined were not met on account, on the one hand, of the time that elapsed between the interviews and the transmission of the notes concerning them and, on the other, of the summary nature of those notes. As regards the inferences to be drawn from that procedural error, the General Court nevertheless recalls that, according to the case-law, a breach of the rights of the defence may be found to have occurred, where there is such a procedural error, only if the undertaking concerned demonstrates that it would have been better able to ensure its defence had there not been that error. In the present case, the General Court considers, however, that that has not been demonstrated by the evidence disclosed to it or the arguments presented to it in that regard.

Addressing, in the second place, the alleged infringement of the right to be heard, the General Court observes that Google's criticisms in that regard constitute the procedural aspect of the complaints put forward to challenge the merits of the finding as to the abusive nature of certain revenue share agreements, in so far as they seek to challenge the denial of a hearing on the AEC test applied in that context. Given that the Commission refused Google a hearing, even though it had sent Google two letters of facts supplementing substantially the substance and scope of the approach initially set out in the statement of objections in that respect, but without adopting, as it ought to have done, a supplementary statement of objections followed by a hearing, the General Court considers that the Commission infringed Google's rights of defence and thus deprived Google of the opportunity better to ensure its defence by developing its arguments in a hearing. The General Court adds that the value of a hearing is all the more apparent in the present case, given the deficiencies previously identified in the Commission's application of the AEC test. Consequently, the finding as to the abusive nature of the portfolio-based revenue share agreements must be annulled on that basis also.

Lastly, being required to carry out, in the exercise of its unlimited jurisdiction, an autonomous assessment of the amount of the fine, the General Court states at the outset that, while the contested decision must accordingly be annulled in part, in so far as it concludes that the portfolio-based revenue share agreements are in themselves abusive, that partial annulment does not affect the overall validity of the finding, in the contested decision, of an infringement, in the light of the exclusionary effects arising from the other abusive practices implemented by Google during the infringement period.

On the basis of its own assessment of all the circumstances relating to the penalty, the General Court rules that it is appropriate to vary the contested decision, concluding that the amount of the fine to be imposed on Google for the infringement committed is to be EUR 4.125 billion. To that end, the General Court considers it appropriate, as did the Commission, to take account of the intentional

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422 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1).

nature of the implementation of the unlawful practices and of the value of relevant sales made by Google in the last year of its full participation in the infringement. By contrast, as regards taking into consideration the gravity and duration of the infringement, the General Court considers it appropriate, for the reasons set out in the judgment, to take account of the evolution over time of the different aspects of the infringement and of the complementarity of the practices concerned, in order to assess the impact of the exclusionary effects properly established by the Commission in the contested decision.

3. Developments in the area of mergers

Judgment of 13 July 2022, Illumina v Commission (T-227/21, EU:T:2022:447)

(Competition – Concentrations – Pharmaceutical industry market – Article 22 of Regulation (EC) No 139/2004 – Referral request from a competition authority not having jurisdiction under national law to examine the concentration – Commission decision to examine the concentration – Commission decisions accepting requests from other national competition authorities to join the referral request – Competence of the Commission – Time limit for submitting the referral request – Concept of 'made known' – Reasonable time – Legitimate expectations – Public statements by the Vice-President of the Commission – Legal certainty)

Illumina is an American company specialising in genomic sequencing. It develops, manufactures and markets integrated systems for genetic analysis, in particular next generation genomic sequencers which are used, among other things, in the development of cancer screening tests. Grail is an American biotechnology company which relies on genomic sequencing to develop such screening tests.

On 21 September 2020, those two undertakings [423] made public a proposal on the acquisition of exclusive control of Grail by Illumina. Since turnover did not exceed the relevant thresholds, the concentration at issue did not have a European dimension, within the meaning of Article 1 of the Merger Regulation, [424] and was accordingly not notified to the European Commission. Nor was it notified in the EU Member States or in States party to the Agreement on the European Economic Area, since it did not reach the relevant national thresholds either.

Under Article 22 of the Merger Regulation, a national competition authority has the option to request referral to the Commission for the examination of any concentration that does not have a European dimension, but which affects trade between Member States and threatens significantly to affect competition in the territory of the Member State concerned.

In the present case, after receiving, on 7 December 2020, a complaint concerning the concentration at issue, the Commission reached the preliminary conclusion that that concentration appeared to satisfy the necessary conditions in order to be the subject of a referral by a national competition authority. [425] It therefore sent a letter on 19 February 2021 to the Member States ('the invitation

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423 Together 'the undertakings concerned'.

424 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1; 'the Merger Regulation').

425 As regards, in particular, the potential impact of the concentration at issue on competition in the internal market, the preliminary analysis carried out by the Commission led it to describe concerns as regards the fact that the transaction could allow Illumina, a company well established in Europe, to block access to Grail's competitors to the next generation

letter') in order, first, to inform them of that concentration and, second, to invite them to send it a referral request under Article 22 of the Merger Regulation. On 9 March 2021, the French competition authority sent it such a referral request, which the Greek, Belgian, Norwegian, Icelandic and Dutch competition authorities subsequently requested, each in its own right, to join. On 11 March 2021, the Commission informed the undertakings concerned of the referral request ('the information letter'). By decisions of 19 April 2021 ('the contested decisions'), the Commission accepted the referral request, along with the respective requests to join.

Illumina, supported by Grail, brought an action for annulment against the contested decisions and the information letter. By its judgment, delivered by a panel sitting in an extended composition following an expedited procedure, the General Court dismisses that action in its entirety. On this occasion, the Court rules for the first time on the application of the referral mechanism laid down in Article 22 of the Merger Regulation to a transaction that did not have to be notified in the State which made the referral request but which entails the acquisition of an undertaking whose significance for competition is not reflected in its turnover. In the present case, the Court acknowledges, in principle, that the Commission may be regarded as competent in such a situation. Moreover, the Court gives clarification concerning the calculation of the time limit of 15 working days for Member States to submit a referral request in such a situation.

The analysis thus accepted by the Court prefigured a new approach on the part of the Commission concerning the application of the referral mechanism laid down in Article 22 of the Merger Regulation, according to the guidelines published on 31 March 2021, [426] whose implementation opens the way for the EU merger control rules better to take into account transactions involving innovative undertakings with significant competitive potential.

Findings of the Court

First, the Court rules on the admissibility of the action, which the Commission disputes, in the light of the nature of the contested decisions.

In that regard, the Court notes, on the one hand, that the contested decisions are, as such, binding and, on the other hand, that each of them entails a change in legal system applicable to the examination of the concentration at issue. In addition, those decisions which put an end to the specific referral procedure, definitively determined the Commission's position on that matter. By accepting the requests submitted by the national competition authorities concerned, under Article 22

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sequencing systems required for the development of cancer screening tests, and, accordingly, to restrict their development in the future.

426 Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1).

of the Merger Regulation, the Commission acknowledged its own authority to examine the concentration at issue in accordance with the substantive and procedural rules laid down for that purpose by the Merger Regulation, to which, in particular, the standstill obligation referred to in Article 7 relates. In those circumstances, it is therefore necessary to find that the contested decisions constitute challengeable acts for the purposes of Article 263 TFEU.

By contrast, according to the Court, this is not the case with regard to the information letter, which, although it also triggers the standstill obligation, is merely an intermediary stage in the referral procedure, with the result that the action is held to be inadmissible, in so far as it is directed against that information letter.

Second, as regards the substance of the case, the Court examines, in the first place, the plea alleging lack of competence on the part of the Commission. In that regard, the Court specifies at the outset that it is called upon, in that context, to determine whether, under Article 22 of the Merger Regulation, the Commission is competent to examine a concentration which is the subject of a referral request made by a Member State which has a national merger control system, but where that concentration does not fall within the scope of that national legislation.

In the present case, the Court finds, first, that, when it acknowledged its own competence in such a scenario, the Commission did not rely on an incorrect interpretation of Article 22 of the Merger Regulation.

The wording of that provision, in particular the use of the expression 'any concentration', makes it clear that a Member State is entitled to refer any concentration to the Commission which satisfies the cumulative conditions set out therein, irrespective of the existence or scope of national merger control rules. Furthermore, it follows from the origin of that provision that the referral mechanism it established was originally for the purpose of serving Member States without their own merger control system, without limiting its applicability to that situation alone. Moreover, from the point of view of the general structure of the Merger Regulation and its objectives, the Court emphasises that its scope and therefore the extent of the Commission's power of examination concerning mergers depend primarily on the exceeding of the turnover thresholds which define the European dimension, but also, in the alternative, on the referral mechanisms laid down, inter alia, in Article 22 of that regulation.

In those circumstances, after noting that the objective of the Merger Regulation is to permit effective control of all concentrations with significant effects on the structure of competition in the European Union, the Court finds, finally, that the referral mechanism at issue is a corrective mechanism forming part of that objective. It provides the flexibility necessary for the examination, at EU level, of concentrations which are likely significantly to impede effective competition in the internal market which, because the turnover thresholds have not been exceeded, would otherwise escape control under the merger control systems of both the European Union and the Member States. Consequently, the Commission regarded itself as competent to examine the concentration at issue in line with a correct interpretation of Article 22 of the Merger Regulation.

Second, the Court considers that such an interpretation does not disregard either the principle of conferral of competences, [427] the principle of subsidiarity, [428] or the principle of proportionality. [429]

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427 As set out in Article 4(1) TEU, read in conjunction with Article 5 TEU.

428 As set out in Article 5(1) and (3) TEU and implemented by Protocol (No 2) on the application of the principles of subsidiarity and proportionality (OJ 2016 C 202, p. 206).

429 As set out in Article 5(1) and (4) TEU.

Lastly, as regards the principle of legal certainty, the Court stresses that it is only the interpretation adopted in the contested decisions which ensures the necessary legal certainty and the uniform application of Article 22 of the Merger Regulation in the European Union. The Court thus finds that the entirety of the plea in law alleging lack of competence on the part of the Commission is unfounded.

As regards, in the second place, the plea in law alleging that the referral request was submitted out of time, the Court finds that, according to the second subparagraph of Article 22(1) of the Merger Regulation, the referral request must be made within 15 working days of the concentrations being 'made known' to the Member State concerned, if no notification of that concentration is required.

In that regard, the Court finds, first of all, that such 'making known' should be understood as the active transmission of information to the Member State concerned, which is appropriate for it to be able to assess, on a preliminary basis, whether the necessary conditions for the purposes of a referral have been satisfied. It follows that the invitation letter, in the present case, constitutes the 'making known' referred to. In those circumstances, it must be held that the referral request was made in due time, so that it cannot be regarded as having been submitted out of time.

That being so, in the context of the examination of the subsidiary complaints alleging infringement of the principles of legal certainty and 'good administration', the Court stresses next that the Commission is nevertheless required to comply with a reasonable time limit in the conduct of administrative procedures, particularly, in the context of merger control, given the fundamental objectives of effectiveness and speed underlying the Merger Regulation. However, in the present case, the Court considers that a period of 47 days between the complaint's being received and the invitation letter's being sent was unreasonable. Nevertheless, since it has not been established that the Commission's failure to comply with a reasonable time limit affected the capacity of the undertakings concerned to defend themselves effectively, it cannot justify the annulment of the contested decisions. Consequently, the Court also rejects the second plea in law in its entirety.

In the third and last place, the Court also rejects the plea alleging breach of the principles of the protection of legitimate expectations and of legal certainty. In that regard, since it considers the claims relating to the latter principle to be insufficiently substantiated, the Court limits its examination to the complaints concerning the principle of the protection of legitimate expectations. It recalls in that regard that in order properly to rely on that principle, it is for the party concerned to establish that he or she received precise, unconditional and consistent assurances, originating from authorised, reliable sources, such as to lead him or her to entertain well-founded expectations. However, in the present case, Illumina failed to demonstrate such circumstances and cannot properly rely on the reorientation of the Commission's decision-making practice.

4. State aid

Judgment of 4 May 2022, Wizz Air Hungary v Commission (TAROM; Rescue aid) (T-718/20, EU:T:2022:276)

(State aid – Air transport – Support measure taken by Romania – Rescue aid to TAROM – Decision not to raise any objections – Action for annulment – Status as a party concerned – Safeguarding of procedural rights – Admissibility – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty – Measure aiming to prevent social hardship or to address market failure – 'One time, last time' principle – Effect of earlier aid granted before Romania's accession to the European Union – Serious difficulties – Obligation to state reasons)

On 19 February 2020, Romania notified to the European Commission a project to grant rescue aid to TAROM, a Romanian airline mainly active in the domestic and international transport of passengers,

cargo and mail. The notified measure consisted of a loan to finance TAROM's liquidity needs in the amount of approximately EUR 36 660 000, repayable at the end of a six-month period with an option to repay part of the loan early.

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission, by decision of 24 February 2020, [430] classified the notified measure as State aid compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. [431]

The airline Wizz Air Hungary Zrt. ('the applicant') brought an action for annulment against that decision, which is dismissed by the Tenth Chamber (Extended Composition) of the General Court. In its judgment, the Court provides clarifications on the examination as to whether rescue and restructuring aid is compatible with the internal market in the light of the condition, laid down in the Guidelines, according to which such aid must contribute to an objective of common interest. The Court also analyses, in an unprecedented manner, the 'one time, last time' condition governing aid for rescuing and restructuring undertakings in difficulty, laid down in those guidelines.

Findings of the Court

The Court rejects, in the first place, the pleas in law for annulment alleging that the Commission erred in law by deciding not to initiate the formal investigation procedure despite the doubts that it should have harboured during the preliminary assessment as to whether the notified aid was compatible with the internal market.

In that regard, the applicant submitted, inter alia, that the finding that the notified aid was compatible with the internal market was contrary to two of the conditions laid down in the Guidelines in order for rescue aid to an undertaking in difficulty to be regarded as compatible with the internal market, namely: (1) the condition relating to the contribution of the aid measure to an objective of common interest; and (2) the 'one time, last time' condition governing rescue and restructuring aid. According to the applicant, failure to comply with those conditions was indicative of the doubts which should have led the Commission to initiate the formal investigation procedure.

First of all, the Court recalls that, when notified aid raises doubts as to its compatibility with the internal market, the Commission is required to initiate the formal investigation procedure.

Next, as regards the first condition applicable to the rescue and restructuring aid, the infringement of which was relied on, namely that relating to the pursuit of an objective of common interest, the Court notes that it is apparent from point 43 of the Guidelines that, in order to be declared compatible with the internal market on the basis of the Guidelines, the notified aid must pursue an objective of common interest, in that it must aim to prevent social hardship or address market failure. This is confirmed by point 44 of those guidelines, according to which Member States must demonstrate that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure, in particular by showing that there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in.

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430 Decision C(2020) 1160 final of the Commission of 24 February 2020 concerning State Aid SA.56244 (2020/N) – Romania – Rescue aid to TAROM (OJ 2020 C 310, p. 3).

431 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines').

According to the Court, it follows from those points of the Guidelines that, although the Member State concerned must demonstrate that the aid aims to prevent social hardship or address market failure, it is not required to establish that, in the absence of the aid measure, certain negative consequences would necessarily arise, but only that such consequences might arise.

With regard to whether the Commission should have harboured doubts as to the existence of a risk that, in the absence of the notified aid measure, social hardship or market failure would have arisen, or whether that measure was intended to prevent or address them, the Court states that, taking into account the poor condition of Romanian road and rail infrastructure, the Commission was entitled to find that regional connectivity by means of domestic air routes and international connectivity provided by TAROM constituted an important service, the disruption of which could involve serious social hardship or constitute a market failure within the meaning of point 44(b) of the Guidelines.

In that context, the Court clarifies, in addition, that, although, when the existence and legality of State aid are being examined, it may be necessary for the Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice, it cannot be inferred from this that it is for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain.

In the light of those clarifications, the Court, by examining the various arguments put forward by the applicant, concludes that those arguments are not such as to call into question the Commission's analysis confirming TAROM's importance for the connectivity of regions in Romania and the very substantial impact on those regions if TAROM were to fail. It follows that the Commission was entitled to conclude, without harbouring any doubts, on that basis alone, that the notified aid met the requirements laid down in points 43 and 44 of the Guidelines.

Lastly, as regards the second condition applicable to the rescue and restructuring aid, the infringement of which was relied on by the applicant, namely the 'one time, last time' condition, the Court recalls that, according to point 70 of the Guidelines, such aid should be granted to undertakings in difficulty in respect of only one restructuring operation. In that context, point 71 of the Guidelines provides, inter alia, that, when an undertaking has already received rescue or restructuring aid, the Commission will only allow further aid if at least 10 years have elapsed (1) since the earlier aid was granted; (2) since the earlier restructuring period came to an end; or (3) since the implementation of the earlier restructuring plan was halted.

In that regard, the Court observes that, although TAROM had received, up to 2019, the implementation of restructuring aid in the form of a loan and several guarantees in respect of other loans taken out by TAROM, the fact remains that that aid had been granted between 1997 and 2003 and that all the loan guarantees had been called immediately after they had been granted. Since the actual transfer of the resources is not decisive in determining the date on which the aid was granted, the first situation provided for in point 71 of the Guidelines, namely the expiry of a period of at least 10 years from the date on which the earlier restructuring aid was granted, was, consequently, established.

As regards the second and third situations provided for in point 71 of the Guidelines, namely the expiry of a period of at least 10 years after the earlier restructuring period ends or after the implementation of the earlier restructuring plan is halted, the Court notes that the concept of a 'restructuring period' refers to the period during which the restructuring measures are taken, which is separate, in principle, from that during which a State aid measure accompanying those measures is implemented. In disregard of the burden of proof that falls on it in that regard, the applicant has not provided any evidence or indication that the earlier restructuring period had ended less than 10 years before the notified aid measure was granted.

With regard to the concept of a 'restructuring plan', the Court clarifies, in addition, that the fact that restructuring aid is linked to a restructuring plan does not mean that that aid, as such, forms part of

that restructuring plan, since the existence of the restructuring plan constitutes, on the contrary, an essential condition for such aid to be considered compatible with the internal market. Thus, the Court also rejects the applicant's argument according to which the fact that the restructuring aid granted to TAROM between 1997 and 2003 was implemented up to 2019 means that the restructuring plan, which was linked to that aid, also lasted up to 2019.

In the light of the foregoing, the Court also rejects the applicant's complaints alleging that the Commission erred in law by deciding not to initiate the formal investigation procedure notwithstanding the doubts that it should have harboured during the preliminary assessment of the 'one time, last time' condition governing rescue and restructuring aid.

In the second place, the Court rejects the plea in law alleging infringement of the Commission's obligation to state reasons and, consequently, dismisses the action in its entirety.

Judgment of 18 May 2022, Ryanair v Commission (Condor; Rescue aid) (T-577/20, EU:T:2022:301)

(State aid – German air transport market – Loan granted by Germany to Condor Flugdienst – Decision declaring the aid compatible with the internal market – Article 107(3)(c) TFEU – Guidelines on State aid for rescuing and restructuring undertakings in difficulty – Intrinsic difficulties that are not the result of an arbitrary allocation of costs within the group – Difficulties that are too serious to be dealt with by the group itself – Risk of disruption to an important service)

On 25 September 2019, the airline Condor Flugdienst GmbH ('Condor'), which provides air transport services mainly to tour operators from a number of German airports, filed for insolvency owing to Thomas Cook Group plc ('the Thomas Cook group'), which fully owns that airline, being placed into liquidation.

On the same day, the Federal Republic of Germany notified the European Commission of a rescue aid measure in favour of Condor, restricted to a period of six months. The notified aid was intended to maintain orderly air transport and to limit the negative consequences for Condor and its passengers and staff arising from the liquidation of its parent company by enabling Condor to continue operating until it reached a settlement with its creditors and, depending on the circumstances, until it was sold.

Without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission, by decision of 14 October 2019 ('the contested decision'), [432] classified the notified measure as State aid that was compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty. [433]

The action for annulment of that decision, brought by the airline Ryanair DAC ('the applicant'), is dismissed by the Tenth Chamber (Extended Composition) of the General Court. In this instance, the court, inter alia, provides clarification regarding the assessment of the compatibility of rescue and restructuring aid with the internal market in the light of the rule, laid down by the Guidelines, that a

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432 Commission Decision C(2019) 7429 final of 14 October 2019 on State aid SA.55394 (2019/N) – Germany – Rescue aid to Condor (OJ 2020 C 294, p. 3).

433 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ 2014 C 249, p. 1; 'the Guidelines').

company belonging to a larger business group is eligible for such aid only if that company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and if those difficulties are too serious to be dealt with by the group itself.

Findings of the Court

The Court rejects, in the first place, the pleas for annulment alleging that the Commission erred in law in deciding not to initiate the formal investigation procedure despite the doubts which it should have had during the preliminary examination of the compatibility of the notified aid with the internal market.

In that regard, the applicant argued, more specifically, that the finding that the notified aid was compatible with the internal market was contrary to point 22, point 44(b) and point 74 of the Guidelines, which is indicative of doubts that should have led the Commission to initiate the formal investigation procedure.

While confirming that the Commission is under an obligation to initiate the formal investigation procedure where there are doubts as to the compatibility of notified aid with the internal market, the Court rejects, first of all, the complaint alleging that the Commission infringed point 22 of the Guidelines.

In accordance with point 22, 'a company belonging to … a larger business group is not normally eligible for aid under [the Guidelines], except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself'.

As regards the part of the sentence 'except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group', it is apparent, according to the Court, from a textual, teleological and contextual interpretation of point 22 of the Guidelines that that part of the sentence merely sets out one and the same condition which is to be interpreted as meaning that the difficulties of an undertaking belonging to a group must be regarded as being intrinsic if they are not the result of an arbitrary allocation of costs within the group.

In that regard, the Court notes that the purpose of point 22 of the Guidelines is to prevent a group of undertakings from offloading its costs, debts or liabilities onto an entity within the group, thus making it eligible for rescue aid, whereas it would not be otherwise. By contrast, the objective of that provision is not to exclude from the scope of rescue aid an undertaking belonging to a group solely on the ground that that undertaking's difficulties have been caused by the difficulties faced by the rest of the group or by another company in the group, in so far as those difficulties have not been created artificially or allocated arbitrarily within that group.

In the present case, since the applicant did not succeed in rebutting the Commission's findings that Condor's difficulties were the result mainly of the Thomas Cook group being placed into liquidation and not of an arbitrary allocation of costs within the group, it failed to demonstrate the existence of doubts as to the compatibility of the notified aid measure with the condition set out in point 22 of the Guidelines.

That conclusion is not called into question by the finding that Condor's difficulties were, in that context, connected with the write-off of significant amounts of receivables held by Condor as against the Thomas Cook group in the context of the pooling of that group's cash. The pooling of cash within a group is a common and widespread practice within groups of companies, which is intended to facilitate financing of the group while enabling companies in that group to make savings in respect of financing costs. In addition, in the present case, that cash-pooling system had been implemented by the Thomas Cook group several years previously and was not the cause of that group's difficulties.

In the absence of any concrete evidence to establish the arbitrary nature of the Thomas Cook group's cash-pooling system, it was not for the Commission to investigate, on its own initiative, the fairness of that system.

Nor, furthermore, did the applicant succeed in demonstrating the existence of doubts in respect of the examination of the condition laid down in point 22 of the Guidelines, according to which the difficulties of an undertaking which, like Condor, belongs to a group, must be too serious to be dealt with by the group itself. In that regard, the Court notes, first, that the Thomas Cook group was itself in liquidation and had ceased trading. It states, second, that the Commission was not obliged to await the outcome of discussions concerning a possible sale of Condor with a view to resolving its financial difficulties, given the urgency surrounding any rescue aid and the uncertainty that is inherent in any ongoing commercial negotiations.

Next, the Court rejects the complaint alleging that the Commission should have had doubts as to whether the notified aid met the requirements set out in point 44(b) of the Guidelines, which details the ways in which Member States may establish that the failure of the beneficiary would be likely to involve serious social hardship or severe market failure.

In accordance with point 44(b) of the Guidelines, Member States may adduce such proof by demonstrating that 'there is a risk of disruption to an important service which is hard to replicate and where it would be difficult for any competitor simply to step in (for example, a national infrastructure provider)'.

In order for a service to be regarded as 'important', it is not necessary, according to the Court, that that service play a systemic role which is important for the economy of a region of the Member State concerned; nor is it necessary that the undertaking which has that role be entrusted with a service of general economic interest or with a service that is of national importance. Accordingly, in view of the fact that the immediate repatriation of 200 000 to 300 000 Condor passengers distributed across 50 to 150 different destinations could not have been carried out at short notice by other, competing airlines, the Commission had correctly concluded that there was a risk of disruption to an important service which was hard to replicate, with the result that Condor's exit from the market was likely to involve a severe failure of that market.

Lastly, the Court also rejects as unfounded the applicant's complaint that the Commission carried out an incomplete and insufficient examination of the one time, last time condition for rescue aid laid down in point 74 of the Guidelines.

In the second place, the Court rejects the plea alleging that the Commission failed to fulfil its obligation to state reasons and, consequently, dismisses the action in its entirety.

Judgment of 8 June 2022, United Kingdom and ITV v Commission (T-363/19 and T-456/19, EU:T:2022:349)

(State aid – Aid scheme implemented by the United Kingdom in favour of certain multinational groups – Decision declaring the aid scheme incompatible with the internal market and unlawful and ordering the recovery of the aid paid – Advance tax rulings – Tax regime relating to the financing of groups and concerning in particular controlled foreign companies – Selective tax advantages)

Under the corporation tax rules in the United Kingdom, only profits generated by activities and assets in the United Kingdom are taxed. However, the rules applicable to controlled foreign companies (CFCs) provide that the profits of those CFCs are taxed in the United Kingdom by means of a charge ('the CFC charge') when they are considered to have been artificially diverted from the United Kingdom.

Such a CFC charge was provided for, inter alia, in respect of the non-trading profits of CFCs, when they arose from activities the significant human functions of which were carried out in the United Kingdom or had been generated from United Kingdom funds or assets.

The rules applicable to CFCs, as applicable between 1 January 2013 and 31 December 2018, provided for the exemption from the CFC charge of non-trading finance profits arising from intra-group loans granted by a CFC to other members of the group which are not resident in the United Kingdom ('qualifying loans') and for which those groups could submit an application for partial or full exemption from the CFC charge ('the exemption scheme').

By decision of 2 April 2019, [434] the European Commission classified that exemption scheme as an unlawful State aid scheme incompatible with the internal market, in so far as it applied to profits arising from activities the significant human functions of which were carried out in the United Kingdom, since it was not justified either by the need to have administrable anti-avoidance rules or by the need to comply with the freedoms enshrined in the Treaties.

By contrast, in so far as the exemption scheme applied to profits arising from United Kingdom funds or assets, the Commission considered that, despite the a priori selective nature of those exemptions, they were justified in that they aimed to apply, in an administrable way, the rules applicable to CFCs.

The United Kingdom Government and ITV plc, [435] which had benefited from the exemption scheme ('the applicants'), brought actions for annulment of the contested decision.

Those actions are dismissed by the Second Chamber (Extended Composition) of the General Court. In its judgment, the General Court confirms, inter alia, that the United Kingdom tax rules applicable to CFCs constitute an appropriate reference framework for assessing the selectivity of the exemption scheme since they form a body of tax rules, distinct from the general United Kingdom corporation tax system.

Findings of the Court

As regards the analysis of tax measures from the point of view of Article 107(1) TFEU, the Court notes, as a preliminary point, that the examination of both the criterion of advantage and that of selectivity requires that the normal tax rules forming the relevant reference framework for that examination be determined.

The Court rejects, first of all, the applicants' pleas alleging errors of assessment on the part of the Commission, in that it had identified the tax rules applicable to CFCs as the reference framework.

In that regard, the Court points out that the reference framework cannot consist of some provisions of the domestic law of the Member State concerned that have been artificially taken from a broader legislative framework. On the other hand, where it appears that the measure is clearly severable from that general scheme, it cannot be ruled out that the reference framework to be taken into account may be more limited than the general scheme.

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434 Commission Decision (EU) 2019/1352 of 2 April 2019 on the State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption (OJ 2019 L 216, p. 1; 'the contested decision').

435 ITV plc, a tax resident in the United Kingdom, is the holding company at the head of the ITV Group, which is active in the creation, production and distribution of audiovisual content over various platforms throughout the world. That group includes inter alia CFCs, such as ITV Enterprises BV and ITV (Finance) Europe BV, two companies formed under Netherlands law which had granted several loans to other companies in the ITV Group.

Thus, in so far as they seek to tax profits which have been artificially diverted from the United Kingdom by CFCs, the tax rules applicable to CFCs are based on a logic distinct from that underlying the general system of taxation in the United Kingdom, which covers profits made in the United Kingdom. Furthermore, in so far as they define specifically for the purpose of taxation of CFCs profits, inter alia, the tax base, the taxable person, the taxable event and the tax rates, those rules constitute a complete body of rules, distinct from the general corporation tax system in the United Kingdom.

Next, the Court rejects the applicants' pleas alleging an error of assessment vitiating the finding as to the existence of an advantage. In so far as the exemption scheme made it possible to exempt from taxation certain profits which should have been subject to a CFC charge in that they had been artificially diverted from the United Kingdom, that system thus conferred an advantage on the companies benefiting from the exemptions.

As regards, finally, the applicants' arguments alleging errors of assessment in the analysis of the selectivity of the exemption scheme, the Court states, first of all, that the Commission had correctly considered that the objective of the tax rules applicable to CFCs was limited to the taxation of CFCs profits artificially diverted from the United Kingdom, in order to protect the United Kingdom corporation tax base. The Court considers, moreover, that the Commission was correct in finding that the exemptions at issue, in that they exempt only CFCs non-trading finance profits arising from qualifying loans, to the exclusion of those arising from non-qualifying loans, lead to a difference in treatment of the two situations even though they are comparable, in the light of the objective pursued by those rules. Since both the profits arising from qualifying loans and those arising from non-qualifying loans were capable of being generated as a result of significant human functions carried out in the United Kingdom, the exclusion of non-qualifying loans from the exemptions at issue cannot be regarded as relating to specific situations of artificial diversion of profits.

In the light of those observations, the Court finds that, in view of the fact that the exemption scheme derogated from the tax rules applicable to CFCs and exempted only the non-trading finance profits of CFCs arising from qualifying loans, that system led to a difference in treatment of two comparable situations in the light of the objective of those rules and was, therefore, a priori selective.

The Court notes, moreover, that none of the circumstances put forward by the United Kingdom can justify that difference in treatment. Since it has not been established that the identification and location of the significant human functions carried out in the context of intra-group loans was part of a particularly costly exercise, the exemptions at issue could not be justified on grounds of administrative practicability. Furthermore, in so far as the taxation of a CFC charge applied only to profits regarded as having been artificially diverted, the imposition of such a charge cannot be regarded as constituting an obstacle to freedom of establishment. Accordingly, the exemptions at issue could not be justified by the need to comply with freedom of establishment.

Finally, the Court upholds the recovery of the aid ordered by the Commission from the beneficiaries of the exemptions at issue without providing for any derogation for cases in which no advantage has been obtained, observing that, in the case of an aid scheme, the Commission is not required to carry out an analysis of the aid granted in each individual case.

Judgment of 30 November 2022, Austria v Commission (T-101/18, EU:T:2022:728)

(State aid – Nuclear industry – Aid planned by Hungary for the development of two new nuclear reactors at the Paks site – Decision declaring the aid compatible with the internal market subject to compliance with certain commitments – Article 107(3)(c) TFEU – Compliance of the aid with EU law other than State aid law – Inextricable link – Promotion of nuclear energy – First paragraph of Article 192 of the Euratom Treaty – Principle of protection of the environment, 'polluter pays' principle, precautionary principle and principle of sustainability – Determination of the economic activity concerned – Market failure – Distortion of

competition – Proportionality of the aid – Need for State intervention – Determination of the aid elements – Public procurement procedure – Obligation to state reasons)

By decision of 6 March 2017 [436] ('the contested decision'), the European Commission approved investment aid, notified by Hungary, for the State-owned undertaking MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares ('the Paks II company'). The aid concerns the operation of two nuclear reactors under construction at the Paks nuclear power station site, which are gradually to replace the four nuclear reactors already in operation on that site.

That investment aid ('the aid at issue'), which consists, in essence, of the provision free of charge of the new nuclear reactors to the Paks II company for the purpose of their operation, is in large part financed by a loan in the form of a revolving credit facility of EUR 10 billion granted by the Russian Federation to Hungary in the framework of an intergovernmental agreement on cooperation on the peaceful use of nuclear energy. In accordance with that agreement, the task of constructing the new reactors was entrusted, by means of a direct award, to the company Nizhny Novgorod Engineering Company Atomenergoproekt ('JSC NIAEP').

In the contested decision, the Commission declared the aid at issue compatible with the internal market, subject to conditions, in accordance with Article 107(3)(c) TFEU. Under that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market, in so far as it does not adversely affect trading conditions to an extent contrary to the common interest.

The Republic of Austria brought an action for annulment of the contested decision.

Findings of the Court

In the first place, the General Court rejects the plea claiming that the contested decision was unlawful in that the Commission declared the aid at issue compatible with the internal market despite the fact that the direct award to JSC NIAEP of the contract for the construction of the new nuclear reactors allegedly constitutes an infringement of EU rules governing public procurement.

In that regard, the Republic of Austria argued in particular that since the award of the contract for the construction of the new reactors was an aspect that was inextricably linked to the aid at issue, the Commission was required to examine it also in the light of the EU rules on public procurement. According to the Republic of Austria, it is apparent, furthermore, from the judgment in *Austria* v *Commission* [437] that the Commission should have assessed the aid at issue in the light of the provisions of EU law on public procurement irrespective of whether the award of the construction contract constituted an aspect that was inextricably linked to that aid.

The General Court, first of all, rejects the line of argument put forward by the Republic of Austria on the basis of the judgment in *Austria* v *Commission*. While it is apparent from that judgment that the economic activity promoted by the aid must be compatible with EU law, no infringement of EU law owing to the activity supported, namely the production of nuclear energy, has been raised by the Republic of Austria in the present case. Moreover, that judgment does not show that the Court of Justice intended to broaden the scope of the review falling to the Commission in the context of a

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436 Commission Decision (EU) 2017/2112 of 6 March 2017 on State aid SA.38454 – 2015/C (ex 2015/N) which Hungary is planning to implement for supporting the development of two new nuclear reactors at Paks II nuclear power station (OJ 2017 L 317, p. 45).

437 Judgment of 22 September 2020, *Austria* v *Commission* (C-594/18 P, EU:C:2020:742).

procedure to determine whether State aid is compatible with the internal market by abandoning its case-law under which a distinction should be drawn between aspects that are inextricably linked to the object of the aid and those that are not.

In addition, recognition of an obligation requiring the Commission, in a procedure to determine whether State aid is compatible with the internal market, to adopt a definitive position on the existence or absence of an infringement of provisions of EU law distinct from those relating to State aid, irrespective of the link between the aspect of the aid and the object of that aid, would run counter to, first, the procedural rules and guarantees specific to the procedures specially established for control of the application of those provisions and, second, the principle of autonomy of administrative procedures and remedies.

In the light of those explanations, the Court finds, next, that the decision to award the contract for the construction of the two new reactors, which preceded the aid measure at issue, does not constitute an aspect that is inextricably linked to the object of that aid. The carrying out of a public procurement procedure and the possible use of another undertaking for the construction of the reactors would alter neither the object of the aid, namely the provision free of charge of two new reactors for the purpose of their operation, nor the beneficiary of the aid, which is the Paks II company. Furthermore, assuming that a tender procedure may have had an influence on the amount of the aid, which the Republic of Austria has not proven, such a factor would not by itself have had any effect on the advantage which that aid constituted for its recipient, namely the provision free of charge of two new reactors with a view to their operation.

Lastly, the Court states that, contrary to what is argued by the Republic of Austria, the Commission was justified in referring in the contested decision to its assessment carried out in earlier infringement proceedings, in which it had found that the direct award of the task of constructing the two new reactors to JSC NIAEP did not infringe EU public procurement law. The principle of legal certainty precludes the Commission from carrying out, in the State aid procedure, a fresh examination of the award of the construction contract in the absence of any new information as against the time when it decided to close the infringement proceedings.

In the second place, the Court rejects the pleas alleging disproportionate distortions of competition and unequal treatment which result in the exclusion of producers of renewable energy from the liberalised internal electricity market. In that regard, the Court observes that the Member States are free to determine the composition of their own energy mix and that the Commission cannot require that State financing be allocated to alternative energy sources.

In the third place, after rejecting the plea alleging the strengthening or creation of a dominant market position, the Court also dismisses the plea relating to risks to the liquidity of the Hungarian wholesale electricity market.

IV. Intellectual property

1. EU trade mark

Judgment of 8 June 2022, Muschaweck v EUIPO – Conze (UM) (T-293/21, EU:T:2022:345)

(EU trade mark – Revocation proceedings – EU word mark UM – Genuine use of the mark – Use with the consent of the proprietor – Use in the form in which the mark was registered – Article 51(1)(a) of Regulation (EC) No 207/2009 (now Article 58(1)(a) of Regulation (EU) 2017/1001) – Representation by the proprietor of the trade mark – Evidence of use submitted within the time limit set)

In 2010, MSM medical company [438] filed an application for registration of the word sign UM as an EU trade mark for medical services. In 2015, that company became subject to insolvency proceedings and an insolvency administrator was appointed.

The applicant, Ms Ulrike Muschaweck, then filed, in 2017, an application for revocation of the contested mark on the ground of lack of genuine use of that mark. [439] After the declaration of bankruptcy of MSM medical company, the same year, that mark was transferred to HUMJC medical practice, [440] and, one year later, relisted in the name of Mr Joachim Conze, legal successor of that medical practice.

The Cancellation Division of the European Union Intellectual Property Office (EUIPO) upheld the applicant's application in part, revoking the contested mark in respect of all the goods and services registered, with the exception of medical services in the field of hernia surgery. That decision was the subject of an appeal which was dismissed by the Second Board of Appeal of EUIPO.

Hearing an action for annulment of those two decisions, the General Court interprets for the first time the EUIPO Guidelines for Examination of European Union trade marks [441] and, in so doing, provides clarification on the extension of a time limit in the event of a second request for an extension of an extendable time limit. Accordingly, the Court dismisses the action and holds that the contested mark has in fact been put to genuine use in connection with medical services in the field of hernia surgery.

Findings of the Court

In the first place, the General Court considers that Mr Conze was entitled to authorise, of his own volition and without the applicant's agreement, in his capacity as partner of HUMJC medical practice, the law firm which represented the latter before the Cancellation Division. If the applicant had had to approve the decision relating to that representation, there would have been a high risk that she

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438 Medizinische Systeme Dr Muschaweck GmbH ('MSM medical company').

439 Under Article 51(1)(a) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

440 Hernienzentrum medical practice Dr Ulrike Muschaweck und PD Dr Joachim Conze PartG.

441 'The EUIPO examination guidelines'. They may be consulted on EUIPO's website.

would not approve it, given her status as cancellation applicant in respect of the contested mark. Such a situation would undermine HUMJC medical practice's right to effective judicial protection. [442]

In the second place, the Court rejects the plea relating to the late submission, before the Cancellation Division, of the evidence of use of the contested mark by HUMJC medical practice.

The Court recalls that the EUIPO examination guidelines are a consolidated set of rules setting out the line of conduct which EUIPO itself proposes to adopt and that, provided that those rules are consistent with provisions of a superior rule of law, EUIPO must comply with those rules. Although those guidelines lack binding force, they are nevertheless a source of reference on EUIPO's practice in relation to trade marks. According to the EUIPO examination guidelines, where a request is filed for an extension to an extendable time limit before this time limit expires and is not accepted, the party concerned will be granted at least one day to meet the deadline, even if the request for an extension arrives on the last day before the expiry of the time limit. [443] In order to preserve the practical effect of those guidelines, the Court holds that that new time limit will be granted from the date on which the adjudicating body of EUIPO before which the request for an extension of a time limit is brought provides its response. In addition, a second request for an extension of the same time period must be refused unless the party requesting it can explain and properly justify the 'exceptional circumstances' which prevented it from carrying out the required action during the previous two time periods. [444]

In the present case, the Court finds, first, that the time limit for submitting evidence of use of the contested mark, the extension of which was requested for a second time by HUMJC medical practice, is an extendable time limit and that that medical practice submitted that request on the last day before the expiry of that time limit. Second, it observes that the fact of granting, essentially on the grounds of fairness, at least one additional day of extension following a request for an extension of a time limit filed on the last day of that period does not infringe a provision of a superior rule of law. Consequently, the Cancellation Division could not have merely dismissed the second request for an extension of the time limit of HUMJC medical practice, without granting further time running from the date of the communication of its response. Therefore, the evidence produced between the submission of that second request for an extension of the time limit and the Cancellation Division's response cannot be regarded as having been submitted out of time and must be taken into account for the purposes of examining the use of the contested mark.

In the third and last place, the Court confirms the existence of genuine use of the contested mark for medical services in the field of hernia surgery. First of all, the Court states that the period to be taken into consideration for the evidence of genuine use of the contested mark is comprised of the five years preceding the date of introduction of the application for revocation, even if that period coincides in part with the grace period. [445] Next, the Court holds that the contested mark had been used by HUMJC medical practice with the consent of MSM medical company, proprietor of that mark during the period at issue. More specifically, implicit consent of use of the contested mark had been given, for a number of years, by the insolvency administrator of that company. Finally, ruling on the territorial use of the contested mark, the Court finds that the evidence shows that HUMJC medical practice was active not only in Munich, but also throughout Germany and in London.

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442 In accordance with Article 47 of the Charter of Fundamental Rights of the European Union.

443 Paragraph 4.3 of the EUIPO examination guidelines, relating to the extension of time limits set by EUIPO.

444 Idem.

445 Under the first subparagraph of Article 15(1) and Article 51(1)(a) of Regulation No 207/2009, that grace period covers the period of five years following the date of registration of the EU trade mark. During that period, the rights of the proprietor cannot be declared to be revoked.

Judgment of 6 July 2022, Zdút v EUIPO – Nehera and Others (nehera) (T-250/21, EU:T:2022:430)

(EU trade mark – Invalidity proceedings – EU figurative mark NEHERA – Absolute ground for invalidity – No bad faith – Article 52(1)(b) of Regulation (EC) No 207/2009 (now Article 59(1)(b) of Regulation (EU) 2017/1001))

In 2014, Mr Ladislav Zdút, the applicant, obtained from the European Union Intellectual Property Office (EUIPO) the registration of an EU figurative mark NEHERA for goods in the textile industry.

In 2019, Ms Nehera, Mr Nehera and Ms Sehnal filed an application for a declaration of invalidity against that mark, based on the applicant's bad faith when he filed the application for registration. [446] They claimed that in Czechoslovakia in the 1930s, their grandfather, Mr Jan Nehera, had established a business marketing clothing and accessories, and had filed and used a national mark identical to the contested mark, enjoying a reputation.

That application was upheld by the Second Board of Appeal of EUIPO. That Board found that the applicant's intention was to take unfair advantage of the reputation of Mr Jan Nehera and of the former Czechoslovak trade mark and, therefore, that the applicant was acting in bad faith when he filed the application for registration of the contested mark.

The applicant brought an action before the General Court seeking the annulment of that decision of the Board of Appeal of EUIPO.

The Court annuls the contested decision and clarifies the concept of bad faith where that is based on an intention to take unfair advantage of the reputation of an earlier trade mark or of the celebrity of a person's name.

Findings of the Court

First of all, the Court notes that, in order to assess the applicant's bad faith, it is possible to take into account the extent of the reputation enjoyed by the sign at issue at the time its registration was sought, including where that sign had previously been registered or used by a third party as a trade mark. The fact that use of a sign for which registration is sought would enable the applicant to take unfair advantage of the reputation of an earlier trade mark or sign or even of the name of a famous person is such as to establish bad faith on the part of the applicant. The relevant public for the purpose of assessing the existence of the reputation and of the unfair advantage taken thereof is the average consumer of the goods for which the contested mark was registered.

Next, the Court considers that parasitic behaviour with regard to the reputation of a sign or of a name is, in principle, only possible if that sign or that name actually and currently enjoys a certain reputation or a certain celebrity. In the present case, on the date on which the application for registration of the contested mark was filed, the former Czechoslovak trade mark and Mr Jan Nehera's name were no longer either registered or protected, or used by a third party to market clothing, or even well known among the relevant public. In that context, the Court specifies that the mere fact that the applicant knew or ought to have known that a third party had, in the past, used a mark similar or

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446 Within the meaning of Article 52(1)(b) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

identical to the mark applied for is not sufficient to establish the existence of bad faith on the part of that applicant.

In addition, the Court points out that the existence on the part of the relevant public of a link between the contested mark and the former sign cannot be sufficient, on its own, to support a finding that unfair advantage was taken of the reputation of the sign or of the former name. In that regard, it underlines that the applicant made his own commercial efforts in order to revive the image of the former Czechoslovak trade mark and that the mere fact of having referred to that mark and to the historic image of its creator for promotional purposes does not appear to be contrary to honest practices in industrial or commercial matters.

Furthermore, the Court recognises that it cannot be ruled out that, in certain specific circumstances, reuse by a third party of a previously renowned former mark or of the name of a previously famous person may give a false impression of continuity or of inheritance with that former mark or with that person. That could be the case, in particular, where the trade mark applicant presents itself to the relevant public as the legal or economic successor of the holder of the former mark, whereas there is no continuity or inheritance relationship between the holder of the former mark and the applicant. Such a circumstance could be taken into account in order to establish, where appropriate, bad faith on the part of the applicant. In the present case, it does not appear, according to the Court, that the applicant deliberately sought to establish a false impression of continuity or inheritance between his undertaking and that of Mr Jan Nehera.

Lastly, the Court rules on the alleged intention on the part of the applicant to defraud Mr Jan Nehera's descendants and heirs and to usurp their rights. In that regard, it notes that at the time the application for registration of the contested mark was filed, the former Czechoslovak trade mark and Mr Jan Nehera's name no longer benefited from any legal protection. Therefore, Mr Jan Nehera's descendants and heirs did not hold any right that might be susceptible to fraud or to being usurped by the applicant.

Consequently, the Court finds no bad faith on the part of the applicant and annuls the decision of the Second Board of Appeal of EUIPO.

2. Designs

Judgment of 27 April 2022, Group Nivelles v EUIPO – Easy Sanitary Solutions (Shower drainage channel) (T-327/20, EU:T:2022:263)

(Community design – Invalidity proceedings – Registered Community design representing a shower drainage channel – Earlier design produced after the filing of the application for a declaration of invalidity – Article 28(1)(b)(v) of Regulation (EC) No 2245/2002 – Discretion of the Board of Appeal – Scope – Article 63(2) of Regulation (EC) No 6/2002 – Oral proceedings and measures of inquiry – Articles 64 and 65 of Regulation (EC) No 6/2002 – Ground for invalidity – Individual character – Article 6 and Article 25(1)(b) of Regulation No 6/2002 – Identification of the earlier design – Earlier whole design – Determination of the features of the contested design – Global comparison)

Easy Sanitary Solutions BV is the holder of a Community design representing a shower drainage channel. I-Drain BVBA, the legal predecessor of the applicant, Group Nivelles NV, lodged an application for a declaration of invalidity based on the lack of novelty and individual character of that design. That application for a declaration of invalidity referred only to an earlier international design. However, in its reply to Easy Sanitary Solutions' observations, I-Drain submitted extracts from the Blücher catalogues containing another design, namely a cover plate.

The Invalidity Division of the European Union Intellectual Property Office (EUIPO), the Board of Appeal, and then the General Court, examined the contested design by taking into account, as an earlier design, the cover plate from the Blücher catalogues. By judgment of 13 May 2015, [447] the General Court annulled the first decision of the Board of Appeal. The appeals against that judgment were dismissed by judgment of the Court of Justice of 21 September 2017. [448]

The case was remitted to the Board of Appeal of EUIPO. After finding that the earlier design examined by the earlier adjudicating bodies did not appear in the application for a declaration of invalidity, the Board of Appeal took into account, as an earlier design, only the designs referred to in the application for a declaration of invalidity. It concluded that the contested design had individual character and therefore that it was, a fortiori, new. The application for a declaration of invalidity was rejected.

An action brought by Group Nivelles is dismissed by the Court, which holds that only the earlier designs identified in the application for a declaration of invalidity can be taken into account.

Findings of the Court

In the first place, the Court observes that the earlier design must be identified when the application for a declaration of invalidity is submitted, because the subject matter of the dispute is defined in the application. Accordingly, the discretion conferred on EUIPO to take into account facts or evidence which are not submitted in due time [449] is applicable only to facts and evidence, [450] and not to the indication and the reproduction of the earlier designs. [451] Although further evidence may be taken into account, in addition to the earlier designs already relied on, to expand the factual context of the application for a declaration of invalidity, it may not however be used to extend the legal context of that application, since the scope of that application was definitively determined when the application was submitted, by identifying the earlier design relied on. Consequently, only the earlier designs identified in the application for a declaration of invalidity must be examined.

In the second place, the Court rejects as ineffective the plea relating to the Board of Appeal's error in determining the features of the contested design, since the error relied on is not one of the grounds of the decision, but is mentioned in the summary of the facts. In addition, the contested design must be compared with the earlier designs as it was registered. Conclusions as to the subject matter and features of the contested design cannot be left to the discretion of the parties.

In the third place, the Court confirms that the contested design has individual character. First of all, it points out that an earlier design incorporated into a product other than the one to which the contested design relates is, in principle, an earlier design which is relevant for the purposes of assessing individual character. Next, it states that any errors made by the Board of Appeal concerning the features of the earlier designs representing only one element of a shower drainage channel have no bearing on the legality of the decision, since no errors were made in the comparison between the contested design and the whole designs. Since an earlier design must be an earlier whole design, only

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447 Judgment of 13 May 2015, *Group Nivelles* v *EUIPO – Easy Sanitairy Solutions (Shower drainage channel)* (T-15/13, EU:T:2015:281).

448 Judgment of 21 September 2017, *Easy Sanitary Solutions and EUIPO* v *Group Nivelles* (C-361/15 P and C-405/15 P, EU:C:2017:720).

449 Article 63(2) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1).

450 For the purposes of Article 28(1)(b)(vi) of Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) No 6/2002 (OJ 2002 L 341, p. 28).

451 Article 28(1)(b)(v) of Regulation No 2245/2002.

the designs representing complete shower drainage channels are relevant. Lastly, in view of the elegant and minimalist appearance of the contested design, the overall impression it produces differs from that of the earlier design, with features which are more functional and not decorative.

Furthermore, the Court states that, although EUIPO may hold oral proceedings, [452] a refusal is vitiated by manifest error only if it is shown that EUIPO did not have all the necessary information. As regards the refusal to hear witnesses, [453] there is no manifest error where the statements could be given in writing and, a fortiori, where, as in the present case, those statements have in fact been submitted.

In the last place, the Court notes that, for reasons of methodology and procedural economy, it is not necessary to examine the requirement of novelty because the novelty of a design may be inferred from the fact that it has individual character.

452 Article 64(1) of Regulation No 6/2002.

453 Article 65(1) and (3) of Regulation No 6/2002.

V. Common foreign and security policy – Restrictive measures

1. Ukraine

Judgment of 27 July 2022, RT France v Council (T-125/22, EU:T:2022:483)

(Common foreign and security policy – Restrictive measures in view of Russia's actions destabilising the situation in Ukraine – Temporary prohibition of broadcasting and suspension of authorisations for the broadcasting of content by certain media outlets – Listing of entities to which the restrictive measures apply – Competence of the Council – Rights of the defence – Right to be heard – Freedom of expression and information – Proportionality – Freedom to conduct a business – Principle of non-discrimination on grounds of nationality)

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted a number of 'packages' of restrictive measures against Russia. Those measures add to the previous measures taken by the Council in 2014 onwards in view of Russia's actions destabilising the situation in Ukraine [454] and in response to Russia's illegal annexation of Crimea and of the city of Sevastopol. [455]

Against that background, on 1 March 2022 the Council adopted Decision 2022/351 [456] and Regulation 2022/350 [457] ('the contested measures') in order to prohibit temporarily Russia's propaganda campaign in support of military aggression against Ukraine, targeted at civil society in the European Union and neighbouring countries, conducted through a number of media outlets under Russian control, since that campaign constituted a threat to the EU's public order and security. As such, it is prohibited for any operator established in the European Union to broadcast any content produced by the legal persons, entities or bodies listed in the annexes to the contested measures. [458]

The applicant, RT France, was included in the list of entities in annex to the contested measures. The applicant is a single-shareholder simplified limited company established in France, whose activity consists in the publication of specialised television channels. The applicant's entire share capital is held by the association ANO 'TV Novosti', an autonomous not-for-profit association in the Russian Federation, without share capital, having its headquarters in Moscow (Russia). The applicant sought annulment of the contested measures on the grounds of infringement of its rights of defence, its

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454 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13)

455 Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2014 L 78, p. 16).

456 Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 5).

457 Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 1).

458 Decision 2014/512/CFSP, Article 4g: '1. It shall be prohibited for operators to broadcast, or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex IX, including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.'

2. Any broadcasting licence or authorisation, transmission and distribution arrangement with the legal persons, entities or bodies listed in Annex IX shall be suspended.'

freedom of expression and information, and its freedom to conduct a business. It also alleged a breach of the principle of non-discrimination. Furthermore, it expressed doubt as to the Council's competence to adopt the contested measures.

The Court, sitting as the Grand Chamber, and having decided of its own motion to adjudicate under an expedited procedure, [459] gives its first ruling on restrictive measures adopted by the Council to prohibit the broadcasting of audiovisual content. In that regard, the Court notes that the Council is competent to adopt such measures under the Common foreign and security policy (CFSP) and rules, inter alia, on respect for the rights of the defence and the limitations on an audiovisual media outlet's exercise of its freedom of expression in the light of the conditions laid down in Article 52(1)of the Charter of Fundamental Rights of the European Union ('the Charter').

Findings of the Court

As regards, first of all, the Council's competence to adopt the restrictive measures at issue, the Court states that, pursuant to the relevant provisions of the Treaty on European Union, the European Union is to contribute to international 'peace [and] security' [460] and that, to that end, the Council is given the power to adopt 'decisions which shall define the approach of the Union to a … matter of a geographical or thematic nature'. [461] The Court states that the EU's competence in matters of CFSP covers all areas of foreign policy and all questions relating to the EU's security, [462] and that the EU's action on the international scene seeks, inter alia, to promote democracy, the rule of law, the universality and indivisibility of human rights, respect for human dignity, respect for the principles of the United Nations Charter and international law. [463] Since the concept of 'approach of the Union' lends itself to a broad interpretation, such approaches may take the form of decisions providing for measures capable of directly affecting the legal position of individuals, as is confirmed by the wording of the second paragraph of Article 275 TFEU. [464] By adopting the contested decision, the Council therefore exercised the competence attributed to the European Union by the Treaties under the provisions relating to the CFSP.

In that regard, the Court states that the fact that national administrative authorities, such as the Autorité de régulation de la communication audiovisuelle et numérique (French Authority for the regulation of audiovisual and digital communication) (Arcom), have competence to adopt sanctions against the audiovisual entities in question does not preclude the Council's competence to do so, since the competence attributed to those authorities is not based on the same values and does not pursue the same objectives. Those authorities cannot guarantee the same results as uniform and immediate intervention by the Council throughout the territory of the European Union, such as that which can be achieved under the CFSP.

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459 Conducted in accordance with Article 151(2) of the Rules of Procedure of the General Court. By order of 30 March 2022 (*RT France* v *Council*, T-125/22 R, not published, EU:T:2022:199), the President of the General Court had previously rejected an application for interim measures lodged by the applicant.

460 Article 3(5) TEU.

461 Article 29 TEU.

462 Article 24(1) TEU.

463 Article 21(1) TEU.

464 Second paragraph of Article 275 TFEU: '… the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.'

As regards the infringements of fundamental rights relied on by the applicant, the Court notes that, in accordance with the provisions of Article 52(1) of the Charter, those rights are not absolute prerogatives and may be subject to limitations, subject to the conditions that the limitations concerned are provided for by law, respect the essence of the fundamental right in question and, subject to the principle of proportionality, that they are necessary and meet objectives of general interest recognised by the European Union.

Thus, as regards the infringement of the rights of the defence and, in particular, the right to be heard, the Court observes that, in the light of the objectives of the CFSP, the measures at issue were adopted in an extraordinary context of extreme urgency, characterised by a rapid escalation of the situation which made any form of modulation of the measures designed to prevent the conflict from spreading difficult. Furthermore, in a strategy of countering so-called 'hybrid' threats, including disinformation, the requirement to adopt restrictive measures against media outlets, such as the applicant, funded by the Russian State budget and directly or indirectly controlled by the leadership of that country, which is the aggressor country, in that they were considered to be at the root of a continuous and concerted activity of disinformation and manipulation of the facts, became, following the launch of the armed conflict, overriding and urgent, in order to preserve the integrity of democratic debate in European society. Having regard to the quite exceptional context in which the contested measures were adopted, the objective which they pursue and the effectiveness of the restrictive measures which they lay down, the Court concludes that the EU authorities were not, therefore, required to hear the applicant before initially placing its name on the lists at issue and, consequently, that there was no breach of the applicant's right to be heard.

Next, concerning the infringement of the freedom of expression and of information, [465] the Court recalls, first of all, the principles of case-law set out in that regard by the European Court of Human Rights. [466] Given the influence wielded by the media in contemporary society, the protection of the right of journalists to impart information on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis, and provide 'reliable and precise' information in accordance with the ethics of journalism and the tenets of responsible journalism. In assessing the proportionality of the restrictive measures at issue, account must be taken, in that regard, of the fact that the audiovisual media have a much more immediate and powerful effect than the print media. The Court also points out that, unlike expression on matters of public interest, which is entitled to strong protection, expression that promotes or justifies the use of and apology for violence, hatred or other forms of intolerance cannot normally claim protection, and that it is therefore necessary to pay attention to the words used and the context in which they were broadcast.

In examining the conditions laid down in Article 52(1) of the Charter, the Court then observes that the restrictive measures at issue were provided for inter alia 'by law', in that they were set out in acts of general application and have clear legal bases in EU law, [467] and that, in view of the applicant's conduct, they were foreseeable. The condition relating to the pursuit of an objective of general interest recognised as such by the European Union is also satisfied. The Council seeks, by the restrictive measures at issue, to pursue a twofold objective of protecting the EU's public order and security, which are threatened by the propaganda campaign at issue, and exerting pressure on the Russian authorities to bring an end to their military aggression against Ukraine.

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465 Article 11 of the Charter.

466 See, in particular, in that regard: ECtHR, 5 April 2022, *NIT S.R.L. v. Republic of Moldova*, CE:ECHR:2022:0405JUD002847012, §§ 178 to 182 and 15 October 2015, *Perinçek v. Switzerland*, CE:ECHR:2015:1015JUD002751008, §§ 197, 205, 206 and 230.

467 Namely Article 29 TEU, in the case of the contested decision, and Article 215 TFEU, in the case of the contested regulation.

Moreover, the Court holds that the Council was entitled to consider that the various items of evidence provided constituted a sufficiently concrete, precise and consistent body of evidence capable of demonstrating that the applicant actively supported, prior to the adoption of the contested measures, the policy conducted by Russia towards Ukraine, and that the applicant had broadcast information justifying the military aggression in question, which constituted a significant and direct threat to the EU's public order and security. In that connection, it holds that the evidence put forward by the applicant does not demonstrate an overall balanced treatment by the latter of information concerning the ongoing war.

Lastly, in the context of the weighing up of the competing interests, the Court states that the news reporting at issue cannot benefit from the enhanced protection afforded to press freedom under Article 11 of the Charter. In that regard, it is also appropriate to take into consideration the International Covenant on Civil and Political Rights of the United Nations of 16 December 1966, to which both the Member States and Russia are parties, under which 'any propaganda for war shall be prohibited by law'. [468] The Court finds that, bearing in mind the extraordinary context of the case, the limitations on the applicant's freedom of expression are proportionate to the aims pursued by the measures adopted.

Furthermore, as regards the infringement of the freedom to conduct a business, the Court also finds that the measures in question do not disproportionately infringe the essential content of the applicant's freedom to conduct a business since they are temporary and reversible.

Lastly, as regards the infringement of the principle of non-discrimination on grounds of nationality, enshrined in particular in Article 21(2) of the Charter, the Court states that that provision must be applied in compliance with the first paragraph of Article 18 TFEU, [469] which concerns situations falling within the scope of EU law in which a national of one Member State is treated in a discriminatory manner by comparison with nationals of another Member State solely on the basis of his or her nationality. The Court states, in that connection, that had the applicant been allegedly discriminated against because of its Russian shareholding and, for that reason, been treated less favourably than the other French audiovisual media outlets (which are not under the same type of control by an entity of a third country), such a type of unequal treatment does not come within the scope of that provision.

In the light of the foregoing, the Court dismisses the action.

2. Syria

Judgment of 18 May 2022, Foz v Council (T-296/20, EU:T:2022:298)

(Common foreign and security policy – Restrictive measures adopted against Syria – Freezing of funds – Error of assessment – Proportionality – Right to property – Right to pursue an economic activity – Misuse of powers – Obligation to state reasons – Rights of the defence – Right to a fair trial – Determination of listing criteria)

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468 Article 20(1).

469 First paragraph of Article 18 TFEU: 'Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

Amer Foz is a businessperson of Syrian nationality. In February 2020, his name was added [470] to the list of persons and entities subject to the restrictive measures adopted against the Syrian Arab Republic by the Council of the European Union and was subsequently maintained on those lists in May 2020 and May 2021. [471] He was included on those lists on the basis that he was a leading businessperson with personal and family business interests and activities in multiple sectors of the Syrian economy who benefits financially from access to commercial opportunities and supports the Syrian regime, while being associated with his brother, Samer Foz, who is also included on those lists. In May 2021, the Council had also stated that Amer Foz was carrying out numerous commercial projects with his brother, in particular in the cable manufacture and solar power sectors, and that the two brothers were carrying on various activities with the Islamic State of Iraq and the Levant ('ISIL') on behalf of the Syrian regime, including the supply of arms and ammunition in exchange for oil and wheat.

Amer Foz's name had been included on the lists at issue on the basis that he met three criteria, namely that of leading businessperson operating in Syria, that of association with the Syrian regime and that of association with a person or entity subject to restrictive measures. [472]

The Court dismisses the action for annulment brought by Amer Foz against the acts which included his name on the lists at issue ('the initial measures', 'the 2020 maintaining acts' and 'the 2021 maintaining acts'), specifying the criteria relating to that inclusion in the event of the simultaneous application by the Council of various listing criteria. In that context, the Court defines, inter alia, the scope of the criterion of association with another person or entity that is already subject to restrictive measures. It also examines, for the first time, the condition requiring there to be sufficient information that the persons included on the lists do not pose a real risk of circumventing the measures adopted. If that condition is met, a person who is associated with another person or entity subject to restrictive measures is then not to be maintained on those lists.

Findings of the Court

The Court notes, first of all, that, for the same person, the reasons for inclusion might overlap while relating, in such a situation, to different criteria. In application, by analogy, of the judgment in *Kaddour* v *Council*, [473] a person may be classified as a leading businessperson operating in Syria and be regarded as being associated, in particular by business links, to another person who is subject to

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470 Council Implementing Decision (CFSP) 2020/212 of 17 February 2020 implementing Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 43 I, p. 6) and Council Implementing Regulation (EU) 2020/211 of 17 February 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 43 I, p. 1).

471 Council Decision (CFSP) 2020/719 of 28 May 2020 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2020 L 168, p. 66) and Council Implementing Regulation (EU) 2020/716 of 28 May 2020 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2020 L 168, p. 1); Council Decision (CFSP) 2021/855 of 27 May 2021 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2021 L 188, p. 90) and Council Implementing Regulation (EU) 2021/848 of 27 May 2021 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2021 L 188, p. 18).

472 The reasons relate, first, to the criterion of a leading businessperson operating in Syria, defined in Article 27(2)(a) and Article 28(2)(a) of Decision 2013/255, as amended by Decision 2015/1836, and in Article 15(1a)(a) of Regulation No 36/2012, as amended by Regulation 2015/1828, second, to the criterion of association with the Syrian regime defined in Article 27(1) and Article 28(1) of that decision and Article 15(1)(a) of that regulation and, lastly, to the criterion of association with a person or entity subject to restrictive measures, defined in the last phrase of Article 27(2) and Article 28(2) of Decision 2013/255 and in the last phrase of Article 15(1a) of Regulation No 36/2012.

473 Judgment of 23 September 2020, *Kaddour* v *Council* (T-510/18, EU:T:2020:436, paragraph 77).

restrictive measures through such operating. Similarly, that person may be associated with the Syrian regime while being associated, for the same reasons, to a person covered by the restrictive measures.

As regards, next, the criterion of Amer Foz's association with a person or entity subject to restrictive measures, [474] the Court points out that Amer Foz's brother was listed because of his status as a leading businessperson operating in Syria and his association with the Syrian regime. Since the Council has not established before the Court [475] that the measures adopted against him should be annulled, those measures enjoy the presumption of legality associated with acts of the EU institutions and therefore continue to produce legal effects until such time as they are withdrawn, annulled or declared invalid. Since the Council does not contend that being a member of the Foz family is an autonomous listing criterion, unlike being a member of the Al-Assad or Makhlouf families, according to Decision 2013/255, the Court finds that the existence of that brotherhood link must be examined as a matter of fact, in particular in the context of the examination of the business links between Amer and Samer Foz.

The Court concludes in that regard that the Council has adduced a set of indicia that is sufficiently specific, precise and consistent with regard to the links between Amer and Samer Foz in the context of those business relations, at the date of adoption of the initial measures, first, through the family business Aman Holding and the company ASM International General Trading, second, through that family business with respect to the 2020 maintaining acts, and, lastly, in respect of the 2021 maintaining acts, on the basis that they carried on activities with ISIL on behalf of the Syrian regime. The existence of business links between the two men is also reflected in a form of concertation in how their share portfolios are managed.

Lastly, in the light of the relevant provisions of Decision 2013/255, as amended by Decision 2015/1836, in view of the privileged position of Samer Foz in the Syrian economy and his influence, the current or past business links between Amer and Samer Foz, the fact that they are brothers, the significance of the family business in which they held shares and occupied positions of responsibility and the fact that it is impossible to rule out concertation between Amer Foz and his brother in the disposal of their shares in various companies, the Court finds that it is reasonable to think that Amer Foz poses a real threat of circumvention of the restrictive measures.

3. Democratic Republic of the Congo

Judgment of 27 April 2022, Ilunga Luyoyo v Council (T-108/21, EU:T:2022:253)

(Common foreign and security policy – Restrictive measures adopted in view of the situation in the Democratic Republic of the Congo – Freezing of funds – Restriction on admission to the territory of the Member States – Retention of the applicant's name on the lists of persons covered – Proof that inclusion and retention on the lists is well founded – Continuation of the factual and legal circumstances which led to the adoption of the restrictive measures)

In response to the deteriorating security situation in the Democratic Republic of the Congo (DRC) and the worsening of the political situation in that country at the end of 2016, the Council had adopted, on

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474 Article 27(2) and Article 28(2) of Decision 2013/255, as amended by Decision 2015/1836.

475 On that point, see judgment of 24 November 2021, *Foz* v *Council* (T-258/19, not published, EU:T:2021:820).

12 December 2016, Decision 2016/2231 and Regulation 2016/2230, [476] which provide, inter alia, for the freezing of funds and economic resources belonging to persons involved in acts undermining the rule of law in the DRC or constituting serious human rights violations.

The applicant's name, Mr Ilunga Luyoyo was initially included on the lists of persons covered by those restrictive measures in 2016. By Decision 2020/2033 and Regulation 2020/2021, [477] the Council maintained that listing, [478] on the grounds that, as the commander of an anti-riot unit (the LNI) until 2017 and the commander of a unit responsible for the protection of institutions and high-ranking officials (the UPIHP) until December 2019, the applicant bore responsibility for human rights violations committed by the Congolese National Police (PNC), which had made disproportionate use of force and violent repression in September 2016 in Kinshasa. The Council had added that Mr Ilunga Luyoyo had retained his rank of General and remained active on the public scene in the DRC.

Mr Ilunga Luyoyo claimed that the Council had committed a manifest error of assessment, given that he had not held a position within the PNC since 2019 and that he no longer carried out any specific public duties. He maintained, inter alia, that his former positions could not justify the decision to maintain his name on the lists in question.

The General Court upholds the action for annulment brought by Mr Ilunga Luyoyo, since the Council was unable to establish that the maintenance of the restrictive measures against him was justified, in particular in the light of changes in his personal situation since the initial inclusion of his name on the lists at issue.

Findings of the Court

The Court points out, first of all, that the EU judicature must ensure that a decision imposing restrictive measures is taken on a sufficiently solid factual basis. To that end, in so far as it is for the competent EU authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, it is necessary that the information or evidence produced should support the reasons relied on. In that regard, the Court observes that it was common ground between the parties that Mr Ilunga Luyoyo had not held a position within the PNC since December 2019 and that the Council had that information when the time came to review the restrictive measures at issue.

The Court then points out that restrictive measures are of a precautionary and, by definition, provisional nature, and their validity always depends on whether the factual and legal circumstances which led to their adoption continue to apply and on the need to persist with them in order to achieve

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476 Council Decision (CFSP) 2016/2231 of 12 December 2016 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo (OJ 2016 L 336I, p. 7) and Council Regulation (EU) 2016/2230 of 12 December 2016 amending Council Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo (OJ 2016 L 336I, p. 1).

477 Council Decision (CFSP) 2020/2033 of 10 December 2020 amending Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo (OJ 2020 L 419, p. 30) and Council Implementing Regulation (EU) 2020/2021 of 10 December 2020 implementing Article 9 of Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo (OJ 2020 L 419, p. 5) ('the contested acts').

478 As had already been the case on three occasions. See, in that regard, judgment of 12 February 2020, *Ilunga Luyoyo* v *Council* (T-166/18, not published, EU:T:2020:50); judgment of 3 February 2021, *Ilunga Luyoyo* v *Council* (T-124/19, not published, EU:T:2021:63); and judgment of 15 September 2021, *Ilunga Luyoyo* v *Council* (T-101/20, not published, EU:T:2021:575).

their objective. It is for the Council, in the course of its periodic review of those measures, to carry out an updated assessment of the situation and to appraise the impact of such measures.

The Court finds, in the present case, that the evidence relied on by the Council is not capable of establishing a link between human rights violations and Mr Ilunga Luyoyo since December 2019, which is almost one year before the adoption of the contested measures, or demonstrating that Mr Ilunga Luyoyo may have been reinstated to any position in connection with the security situation in the DRC. Moreover, the fact that Mr Ilunga Luyoyo retained his rank of General does not in itself permit the inference that he could have exercised any influence whatsoever on the security forces in the DRC. As regards Mr Ilunga Luyoyo's duties as President of the Congolese Boxing Federation, there is no concrete information in the articles produced by the Council to justify the view that the holder of that position may have an influence on security policy in the DRC, or to suggest that Mr Ilunga Luyoyo carried out highly politicised duties in that capacity.

Since the Council has failed to adduce sufficient evidence to support the view that there was still a sufficient link between Mr Ilunga Luyoyo and the security situation which gave rise to the human rights violations in the DRC, even though, for a considerable period of time before the adoption of the contested measures, he had not held the various positions which had justified the inclusion of his name on the lists in question, the Court also considers that the Council could not legitimately rely on the fact that Mr Ilunga Luyoyo had not dissociated himself from the regime formerly in power in the DRC to support its decision to maintain the restrictive measures against him.

4. Combating terrorism

Judgment of 30 November 2022, Kurdistan Workers' Party (PKK) v Council (Joined Cases T-148/19 and T-316/14 RENV EU:T:2022:727)

(Common foreign and security policy – Restrictive measures against the PKK with a view to combating terrorism – Freezing of funds – Common Position 2001/931/CFSP – Applicability to situations of armed conflict – Terrorist group – Factual basis of the fund-freezing decisions – Decision taken by a competent authority – Authority of a third State – Review – Proportionality – Obligation to state reasons – Rights of the defence – Right to effective judicial protection – Modification of the application)

Since 2002, the Kurdistan Workers' Party (PKK) has been listed as an organisation involved in acts of terrorism on the lists of persons or entities subject to fund-freezing measures annexed to Common Position 2001/931/CFSP and Regulation No 2580/2001. [479] In the measures that it had adopted in 2014 against that organisation, the Council relied on national decisions adopted by a UK authority and by US authorities respectively, in addition to relying, from 2015, on judicial decisions adopted by French courts.

By judgment of 22 April 2021, *Council* v *PKK* (Case C-46/19 P), [480] the Court of Justice had set aside the judgment of the General Court of 15 November 2018 in the Case *PKK* v *Council* (T-316/14), [481] which

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479 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93) and Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70). Those measures were subject to regular updates.

480 Judgment of 22 April 2021, *Council* v *PKK* (C-46/19 P, EU:T:2021:316).

itself had annulled several measures adopted by the Council of the European Union between 2014 and 2017 [482] which had retained the PKK on the lists at issue. That case was referred back to the General Court (T-316/14 RENV) and was joined to the Case *PKK* v *Council* (T-148/19), in which the PKK also sought annulment of the measures adopted against it by the Council between 2019 and 2020. [483]

By its judgment in both cases, the General Court annuls the regulations adopted by the Council in 2014 in so far as they retain the PKK on the lists at issue, on the ground that the Council failed to comply with its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism. As regards the acts adopted subsequently by the Council, the Court concludes, however, that the pleas raised by the applicant concerning the US and UK national decisions do not call into question the Council's assessment – which is based, inter alia, on subsequent incidents and facts – as to whether that risk was ongoing. The General Court also took the opportunity to clarify its case-law on the scope of Article 266 TFEU in relation to restrictive measures.

Findings of the Court

The Court notes, first of all, the principles governing the initial adoption of the restrictive measures and their review by the Council under Common Position 2001/931/CFSP. [484] In the absence of means on the part of the European Union to carry out its own investigations, the procedure that may lead to the adoption of an initial fund-freezing measure takes place on two levels: national level, through the adoption by a competent national authority of a decision in respect of the person concerned, and European level, through the Council's decision to include the person concerned on the list in question, on the basis of precise information or material in the file which shows that such a decision was taken at national level. Such a prior decision has the function of establishing the existence of serious and credible evidence or clues of the involvement of the person concerned in terrorist activities which are

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481 Judgment of 15 November 2018, *PKK* v *Council* (T-316/14, EU:T:2018:788).

482 Council Implementing Regulation (EU) No 125/2014 of 10 February 2014 (OJ 2014 L 40, p. 9); Council Implementing Regulation (EU) No 790/2014 of 22 July 2014 (OJ 2014 L 217, p. 1); Council Decision (CFSP) 2015/521 of 26 March 2015 (OJ 2015 L 82, p. 107); Council Implementing Regulation (EU) 2015/513 of 26 March 2015 (OJ 2015 L 82, p. 1); Council Decision (CFSP) 2015/1334 of 31 July 2015 (OJ 2015 L 206, p. 61); Council Implementing Regulation (EU) 2015/1325 of 31 July 2015 (OJ 2015 L 206, p. 12); Council Implementing Regulation (EU) 2015/2425 of 21 December 2015 (OJ 2015 L 334, p. 1); Council Implementing Regulation (EU) 2016/1127 of 12 July 2016 (OJ 2016 L 188, p. 1); Council Implementing Regulation (EU) 2017/150 of 27 January 2017 (OJ 2017 L 23, p. 3); Council Decision (CFSP) 2017/1426 of 4 August 2017 (OJ 2017 L 204, p. 95); and Council Implementing Regulation (EU) 2017/1420 of 4 August 2017 (OJ 2017 L 204, p. 3).

483 Council Decision (CFSP) 2019/25 of 8 January 2019 (OJ 2019 L 6, p. 6); Council Decision (CFSP) 2019/1341 of 8 August 2019 (OJ 2019 L 209, p. 15); Council Implementing Regulation (EU) 2019/1337 of 8 August 2019 (OJ 2019 L 209, p. 1); Council Implementing Regulation (EU) 2020/19 of 13 January 2020 (OJ 2020 L 8I, p. 1); Council Decision (CFSP) 2020/1132 of 30 July 2020 (OJ 2020 L 247, p. 18); and Council Implementing Regulation (EU) 2020/1128 of 30 July 2020 (OJ 2020 L 247, p. 1).

484 See Article 1(4) and (6) of Common Position 2001/931/CFSP.

considered reliable by those national authorities. Consequently, it is not for the Council to verify whether the events relied on in the national condemnation decisions on which an initial listing was based actually took place and who is responsible for them and the burden of proof borne by it in that regard is therefore relatively limited in scope.

The Court goes on to note that a distinction must be drawn, for each of the contested measures, according to whether they are based on the decisions of competent national authorities justifying the applicant's initial listing or according to whether they are based on subsequent decisions of those national authorities or on material independently relied on by the Council. [485] As regards the material on which the Council may rely in order to demonstrate that there is an ongoing risk of involvement in terrorist activities at the stage of the periodic review of measures adopted previously, [486] it is for the Council, in the event of challenge, to establish that the findings of fact mentioned in the measures maintaining the entity concerned on the lists in question are well founded and for the Courts of the European Union to determine whether they are made out.

The Court notes, moreover, that the Council also remains subject to an obligation to state reasons as regards both the incidents found to have occurred in the national decisions taken into account at the stage when the measures at issue were initially adopted and the incidents found to have occurred in subsequent national decisions or any incidents taken into account by the Council independently.

As regards the order of the UK Home Secretary of 29 March 2001 proscribing the PKK, the Court notes that it has previously held, in its case-law, that that decision emanates from a 'competent authority' within the meaning of Common Position 2001/931/CFSP, which does not preclude the taking into account of decisions of administrative authorities, where those authorities may be regarded as 'equivalent' to judicial authorities if their decisions are open to a judicial review that covers matters both of fact and of law. Appeals against orders of the UK Home Secretary may be brought before the Proscribed Organisations Appeal Commission and, where appropriate, before an appeal court.

In the present case, after stating that the common position does not require the decision of the competent authority in question necessarily to be taken in the context of criminal proceedings *stricto sensu*, the Court finds that the 2001 order was issued in the context of the fight against terrorism and forms part of national proceedings seeking the imposition on the PKK of measures of a preventive or punitive nature. The Court concludes that the contested measures meet the conditions laid down in that regard by the common position. [487]

However, the Court concludes that it was for the Council to verify the classification of the facts by the competent national authority and whether the acts taken into account by that authority correspond to the definition of terrorist acts established by the common position. It considers it sufficient in that regard that it stated, in the statements of reasons adopted by the Council in support of the contested measures, that it verified that the underlying grounds for the decisions taken by the national competent authorities are covered by the definition of terrorism set out in Common Position 2001/931/CFSP. The Court notes that that verification obligation relates solely to the incidents identified in the decisions of the national authorities on which the initial listing of the entity concerned was based. When it retains the name of an entity on the fund-freezing lists in the context of a periodic

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485 Those two types of basis are governed by different provisions of Common Position 2001/931/CFSP, the former falling within Article 1(4) of that position and the latter falling within Article 1(6) thereof.

486 See Article 1(6) of Common Position 2001/931/CFSP.

487 Article 1(4) of Common Position 2001/931/CFSP.

review, [488] the Council need only establish that there is an ongoing risk of that entity being involved in such acts.

In the context of that review, the Council is required to verify whether, since the initial inclusion of the name of the person or entity concerned, the factual situation has changed as regards the latter's involvement in terrorist activities and, in particular, whether the national decision has been repealed or withdrawn as a result of new facts or any modification of the competent national authority's assessment. In that regard, the mere fact that the national decision that served as the basis for the initial inclusion is still in force may, in view of the passage of time and in the light of changes in the circumstances of the case, no longer be sufficient to support the conclusion that the risk is ongoing. In such a situation, the Council is then required to base the retention of the restrictive measures on an up-to-date assessment of the situation, which demonstrates that that risk still exists. In that case, the Council may rely on recent material taken not only from national decisions adopted by competent authorities but also from other sources and, therefore, from its own assessments.

The Court observes that, in that situation, the Courts of the European Union are required to determine, as regards whether the obligation to state reasons has been fulfilled, whether the reasons relied on in the statement of reasons underpinning the retention on the fund-freezing lists are sufficiently detailed and specific and, as part of the review of substantive legality, whether those reasons are substantiated and have a sufficiently solid factual basis. Irrespective of whether that material is derived from a national decision adopted by a competent authority or from other sources, it is for the Council, in the event of challenge, to establish that the findings of fact are well founded and for the Courts of the European Union to determine whether the events concerned are made out.

Lastly, as regards Article 266 TFEU, which was relied on by the PKK solely in Case T-148/19, according to which an institution whose act has been declared void is to be required to take the necessary measures to comply with any judgment declaring that act void, [489] the Court notes that that obligation is incumbent on it as soon as the judgment at issue is delivered where it declares a decision void, unlike a judgment declaring a regulation void. [490] Accordingly, on the date of adoption of the 2019 decisions concerning the PKK, the Council was required either to withdraw the PKK from the list or to adopt a re-listing measure in accordance with the grounds of the judgment of 15 November 2018 (T-316/14). The Court points out that, without that obligation, the annulment ordered by the Courts of the European Union would be deprived of practical effect.

The Court observes, in that regard, that in the 2019 decisions the Council reproduced the same reasons as those on which it had relied in the 2015 to 2017 measures which had been declared unlawful in the judgment of 15 November 2018. Although the Council lodged an appeal against that judgment, which did not have suspensory effect, such a refusal by the Council to draw the appropriate conclusions from *res judicata* was liable to harm the confidence placed by individuals in compliance with judicial decisions. However, since the judgment of 15 November 2018 (T-316/14) was set aside by the judgment of the Court of Justice of 22 April 2021 (C-46/19 P), in particular in so far as it had itself annulled the 2015 to 2017 measures, and in view of the retroactive nature of that annulment by the Court of Justice, the General Court concludes that the Council's failure to meet its

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488 Under Article 1(6) of Common Position 2001/931/CFSP.

489 Article 266 TFEU: 'The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union. This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340'.

490 Under the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, judgments declaring regulations void are to take effect only on expiry of the period for bringing an appeal or after the dismissal of the appeal.

obligations cannot lead to the annulment of the 2019 decisions. Since the applicant was nevertheless entitled to believe that it was justified in bringing the action in Case T-148/19, the Court therefore takes that factor into account in the settlement of costs between the parties.

In the light of the foregoing, the Court concludes, with regard to the periodic review carried out by the Council, [491] that the latter had infringed its obligation to update the assessment of whether there was an ongoing risk that the PKK was involved in terrorism for the purposes of the 2014 measures. Consequently, the Court annuls Council Implementing Regulations No 125/2014 and No 790/2014 in Case T-316/14 RENV. However, as regards the subsequent 2015 to 2017 measures and the 2019 decisions, the Court concludes that the pleas raised by the applicant do not call into question the Council's assessment relating to whether there was an ongoing risk that the PKK was involved in terrorism, which remains validly based on the UK Home Secretary's order, which is still in force, and, as the case may be, on other subsequent incidents. Accordingly, the Court dismisses the action as to the remainder in Case T-316/14 RENV and dismisses the action in Case T-148/19.

491 Under Article 1(6) of Common Position 2001/931/CFSP.

VI. Economic, social and territorial cohesion

Judgment of 22 June 2022, Italy v Commission (T-357/19, EU:T:2022:385)

(ERDF – Regional policy – Operational programmes coming under the 'Investment for growth and jobs' objective in Italy – Decision approving the financial contribution of the ERDF to the major project 'Major National Project Ultra Broadband – White Areas' – Ineligibility of the costs incurred by the beneficiary in respect of value added tax (VAT) – Article 69(3)(c) of Regulation (EU) No 1303/2013 – Concept of 'VAT that is recoverable under national VAT legislation)

In 2015, the Italian Republic adopted the 'Italian Strategy for Ultra Broadband'. That strategy included, inter alia, the objective of guaranteeing high-speed internet connection across the national territory. In particular, the strategy targeted market failure areas in which next generation broadband access networks were non-existent and where private operators had no plan to deploy such networks in the near future ('white areas').

Direct public assistance up to EUR 4 billion was planned [492] with a view to deploying the next generation broadband access networks in those white areas.

In 2017, the Italian authorities sent a request to the European Commission for a financial contribution from the European Regional Development Fund (ERDF) with a view to implementing the 'Major National Project Ultra Broadband – White Areas'. The Italian Ministry of Economic Development was designated as the beneficiary of the ERDF contribution, whereas the implementation of the project was to be the responsibility of Infratel Italia SpA ('Infratel'), an in-house company of the Italian Ministry of Economy and Finance. Accordingly, in order to build the broadband access network infrastructure and to ensure its maintenance and commercial operation, Infratel selected Open Fiber SpA as the concessionaire.

According to the Italian authorities, value added tax (VAT) linked to construction costs was eligible to be covered by the ERDF funding, in so far as it is paid by the Ministry of Economic Development without the VAT being recoverable under national VAT legislation, because the Ministry is not subject to VAT and cannot deduct it. In accordance with invoicing arrangements, the concessionaire submitted to Infratel the invoices for construction costs, including VAT, and Infratel then submitted invoices for the same amounts to the Ministry of Economic Development, including VAT. That ministry paid, on the one hand, the invoices issued by Infratel, excluding VAT, and, on the other, the VAT directly to the Italian Ministry of Economy and Finance, according to the split payment system in respect of VAT provided for under national law.

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492 By Decision C(2016) 3931 final of 30 June 2016, the Commission considered that this public funding constituted State aid compatible with the internal market.

By the contested decision, [493] the Commission considered that VAT-related expenditure on the 'Major National Project Ultra Broadband – White Areas' was not eligible for the financial contribution from the ERDF. The Commission took the view that the VAT incurred by the Ministry of Economic Development for the implementation of the project did not constitute an economic burden for the beneficiary and could not be considered as non-recoverable under national VAT legislation, within the meaning of Article 69(3)(c) of Regulation No 1303/2013. [494]

The action brought by the Italian Republic against that decision is upheld by the General Court.

This case leads the Court to interpret, for the first time, Article 69(3)(c) of Regulation No 1303/2013 which provides for the exclusion, in principle, of VAT from the costs that are eligible for a contribution from the ESI Funds, except where it is non-recoverable 'under national VAT legislation'. For many public investments eligible for EU funding, VAT-related expenditure represents a significant financial burden for public authorities (in the present case, total VAT-related expenditure represented more than EUR 210 million, EUR 125 million of which could be financed by the ERDF).

Findings of the Court

The Court finds, first of all, that, by providing that VAT does not constitute a cost eligible for a contribution from the ESI Funds which takes the form of a grant, except where it is non-recoverable under national VAT legislation, Article 69(3)(c) of Regulation No 1303/2013 ensures the proper functioning of economic, social and territorial cohesion mechanisms established by that regulation.

On the one hand, the inclusion of VAT in the costs eligible for a contribution from the ESI Funds would give rise to unjust enrichment for the beneficiary of the contribution if, after having paid the VAT due on the subsidised supply of goods or provision of services, the beneficiary was able to recover it under national law. On the other hand, the exclusion of VAT from eligible costs if VAT were not recoverable would have the effect of increasing the share of funding borne by the beneficiary of the ESI Funds and could, therefore, constitute a hindrance to the achievement of operations that the funds are intended to finance.

Next, the Court finds, in view of the wording of Article 69(3)(c) of Regulation No 1303/2013 and in the light of the preparatory documents, that that provision now limits the ineligibility of VAT for a contribution from the ESI Funds to the situation where VAT is recoverable under national VAT legislation, and not by any other means. [495]

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493 Commission Implementing Decision C(2019) 2652 final of 3 April 2019 approving the financial contribution to the major project 'Major National Project Ultra Broadband – White Areas', selected in the context of operational programmes 'POR Abruzzo FESR 2014-2020', 'Basilicata', 'POR Calabria FESR FSE', 'Campania', 'POR Emilia Romagna FESR', 'POR Lazio FESR', 'POR Liguria FESR', 'POR Lombardia FESR', 'POR Marche FESR 2014-2020', 'POR Piemonte FESR', 'POR Puglia FESR-FSE', 'POR Sardegna FESR', 'Sicilia', 'Toscana', 'POR Umbria FESR', 'POR Veneto FESR 2014-2020' and 'Enterprises and competitiveness' in Italy.

494 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). Regulation No 1303/2013 establishes, with effect from 1 January 2014, common provisions for 'European structural and investment funds' ('ESI Funds'), which include the ERDF, and general provisions which apply to the ERDF.

495 Contrary to the situation under the law as it previously stood, pursuant to which VAT was excluded from EU funding if it was recoverable by any means (see, to that effect, judgments of 20 September 2012, *Hungary* v *Commission* T-89/10, not published, EU:T:2012:451, and of 20 September 2012, *Hungary* v *Commission*, T-407/10, not published, EU:T:2012:453).

Furthermore, the Court notes that the expression 'VAT recoverable under national VAT legislation' necessarily includes deductible VAT, without however being limited to that situation alone, since other possibilities for recovery provided for by national VAT legislation could also preclude taking VAT into account in the context of a contribution from the ESI Funds.

Lastly, the Court, on the basis of the contextual interpretation, the case-law, and the origin of the rules previously in force, from which Regulation No 1303/2013 [496] evolved, finds that the beneficiary of the ERDF contribution is the entity or person from whose perspective the recoverability of the VAT is to be assessed.

Consequently, if the VAT due by reason of the implementation of an operation subsidised by a contribution from the ESI Funds is actually and definitively borne by the beneficiary of that contribution and if the VAT is recoverable by the beneficiary under national VAT legislation, it cannot be included in the costs eligible for a contribution.

In the light of those considerations, the Court finds that the Commission's reasons on which the contested decision is based do not justify the failure to take into account, in the costs eligible for the ERDF contribution, VAT-related expenditure in implementing the 'Major National Project Ultra Broadband – White Areas'.

In the first place, the Court finds that, to implement the 'Major National Project Ultra Broadband – White Areas', the Ministry of Economic Development had the status of beneficiary within the meaning of Regulation No 1303/2013 and that it had to bear the burden of the VAT incurred in respect of the construction of the ultra broadband access network.

The Court then finds that the reason why the payment of VAT by the Ministry of Economic Development to another ministry, in this case the Ministry of Economy and Finance, cannot be considered to be a cost incurred by the central administration of the State cannot be upheld, in particular because such an argument would result in the automatic exclusion of VAT from the costs eligible for a contribution from the ERDF where the beneficiary is a part of the central administration of a Member State, such as a ministerial department, contrary to Article 2(10) of Regulation No 1303/2013. [497]

In the second place, the Court finds unlawful the second ground of the contested decision, relating, in essence, to the fact that the VAT-related cost should have been borne not by the Ministry of Economic Development, but by Infratel in its capacity as an 'in-house company' of the Ministry of Economic Development, since that company can then recover the VAT by deducting it. Apart from the fact that the concepts of 'internal transaction' and 'in-house company' are not provided for in the VAT Directive, [498] the Court finds, in particular, that the option given to the Member States under Article 11 of that directive to regard as a single taxable person any persons who are closely linked has not been transposed into Italian legislation with regard to entities such as the Ministry of Economic Development and Infratel, which constitute two separate legal entities.

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496 In particular, Regulation No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999 (OJ 2006 L 210, p. 1).

497 In accordance with that provision, the concept of 'beneficiary' includes public bodies, irrespective of whether they belong to the central administration of a Member State or have legal personality that is separate from and autonomous of the State within whose responsibility they fall.

498 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

In the third and last place, the Court finds, with regard to the third ground of the contested decision, that the mere fact that the concession fees for the ultra broadband access network paid by the concessionaire to Infratel are subject to VAT has no bearing on the real and definitive liability of the Ministry of Economic Development for VAT-related expenditure incurred for the implementation of the project in question. In that regard, the Court notes, in particular, that it does not appear from the documents in the file that the Ministry of Economic Development could recover indirectly, even in part, and pursuant to national VAT legislation, the VAT due from the concessionaire on concession fees during the operational phase of the ultra broadband access network, with the result that it could be considered that the Ministry of Economic Development itself does not bear the real and definitive burden of the VAT.

VII. Protection of personal data

Judgment of 27 April 2022, Veen v Europol (T-436/21, EU:T:2022:261)

(Non-contractual liability – Cooperation of the police authorities and other law enforcement agencies of the Member States – Fight against crime – Communication of information by Europol to a Member State – Alleged unauthorised data processing – Regulation (EU) 2016/794 – Article 50(1) – Non-material harm)

As part of an investigation following the seizure of 1.5 tonnes of methamphetamine, the Slovak police sought the assistance of Europol, [499] stating that Mr Veen was suspected of involvement in trafficking of that substance.

On the basis of information supplied by the Member States, Europol drew up a report, which was communicated to only France, the Netherlands, Slovakia and the United States. The report states that Mr Veen had been involved in several investigations in the Netherlands and had also been reported in the context of investigations in Sweden and Poland.

Mr Veen considered that he had suffered harm as a result of the inaccurate statement that he had been the subject of investigations in Sweden and Poland. He therefore brought an action before the General Court on the basis of the Europol Regulation [500] seeking compensation for the non-material harm he claimed to have suffered as a result of the alleged unlawful processing of his personal data by Europol.

The Court dismisses the action and, for the first time, applies the specific and autonomous regime for the protection of personal data in the context of Europol's actions.

Findings of the Court

First of all, the Court points out that the inclusion of personal information about an individual in a Europol report does not in itself constitute an unlawful act such as to incur liability on Europol's part. Europol's task is, inter alia, to collect, store, process, assess and exchange information, including criminal intelligence, and to notify the Member States without delay of any information and connections between criminal offences concerning them.

To that end, the Europol Regulation authorises Europol to process information, including personal data, inter alia through cross-checking aimed at identifying connections between information related to different categories of data subjects. [501] Europol must, however, comply with the data protection safeguards provided for in that regulation. [502] That protection is therefore autonomous and adapted to the specificity of the processing of personal data in a law enforcement context.

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499 European Union Agency for Law Enforcement Cooperation.

500 Article 50(1) of Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ 2016 L 135, p. 53; 'the Europol Regulation').

501 Article 18(1) and (2) of the Europol Regulation.

502 In accordance with Article 18(4) of the Europol Regulation.

Against that background, the Europol Regulation specifies how responsibility in personal data protection matters is to be attributed between, inter alia, Europol and the Member States. [503] Accordingly, Europol assumes responsibility for compliance with the general principles of data protection, with the exception of the requirement for data to be accurate and up to date, and responsibility for all data processing operations that it carries out. Meanwhile, the Member States are responsible for the quality of the personal data that they provide to Europol and for the legality of such transfers.

Therefore, even if the information contained in the report is incorrect, Europol cannot be held liable for any inaccuracies in data supplied by a Member State.

Next, the Court notes that there is no obligation on Europol to obtain prior authorisation from any court or independent administrative authority before processing any personal data, nor any obligation to give an individual the opportunity to be heard before such data about him or her is included in a report. To impose the latter obligation on Europol could undermine the practical effect of the Europol Regulation and the actions of given police authorities and law enforcement agencies.

Lastly, in relation to the alleged infringement of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union [504] concerning the respect for private and family life and the protection of personal data, the Court recalls that Article 52(1) of the Charter, concerning the scope of the guaranteed rights, means that legislation involving a measure which permits interference with those rights must lay down clear and precise rules governing the scope and application of the measure in question and impose minimum safeguards.

The Europol Regulation was drawn up with a view to guaranteeing respect for the right to the protection of personal data and the right to privacy, whilst also pursuing the objective of effectively combating forms of serious crime affecting several Member States. Within that context, the EU legislature laid down clear and precise rules on the scope of the powers devolved to Europol, made Europol's actions subject to minimum safeguards in relation to the protection of personal data and put in place independent, transparent and accountable structures for supervision.

Accordingly, as Mr Veen has not established that Europol had failed to fulfil the obligations imposed on it, there can be no finding of any infringement of Articles 7 and 8 of the Charter.

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503 Article 38(2), (4), (5) and (7) of the Europol Regulation.

504 'The Charter'.

VIII. Public health

Judgment of 27 April 2022, Roos and Others v Parliament, (T-710/21, T-722/21 and T-723/21, EU:T:2022:262)

(Public health – Requirement to present a valid EU digital COVID-19 certificate to access the Parliament's buildings – Legal basis – Freedom and independence of Members of the European Parliament – Obligation to ensure the health of staff in the service of the European Union – Parliamentary immunity – Processing of personal data – Right to respect for private life – Right to physical integrity – Right to security – Equal treatment – Proportionality)

On 27 October 2021, the Bureau of the European Parliament introduced exceptional health and safety rules for access to the Parliament's buildings at its three places of work (Brussels, Strasbourg and Luxembourg). In essence, that decision made access to those buildings conditional on presentation of a digital COVID-19 vaccination, test or recovery certificate, [505] or an equivalent certificate, [506] for an initial period until 31 January 2022. The applicants, who are all Members of the European Parliament, brought proceedings before the General Court of the European Union for the annulment of that decision.

The Court, ruling in extended composition, examines for the first time the lawfulness of certain restrictions imposed by the EU institutions with a view to protecting the health, in particular, of their staff, in the context of the COVID-19 pandemic. It dismisses the actions of the Members of the European Parliament and holds that the Parliament may require them to present a valid COVID certificate in order to access its buildings.

Findings of the Court

In the first place, the Court holds that the Parliament did not need express authorisation from the EU legislature in order to adopt the contested decision. In that it seeks to restrict access to the Parliament's buildings only to those with a valid COVID certificate, that decision falls within the Parliament's power to adopt rules for its own internal organisation [507] and is intended to apply only on its premises. In addition, that decision can determine the elements of processing of personal data, as it constitutes a 'law', [508] that concept not being limited to legislative texts adopted after parliamentary debate.

In the second place, the Court notes that the contested decision does not constitute a disproportionate or unreasonable interference with the free and independent exercise of the Member's mandate. The Court recognises that in that it imposes an additional condition for access to the Parliament's buildings, that decision constitutes an interference with the free and independent exercise of the Members' mandate. Nevertheless, that decision pursues a legitimate aim, seeking to

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505 Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ 2021 L 211, p. 1).

506 As provided for in Article 8 of Regulation 2021/953 ('COVID-19 certificates and other documentation issued by a third country').

507 As provided for in Article 25(2) of the Rules of Procedure of the European Parliament, itself based on Article 232 TFEU.

508 As provided for in Article 8 of the Charter of Fundamental Rights of the European Union.

balance two competing interests in the context of a pandemic, namely, continuity of the Parliament's activities and the health of those present on its premises.

As regards an alleged infringement of the immunities granted to Members of the European Parliament, the Court notes that it is not apparent either from the Protocol on the privileges and immunities of the European Union [509] or the Parliament's Rules of Procedure that the Parliament could not adopt the internal organisation measures at issue. On the contrary, the Rules of Procedure expressly provide that the right of Members to participate actively in the Parliament's work is to be exercised in accordance with those rules. [510]

In the third place, the Court holds that the processing of personal data by the Parliament under the contested decision is not unlawful or unfair. First, the contested decision, adopted on the basis of the power of internal organisation arising under the TFEU, constitutes a legal basis for the processing of the data contained in COVID certificates. [511] On that basis, the Court notes that that processing pursues an EU general public interest, namely, the protection of public health. Secondly, the processing of the data is transparent and fair, as the Parliament first provided the individuals concerned with information concerning further processing of data for a purpose other than that for which those data were initially obtained. [512]

In the fourth place, the Court considers that the contested decision is not an infringement or a disproportionate infringement of the right to physical integrity, the principles of equal treatment and non-discrimination, the right to free and informed consent to any medical treatment, the right to freedom and, lastly, the right to privacy and protection of personal data. Furthermore, it holds that, in view of the epidemiological situation and current scientific knowledge the measures at issue, at the time they were adopted, were necessary and appropriate. Although it is true that neither vaccination, tests nor recovery allow transmission of COVID-19 to be completely ruled out, the requirement to present a valid COVID certificate allows the objective and non-discriminatory reduction of that risk and thus the objective of protecting health to be achieved.

The Court finds, moreover, that the measures at issue are also proportionate in relation to the objective pursued. The applicants have not established the existence of less restrictive measures that are equally effective. Therefore, without the measures at issue, a person who is neither vaccinated nor recovered, a potential carrier of the virus, could have free access to the Parliament's buildings, whilst risking, by the same token, infecting others. Furthermore, the contested decision takes account of the general epidemiological situation in Europe and also the specific situation of the Parliament, in particular frequent international travel of those with access to its premises. In addition, the measures at issue are limited in time and reviewed regularly.

Lastly, the Court finds that the practical disadvantages caused by the presentation of a valid certificate cannot outweigh the protection of the health of others or be treated in the same way as disproportionate interferences with the applicants' fundamental rights.

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509 Protocol No 7 on the privileges and immunities of the European Union (OJ 2012 C 326, p. 1).

510 Article 5 of the Rules of Procedure of the European Parliament.

511 In compliance with Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ 2018 L 295, p. 39).

512 In accordance with Article 16(4) of Regulation 2018/1725.

However, it notes that those measures must be reassessed from time to time in the light of the health situation in the European Union and in the Parliament's three places of work and that they must apply only for so long as the exceptional circumstances which justify them continue.

Judgment of 23 November 2022, CWS Powder Coatings v Commission (Joined Cases T-279/20, T-288/20 and T-283/20, EU:T:2022:725)

(Environment and protection of human health – Regulation (EC) No 1272/2008 – Classification, labelling and packaging of substances and mixtures – Delegated Regulation (EU) 2020/217 – Classification of titanium dioxide in powder form containing 1% or more of particles of a diameter equal to or below 10 µm – Criteria for classification of a substance as carcinogenic – Reliability and acceptability of studies – Substance that has the intrinsic property to cause cancer – Calculation of lung overload in particles – Manifest errors of assessment)

Titanium dioxide is an inorganic chemical substance used, in particular in the form of a white pigment, for its colourant and covering properties in various products, ranging from paints to medicinal products and toys. In 2016, the competent French authority submitted to the European Chemicals Agency (ECHA) a proposal to classify titanium dioxide as a carcinogenic substance. [513] The following year, ECHA's Committee for Risk Assessment ('the RAC') adopted an opinion classifying titanium dioxide as a category 2 carcinogen, including the hazard statement 'H 351 (inhalation)'.

On the basis of the RAC Opinion, the European Commission adopted Regulation 2020/217, [514] by which it proceeded with the harmonised classification and labelling of titanium dioxide, recognising that that substance was suspected of being carcinogenic to humans, by inhalation, in powder form containing 1% or more of particles of a diameter equal to or below 10 µm.

The applicants, in their capacity as manufacturers, importers, downstream users or suppliers of titanium dioxide, brought actions before the General Court for the partial annulment of Regulation 2020/217.

By its judgment, delivered in a chamber sitting in extended composition in three joined cases, [515] the Court annuls the contested regulation in so far as it concerns the harmonised classification and labelling of titanium dioxide. On that occasion, it rules on novel questions alleging manifest errors of assessment and infringement of the criteria established for harmonised classification and labelling under Regulation No 1272/2008 as regards, first, the reliability and acceptability of the scientific study on which the classification was based and, second, compliance with the classification criterion laid

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513 Proposal for harmonised classification and labelling pursuant to Article 37(1) of Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

514 Commission Delegated Regulation (EU) 2020/217 of 4 October 2019 amending, for the purposes of its adaptation to technical and scientific progress, Regulation (EC) No 1272/2008 of the European Parliament and of the Council on classification, labelling and packaging of substances and mixtures and correcting that Regulation (OJ 2020 L 44, p. 1, 'the contested regulation').

515 T-279/20, T-283/20 and T-288/20.

down by that regulation, according to which the substance must have the intrinsic property to cause cancer. [516]

Findings of the Court

In the first place, the Court holds that, in the present case, the requirement to base the classification of a carcinogenic substance on reliable and acceptable studies was not satisfied.

In recognising that the results of a scientific study on which it based its opinion on the classification and labelling of titanium dioxide were sufficiently reliable, relevant and adequate for assessing the carcinogenic potential of that substance, the RAC committed a manifest error of assessment. Specifically, in order to verify the degree of lung overload of titanium dioxide particles in that scientific study in order to assess carcinogenicity, the RAC used a density value corresponding to the density of unagglomerated primary particles of titanium dioxide, which is always higher than the density of the agglomerates of nano-sized particles of that substance. However, in so doing, it did not take into account all the relevant factors in order to calculate the lung overload during the scientific study at issue, namely the characteristics of the particles tested in that scientific study, the fact that those particles tend to agglomerate and the fact that the density of the agglomerates of particles was lower than the particle density and that, for that reason, those agglomerates occupied more volume in the lungs. Thus, the RAC's findings that the lung overload in the scientific study at issue was acceptable were implausible.

Consequently, in so far as, for the purposes of the harmonised classification and labelling of titanium dioxide, the Commission based the contested regulation on the RAC Opinion and thus followed the RAC's conclusion as to the reliability and acceptability of the results of the scientific study at issue, which constituted a decisive study for the classification proposal for titanium dioxide, it made the same manifest error of assessment as the RAC.

In the second place, the Court finds that the contested classification and labelling infringed the criterion according to which the classification of a substance as carcinogenic can apply only to a substance that has the intrinsic property to cause cancer.

In that context, in view of the fact that, under Regulation No 1272/2008, harmonised classification and labelling of a substance as carcinogenic may be based only on the intrinsic properties of the substance which determine its intrinsic capacity to cause cancer, the Court goes on to interpret the concept of 'intrinsic properties'. In that regard, it states that, although that concept does not appear in Regulation No 1272/2008, it must be interpreted in its literal sense as referring to the 'properties which a substance has in and of itself', which is consistent, inter alia, with the objectives and purpose of harmonised classification and labelling under that regulation.

In addition, it notes that the contested classification and labelling are intended to identify and notify a carcinogenic hazard of titanium dioxide which, in the RAC Opinion, was classified as 'non-intrinsic in a classical sense'. The Court states that that 'non-intrinsic in a classical sense' nature stems from several factors, referred to both in that opinion and in the contested regulation. The carcinogenicity hazard is linked solely to certain respirable titanium dioxide particles, when they are present in a certain form, physical state, size and quantity, it occurs only in lung overload conditions and corresponds to particle toxicity.

The Court therefore concludes that, by upholding the conclusion contained in the RAC Opinion that the mode of action of carcinogenicity on which that committee relied could not be regarded as

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516 Criteria referred to in Section 3.6.2.2.1 of Annex I to Regulation No 1272/2008.

intrinsic toxicity in the classical sense, but which had to be taken into consideration in the context of harmonised classification and labelling under Regulation No 1272/2008, the Commission committed a manifest error of assessment.

The Court states that the examples of classification and labelling of other substances, relied on in order to compare them with the classification and labelling of titanium dioxide, illustrate only cases in which, even though the form and size of the particles were taken into account, certain properties specific to the substances were nevertheless decisive for their classification, which does not correspond to the case here.

IX. Energy

Judgment of 7 September 2022, BNetzA v ACER, (T-631/19, EU:T:2022:509)

(Energy – Internal market in electricity – Regulation (EU) 2019/942 – Decision of the Board of Appeal of ACER – Action for annulment – Act not open to challenge – Inadmissibility – Competence of ACER – Article 8 of Regulation (EC) No 713/2009 – Article 6(10) of Regulation 2019/942 – Article 9(12) of Regulation (EU) 2015/1222 – Applicable law – Regulation (EU) 2019/943)

On 24 July 2015, the European Commission adopted Regulation (EU) 2015/1222 establishing a guideline on capacity allocation and congestion management [517] in the electricity sector. That regulation sets out a series of requirements relating to cross-zonal capacity allocation and congestion management in the day-ahead and intraday markets, including in particular a requirement to set a common coordinated capacity calculation methodology ('CCM') in each of the capacity calculation regions ('CCRs'). [518]

In accordance with that regulation, [519] the transmission system operators in the Core CCR [520] submitted two proposals for approval by the national regulatory authorities of the concerned region, relating to the draft regional day-ahead CCM and the draft regional intraday CCM respectively, which were amended at the request of those authorities.

Since the regulatory authorities failed to reach a unanimous agreement to validate the two amended proposals, the European Agency for the Cooperation of Energy Regulators (ACER), under the same regulation, [521] adopted a decision on the day-ahead and intraday CCMs for the Core CCR ('the initial decision').

The applicant, Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (BNetzA), as the national regulatory authority of the Federal Republic of Germany, appealed [522] against the initial decision to ACER's Board of Appeal ('the Board of Appeal'). The Board of Appeal having dismissed its appeal, the applicant brought an action before the General Court seeking, primarily, annulment of certain provisions of the initial decision and of the decision of the Board of Appeal and, in the alternative, annulment of both those decisions in their entirety.

In its judgment, the Court (Second Chamber, Extended Composition), while finding the action to be inadmissible in so far as it concerns the initial decision, annuls the Board of Appeal's decision dismissing the appeal. The Court has taken the opportunity to clarify, first, the extent of ACER's

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517 Commission Regulation (EU) 2015/1222 of 24 July 2015 establishing a guideline on capacity allocation and congestion management (OJ 2015 L 197, p. 24).

518 Articles 20 to 26 of Regulation 2015/1222.

519 Articles 9(7) and 20(2) of Regulation 2015/1222.

520 The 'Core CCR' is the geographical area for the purpose of calculating capacity established under Article 15 of Regulation 2015/1222 and comprising Belgium, the Czech Republic, Germany, France, Croatia, Luxembourg, Hungary, the Netherlands, Austria, Poland, Romania, Slovenia and Slovakia.

521 Article 9(12) of Regulation 2015/1222.

522 Under Article 19 of Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ 2009 L 211, p. 1).

competence in comparison with the competence of the national regulatory authorities in the context of the adoption of the regional CCMs and, secondly, the substantive law applicable to the case.

Findings of the Court

As a preliminary issue, the Court finds the applicant's action for annulment to be inadmissible in so far as it concerns the initial decision. It notes in that respect that the admissibility of actions for annulment brought by natural or legal persons against acts of ACER intended to produce legal effects in relation to them must be examined in the light of the specific conditions and arrangements laid down by the act setting up that body, namely Regulation (EU) 2019/942. [523] According to that regulation, where an internal appeal has been lodged against a decision made by ACER, an action for annulment will only be admissible if it concerns the decision by the Board of Appeal dismissing that internal appeal or, as applicable, confirming the initial decision. [524] In consequence, since the decision of the Board of Appeal is based on the grounds stated in the initial decision, and indeed confirms those grounds, the pleas in law and arguments directed against those grounds must be found to be fully effective for the purpose of reviewing the legality of the Board of Appeal's decision.

In line with the foregoing finding, the Court continues its analysis on the substance. It examines, first, whether the Board of Appeal erred in law by failing to find that, in adopting the initial decision, ACER exceeded the limits of its competence. It therefore seeks to establish whether the provisions of Regulations 2019/942 [525] and 2015/1222, [526] both in force and applicable at the time the Board of Appeal adopted its decision, empowered ACER to adopt the final day-ahead and intraday CCMs of the Core CCR. According to those provisions, ACER is competent to decide on or to adopt individual decisions on regulatory issues or problems having effects on cross-border trade or cross-border system security, such as the adoption of the day-ahead and intraday CCMs of each CCR where, as in the present case, the competent national regulatory authorities have failed to reach agreement. In contrast to the line of argument put forward by the applicant, it does not emerge from those provisions that ACER's competence is confined to the points of disagreement between the authorities concerned. Regulatory issues or problems that initially fall within the competence of the national regulatory authorities before becoming the competence of ACER because those authorities fail to reach agreement [527] are instead understood as an inseparable whole that is referred to the national regulatory authorities and then to ACER globally with no distinction drawn between points of agreement and points of disagreement.

That literal interpretation is borne out by the context and the objectives pursued by the legislation of which those provisions form part. It can be seen from the explanatory memoranda to the proposals for Regulation 2019/942 and for Regulation No 713/2009, [528] which applied previously, that the EU legislature clearly intended to make decision-making on cross-border issues faster and more efficient, by strengthening ACER's individual decision powers in a manner compatible with keeping the central role of the national regulatory authorities in energy regulation and in accordance with the principles

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523 Regulation of the European Parliament and of the Council of 5 June 2019 establishing a European Union Agency for the Cooperation of Energy Regulators (recast) (OJ 2019 L 158, p. 22).

524 Recital 34 and Articles 28 and 29 of Regulation 2019/942.

525 Article 6(10) of Regulation 2019/942, formerly Article 8(1) of Regulation No 713/2009.

526 Article 9(12) of Regulation 2015/1222.

527 Article 6(10) of Regulation 2019/942, formerly Article 8(1) of Regulation No 713/2009.

528 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

of subsidiarity and proportionality. It is also clear from the preamble of Regulation 2019/942 [529] that ACER was established to fill the regulatory gap at EU level and to contribute towards the effective functioning of the internal markets for electricity and natural gas.

Accordingly, not only the purpose of the provisions being interpreted and the context of which they form part but also the specific circumstances of the present case confirm that ACER is empowered to decide itself on the development of the regional CCMs where the regulatory authorities at Member State level have failed to reach a decision on the matter, while keeping the central role conferred on the national regulatory authorities through assent by the Board of Regulators on which those authorities are represented, and that its competence is not confined to the specific aspects around which those authorities' disagreement crystallised. Similarly, since ACER has been given its own decision-making powers to perform its regulatory functions independently and efficiently, ACER is empowered to amend the proposals from the transmission system operators in order to ensure that they comply with EU energy law, and must not be bound by any points of agreement there may be between the competent national regulatory authorities.

The Court therefore finds that the Board of Appeal did not err in law by failing to find that ACER had exceeded the limits of its competence by determining, in the initial decision, points of the day-ahead and intraday CCMs of the Core CCR on which the national regulatory authorities of that CCR had reached agreement.

Secondly, the Court seeks to determine whether, because it did not review the legality of the CCMs in ACER's initial decision in the light of the requirements governing the adoption of CCMs laid down in Articles 14 to 16 of Regulation 2019/943, the Board of Appeal erred in law in its determination of the applicable law.

The Court notes in that respect that Articles 14 to 16 of Regulation 2019/943 govern capacity allocation on the markets in day-ahead and intraday cross-border exchanges in electricity and therefore dictate the requirements to be taken into consideration when day-ahead and intraday CCMs are adopted. It also calls to mind that a new legal rule, in principle, applies from the entry into force of the act introducing it and, while it does not apply to legal situations that have arisen and become definitive under the old law, it does apply to their future effects and to new legal situations. At the time the initial decision was adopted, namely 21 February 2019, Articles 14 to 16 of Regulation 2019/943 had not yet entered into force or become applicable, whereas they had, with certain limits with regard to Article 16, at the time the Board of Appeal adopted its decision, namely 11 July 2019. Accordingly, where, as in the present case, an appeal is lodged before the Board of Appeal against a decision of ACER concerning day-ahead or intraday CCMs, it is the decision of the Board of Appeal confirming that decision that definitively establishes ACER's position on that methodology, following a full examination by the Board of Appeal of the situation at issue, in fact and in law, in the light of the law applicable at the time it makes its decision. In consequence, since Articles 14 to 16 of Regulation 2019/943 were already applicable by that date, the Board of Appeal was obliged to determine whether the CCMs approved by ACER in the initial decision complied with the new rules emanating from those articles.

It follows that, by not reviewing the legality of the day-ahead and intraday CCMs of the Core CCR in the light of the requirements of Articles 14 to 16 of Regulation 2019/943, the Board of Appeal erred in law in its determination of the law applicable at the time of final adoption of those CCMs.

The Board of Appeal's decision is therefore annulled.

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529 Recital 10 of Regulation 2019/942, formerly recital 5 of Regulation No 713/2009.

X. Common commercial policy

Judgment of 18 May 2022, Uzina Metalurgica Moldoveneasca v Commission (T-245/19, EU:T:2022:295)

(Safeguard measures – Market for steel products – Implementing Regulation (EU) 2019/159 – Action for annulment – Interest in bringing proceedings – Standing to bring proceedings – Admissibility – Equal treatment – Legitimate expectations – Principle of sound administration – Duty of care – Threat of serious injury – Manifest error of assessment – Initiation of a safeguard investigation – Competence of the Commission – Rights of the defence)

In the context of the EU's commercial defence policy, the European Commission made imports of certain steel products originating in certain third countries [530] ('the product concerned') subject to prior monitoring. In the light of the statistical data collected for that purpose, the Commission initiated a safeguard investigation, further to which it adopted Implementing Regulation (EU) 2019/159, [531] which introduced definitive safeguard measures, in the form of tariff-rate quotas, against those imports. [532]

Uzina Metalurgica Moldoveneasca OAO ('the applicant'), established in Moldova, is an exporting producer of certain categories of the product concerned, and brought an action seeking annulment of the contested regulation in so far as it applies to the applicant.

The General Court, while declaring that action admissible in respect of the safeguard measures, dismisses it by examining whether, by treating Moldova differently from that applied to the Member States of the European Economic Area (EEA), the Commission infringed the principle of non-discrimination as a fundamental principle of EU law. It also interprets Article 5(1) of Regulation (EU) 2015/478 [533] in the light of the Commission's power to initiate a safeguard investigation on its own initiative.

Findings of the Court

As regards the admissibility of the action, the Court rejects the plea of inadmissibility raised by the Commission alleging that the applicant has no legal interest in bringing proceedings and has no standing to do so.

As regards the applicant's interest in bringing proceedings, the Court considers that a partial annulment of the contested regulation would in itself be capable of having legal consequences and would be capable of procuring an advantage for the applicant. It is apparent from the mechanism put

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[530] Commission Implementing Regulation (EU) 2016/670 of 28 April 2016 introducing prior Union surveillance of imports of certain iron and steel products originating in certain third countries (OJ 2016 L 115, p. 37).

[531] Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products (OJ 2019 L 31, p. 27; 'the contested regulation').

[532] In the present case, the contested regulation established a country-specific tariff-rate quota for countries having a significant interest as suppliers and a 'residual' tariff-rate quota for other exporting countries to the European Union. Countries having a significant interest as suppliers, such as Moldova, could operate under those two separate systems, since the competent authorities were required to apply an additional duty at the rate of 25% on imports from those countries once the two tariff quotas had been exhausted ('the above-quota tariff').

[533] Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (OJ 2015 L 83, p. 16; 'the Basic Safeguards Regulation').

in place by the contested regulation, namely the imposition of an above-quota duty of 25% in the event that the tariff-rate quotas are exhausted, that the legal rules applicable to the export of the applicant's products to the European Union is less favourable than that which applied to it prior to the adoption of that regulation.

As to the applicant's standing to bring proceedings, the Court notes that the applicant is directly and individually concerned by the contested regulation. As regards direct concern, the Court finds, in the first place, that the contested regulation produces direct effects on the applicant's legal situation: it determines the legal framework and the conditions under which the applicant may export to the European Union, in terms both of volume and pricing, since its products are now subject to a quota system and no longer subject to free movement within the European Union, which requires neither the allocation of quantities nor authorisation from the Commission. In the second place, the contested regulation leaves no discretion to the competent authorities of the Member State in the implementation of safeguard measures, since those authorities are required to apply the above-quota duty once the tariff-rate quotas have been exhausted. As regards individual concern, the Court holds that there is a set of factual and legal elements constituting a particular situation which distinguishes the applicant from all other economic operators and which shows that the applicant is individually concerned by the contested regulation. The applicant may be regarded as (i) being part of a closed group, (ii) identifiable in the contested regulation, (iii) having participated in the investigation in preparation for the introduction of safeguard measures, and (iv) the only operator whose commercial data were used to set the tariff-rate quotas in respect of Moldova.

As to the substance, the Court rejects, first of all, the applicant's complaint alleging infringement of the principle of non-discrimination in that the Commission did not exclude the Republic of Moldova from the application of the contested regulation, like the Member States of the EEA, when it is in a comparable situation in so far as concerns close integration with the EU market, overall import figures and the low risk of diversion of trade flows. In that connection, the Court explains that the comparability of the situations should be assessed in the light of the context of the relations between the European Union and the third State concerned. The Agreement on the European Economic Area and the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, in terms of their respective scope, objectives and institutional mechanisms. Thus, the Commission cannot be criticised for taking the view that Moldova's situation was not comparable to that of the relevant EEA Member States.

Second, the Court rejects the applicant's complaint alleging infringement of Article 5(1) of the Basic Safeguards Regulation, [534] in that the Commission initiated a safeguard investigation on its own initiative, whereas only the Member States may initiate such an investigation. In that regard, the Court rules that the interpretation advocated by the applicant, which is tantamount to making the initiation of an investigation dependent on a Member State referring the matter to the Commission, aside from the fact that it appears inconsistent with the other provisions of the contested regulation, is incompatible with the general scheme of the system laid down by that regulation. Since no safeguard measures may be imposed without the initiation of a prior investigation, the power granted to the Commission to impose, on its own initiative, safeguard measures where the substantive conditions are met would be limited in its effects. [535] Furthermore, the very purpose of the monitoring

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534 Article 5(1) the Basic Safeguards Regulation reads as follows: 'Where it is apparent to the Commission that there is sufficient evidence to justify the initiation of an investigation, the Commission shall initiate an investigation within 1 month of the date of receipt of information from a Member State and publish a notice in the *Official Journal of the European Union* …'

535 Pursuant to Article 15(1) of the Basic Safeguards Regulation, the Commission, in order to safeguard the interests of the European Union, may, inter alia on its own initiative, impose such measures where substantive conditions are satisfied.

mechanism would be affected by depriving the study of the data collected under that mechanism of most of its interest, since that data has allowed the Commission to consider that trends in imports of the product concerned might make it necessary to resort to safeguard measures. Accordingly, the Court concludes that the Commission has the opportunity to act on its own initiative where it has sufficient evidence to justify its action, and that such a possibility is recognised in the context of the initiation of investigations referred to in Article 5(1) of the Basic Safeguards Regulation.

XI. Economic and monetary policy

1. Single Resolution Mechanism [536]

Judgment of 1 June 2022, Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB (T-481/17, EU:T:2022:311)

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption of a resolution scheme by the SRB in respect of Banco Popular Español – Action for annulment – Challengeable act – Admissibility – Right to be heard – Right to property – Obligation to state reasons – Articles 18, 20 and 24 of Regulation (EU) No 806/2014)

Judgment of 1 June 2022, Del Valle Ruíz and Others v Commission and SRB (T-510/17, EU:T:2022:312)

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Delegation of power – Right to property – Obligation to state reasons – Articles 18 and 20 and Article 21(1) of Regulation (EU) No 806/2014)

Judgment of 1 June 2022, Eleveté Invest Group and Others v Commission and SRB (T-523/17, EU:T:2022:313)

(Economic and monetary union – Banking union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Right to be heard – Duty to state reasons – Articles 18 and 20 of Regulation (EU) No 806/2014 – Non-contractual liability)

Judgment of 1 June 2022, Algebris (UK) and Anchorage Capital Group v Commission (T-570/17, EU:T:2022:314)

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Obligation to state reasons – Principle of good administration – Article 20 of Regulation (EU) No 806/2014 – Right to be heard – Right to property)

Judgment of 1 June 2022, Aeris Invest v Commission and SRB (T-628/17, EU:T:2022:315)

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[536] Common résumé for cases: *Fundación Tatiana Pérez de Guzmán el Bueno and SFL* v *SRB* (T-481/17), *Del Valle Ruíz and Others* v *Commission and SRB* (T-510/17), *Eleveté Invest Group and Others* v *Commission and SRB* (T-523/17), *Algebris (UK) and Anchorage Capital Group* v *Commission* (T-570/17) and *Aeris Invest* v *Commission and SRB* (T-628/17).

(Economic and monetary union – Banking Union – Single Resolution Mechanism for credit institutions and certain investment firms (SRM) – Resolution procedure applicable where an entity is failing or is likely to fail – Adoption by the SRB of a resolution scheme in respect of Banco Popular Español – Delegation of power – Right to be heard – Right to property – Duty to state reasons – Articles 14, 18 and 20 of Regulation (EU) No 806/2014)

Banco Popular Español, SA ('Banco Popular') was a Spanish credit institution under direct prudential supervision by the European Central Bank (ECB). On 7 June 2017, the Single Resolution Board (SRB) adopted a decision concerning a resolution scheme in respect of Banco Popular [537] ('the resolution scheme'). On the same day, the European Commission adopted Decision 2017/1246, [538] endorsing that resolution scheme.

Prior to the adoption of the resolution scheme, a valuation of Banco Popular was carried out, comprising two reports which are annexed to the resolution scheme, namely a first valuation ('valuation 1'), dated 5 June 2017 and drafted by the SRB, and a second valuation ('valuation 2'), dated 6 June 2017, drafted by an independent expert. The purpose of valuation 2 was, inter alia, to estimate the value of Banco Popular's assets and liabilities, to inform the decision to be taken on the shares and instruments of ownership to be transferred, and to enable the SRB to determine what constituted commercial terms for the purposes of the sale of business tool. Also on 6 June 2017, the ECB, after consulting the SRB, carried out an assessment as to whether Banco Popular was failing or was likely to fail, [539] from which it concluded that, given the liquidity problems which Banco Popular was facing, the latter would probably not be in a position, in the near future, to pay its debts or other liabilities as they fell due. [540] On the same day, Banco Popular's Board of Directors informed the ECB that it had reached the conclusion that the institution was likely to fail.

In the resolution scheme, the SRB considered that Banco Popular fulfilled the conditions for the adoption of a resolution scheme, [541] that is to say that it was failing or was likely to fail, that there were no other measures that could have prevented its failure within a reasonable time frame and that resolution action in the form of a sale of business tool [542] was necessary in the public interest. The SRB exercised its power to write down and convert Banco Popular's capital instruments [543] and ordered that the resulting new shares were to be transferred to Banco Santander for the price of EUR 1.

The actions were designated as 'test cases' representing approximately 100 actions brought by natural and legal persons who owned capital instruments in Banco Popular before the resolution. The

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537 Decision SRB/EES/2017/08 of the Executive Session of the SRB of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, SA.

538 Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español SA (OJ 2017 L 178, p. 15).

539 In accordance with the second subparagraph of Article 18(1) 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; 'the SRM Regulation'). Article 18 of that regulation concerns the resolution procedure.

540 In accordance with Article 18(1)(a) and (4)(c) of Regulation No 806/2014.

541 In accordance with Article 18(1) of Regulation No 806/2014.

542 In accordance with Article 24(1)(1) of Regulation No 806/2014.

543 In accordance with Article 21 of Regulation No 806/2014.

actions sought the annulment of the resolution scheme and/or Decision 2017/1246, together with compensation.

By its five judgments delivered by the Third Chamber, Extended Composition, the General Court dismisses the applicants' actions in their entirety. The present cases provide the Court, for the first time, with the opportunity to rule on the lawfulness of a decision concerning a resolution scheme adopted by the SRB.

Findings of the Court

In the first place, the Court states that an action may be brought against a resolution scheme adopted by the SRB, without there being any requirement that an action must also be brought against the Commission decision endorsing that scheme, with the result that, once it is endorsed by the Commission, such a scheme produces legal effects and constitutes an act against which an independent action for annulment may be brought.

In the second place, as regards the scope of its review, the Court considers that, since the decisions which the SRB is required to adopt in the context of a resolution procedure are based on highly complex economic and technical assessments, the Court must carry out a limited review. However, the Court considers that, even in the case of complex assessments such as those made by the SRB in the present case, the EU judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but also review whether that evidence constitutes all the relevant information which must be taken into account in order to assess a complex situation and whether that information is capable of supporting the conclusions drawn from it.

In the third place, the Court examines the applicants' arguments in the light of the Charter of Fundamental Rights of the European Union.

First, the Court holds that, although the shareholders and creditors of an institution which is the subject of a resolution action may rely on the right to be heard in a resolution procedure, the exercise of that right may be subject to limitations. In that regard, the Court states that the procedure for the resolution of Banco Popular pursued an objective of general interest, namely the objective of ensuring the stability of the financial markets, capable of justifying a limitation on the right to be heard. Thus, in the context of the procedure for the resolution of Banco Popular, the absence of a provision requiring the shareholders and creditors of the entity concerned to be heard, and the failure to hear the applicants, constitute a limitation on the right to be heard which is justified and necessary in order to meet an objective of general interest and respects the principle of proportionality. Such hearings would have undermined the objectives of the protection of the stability of financial markets and the continuity of the entity's critical functions, as well as the requirements of speed and effectiveness of the resolution procedure.

Second, the Court states, as regards the right to property, inter alia, that Banco Popular was failing or was likely to fail and that there were no alternative measures capable of preventing that situation. Accordingly, the decision to write down and convert Banco Popular's capital instruments in the resolution scheme does not constitute an excessive and intolerable interference impairing the very substance of the applicants' right to property, but must be regarded as a justified and proportionate restriction of their right to property.

Third, in respect of the right of access to the file, the Court finds that, during the administrative procedure which led to the adoption of the resolution scheme, the fact that (i) valuation 2 was not communicated by the SRB and (ii) the SRB and the Commission did not disclose the documents on which they relied does not constitute an infringement of that right. Certain information held by the SRB, contained in the resolution scheme, in valuation 2 and in the documents on which the SRB relied, is covered by professional secrecy and is confidential. The Court therefore finds that, after the adoption of the resolution scheme, the applicants do not have a right to receive communication of the entire file on which the SRB relied.

In the fourth place, the Court rejects the plea of illegality alleging that the relevant provisions of the SRM Regulation [544] infringe the principles relating to the delegation of powers, stating that it is necessary for an EU institution, namely the Commission or the Council, to endorse the resolution scheme with regard to its discretionary aspects in order for the scheme to produce legal effects. The EU legislature thus conferred on an institution the legal and political responsibility for determining the EU's resolution policy, thereby avoiding an 'actual transfer of responsibility', [545] without having delegated autonomous power to the SRB.

In the fifth place, as regards valuations 1 and 2, the Court indicates that, in view of the urgency of the situation, the SRB could rely on valuation 2 in order to adopt the resolution scheme. Given the time constraints and the information available, some uncertainties and approximations are inherent in any provisional valuation, and the reservations expressed by an expert who carried out that valuation cannot mean that it was not 'fair, prudent and realistic'. [546] Furthermore, the Court observes that valuation 1, which was aimed at determining whether Banco Popular was failing or was likely to fail, in order to establish whether the conditions for initiating a resolution procedure or for the write-down or conversion of capital instruments had been met, became obsolete following the assessment carried out by the ECB on 6 June 2017 that Banco Popular was failing or was likely to fail.

In the sixth place, the Court finds that the SRB and the Commission did not make a manifest error of assessment in finding that the conditions laid down in Article 18(1) of Regulation No 806/2014 for the adoption of a resolution scheme had been satisfied.

First, the Court states that the insolvency of an entity is not a condition for a finding that it is failing or is likely to fail and, therefore, is not a condition for the adoption of a resolution scheme. The fact that an entity is balance sheet solvent does not mean that it has sufficient liquidity, that is to say that it has funds available to settle its debts or other liabilities as they fall due. The Court therefore holds that the SRB and the Commission did not make a manifest error of assessment in finding that Banco Popular was failing or was likely to fail. It also notes that the resolution scheme was validly adopted irrespective of the reasons which led Banco Popular to be failing or to be likely to fail.

Second, the Court finds that the applicants have not established that there were alternative measures to resolution and that the SRB and the Commission did not make a manifest error of assessment in finding that there was no other reasonable prospect that alternative private-sector measures or supervisory action would prevent the failure of Banco Popular within a reasonable time frame.

Third, the Court states that the SRB and the Commission did not make a manifest error of assessment in finding that the resolution action was necessary and proportionate in light of the public-interest objectives pursued.

In the seventh place, the Court rejects the plea alleging that the Commission did not examine the resolution scheme before endorsing it, stating that the Commission designates a representative entitled to participate in meetings of executive sessions and plenary sessions of the SRB as a permanent observer, and that its representative is entitled to participate in the debates and have access to all documents. Thus, the Commission, having participated in several meetings with the SRB, had been associated with the various phases leading to the adoption of the resolution scheme, had

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544 Articles 18, 21, 22 and 24 of the SRM Regulation.

545 Within the meaning of the judgment of 13 June 1958, *Meroni* v *High Authority* (C-9/56, EU:C:1958:7).

546 Under Article 20(1) of the SRM Regulation.

access to the preliminary drafts of that scheme and had participated in the preparation of those drafts.

In the eighth place, the Court rejects the plea regarding the infringement of the Commission's obligation to state reasons. The Court states that, when the Commission endorsed the resolution scheme in Decision 2017/1246, it was entitled, in order to justify the adoption of that scheme, to limit itself to providing a statement of reasons indicating that it agreed with the content of that resolution scheme and the reasons put forward by the SRB.

In the ninth place, the Court rejects the arguments regarding the irregularity of the sale procedure. It confirms, inter alia, the lawfulness of the SRB's decision to ask the national resolution authority to contact only the institutions which had participated in the procedure for the private sale of Banco Popular. That authority is entitled to solicit particular potential purchasers. [547]

In the tenth and last place, the Court, in the present case, rules out non-contractual liability on the part of the SRB and the Commission. In that regard, the Court notes that the applicants have not demonstrated that the SRB or the Commission acted unlawfully. It has not been demonstrated that the SRB or the Commission made any disclosure of confidential information on the implementation of a resolution procedure in respect of Banco Popular and, consequently, there can be no finding that they infringed the principle of confidentiality or the obligation of professional secrecy.

Furthermore, the applicants have not demonstrated a causal link between the unlawful conduct of the SRB and the Commission, even if that conduct had been established, and Banco Popular's liquidity crisis, and therefore between that unlawful conduct and the alleged damage.

2. The prudential supervision of credit institutions

Judgment of 22 June 2022, Anglo Austrian AAB and Belegging-Maatschappij "Far-East" v ECB (T-797/19, EU:T:2022:389)

(Economic and monetary policy – Prudential supervision of credit institutions – Specific supervisory tasks assigned to the ECB – Decision to withdraw a credit institution's authorisation – Serious breach of the national provisions transposing Directive 2005/60/EC – Proportionality – Infringement of the national legislation on the governance of credit institutions – Rights of the defence – Manifest error of assessment – Right to effective judicial protection)

Since 2010, the Österreichische Finanzmarktbehörde (Austrian financial markets supervisory authority; 'the FMA') has adopted a large number of injunctions and sanctions against AAB Bank, a credit institution established in Austria. On that basis, in 2019, the FMA submitted to the European Central Bank (ECB) a draft decision to withdraw AAB Bank's authorisation to access the activities of a credit institution. By its decision, [548] the ECB withdrew that authorisation. In essence, it considered that, based on the FMA's findings, made in the context of carrying out its task of prudential

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547 According to the second subparagraph of Article 39(2) 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).

548 Decision ECB-SSM-2019-AT 8 WHD-2019 0009 of 14 November 2019.

supervision and in relation to AAB Bank's continued and repeated non-compliance with the requirements on anti-money laundering and countering the financing of terrorism and internal governance, AAB Bank was not able to ensure a sound management of its risks.

The action seeking annulment of that decision of the ECB is dismissed by the Ninth Chamber (Extended Composition) of the General Court. In its judgment, the Court rules, for the first time, on a withdrawal of authorisation of a banking institution on account of serious breaches of the legislation on anti-money laundering and countering the financing of terrorism and infringements of the rules on the governance of credit institutions.

Findings of the Court

First of all, the Court finds that, in the present case, the criteria justifying the withdrawal of authorisation provided for in Directive 2013/36 [549] and transposed into national law were fulfilled.

First, on the ECB's finding that AAB Bank was found liable for serious breaches of the national provisions on anti-money laundering and countering the financing of terrorism adopted pursuant to Directive 2005/60, [550] [551] the Court holds that the ECB committed no manifest error of assessment.

As a preliminary point, the Court observes that, in exercising its competence relating to the withdrawal of authorisations of credit institutions, the ECB is obliged to apply, inter alia, the national law provisions transposing Directive 2013/36.

In the present case, it notes that, in taking into account inter alia the decisions of the FMA and the judgments of the Austrian courts, the ECB considered that AAB Bank had infringed, for several years, the national provisions transposing Directive 2013/36. It did not have an appropriate procedure for managing risks for the purposes of preventing money laundering and had been found liable for serious, repeated or systematic breaches of the national legislation on anti-money laundering and countering the financing of terrorism.

The Court considers that, in view of the importance of combating money laundering and terrorist financing, a credit institution may be found liable for serious breaches on the basis of administrative decisions adopted by a competent national authority, sufficient, in themselves, to justify a withdrawal of its authorisation. The fact that the breaches are old or have been corrected has no bearing on the incurrence of such liability. The relevant national law does not impose a time limit to be observed for taking into account earlier decisions establishing liability. Nor does it require that serious breaches be interrupted or still exist when the decision to withdraw authorisation is adopted, especially since, in this case, the breaches were found only a few years before the adoption of the contested decision. Regarding AAB Bank's position that the breaches had been corrected and, consequently, could no longer justify such a withdrawal of authorisation, the Court states that such an approach would call into question the objective of safeguarding the European banking system since it would permit credit institutions that have committed serious breaches to continue their activities as long as the competent authorities do not demonstrate again that they have committed new breaches. In

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549 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).

550 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJ 2005 L 309, p. 15).

551 Criterion resulting in the revocation of authorisation, referred to in Article 67(1)(o) of Directive 2013/36.

addition, a credit institution found liable for serious breaches by a decision which has become final cannot invoke any time-barring of such breaches.

The Court also rejects the arguments of AAB Bank aimed at disputing the seriousness of the breaches found.

In that regard, it emphasises, in particular, that the seriousness of the breaches cannot be challenged at the stage of the administrative procedure before the ECB given that, in the decisions preceding the FMA's proposal of withdrawal, which became final on the date of the contested decision, the competent authorities deemed AAB Bank liable for the said breaches. Moreover, in the light of the objective of safeguarding the European banking market, the ECB cannot be criticised for having found that systematic, serious and continuous breaches of the national legislation on anti-money laundering and countering the financing of terrorism had to be classified as serious breaches justifying a withdrawal of authorisation.

Second, the Court endorses the position of the ECB according to which AAB Bank failed to implement the governance arrangements required by the competent authorities in accordance with the national provisions transposing Directive 2013/36. [552] In that context, it rejects the arguments of AAB Bank according to which, at the date of the contested decision, it was not in breach of the legislation on governance arrangements. It notes that the interpretation according to which past breaches or breaches which have been mitigated cannot justify a withdrawal of authorisation is apparent neither from Directive 2013/36 nor from the relevant national law.

Next, the Court concludes that, in refusing to suspend the application of the contested decision, the ECB committed no error. It observes inter alia that the latter's refusal to suspend the immediate application of that decision did not prevent AAB Bank from bringing an action for annulment and making an application for interim measures. In addition, the President of the General Court ordered the suspension of operation of the contested decision six days after its adoption, the time for a decision on the application for interim measures to be taken. Thus, no infringement of the right to effective legal protection could be found.

Subsequently, the Court rules that the contested decision was adopted in due observance of the rights of defence of AAB Bank. In that context, it states that AAB Bank was properly heard during the adoption of the contested decision. The latter was given the opportunity to submit its observations on the draft of that decision. By contrast, the ECB was not obliged to send AAB Bank the FMA's draft decision and thus allow it to respond to it.

Furthermore, the Court finds that, in the present case, the ECB did not fail to determine, examine and assess carefully and impartially all the material elements relevant for the withdrawal of the authorisation. Specifically, the ECB validly declared, following its own assessment, that it agreed with the FMA's determinations on the commission of breaches by AAB Bank, confirmed both by the FMA's administrative decisions and by the decisions of the national courts. At the end of its own assessment, the ECB classified the facts at issue as establishing that AAB Bank had been found liable for a serious breach of the national legislation on anti-money laundering and countering the financing of terrorism. Likewise, it did not merely reproduce the findings made by the FMA regarding AAB Bank's failure to implement the necessary governance arrangements. On the contrary, the ECB relied on its own assessment of compliance with the national provisions relevant in that regard.

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552 Criterion resulting in the revocation of authorisation, referred to in Article 67(1)(d) of Directive 2013/36.

Last, the Court rejects AAB Bank's plea according to which the contested decision destroyed the economic value of the shares that its shareholder held in its capital and undermined the essence of that shareholder's right to property. As AAB Bank is not the holder of that property right, it cannot rely on that right in support of its action for annulment.

Judgment of 7 December 2022, PNB Banka v ECB (T-275/19, EU:T:2022:781)

(Economic and monetary policy – Prudential supervision of credit institutions – Powers of the ECB – Investigatory powers – On-site inspections – Article 12 of Regulation (EU) No 1024/2013 – Decision of the ECB to conduct an inspection at the premises of a less significant credit institution – Action for annulment – Challengeable act – Admissibility – Competence of the ECB – Obligation to state reasons – Elements capable of justifying an inspection – Article 106 of the Rules of Procedure – Request for a hearing without a statement of reasons)

The applicant, PNB Banka AS, is a credit institution incorporated under Latvian law which, before 1 March 2019, was considered to be a 'less significant' [553] credit institution and was therefore subject to direct prudential supervision by the Finanšu un kapitāla tirgus komisija (Financial and Capital Market Commission, Latvia; 'the FCMC'). In 2017, it was classified as a 'less significant institution in crisis', which entailed it being subject to specific supervision by a crisis management group composed of the FCMC and the European Central Bank (ECB). On 21 December 2018, the FCMC requested the ECB to take over the direct prudential supervision of the applicant. On the basis of a draft decision approved by the ECB's Supervisory Board, in the absence of any objection by the ECB's Governing Council, the decision to carry out an on-site inspection at the applicant's premises was deemed adopted by the Governing Council on 21 January 2019 ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules on a number of issues which have not previously been addressed. It confirms, first of all, its power to rule on an action without an oral part of the procedure where a request for a hearing lacks a statement of reasons. It then examines whether a decision by the ECB to conduct an on-site inspection is challengeable. It also analyses pleas relating to the formal legality of the contested decision (competence of the ECB and the applicant's right to be heard). Lastly, it considers substantive issues relating to, first, the relationship between off-site and on-site checks and, second, the ECB's competence itself to conduct an investigation into acts of corruption. The Court dismisses the action in its entirety.

Findings of the Court

First, the Court holds that it follows from the applicable procedural rules that, if no request for a hearing is made, or if a request for a hearing is made without a statement of reasons, the Court may decide to rule on the action without an oral part of the procedure if it considers that it has sufficient information available to it from the material in the case file. Thus, in the present case, the Court, finding that the applicant's request for a hearing does not state any reason why it wishes to be heard, and after considering that it has sufficient information, decides to rule on the action without an oral part of the procedure.

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553 Under 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; 'the SSM Regulation').

Secondly, the Court rules that an on-site inspection decision adopted by the Governing Council of the ECB, such as the contested decision, is an act open to challenge before the EU judicature. The Court finds that that decision is capable of affecting the interests of the legal person notified of it, by bringing about a distinct change in the latter's legal position. The Court states, inter alia, that, by providing that inspections of legal persons and, in particular, credit institutions, must be carried out by the ECB on the basis of a decision which defines the subject matter and purpose of the inspection and must be notified to the person concerned, the legislative and regulatory framework confers, on the act that decides on that inspection, binding legal effects on the latter.

Thirdly, as regards the pleas relating to the formal legality of the contested decision, the Court rules that the ECB has the power to exercise, with regard to a 'less significant' credit institution, the investigatory powers available to it, [554] in particular the power to carry out an on-site inspection. It points out that the ECB has exclusive competence to carry out the prudential supervision tasks entrusted to it [555] in respect of all credit institutions, without distinction between those which are 'significant' and those which are 'less significant', and considers that, although the national authorities assist the ECB in carrying out those tasks, in a decentralised manner and under the supervision of the ECB, that assistance has no bearing on the ECB's competence to exercise, at any time, its investigatory powers.

The Court also considers that it is apparent from the relevant legislation, [556] consistent with the nature of an investigatory measure, the sole purpose of which is to gather information, that a decision by the ECB, in the exercise of its investigatory powers, to carry out an on-site inspection in a credit institution is not subject to the right of the entity concerned to be heard before that decision is adopted. It is after that decision and before any adoption of a decision, under, inter alia, its specific supervisory powers, [557] that the ECB is required to give the persons concerned the opportunity to be heard.

Fourthly, as regards the pleas relating to the validity of the contested decision, the Court finds that credit institutions are subject to 'ongoing' prudential supervision, which is based on a combination of off-site checks, carried out on the basis of information regularly communicated to the competent authorities, and on the basis of on-site checks, which enable the information provided to be verified. Off-site checks cannot, in principle, replace on-site inspections, which, inter alia, enable the competent authority to verify independently the information declared by those institutions. The Court states that, unlike certain inspections carried out by the European Commission under the implementation of competition rules, the purpose of which is to detect infringements, the purpose of the on-site inspections carried out by the ECB is to verify, in the context of ongoing supervision combining off-site and on-site checks, that credit institutions ensure sound management and coverage of their risks and that the information communicated is reliable, so that the implementation of those inspections is not subject to the existence of suspicion of an infringement.

Furthermore, the Court rules that the ECB itself is not competent to conduct an investigation into acts of corruption that have been reported and that the ECB cooperates in that regard with the national competent authorities.

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554 Under Articles 10 to 13 of the SSM Regulation.

555 Under Article 4(1) of the SSM Regulation.

556 In particular, Article 31 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1).

557 Under Section 2 of Chapter III of the SSM Regulation.

Judgment of 7 December 2022, PNB Banka v ECB (T-301/19, EU:T:2022:774)

(Economic and monetary policy – Prudential supervision of credit institutions – Article 6(5)(b) of Regulation (EU) No 1024/2013 – Need for the ECB's direct supervision of a less significant credit institution – Request by the national competent authority – Article 68(5) of Regulation (EU) No 468/2014 – ECB decision classifying PNB Banka as a significant entity subject to its direct prudential supervision – Obligation to state reasons – Proportionality – Rights of the defence – Access to the administrative file – Report laid down in Article 68(3) of Regulation No 468/2014 – Article 106 of the Rules of Procedure – Request for a hearing lacking a statement of reasons)

In the context of the authorisation granted to the credit institution PNB Banka as described above, [558] on 1 March 2019, the Secretary of the Governing Council of the ECB notified the applicant of the ECB's decision to classify it as a 'significant' entity subject to its direct prudential supervision [559] ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules once again on a number of issues which have not previously been addressed. First of all, it determines the purpose of, and conditions for, the adoption of a decision of the ECB to exercise directly itself prudential supervision of a less significant credit institution in order to ensure a consistent application of high supervisory standards. Next, it examines the issue of the right of access to the file in the context of a supervisory procedure. Finally, it clarifies the subject matter of the report accompanying a request from the national competent authority to the ECB for the latter to decide to exercise direct prudential supervision. The Court dismisses the action in its entirety.

Findings of the Court

First, the Court rules that, where the ECB decides to carry out itself direct prudential supervision of a less significant credit institution in accordance with the applicable legislation, [560] in order to ensure a consistent application of high supervisory standards, it must adopt a decision classifying that institution as significant.

It states that a decision to classify an entity as significant, where the ECB decides to exercise direct prudential supervision of that entity, relates only to the determination of the competent authority and does not alter either the prudential rules applicable to that institution or the supervisory powers which the competent authority has in respect of that entity for the purposes of the supervisory tasks conferred on the ECB under the Single Supervisory Mechanism (SSM).

It adds that the implementation of the legislative provisions [561] on the basis of which that decision is adopted is not subject to there being exceptional circumstances.

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558 As regards the factual and legal context of the proceedings, see judgment of 7 December 2022, *PNB Banka* v *ECB* (T-275/19, EU:T:2022:781) set out above in this section p. 286.

559 Under Article 6(5)(b) of the SSM Regulation and Part IV of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities ('the SSM Framework Regulation;) (OJ 2014 L 141, p. 1).

560 Under Article 6(5)(b) of the SSM Regulation and Article 68(5) of the SSM Framework Regulation.

561 Namely Article 6(5)(b) of the SSM Regulation.

Secondly, as regards the right of access of a party concerned to the file in the context of a supervisory procedure, the Court rules that such access requires the submission of a request by that party. When sufficiently precise information has been disclosed, enabling the entity concerned properly to state its point of view on the planned measure, the principle of respect for the rights of the defence does not mean that that the ECB is obliged spontaneously to grant access to the documents in the file.

Thirdly, as regards the purpose of the report [562] accompanying a request from the national competent authority to the ECB for the latter to decide to exercise direct prudential supervision in order to ensure the consistent application of high supervisory standards, the Court points out that, even though the report is compulsory, its purpose is, inter alia, to ensure the proper transmission of information between the national competent authority and the ECB. More specifically, the report enables the ECB to assess the request for the taking-over of prudential supervision submitted by the national competent authority and helps to ensure, if the ECB grants that request, a harmonious transfer of the competences associated with that supervision. That report does not therefore constitute a procedural guarantee intended to protect the interests of the credit institution concerned or, a fortiori, an essential procedural requirement within the meaning of Article 263 TFEU.

Judgment of 7 December 2022, PNB Banka v ECB, T-330/19, EU:T:2022:775)

(Economic and monetary policy – Prudential supervision of credit institutions – Article 22 of Directive 2013/36/EU – Opposition of the ECB to the acquisition of qualifying holdings in a credit institution – Starting point of the assessment period – Intervention by the ECB during the initial stage of the procedure – Criteria of financial stability of the proposed acquirer and compliance with prudential requirements – Existence of reasonable grounds for opposing the acquisition on the basis of one or more assessment criteria – Article 106 of the Rules of Procedure – Request for a hearing without a statement of reasons)

Again as regards the abovementioned credit institution PNB Banka, [563] on 1 October 2018, the applicant notified the FCMC of its intention to acquire directly a qualifying holding in another Latvian credit institution ('the acquisition'). On 1 March 2019, the FCMC submitted to the European Central Bank (ECB) a proposal for a decision, [564] to the effect of an opposition to the proposed acquisition. By decision notified on 21 March 2019, the ECB opposed the acquisition, since neither the criterion of financial soundness of the proposed acquirer nor the criterion of compliance with prudential requirements was satisfied ('the contested decision').

Hearing an action for annulment of that decision, the General Court rules once again on a number of issues which have not previously been addressed. It examines, first of all, the ECB's right to intervene in the procedure for authorisation of the acquisition of a qualifying holding in a credit institution from the start of that procedure. It then specifies the conditions under which the ECB may oppose the acquisition on the basis of the criterion of financial soundness of the proposed acquirer. Finally, it determines the conditions under which the competent authority may oppose the acquisition of a credit institution. The Court dismisses the action in its entirety.

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562 Under Article 68(3) of the SSM Framework Regulation.

563 As regards the factual and legal context of the proceedings, see judgment of 7 December 2022, *PNB Banka* v *ECB* (T-275/19, EU:T:2022:781) set out above in this section p. 286 and 288.

564 Under Article 15(2) of the SSM Regulation.

Findings of the Court

First, the Court rules that, in view of the particular mechanism for collaboration which the EU legislature intended to establish between the ECB and the national competent authority for the examination of applications for authorisation prior to any acquisition or increase in qualifying holdings in credit institutions, the ECB may intervene in the procedure before that national competent authority sends a proposal for a decision, [565] even from the beginning of the procedure.

The Court states that, where the legislature opts for an administrative procedure under which the national authorities adopt acts that are preparatory to a final decision of an EU institution which produces legal effects and is capable of adversely affecting a person, it seeks to establish between that institution and those national authorities a specific mechanism which is based on the exclusive decision-making power of the EU institution. Under the applicable legislation, [566] the ECB has exclusive competence to decide whether or not to authorise the proposed acquisition at the end of the procedure in question. The Court adds that, within the framework of relations governed by the principle of sincere cooperation, [567] the national authorities' role consists in registering applications for authorisation and in assisting the ECB, which alone has the decision-making power, in particular by providing it with all the information necessary for carrying out its tasks, by examining such applications and then by forwarding to the ECB a proposal for a decision, which is not binding on the ECB and which, moreover, EU law does not require to be notified to the applicant.

Secondly, as regards the conditions under which the ECB may oppose the acquisition on the basis of the criterion of financial soundness of the proposed acquirer, the Court rules that, for that purpose, in the light of the legislation in force, [568] the ECB is not required, first, to demonstrate that the proposed acquisition would have a material adverse effect compared with a situation in which that acquisition is not carried out or, secondly, to carry out a counterfactual analysis of the situation in which that acquisition does not take place.

In the present case, the Court finds, on the contrary, that the relevant legislation defines the financial soundness of the proposed acquirer as its ability to finance the proposed acquisition and to maintain, for the foreseeable future, a sound financial structure for itself and the target undertaking, and does not refer to any ground of opposition based on the material adverse effect of the proposed acquisition, nor does it require an analysis of the situation in which that acquisition does not take place.

Thirdly, the Court rules that the competent authority may oppose the acquisition of a credit institution without examining, in its decision, all of the assessment criteria set out in Directive 2013/36. [569] It

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565 Laid down in Article 15(2) of the SSM Regulation.

566 Under Article 4(1)(c) of the SSM Regulation, read in conjunction with Article 15(3) of that regulation and with Article 87 of Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities ('the SSM Framework Regulation') (OJ 2014 L 141, p. 1).

567 Under Article 6(2) of the SSM Regulation.

568 Article 23(1) and (2) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338), and the Joint Guidelines of the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) on the prudential assessment of acquisitions and increases of qualifying holdings in entities in the financial sector, published on 20 December 2016 (JC/GL/2016/01).

569 Criteria referred to in Article 23 of Directive 2013/36.

states that, in accordance with the objective of ensuring the sound and prudent management of the credit institution in which an acquisition is proposed, laid down in that directive, it is sufficient if there are reasonable grounds for opposing the acquisition on the basis of one or more of those criteria.

XII. Public procurement by the EU institutions

Judgment of 26 January 2022, Leonardo v Frontex, (T-849/19, EU:T:2022:28)

(Public supply contracts – Tendering procedure – Aerial surveillance services – Action for annulment – No interest in bringing proceedings – Inadmissibility – Non-contractual liability)

On 18 October 2019, by contract notice, [570] the European Border and Coast Guard Agency (Frontex) launched a tendering procedure [571] ('the contested contract notice') in order to acquire aerial surveillance services by the means of Medium Altitude Long Endurance Remotely Piloted Aircraft System for maritime purposes.

The applicant, Leonardo SpA, a company operating in the aerospace sector, did not participate in the tendering procedure launched by the contested contract notice.

On 31 May 2020, the tender evaluation committee submitted its evaluation report to the authorising officer responsible who then approved the tender evaluation report and signed the contract award decision ('the contested award decision').

The applicant then brought an action before the General Court, first, for annulment of the contested contract notice and its annexes [572] and the contested award decision and, secondly, for compensation for the damage it claims to have suffered as a result of the unlawful nature of the call for tenders at issue. [573]

By its judgment, delivered in a chamber sitting in extended composition, the Court dismisses the applicant's action in its entirety. The principal feature of the case is that the action for annulment is directed against a contract notice and its annexes and has been brought by an undertaking which did not participate in the tendering procedure organised by that notice. The question whether such an action is admissible is without precedent.

Findings of the Court

In the first place, examining the admissibility of applications for the annulment of the contested acts, the Court notes that, in the light of the applicant's assertion that it did not participate in the tendering procedure at issue since the requirements of the tender specifications prevented it from submitting a tender, the question is whether, in such circumstances, it has an interest in bringing proceedings for the purposes of Article 263 TFEU against that call for tenders. In that context, the General Court recalls the position taken in that regard by the Court of Justice in a preliminary ruling, according to which, since it is only in exceptional cases that a right to bring proceedings is given to an operator which has not submitted a tender, it cannot be regarded as excessive to require that operator to

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570 Contract notice published in the Supplement to the *Official Journal of the European Union* (OJ 2019/S 202-490010).

571 Tendering procedure FRONTEX/OP/888/2019/JL/CG entitled 'Remotely Piloted Aircraft Systems (RPAS) for Medium Altitude Long Endurance Maritime Aerial Surveillance'.

572 Article 263 TFEU.

573 Article 268 TFEU.

demonstrate that the clauses in the call for tenders make it impossible to submit a tender. [574] Although that judgment was delivered in response to a question referred for a preliminary ruling on the interpretation of provisions of Directive 89/665, [575] which is binding only on the Member States, the Court considers that the solution it provides can be applied, *mutatis mutandis*, in a case such as the present one, in which the applicant claims that it was prevented from submitting a tender on account of the technical specifications of the tender documents launched by an agency of the European Union, technical specifications which it disputes. It must therefore, in the Court's view, be determined whether the applicant has established that it was prevented from submitting a tender and, therefore, whether it has an interest in bringing proceedings.

In that regard, first, in respect of the tendering procedure at issue, the Court recalls that, in the present case, that procedure was preceded by the tendering procedure FRONTEX/OP/800/2017/JL, launched in 2017, for the trials of two types of remotely piloted aircraft systems (RPAS). That contract was divided into two lots and the applicant won the contract for the second lot. Once those contracts were performed, Frontex carried out detailed assessments and it was on the basis of those evaluation reports that it established the requirements contained in the contested contract notice and its annexes, the questions and answers and the minutes of the informative meeting, referred to in the application, which include those which the applicant considers to be discriminatory. The establishment of those requirements was therefore, in the Court's view, at the end of a staged process marked by feedback which enabled Frontex to assess their necessity in detail and diligently.

Secondly, with regard to the applicant's assertion that 'the rules of the call for tenders contain clauses which are *contra legem* and unjustified and which expose potential competitors to claims which are not technically feasible', the Court finds that three undertakings submitted a tender and two of them, at the very least, fulfilled all of the technical specifications as the contract was awarded to them.

Thirdly, with regard to the treatment of the applicant in relation to the other candidates, the Court considers that the applicant has not established either that the technical specifications were applied differently to it than to the other candidates or, more generally, that it was treated differently even though it was in a similar situation to those candidates.

Fourthly, with regard to the applicant's assertion that its participation was made 'impossible' or that it was subject to 'excessive economic burdens to the point of undermining the submission of a competitive tender', the Court finds that that argument cannot demonstrate any discrimination against the applicant.

In those circumstances, the Court holds that the applicant has not demonstrated that the requirements of the call for tenders at issue could be discriminatory against it. Therefore, the applicant has not established that it was prevented from submitting a tender and therefore it does not have an interest in seeking the annulment of the contested acts. Consequently, the Court rejects as inadmissible the claims for annulment of those acts and, as a result, those directed against the award decision, without there being any need to rule on the requirements relating to the existence of a challengeable act and the applicant's standing to bring proceedings, or on the effectiveness of the measures of inquiry sought.

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574 Judgment of 28 November 2018, *Amt Azienda Trasporti and Mobilità and Others* (C-328/17, EU:C:2018:958, paragraph 53). That judgment was delivered in response to a question referred for a preliminary ruling on the interpretation of Article 1(3) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 (OJ 2007 L 335, p. 31).

575 See footnote [206] for the full reference for Directive 89/665.

In the second place, examining the claim for compensation, the Court recalls that, as regards the condition requiring actual damage to have been suffered, the European Union will incur liability only if the applicant has actually suffered 'real and certain' loss. Consequently, it is for the applicant to produce to the EU Courts the evidence to establish the fact and the extent of such loss. In the present case, the Court finds that the applicant is merely seeking compensation for all the damage that has been suffered and continues to be suffered as a result of the unlawful nature of the call for tenders at issue, without adducing evidence to establish the fact and the extent of that damage. It follows that the condition requiring actual damage to have been suffered has not been satisfied for the European Union to incur non-contractual liability. [576]

In those circumstances, the Court holds that the applicant's claim for compensation must be rejected and, consequently, its action must be dismissed in its entirety.

576 Under the second paragraph of Article 340 TFEU.

XIII. Budget and subsidies of the European Union

Judgment of 29 June 2022, LA International Cooperation v Commission, (T-609/20, EU:T:2022:407)

(Pre-Accession Assistance Instrument – OLAF investigation – Commission decision imposing an administrative sanction – Exclusion from procurement and grant award procedures covered by the general budget of the European Union for a period of four years – Registration in the early detection and exclusion system database – Financial regulation – Unlimited jurisdiction – Proportionality of the sanction)

Pursuant to Regulation No 1085/2006, [577] the European Union is to assist the countries concerned by pre-accession assistance, including the Republic of North Macedonia, in the progressive alignment with its standards and policies. In the framework of two national programmes in favour of that country, two contracts had been awarded to the applicant, LA International Cooperation Srl, and concluded in 2013 and 2015.

Following an investigation and a final report by the European Anti-Fraud Office (OLAF) into potential acts of fraud and corruption committed by the applicant, between October 2012 and January 2017, the investigating body [578] adopted a recommendation. In the light of the latter, the European Commission inter alia decided to exclude the applicant, for a period of four years, from participating in procurement and grant award procedures financed by the general budget of the European Union [579] and from participating in procedures for the award of funds under the 11th European Development Fund. [580]

Hearing an action for annulment of the Commission decision, the General Court exercises for the first time its unlimited jurisdiction to review the sanctions adopted by the Commission. [581] It also examines

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577 Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA) (OJ 2006 L 210, p. 82), Article 1. The countries concerned are listed in Annexes I and II to that regulation.

578 In accordance with Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1), Article 143.

579 Under the law in force, namely:

- Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1), Article 93, applicable from 22 August 2006;
- Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Regulation No 1605/2002 (OJ 2012 L 298, p. 1), Article 106(1), applicable from 1 January 2013;
- Regulation No 966/2012, as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1), Article 106(1).

580 Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund (OJ 2015 L 58, p. 17).

581 Under Article 108(11) of Regulation No 966/2012, as amended by Regulation 2015/1929.

whether the four-year period of exclusion decided upon by the Commission is appropriate and proportionate.

Findings of the Court

The Court notes that it has unlimited jurisdiction which empowers it, beyond the mere review of legality, to review a decision whereby the contracting authority excludes an economic operator and/or imposes on it a financial penalty, including reducing or increasing the duration of the exclusion and/or cancelling, reducing or increasing the financial penalty imposed.

The Court assesses whether the duration of the exclusion at issue takes into account the mitigating circumstances invoked by the applicant, namely its good cooperation during the investigation and the organisational measures it subsequently adopted.

First, the Court recalls that a contracting authority which excludes an economic operator must comply with the principle of proportionality and, in so doing, must take into account, inter alia, the seriousness of the situation, its duration and its recurrence, the intention or degree of negligence, or any other mitigating circumstances, such as the collaboration of that operator and its contribution to the investigation.

Second, it finds that the acts of corruption and grave professional misconduct committed by the applicant are very serious by their very nature. Account must be taken both of the seriousness of the acts themselves and of their impact on the EU's financial interests.

Third, it is true that the elements relied on by the applicant in terms of its very good and full cooperation during the on-the-spot checks are established. However, the Court states that the applicant had been under an obligation to cooperate with OLAF and that, in the present case, its conduct can have only a slight impact on the degree of severity of the sanction, given the seriousness of the acts at issue.

Fourth, the Court decides not to take account of the organisational measures adopted by the applicant in 2016 since it finds that not only did they not put an end to its misconduct, which continued until January 2017, but, moreover, they had no effect at all on its conduct during the relevant period.

Fifth, the applicant's conduct constituted both acts of grave professional misconduct, incurring an exclusion measure of five years, before 1 January 2016, and of three years after that date, and acts of corruption, subject to exclusion measures of a maximum duration of five years after 1 January 2016.

In the light of all those findings and circumstances, the Court holds that an exclusion of four years is appropriate and proportionate.

XIV. Access to documents of the institutions

1. Exception relating to the protection of court proceedings

Judgment of 12 October 2022, Saure v Commission (T-524/21, EU:T:2022:632)

(Access to documents – Regulation (EC) No 1049/2001 – Commission correspondence with AstraZeneca and the German authorities concerning the quantity of COVID-19 vaccines and their delivery times – Exception relating to the protection of court proceedings – Documents having been produced in the context of court proceedings that were closed at the time of adoption of the decision refusing access to those documents – Exception relating to the protection of privacy and the integrity of the individual – Exception relating to the protection of commercial interests of a third party)

The applicant, Mr Hans-Wilhelm Saure, is a journalist employed by the German daily newspaper *Bild*. At the beginning of 2021, he submitted an application for access [582] to copies of all the correspondence exchanged since 1 April 2020 between the Commission and, first, the company AstraZeneca plc or its subsidiaries and, second, the German federal authorities, relating to, inter alia, the quantities of COVID-19 vaccines and the delivery times offered by that company.

The Commission, initially, identified a number of documents to which access had to be refused on the basis of the protection of court proceedings, [583] given that proceedings between the European Union and AstraZeneca were pending before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking), Belgium). Following the closure of those proceedings after an agreement had been reached between the parties, the Commission, after re-examining the applicant's request, adopted a second decision replacing the first. In that new decision, the Commission stated that the exception relating to the protection of court proceedings applied wholly or partially to a number of documents covered by the applicant's request for access. Furthermore, it refused access to certain documents on the basis of the protection of privacy and the integrity of the individual, the protection of commercial interests [584] and the general presumption of confidentiality by virtue of that exception.

Hearing an action for annulment against, inter alia, the second Commission decision, the General Court rules on the application of the exception relating to the protection of court proceedings and, in particular, on the duty of sincere cooperation with the judicial authorities of the Member States. It concludes that the application of that exception in the present case is unlawful and, consequently, that the second decision must be annulled in part.

Findings of the Court

As a preliminary point, the Court notes that the application of the exception relating to the protection of court proceedings precludes the disclosure of documents only for as long as, having regard to their content, the risk of undermining court proceedings persists. That protection is accounted for by the

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582 In accordance with 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).

583 Exception provided for in the second indent of Article 4(2) of Regulation No 1049/2021.

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

need to ensure, first, respect for the principle of equality of arms, in particular in order to ensure that criticism of the position of an institution in a dispute, contained in a disclosed document, is not liable unduly to influence that position and, second, the sound administration of justice and the integrity of court proceedings, in order to ensure that, throughout those proceedings, the exchanges of argument between the parties and the deliberations of the court concerned in the case take place in an entirely calm atmosphere, without external pressure on judicial activities.

In the present case, first, the Court finds that, on the date on which the second decision was adopted, the court proceedings capable of justifying the application of the exception relating to the protection of court proceedings were closed. It recalls that it is true that a document which was not drawn up in the context of specific court proceedings may be protected if, on the date on which the reply is made to that request for access, it has been produced in court proceedings. However, the legislature did not exclude the institution's litigious activities from the public's right of access and such a document is capable of being protected solely on the basis of its content.

Second, in order to assess whether the exception relating to the protection of court proceedings could no longer justify the refusal of access at issue after the closure of the judicial proceedings before the Tribunal de première instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)), the Court examines whether, in the light of the content of the documents in question, the Commission has demonstrated that their disclosure would continue to undermine those proceedings. The Court finds that the Commission has failed to explain how that access could specifically and actually continue to undermine court proceedings.

Similarly, regarding the need to ensure respect for the integrity of court proceedings, it states that the exchanges of argument between the parties and the deliberations were able to take place in an entirely calm atmosphere, without any external pressure on judicial activities. Furthermore, it does not find that any other court proceedings were pending, or even imminent, at the time of adoption of the second contested decision in which arguments developed in the context of the proceedings which had been closed could have been used in support of the legal position defended by the institution.

Third, the Court rejects the Commission's argument that, by reason of the principle of sincere cooperation with the national court before which the matter had been brought, it was required to refuse access to those documents in order to comply with the requirements of the Code judiciaire belge (Belgian Judicial Code). [585] Under those requirements, a party to court proceedings is not authorised to disclose a business secret or alleged business secret of which it has become aware as a result of its participation in the proceedings, even after those proceedings have concluded, where the court has decided that such a secret should remain confidential.

First of all, the Court notes that those requirements follow from provisions transposing the directive on the protection of undisclosed know-how and business information against their unlawful acquisition, use and disclosure. [586] It is apparent from that directive that the Commission cannot rely on a provision of national law transposing that directive in order to frustrate its obligations concerning access to documents.

Next, on the one hand, the Court finds that the documents at issue were in the Commission's possession before those proceedings began. On the other hand, the national court before which the

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585 Article 871 *bis* of the Belgian Judicial Code.

586 Article 9(1) of Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (OJ 2016 L 157, p. 1).

matter was brought had not adopted any decision pursuant to the abovementioned provisions of the Belgian Judicial Code. It is the parties themselves which concluded an agreement under which certain documents produced in the course of those proceedings would remain confidential. In those circumstances, the Commission cannot, by means of a mere agreement concluded with a third-party company, restrict the right of an EU citizen to secure access to documents in its possession and thus circumvent its obligation, subject to certain exceptions, to provide access to those documents. Nor, in that context, can it rely on its duty of sincere cooperation with the judicial authorities of the Member States in order to justify the refusal to grant access to those documents.

Finally, the Court notes that the purpose of the provisions of the Belgian Judicial Code in question, in so far as they are designed to protect business secrets, differs from that pursued by provisions seeking to ensure compliance with the principles of equality of arms and the sound administration of justice and integrity of court proceedings. Thus, the mere fact that the documents at issue contain business secrets does not make it possible to explain how access to those documents could specifically and actually continue to undermine the court proceedings which had been closed at the time when the second contested decision was adopted.

2. Exception relating to inspections, investigations and audits

Judgment of 28 September 2022, Agrofert v Parliament (T-174/21, EU:T:2022:586)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to the investigation against the former Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest – Refusal to grant access – Exception relating to protection of the purpose of inspections, investigations and audits – Interest in bringing proceedings in part ceasing to exist – No need to adjudicate in part – Obligation to state reasons)

The applicant, Agrofert, a.s., is a Czech holding company which controls more than 230 companies active in various sectors of the economy, such as agriculture, food production, the chemical industry or the media. It was initially established by Mr Andrej Babiš, who was Prime Minister of the Czech Republic from 2017 to 2021. In a Parliament resolution [587] on the reopening of the investigation against the Czech Prime Minister on misuse of European funds and potential conflicts of interest, it was stated that the latter continued to control the Agrofert group after his appointment as Prime Minister. Taking the view that that statement was inaccurate and wishing to know the sources and information held by the Parliament before it adopted that resolution, the applicant submitted to the latter an application for access to several documents. [588] In its initial reply of 14 September 2020, the Parliament identified certain documents as publicly accessible and refused access to a letter sent by the Commission to the Czech Prime Minister and to a final audit report of the Commission relating to the audit on the functioning of the management and control systems in place in the Czech Republic for the purpose of preventing conflicts of interests. [589] In response to a confirmatory application, the

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587 European Parliament resolution 2019/2987(RSP) of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest (OJ 2021 C 362, p. 37).

588 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).

589 In accordance with Articles 72 to 75 and 125 of 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

Parliament, by decision of 15 January 2021, [590] inter alia, confirmed its refusal of access to both those documents on the basis of the exception relating to protection of the purpose of inspections, investigations and audits provided for by Regulation No 1049/2001. [591]

In an action for annulment of that decision, the Court, first, finds that the applicant's interest in bringing proceedings against the Parliament's refusal to grant it access to the Commission's final audit report has ceased to exist and, second, dismisses the action against the decision refusing access to the Commission's letter to the Czech Prime Minister.

Findings of the Court

In the first place, the Court examines whether, following the publication by the Commission of its final audit report, the applicant retained its interest in bringing proceedings, in so far as its application for annulment relates to the Parliament's refusal to grant access to that report.

It states that, following publication of that report, the Parliament's refusal to grant access to that document is no longer effective in so far as the author of the document, the Commission, decided to make it accessible to the public, and that annulment of the contested decision, in so far as it refuses access to that report, would have no additional consequence in relation to the disclosure of that document and could not procure an advantage for the applicant.

Those findings are not called into question by the fact that the Commission did not publish the full version of the final audit report. The Court points out that the effect of an application for access is to make the document in question accessible to the public and can only lead to the disclosure of its public version. In that regard, it observes that, in [refusing to] make available to the public certain information contained in the final audit report, the Commission did not rely on the exception relating to the protection of the purpose of inspections, investigations and audits laid down in Regulation No 1049/2001, but on the requirements relating to the protection of certain information, such as personal data or business secrets. It infers from this that the annulment of the Parliament's decision refusing to grant access to the final audit report, on the basis of the exception relating to the protection of the purpose of inspections, investigations and audits provided for in Regulation

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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).

590 Decision A(2019) 8551 C (D 300153) of the European Parliament of 15 January 2021, by which it refused the applicant access to two documents relating to the investigation against the former Prime Minister of the Czech Republic on misuse of European funds and potential conflicts of interest.

591 Exception provided for in the third indent of Article 4(2) of Regulation No 1049/2021.

No 1049/2001, would not have the effect of making that data public, since the Parliament was not the author of that report and could not therefore go beyond the disclosure granted by the Commission, the author of that document. Therefore, as a result of the publication of the final audit report, the applicant obtained the only advantage which its action could have afforded it.

The Court adds that the fact that the applicant chose to apply to the Parliament for access to the final audit report and not to the institution which is the author of it cannot lead to the conclusion that the publication of that document by the Commission constitutes disclosure by a 'third party', where the Commission is the author of that document.

It concludes that the applicant's interest in bringing proceedings against the contested decision inasmuch as the Parliament refused access to the final audit report has ceased to exist.

In the second place, the Court analyses the application for partial annulment of the contested decision inasmuch as the Parliament refused the applicant access to the Commission's letter.

First, it rejects the first plea, alleging infringement of the exception relating to the protection of the purpose of inspections, investigations and audits laid down in Regulation No 1049/2001 in so far as the Parliament allegedly failed to establish that the conditions for refusing access to the Commission's letter were met.

In that regard, the Court holds that, in the present case, the purpose of the Commission's investigation, namely to ensure that a Member State's management and control systems comply with EU law, had not been achieved with the adoption of the contested decision. That purpose cannot be limited solely to the analysis of the systems put in place by the Member State concerned; the implementation, by the latter, of the recommendations formulated by the Commission in its audit report also constitutes a stage in the achievement of that purpose. Thus, the protection of the purpose of investigations ensured by that exception does not come to an end with the adoption of that report or with that of the follow-up letter by which the Commission monitors the recommendations set out in that report. In both cases, discussion phases with the Member State are initiated, one concerning the initial recommendations and the other concerning those recommendations that remain open, which form part of the investigations covered by that exception.

Furthermore, the Court rejects the applicant's argument that the Parliament did not establish that disclosure of the Commission's letter could undermine the investigation. On one hand, in order to establish the link between the Commission's letter and the audit investigation at issue, the Parliament had to show only that that letter formed part of the documents relating to the ongoing investigation. On the other hand, the statement of reasons in the contested decision is sufficient to explain why disclosure of the Commission's letter was likely to undermine the purpose of the audit investigation, especially as, since the Czech Prime Minister was directly involved, it was important to respect the confidentiality of the dialogue between him and the Commission.

Second, the Court rejects the second plea, alleging failure to take into account the existence of an overriding public interest justifying disclosure of the Commission's letter. It is true that the existence of the rights of the defence is in itself a public interest. However, the fact that those rights are manifested in the present case by the applicant's subjective interest in defending itself against serious accusations made with regard to it by the Parliament implies that the interest on which the applicant relies is not a public interest but a private interest, so that the applicant has not shown that there is an overriding public interest warranting disclosure of the Commission's letter.

3. Exception relating to protection of the decision-making process

Judgment of 14 September 2022, Pollinis France v Commission (T-371/20 and T-554/20, EU:T:2022:556)

(Access to documents – Regulation (EC) No 1049/2001 – Standing Committee for Plants, Animals, Food and Feed – EFSA guidance document on the risk assessment of plant protection products on bees – Individual positions of the Member States – Refusal to grant access – Article 4(3) of Regulation No 1049/2001 – Exception relating to protection of the decision-making process)

The applicant, Pollinis France, is a French non-governmental organisation whose activity concerns the protection of the environment and whose purpose is the protection of wild and honey bees and the promotion of sustainable agriculture in order to help preserve pollinators.

On 27 January 2020 and on 8 April 2020, the applicant lodged with the European Commission two requests for access [592] to certain documents concerning the Guidance Document of the European Food Safety Authority (EFSA) on the risk assessment of plant protection products on bees, adopted by the EFSA on 27 June 2013 ('the 2013 guidance document on bees').

By two decisions of 19 June 2020 and 21 July 2020, [593] the Commission refused to grant the applicant access to certain documents and granted partial access to certain other documents concerning the 2013 guidance document on bees ('the contested decisions'). The refusals to grant access were based on the exception relating to the protection of the privacy and the integrity of the individual [594] and the exception relating to the protection of the decision-making process, both of which are provided for in Regulation No 1049/2001. [595]

The applicant lodged before the General Court two actions seeking the annulment of the contested decisions.

By its judgment, the General Court, in an extended composition, annuls those decisions in that they refuse access to the documents requested on the basis of the exception relating to protection of the decision-making process. On this occasion, it rules on whether a decision-making process is to be classified as being ongoing or closed, and on the access to documents setting out the individual positions of the Member States expressed within a comitology committee.

Findings of the Court

Before turning to examine the merits of the actions, the General Court first of all clarifies the subject matter of the action for the annulment of the decision of 19 June 2020.

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592 Pursuant to 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) and Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in the Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

593 Commission Decisions C(2020) 4231 final of 19 June 2020 and C(2020) 5120 final of 21 July 2020.

594 Article 4(1)(b) of Regulation No 1049/2001.

595 First subparagraph of Article 4(3) of Regulation No 1049/2001.

In the present case, that decision replaced the implied rejection decision, by providing an express response to the confirmatory request lodged by the applicant on 25 March 2020. The applicant submitted a statement of modification of the application [596] asking for the action to be henceforth regarded as seeking the annulment of that express decision.

The General Court observes that the statement of modification is not to replace the application in its entirety, but must contain the modified form of order sought and, where appropriate, the modified pleas in law and arguments and evidence offered in connection with the modification of the form of order sought. [597] In the present case, the statement on the modification supplemented the application, which was the common understanding of the parties. Accordingly, the Court finds that the subject matter of the application concerned was the Commission decision of 19 June 2020.

As to the substance, in the first place, the General Court examines whether the Commission correctly applied the exception relating to protection of a decision-making process which is ongoing. In that regard, it finds that the decision-making process to which the requested documents relate could not be regarded as ongoing at the time when the contested decisions were adopted. The General Court observes that, at that time, there was no longer any decision-making process which had the aim of implementing that 2013 guidance document on bees, and that, on the contrary, the Commission had decided, implicitly but necessarily, not to implement that 2013 guidance document and had even expressly asked the EFSA to revise it. That revision, which was still ongoing at the time that the contested decisions were adopted, meant that it was impossible to determine the content of any revised document, the form of its possible adoption or the procedure that might be followed for that purpose, and so the General Court finds that it means that the Commission's decision-making process was devoid of any object at the time when the contested decisions were adopted.

In addition, the General Court states that the review appears to have been contemplated in view of the impossibility of adopting the 2013 guidance document on bees and in order to enable the swift acceptance of a revised guidance document on bees.

It follows, according to the General Court, that the Commission's decision-making process relating to the 2013 guidance document on bees had been closed at the time when the contested decisions were adopted and that, consequently, the Commission could not validly base the contested decisions on the exception which seeks to protect the institution's decision-making process relating to a matter where the institution has not yet taken a decision.

In the second place, on the hypothesis that that exception were applicable, the General Court examines the grounds advanced by the Commission in the contested decisions. In that regard, to the extent that the Commission stated in the contested decisions that certain provisions in the Standard Rules of Procedure [598] expressly exclude the individual positions of the Member States from public access, the General Court finds that those committees are subject to the same rules as the Commission as regards public access to documents, namely those laid down in Regulation

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596 In accordance with Article 86(1) and (2) of the Rules of Procedure of the General Court, where a measure the annulment of which is sought is replaced by another measure with the same subject matter, the applicant may, before the oral part of the procedure is closed or before the decision of the Court to rule without an oral part of the procedure, modify the application to take account of that new factor by introducing that modification by a separate document and within the time limit down in the sixth paragraph of Article 263 TFEU within which the annulment of the measure justifying the modification of the application may be sought.

597 Article 86 (4) of the Rules of Procedure of the General Court.

598 The Standard Rules of Procedure for Committees (OJ 2011 C 206, p. 11) ('the Standard Rules of Procedure') adopted by the Commission.

No 1049/2001, and that there are no specific rules on public access to documents as regards the work of committees. [599] Thus, the provisions of the Standard Rules of Procedure relied on by the Commission in the contested decisions cannot permit a protection of the individual positions expressed by the Member States that goes beyond that laid down by Regulation No 1049/2001. [600]

Furthermore, it follows from the case-law [601] that the EU legislation on access to documents cannot justify an institution's refusal, as a matter of principle, to grant access to documents pertaining to its deliberations on the basis that they contain information relating to positions taken by representatives of the Member States. It follows that, as regards public access to the documents inherent in the work of comitology committees, the Commission cannot take the view that the relevant legal framework excludes, as a matter of principle, public access to the individual positions of the Member States.

Moreover, the General Court observes that the provisions of the Standard Rules of Procedure relied on by the Commission in the contested decisions cannot be interpreted as precluding public access, on request, to the individual positions of the Member States. The General Court states that the fact that, according to the Standard Rules of Procedure, the summary record of the work of the committees does not mention the individual position of the Member States has no bearing on access to documents and cannot therefore prejudice public access, upon application, to documents showing those individual positions.

Thus, the General Court concludes that, contrary to what the Commission maintained in the contested decisions, the comitology procedures, and in particular the Standard Rules of Procedure, do not in themselves require access to documents showing the individual position of the Member States to be refused in order to protect the decision-making process of the committee concerned, [602] which, however, does not in any way prevent the Commission, in duly justified cases, from refusing access to documents which show the individual position of the Member States within that committee where their disclosure would be likely specifically to undermine the interests protected by the exceptions provided for by Regulation No 1049/2001. [603]

After having examined the other grounds put forward by the Commission in the contested decisions, the General Court finds that those grounds do not make it possible to establish such harm and, consequently, to justify reliance on the exception laid down in the first subparagraph of Article 4(3) of Regulation No 1049/2001, even assuming it applies.

Therefore, the General Court finds that, in the contested decisions, the Commission infringed the first subparagraph of Article 4(3) of Regulation No 1049/2001 by refusing to disclose the requested documents on the ground that to do so would seriously undermine an ongoing decision-making process.

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599 See recital 19 and Article 9(2) of the Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

600 First subparagraph of Article 4(3) of Regulation No 1049/2001.

601 See, to that effect, judgment of 10 October 2001, *British American Tobacco International (Investments)* v *Commission* (T-111/00, EU:T:2001:250, paragraph 52 and the case-law cited).

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

603 Article 4 of Regulation No 1049/2001.

XV. Civil service

1. No dispute between the Union and one of its servants

Order of 13 June 2022, Mendes de Almeida v Council (T-334/21, EU:T:2022:375)

(Civil service – Appointment of the European Prosecutors of the European Public Prosecutor's Office – Appointment of one of the candidates nominated by Portugal – No dispute between the Union and one of its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS – Article 270 TFEU – Manifest lack of jurisdiction)

On 12 October 2017, the Council of the European Union adopted Regulation 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). [604] That regulation establishes the EPPO as a body of the European Union and sets out rules concerning its functioning.

Article 16(1) of Regulation 2017/1939 provides that each Member State participating in that enhanced cooperation must nominate three candidates for the position of European Prosecutor. Article 16(2) of that regulation states that, after having received the reasoned opinion of the selection panel [605] responsible for drawing up a shortlist of candidates, the Council is to select and appoint one of the candidates to be the European Prosecutor of the Member State in question. That provision also states that, if the selection panel finds that a candidate does not fulfil the conditions required for the performance of the duties of a European Prosecutor, its opinion is binding on the Council. Under Article 16(3) of that regulation, the Council, acting by simple majority, is to select and appoint the European Prosecutors for a non-renewable term of six years and may decide to extend the mandate for a maximum of three years at the end of the six-year period.

Article 96(1) of Regulation 2017/1939 provides that the Staff Regulations of Officials of the European Union ('the Staff Regulations') and the Conditions of Employment of Other Servants of the European Union ('the CEOS') apply, inter alia, to the European Prosecutors 'unless otherwise provided for in this Regulation'.

On 23 April 2019, at the end of the national selection procedure, the three candidates for the position of European Prosecutor hoping to be nominated by the Portuguese Republic were successful. The applicant, Ms Ana Carla Mendes de Almeida, was one of those candidates. The names of those three candidates, listed in alphabetical order, were communicated to the selection panel.

On 18 November 2019, after hearing those candidates, the selection panel sent its reasoned opinion to the Council and gave an order of preference concerning them, that is to say, the applicant, followed by the other two candidates.

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

605 As referred to in Article 14(3) of Regulation 2017/1939.

On 27 July 2020, the Council adopted Implementing Decision 2020/1117 [606] appointing the European Prosecutors of the EPPO, and in particular Mr Moreira Alves d'Oliveira Guerra, from 29 July 2020 ('the contested decision').

On 22 October 2020, the applicant submitted a complaint to the Council, pursuant to Article 90 of the Staff Regulations, against the contested decision. By decision of 8 March 2021 ('the decision rejecting the complaint'), the appointing authority of the Council ('the appointing authority') considered that complaint to be manifestly inadmissible based on its lack of competence to uphold it.

The applicant then brought an action under Article 270 TFEU seeking the annulment of the contested decision, in so far as it appoints Mr Moreira Alves d'Oliveira Guerra as a European Prosecutor of the EPPO and rejects her application for that position, and of the decision rejecting the complaint.

The General Court dismisses the action and provides clarification concerning the legal basis on which an action concerning the appointment of European Prosecutors must be brought, namely Article 263 TFEU, and not Article 270 TFEU. Article 270 TFEU creates a legal remedy for civil service disputes which is distinct from general legal remedies such as an action for annulment governed by Article 263 TFEU.

Findings of the Court

The Court states, first of all, that it follows from the wording of Article 270 TFEU that the jurisdiction provided for therein extends to any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations and the CEOS.

The Court goes on to point out that the notion of dispute between the Union and its servants has been given a wide definition by the case-law, with the result that disputes concerning persons who have the status neither of officials nor of employees, but who claim that status, are also examined within that framework. This applies to persons who are candidates for a post for which the conditions of appointment are laid down in the Staff Regulations or the CEOS.

The Court observes next that, concerning the EPPO, not all provisions of the Staff Regulations are applicable to it per se. As regards European Prosecutors, only their pay and employment conditions fall within the scope of the CEOS and within the competence of the EPPO's Authority Empowered to Conclude Contracts of Employment. The situation is different for the conditions and procedures leading to their appointment.

As those conditions and procedures are not laid down in the Staff Regulations or in the CEOS but in Article 16 of Regulation 2017/1939, which, in that regard, lays down a specific procedure with special rules, the disputes that relate to those conditions and procedures cannot be regarded as disputes between the Union and one of its servants for the purposes of Article 270 TFEU. The Court, therefore, manifestly lacks jurisdiction to hear and determine the present action against the decision to appoint a European Prosecutor on the basis of Article 270 TFEU.

Moreover, since the contested decision is not a decision falling within the Staff Regulations and the CEOS, it cannot be considered that the complaint made by the applicant against it and the decision taken by the Council to reject that complaint may fall within the scope of the Staff Regulations and the CEOS. The Court therefore also manifestly lacks jurisdiction to hear and determine the decision rejecting the complaint.

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606 Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors of the European Public Prosecutor's Office (OJ 2020 L 244, p. 18).

It is for the applicant to choose the legal basis of its action and not for the EU judicature itself to choose the most appropriate legal basis. It is not possible to regard the present action as having been brought on the basis of Article 263 TFEU, since the applicant has expressly invoked Article 270 TFEU.

As regards the decision rejecting the complaint, in any event and assuming the applicant intended to bring her action against that decision under Article 263 TFEU, the Court finds, inter alia, for the same reasons, that the appointing authority was not competent to hear and determine the complaint against the appointment decision lodged by the applicant on the basis of Article 90 of the Staff Regulations. It was therefore right to reject that complaint and the action is therefore, in any event, manifestly unfounded in that regard.

2. Resettlement allowance

Judgment of 7 September 2022, LR v EIB (T-529/20, EU:T:2022:523)

(Civil service – EIB staff – Remuneration – Resettlement allowance – Establishment of a member of staff's residence in his or her own home after leaving the service of the EIB – Second indent of the first paragraph of Article 13 of the EIB Staff Rules – Concept of 'home' – Literal interpretation according to a prevailing language version– Unlimited jurisdiction – Dispute of a financial character – Admissibility)

LR, a former member of staff of the European Investment Bank (EIB), applied to it for payment of a resettlement allowance on the ground that, following his retirement, he had moved away from his place of employment.

The EIB rejected that request on the grounds that LR owned the house into which he had moved back and that he therefore did not satisfy the conditions for the grant of the resettlement allowance provided for in Article 13 of the EIB Staff Rules ('the Staff Rules'). Following the rejection of his request for a review of that refusal, LR brought an action before the General Court seeking, first, annulment of the decision refusing him the benefit of the resettlement allowance and, second, an order requiring the EIB to pay that allowance.

That action has been upheld by the General Court, which, sitting in extended composition, has specified the conditions for the grant of the resettlement allowance after an official has left the service under Article 13 of the Staff Rules. In that context, the Court also provides clarification as to the interpretation of that general rule adopted by the EIB in the event of linguistic disparity.

Findings of the Court

The Court begins by noting that, although Article 13 of the Staff Rules provides for the payment of a flat-rate resettlement allowance to a member of staff of the EIB who has changed his or her place of residence, after leaving the service of the EIB, in order to reside at least 50 kilometres from his or her last place of employment, the benefit of that allowance is nevertheless conditional on the staff member concerned not residing in his or her own home.

As regards the literal interpretation of that provision, the Court notes the absence of a definition in the Staff Rules of the concepts of 'residence' and 'home' and the possibility of interpreting differently, on the one hand, the expression 'propre foyer' used in the French version of Article 13 of the Staff Rules and, on the other hand, the expression 'own home' used in its English version.

After recalling the settled case-law according to which, where there is disparity between the various language versions of a text of EU law, the provision in question must, in principle, be interpreted by reference to the general scheme and purpose of the rules of which it forms part, [607] the Court derogates from that case-law, in the particular circumstances of the present case, in so far as, first, Article 13 of the Staff Rules is the result of a proposal drafted and adopted in French, and, second, the EIB chose to state expressly, in the last paragraph of the introduction to the Staff Rules, that the English version, inter alia, of those rules was a 'translation of the French original'.

Thus, the Court decides, in order to determine objectively the intention of the author of the provision at issue when it was adopted, to interpret the terms of Article 13 of the Staff Rules in accordance with their usual meaning in the prevailing language version, which in the present case is the French-language version.

In that regard, the Court points out that, in French, the term 'foyer' refers to the place where fire is made and, by extension, to the place where a person's family resides, whereas the term 'résidence' refers to the place or location where a person is established. It thus follows from the wording of Article 13 of the Staff Rules that payment of the flat-rate resettlement allowance is excluded when the new residence of the former member of staff coincides with the residence where his or her family lives. Since the accommodation occupied by a person does not necessarily or systematically correspond to the place of residence of the members of that person's family, it follows from a literal interpretation of that provision that payment of the resettlement allowance is excluded only where the staff member concerned transfers his or her habitual residence to the place where the members of his or her family reside, and not where the house to which the staff member returns is his or her own home.

That literal interpretation of Article 13 of the Staff Rules is supported by its contextual interpretation. The other articles of the Staff Rules use the term 'home' to designate the place where the members of the family of the staff member habitually reside, and not the place of residence owned by the staff member.

The Court notes, moreover, that Article 5(4) of Annex VII to the Staff Regulations of Officials of the European Union ('the Staff Regulations') contains a clause excluding entitlement to the installation allowance which, according to the case-law, [608] applies where the official is posted to the place where his or her family already resides and moves in with them. While confirming that the EIB enjoys operational autonomy to determine the conditions of employment applicable to its staff members, the Court takes the view that that institution has not shown how its operational autonomy would be disregarded by application by analogy of that case-law to the clause excluding the right to the resettlement allowance provided for in the second indent of the first paragraph of Article 13 of the Staff Rules.

Finally, the Court notes that the teleological interpretation of Article 13 of the Staff Rules confirms that literal and contextual interpretation of that article.

The purpose of the resettlement allowance is to cover and alleviate the financial burdens involved in the resettlement of the former official or member of staff in a new environment for an indefinite but rather long period, because of the change in his or her main residence after definitely leaving the service.

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607 Judgment of 21 December 2021, *Trapeza Peiraios* (C-243/20, EU:C:2021:1045, paragraph 32 and the case-law cited.

608 Judgment of 18 November 2015, *FH* v *Parliament* (F-26/15, EU:F:2015:137, paragraph 35).

It is true that the fact that the member of staff, upon leaving the service, resettles in a house of which he or she is the owner or co-owner is likely to reduce some costs linked to his or her resettlement. However, it cannot be inferred from such a circumstance that there is a general presumption that integration of the member of staff concerned into an environment different from that of his or her last place of employment would not expose him or her to any expenses.

In the light of the foregoing, the Court holds that, by refusing to grant LR entitlement to the resettlement allowance on the ground that he was the owner of the house in which he resettled, the EIB infringed Article 13 of the Staff Rules. Consequently, the Court annuls that decision of the EIB.

In addition, the Court applies by analogy Article 91(1) of the Staff Regulations, which, in disputes of a financial character brought by staff members against an institution confers unlimited jurisdiction on the EU Courts, and, upholding LR's claims to that effect, thus orders the EIB to pay the resettlement allowance, together with default interest. [609]

3. Termination of a contractual relationship

Judgment of 5 October 2022, WV v CdT (T-618/21, EU:T:2022:603)

(Civil service – Members of the temporary staff – Sick leave – Unjustified absences – Termination of the contract without notice – Article 16 of the CEOS – Article 48(b) of the CEOS – Liability)

WV was recruited by the Translation Centre for the Bodies of the European Union (CdT) in 1997 and signed a contract of indefinite duration in 2004. From 23 July to 15 November 2019, WV was put on paid sick leave. His absence from 18 November 2019 to 7 February 2020 was regarded by the CdT as unjustified. His absences from 8 February to 10 April 2020 and from 29 April to 4 May 2020 were, however, accepted by the CdT as justified. From 5 May 2020 onwards, his absences were regarded as unjustified.

WV's lawyer requested that he be declared invalid. She stated that, given WV's state of health, a return to normal was not to be expected in the near future. By letter of 14 September 2020, the CdT rejected that request and informed WV that it was proposing to apply Article 48(b) of the Conditions of Employment of Other Servants of the European Union ('the CEOS') and terminate his employment.

On 26 November 2020, on the basis of that provision, which provides for the possibility of terminating employment without notice if the servant is unable to resume his duties at the end of a period of paid sick leave, a decision terminating WV's employment without notice was adopted. WV then brought an action before the General Court seeking the annulment of that decision ('the contested decision').

The General Court upholds the action and annuls the contested decision. In its judgment, the General Court gives a ruling on the question, not previously decided in the case-law, of whether the administration can terminate the employment of a staff member pursuant to Article 48(b) of the CEOS solely on the basis of his or her unjustified absences and the interests of the service, without examining whether the conditions laid down in the second paragraph of Article 16 of the CEOS, to which Article 48(b) thereof refers, are fulfilled.

Findings of the Court

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609 Judgment of 2 October 2001, *EIB* v *Hautem* (C-449/99 P, EU:C:2001:502, paragraph 95).

The General Court states that it is clear from the second paragraph of Article 16 and from Article 48(b) of the CEOS that the employment of a servant may be terminated where two conditions are met: first, the period for paid sick leave must have expired and the servant must be unable to resume his or her duties at the end of that period.

As regards the first condition, relating to expiry of the period for paid sick leave, the General Court points out that the paid sick leave mentioned in Article 48(b) of the CEOS, at the end of which the servant's ability to resume his or her duties is to be assessed, is that provided for in the second paragraph of Article 16 of the CEOS.

It is clear from a combined reading of Article 48(b) of the CEOS and the second paragraph of Article 16 of the CEOS that a servant's employment may be terminated without notice at the end of his or her paid sick leave if that leave is either longer than three months or longer than the length of time worked by the member of staff in question, where the latter is longer.

Therefore, in order to terminate the applicant's employment on the basis of Article 48(b) of the CEOS, the CdT was required to verify that that condition was met.

In that regard, the General Court notes that the CdT considered that WV's unjustified absences, by terminating his entitlement to paid sick leave, relieved the administration of the obligation to verify the fulfilment of the condition relating to the expiry of the period for paid sick leave to which the applicant was entitled. However, neither Article 48(b) of the CEOS, on which the contested decision is based, nor the provisions of the second paragraph of Article 16 of the CEOS, which lays down the latter condition, provide that a decision to terminate employment without notice may be adopted without first verifying the expiry of the period for paid sick leave to which the staff member concerned is entitled in accordance with the rules in the second paragraph of Article 16 of the CEOS. Moreover, neither of those provisions, nor Article 59 of the Staff Regulations, which sets out, inter alia, the legal regime applicable to sick leave and unjustified absences, suggests that verification of the condition relating to the expiry of the period for paid sick leave provided for by the second paragraph of Article 16 of the CEOS might be replaced, in cases of unjustified absence on the date of the contested termination or prior to that date, by the formal taking of note of such absences. Consequently, in the contested decision, the CdT applied a condition relating to unjustified absence which is not contemplated by Article 48(b) and the second paragraph of Article 16 of the CEOS and terminated WV's employment for an indefinite duration without having verified that the first condition laid down by those provisions was fulfilled.

As regards the second condition, relating to the servant's inability to resume his duties at the end of the period of paid sick leave, the General Court finds that it is apparent from the letters from WV's lawyers that WV acknowledged that he was not able to resume his duties, which indeed the CdT took into account in the contested decision, referring to the content of those letters in that decision.

However, since the date on which that inability to resume duties ought to have been established is, according to Article 48(b) of the CEOS, after the expiry of the period for paid sick leave, which, as previously noted, the CdT had not evaluated, the second condition cannot be regarded as fulfilled. The General Court therefore concludes that, by adopting the contested decision, the CdT infringed Article 48(b) and the second paragraph of Article 16 of the CEOS.

XVI. Applications for interim measures

Order of 30 March 2022, RT France v Council (T-125/22 R, not published, EU:T:2022:199)

(Interim relief – Common foreign and security policy – Restrictive measures taken in view of Russia's actions destabilising the situation in Ukraine – Suspension of the broadcasting activities of certain media – Application for suspension of operation of a measure – No urgency – Weighing of competing interests)

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted, on 1 March 2022, [610] a number of new measures to add to those adopted by the Council in 2014 in view of Russia's actions destabilising the situation in Ukraine. [611] Those new measures sought to suspend the broadcasting activities in the European Union, or directed at the European Union, of certain media outlets, including RT France. According to the Council, Russia engaged in propaganda actions targeted at civil society in the European Union and neighbouring countries, gravely distorting and manipulating facts, and, in order to do so, used certain media outlets under the control of Russia's leadership as conduits.

RT France brought an action before the General Court of the European Union seeking annulment of the acts adopted by the Council. [612] It also lodged an application for interim measures seeking the suspension of the operation of those acts.

By his order of 30 March 2022, the President of the General Court dismissed the application for interim measures on the grounds that the condition relating to urgency as regards a suspension of operation had not been satisfied and that the balance of interests at stake weighed in favour of the Council.

Findings of the President of the General Court

First of all, the President of the General Court examines whether the arguments put forward by RT France show that the condition relating to urgency, which must be met in order for the judge hearing the application for interim measures to grant the suspension of operation, has been satisfied. RT France argues, in the first place, that the restrictive measures at issue will give rise to dramatic economic, financial and human consequences, since it is prevented from carrying on its activity. In that regard, first of all, the President of the General Court notes that, from a corporate perspective, the data provided by RT France do not include the number of jobs that have been directly jeopardised in the short term, the date on which RT France would cease to have the funds necessary to remunerate its employees or an outline of the business plan it may put in place, particularly in terms of the possibilities for the redeployment or re-employment of the staff affected. The damage alleged is therefore of a purely economic and financial nature. The President of the General Court notes that damage of that nature cannot, otherwise than in exceptional circumstances, be regarded as

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610 Council Decision (CFSP) 2022/351 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 5) and Council Regulation (EU) 2022/350 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2022 L 65, p. 1).

611 Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13).

612 See, in that regard, judgment of 27 July 2022, *RT France* v *Council* (T-125/22, EU:T:2022:483).

irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the situation that obtained before he suffered the damage. The judge hearing the application for interim measures must have actual and specific information, supported by detailed, certified documentary evidence showing the situation of the party seeking interim measures and enabling an assessment of the consequences if the measures sought are not granted. The President of the General Court finds that RT France has failed to explain its financial situation and to provide, in the application for interim measures, any data, in particular figures, which would allow the judge hearing that application to assess the serious and irreparable nature of the alleged damage and would prove that there is a risk of such damage occurring.

In that regard, although RT France is admittedly unable to broadcast its programmes and is therefore prevented from carrying on its activity, the President of the General Court points out that the prohibition on broadcasting is precisely the objective pursued by those measures, and that it is not sufficient for RT France to make general and abstract references to its financial viability in order for it to be found that there is an imminent risk thereto. The President of the General Court adds, in that connection, that the obligation for RT France to suspend its broadcasting activities in the European Union, or directed at the European Union, is only temporary, and that the contested acts do not prevent RT France from broadcasting its content outside the European Union.

In the light of the above, RT France has therefore failed to demonstrate that it would suffer serious and irreparable damage if the suspension of operation sought were not granted.

As regards, in the second place, RT France's argument that the contested acts cause serious harm to its reputation, since it is portrayed in those acts as a media outlet under the permanent and exclusive control of the Russian leadership, the President of the General Court notes that any damage to its reputation has already been caused by the contested acts, and will persist until such time as those acts are annulled by the judgment in the main proceedings. The purpose of interim proceedings is not to secure reparation of damage already suffered. Annulment of the contested acts on conclusion of the main proceedings provides sufficient reparation for the non-material damage alleged. Moreover, the grant of the interim measures sought is justified only where the act at issue constitutes the decisive cause of the alleged serious and irreparable damage. However, it has not been established that the contested acts were the decisive cause of the alleged damage, namely the fact of being portrayed as a media outlet under the permanent and exclusive control of the Russian leadership, since other sources have previously criticised RT France's lack of objectivity and independence vis-à-vis the Russian Government.

In the third place, RT France claims that the seriousness and the irreparable nature of the damage are established by the fact that the activity of an information service has been totally and permanently blocked, and that such acts are irremediable and particularly serious in democratic societies. The President of the General Court states that it was for RT France to set forth and establish the likelihood of such damage occurring, and finds that RT France relies, in general and abstract terms, on the damage that the contested acts would cause to the democratic nature of European society, without specifying how that damage would concern or affect RT France itself. The President of the General Court therefore holds that the condition relating to urgency has not been satisfied.

He considers, furthermore, that the balance of the interests at stake weigh in favour of the Council, since the interests pursued by that institution are concerned with the need to protect the Member States against disinformation and destabilisation campaigns conducted by media outlets under the control of the Russian leadership, which threaten the EU's public order and security, in a context marked by military aggression against Ukraine. They are thus public interests which aim to protect European society and form part of an overall strategy which is designed to put an end, as quickly as possible, to the aggression suffered by Ukraine. In that context, the immediate suspension of the contested acts would endanger the pursuit by the European Union of its objectives, including the peaceful objectives, under Article 3(1) and (5) of the Treaty on European Union.

The interests relied on by RT France, on the other hand, relate to the situation of its employees and to its financial viability. They are the interests of a private company whose main activities have been temporarily prohibited.

The President of the General Court adds that, should RT France succeed in the main proceedings by having the contested acts annulled, the damage suffered as a result of the adverse effects on its interests could be assessed, so that any damage suffered could subsequently be remedied or compensated. Lastly, he states that, taking into account the exceptional circumstances in question, the court hearing the substance of the case decided to adjudicate under an expedited procedure in order to provide RT France with a response to its application for annulment as soon as possible. [613]

In the light of the foregoing, the President of the General Court concludes that the application for interim measures should be dismissed, without it being necessary to rule on the existence of a prima facie case.

Order of 31 March 2022, AL v Council (T-22/22 R, not published, EU:T:2022:200)

(Interim relief – Civil service – Officials – Disciplinary proceedings – Removal from post – Application for interim measures – Urgency – Prima facie case – Weighing of interests)

Between 2009 and 2019, AL, an official of the Council of the European Union, made several declarations to the appointing authority with a view to obtaining the allowances and financial benefits provided for by the Staff Regulations of Officials of the European Union ('the Staff Regulations') for a number of persons who were integrated into his family during his period of service and, in particular, for his disabled adopted son.

After the appointing authority had expressed some concerns regarding the applicant's requests for family allowances, the European Anti-Fraud Office (OLAF) opened an investigation into suspected fraud on the part of the applicant concerning the composition of his family and the conditions required for obtaining family allowances.

At the end of its investigation, OLAF, inter alia, sent recommendations to the Council that it take all the appropriate measures for recovery of a sum unduly paid to the applicant and initiate disciplinary proceedings against him. Following the disciplinary proceedings, the Council took the decision to remove the applicant from his post ('the contested decision'). The appointing authority decided, however, to uphold in part a complaint filed by the applicant against certain financial recovery decisions and to restore the allowances in question.

After hearing an application for interim measures brought by the applicant at the same time as the action for annulment of the contested decision, the President of the General Court granted that application and ordered the Council to suspend the operation of the contested decision.

Findings of the President of the General Court

In the first place, in his assessment of the condition relating to urgency, in so far as concerns the applicant's argument that suspension of operation of the contested decision is necessary in order to preserve the health, or even the life, of his disabled adopted son, the President of the General Court

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613 See, in that regard, judgment of 27 July 2022, *RT France* v *Council* (T-125/22, EU:T:2022:483).

points out that the damage alleged can be taken into account by the judge hearing an application for interim measures only in so far as it may be caused to the interests of the party seeking the interim relief. It follows that the damage which implementation of the contested decision may cause to a party other than the party seeking interim relief can be taken into consideration, if appropriate, by the judge hearing the application for interim measures only when weighing up the interests before him.

In those circumstances, the damage to the health and life of the applicant's disabled adopted son and the damage connected with the loss of the financial benefits that he received for his son, as pleaded by the applicant, can be taken into account by the judge hearing the application for interim measures only in so far as that damage may be caused to the applicant.

It cannot be disputed that a son's health is at the centre of a father's worries and concerns, whether the son is adopted or not. The serious and irreparable damage alleged by the applicant in respect of the health and life of his son is therefore capable of directly affecting the applicant as an adoptive father.

As a single parent who has assumed and continues to assume responsibility for the treatment and education of his adopted son, who is affected by congenital cerebral palsy/spastic tetra paresis and associated illnesses, the applicant would necessarily suffer serious and irreparable personal damage if, owing to the lack of the current wide-ranging medical support, his adopted son's health could no longer be ensured until a possible favourable judgment in the main action.

Since that medical support depends on the financial allowances and benefits to which the applicant and his son were entitled by virtue of the applicant's status as an official, their loss would cause the latter direct damage. As a single parent who has financial responsibility for the medical support and education of his disabled adopted son, the applicant will personally suffer serious and irreparable damage if his son is deprived of that medical and educational support, thus exposing him to the risks to his health which are alleged.

In the second place, the President of the General Court finds that there is a prima facie case, in so far as some of the pleas relied on by the applicant appear, prima facie, not unfounded.

In that regard, the President of the General Court points out that a decision imposing a penalty of removal necessarily entails a careful consideration on the part of the institution, having regard to the particularly serious consequences arising from it. The institution has broad discretion in that respect and the General Court cannot substitute its own assessment for that of the appointing authority. The judicial review is limited to ascertaining whether the facts relied on are materially accurate, and whether there has been any manifest error of assessment of the facts and any misuse of powers. In addition, the lawfulness of any disciplinary measure assumes that the truth of the facts alleged against the person concerned has been established.

In that context, without prejudice to the future decision of the Court in the main proceedings, the President of the General Court holds that the reduction of the sums to be recovered should have a direct impact on the disciplinary penalty adopted in respect of the applicant and that, in order to determine the seriousness of the misconduct and to decide on the disciplinary penalty to be imposed on the applicant, the appointing authority, in its analysis of the nature of the misconduct and the circumstances in which it occurred, should have taken into account the fact that no action or criminal proceedings had been initiated by the competent national authorities in respect of the misconduct alleged against him.

Furthermore, the President of the General Court acknowledges that, although the children's welfare cannot under any circumstances excuse the applicant's behaviour, it seems, prima facie, that the appointing authority should nevertheless have taken that factor into account as a motive which had led the applicant to commit the misconduct, particularly since, as the appointing authority itself recognises, the applicant did not have any malicious intent or a wish to enrich himself personally.

In the third and last place, as regards the weighing of interests and, more specifically, as regards the Council's interest, the President of the General Court notes that the duty of loyalty does indeed have an impact on the preservation of a personal relationship of trust between an institution and its officials which affects the maintenance of an employment relationship. That duty requires not only that officials refrain from conduct detrimental to the dignity of the role and the respect due to the institution and its authorities, but also that they conduct themselves in a manner that is beyond suspicion, in order that the relationship of trust between that institution and themselves may at all times be maintained. However, it does not follow that all breaches of the duty of loyalty systematically lead to loss of that trust, and therefore to dismissal as the inevitable result.

By contrast, if the interim measures sought by the applicant are not ordered, the applicant's adopted son will no longer receive the allowances that enable him to receive the medical care that is indispensable for his survival. The balance of interests therefore weighs in favour of the applicant.

In the light of the foregoing, the application for interim measures was granted.

Order of 25 April 2022, HB v Commission (T-408/21 R, not published, EU:T:2022:241)

(Interim relief – Public service contracts – Irregularities in the contract award procedure – Recovery of sums unduly paid – Enforceable decision – Application for interim measures – Urgency – Prima facie case – Weighing up of the interests)

In the context of the two calls for tenders issued by the European Union, as described below, [614] two contracts had been awarded [615] to a consortium coordinated by the applicant, HB, a private limited liability company under Belgian law, whose sole shareholder is another limited company.

On the basis of an analysis report by the European Anti-Fraud Office (OLAF), the Commission, first of all, suspended the performance of the TACIS and CARDS contracts on the ground that the award procedure was vitiated by substantial errors or irregularities or by fraud. The Commission then adopted two decisions to reduce the sums payable under those contracts and to recover the sums unduly paid. Finally, it adopted two decisions constituting an enforceable order, relating, respectively, to the recovery of each of the amounts receivable from the applicant under the TACIS and CARDS contracts.

After hearing an application for interim measures brought by the applicant at the same time as the action for annulment of those two decisions, the President of the General Court granted that application and ordered the Commission to suspend the operation of those decisions.

Findings of the President of the General Court

In the first place, the President of the General Court examines from the outset the condition relating to the urgency of interim measures sought, and concludes that it has been satisfied in this case. In that regard, since the alleged damage is of a purely financial nature, he points out that, in such a situation, the interim measures sought are justified if it appears that, in the absence of those

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614 As regards the factual and legal context of the proceedings, see judgment of 20 October 2022, *PB* v *Commission* (T-407/21 R, EU:T:2022:655) set out above in this section p. 324.

615 Contracts with reference TACIS/2006/101-510 and reference CARDS/2008/166-429, respectively.

measures, the applicant would be in a position that would imperil its financial viability before final judgment is given in the main action, or if its market share would be affected substantially in the light of, inter alia, the size and turnover of its undertaking and, where appropriate, the characteristics of the group to which it belongs.

More specifically, the fact that an undertaking may become insolvent does not necessarily mean that the condition relating to urgency is satisfied. When assessing an undertaking's financial viability, its material circumstances may be assessed by taking into consideration inter alia the characteristics of the group to which the undertaking is linked by way of its shareholders, which may lead the judge hearing the application for interim measures to hold that the condition relating to urgency is not satisfied, in spite of the foreseeable insolvency of the undertaking.

In the present case, for the purpose of assessing the financial strength of the applicant undertaking, the President of the General Court recalls the legal form of the applicant and its shareholders, and points out that its director, jointly with the applicant, is also required to pay the Commission the sum imposed by the contested decisions. He concludes from those circumstances that the conditions governing the applicant's membership of that group and the characteristics of the group, in particular the financial capacity which the group has as a whole, constitute essential elements for the purpose of assessing the urgency of the application for interim measures.

However, in the light of the figures provided by the applicant, he holds, first, that it is clear that the total assets belonging to the group of which the applicant is a member is considerably lower than the sum in excess of EUR 5 000 000.000 claimed by the Commission. Second, the statutory auditor's certificate confirms that the seizure of the assets of the two undertakings belonging to the group of which the applicant is a member may be regarded as a circumstance that is capable of calling into question the continued operation, and therefore potential demise, of those undertakings. The President of the General Court concludes that, in order to avoid serious and irreparable damage to the applicant's interests, the suspension of the operation of the contested decisions must be ordered and produce its effects before a decision is reached in the main action.

In the second place, the President of the General Court examines the condition relating to establishing a prima facie case and, in that connection, carries out a prima facie examination of the substance of the pleas in law raised by the applicant in support of the main action, and therefore ascertains whether at least one of them is so weighty that it cannot be ruled out in the proceedings for interim measures.

As regards the plea alleging lack of competence of the Commission to adopt the contested decisions, lack of a legal basis and infringement of the principle of legitimate expectations, the President of the General Court points out that it is true that the Financial Regulation may serve as a legal basis [616] for the Commission to adopt decisions constituting an enforceable order, [617] even though the pecuniary obligation in question is of a contractual nature. However, first, the EU judicature does not have jurisdiction to hear an action for annulment where the applicant's legal position falls within the framework of contractual relationships whose legal status is governed by the national law agreed to by the contracting parties, and second, the Commission may not adopt an enforceable decision in the

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616 Under Article 100(2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').

617 For the purposes of Article 299 TFEU.

context of contractual relations which do not contain an arbitration clause in favour of the EU judicature and which therefore fall within the jurisdiction of the courts of a Member State. Therefore, the Commission's power to adopt enforceable decisions in contractual relations should be limited to contracts which contain an arbitration clause conferring jurisdiction on the EU judicature.

In the present case, although the contested decisions are based on the FEU Treaty and the Financial Regulation, the President of the General Court finds that the contracts do not contain an arbitration clause conferring jurisdiction on the EU judicature.

He concludes that, without prejudice to the decision of the General Court in the main proceedings, the plea raised by the applicant appears, prima facie, not without reasonable substance. It therefore calls for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be examined in the main proceedings.

In the third place, the President of the General Court weighs up the risks of each of the possible solutions. In that connection, as regards the applicant's interest in obtaining suspension of the operation of the contested decisions, he finds that, in the circumstances of the case, implementation of the contested decisions would probably bring the applicant's economic activity to an end. As regards the interest in the immediate application of the contested decisions, he notes that the Commission has not provided any explanation in that regard, and that the Commission itself seems to consider that suspension of the operation of the contested decisions would be desirable in the present case. The President of the General Court concludes that the balance of interests therefore weighs in favour of suspension of the operation of the contested decisions.

In the light of the foregoing, the application for interim measures was granted.

Order of 30 May 2022, OT v Council (T-193/22 R, not published, EU:T:2022:307)

(Interim relief – Common foreign and security policy – Restrictive measures adopted in view of Russia's actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – Freezing of funds – Application for interim measures – No prima facie case – No urgency)

Following the military aggression perpetrated by the Russian Federation ('Russia') against Ukraine on 24 February 2022, the Council of the European Union adopted, on, 15 March 2022, Decision (CFSP) 2022/429 and Implementing Regulation (EU) 2022/427, [618] by which the applicant's name was added to the list of persons, entities and bodies adopted by the Council in 2014 as a result of support for actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

OT brought an action before the General Court of the European Union seeking annulment of the acts adopted by the Council. He also lodged an application for interim measures seeking the suspension of the operation of those acts and the grant of various interim measures.

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618 Council Decision (CFSP) 2022/429 of 15 March 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 871, p. 44) and Council Implementing Regulation (EU) 2022/427 of 15 March 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 L 871, p. 1).

By his order of 30 May 2022, the President of the General Court dismissed OT's application for interim measures on the grounds that the condition relating to establishing a prima facie case and the condition relating to urgency were not satisfied.

Findings of the President of the General Court

First of all, the President of the General Court examines whether the condition relating to establishing a prima facie case is satisfied by carrying out a prima facie examination of the substance of the pleas in law raised by the applicant in support of the main action. The applicant raises, in that regard, various pleas seeking to demonstrate the illegality of the acts which the Council adopted against him.

Examining, in the first place, the applicant's argument concerning infringement of the rights of the defence, the President of the General Court points out that, in the context of an initial listing decision, respect for the rights of the defence and for the right to effective judicial protection requires that the competent EU authority – in this case the Council – disclose to the individual concerned the evidence against that person available to that authority, so that that person is in a position to defend himself, bring an action before the EU Courts if necessary and effectively make known his views on the grounds advanced against him. However, in order for those measures to be able to take advantage of a surprise effect and to apply immediately, the Council is not required to communicate to the individual concerned the grounds relating to him before his initial listing, but only concomitantly with or as soon as possible after the adoption of the decision at issue.

In the present case, as the applicant's address was not in the public domain, the Council published a notice in the *Official Journal of the European Union* of 16 March 2022 [619] informing the applicant of the Council's decision to impose restrictive measures and stating that the grounds for that listing were given in the annexes to the acts in question, and informing him of his right to make a request to the Council for reconsideration of that decision. The reasons for the decision were therefore communicated to the applicant. The President of the General Court concludes that, prima facie, the lack of individual notification to the applicant of the decision at issue did not infringe his rights of defence.

Furthermore, since the reasons given for a measure adversely affecting a person are sufficient if that measure was adopted in a context which was known to that person and which enables him to understand the scope of the measure concerning him, the President of the General Court notes that it is difficult to dispute, in the present case, that the applicant was fully aware of the context in which the measures concerning him were adopted. It is apparent, prima facie, that the statement of reasons was sufficiently clear and precise to enable the applicant to understand the reasons for the inclusion of his name on the lists at issue, and that the Council sent the applicant all the documents in the evidence pack concerning him.

As regards, in the second place, the applicant's plea alleging infringement of the obligation to state reasons, the President of the General Court finds that the applicant is in fact disputing the merits of the reasons which the Council relied on against him. In that regard, it is apparent from the evidence pack that the evidence taken into consideration by the Council appears, prima facie, to constitute a set of indicia sufficiently specific, precise and consistent to enable the facts attributed to the applicant to be classified as actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, and thus to support the grounds for including the applicant's name on the

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619 Notice for the attention of the persons, entities and bodies subject to the restrictive measures provided for in Council Decision 2014/145/CFSP, as amended by Council Decision (CFSP) 2022/429, and Council Regulation (EU) No 269/2014, as implemented by Council Implementing Regulation (EU) 2022/427 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ 2022 C 121I, p. 1).

lists. Since the facts relied on by the Council pre-date Russia's invasion of Ukraine and do not concern that conflict, and since the applicant has not adduced any additional evidence to the contrary, the President of the General Court holds that there is no reason to doubt, prima facie, the reliability of the facts relied on by the Council.

As regards the applicant's third plea, alleging infringement of the principle of proportionality, the President of the General Court points out that fundamental rights do not enjoy absolute protection under EU law, but must be viewed in relation to their function in society. Consequently, restrictions may be imposed on their exercise where those restrictions meet objectives of general interest for the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference capable of impairing the substance of the right guaranteed. In the present case, in the light of the fundamental objective of the protection of civilian populations, it appears that the freezing of funds and the prohibition of entry into EU territory of the applicant are not inappropriate. The President of the General Court also finds that alternative and less restrictive measures would not be as effective in achieving the objective pursued, namely that of exerting pressure on those who support actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, having regard in particular to the possibility of circumventing the restrictions imposed. Thus, given the prime importance of the preservation of international peace and security, the restrictions at issue appear, prima facie, to be justified by an objective of general interest and do not seem disproportionate to the aims pursued.

In the light of the foregoing, the President of the General Court concludes that the applicant's arguments in support of his application for interim measures have not established the existence of a prima facie case.

According to the President of the General Court, that solution is consistent with the assessment of the condition relating to the urgency of the measures sought.

In the present case, the applicant, who is seeking the adoption of interim measures in so far as the contested acts deprive him of his freedom of movement and prevent him from seeing his family, had the opportunity to apply to the authorities of the Member State concerned for an exemption from the prohibition to which he is subject on the grounds of urgent humanitarian need. He has not demonstrated that he has exhausted all possibilities to obtain such an exemption. Similarly, he has not established the existence of serious and irreparable harm such as to justify his being reunited with his family. Lastly, since the applicant requested the release of certain frozen funds, as is permitted by the contested acts, the President of the General Court holds that the exemptions obtained in that regard allow the applicant's family to lead a normal life. Accordingly, the President of the General Court concludes that the condition relating to urgency is not satisfied and that the application for interim measures must therefore be dismissed.

Order of 8 June 2022, Hungary v Commission (T-104/22 R, not published, EU:T:2022:351)

(Interim measures – Access to documents – Regulation (EC) No 1049/2001 – European Structural and Investment Funds – Regulation (EU) No 1303/2013 – Documents originating from a Member State – Application for suspension of operation of a measure – Prima facie case – Urgency – Balancing of interests)

Following a request to the Commission for access to documents, concerning correspondence exchanged between the Commission and the Hungarian authorities on a call for proposals in the

context of on shared management, [620] the Commission had initially refused to grant access to those documents, and then, after a confirmatory application was submitted, finally granted the third party applicant partial access to the documents at issue, despite the Hungarian Government's objection.

After hearing an application for interim measures brought by Hungary at the same time as the action for annulment of that Commission decision, the President of the General Court granted that application and ordered the Commission to suspend the operation of that decision in so far as it grants access to the documents originating from the Hungarian authorities.

Findings of the President of the General Court

In the first place, the President of the General Court finds that there is a prima facie case in so far as the two arguments put forward by Hungary appear, prima facie, not unfounded and therefore call for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be examined in the main proceedings.

In that regard, the President of the General Court points out, first of all, that, while a Member State may request an institution not to disclose a document originating from that Member State without its prior agreement, [621] the Member State concerned is not given a general and unconditional right of veto, such that it might oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State. Second, it is for the institution to determine whether, in the light of the circumstances of the case and of the relevant rules of law, the reasons given by the Member State for its objection are capable of justifying prima facie such refusal. Lastly, the Commission's examination must be undertaken in the context of the genuine dialogue which is a feature of the decision-making process established under the regulation on access to documents, held by an institution, which originate from a Member State.

As regards the first argument, that the exception relating to the risk of an institution's decision-making process being seriously undermined [622] in the event of disclosure of a document is applicable in the case of shared management, the President of the General Court finds that, in the context of the shared management at issue in the present case, the Member States and the Commission have a shared responsibility for the management and control of programmes, and that it is for the Commission, in particular, to ensure the legal and regular use of the European Structural and Investment Funds by the Member States. He infers from this that the possibility remains, prima facie, that the documents at issue in the present case may be regarded as falling within the process of adoption of an EU decision, particularly since, according to the case-law of the Court of Justice, a Member State's right to request an institution not to divulge a document originating from that Member State without its prior agreement 'is a provision dealing with the process of adoption of the Community decision'.

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620 In accordance with Articles 74 and 125 of 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).

621 In accordance with Article 4(5) 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).

622 Under the first subparagraph of Article 4(3) of Regulation No 1049/2001.

As regards the second argument, according to which, in the context of the genuine dialogue, the Commission should have set out the reason why it had changed its previous practice and, in the light of that, given Hungary the opportunity to put forward other possible grounds for refusal, the President of the General Court notes that the contested decision is a confirmatory decision which departs from the refusal decision initially taken by the Commission. In view of the particular context of the case, he does not therefore rule out the possibility that the Commission should have given Hungary the opportunity to set out the grounds for its refusal more clearly, or set out other possible grounds for refusal, before it adopted the contested decision. Furthermore, he notes that the Commission could have examined on its own initiative whether the request for access at issue fell within the scope of any other exceptions to the right of access to documents.

In the second place, the President of the General Court considers that the condition relating to urgency is satisfied in the present case, since the risk of Hungary suffering serious and irreparable damage has been proven to the required legal standard. He notes that the alleged damage would result from the disclosure of information claimed to be confidential, and that that information concerns the organisation of a competitive call for proposals in which several interested parties are expected to participate. The proper conduct of that procedure could therefore be jeopardised if the information were disclosed. The President of the General Court concludes that, since the documents at issue are likely to be confidential, as claimed by Hungary, their disclosure would infringe the exception relating to an institution's decision-making process being seriously undermined and their non-public status could not be restored, even if the main action were ultimately upheld.

In the third place, based on the weighing up of the interests involved, which consists of determining whether or not the applicant's interest in obtaining the interim measures sought outweighs the interest in the immediate application of the contested act, the President of the General Court examines the condition that the legal situation created by an interim relief order must be reversible. In that regard, he finds that, in the present case, judgment ordering annulment would be rendered illusory and deprived of effectiveness if Hungary's application for interim measures were to be dismissed, since the consequence of that dismissal would be that the Commission would be free to immediately disclose the documents at issue and therefore de facto to prejudge the future decision in the main action, namely that the action for annulment would be dismissed. Moreover, he recalls that the Commission itself does not object to the suspension of the contested decision.

In the light of the foregoing, the application for interim measures was granted.

Order of 20 October 2022, PB v Commission (T-407/21 R, not published, EU:T:2022:655)

(Interim relief – Public service contracts – Irregularities in the contract award procedure – Recovery of amounts unduly paid – Enforceable decision – Application for interim measures – Urgency – Prima facie case – Balance of interests)

Following two calls for tenders issued by the European Union with the aim of concluding a TACIS service contract for the provision of technical assistance to the Ukrainian authorities for the purpose of the approximation of Ukrainian legislation with EU legislation, and a CARDS service contract for the provision of capacity-enhancing services, specialist services and support services to the Serbian

Ministry of Justice those two contracts had been awarded [623] to a consortium coordinated by a private company of which the applicant, PB, was the director.

On the basis of an analysis report by the European Anti-Fraud Office (OLAF), the Commission, first of all, suspended the performance of the TACIS and CARDS contracts on the ground that the award procedure had been vitiated by substantial errors or irregularities or by fraud. It then adopted a decision concerning the application of an administrative measure against the applicant, withdrawing the payments unduly received under those contracts, holding the applicant jointly and severally liable, with the undertaking of which he was the director, for the payment of the sums in question. Lastly, it adopted an enforceable decision to recover the amounts unduly paid, holding the applicant jointly and severally liable, with the undertaking of which he was the director, for the payment of the amount in question.

After hearing an application for interim measures brought by the applicant at the same time as the action for annulment of the latter decision, the President of the General Court granted that application and ordered the Commission to suspend the operation of that decision.

Findings of the President of the General Court

In the first place, the President of the General Court examines at the outset the condition relating to the urgency of the interim measures sought. In that regard, he considers that condition to have been satisfied in so far as, in the particular circumstances of the present case, the serious and irreparable damage alleged by the applicant must be regarded as having been established, since the inability to meet his basic needs for a prolonged period cannot be remedied by subsequent financial compensation.

As regards the circumstances specific to the applicant's situation, it does not appear that, if the contested decision is implemented, he would have the means to enable him to meet all the expenditure necessary for satisfying his own basic needs until a ruling is given in the main action.

In the second place, the President of the General Court examines the condition relating to establishing a prima facie case and, in that connection, carries out a prima facie examination of the substance of the pleas in law raised by the applicant in support of the main action, and therefore ascertains whether at least one of them is so weighty that it cannot be ruled out in the proceedings for interim measures.

As regards the plea alleging lack of competence of the Commission to adopt enforceable decisions, lack of a legal basis and a manifest error of assessment, the President of the General Court points out that it is true that the Financial Regulation may serve as a legal basis [624] for the Commission to adopt decisions constituting an enforceable order, [625] even though the pecuniary obligation in question is of a contractual nature. However, first, the EU judicature does not have jurisdiction to hear an action for annulment where the applicant's legal position falls within the framework of contractual relationships whose legal status is governed by the national law agreed to by the contracting parties, and second,

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623 Contracts with reference TACIS/2006/101-510 and reference CARDS/2008/166-429, respectively.

624 Under Article 100(2) of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 (OJ 2018 L 193, p. 1) ('the Financial Regulation').

625 For the purposes of Article 299 TFEU.

the Commission may not adopt an enforceable decision in the context of contractual relations which do not contain an arbitration clause in favour of the EU judicature and which therefore fall within the jurisdiction of the courts of a Member State. Therefore, the Commission's power to adopt enforceable decisions in contractual relations should be limited to contracts which contain an arbitration clause conferring jurisdiction on the EU judicature.

The President of the General Court states, first, that the Regulation on the protection of the European Communities financial interests [626] cannot constitute on its own the relevant legal basis for the purposes of adopting administrative measures seeking the recovery of amounts unduly paid and, second, that the provisions of that regulation defining the administrative measures [627] do not mention that those measures may apply to persons or entities other than the beneficiary of those payments, in particular by ordering a third party to repay the sums unduly received by that beneficiary.

In the present case, although the administrative measures adopted by the Commission are based on the FEU Treaty, the Financial Regulation and the Regulation on the protection of the European Communities financial interests, the President of the General Court finds that the contracts concluded with the undertaking of which the applicant is the director do not contain an arbitration clause conferring jurisdiction on the EU judicature.

He concludes that, without prejudice to the decision of the General Court in the main proceedings, the plea raised by the applicant alleging lack of competence of the Commission to adopt enforceable decisions, lack of a legal basis and a manifest error of assessment, appears, prima facie, not without reasonable substance. It therefore calls for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be examined in the main proceedings.

In the third place, the President of the General Court weighs up the risks of each of the possible solutions. In that connection, as regards the applicant's interest in avoiding the immediate recovery of the sums in question, he finds that, in the circumstances of the present case, implementation of the contested decision would probably result in the applicant's being unable to meet his most basic needs. As regards the financial interests of the European Union, he notes that the Commission has not provided any explanation in that regard, and that the Commission itself seems to consider that suspension of the operation of the contested decision would be desirable in the present case. The President of the General Court concludes that the balance of interests therefore weighs in favour of the applicant.

In the light of the foregoing, the application for interim measures was granted.

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626 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1).

627 In the present case Article 4 of Regulation No 2988/95.