COURT OF JUSTICE
OF THE EUROPEAN UNION

ANNUAL REPORT 2020

JUDICIAL ACTIVITY

COURT OF JUSTICE
OF THE EUROPEAN UNION

Annual Report 2020
Judicial Activity

Synopsis of the judicial activity of the Court of Justice and the General Court of the European Union

Luxembourg, 2021

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Koen Lenaerts

President of the Court of Justice
of the European Union

In Europe, as in the rest of the world, 2020 will be remembered as a black page in the history of the 21st century because of the Covid-19 pandemic. That pandemic, which continues to exact a harsh toll on society, especially its most vulnerable members, cut us adrift of our daily routine. It disrupted our private and social lives, as well as our environment and working habits.

It is against that background that I would like, once again, to express my deepest gratitude to the members and staff of the Court for their exemplary commitment and capacity to adapt since the pandemic began, ensuring the smoothest possible functioning of the institution and the continuity of its activities in the service of European justice. I am grateful, in particular, to our Registrar, Mr Calot Escobar, for his foresight and proactive approach. The crisis plans he set in motion in close cooperation with the Judges' Chambers and the institution's staff proved to be of the utmost effectiveness in managing this unexpected situation.

To that end, IT solutions were rolled out in record time, making it possible for everyone to work under conditions resembling, as far as possible, normal working conditions and for hearings to be resumed after a forced interruption of several weeks between mid-March and the end of May. Stringent health measures were also taken to guarantee the safety of all those who had to visit the Court's buildings, particularly for the purpose of taking part in hearings and deliberations.

The range of solutions and measures implemented during the crisis should enrich discussions about how to organise our work in the future. IT tools such as teleworking and videoconferencing were used on an unprecedented scale. We should continue to take advantage of them, even after the return to better days.

One emotional event also marked 2020: the actual withdrawal of the United Kingdom from the European Union at midnight on 31 January. After more than 47 years of shared history, and at the end of a transition period that expired on 31 December 2020, the European Union and the United Kingdom will have to reshape their relations on the basis of three agreements (a trade and cooperation agreement, an agreement on the security of classified information and an agreement on nuclear energy), negotiations on which were completed on 24 December 2020 and which entered into force on 1 January 2021.

At the institutional level, the withdrawal of the United Kingdom resulted in the departure of the UK judges of the Court of Justice and the General Court, Messrs Vajda and Forrester. Moreover, a Greek Advocate General, Mr Rantos, succeeded Advocate General Sharpston. 2020 was also marked by the departure of the

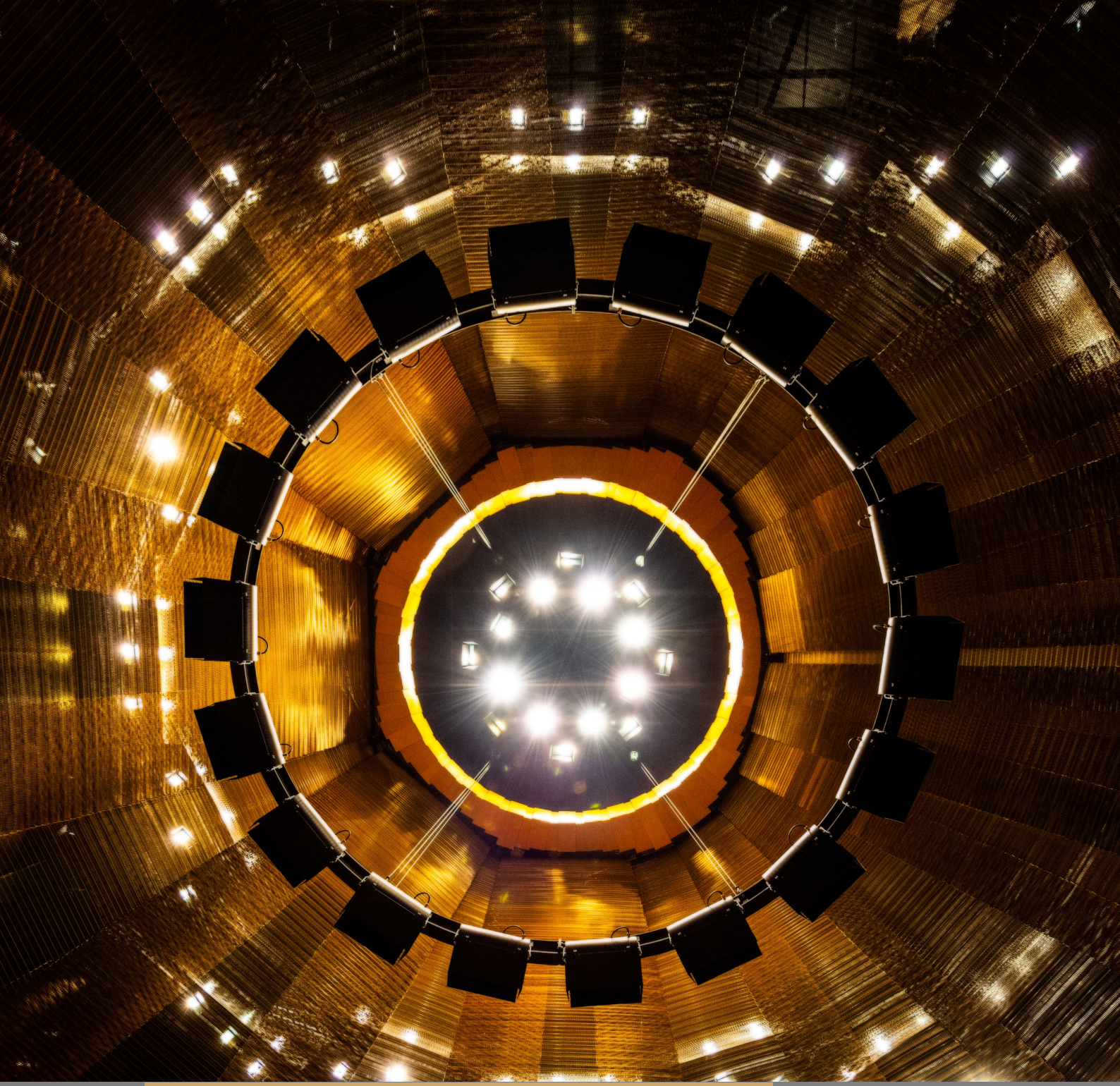
first Czech judge of the Court of Justice, Mr Malenovský, and his replacement by Mr Passer, formerly a judge at the General Court, and by the arrival of the Latvian judge Ms Ziemele and the French Advocate General Mr Richard de la Tour.

Still at the institutional level, and in accordance with Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, on 21 December 2020 the Court of Justice sent to the European Parliament, the Council of the European Union and the European Commission a report on the implementation of the twofold increase in the number of judges at the General Court and on the accompanying measures adopted by that court as part of the reform of the judicial structure of the European Union. That report also contains an evaluation of the preliminary results of that reform and recommends a series of measures designed to make best use of the available resources, with a view to bringing about continuous improvement in the quality and speed of the European public service of justice.

The public-health crisis has had an inevitable impact on the statistics for the past year. The number of cases brought before both courts (1 582) is lower than last year's all-time high (1 905), but the decrease is less pronounced when compared to the figures for 2018 (1 683) and 2017 (1 656). As regards the Court of Justice in particular, that decrease is primarily due to the slowdown at the beginning of the pandemic in the activity of the national courts and, therefore, in the number of references for a preliminary ruling (556 compared to 641 in 2019), but the significant decline in the number of appeals against the decisions of the General Court is also a factor (131 compared to 266 in 2019). The number of cases disposed of by the Court of Justice and the General Court also fell in 2020 (1 540 compared to 1 739 in 2019), mainly due to the postponement of numerous hearings as a result of the public-health situation and the restrictions on cross-border travel throughout the past year. However, the reduction is less marked at the Court of Justice, which disposed of 792 cases in 2020, lower than the record figure set in 2019 (865) but higher than the figures for 2018 (760) and 2017 (699). Furthermore, the average duration of proceedings before both courts remained very close to previous years, giving significant cause for satisfaction.

The efforts made at all levels of the institution to overcome the challenges posed by this epoch-defining public-health crisis have thus overwhelmingly paid off. We must continue along that path, ensuring that cases are dealt with as expeditiously as possible while safeguarding the quality of judicial decision-making. The Court of Justice and the General Court are increasingly in the spotlight of the legal world and the media, owing, among other things, to the importance and sensitivity of the cases before them. I am thinking, in particular, of cases involving fundamental freedoms and the very principles of the rule of law.

In the hope that 2021 will see a progressive return to normal, let me conclude by warmly thanking my colleagues and the entire staff of the institution for the outstanding work carried out by them during this extraordinary year.



Chapter 1
The Court of Justice

A The Court of Justice: changes and activity in 2020

By Mr **Koen Lenaerts**, President of the Court of Justice

This first chapter summarises the activities of the Court of Justice in 2020. It begins, in the first part (A), by describing briefly how the Court evolved during the past year and providing an overview of its judicial activity. The second part (B) presents, as it does each year, the main developments in the case-law, arranged by subject matter. The third and fourth parts outline the main statistical trends relating to the past year and the measures taken by the Court in response to the public-health crisis (C and D), while the fifth and last part sets out the Court's composition during 2020 (E).

1.1. 2020 was characterised by the departure of three members of the Court of Justice: Jiří Malenovský (Judge at the Court from 2004 to 2020), Christopher Vajda (Judge at the Court from 2012 to 2020) and Eleanor Sharpston (Advocate General at the Court from 2006 to 2020).

Also in 2020, Ineta Ziemele (Latvia) and Jan Passer (Czech Republic) took office as judges and Jean Richard de la Tour (France) and Athanasios Rantos (Greece) as advocates general.

1.2. As regards the functioning of the institution, on 21 December 2020, the Court of Justice sent to the European Parliament, the Council of the European Union and the European Commission the second of the two reports which Article 3 of Regulation 2015/2422 [1] required it to submit as part of the review of the implementation of the reform of the judicial structure of the European Union, consisting in doubling, in three successive phases, the number of judges at the General Court.

The reader may recall that the first of those reports was submitted to the abovementioned institutions on 14 December 2017 and related to possible changes in the attribution of jurisdiction to give preliminary rulings under Article 267 of the Treaty on the Functioning of the European Union. The Court concluded that it was not appropriate, at that stage, to transfer part of its jurisdiction over preliminary rulings to the General Court. That conclusion was based in particular on the fact that requests for a preliminary ruling brought before the Court of Justice are handled expeditiously, notwithstanding the significant increase in the volume of such cases and the intensity of the dialogue with the courts of the Member States reflected by that increase.

The second report gives an account of the implementation of the increase in the number of judges at the General Court and the accompanying measures adopted by that court as part of the abovementioned reform, as at 30 September 2020. In view of the relatively short period for implementation of the reform (the first additional judges took office in April 2016) and the fact that it was staggered (seven of the last additional judges took office in September 2019, while the eighth and last judge in the third stage had still not been appointed, and neither had the twelfth and final judge of the first stage), the report states that no definitive conclusions should be drawn from the analysis of the results of that reform. That limitation is all the more relevant in view of the three-yearly rotation that occurred at the General Court in September 2019 (with the departure of eight judges) and the impact of the public-health crisis on the work of the General Court from March 2020 onwards, particularly on the holding of hearings and, consequently, on the number of cases disposed of during the past year.

1| Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

The analysis carried out for the preparation of that second report nevertheless highlighted a number of positive trends, recognised by the participants (agents and lawyers) in proceedings before the General Court who were consulted, namely a significant reduction in the length of proceedings, a more intensified investigation of cases and more frequent referrals of cases to extended chamber formations.

In order for litigants to be able to reap all of the benefits of the reform of the General Court, the report recommends a series of measures designed to adapt the way in which cases are assigned (in particular, by creating specialised chambers according to the model already introduced for intellectual property and staff cases); to extend the reduction in the length of proceedings to cover types of cases in respect of which that trend is not, as yet, sufficiently discernible (such as cases involving State aid and the civil service); to implement a prompt, proactive and streamlined management of the stages of the procedure to ensure that each case is dealt with as quickly and as efficiently as possible; and to increase the number of referrals to extended chambers and to the Grand Chamber, guaranteeing the consistency, quality and authority of the case-law of the General Court.

The second report concludes that redefining how jurisdiction is shared between the Court of Justice and the General Court is not necessary at present and that, in view, in particular, of the positive results recorded by the Court of Justice in 2020, it is preferable to wait until the increase in the number of judges at the General Court has produced all its effects before formulating, where appropriate, a request for legislation amending the Statute pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, as provided for in the third subparagraph of Article 3(1) of Regulation 2015/2422.

2. As regards statistics – and without prejudice to the more detailed comments set out in Part C of this chapter of the annual report – a number of trends emerge from a reading of the statistics relating to the past year.

The first trend concerns the decrease in the number of new cases. While 966 cases were brought before the Court in 2019, the number of new cases fell to 735 in 2020. That reduction is clearly attributable to the public-health crisis, which led to significantly fewer new requests for a preliminary ruling, particularly during the first wave of the pandemic, but the substantial decline in the number of appeals is also a factor: only 131 appeals, appeals against interim measures and appeals on intervention were lodged with the Court in 2020, compared to more than double that figure in 2019 (266). Notwithstanding that tendency, it should be noted that an increasing share of the Court's workload is taken up with preliminary rulings, which alone accounted for more than 75% of the cases brought before it last year.

Although the number of cases disposed of by the Court in 2020 (792) is also lower than the number of cases it disposed of in 2019 (865), that figure is nevertheless higher than the number of cases disposed of in 2017 and 2018 (699 and 760 respectively), which testifies to the remarkable ability of all the members and staff of the institution to rally together to ensure that the Court continues to fulfil its mission, in spite of the extremely difficult circumstances brought about by the public-health crisis. As is apparent from the second part of this chapter, throughout the past year the Court has continued to develop its case-law in areas as important and varied as the protection of the values of the rule of law, fundamental freedoms and rights, asylum and immigration policy, the area of freedom, security and justice, the internal market, social policy, environmental protection and consumer protection.

Lastly, it should be pointed out that notwithstanding the abovementioned circumstances, the average duration of proceedings before the Court in 2020 remained very close to the excellent figure achieved in 2019 (14.4 months), standing at 15.4 months (all case categories combined). In 2020, the average duration of proceedings was thus 13.8 months for appeals, 15.8 months for preliminary rulings and 19.2 months for direct actions. That figure stands at 3.9 months for cases dealt with under the urgent preliminary-ruling procedure, while the Chamber determining whether appeals may proceed took an average of 3.2 months to dispose of the cases before it during the past year.

B Case-law of the Court of Justice in 2020

I. Fundamental rights

In 2020, the Court ruled on numerous occasions on fundamental rights in the EU legal order. A number of those decisions are covered in this section of the report. [1] The decisions set out in this section provide considerable guidance on the scope of some of the rights and principles laid down in the Charter of Fundamental Rights of the European Union ('the Charter').

1. Freedom of religion

By its judgment in ***Veselības ministrija*** (C-243/19, EU:C:2020:872), delivered on 29 October 2020, the Court ruled on a case in which the son of the applicant in the main proceedings had to have open-heart surgery. That operation was available in the latter's Member State of affiliation, Latvia, but could not be carried out without a blood transfusion. However, the applicant in the main proceedings opposed that method of treatment on the ground that he was a Jehovah's Witness, and therefore requested that the Nacionālais veselības dienests (National Health Service, Latvia) issue an authorisation so that his son could receive scheduled treatment in Poland, where the operation could be performed without a blood transfusion. As his request was refused, the applicant brought an action against the health service's refusal decision. That action was dismissed at first instance, a ruling which was upheld on appeal. In the meantime, the applicant's son had heart surgery in Poland, without a blood transfusion.

Hearing an appeal on a point of law, the Augstākā tiesa (Senāts) (Supreme Court, Latvia) was uncertain whether the Latvian health authorities were entitled to refuse to issue the form, allowing the assumption of costs for the scheduled treatment, on the basis of solely medical criteria or whether they were also required to take account of the applicant's religious beliefs. Since it was unsure whether a system of prior authorisation such as that at issue was compatible with EU law, the Augstākā tiesa (Senāts) (Supreme Court) referred two questions to the Court for a preliminary ruling relating to the interpretation (i) of Article 20(2) of Regulation

1| The following judgments are included: judgments of 26 March 2020, ***Miasto Łowicz and Prokurator Generalny*** (Joined Cases C-558/18 and C-563/18, EU:C:2020:234), and of 16 July 2020, ***Inclusion Alliance for Europe*** v ***Commission*** (C-378/16 P, EU:C:2020:575) and ***ADR Center*** v ***Commission*** (C-584/17 P, EU:C:2020:576), presented in Section V 'Proceedings of the European Union'; judgment of 18 June 2020, ***Commission*** v ***Hungary (Transparency of associations)*** (C-78/18, EU:C:2020:476), presented in Section VII 'Freedom of movement'; judgments of 16 July 2020, ***Addis*** (C-517/17, EU:C:2020:579), and of 14 May 2020, ***Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*** (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), presented in Section VIII 'Border controls, asylum and immigration'; judgment of 8 September 2020, ***Recorded Artists Actors Performers*** (C-265/19, EU:C:2020:677), presented in Section XIV 'Approximation of laws'; judgment of 16 December 2020, ***Council and Others*** v ***K. Chrysostomides & Co. and Others*** (Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028), presented in Section XVI 'Economic and monetary policy'; judgment of 23 April 2020, ***Associazione Avvocatura per i diritti LGBTI*** (C-507/18, EU:C:2020:289), presented in Section XVII 'Social policy'; judgment of 25 June 2020, ***A and Others (Wind turbines at Aalter and Nevele)*** (C-24/19, EU:C:2020:503), presented in Section XIX 'Environment'; judgment of 2 April 2020, ***Ruska Federacija*** (C-897/19 PPU, EU:C:2020:262), presented in Section XX 'International agreements'; judgments of 8 September 2020, ***Commission and Council*** v ***Carreras Sequeros and Others*** (Joined Cases C-119/19 P and C-126/19 P, EU:C:2020:676), and of 18 June 2020, ***Commission*** v ***RQ*** (C-831/18 P, EU:C:2020:481), presented in Section XXII 'European civil service'.

No 883/2004, [2] which determines the conditions under which the Member State of residence of an insured person who requests authorisation to travel to another Member State to receive healthcare is required to issue that authorisation and, consequently, to assume the costs of the healthcare received in the other Member State, and (ii) of Article 8 of Directive 2011/24, [3] which concerns the systems of prior authorisation for reimbursement of cross-border healthcare, read in the light of Article 21(1) of the Charter, which, inter alia, prohibits any discrimination based on religion.

The Court held, in the first place, that Article 20(2) of Regulation No 883/2004, read in the light of Article 21(1) of the Charter, does not preclude the insured person's Member State of residence from refusing to grant that person the authorisation provided for in Article 20(1) of that regulation, where hospital care, the medical effectiveness of which is not contested, is available in that Member State, although the method of treatment used is contrary to that person's religious beliefs.

In that regard, the Court found, inter alia, that the refusal to grant the prior authorisation provided for in Regulation No 883/2004 introduces a difference in treatment indirectly based on religion or religious beliefs. Indeed, patients who undergo a medical procedure including the use of a blood transfusion have the corresponding costs assumed by the social security system of the Member State of residence, while those who decide for religious reasons not to have such a procedure in that Member State and to have recourse, in another Member State, to treatment which does not conflict with their religious beliefs, do not benefit from such assumption of costs in the Member State of residence.

Such a difference in treatment is nevertheless justified where it is based on an objective and reasonable criterion and is proportionate to the aim pursued. The Court found that that was the situation in that case. First, it observed that if benefits in kind provided in another Member State give rise to higher costs than those relating to benefits which would have been provided in the insured person's Member State of residence, the obligation to refund in full may give rise to additional costs for the Member State of residence. It then noted that if the competent institution were obliged to take account of the insured person's religious beliefs, such additional costs could, given their unpredictability and potential scale, entail a risk for the financial stability of the health-insurance system of the Member State of affiliation, which is a legitimate objective recognised by EU law.

The Court concluded from this that, in the absence of a prior authorisation system based exclusively on medical criteria, the Member State of affiliation would face an additional financial burden which would be difficult to foresee and likely to entail a risk to the financial stability of its health-insurance system. Consequently, not to take into account the insured person's religious beliefs appears to be a justified measure in the light of the aforementioned objective, which satisfies the requirement of proportionality.

The Court found, in the second place, that Article 8(5) and (6)(d) of Directive 2011/24, read in the light of Article 21(1) of the Charter, precludes a patient's Member State of affiliation from refusing to grant that patient the authorisation provided for in Article 8(1) of that directive, where hospital care, the medical effectiveness of which is not contested, is available in that Member State, although the method of treatment used is contrary to that patient's religious beliefs. The position would be different if that refusal were

2| Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrigendum OJ 2004 L 200, p. 1).

3| Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare (OJ 2011 L 88, p. 45).

objectively justified by a legitimate aim relating to maintaining treatment capacity or medical competence in the Member State of affiliation, and were an appropriate and necessary means of achieving that aim, which it is for the referring court to determine.

In that regard, the Court noted, first, that the objective of protecting the financial stability of the social security system cannot be relied on by the Latvian Government to justify the refusal to grant the authorisation provided for in Article 8(1) of Directive 2011/24 in circumstances such as those at issue in the main proceedings. The system of reimbursement established by Regulation No 883/2004 is different from that provided for by Directive 2011/24 in that the reimbursement provided for by that directive is, on the one hand, calculated on the basis of the fees for healthcare in the Member State of affiliation and, on the other hand, does not exceed the actual costs of the treatment received when the cost of the healthcare provided in the host Member State is lower than that of the healthcare provided in the Member State of affiliation. Given that twofold limit, the healthcare system of the Member State of affiliation is not liable to be faced with a risk of additional costs linked to the assumption of cross-border healthcare costs and that Member State will not, as a rule, be exposed to any additional financial costs with respect to cross-border healthcare.

Concerning, next, the legitimate objective of maintaining treatment capacity or medical competence, the Court observed that the refusal to grant the prior authorisation provided for in Article 8(1) of Directive 2011/24, on the ground that the requirements laid down in Article 8(5) and (6) have not been met, introduces a difference in treatment indirectly based on religion. The Court made clear that in order to assess whether that difference in treatment is proportionate to the objective pursued, the referring court will have to examine whether the taking into account of patients' religious beliefs when implementing Article 8(5) and (6) of Directive 2011/24 may give rise to a risk for the planning of hospital treatment in the Member State of affiliation.

By its judgment in ***Centraal Israëlitisch Consistorie van België and Others*** (C-336/19, EU:C:2020:1031), delivered on 17 December 2020, the Court, sitting as the Grand Chamber, ruled on a case concerning a decree of the Flemish Region (Belgium) of 7 July 2017 amending the Law on the protection and welfare of animals, regarding permitted methods of slaughtering animals, which prohibits animals from being slaughtered without prior stunning, including in the case of slaughter prescribed by a religious rite. In the context of ritual slaughter, that decree provides for the use of reversible stunning which cannot result in the animal's death.

The decree was challenged, inter alia, by several Jewish and Muslim associations, seeking its annulment in whole or in part. In their view, in not allowing Jewish and Muslim believers to obtain meat from animals slaughtered in accordance with their religious precepts, which preclude the reversible stunning technique, the decree infringes Regulation No 1099/2009 [4] and, therefore, prevents believers from practising their religion.

It was in that context that the Grondwettelijk Hof (Constitutional Court, Belgium) decided to make a reference to the Court of Justice for a preliminary ruling in order to ascertain, principally, whether EU law precludes legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

4| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

That question led the Court, for the third time, [5] to seek a balance between freedom of religion, guaranteed by Article 10 of the Charter, and animal welfare, as set out in Article 13 TFEU and given specific expression to in Regulation No 1099/2009.

The Court observed, first of all, that the principle that an animal should be stunned prior to being killed, laid down by Regulation No 1099/2009, meets the main objective of the protection of animal welfare pursued by that regulation. In that regard, although the regulation [6] permits the practice of ritual slaughter in accordance with which an animal may be killed without first being stunned, that form of slaughter is, however, authorised only by way of derogation in the European Union and solely in order to ensure observance of freedom of religion. In addition, Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in that regulation in relation to ritual slaughter. [7] Thus, the regulation reflects the fact that the European Union and the Member States are to pay full regard to the welfare requirements of animals, while respecting the provisions and customs of the Member States relating in particular to religious rites. However, the regulation does not itself effect the necessary reconciliation between animal welfare and the freedom to manifest religion, but merely provides a framework for the reconciliation which Member States must achieve between those two values.

It follows that Regulation No 1099/2009 does not preclude Member States from imposing an obligation to stun animals prior to killing which also applies in the case of slaughter prescribed by religious rites, provided, however, that in so doing, the Member States respect the fundamental rights enshrined in the Charter.

As regards, specifically, the question whether the decree respects those fundamental rights, the Court pointed out that ritual slaughter falls within the scope of the freedom to manifest religion, guaranteed in Article 10(1) of the Charter. By requiring, in the context of ritual slaughter, reversible stunning, contrary to the religious precepts of Jewish and Muslim believers, the decree thus entails a limitation on the exercise of the right of those believers to the freedom to manifest their religion.

In order to assess whether such a limitation is permissible, the Court found, first of all, that the interference with the freedom to manifest religion resulting from the decree is indeed provided for by law and, moreover, respects the essence of Article 10 of the Charter, since it is limited to one aspect of the specific ritual act of slaughter, and that act of slaughter is not, by contrast, prohibited as such.

The Court then found that that interference meets an objective of general interest recognised by the European Union, namely the promotion of animal welfare.

In its examination of the proportionality of the limitation, the Court concluded that the measures contained in the decree allow a fair balance to be struck between the importance attached to animal welfare and the freedom of Jewish and Muslim believers to manifest their religion. In that regard, it stated, first, that the obligation to use reversible stunning is appropriate for achieving the objective of promoting animal welfare. Secondly, as regards the necessity of the interference, it emphasised that the EU legislature had intended to give each Member State a broad discretion in the context of the need to reconcile the protection of the welfare of animals when they are killed and respect for the freedom to manifest religion. As it is, a scientific consensus has emerged that prior stunning is the optimal means of reducing the animal's suffering at the time of killing. Thirdly, as regards the proportionality of that interference, the Court observed, first of all,

5| Following the Court's judgments of 29 May 2018, ***Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*** (C-426/16, EU:C:2018:335), and of 26 February 2019, ***Œuvre d'assistance aux bêtes d'abattoirs*** (C-497/17, EU:C:2019:137).

6| Article 4(4) of Regulation No 1099/2009.

7| Point (c) of the first subparagraph of Article 26(2) of Regulation No 1099/2009.

that the Flemish legislature had relied on scientific research and that it sought to give preference to the most up-to-date method of killing that is authorised. It pointed out, next, that that legislature formed part of an evolving societal and legislative context, which is characterised by an increasing awareness of the issue of animal welfare. Lastly, the Court found that the decree neither prohibits nor hinders the putting into circulation of products of animal origin derived from animals which have undergone ritual slaughter, where those products originate in another Member State or in a non-Member State.

Accordingly, the Court held that Regulation No 1099/2009, read in the light of Article 13 TFEU and Article 10(1) of the Charter, does not preclude legislation of a Member State which requires, in the context of ritual slaughter, a reversible stunning procedure which cannot result in the animal's death.

In addition, the Court upheld the validity of Regulation No 1099/2009 [8] in the light of the principles of equality, non-discrimination and cultural, religious and linguistic diversity, as guaranteed by the Charter. [9] The fact that the regulation authorises Member States to take measures such as compulsory stunning in the context of ritual slaughter, but contains no similar provision governing the killing of animals in the context of hunting and recreational fishing activities or during cultural or sporting events, is not contrary to those principles.

In that regard, the Court pointed out that cultural and sporting events result at most in a marginal production of meat which is not economically significant. Consequently, such events cannot reasonably be understood as a food production activity, which justifies their being treated differently from slaughtering. The Court drew the same conclusion with regard to hunting and recreational fishing activities. Those activities take place in a context where conditions for killing are very different from those employed for farmed animals.

2. Right to an effective remedy and right to a fair trial

Two decisions should be mentioned under this heading: an interim order made in a case concerning the effects of the judicial reforms in Poland [10] and a judgment delivered in the context of a procedure applicable to the exchange of information on request in tax matters. [11]

8| In particular, point (c) of the first subparagraph of Article 26(2), concerning the power of Member States to adopt national rules aimed at ensuring more extensive protection of animals in the case of ritual slaughter.

9| Articles 20, 21 and 22 of the Charter, respectively.

10| Two further judgments delivered by the Court in that regard are worthy of note: judgment of 26 March 2020, ***Miasto Łowicz and Prokurator Generalny*** (Joined Cases C-558/18 and C-563/18, EU:C:2020:234), presented in Section V.4 'References for a preliminary ruling', and judgment of 17 December 2020, ***Openbaar Ministerie (Independence of the issuing judicial authority)*** (Joined Cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), presented in Section X.I 'European arrest warrant'.

11| Reference should also be made under this heading to the following judgments: judgment of 26 March 2020, ***Review Simpson* v *Council and HG* v *Commission*** (Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), presented in Section XXII.1 'Procedure for appointing judges to the Civil Service Tribunal'; judgment of 9 July 2020, ***Czech Republic* v *Commission*** (C-575/18 P, EU:C:2020:530), concerning the conditions of the Member States' access to effective judicial protection in the event of a dispute over the extent of their financial liability having regard to EU law governing the Union's own resources, presented in Section IV 'Budget and subsidies of the European Union'; judgment of 16 July 2020, ***ADR Center* v *Commission*** (C-584/17 P, EU:C:2020:576), dealing with the compatibility of the principle of effective judicial protection with the case-law of the General Court according to which the EU judicature, when hearing an action for annulment brought against an enforceable decision, adopted pursuant to a jurisdiction distinct from the contractual relationship between the parties, should limit its assessment solely to pleas challenging the legality of such an act, presented in Section V.3 'Actions for annulment'; and judgment of 24 November 2020, ***Minister van Buitenlandse Zaken*** (Joined Cases C-225/19 and C-226/19, EU:C:2020:951), which sets out the characteristics of appeals against visa refusal decisions in the light of the right to an effective remedy, presented in Section VIII.3 'Immigration policy: visa applications'.

On 8 April 2020, in the interim order in ***Commission* v *Poland*** (C-791/19 R, EU:C:2020:277), the Court, sitting as the Grand Chamber, ordered the Republic of Poland to suspend immediately the application of the national provisions forming the basis of the jurisdiction of the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court, Poland) to rule in disciplinary cases relating to judges and to refrain from referring the cases pending before the Disciplinary Chamber to a formation that does not satisfy the requirements of independence defined, inter alia, in the judgment in *A. K.* [12] The application for interim relief had been made in an action for failure to fulfil obligations brought by the European Commission in October 2019, seeking a declaration that the Republic of Poland, by adopting the new disciplinary regime for the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts, had failed to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU [13] and the second and third paragraphs of Article 267 TFEU. [14]

Under that new system, adopted in 2017, the Disciplinary Chamber established within the Sąd Najwyższy (Supreme Court) has jurisdiction in disciplinary cases concerning judges of that court and, on appeal, those concerning judges of the ordinary courts. According to the Commission, [15] that regime does not guarantee the independence and impartiality of the Disciplinary Chamber, composed exclusively of judges selected by the Krajowa Rada Sądownictwa (National Council of the Judiciary; 'the KRS'), the 15 members of which who are judges were elected by the Lower Chamber of the Polish Parliament, whereas, before the 2017 reform, they had been elected by their peers. Following the judgment in *A. K.*, [16] the Chamber of Labour and Social Security of the Sąd Najwyższy (Supreme Court), sitting in the cases which gave rise to that judgment, held, in judgments of 5 December 2019 and 15 January 2020, that the Disciplinary Chamber could not, having regard to the circumstances in which it was created, the extent of its powers, its composition and the involvement of the KRS in its constitution, be regarded as a tribunal within the meaning of both EU and Polish law. However, the Disciplinary Chamber continued to exercise its judicial functions.

In the first place, before examining the substance of the Commission's application for interim measures, the Court dismissed the plea of inadmissibility raised by the Republic of Poland. In particular, as regards its competence to order the interim measures in question, it recalled that, although the organisation of justice in the Member States falls within the competence of the Member States, they are nevertheless required, in the exercise of that competence, to comply with their obligations under EU law, in particular the second subparagraph of Article 19(1) TEU. The Court then stated that that provision, which gives concrete expression

12| Judgment of the Court 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; 'the judgment in *A. K.*').

13| That provision states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

14| That provision stipulates that the Court of Justice has jurisdiction to give preliminary rulings. According to the second and third paragraphs of the article, 'where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court'.

15| Supported by the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and the Kingdom of Sweden.

16| In that judgment, the Court held inter alia that EU law precludes cases concerning the application of that law 'from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal ... That is the case where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law'.

to the rule of law, confers on national courts and tribunals and on the Court of Justice the responsibility for ensuring the full application of EU law in all the Member States and the judicial protection which individuals derive from EU law. After recalling the overriding importance of preserving the independence of those bodies in order to guarantee such protection, the Court stated that it is consequently for every Member State to ensure that the disciplinary rules applicable to the judges of national courts within their system of legal remedies in the fields covered by EU law respect the principle of judicial independence. Thus, it is necessary to safeguard, in particular, the fact that decisions given in disciplinary proceedings brought against the judges of those courts are reviewed by a body which itself satisfies the guarantees inherent in effective judicial protection, including that of independence. In those circumstances, the Court recognised that it has jurisdiction, in the context of an action for failure to fulfil obligations seeking to challenge the compatibility with EU law of national provisions relating to the disciplinary regime applicable to judges called upon to rule on questions relating to EU law, to order interim measures ordering the suspension of the application of such provisions.

In the second place, as regards the examination of the substance of the application for interim measures, the Court set out the circumstances in which an interim measure may be granted by the judge hearing an application for interim measures. It must therefore be established that the grant of such a measure is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be adopted and produce its effects before a decision is reached on the substance of the case. Where appropriate, the judge hearing such an application must also weigh up the interests involved.

As regards the condition relating to the existence of a prima facie case, the Court first of all pointed out that that condition is satisfied where at least one of the pleas in law put forward by the party seeking interim measures in support of the main action appears, prima facie, not unfounded. In that case, without ruling on the merits of the arguments put forward by the parties in the context of the action for failure to fulfil obligations, the Court held that, having regard to the facts put forward by the Commission and to the interpretative guidance provided, in particular, by the judgment in *Commission* v *Poland (Independence of the Supreme Court)* [17] and by the judgment in *A.K.*, the arguments relating to the lack of a guarantee of the independence and impartiality of the Disciplinary Board, relied on in the action for failure to fulfil obligations, appear, prima facie, not to be unfounded.

As regards the condition relating to urgency, the Court considered that that condition was satisfied in that case. The mere prospect, for the judges of the Sąd Najwyższy (Supreme Court) and the ordinary courts, of facing the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is liable to affect their own independence and, consequently, the effective judicial protection of the rights which individuals derive from EU law. The Court inferred from this that the application of national provisions at issue which confer jurisdiction to hear disciplinary cases relating to the judges referred to above on a body whose independence might not be guaranteed is liable to cause serious and irreparable harm to the legal order of the European Union.

Finally, the Court weighed up the interests involved. In concluding that the Court was inclined to be in favour of granting the interim measures requested by the Commission, it pointed out, inter alia, that the grant of those measures would not entail the dissolution of the Disciplinary Chamber, but only the provisional suspension of its activity until final judgment had been delivered. Furthermore, it considered that, in so far as the grant of those measures would mean that the handling of the cases pending before the Disciplinary

17| Judgment of the Court of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)*** (C-619/18, EU:C:2019:531).

Board had to be suspended until final judgment had been delivered, the harm resulting from the suspension of those cases for the persons concerned was less than that resulting from their examination by a body whose lack of independence and impartiality cannot, prima facie, be excluded.

In the judgment in ***État luxembourgeois (Judicial protection against requests for information in tax law)*** (Joined Cases C-245/19 and C-246/19, EU:C:2020:795), delivered on 6 October 2020, the Grand Chamber of the Court adjudicated on two cases in which, in response to two requests for exchange of information made by the Spanish tax administration in the context of an investigation concerning F.C., a natural person resident in Spain, the director of the Luxembourg direct taxation administration issued to Company B and Bank A decisions ordering them to provide information regarding bank accounts and financial assets held or beneficially owned by F.C. and regarding various legal, banking, financial and economic transactions that may have been carried out by F.C. or by third parties acting on her behalf or in her interest.

Under Luxembourg legislation on the procedure applicable to the exchange of information on request in tax matters, an action could not, at the time of the material facts, be brought against such information orders. Nevertheless, F.C. and Companies B, C and D brought actions before the tribunal administratif du Luxembourg (Administrative Court, Luxembourg) seeking, primarily, variation or, in the alternative, annulment of those orders. The tribunal administratif (Administrative Court) declared that it had jurisdiction to hear those actions on the basis that the Luxembourg legislation was not consistent with Article 47 of the Charter, which enshrines the right to an effective remedy for everyone whose rights and freedoms guaranteed by EU law have been infringed, and that that legislation should therefore not be applied. As regards substance, that court annulled the information orders in part, on the ground that some of the information requested was not foreseeably relevant.

The Luxembourg State brought appeals against those judgments before the Cour administrative (Higher Administrative Court, Luxembourg), which decided to make references for a preliminary ruling to the Court of Justice concerning, in particular, the interpretation of Article 47 of the Charter. The referring court thus asked whether that article precludes national legislation that excludes a person holding information (such as Company B), a taxpayer subject to a tax investigation (such as F.C.) and third parties concerned by such information (such as Companies C and D) from bringing a direct action against an information order. In addition, the referring court was uncertain as to the scope of the possibility, under Directive 2011/16, [18] for Member States to exchange information provided that it is 'foreseeably relevant' to the administration and enforcement of national tax law.

In its judgment, the Court held, in the first place, that Article 47 of the Charter, read together with Articles 7 and 8 thereof (which enshrine the right to privacy and the right to the protection of personal data, respectively), and Article 52(1) thereof (which allows the exercise of certain fundamental rights to be restricted in certain circumstances):

– precludes legislation of a Member State implementing the procedure for the exchange of information on request established by Directive 2011/16 from preventing a person who holds information from bringing an action against a decision by which the competent authority of that Member State orders that person to provide it with that information, with a view to following up on a request for exchange of information made by the competent authority of another Member State, but

18| 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 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1).

– does not preclude such legislation from preventing the taxpayer subject to the investigation giving rise to that request for information and the third parties concerned by the information in question from bringing an action against that decision.

Having ruled that the Charter was applicable in so far as the national legislation at issue in the main proceedings implemented EU law, the Court noted, first, as regards the right to an effective remedy, that the protection of natural and legal persons against arbitrary or disproportionate intervention by public authorities in their private sphere is a general principle of EU law and may be relied on by a legal person who is the addressee of a decision ordering that information be provided to the tax administration, in order to challenge that decision in court.

Nevertheless, the Court recalled that the exercise of the right to an effective remedy may be restricted, in the absence of relevant EU rules, by national legislation, where the conditions laid down in Article 52(1) of the Charter are satisfied. That provision requires, in particular, that the essence of the rights and freedoms guaranteed by the Charter be respected.

In that regard, the Court clarified that the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other things, the possibility for the holder of that right to have access to a court or tribunal with the jurisdiction to ensure respect of the rights and freedoms guaranteed by EU law and, to that end, to consider any question of law or fact relevant to the outcome of the dispute before it. Furthermore, in order to have access to such a court or tribunal, that person must not be obliged to infringe a legal rule or obligation or be liable to the relevant penalty for such an infringement. The Court found that, under the national law applicable in that instance, it is only where the addressee of the information order does not comply with that order and subsequently receives a financial penalty on that ground that that person has the possibility of challenging that order incidentally, in the context of the action brought against such a penalty. Consequently, such national legislation does not comply with Article 47 and Article 52(1) of the Charter, read together.

As regards, secondly, the right to an effective remedy of the taxpayer subject to the investigation giving rise to the information order, the Court held that such a taxpayer is, as a natural person, entitled to the right to privacy guaranteed by Article 7 of the Charter and the right to the protection of personal data guaranteed by Article 8 thereof, and that the communication of information concerning him or her to a public authority is liable to infringe those rights, in which situation it is justified for the person concerned to be granted the benefit of the right to an effective remedy.

The Court added, however, that the requirement that the essence of that right be respected does not mean that the taxpayer must have access to a direct remedy aimed primarily at challenging a particular measure, provided that there are one or more remedies available before the various competent national courts or tribunals enabling him or her to obtain, in an incidental manner, an effective judicial review of that measure without running the risk of being penalised for doing so. Accordingly, where there is no possibility of bringing a direct action against an information order, the taxpayer must have a right of appeal against the correction decision or adjustment decision adopted at the end of the investigation and, in that context, the possibility of challenging, on an incidental basis, the first of those decisions and the conditions in which the evidence gathered on the basis of that decision was obtained and used. Thus, the Court held that legislation preventing such a taxpayer from bringing a direct action against an information order does not damage the essence of the right to an effective remedy.

Furthermore, the Court noted that such legislation meets an objective of general interest that is recognised by the European Union, namely the objective of combating international tax evasion and avoidance by strengthening cooperation between the competent national authorities in that area, and that it complies with the principle of proportionality.

As regards, thirdly, the situation of the third parties concerned by the information in question, the Court held, similarly, that the exercise of the right to an effective remedy which must be available to such third parties, where there is an information order that could infringe their right to protection against arbitrary or disproportionate intervention by public authorities in their private sphere, may be limited by national legislation excluding the bringing of a direct action against such an order, provided that such third parties have, in addition, a remedy that enables them to obtain effective respect of their fundamental rights, such as an action to establish liability.

In the second place, the Court ruled that a decision by which the competent authority of a Member State orders a person holding information to provide it with that information, with a view to following up on a request for exchange of information, is to be regarded as relating to information that is 'foreseeably relevant', within the meaning of Directive 2011/16, where it states the identity of the person holding the information in question, that of the taxpayer subject to the investigation giving rise to the request for exchange of information and the period covered by that investigation, and where it relates to contracts, invoices and payments which, although not expressly identified, are defined by personal, temporal and material criteria establishing their links with the investigation and the taxpayer subject to that investigation. That combination of criteria is sufficient to consider that the information requested is not manifestly devoid of any foreseeable relevance, so that a more precise definition of that information is not necessary.

3. Freedom of the arts and sciences, right to education and freedom to conduct a business

In the judgment of 6 October 2020, ***Commission* v *Hungary (Higher education)*** (C-66/18, EU:C:2020:792), the Grand Chamber of the Court found, inter alia, that Hungary had failed to fulfil its obligations under Article 13, Article 14(3) and Article 16 of the Charter – relating, respectively, to academic freedom, the freedom to found educational establishments and the freedom to conduct a business – by adopting provisions making the possibility for higher-education institutions to exercise teaching activities leading to a qualification in the territory of Hungary subject to the existence of an international treaty between Hungary and the government of the State where the institution has its seat and also subject to the requirement that those institutions must genuinely offer higher education in that State.

The Court stated, first of all, that Hungary was bound by the Charter, as regards the contested provisions, in so far as the performance of its obligations under an international agreement forming an integral part of EU law, such as the General Agreement on Trade in Services (GATS), [19] and the restrictions imposed by those provisions on fundamental freedoms, which it claimed to be justified, are part of the implementation of EU law, within the meaning of Article 51(1) of the Charter.

Examining one after another the scope of the guarantees provided by the abovementioned provisions of the Charter, the Court made clear, in relation to the exercise of the activities of higher-education institutions, that academic freedom does not only have an individual dimension in so far as it is associated with freedom of expression and, specifically in the field of research, the freedoms of communication, of research and of dissemination of results thus obtained, but also an institutional and organisational dimension reflected in the autonomy of those institutions. The Court held that the measures at issue were capable of endangering the academic activities of the foreign higher-education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous infrastructure necessary for

19| Those aspects of the judgment are presented in Section XX 'International agreements'.

conducting their scientific research and for carrying out their educational activities; consequently, those measures were such as to limit the academic freedom protected in Article 13 of the Charter. Furthermore, the founding of those institutions is covered by Article 14(3) and Article 16 of the Charter and, for reasons similar to those just outlined, the measures at issue constituted an interference with the rights enshrined in those provisions. Since the various interferences could not be justified under Article 52(1) of the Charter, the Court held that Hungary had failed to comply with the provisions of the Charter cited above.

4. Protection of personal data

In 2020, the Court, sitting as the Grand Chamber, delivered three particularly important judgments in the area of protection of personal data. The first judgment concerns the transfer of personal data from the European Union to the United States. The other two judgments deal with the limits imposed on the retention of and access to personal data in the field of electronic communications, in the context of safeguarding national security and combating serious crime and terrorism.

In the judgment in ***Facebook Ireland and Schrems*** (C-311/18, EU:C:2020:559), delivered on 16 July 2020, the Court, sitting as the Grand Chamber, ruled on the adequate level of protection to be ensured where data is transferred to a third country and on the obligations incumbent on supervisory authorities in connection with the transfer of personal data from the European Union to the United States. The Court also examined whether the protection provided by the EU-US Privacy Shield was compatible with the requirements relating to protection of personal data and observance of fundamental rights.

The General Data Protection Regulation ('the GDPR') [20] provides that the transfer of such data to a third country may, in principle, take place only if the third country in question ensures an adequate level of data protection. According to the GDPR, the European Commission may find that a third country ensures, by reason of its domestic law or its international commitments, an adequate level of protection. [21] In the absence of an adequacy decision, such a transfer may take place only if the personal-data exporter established in the European Union has provided appropriate safeguards, which may arise, in particular, from standard data-protection clauses adopted by the Commission, and if data subjects have enforceable rights and effective legal remedies. [22] Furthermore, the GDPR details the conditions under which such a transfer may take place in the absence of an adequacy decision or appropriate safeguards. [23]

Maximillian Schrems, an Austrian national residing in Austria, began using Facebook in 2008. As in the case of other users residing in the European Union, some or all of Mr Schrems's personal data was transferred by Facebook Ireland to servers belonging to Facebook Inc., located in the United States, to undergo processing. Mr Schrems lodged a complaint with the Irish supervisory authority seeking, in essence, to prohibit those transfers. He claimed that the law and practices in the United States did not offer sufficient protection against access by the public authorities to the data transferred to that country. That complaint was rejected on the

20| 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).

21| Article 45 of the GDPR.

22| Article 46(1) and (2)(c) of the GDPR.

23| Article 49 of the GDPR.

ground, inter alia, that, in Decision 2000/520, [24] the Commission had found that the United States ensured an adequate level of protection. In a judgment delivered on 6 October 2015, the Court of Justice, before which the High Court (Ireland) had referred questions for a preliminary ruling, declared that decision invalid ('the *Schrems I* judgment'). [25]

Following the *Schrems I* judgment and the subsequent annulment by the referring court of the decision rejecting Mr Schrems's complaint, the Irish supervisory authority asked Mr Schrems to reformulate his complaint in the light of the declaration by the Court that Decision 2000/520 was invalid. In his reformulated complaint, Mr Schrems claimed that the United States did not offer sufficient protection of data transferred to that country. He sought the suspension or prohibition of future transfers of his personal data from the European Union to the United States, which Facebook Ireland then carried out pursuant to the standard data-protection clauses set out in the annex to Decision 2010/87. [26] Taking the view that the outcome of Mr Schrems's complaint depended, in particular, on the validity of Decision 2010/87, the Irish supervisory authority brought proceedings before the High Court in order for it to refer questions to the Court of Justice for a preliminary ruling. After the initiation of those proceedings, the Commission adopted Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield. [27]

By its request for a preliminary ruling, the referring court asked the Court of Justice whether the GDPR applies to transfers of personal data pursuant to the standard data-protection clauses in Decision 2010/87, what level of protection is required by the GDPR in connection with such a transfer and what obligations are incumbent on supervisory authorities in those circumstances. The High Court also raised the question of the validity both of Decision 2010/87 and of Decision 2016/1250.

The Court considered, first of all, that EU law, and in particular the GDPR, applies to the transfer of personal data for commercial purposes by an economic operator established in a Member State to another economic operator established in a third country, even if, at the time of that transfer or thereafter, that data may be processed by the authorities of the third country in question for the purposes of public security, defence and State security. The Court added that this type of data processing by the authorities of a third country cannot preclude such a transfer from the scope of the GDPR.

Regarding the level of protection required in respect of such a transfer, the Court held that the requirements laid down for such purposes by the GDPR concerning appropriate safeguards, enforceable rights and effective legal remedies must be interpreted as meaning that data subjects whose personal data are transferred to a third country pursuant to standard data-protection clauses must be afforded a level of protection essentially equivalent to that guaranteed within the European Union by the GDPR, read in the light of the Charter. In those circumstances, the Court specified that the assessment of that level of protection must take into consideration both the contractual clauses agreed between the data exporter established in the European

24| Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).

25| Judgment of the Court of 6 October 2015, ***Schrems*** (C-362/14, EU:C:2015:650).

26| Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council (OJ 2010 L 39, p. 5), as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016 (OJ 2016 L 344, p. 100).

27| Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-US Privacy Shield (OJ 2016 L 207, p. 1).

Union and the recipient of the transfer established in the third country concerned and, as regards any access by the public authorities of that third country to the data transferred, the relevant aspects of the legal system of that third country.

Regarding the supervisory authorities' obligations in connection with such a transfer, the Court held that, unless there is a valid Commission adequacy decision, those competent supervisory authorities are required to suspend or prohibit a transfer of personal data to a third country where they take the view, in the light of all the circumstances of that transfer, that the standard data-protection clauses are not or cannot be complied with in that country and that the protection of the data transferred that is required by EU law cannot be ensured by other means, where the data exporter established in the European Union has not itself suspended or put an end to such a transfer.

Next, the Court examined the validity of Decision 2010/87. The Court considered that the validity of that decision was not called into question by the mere fact that the standard data-protection clauses in that decision do not, given that they are contractual in nature, bind the authorities of the third country to which data may be transferred. However, that validity depends on whether the decision includes effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection required by EU law and that transfers of personal data pursuant to such clauses are suspended or prohibited in the event of the breach of such clauses or it being impossible to honour them. The Court found that Decision 2010/87 establishes such mechanisms. In that regard, the Court pointed out, in particular, that that decision imposes an obligation on a data exporter and the recipient of the data to verify, prior to any transfer, whether that level of protection is respected in the third country concerned and that the decision requires the recipient to inform the data exporter of any inability to comply with the standard data-protection clauses, the latter then being, in turn, obliged to suspend the transfer of data and/or to terminate the contract with the former.

Lastly, the Court examined the validity of Decision 2016/1250 in the light of the requirements arising from the GDPR, read in the light of the provisions of the Charter guaranteeing respect for private and family life, protection of personal data and the right to effective judicial protection. In that regard, the Court noted that that decision enshrines the position, as did Decision 2000/520, that the requirements of US national security, public interest and law enforcement have primacy, thus condoning interference with the fundamental rights of persons whose data are transferred to that third country. In the view of the Court, the limitations on the protection of personal data arising from the domestic law of the United States on the access and use by US public authorities of such data transferred from the European Union to that third country, which the Commission assessed in Decision 2016/1250, are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required under EU law, by the principle of proportionality, in so far as the surveillance programmes based on those provisions are not limited to what is strictly necessary. On the basis of the findings made in that decision, the Court pointed out that, in respect of certain surveillance programmes, those provisions do not indicate any limitations on the power they confer to implement those programmes, or the existence of guarantees for potentially targeted non-US persons. The Court added that, although those provisions lay down requirements with which the US authorities must comply when implementing the surveillance programmes in question, the provisions do not grant data subjects actionable rights before the courts against the US authorities.

As regards the requirement of judicial protection, the Court held that, contrary to the view taken by the Commission in Decision 2016/1250, the Ombudsperson mechanism referred to in that decision does not provide data subjects with any cause of action before a body which offers guarantees substantially equivalent to those required by EU law, such as to ensure both the independence of the Ombudsperson provided for by that mechanism and the existence of rules empowering the Ombudsperson to adopt decisions that are binding on the US intelligence services. On all those grounds, the Court declared Decision 2016/1250 invalid.

By two judgments, ***Privacy International*** (C-623/17, EU:C:2020:790) and ***La Quadrature du Net and Others*** (Joined Cases C-511/18, C-512/18 and C-520/18, EU:C:2020:791), delivered on 6 October 2020, the Grand Chamber of the Court ruled, first of all, that Directive 2002/58 [28] ('the Directive on privacy and electronic communications') is applicable to national legislation requiring providers of electronic communications services to carry out personal-data-processing operations, such as the retention of those data and their transmission to public authorities, for the purposes of safeguarding national security and combating crime. In addition, while confirming its case-law stemming from the judgment in *Tele2 Sverige and Watson and Others*, [29] concerning the disproportionate nature of general and indiscriminate retention of traffic and location data, the Court provided clarification, inter alia, as to the scope of the powers conferred on the Member States by that directive in the field of the retention of such data for the purposes mentioned above.

In recent years, the Court has ruled, in several judgments, on the retention of and access to personal data in the field of electronic communications. [30] The resulting case-law, in particular the judgment in *Tele2 Sverige and Watson and Others*, in which the Court held, inter alia, that Member States could not require providers of electronic communications services to retain traffic and location data in a general and indiscriminate way, has caused concerns on the part of certain States that they may have been deprived of an instrument which they consider necessary to safeguard national security and to combat crime.

It was against that background that proceedings were brought before the Investigatory Powers Tribunal (United Kingdom) (*Privacy International*, C-623/17), the Conseil d'État (Council of State, France) (*La Quadrature du Net and Others*, C-511/18 and C-512/18) and the Cour constitutionnelle (Constitutional Court, Belgium) (*Ordre des barreaux francophones et germanophone and Others*, C-520/18) concerning the lawfulness of legislation adopted by certain Member States in those fields, imposing in particular an obligation on providers of electronic communications services to forward users' traffic and location data to a public authority or to retain such data in a general or indiscriminate way.

First of all, the Court took care to dispel the doubts raised in the different cases as to the applicability of the Directive on privacy and electronic communications. Several Member States that submitted written observations to the Court differed in their opinions in that regard. They contended, inter alia, that the directive did not apply to the national legislation at issue, as the purpose of that legislation was to safeguard national security, which is the sole responsibility of the Member States, as attested to by, in particular, the third sentence of

28| 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).

29| Judgment of the Court of 21 December 2016, ***Tele2 Sverige and Watson and Others*** (C-203/15 and C-698/15, EU:C:2016:970; 'the judgment in *Tele2 Sverige and Watson and Others*').

30| Thus, in the judgment of 8 April 2014, ***Digital Rights Ireland and Others*** (C-293/12 and C-594/12, 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, 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, EU:C:2016:970), the Court interpreted Article 15(1) of the Directive on privacy and electronic communications, which empowers the Member States – on grounds of the protection, inter alia, of national security – to adopt 'legislative measures' intended to restrict the scope of certain rights and obligations provided for in that directive. Lastly, in the judgment of 2 October 2018, ***Ministerio Fiscal*** (C-207/16, EU:C:2018:788), the Court interpreted Article 15(1) of that directive in a case which concerned public authorities' access to data relating to the civil identity of users of electronic communications systems.

Article 4(2) TEU. The Court considered, however, that national legislation requiring providers of electronic communications services to retain traffic and location data or to forward that data to the national security and intelligence authorities for that purpose falls within the scope of that directive.

Next, the Court recalled that the Directive on privacy and electronic communications [31] does not permit the exception to the obligation of principle to ensure the confidentiality of electronic communications and the related data and to the prohibition on storage of such data to become the rule. This means that the directive does not authorise the Member States to adopt, inter alia for the purposes of national security, legislative measures intended to restrict the scope of rights and obligations provided for in that directive, in particular the obligation to ensure the confidentiality of communications and traffic data, [32] unless such measures comply with the general principles of EU law, including the principle of proportionality, and the fundamental rights guaranteed by the Charter. [33]

In that context, the Court held, first, in the *Privacy International* case, that the Directive on privacy and electronic communications, read in the light of the Charter, precludes national legislation requiring providers of electronic communications services to carry out the general and indiscriminate transmission of traffic and location data to the security and intelligence agencies for the purpose of safeguarding national security. Secondly, in the other two cases, the Court found that the directive precludes legislative measures requiring providers of electronic communications services to carry out the general and indiscriminate retention of traffic and location data as a preventive measure. Those obligations to forward and to retain such data in a general and indiscriminate way constitute particularly serious interferences with the fundamental rights guaranteed by the Charter, where there is no link between the conduct of the persons whose data are affected and the objective pursued by the legislation at issue. Similarly, the Court interpreted Article 23(1) of the GDPR, read in the light of the Charter, as precluding national legislation requiring providers of access to online public communication services and hosting service providers to retain, generally and indiscriminately, inter alia, personal data relating to those services.

By contrast, the Court held that, in situations where the Member State concerned is facing a serious threat to national security that is shown to be genuine and present or foreseeable, the Directive on privacy and electronic communications, read in the light of the Charter, does not preclude recourse to an order requiring providers of electronic communications services to retain, generally and indiscriminately, traffic and location data. In that context, the Court specified that the decision imposing such an order, for a period that is limited in time to what is strictly necessary, must be subject to effective review either by a court or by an independent administrative body whose decision is binding, in order to verify that one of those situations exists and that the conditions and safeguards laid down are observed. In those circumstances, that directive also does not preclude the automated analysis of the data, inter alia traffic and location data, of all users of electronic communications systems.

The Court added that the Directive on privacy and electronic communications, read in the light of the Charter, does not preclude legislative measures that allow recourse to the targeted retention, limited in time to what is strictly necessary, 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. Likewise, that directive does not preclude legislative measures that provide for the general and indiscriminate retention of IP addresses assigned to the source of a communication, provided that the retention period is limited to

31| Article 15(1) and (3) of Directive 2002/58.

32| Article 5(1) of Directive 2002/58.

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

what is strictly necessary, or measures that provide for such retention of data relating to the civil identity of users of electronic communications systems, the Member States not being required in the latter case to limit the retention period. Moreover, that directive does not preclude a legislative measure that allows recourse to the expedited retention of data available to service providers, where situations arise in which it becomes necessary to retain that data beyond statutory data-retention periods in order to shed light on serious criminal offences or acts adversely affecting national security, where such offences or acts have already been established or where their existence may reasonably be suspected.

In addition, the Court ruled that the Directive on privacy and electronic communications, read in the light of the Charter, does not preclude national legislation which requires providers of electronic communications services to have recourse to real-time collection, inter alia, of traffic and location data, where that collection is limited to persons in respect of whom there is a valid reason to suspect that they are involved in one way or another in terrorist activities and is subject to a prior review carried out either by a court or by an independent administrative body whose decision is binding, to ensure that such real-time collection is authorised only within the limits of what is strictly necessary. In urgent cases, the review must take place promptly.

Lastly, the Court addressed the issue of maintaining the temporal effects of national legislation held to be incompatible with EU law. In that regard, it ruled that a national court may not apply a provision of national law empowering it to limit the temporal effects of a declaration of illegality which it is bound to make in respect of national legislation imposing on providers of electronic communications services an obligation requiring the general and indiscriminate retention of traffic and location data that is incompatible with the Directive on privacy and electronic communications, read in the light of the Charter.

That being said, in order to give a useful answer to the referring court, the Court recalled that, as EU law currently stands, it is for national law alone to determine the rules relating to the admissibility and assessment, in criminal proceedings against persons suspected of having committed serious criminal offences, of evidence obtained by the retention of data in breach of EU law. However, the Court specified that the Directive on privacy and electronic communications, interpreted in the light of the principle of effectiveness, requires national criminal courts to disregard evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of such criminal proceedings, where those persons suspected of having committed criminal offences are not in a position to comment effectively on that evidence.

II. Citizenship of the Union

In the judgment in ***TÜV Rheinland LGA Products and Allianz IARD*** (C-581/18, EU:C:2020:453), delivered on 11 June 2020, the Grand Chamber of the Court held that the general prohibition of discrimination on grounds of nationality [34] is not applicable to a clause, stipulated in a contract between an insurance company and a manufacturer of medical devices, limiting the geographical extent of the insurance coverage against civil liability arising from those devices to harm that has occurred in the territory of a single Member State, since such a situation does not fall, as EU law currently stands, within the scope of application of EU law.

34| Laid down in the first paragraph of Article 18 TFEU.

In 2006, a German citizen had inserted in Germany, where she is resident, breast implants manufactured by Poly Implant Prothèses SA ('PIP'), a company established in France. As from 1997, PIP commissioned TÜV Rheinland LGA Products GmbH ('TÜV Rheinland'), in accordance with Directive 93/42 concerning medical devices, [35] to undertake an assessment of the quality system put in place for the design, manufacture and final inspection of the breast implants that PIP was producing. Following a number of inspections at the premises of PIP, TÜV Rheinland approved the quality system and renewed the CE examination certification guaranteeing the conformity of those implants with the requirements of that directive.

Furthermore, PIP took out with the company AGF IARD SA, the predecessor of Allianz IARD SA ('Allianz'), an insurance contract covering its civil liability arising from the manufacture of those implants. That contract included a clause limiting the geographical extent of the insurance coverage to harm that occurred in metropolitan France or in the French overseas territories.

In 2010, the Agence française de sécurité sanitaire des produits de santé (the French agency for the safety of healthcare products) found that the breast implants manufactured by PIP were filled with unauthorised industrial silicone. PIP was liquidated in 2011. In addition, in 2012, the Bundesinstitut für Arzneimittel und Medizinprodukte (Federal Institute for medicinal products and medical devices, Germany) advised the patients concerned to take steps, as a precaution, to remove the implants manufactured by PIP, because of the risk of their premature rupture and the inflammatory effects of the silicone used.

The patient concerned brought, before the German court with jurisdiction, an action for damages imputing joint and several liability to the doctor who had inserted the defective breast implants, to TÜV Rheinland and to Allianz. She claimed, inter alia, that she had, under French law, a direct right of action against Allianz, even though the insurance contract contained a clause limiting the insurance coverage to harm that has occurred in France, since that clause was contrary to EU law. The action at first instance having been dismissed, she brought an appeal before the Oberlandesgericht Frankfurt am Main (Higher Regional Court of Frankfurt am Main, Germany); that court was uncertain as to the compatibility of that clause with the prohibition of any discrimination on grounds of nationality, laid down in the first paragraph of Article 18 TFEU, and referred to the Court a number of questions for a preliminary ruling on that point.

The Court examined, first, whether the first paragraph of Article 18 TFEU was applicable to the case. The Court stated, in that regard, that, in accordance with settled case-law, the application of that provision is subject to two cumulative conditions being satisfied: (i) the situation that has given rise to the discrimination claimed must fall within the scope of application of EU law and (ii) there must be no specific rule laid down by the Treaties prohibiting discrimination on grounds of nationality that is applicable to that situation.

In order to determine whether the first condition was satisfied in that instance, the Court examined, in the first place, whether the situation in the main proceedings was the subject of regulation under EU law. The Court observed that there is not, in EU secondary law (including Directives 93/42 and 85/374), [36] any provision which imposes an obligation on the manufacturer of medical devices to take out civil liability insurance designed to cover risks linked to those devices, or which regulates such insurance. The Court concluded that, as EU law currently stands, insurance covering the civil liability of manufacturers of medical devices with respect to harm linked to those devices is not the subject of regulation by EU law.

35| Council Directive 93/42/EEC of 14 June 1993 concerning medical devices (OJ 1993 L 169, p. 1).

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

In the second place, the Court determined whether the situation at issue fell within the scope of a fundamental freedom laid down by the TFEU, by reason of the existence of a specific connecting factor linking that situation and such a freedom, a link which would bring that situation within the scope of application of the Treaties, within the meaning of the first paragraph of Article 18 TFEU.

As regards, first, the free movement of Union citizens, the Court observed that the patient concerned had not made use of her freedom of movement, since she sought payment of insurance compensation for harm caused by the insertion of breast implants in Germany, the Member State in which she resided, so that there was no specific connecting factor linking the situation at issue in the main proceedings and that freedom. Secondly, as regards the freedom to provide services, the Court noted that the situation at issue again had no specific connecting factor linking it to that freedom, since, in the first place, the patient concerned had received medical treatment in her Member State of residence and, in the second place, the insurance contract concerned had been concluded between two companies established in one and the same Member State, in that instance France. Lastly, as regards the free movement of goods, the Court observed that the dispute in the main proceedings related not to the cross-border movement of goods in itself, since the cross-border movement of the breast implants concerned was not affected by any discriminatory obstacle, but to the harm caused by the goods so moved. Consequently, the situation at issue again had no specific connecting factor linking it to free movement of goods.

The Court accordingly concluded that that situation did not fall within the scope of application of EU law, within the meaning of the first paragraph of Article 18 TFEU, and consequently that provision must be held not to apply to that case.

By its judgment in ***Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)*** (C-398/19, EU:C:2020:1032), delivered on 17 December 2020, the Court, sitting as the Grand Chamber, ruled on a case concerning the extradition of an EU citizen to a third State.

BY, a national of both Ukraine and Romania, was born in Ukraine and lived in that State until he moved to Germany in 2012. In 2014, he applied for and obtained Romanian nationality as a descendant of Romanian nationals, but never resided in Romania.

In March 2016, the German authorities received from the General Prosecutor's Office of Ukraine a request for the extradition of BY, for the purpose of conducting a criminal prosecution. In November 2016, the Generalstaatsanwaltschaft Berlin (General Prosecutor's Office in Berlin, Germany) informed the Romanian Ministry of Justice of the extradition request and asked whether the Romanian authorities envisaged that they would themselves conduct a criminal prosecution of BY. The Romanian Ministry of Justice replied, first, that the Romanian authorities could make a decision to conduct a criminal prosecution only if requested to do so by the Ukrainian judicial authorities and, secondly, that the issue of a national arrest warrant, as a prerequisite for the issue of a European arrest warrant, was subject to there being sufficient evidence of the guilt of person concerned. That ministry therefore asked the German authorities to provide it with the evidence that had been sent to them by the Ukrainian authorities.

German law prohibits the extradition of German nationals, but not the extradition of nationals of other Member States. Accordingly, the Kammergericht Berlin (Higher Regional Court, Berlin, Germany) considered that the extradition of BY to Ukraine was lawful, but it was uncertain whether that extradition was compatible with the principles set out by the Court in the *Petruhhin* judgment, [37] given that the Romanian judicial authorities had not formally made a decision on the possible issue of a European arrest warrant. In the abovementioned

37| Judgment of the Court of 6 September 2016, ***Petruhhin*** (C-182/15, EU:C:2016:630; 'the *Petruhhin* judgment'; particularly paragraphs 48 and 50).

judgment, the Court held, in particular, that, when a Member State to which a national of another Member State has moved has received an extradition request from a third State, it is obliged to inform the Member State of which the person whose extradition is requested is a national in order to give the authorities of the latter Member State the opportunity to issue a European arrest warrant for the surrender of that person for criminal prosecution.

The German court was uncertain as to the consequences of that judgment for the outcome of the case before it, and submitted to the Court of Justice three questions for a preliminary ruling, concerning the interpretation of Articles 18 and 21 TFEU (relating to, respectively, the principle of non-discrimination on grounds of nationality and the right of Union citizens to move and reside freely within the territory of the Member States) and of the *Petruhhin* judgment.

The Court examined, first, whether Articles 18 and 21 TFEU were applicable to the situation of a Union citizen such as the person concerned in the main proceedings. In that regard, the Court stated that, in accordance with its case-law, a national of one Member State, who thereby has Union citizenship and who is residing in the territory of another Member State, is entitled to rely on Article 21(1) TFEU and falls within the scope of the Treaties, within the meaning of Article 18 TFEU. The fact that BY was already residing in a Member State when he acquired the nationality of another Member State had no effect in that respect.

Secondly, the Court clarified the obligations incumbent on the Member States in the exchanging of information referred to in the *Petruhhin* judgment. In that regard, the Court stated that the Member State from which extradition is requested ('the requested Member State') must put the competent authorities of the Member State of which the person whose extradition is requested is a national in a position to request the surrender of that person by means of a European arrest warrant. In order to do so, the requested Member State must inform those authorities not only of the existence of an extradition request, but also of all the elements of fact and law communicated by the third State requesting extradition in the context of that extradition request. It must also give notice of any change in the situation of the person whose extradition is requested that might be relevant to the possibility of the issue of a European arrest warrant in respect of that person. However, neither of those Member States is obliged, under EU law, to ask the third State that is requesting extradition to send the criminal investigation file, in order to permit the Member State of which the person concerned is a national to assess the possibility that it might itself conduct a criminal prosecution of that person.

The Court stated that, provided that that obligation to inform has been respected, the authorities of the requested Member State may continue the extradition procedure and, if appropriate, carry out the extradition of the person concerned where no European arrest warrant has been issued, within a reasonable time, by the authorities of the Member State of which that person is a national. A reasonable time limit must be imposed, by the requested Member State, on those authorities, that time limit being set to take account of all the circumstances of the case, in particular whether the person concerned is in custody on the basis of the extradition procedure and the complexity of the case.

Thirdly, the Court held that Articles 18 and 21 TFEU cannot be interpreted as meaning that the requested Member State is obliged to refuse the extradition of a Union citizen who is a national of another Member State, and itself to conduct a criminal prosecution of that person for offences committed in a third State, where, as in the main proceedings, the national law of the requested Member State empowers that State to prosecute that Union citizen for certain offences committed in a third State.

In such a situation, if there were an obligation on the requested Member State to refuse extradition and itself to conduct a criminal prosecution, the consequence would be that that Member State would be deprived of the opportunity to decide itself on the appropriateness of conducting a prosecution of that citizen on the basis of national law, and that obligation would go beyond the limits that EU law may impose on the exercise

of the discretion enjoyed by that Member State with respect to whether or not prosecution is appropriate in criminal matters. The question of EU law that arises, in a case such as that in the main proceedings, is solely whether the requested Member State is able to adopt a course of action, with respect to that Union citizen, which would be less prejudicial to the exercise of that citizen's right to free movement and residence by considering that he or she should be surrendered to the Member State of which he or she is a national rather than extradited to the third State that is requesting extradition.

III. Institutional provisions

Four judgments are worthy of note under this heading, relating to the privileges and immunities of the European Union and access to documents. [38]

1. Privileges and immunities of the European Union: inviolability of the archives of the European Central Bank (ECB)

By its judgment in ***Commission* v *Slovenia (Archives of the ECB)*** (C-316/19, EU:C:2020:1030), delivered on 17 December 2020, the Grand Chamber of the Court was required to clarify the conditions relating to the protection of the archives of the European Union in connection with the unilateral seizure of documents by the authorities of a Member State and, in particular, the conditions under which a finding of infringement of the principle of the inviolability of the archives of the ECB may be made.

On 6 July 2016, the Slovenian authorities searched the premises of the Banka Slovenije (Central Bank of Slovenia) and seized paper and electronic documents there. The documents seized by those authorities included all communications sent through the email account of the Governor at that time, all the electronic documents on his workspace computer and on his laptop concerning the period between 2012 and 2014, irrespective of their content, and documents relating to that period that were in the Governor's office. Those interventions took place in connection with an investigation against certain members of staff of the Central Bank of Slovenia, including that governor, on suspicion of abuse of power and of official functions in connection with the restructuring, in 2013, of a Slovenian bank. Although the Central Bank of Slovenia argued that those measures infringed the principle of the inviolability of the 'archives of the European Central Bank (ECB)' resulting from the Protocol on the privileges and immunities of the European Union [39] and requiring that any access by the national authorities to those archives be subject to the express agreement of the ECB, the Slovenian authorities continued with that search and seizure of documents without involving the ECB.

38| Reference should also be made under this heading to two other judgments concerning the powers of the EU institutions: judgment of 26 March 2020, ***Review Simpson* v *Council and HG* v *Commission*** (Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), which deals, among other things, with the interpretation of the principles of judicial independence and of the lawful judge in the context of an irregularity in the procedure for appointment of a judge to the Civil Service Tribunal, presented in Section XXII.1 'Procedure for appointing judges to the Civil Service Tribunal', and judgment of 16 July 2020, ***ADR Center* v *Commission*** (C-584/17 P, EU:C:2020:576), concerning inter alia the Commission's power to adopt enforceable decisions within contractual relationships, presented in Section V.3 'Actions for annulment'.

39| Protocol (No 7) on the privileges and immunities of the European Union (OJ 2016 C 202, p. 266).

In that context, the ECB explained to the Slovenian authorities that its archives included not only the documents which it had drawn up itself in the performance of its tasks, but also the communications between it and national central banks which were necessary for the performance of the tasks of the European System of Central Banks (ESCB) or of the Eurosystem and the documents drawn up by those central banks for the performance of the tasks of the ESCB or of the Eurosystem. The ECB also maintained that, subject to certain conditions, it would not refuse to waive the protection enjoyed by the documents seized by the Slovenian authorities.

Considering, first, that the unilateral seizure of the documents at issue constituted an infringement of the principle of the inviolability of the archives of the ECB [40] and, secondly, that the Slovenian authorities, contrary to what is required by the obligation of sincere cooperation, [41] had not engaged in constructive discussion to eliminate the unlawful consequences of the infringement of that principle, the European Commission brought an action for failure to fulfil obligations against the Republic of Slovenia before the Court.

In its judgment, the Court upheld the Commission's action and declared that the infringements alleged took place in their entirety.

- The concept of 'archives of the ECB'

The Court pointed out that, since the ECB is an EU institution, the principle of the inviolability of the archives of the Union applies to its archives. In that regard, the Court stated that the archives of the Union cover the archives of an EU institution such as the ECB even if they are stored in places other than the buildings and premises of the European Union. [42]

The Court observed that the ECB and the national central banks of the Member States constitute the ESCB and that the monetary policy of the Union is conducted by the ECB and the national central banks of the Member States whose currency is the euro (including the Central Bank of Slovenia), those banks constituting the Eurosystem. [43] The governors of those banks, including the Governor of the Central Bank of Slovenia, are members of the Governing Council of the ECB [44] and participate in the adoption of the decisions necessary to perform the tasks of the ESCB. The primary objective of the ESCB is to maintain price stability. To that end, the basic tasks to be carried out through the ESCB include, inter alia, that of defining and implementing the monetary policy of the Union, [45] which requires close cooperation between the ECB and the national central banks. [46] In this system, the national central banks and their governors have a hybrid status inasmuch as, although they constitute national authorities, they are authorities acting under the ESCB, which is constituted by those national central banks and the ECB.

40| Article 343 TFEU; Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ 2016 C 202, p. 230), Article 39; Protocol on privileges and immunities, Articles 2 and 22.

41| Article 4(3) TEU; Protocol on privileges and immunities, Article 18.

42| Protocol on privileges and immunities, Articles 1 and 2.

43| Article 282(1) TFEU; Protocol on the ESCB and the ECB, Articles 1 and 14.3.

44| Article 283(1) TFEU; Protocol on the ESCB and the ECB, Article 10.1.

45| Article 127(2) TFEU.

46| Protocol on the ESCB and the ECB, Article 9.2.

The Court pointed out that the correct functioning of the ESCB and of the Eurosystem and the proper performance of their tasks require close cooperation and permanent exchange between the ECB and the national central banks which participate in those systems, which necessarily means that documents linked to the performance of the tasks of the ESCB and of the Eurosystem are in the possession not only of the ECB but also of the national central banks.

In those circumstances, the Court took the view that such documents are covered by the concept of 'archives of the ECB' even if they are held by the national central banks and not by the ECB itself.

- Infringement of the principle of the inviolability of the archives of the ECB

The Court noted that, in that case, an infringement of the principle of the inviolability of the archives of the ECB may only be found if, first, a seizure decided upon unilaterally by the national authorities of documents belonging to the archives of the Union may constitute such an infringement and, secondly, the documents seized in fact included documents which must be considered to form part of the archives of the ECB.

In the first place, the Court found that the concept of 'inviolability' means protection against any unilateral interference on the part of the Member States. That is confirmed by the fact that that concept is described as protection against any search, requisition, confiscation or expropriation measures. Therefore, the Court held that the unilateral seizure by the national authorities of documents belonging to the archives of the Union constitutes an infringement of the principle of the inviolability of those archives of the Union.

In the second place, the Court recalled that it is for the Commission, in an action for failure to fulfil obligations, to prove the existence of the alleged infringement. It must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose. In that case, the Commission has acknowledged that it did not have specific information as to the nature of the documents at issue seized by the Slovenian authorities, such that it was not in a position to determine whether a subset of those documents had to be regarded as forming part of the archives of the Union.

However, having regard to the considerable number of documents at issue seized and to the duties that the governor of a national central bank, such as the Central Bank of Slovenia, is called upon to carry out within the framework of the Governing Council of the ECB, and therefore within the framework of the ESCB and the Eurosystem, the Court considered it to be established that the documents seized by the Slovenian authorities must have included documents which were part of the archives of the ECB. It also held that, by seizing such documents unilaterally, the Slovenian authorities infringed the principle of the inviolability of the archives of the ECB.

In that context, the Court noted that the Protocol on privileges and immunities and the principle of the inviolability of the archives of the Union preclude, in principle, the seizure of documents by the authority of a Member State where those documents are part of those archives and the institutions have not agreed to such a seizure. Nevertheless, that authority has the option of requesting the EU institution concerned to waive the protection enjoyed by the documents concerned, subject to conditions if necessary, and, in the event that access is refused, of applying to the EU judicature for a decision of authorisation forcing that institution to give access to its archives. Furthermore, the protection of the archives of the Union does not preclude in any way the seizure by the national authorities at the premises of a Member State's central bank of documents which do not belong to the archives of the Union.

- Failure to comply with the obligation of sincere cooperation

After recalling its settled case-law relating to the scope of the obligation of sincere cooperation, the Court observed that by failing to allow the ECB, by the end of the period fixed in the reasoned opinion, to identify, among the documents seized on 6 July 2016, those linked to the performance of the tasks of the ESCB and of the Eurosystem and by failing to have returned those documents to the Central Bank of Slovenia, the Slovenian authorities had failed to fulfil their obligation of sincere cooperation with the ECB. That conclusion is not affected by the fact that the Prosecutor-General requested the ECB to propose criteria to him which could identify those of the documents seized by the Slovenian authorities which, according to the ECB, were part of its archives. Even after receiving that proposal, the Slovenian authorities did not take measures to enable the ECB to identify the documents linked to the performance of the tasks of the ESCB and of the Eurosystem which had been seized. Furthermore, those authorities did not accede to the ECB's request to return to the Central Bank of Slovenia all the documents which they considered to be of no relevance for the purposes of the investigation at issue.

In that context, the Court considered that the fact that the Slovenian authorities took measures to ensure that the confidentiality of those documents was maintained does not cast doubt on the finding that, in that case, those authorities failed to fulfil their obligation of sincere cooperation with the ECB.

Accordingly, as regards the period after the contested seizure, the Court held that the Slovenian authorities failed to fulfil their obligation of sincere cooperation with the ECB.

2. Access to documents

In 2020, the Court had the opportunity to deliver a number of important judgments on access to documents, three of which merit special attention. The first judgment concerns a refusal to grant access to documents of the European Central Bank. The other two deal with access to the file of a marketing authorisation application for a medicinal product.

By its judgment in ***De Masi and Varoufakis*** **v** ***ECB*** (C-342/19 P, EU:C:2020:1035), delivered on 17 December 2020, the Court ruled on a case in which the ECB, by decision of 16 October 2017, had refused to grant the appellants, Fabio de Masi and Yanis Varoufakis, access to the document entitled 'Responses to the questions concerning the interpretation of Article 14.4 of the Protocol on the Statute of the European Central Banks System and of the European Central Bank'. That document included the response from an external adviser to a legal consultation requested by the ECB concerning the powers of the Governing Council under said Article 14.4. The ECB refused to grant access to that document on the basis of (i) the exception relating to the protection of legal advice, provided for in the second indent of Article 4(2) of Decision 2004/258, [47] and (ii) the exception relating to the protection of documents intended for internal use, provided for in the first subparagraph of Article 4(3) of that decision.

47| Decision 2004/258/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3) (OJ 2004 L 80, p. 42), as amended by Decision 2011/342/EU of the European Central Bank of 9 May 2011 (ECB/2011/6) (OJ 2011 L 158, p. 37) and Decision (EU) 2015/529 of the European Central Bank of 21 January 2015 (ECB/2015/1) (OJ 2015 L 84, p. 64).

The action brought by the appellants before the General Court against that decision of the ECB was dismissed as unfounded. [48] The General Court held that the ECB was fully entitled to base its refusal to grant access to the document at issue on the exception concerning the protection of documents for internal use, provided for in the first subparagraph of Article 4(3) of Decision 2004/258.

On hearing the appeal brought by the appellants against the judgment of the General Court, the Court of Justice upheld the General Court's analysis and dismissed the appeal.

First of all, the Court of Justice found that, in that case, the General Court had not failed to fulfil its obligation to state reasons. In that regard, it noted that, while the second subparagraph of Article 4(3) of Regulation No 1049/2001 [49] requires it to be established that disclosure of the document would seriously undermine the institution's decision-making process, that is not a requirement in connection with the exception provided for in the first subparagraph of Article 4(3) of Decision 2004/258. It concluded from this that the General Court was under no obligation to assess whether the ECB had provided explanations as to how granting access to the document at issue could lead to its decision-making process being seriously undermined. It noted that refusal to grant access to a document on the basis of that provision of Decision 2004/258 requires only that it be established, first, that that document is, inter alia, for internal use as part of deliberations and preliminary consultations within the ECB and, secondly, that there is no overriding public interest in disclosure of that document.

Next, the Court of Justice took the view that the General Court had not misconstrued the scope of the second indent of Article 4(2) and the first subparagraph of Article 4(3) of Decision 2004/258. In the first place, the wording of the second indent of Article 4(2) of that decision contains no indications which might confer on it the character of *lex specialis* in relation to the first subparagraph of Article 4(3) of that decision. In the second place, nothing in the wording of Article 4 of Decision 2004/258 precludes the same part of a document from being covered by more than one of the exceptions referred to therein. In the third place, it is irrelevant, for the purpose of applying the exception referred to in the first subparagraph of Article 4(3) of Decision 2004/258, that the document at issue may also be classified as 'legal advice' within the meaning of the second indent of Article 4(2) of that decision, since the legislature of the European Union did not make the possibility of relying on the exception set out in the first subparagraph of Article 4(3) of Decision 2004/258 conditional on the document at issue not being 'legal advice', within the meaning of the second indent of Article 4(2) of that decision.

Lastly, the Court of Justice confirmed the interpretation adopted by the General Court of the first subparagraph of Article 4(3) of Decision 2004/258, stating that that provision cannot be read as reserving the protection contained in it only to documents linked to a specific decision-making process. That provision requires only that a document be used as part of deliberations and preliminary consultations within the ECB and has the effect of covering, in a broad manner, documents linked to the ECB's internal processes. In addition, the Court of Justice noted that the scope of that provision is different from that of Article 4(3) of Regulation No 1049/2001. First, the purpose of the protection is not the same and, secondly, while that provision of Regulation No 1049/2001 makes refusal to grant access to a document conditional upon that document relating to a matter where the decision has not been taken by the institution, the first subparagraph of Article 4(3) of Decision 2004/258 does not contain such a precision and specifically provides that access to the document is to be refused even after the decision has been taken.

48| Judgment of the General Court of 12 March 2019, ***De Masi and Varoufakis* v *ECB*** (T-798/17, EU:T:2019:154).

49| 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).

In the judgments in ***PTC Therapeutics International* v *EMA*** (C-175/18 P, EU:C:2020:23) and ***MSD Animal Health Innovation and Intervet International* v *EMA*** (C-178/18 P, EU:C:2020:24), delivered on 22 January 2020, the Court was required to examine, for the first time, the question of access to European Union documents submitted in the context of marketing authorisation (MA) applications. In that instance, it dismissed the appeals brought by, on the one hand, PTC Therapeutics International and, on the other, MSD Animal Health Innovation and Intervet International against the judgments of the General Court [50] dismissing their actions for annulment of the decisions [51] by which the European Medicines Agency (EMA) had granted access to documents containing information submitted in the context of the procedure relating to MA applications for medicinal products.

Both cases concern the legality of the EMA's decisions to grant, under Regulation No 1049/2001, [52] access to a number of documents, namely toxicology reports and a clinical study report ('the reports at issue'), submitted by the appellants in the context of their MA applications relating to two medicinal products, one for human use (Case C-175/18 P) and the other for veterinary use (Case C-178/18 P). In that case, after authorising the placing on the market of those medicinal products, the EMA decided to disclose the content of those reports to third parties, subject to some redactions. Unlike the appellants, who claimed that those reports should benefit from a presumption of confidentiality in their entirety, the EMA contended that, apart from the information that had already been redacted, those reports were not confidential.

Thus, the Court examined, as a first step, the application of a general presumption of confidentiality by an EU institution, body, office or agency which had received an application for access to documents. It found that the application of such a presumption, which allows the institution, body, office or agency concerned to decide that the disclosure of documents would, in principle, undermine the interest protected by one or more exceptions laid down in Article 4 of Regulation No 1049/2001, is merely an option. That institution, body, office or agency thus always retains the possibility of carrying out a specific and individual examination of the documents in question to determine whether they are protected, in whole or in part, by one or more of the exceptions laid down in Article 4 of Regulation No 1049/2001. Consequently, the Court rejected the appellants' plea that the reports at issue were covered by a general presumption of confidentiality, noting that the EMA was free to carry out a specific and individual examination of those reports, which had led it to redact certain passages.

As a second step, the Court addressed the question whether the EMA's decision to grant access to the reports at issue had undermined the appellants' commercial interests, an exception laid down in the first indent of Article 4(2) of Regulation No 1049/2001. Thus, the Court stated, first of all, that a person seeking application of one of the exceptions laid down in Article 4 of Regulation No 1049/2001 by an institution, body, office or agency to which that regulation applies must provide, as must the institution, body, office or agency concerned where it intends to refuse access to documents, explanations as to how access to those documents could specifically and actually undermine the interest protected by one of those exceptions. Next, it held that the existence of a risk of misuse of the data contained in a document to which access is sought must be established. Therefore, a mere unsubstantiated claim relating to a general risk of misuse cannot lead to those data being regarded as falling within the exception relating to the protection of commercial interests, where the person seeking the application of that exception has not adduced, prior to the institution, body, office or agency in

50| Judgments of the General Court of 5 February 2018, ***PTC Therapeutics International* v *EMA*** (T-718/15, EU:T:2018:66) and ***MSD Animal Health Innovation and Intervet international* v *EMA*** (T-729/15, EU:T:2018:67).

51| Decisions of the European Medicines Agency (EMA) of 25 November 2015, EMA/722323/2015 and EMA/785809/2015.

52| 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).

question taking a decision in that respect, additional details, concerning the nature, purpose and scope of the data, that are capable of enabling the Courts of the European Union to understand how disclosure of those data would be likely concretely and reasonably foreseeably to undermine the commercial interests of the persons concerned thereby. Finally, the Court of Justice concluded, upholding the reasoning of the General Court, that the passages in the reports at issue which had been disclosed did not constitute information capable of falling within the exception relating to the protection of commercial interests. As regards the appellant in Case C-175/18 P, the Court found that (i) it had not provided the EMA, before adoption of the decision, with explanations concerning the nature, purpose and scope of the data at issue which supported the conclusion that there was a risk of misuse of the data contained in the reports at issue and (ii) it had not specifically and precisely identified before the EMA which passages of the reports at issue could undermine its commercial interests if disclosed. As regards the appellants in Case C-178/18 P, the Court of Justice noted that they had not provided such explanations before the General Court or specifically and precisely identified the passages in the reports at issue which could undermine their commercial interests in the event of disclosure.

As a third step, the Court of Justice pointed out that the General Court was entitled to rely on implicit reasoning when addressing arguments, raised by a party, that were not sufficiently clear and precise. In that regard, it stated that it was for the appellants to submit to the EMA, during the administrative procedure before that agency, explanations concerning the nature, purpose and scope of the data whose disclosure would undermine their commercial interests and that, in the absence of such explanations, the General Court was fully entitled to conclude, implicitly but necessarily, that the witness statements submitted by the appellants after the EMA adopted the decisions were not relevant for the purposes of assessing the legality of those decisions. The Court noted that the legality of such a decision relating to the disclosure of a document may be assessed only on the basis of the information available to the EMA on the date on which it adopted that decision.

As a fourth and final step, the Court analysed the exception to the right of access to documents relating to the protection of the decision-making process, provided for in the first subparagraph of Article 4(3) of Regulation No 1049/2001. [53] The appellants criticised the General Court for disregarding the fact that disclosure of the reports at issue during the data-exclusivity period would seriously undermine the decision-making process relating to potential MA applications for generic medicinal products during that period. The Court of Justice rejected that argument and held that those applications related to decision-making processes that were separate from the decision-making process concerning the MA for the medicinal products concerned, which, as the General Court had found, was closed on the date of the request for access to the reports at issue.

IV. Budget and subsidies of the European Union

In the judgment in ***Czech Republic* v *Commission*** (C-575/18 P, EU:C:2020:530), delivered on 9 July 2020, the Grand Chamber of the Court ruled on the conditions of the Member States' access to effective judicial protection in the event of a dispute over the extent of their financial liability having regard to EU law governing the Union's own resources.

53| Under that provision, disclosure to third parties of documents forming part of a decision-making process still pending at the date on which the decision on the request for access is adopted must be refused.

On 30 May 2008, the European Anti-Fraud Office (OLAF) adopted a report on an investigation to check imports of pocket flint lighters from Laos. According to that report, which concerned, in particular, 28 cases of imported goods in the Czech Republic, the Member States were required to institute audits of the importers concerned and to take administrative duty-recovery proceedings. The Czech authorities took steps to carry out tax adjustments and recovery but stated that, in some of those cases, it had not been possible to recover the amount representing the Union's own resources. By letter of 20 January 2015, the European Commission informed those authorities that the Czech Republic could not be released from its obligation to make the Union's own resources available, in accordance with Regulation No 1150/2000, [54] and requested them to pay the amount at issue, advising that any delay would give rise to the payment of interest.

The Czech Republic took issue with the position expressed by the Commission in that letter and brought an action before the General Court for annulment of the Commission's decision allegedly contained in the letter. By an order, [55] the General Court upheld the plea of inadmissibility put forward by the Commission and consequently dismissed the action. It ruled that the action was directed against a measure which could not be the subject of an action for annulment in so far as it did not produce binding legal effects. The Czech Republic brought an appeal before the Court of Justice, claiming, in essence, that the inadmissibility of its action for annulment had deprived it of judicial protection since it did not have a legal remedy that would enable it to obtain an effective judicial review of the Commission's position.

First of all, the Court held that, as EU law currently stands, the obligations to collect, establish and place on account the Union's own resources are imposed directly on the Member States. Thus, the Commission does not have any decision-making power enabling it to require the Member States to establish and to make available to it amounts representing those resources. The Court concluded from this that making available an action for annulment against a letter, such as the letter at issue, for the purpose of reviewing the validity of the obligation of a Member State to make such amounts available to the Commission would be effectively to disregard the system of the Union's own resources, as laid down by EU law. It is not for the Court to change the choice made in that respect by the EU legislature.

Next, the Court ruled that, as EU law currently stands, the Commission's ability to submit to review by the Court, in infringement proceedings, a dispute between the Commission and a Member State regarding the latter's obligation to make available to the Commission a certain amount of the Union's own resources is inherent in the system of those resources. The Court added that, where a Member State makes an amount of those resources available subject to reservations as to the Member State's obligation to do so, it is for the Commission, in accordance with the principle of sincere cooperation, to engage in constructive dialogue with the Member State. Should that dialogue fail, the Commission has the possibility of initiating infringement proceedings against that Member State. The making available of the Union's own resources subject to reservations would justify a finding of a failure to fulfil obligations if the Member State concerned is indeed required to make those resources available.

However, in view of the Commission's discretion as to whether to initiate infringement proceedings, the Court concluded that the remedy of such proceedings does not offer the Member State concerned any guarantee of having its dispute with that institution concerning the making available of the Union's own resources resolved by the Court. The Court nevertheless added that when a Member State has made available to the

54| Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ 2000 L 130, p. 1), as amended by Council Regulation (EC, Euratom) No 2028/2004 of 16 November 2004 (OJ 2004 L 352, p. 1) and by Council Regulation (EC, Euratom) No 105/2009 of 26 January 2009 (OJ 2009 L 36, p. 1). See, in particular, Article 17(2) of that regulation.

55| Order of the General Court of 28 June 2018, ***Czech Republic* v *Commission*** (T-147/15, not published, EU:T:2018:395).

Commission an amount of the Union's own resources while expressing reservations as to the validity of the Commission's arguments, and dialogue has not brought the dispute between that institution and the Member State to an end, the Member State can seek damages on account of the Union's unjust enrichment and, if necessary, bring an action before the General Court to that end.

In that regard, the Court recalled that actions for unjust enrichment of the European Union brought under Article 268 TFEU and the second paragraph of Article 340 TFEU require proof of enrichment on the part of the defendant for which there is no valid legal basis and proof of impoverishment on the part of the applicant which is linked to that enrichment. Thus, when examining such an action, the General Court would have to assess, in particular, whether the impoverishment of the applicant Member State, corresponding to the amount of the Union's own resources which have been made available to the Commission and which that Member State has disputed, and the corresponding enrichment of the Commission, are justified by the Member State's obligations under EU law governing the Union's own resources or, on the contrary, whether no such justification exists. Accordingly, having found that a Member State is not deprived of any effective judicial protection in the event of disagreement with the Commission as to the Member State's obligations in relation to the Union's own resources, the Court dismissed the appeal in its entirety.

In the judgment in ***Úrad ššpeciálnej prokuratúry*** (C-603/19, EU:C:2020:774), delivered on 1 October 2020, the Court ruled on a case in which the Úrad špeciálnej prokuratúry Generálnej prokuratúry Slovenskej republiky (Office of the Special Prosecutor in the Department of the Public Prosecutor of the Slovak Republic) had brought criminal proceedings against two natural persons ('the accused') for acts liable to constitute subsidy fraud funded in part from the budget of the European Union. The criminal offence was alleged to have been committed in the context of two calls for tenders issued by the Slovak public authorities for the submission of applications for subsidies to support, in particular, job creation for persons with disabilities.

The accused had set up a number of commercial companies in which they were partners and managers. Those companies obtained subsidies totalling EUR 654 588.34, including EUR 279 272.18 from the budget of the European Union. Following the payment of those subsidies, the accused transferred their shares in the companies concerned to a third party, then those companies ceased trading. When criminal proceedings were brought, the company assets were no longer on the premises of those companies, which were removed from the register of companies. During the period in which the subsidies were paid, persons with disabilities were employed by the companies concerned, but their work was fictitious and did not contribute to the objectives set out in the applications for subsidies.

Criminal proceedings were brought before the referring court, namely the Špecializovaný trestný súd (Special Criminal Court, Slovakia), against the accused in their capacity as partners and managers of those companies. The úrady práce, sociálnych vecí a rodiny (the district offices for labour, social affairs and family), as civil parties claiming injury, sought damages from the accused during the investigation, in the amount of the subsidy actually paid.

However, the referring court took the view that, in the light of the case-law of the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic), which had already been applied in criminal proceedings concerning offences affecting the financial interests of the European Union and subsidy fraud, national provisions did not allow the State, in criminal proceedings, to bring an action for compensation for damage caused to it. According to the referring court, the application of that case-law in the main proceedings could have the effect of preventing the State from bringing an action for compensation for damage caused by fraud. Recourse to administrative proceedings also provided for in Slovak law enables repayment of a wrongly paid subsidy to be demanded only from the beneficiary of that subsidy. As regards, in that case, commercial companies which no longer hold any assets and which have been removed from the register of companies, such administrative proceedings cannot therefore enable the recovery of the wrongly paid subsidies.

It was against that background that the referring court submitted several questions to the Court of Justice for a preliminary ruling concerning, in particular, Article 325 TFEU, paragraph 1 of which provides that, in order to counter illegal activities affecting the financial interests of the Union, Member States must take effective deterrent measures which are equivalent to those taken at national level to counter fraud affecting the interests of the Member State concerned. In particular, the referring court asked whether national rules of criminal procedure which do not confer on the State, in a case such as that in the main proceedings, the right to compensation in criminal proceedings are compatible with the obligations under Article 325 TFEU.

In its judgment, the Court ruled that Article 325 TFEU does not preclude provisions of national law, as interpreted in national case-law, under which, in criminal proceedings, the State may not claim compensation for damage caused to it by fraudulent conduct on the part of the accused person resulting in the misappropriation of funds from the budget of the European Union, and under which the State does not have, in those proceedings, any other type of action available to it by which it may assert its right as against the accused person, provided that the national legislation provides for effective proceedings for the recovery of assistance wrongly received from the budget of the European Union, which is a matter for the referring court to verify.

In that regard, the Court noted that, although Member States are required to take effective measures to enable the recovery of sums wrongly paid to the beneficiary of a subsidy funded in part from the budget of the European Union, Article 325 TFEU does not, however, impose on those Member States any constraint, other than that relating to the effectiveness of the measures, as regards the procedure which must enable such an outcome to be achieved. The coexistence of different legal remedies with different objectives specific to administrative law, civil law or criminal law, cannot, therefore, in itself, undermine the effectiveness of the fight against fraud affecting the financial interests of the European Union, provided that the national legislation, as a whole, enables the recovery of wrongly paid assistance from the budget of the European Union.

The Court pointed out in that regard that although criminal penalties may be essential to enable Member States to combat certain cases of serious fraud in an effective and dissuasive manner, such penalties are not intended to permit the recovery of sums paid but not due. The existence, in the national legal order, of an effective remedy for acts affecting the financial interests of the European Union, whether in the context of criminal, administrative or civil proceedings, is sufficient to satisfy the obligation of effectiveness laid down by Article 325 TFEU, provided that that remedy allows the recovery of wrongly received assistance and provided that criminal penalties make it possible to combat cases of serious fraud. The Court noted that that is the position in that case, provided that, according to the applicable national law, the State has the option – which it is for the referring court to verify – of bringing, first, administrative proceedings enabling it to obtain the recovery of the assistance wrongly paid to the legal person and, secondly, civil proceedings not only to establish the civil liability of the legal person which received the wrongly paid assistance, but also to obtain, following a criminal conviction, compensation from the convicted natural person for the damage suffered.

Lastly, reference should also be made to the judgments in ***Inclusion Alliance for Europe* v *Commission*** (C-378/16 P, EU:C:2020:575) and ***ADR Center* v *Commission*** (C-584/17 P, EU:C:2020:576), of 16 July 2020, concerning the recovery of financial contributions paid by the Commission under various grant agreements concluded by it. [56]

56| Those judgments are presented in Section V.3 'Actions for annulment'.

V. Proceedings of the European Union

Nine judgments deserve to be mentioned under this heading. The first deals with the procedural rules governing legal representation before the EU Courts. The second concerns a finding of failure to fulfil obligations in connection with the transposition of a directive. Four other judgments delivered on appeal involve annulment proceedings. Lastly, mention should also be made under this heading of three judgments delivered in preliminary-ruling proceedings, in so far as the Court was required to rule, first, on the admissibility of references for a preliminary ruling having regard to the definition of 'court or tribunal', within the meaning of Article 267 TFEU, and to the requirement for there to be a connecting factor between the dispute and the provision of EU law for which an interpretation is sought and, secondly, on its jurisdiction in the light of a provision of German law referring to EU law. [57]

1. Legal representation before the EU Courts

In the judgment in ***Uniwersytet Wrocławski and Poland* v *REA*** (Joined Cases C-515/17 P and C-561/17 P, EU:C:2020:73), delivered on 4 February 2020, the Court of Justice, sitting as the Grand Chamber, set aside the order of the General Court [58] which had dismissed as manifestly inadmissible the action brought by the University of Wrocław against the decisions of the Research Executive Agency (REA), on the ground that the legal adviser representing that university did not satisfy the condition of independence required by the Statute of the Court of Justice of the European Union ('the Statute'). [59]

In connection with a research programme, the REA concluded a grant agreement with the University of Wrocław. However, it became apparent that the university was not observing the terms of that agreement, with the result that the REA terminated the agreement and sent three debit notes to that university, which the latter paid.

The University of Wrocław then brought an action before the General Court seeking, inter alia, annulment of the decisions of the REA terminating the grant agreement and requiring it to repay a part of the subsidies. As the legal adviser representing the university was connected to that university by a contract for the provision of lecturing services, the General Court dismissed that action as manifestly inadmissible.

Hearing the appeals brought by the University of Wrocław (Case C-515/17 P) and the Republic of Poland (Case C-561/17 P), the Court of Justice recalled that Article 19 of the Statute contains two separate, but cumulative, conditions as regards the representation, in direct actions brought before the Courts of the European Union, of a party not covered by the first two paragraphs of that article. The first condition [60] lays down the requirement for such a party to be represented by a 'lawyer' before the Courts of the European

57| The following decisions should also be mentioned under this heading: judgment of 26 March 2020, ***Review Simpson* v *Council and HG* v *Commission*** (Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), delivered in review proceedings, presented in Section XXII.1 'Procedure for appointing judges to the Civil Service Tribunal', and order in ***Commission* v *Poland*** (C-791/19 R, EU:C:2020:277), made on 8 April 2020 in interim proceedings brought in connection with the judicial reforms implemented in Poland, presented under Section I.2 'Right to an effective remedy and right to a fair trial'.

58| Order of the General Court of 13 June 2017, ***Uniwersytet Wrocławski* v *REA*** (T-137/16, not published, EU:T:2017:407).

59| Article 19 of the Statute.

60| Set out in the third paragraph of Article 19 of the Statute.

Union. The second condition [61] provides that the lawyer representing that party must be authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area.

Noting that the second condition was satisfied by the University of Wrocław's legal adviser, the Court examined whether the first condition was satisfied in the case at hand.

It began by recalling that, there being no reference to the national law of the Member States, it was necessary to give an autonomous and uniform interpretation of the concept of 'lawyer' contained in Article 19 of the Statute, taking into account not only the wording of that provision, but also its context and purpose. In that regard, it emphasised that, according to the wording of that article, a 'party' not covered by the first two paragraphs thereof is not authorised to act on its own behalf before a Court of the European Union, but must use the services of a third party, more specifically a lawyer, unlike the parties referred to in those first two paragraphs, who may be represented by an agent. The Court specified that the objective of the task of representation by a lawyer referred to in Article 19 of the Statute is, above all, to protect and defend the principal's interests to the greatest possible extent, acting in full independence and in line with the law and professional rules and codes of conduct. It recalled that the concept of the independence of lawyers, in the specific context of that provision of the Statute, is determined not only negatively, that is to say, by the absence of an employment relationship, but also positively, by reference to professional ethical obligations. In that context, the lawyer's duty of independence is to be understood not as the lack of any connection whatsoever between the lawyer and his or her client, but the lack of connections which have a manifestly detrimental effect on his or her capacity to carry out the task of defending his or her client while acting in that client's interests to the greatest possible extent.

The Court recalled, in that regard, that a lawyer who has been granted extensive administrative and financial powers which place his or her function at a high executive level within the legal person he or she is representing, such that his or her status as an independent third party is compromised, is not sufficiently independent from that legal person; nor is a lawyer who holds a high-level management position within the legal person he or she is representing, or a lawyer who holds shares in, and is the president of the board of administration of the company he or she is representing.

However, the situation in which the legal adviser not only was not defending the interests of the University of Wrocław in the context of a hierarchical relationship with that university, but also was simply connected to the university by a contract for the provision of lecturing services at that university, cannot be regarded as equivalent to those situations. According to the Court, such a connection is not sufficient for a finding that that legal adviser was in a situation that had a manifestly detrimental effect on his capacity to defend his client's interests to the greatest possible extent, in full independence.

Consequently, the Court of Justice ruled that, by holding that the mere existence of a civil law contract for the provision of lecturing services between the University of Wrocław and the legal adviser representing that university was liable to have an effect on the independence of that adviser because there was a risk that the professional opinion of that adviser would be, at least partly, influenced by his working environment, the General Court had erred in law. Accordingly, the Court of Justice set aside the order under appeal and referred the case back to the General Court.

61| Set out in the fourth paragraph of Article 19 of the Statute.

2. Actions for failure to fulfil obligations

In the judgments in ***Commission* v *Romania (Fight against money laundering)*** (C-549/18, EU:C:2020:563) and ***Commission* v *Ireland (Fight against money laundering)*** (C-550/18, EU:C:2020:564), delivered on 16 July 2020, the Grand Chamber of the Court upheld the actions for failure to fulfil obligations brought by the European Commission against those two Member States. It held, in the first place, that, on the expiry of the period set for them in the reasoned opinion, Romania and Ireland had neither adopted the national measures transposing Directive 2015/849 [62] nor notified such measures to the Commission and that, consequently, they had failed to fulfil their obligations under that directive. In the second place, it found that Article 260(3) TFEU, concerning the obligation on Member States to notify measures transposing a directive, was applicable in those cases. [63]

Directive 2015/849 aims to prevent the use of the EU's financial system for the purposes of money laundering and terrorist financing. Member States were required to transpose that directive into their national law by 26 June 2017 and notify the Commission of the measures adopted for that purpose.

On 27 August 2018, the Commission brought two actions before the Court for failure to fulfil obligations, submitting that Romania, on the one hand, and Ireland, on the other, had, within the period set for them in the respective reasoned opinions, neither transposed Directive 2015/849 in full nor notified the corresponding national transposition provisions. In addition, on the basis of Article 260(3) TFEU, [64] the Commission sought an order that Romania and Ireland should, first, pay a daily penalty payment, as from the date of delivery of the judgment, for failure to fulfil the obligation to notify the measures transposing that directive and, secondly, a lump sum. Subsequently, the Commission informed the Court that it was withdrawing part of its actions inasmuch as it no longer sought the imposition of a daily penalty payment, since that claim had become devoid of purpose as a result of Directive 2015/849 having been transposed in full into Romanian law and Irish law.

Romania and Ireland disputed the application of the system of penalties provided for in Article 260(3) TFEU. Both Member States also maintained that the Commission's application for a lump sum to be imposed was not only unjustified, but also disproportionate in the light of the facts of the case and the objective of that type of financial penalty. They complained that the Commission had failed to provide a detailed statement of reasons, on a case-by-case basis, for its decision to request the imposition of such a penalty in those cases.

The Court recalled that the obligation to notify measures transposing a directive, within the meaning of Article 260(3) TFEU, refers to the obligation of the Member States to provide sufficiently clear and precise information on the measures transposing a directive. Compliance with that obligation required, in those cases, the Member States to state, for each provision of the directive concerned, the national provision or provisions ensuring its transposition. Noting that the Commission had established that Romania and Ireland had failed to notify the measures transposing Directive 2015/849 within the period prescribed in the reasoned opinion, the Court held, first, that the failure to fulfil obligations thus declared fell within the scope of Article 260(3) TFEU.

62| 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).

63| The Court applied that provision of the TFEU for the first time in the judgment of 8 July 2019, ***Commission* v *Belgium (Article 260-(3) TFEU – High-speed networks)*** (C-543/17, EU:C:2019:573).

64| Article 260(3) TFEU enables the Court to impose a financial penalty on the Member State concerned (lump sum or daily penalty payment) in the event of failure to fulfil the 'obligation to notify measures transposing [an EU] directive' to the Commission.

Secondly, the Court pointed out that the Commission is not required to state reasons on a case-by-case basis for its decision to seek the imposition of a financial penalty under Article 260(3) TFEU. The conditions for applying Article 260(3) TFEU cannot be more restrictive than those governing the implementation of Article 258 TFEU, since Article 260(3) TFEU is only an ancillary mechanism of the infringement proceedings, the commencement of which falls within the Commission's discretion, which is not for review by the Court. That absence of a statement of reasons does not affect the procedural guarantees of the Member State in question, since when it imposes such a penalty, the Court is obliged to state reasons.

Nonetheless, the Court clarified that the Commission is still required to state reasons for the nature and the amount of the financial penalty sought, taking into account in that regard the guidelines which it has adopted, since, in the context of proceedings brought under Article 260(3) TFEU, the Court has only a limited power to assess. Where the Court finds that there is an infringement, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty which it may set.

Thirdly, as regards the imposition of a lump sum in the cases at issue, the Court pointed out that the objective pursued by the introduction of the system set out in Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify a national measure transposing a directive adopted through a legislative procedure. The Court therefore held that an application of the Commission which, as in those cases, sought the imposition of a lump sum cannot be dismissed as disproportionate solely because it concerns a failure to fulfil obligations which, having persisted over time, came to an end at the time of the Court's examination of the facts, since the imposition of a lump-sum payment is based on the assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period.

Fourthly, as regards the calculation of the lump sum which it is appropriate to impose in those cases, the Court pointed out that, in exercising its discretion in the matter, as delimited by the Commission's proposals, it is for the Court to fix the amount of the lump sum which may be imposed on a Member State pursuant to Article 260(3) TFEU, in an amount appropriate to the circumstances and proportionate to the failure to fulfil obligations. Relevant considerations in that respect include factors such as the seriousness of the failure to fulfil obligations, the length of time for which the failure has persisted and the relevant Member State's ability to pay.

As regards, first of all, the seriousness of the infringement, the Court found that although Romania and Ireland had, in the course of the proceedings, put an end to the failure to fulfil obligations complained of, the fact remains that that failure to fulfil obligations existed on the expiry of the period prescribed in the respective reasoned opinions, with the result that the effectiveness of EU law was not ensured at all times.

Concerning, next, the assessment of the duration of the infringement, the Court recalled that that duration must, as a rule, be assessed by reference to the date on which the Court assesses the facts, that is, the date of conclusion of the proceedings. As for the beginning of the period which must be taken into account in order to set the amount of the lump sum to be imposed pursuant to Article 260(3) TFEU, the relevant date for evaluating the duration of the infringement is not the date of expiry of the period prescribed in the reasoned opinion (used for determining the daily penalty payment to be imposed), but the date of expiry of the transposition period laid down in the directive in question. That provision aims to encourage Member States to transpose directives within the deadlines set by the EU legislature and to ensure the full effectiveness of EU legislation. Any other approach would indeed be tantamount to calling into question the effectiveness of the provisions of directives setting the date on which the measures transposing those directives must enter into force and to granting an additional transposition period, whose duration would moreover vary

according to the speed with which the Commission initiated the pre-litigation procedure, without its nonetheless being possible to take into account the duration of that period when evaluating the duration of the failure to fulfil the obligations at issue. Consequently, the Court concluded that the failure to fulfil obligations by Romania and Ireland had persisted for somewhat more than two years.

As regards, lastly, the ability to pay of the Member State concerned, the Court pointed out that it is necessary to take account of recent trends in that Member State's gross domestic product (GDP) at the time of the Court's examination of the facts.

Consequently, having regard to all the circumstances of the cases at issue and in the light of the Court's discretion under Article 260(3) TFEU, the Court ordered Romania and Ireland to pay the Commission a lump sum of EUR 3 000 000 and EUR 2 000 000, respectively.

3. Actions for annulment

In relation to actions for annulment, three judgments deserve to be mentioned. In the first judgment, the Court defined the scope of the EU Courts' review of the legality of decisions adopted by the European Union Satellite Centre having the effect of terminating the contract of one of its staff members. The second judgment concerns the jurisdiction of the EU Courts to review the legality of a Commission decision to recover sums unduly paid under several grant agreements. The third judgment relates to the Commission's power to adopt an enforceable decision within contractual relationships and to the circumstances in which the legality of such a decision may be reviewed in an action for annulment. [65]

In the judgment in ***SatCen* v *KF*** (C-14/19 P, EU:C:2020:492), delivered on 25 June 2020, the Court of Justice confirmed on appeal the judgment of the General Court [66] which had, first, annulled two decisions of the Director of the European Union Satellite Centre (SatCen), [67] concerning the suspension and removal, respectively, of KF, a member of the contract staff, and the decision of SatCen's Appeals Board in the same dispute ('the contested decisions'), and, secondly, ordered SatCen to pay KF the sum of EUR 10 000 by way of compensation for the non-material damage she had suffered.

KF had been recruited by SatCen on 1 August 2009 as Head of the Administration Division. When shortcomings as regards human relations within that division were identified, and following a complaint about the behaviour and conduct of KF, an administrative investigation was launched concerning her. Following that investigation, the Deputy Director of SatCen concluded that KF's alleged behaviour was confirmed and constituted psychological harassment. As a result, the Director of SatCen decided to initiate disciplinary proceedings against KF and to suspend her from her duties. On the conclusion of those proceedings, the Director of

65| Reference should also be made to the judgment in ***Czech Republic* v *Commission*** (C-575/18 P, EU:C:2020:530), delivered on 9 July 2020, concerning the interpretation of the concept of 'actionable measure' for the purposes of Article 263 TFEU. That judgment is presented in Section IV 'Budget and subsidies of the European Union'.

66| Judgment of the General Court of 25 October, ***KF* v *SatCen*** (T-286/15, EU:T:2018:718).

67| On 27 June 1991, the Council of Ministers of the Western European Union (WEU) took a decision to set up a satellite-data operating centre. On 10 November 2000, the Council of the European Union decided to create, in the form of an agency of the European Union, a satellite centre incorporating the relevant features of the centre set up within the WEU. That centre was established by Council Joint Action 2001/555/CFSP of 20 July 2001 on the establishment of a European Union Satellite Centre (OJ 2001 L 200, p. 5). Subsequently, the Council adopted Decision 2014/401/CFSP of 26 June 2014 on SatCen and repealing Joint Action 2001/555/CFSP on the establishment of a European Union Satellite Centre (OJ 2014 L 188, p. 73), which henceforth constitutes the legal framework applicable to SatCen.

SatCen removed KF from her post for disciplinary reasons. The administrative complaint KF made to the Director of SatCen against that decision was rejected, as was the appeal she brought before SatCen's Appeals Board, whose decisions, which are binding on both parties, may not be appealed against. [68]

KF brought an action before the General Court seeking annulment of the contested decisions, inter alia, and an order for SatCen to pay to her her unpaid salary, plus EUR 500 000 in respect of the non-material harm she had suffered. In support of her action, she put forward pleas in law alleging, in particular, breach of the principle of sound administration, the principle of impartiality and the principle of respect for the rights of the defence. In addition, she raised, on the basis of Article 277 TFEU, a plea of illegality against Article 28(6) of the SatCen Staff Regulations, on the ground that that provision makes the Appeals Board the only body with jurisdiction to review the legality of the decisions of the Director of SatCen, thus exempting those decisions from any judicial review. The General Court having upheld the plea of illegality and upheld in part the action, SatCen brought an appeal against that judgment. It raised four grounds in support of that appeal, alleging, respectively, that the General Court did not have jurisdiction to hear the action at first instance, that that action was inadmissible, distortion of facts, and failure to have due regard for the principle of sound administration and the principle of respect for the rights of the defence.

Examining, in the first place, the grounds alleging that the General Court did not have jurisdiction to hear the action at first instance and that that action was inadmissible, the Court of Justice ruled, first, that the fifth paragraph of Article 263 TFEU does not allow an EU institution to introduce specific conditions and arrangements that shield disputes involving the interpretation or application of EU law from the jurisdiction of both the courts of the Member States and the EU Courts. Yet that is the effect of the provision granting the Appeals Board exclusive jurisdiction to interpret and apply, without the possibility of appeal, the SatCen Staff Regulations, which are contained in a decision adopted by the Council and therefore constitute provisions of EU law. Accordingly, granting the Appeals Board that exclusive jurisdiction is contrary to the Court's case-law [69] according to which Article 19 TEU entrusts the responsibility for ensuring the full application of EU law to national courts and tribunals and to the Court.

Secondly, the Court ruled that the contested decisions satisfied the conditions necessary to be considered acts open to review for the purposes of Article 263 TFEU. They definitively determine the position of SatCen and are intended to have binding legal effects capable of affecting the interests of KF, to whom they are addressed and who they adversely affect, by bringing about a distinct change in her legal position. Furthermore, the Court stated that the employment relationship between KF and SatCen, to which Article 270 TFEU did not apply, did not provide grounds for concluding that the dispute was not between SatCen and a 'third party' within the meaning of the first paragraph of Article 263 TFEU. That employment relationship did not therefore exclude that dispute from the scope of that provision.

Thirdly, the Court noted that the preservation of the coherence of the judicial system requires, in principle, that the EU judicature relinquish the jurisdiction conferred on it by Article 263 TFEU where the applicant's legal situation is covered by the contractual relationships subject to the jurisdiction conferred by Articles 272 or 274 TFEU. However, in a context where the decisions adopted by SatCen are exempt from any form of judicial review, under Articles 272 or 274 TFEU, by the national courts and by the EU Courts, declining

68| In accordance with Article 28(6) of Council Decision 2009/747/CFSP of 14 September 2009 concerning the Staff Regulations of the European Union Satellite Centre (OJ 2009 L 276, p. 1) ('the SatCen Staff Regulations'). The composition, operation and specific procedures of that body are given in Annex X to Decision 2009/747.

69| Opinion 1/17 of 30 April 2019, ***EU-Canada Agreement*** (EU:C:2019:341, point 111), and judgment of the Court 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, paragraph 167).

jurisdiction on the part of the EU Courts is not justified by the objective of preserving the coherence of the judicial system. In those circumstances, in order to ensure effective judicial review, it is for the EU Courts to exercise the jurisdiction conferred on them by Article 263 TFEU.

Fourthly, the Court stated that, although the initial link between SatCen and the Western European Union, which is an international inter-governmental organisation, had meant, in the past, that the situation of SatCen staff could not be treated in the same way as that of servants of the European Union, this is no longer the case since the entry into force of the Treaty of Lisbon on 1 December 2009, since disputes between SatCen and its staff members are, as of that date, comparable to disputes between EU servants and their employer. Similarly, the exception to the jurisdiction of the EU Courts in connection with Treaty provisions relating to the common foreign and security policy (CFSP) [70] does not exclude the jurisdiction of the EU Courts to review acts of staff management, such as the contested decisions.

In the second place, examining the ground based on failure to have due regard for the principle of sound administration and the principle of respect for the rights of the defence, the Court stated that it is clear both from the principle of sound administration, which includes the right to be heard, and from the SatCen Staff Regulations [71] that the Deputy Director of SatCen, before reaching conclusions following the internal investigation, and, in any event, the Director of SatCen, before initiating disciplinary proceedings against KF, were required to respect her right to be heard. They should, to that end, have communicated to KF the facts concerning her and granted her a reasonable period of time to prepare her observations. That information should have been disclosed, at the very least, by means of a summary of the statements used, prepared in compliance with any legitimate expectations as regards confidentiality of the witnesses consulted.

In its judgment in ***Inclusion Alliance for Europe* v *Commission*** (C-378/16 P, EU:C:2020:575), delivered on 16 July 2020, the Court of Justice set aside the order of the General Court, [72] by which the latter had dismissed the action brought by the Romanian company, Inclusion Alliance for Europe GEIE ('IAE'), for annulment of a decision of the Commission [73] concerning the recovery of part of the financial contribution paid to IAE under three grant agreements concluded with it.

In 2007 and 2008, the Commission concluded with IAE, a company operating in the health and social-inclusion sector, three grant agreements in the context of projects concerning, inter alia, research, technological development and demonstration activities and competitiveness and innovation. Under those contracts, IAE received from the Commission funding for the implementation of the projects in question. Having determined, based on the results of an audit which identified problems in the financial management of those projects, that IAE had not complied with the contractual conditions, the Commission launched a procedure for the recovery of the sums unduly paid. Since IAE did not repay those amounts, the Commission adopted, on 17 July 2013, an enforceable decision within the meaning of Article 299 TFEU. After the General Court dismissed the action brought against that decision, IAE lodged an appeal with the Court of Justice. IAE argued that the General Court, in particular, had incorrectly classified its action by holding that that action was wrongly based on Article 263 TFEU and that it should have been brought on the basis of Article 272 TFEU, since the pleas raised by IAE alleged failure to perform contractual obligations or infringement of the law applicable to the contracts at issue.

70| The last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

71| Article 1(1) and Article 2 of Annex IX to the SatCen Staff Regulations.

72| Order of the General Court of 21 April 2016, ***Inclusion Alliance for Europe* v *Commission*** (T-539/13, not published, EU:T:2016:235).

73| Commission Decision C(2013) 4693 final of 17 July 2013.

The Court, first of all, pointed out the limits of the jurisdiction of the EU judicature over an action for annulment under Article 263 TFEU. It stated that the EU judicature does not have jurisdiction over such an action where the applicant's legal position falls entirely within contractual relationships. Were the EU judicature to hold that it had jurisdiction over such an action, it would, on the one hand, risk rendering Article 272 TFEU – under which jurisdiction may be conferred on the Courts of the European Union by means of an arbitration clause – meaningless and, on the other hand, where the contract does not contain such a clause, risk extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party. Consequently, the Court pointed out that, where there is a contract between an individual and one of the EU institutions, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested measure aims to produce binding legal effects falling outside the contractual relationship between the parties and which involve the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority. It also stated that the Commission cannot adopt an enforceable decision in the context of contractual relationships that do not contain an arbitration clause in favour of the EU judicature and therefore fall within the jurisdiction of national courts or tribunals.

Next, the Court of Justice recalled the case-law of the General Court, according to which an applicant can rely on failure to perform contractual obligations or infringement of the national provisions applicable to the contract concerned only in the context of an action brought on the basis of Article 272 TFEU, without it being possible for that applicant to raise such a plea in the context of an action based on Article 263 TFEU. Consequently, the EU judicature, adjudicating on an action for annulment brought against an enforceable decision adopted under a power that is distinct from the contractual relationship between the parties, will declare inadmissible any plea alleging failure to perform the contractual obligations or infringement of national provisions, unless it is possible to reclassify such a plea. However, according to the Court of Justice, that case-law of the General Court would not ensure that all the questions of fact and law that are relevant to the dispute are examined, such as to afford the applicant effective judicial protection under Article 47 of the Charter. Accordingly, to ensure that protection, it is for the EU judicature, adjudicating on an action for annulment in the context of a dispute concerning an enforceable decision, to hear and determine both the pleas calling into question that decision on the ground that the EU institution exercised its prerogatives of a public authority and those calling into question the contractual obligations that led to the adoption of that decision.

The Court also pointed out that if the parties decide, in their contract, to confer on the EU judicature, by means of an arbitration clause, jurisdiction over disputes relating to that contract, that judicature will have jurisdiction, independently of the applicable law stipulated in the contract, to examine infringements of the Charter or of general principles of EU law.

Consequently, the Court of Justice found that the General Court had erred in law in ruling that, in the context of an action brought on the basis of Article 263 TFEU, the EU judicature must assess the legality of the contested measure solely in the light of EU law and that a failure to perform the clauses of the contract concerned or an infringement of the law applicable to that contract may be relied on only in the context of an action brought on the basis of Article 272 TFEU. The Court of Justice therefore set aside the order of the General Court and referred the case back to the latter.

By its judgment in ***ADR Center* v *Commission*** (C-584/17 P, EU:C:2020:576), delivered on 16 July 2020, the Court of Justice dismissed the appeal brought by the Italian company ADR Center SpA ('ADR') against the judgment of the General Court [74] by which that court had dismissed its action seeking, first, annulment of a Commission

74| Judgment of the General Court of 20 July 2017, ***ADR Center* v *Commission*** (T-644/14, EU:T:2017:533).

decision [75] relating to the recovery of part of the financial contribution paid to ADR pursuant to three grant agreements and, secondly, to obtain an order requiring that institution to pay to it the balance outstanding under those agreements and damages.

In that case, ADR is a company that provides services in the field of amicable settlement of disputes. In 2008, the Commission concluded three grant agreements under the 'Civil Justice' programme with consortia, coordinated by ADR, containing arbitration clauses in favour of the EU judicature. Following audits carried out by the Commission, the Commission launched the procedure for recovering amounts unduly paid. Since ADR did not repay those amounts, the Commission adopted, on 27 June 2014, an enforceable decision within the meaning of Article 299 TFEU. After the General Court had dismissed the action brought against that decision, ADR lodged an appeal with the Court of Justice. ADR criticised the General Court, inter alia, for having erred in law in interpreting, first, the principle governing EU financial aid and, secondly, the first paragraph of Article 299 TFEU, Article 47 of the Charter and Article 79 of Regulation No 966/2012 ('the Financial Regulation'). [76]

In that context, the Court examined, first of all, the Commission's power to adopt an enforceable decision in contractual relations. In that regard, after pointing out that the first paragraph of Article 299 TFEU is applicable to all acts establishing a pecuniary obligation on the part of the institutions of the Union, the Court stated that that provision does not, of itself, constitute a sufficient legal basis for the adoption of enforceable measures. Furthermore, it found that Article 79(2) of the Financial Regulation confers on the Commission the power formally to establish an amount as being receivable from persons other than Member States in a decision constituting an enforceable decision and that that provision is intended to apply to all operations within the budget of the European Union. Consequently, the Court of Justice upheld the General Court's conclusion that neither Article 299 TFEU nor Article 79(2) of the Financial Regulation draws a distinction according to whether the claim, formally established by an enforceable decision, is of contractual or non-contractual origin. It therefore held that those provisions conferred jurisdiction on the Commission to adopt an enforceable decision, despite the contractual nature of the pecuniary obligation at issue.

The Court then pointed out that, where there is a contract between the applicant and an EU institution, an action may be brought before the EU judicature on the basis of Article 263 TFEU only where the contested act aims to produce binding legal effects falling outside the contractual relationship between the parties and entailing the exercise of the prerogatives of a public authority conferred on the contracting institution acting in its capacity as an administrative authority. Confirming the reasoning of the General Court, the Court of Justice found that a decision to recover money which is enforceable within the meaning of Article 299 TFEU involves, on the part of the Commission, the exercise of such prerogatives and that the binding effects of such a decision result not from the grant agreements concluded by that institution but from the provisions of Article 299 TFEU, read in conjunction with Article 79(2) of the Financial Regulation. Moreover, the Court noted that, where the Commission uses those prerogatives of public authority to adopt acts the legal effects of which lie outside the contractual framework, such as an enforceable decision, those acts fall within the jurisdiction of the Court of Justice of the European Union and may be challenged by way of an action for annulment based on Article 263 TFEU. However, the Court specified that the Commission's power to adopt decisions giving effect to contractual relations must be limited to contracts which contain an arbitration clause in favour of the EU judicature, in order to avoid restricting the jurisdiction of the national courts and so as not to allow the Commission to circumvent the division of powers between those courts and the EU judicature.

75| Commission Decision C(2014) 4485 final of 27 June 2014.

76| 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).

Finally, as in the judgment of the same date in ***Inclusion Alliance for Europe* v *Commission***, the Court of Justice ruled on the compatibility with the principle of effective judicial protection, enshrined in Article 47 of the Charter, of the case-law of the General Court according to which the Court of Justice of the European Union, when hearing an action for annulment brought against an enforceable decision, adopted pursuant to a jurisdiction proper and distinct from the contractual relationship between the parties, should assess only pleas challenging the legality of such an act and declare inadmissible any plea alleging non-performance of the terms of the contract concerned or infringement of the provisions of the national law applicable to that contract. The Court pointed out that even if the Court of Justice of the European Union were to reclassify the action for annulment brought before it as an action brought both under Article 263 TFEU and under Article 272 TFEU, in order to be able to examine a plea relating to that contract, such reclassification could not ensure effective judicial protection. Accordingly, the Court of Justice concluded that the General Court had erred in law by holding that, in the context of an action brought under Article 263 TFEU, the EU judicature must assess the legality of the contested act solely from the point of view of EU law, whereas, in the context of an action brought under Article 272 TFEU, the applicant can validly rely only on an infringement of the terms of the contract concerned or an infringement of the law applicable to that contract. However, it stated that, since the General Court had carried out a complete analysis of all the questions of fact and law relevant to the decision in the dispute, that error did not affect the operative part of the judgment under appeal. For that reason, the Court of Justice dismissed as inoperative ADR's argument based on infringement of the principle of effective judicial protection.

4. References for a preliminary ruling

In the judgment in ***Banco de Santander*** (C-274/14, EU:C:2020:17), delivered on 21 January 2020, the Court, sitting as the Grand Chamber, ruled inadmissible a request for a preliminary ruling made by the Tribunal Económico-Administrativo Central (Central Tax Tribunal, Spain) ('the referring body'), on the ground that that body did not satisfy the criterion of the independence required in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU.

The request for a preliminary ruling submitted to the Court by the referring body concerned, in essence, the interpretation and validity of successive decisions adopted by the Commission [77] on State aid with respect to the Spanish scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions. The request was referred to the Court in the context of proceedings between Banco de Santander and the Inspección Financiera (Tax Inspectorate, Spain) concerning the deduction of goodwill resulting from the acquisition by that bank of all the shares in a holding company governed by German law. According to the relevant national legislation, the referring body is required to hear and determine complaints made against decisions taken by certain central tax authorities, including the authority involved in that case, and also, as an appeal body, certain decisions taken by the other Tribunales Económico-Administrativos (Tax Tribunals), whose territorial competence is limited. A special chamber of the referring body hears and determines extraordinary appeals for the unification of precedent; any such appeals may only be brought by the Director-General of Taxation of the Ministry of the Economy and Finance.

77| Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48); Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1); and Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain – Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2015 L 56, p. 38).

The Court considered that it was necessary, as a preliminary point, to examine, in the light of the latest developments in its case-law, [78] whether the referring body fell within the category of 'court or tribunal' for the purposes of Article 267 TFEU.

The Court recalled at the outset that that description implies, in particular, that the referring body satisfies the criterion of independence. The independence of national courts and tribunals responsible for applying EU law is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU, and that mechanism can be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.

As regards, in the first place, the external aspect of the concept of 'independence', the Court stated that it requires that the body concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions, which means, in particular, determining dismissals of members by means of express legislative provisions offering safeguards that meet the requirements of the principle of irremovability which is essential to judicial independence. However, the Court found that the members of the referring body may be removed by Royal Decree adopted by the Council of Ministers, on the proposal of the Minister for the Economy and Finance, and that those arrangements for removal are not governed by specific rules, so that those members do not enjoy any guarantees other than those provided for by the general rules of administrative law.

As regards, in the second place, the internal aspect of the concept of 'independence', the Court recalled that it is linked to the concept of 'impartiality', which requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. On that basis, the concept of 'independence' implies that the body in question acts as a 'third party' in relation to the authority which adopted the contested decision. However, the characteristics of the extraordinary appeal which may be brought before a special chamber of the referring body against decisions of that body do not permit the inference that that body acts as a 'third party' with respect to the interests before it. The Court noted, in particular, that such an appeal may be brought only by the Director-General of Taxation of the Ministry of the Economy and Finance, who will be part of the panel that is to hear that appeal, along with the Director-General or the Director of the department of the tax administration to which the body that issued the act referred to in the decision that is the object of that appeal belongs.

The Court added that the fact that the referring body does not constitute a 'court or tribunal' for the purposes of Article 267 TFEU does not relieve it of the obligation to ensure that EU law is applied when adopting its decisions, disapplying, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect. Moreover, the existence of judicial appeals against decisions of the referring body ensures the effectiveness of the preliminary-ruling mechanism, since the national courts and tribunals have the option of making or, where appropriate, are required to make a request for a preliminary ruling to the Court where a decision on the interpretation or the validity of EU law is necessary in order for them to give judgment.

In the judgment in ***Miasto Łowicz and Prokurator Generalny*** (Joined Cases C-558/18 and C-563/18, EU:C:2020:234), delivered on 26 March 2020, the Court, sitting as the Grand Chamber, declared the requests for a preliminary ruling made by the Sąd Okręgowy w Łodzi (Regional Court, Łódź, Poland) and the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) to be inadmissible. By those two requests, the referring courts in essence

78| In its assessment, the Court referred in particular to the judgments of 16 February 2017, ***Margarit Panicello*** (C-503/15, EU:C:2017:126); of 27 February 2018, ***Associação Sindical dos Juízes Portugueses*** (C-64/16, EU:C:2018:117); and of 24 June 2019, ***Commission* v *Poland (Independence of the Supreme Court)*** (C-619/18, EU:C:2019:531).

asked the Court of Justice whether the new Polish legislation relating to the disciplinary regime for judges was compatible with the right of individuals to effective judicial protection, guaranteed in the second subparagraph of Article 19(1) TEU.

The first case (C-558/18) originated from a dispute between the town of Łowicz in Poland and the State Treasury concerning a request for payment of public funding. The referring court stated that it was likely that the decision which it was going to take in that case would be unfavourable to the State Treasury. The second case (C-563/18) concerned criminal proceedings brought against three persons for offences committed in 2002 and 2003 and the referring court had to consider granting them an exceptional reduction in their sentences given that they had collaborated with the criminal authorities by admitting the charges against them. Both requests for a preliminary ruling expressed fears that such decisions would lead to disciplinary proceedings being brought against the single judge presiding in each of the cases. The national courts referred to the recent legislative reforms that had taken place in Poland, which, in their view, call into question the objectivity and impartiality of disciplinary proceedings relating to judges and have an impact on the independence of the Polish courts. Highlighting in particular the considerable influence which the Minister for Justice has in disciplinary proceedings relating to the judges of the ordinary courts, the referring courts pointed to the lack of adequate safeguards accompanying that influence. For those courts, the disciplinary procedures thus conceived confer on the legislative and executive branches a means of ousting judges whose decisions do not suit them, thereby influencing the court judgments which they must deliver.

After confirming that it had jurisdiction to interpret the second subparagraph of Article 19(1) TEU, the Court ruled on the admissibility of both requests for a preliminary ruling. In that regard, it first of all observed that, under Article 267 TFEU, the preliminary ruling sought must be 'necessary' to enable the referring court 'to give judgment'. It also pointed out that, under that provision as interpreted by the case-law of the Court, a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. Highlighting the specific nature of its role in references for a preliminary ruling, that is to say, helping the referring court to resolve the specific dispute pending before that court, the Court of Justice then stated that there must be a connecting factor between that dispute and the provision of EU law for which an interpretation is sought. That connecting factor must be such that that interpretation is objectively required for the decision to be taken by the referring court.

In that case, the Court found, first, that the disputes in the main proceedings were not connected with Union law, in particular with the second subparagraph of Article 19(1) TEU to which the questions referred for a preliminary ruling relate. It therefore held that the referring courts were not called upon to apply that law in order to rule on the substance of those disputes. Secondly, noting that it had indeed already held to be admissible questions concerning the interpretation of procedural provisions of EU law which the referring court concerned was required to apply in order to deliver its judgment, [79] the Court stated that that was not the scope of the questions referred in the two cases. Thirdly, the Court stated that an answer to those questions did not appear capable of providing the referring courts with an interpretation of EU law which would allow them to resolve procedural questions of national law before being able to rule, as appropriate, on the substance of the disputes in the main proceedings. [80] Accordingly, the Court held that it was not apparent from the orders for reference that there was a connecting factor between the provision of EU law to which the questions referred for a preliminary ruling related and the disputes in the main proceedings, which made it necessary to have the interpretation sought so that the referring courts could, by applying

79| Judgment of the Court of 17 February 2011, ***Weryński*** (C-283/09, EU:C:2011:85).

80| Judgment of the Court of 19 November, ***A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*** (Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982).

the guidance provided by such an interpretation, deliver their respective judgments. It therefore found that the questions referred were general in nature, so that the requests for a preliminary ruling had to be declared inadmissible.

Finally, the Court observed that provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot be permitted. [81] Indeed, such a prospect of disciplinary proceedings is likely to undermine the effective exercise by the national judges concerned of the discretion to refer questions to the Court and of the functions of the court responsible for the application of EU law entrusted to them by the Treaties. In that regard, the Court made it clear that not being exposed to such disciplinary proceedings or measures for that reason also constitutes a guarantee essential to their independence.

The judgment in ***J & S Service*** (C-620/19, EU:C:2020:1011), delivered on 10 December 2020, concerned a case in which D.-H. T., as insolvency administrator of J & S Service, a company governed by German law, had requested that company's tax data from the tax office so that it could examine whether it would be appropriate to bring insolvency-avoidance claims in the context of insolvency proceedings. The tax office refused that request and D.-H. T. brought an action before the Verwaltungsgericht (Administrative Court, Germany) having jurisdiction, which essentially upheld the action. The Oberverwaltungsgericht (Higher Administrative Court, Germany) having jurisdiction dismissed the appeal brought by the *Land* Nordrhein-Westfalen (*Land* of North Rhine-Westphalia, Germany) against the judgment at first instance, taking the view, inter alia, that the right of access to information, exercised on the basis of the Law on freedom of information of the *Land* of North Rhine-Westphalia, was not excluded by specific rules in the field of taxation. Therefore, although the information requested was covered by tax secrecy, D.-H. T. was entitled, as insolvency administrator, to request from J & S Service all information linked to the insolvency proceedings.

Hearing an appeal on a point of law (*Revision*) against the decision of the Oberverwaltungsgericht (Higher Administrative Court) having jurisdiction, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) observed that the GDPR [82] was not directly applicable to the case at hand because the main proceedings did not concern personal data relating to a natural person or the data subject's right of access. According to the referring court, that right of access was a right attached to the data subject by virtue of the processing of personal data; it did not form part of the insolvency estate and thus was not covered by the transfer of powers of management and disposal to the insolvency administrator. Nevertheless, in order to ensure the uniform interpretation of EU law, the referring court recalled that the Court of Justice had already held that it had jurisdiction to rule on requests for a preliminary ruling concerning provisions of EU law in purely internal situations, in which those provisions had been made directly and unconditionally applicable by national law. It took the view that that condition was satisfied in the case at hand since the German Tax Code refers, as regards the processing of the personal data of legal persons, to the provisions of the GDPR.

It was against that background that the Bundesverwaltungsgericht (Federal Administrative Court) asked the Court of Justice to clarify whether it was open to the tax office to limit access to the tax data of a tax debtor on the basis of a provision of the GDPR, to which the Tax Code expressly refers. If the view were taken that the tax office could rely on that provision of the GDPR, the referring court asked the Court of Justice to clarify whether the concept of 'enforcement of civil law claims' appearing in that provision of the GDPR also covered

81| Order of the President of the Court of 1 October 2018, ***Miasto Łowicz and Prokurator Generalny*** (Joined Cases C-558/18 and C-563/18, not published, EU:C:2018:923).

82| 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 defence against civil-law claims. Lastly, the referring court asked the Court of Justice to clarify whether a national provision imposing a limitation on the right of access conferred by the GDPR in relation to the defence of insolvency avoidance claims which may be brought in insolvency proceedings against the tax office had its basis in that regulation.

After examining the circumstances in which the case had been referred to it by the national court, the Court of Justice held that it did not have jurisdiction to answer the questions submitted by the Bundesverwaltungsgericht (Federal Administrative Court).

As a preliminary point, concerning the cooperation between the Court of Justice and the national courts provided for by Article 267 TFEU, the Court pointed out that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. However, the Court must examine the circumstances in which cases are referred to it by the national court in order to assess whether it has jurisdiction.

As regards the assessment of its jurisdiction in preliminary-ruling proceedings, the Court made clear that it has repeatedly considered itself to have jurisdiction to give preliminary rulings on questions concerning provisions of EU law in situations where the facts at issue in the main proceedings were outside the scope of EU law and therefore fell within the competence of the Member States alone, but where those provisions of EU law had been rendered applicable by domestic law due to a reference made by that law to the content of those provisions. The Court stated that such jurisdiction is justified by the fact that it is clearly in the interest of the EU legal order that, in order to forestall future differences of interpretation, the provisions taken from EU law should be interpreted uniformly.

Noting that its jurisdiction is confined to considering provisions of EU law alone, the Court observed that it cannot, when replying to the national court, take account of the general scheme of the provisions of domestic law which, while referring to EU law, define the extent of that reference. Consideration of the limits which the national legislature may have placed on the application of EU law to purely internal situations, to which that law is applicable only through the operation of national legislation, is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State concerned.

In the case at hand, the Court pointed out that the questions referred for a preliminary ruling concerned the interpretation of the GDPR, the provisions of which relating to the processing of personal data of natural persons were made applicable, pursuant to a reference in the Tax Code, *mutatis mutandis* to legal persons, in order to delimit the obligation of the tax office to provide information and the data subject's right of access vis-à-vis that authority. It noted, however, that the GDPR lays down rules on the protection of personal data of natural persons and does not cover data relating to legal persons. Therefore, the provisions of the GDPR cannot be interpreted in the same way as regards both natural persons and legal persons, since the latter's right to protection of their data is not set out in the GDPR.

Since the provisions of the Tax Code at issue in the main proceedings did not simply make the provisions of the GDPR applicable beyond the scope of that regulation, but altered their purpose and extent, the Court took the view that it was not possible to consider that those provisions had been made applicable in themselves beyond the GDPR's scope by the domestic law concerned. Therefore, the Court held that, in the case at hand, there was no clear interest in interpreting the provisions of the GDPR in order to ensure their uniform interpretation.

Consequently, the Court found that it did not have jurisdiction to answer the questions raised by the national court.

VI. Agriculture and fisheries

In its judgment in ***Syndicat interprofessionnel de défense du fromage Morbier*** (C-490/19, EU:C:2020:1043), delivered on 17 December 2020, the Court ruled on a case concerning the protection of registered names.

'Morbier' is a cheese produced in the Jura mountains (France) which has enjoyed a protected designation of origin (PDO) since 22 December 2000. It is characterised by the presence of a black line which divides the cheese in two, horizontally. That black line, originally made from a layer of cinder and now made from vegetable carbon, is expressly referred to in the product description in the specification for the PDO.

The Société fromagère du Livradois SAS, which has produced Morbier cheese since 1979, is not situated within the geographical area reserved for the name 'Morbier'. Since the expiry of a transitional period, it has therefore used the name 'Montboissié du Haut Livradois' for its cheese.

In 2013, the Syndicat interprofessionnel de défense du fromage Morbier ('the Syndicat') brought proceedings against the Société fromagère du Livradois before the tribunal de grande instance de Paris (Regional Court, Paris, France). The Syndicat accused the Société fromagère du Livradois of infringing the PDO and committing acts of unfair and parasitic competition by producing and marketing a cheese that reproduces the visual appearance of 'Morbier', the product covered by the PDO, in particular the black line. Its action was dismissed.

By a 2017 judgment, the cour d'appel de Paris (Court of Appeal, Paris, France) upheld that decision. That court held that the PDO is intended to protect not the appearance or features of a product but its name, so that the production of a product using the same techniques is not prohibited. The Syndicat therefore appealed on a point of law to the referring court.

In those circumstances, the Cour de cassation (Court of Cassation, France) sought a ruling by the Court of Justice on the interpretation of Article 13(1) of Regulation No 510/2006 [83] and Article 13(1) of Regulation No 1151/2012, [84] which concern the protection of registered names. In particular, the question arose as to whether the reproduction of the physical characteristics of a product covered by a PDO without the use of the registered name could constitute a practice that is liable to mislead the consumer as to the true origin of the product, which is prohibited by Article 13(1)(d) of those two regulations. The Court was therefore required, for the first time, to interpret Article 13(1)(d) of both of those regulations.

The Court found, in the first place, that Article 13(1) of Regulation No 510/2006 and Article 13(1) of Regulation No 1151/2012 do not prohibit solely the use by a third party of the registered name. In the second place, the Court stated that Article 13(1)(d) of both of those regulations prohibits the reproduction of the shape or appearance characterising a product covered by a registered name where that reproduction may lead the consumer to believe that the product in question is covered by that registered name. It observed, in that regard, that it was necessary to assess whether that reproduction could mislead the European consumer, who is reasonably well informed and reasonably observant and circumspect, taking into account all the relevant factors in the case, including the way in which the products in question are presented to the public and marketed, and the factual context.

83| Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93, p. 12).

84| Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (OJ 2012 L 343, p. 1).

In reaching those findings, the Court noted, first of all, that Article 13(1) of Regulation No 510/2006 and Article 13(1) of Regulation No 1151/2012 contain a graduated list of prohibited conduct and do not merely prohibit the use of the registered name itself. Thus, although they do not specify the prohibited conduct, Articles 13(1)(d) of both of those regulations broadly cover any conduct, other than that prohibited by Articles 13(1)(a) to (c), which may result in the consumer being misled as to the true origin of the product in question.

Concerning, next, whether the reproduction of the shape or appearance of a product covered by a registered name may constitute conduct liable to mislead the consumer, the Court observed that, indeed, the protection provided for by Regulations No 510/2006 and No 1151/2012 concerns the registered name and not the product covered by that name. It follows that the purpose of that protection is not to prohibit the use of manufacturing techniques or the reproduction of one or more characteristics indicated in the specification of a product covered by a registered name, on the ground that they appear in that specification.

Nevertheless, PDOs are protected as they designate a product that has certain qualities or characteristics. Thus, the PDO and the product covered by it are closely linked. Therefore, the possibility remains that the reproduction of the shape or appearance of a product covered by a registered name may fall within the scope of Article 13(1)(d) of both regulations without that name appearing either on the product in question or on its packaging. This will be the case where that reproduction is liable to mislead the consumer as to the true origin of the product in question.

In order to determine whether that is the case, it is necessary, in particular, to assess whether an element of the appearance of the product covered by the registered name constitutes a baseline characteristic which is particularly distinctive of that product so that its reproduction may, in conjunction with all the relevant factors in the case in point, lead the consumer to believe that the product containing that reproduction is covered by that registered name.

It will also be recalled that, in the judgment in ***Centraal Israëlitisch Consistorie van België and Others*** (C-336/19, EU:C:2020:1031), delivered on 17 December, [85] the Grand Chamber of the Court was required to seek a balance – in connection with the slaughter of animals in accordance with religious rites without first being stunned – between freedom of religion, guaranteed by Article 10 of the Charter, and animal welfare, as set out in Article 13 TFEU and given specific expression to in Regulation No 1099/2009. [86]

VII. Freedom of movement

1. Free movement of goods

In the judgment of 19 November 2020, ***B S and C A (Marketing of cannabidiol (CBD))*** (C-663/18, EU:C:2020:938), the Court ruled on a case concerning B S and C A, the former directors of a company whose object was the marketing and distribution of a cannabidiol ('CBD') oil electronic cigarette, a molecule present in hemp

85| That judgment is presented in Section I.1 'Freedom of religion'.

86| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

(or *Cannabis sativa*) and part of the cannabinoid family. In the case at hand, the CBD was produced in the Czech Republic from hemp plants grown lawfully and using the entirety of the plant, the leaves and flowers included. It was then imported into France to be packaged in electronic cigarette cartridges.

Criminal proceedings were instituted against B S and C A, since, under French legislation, [87] only the fibre and seeds of hemp may be put to commercial use. Sentenced by the tribunal correctionnel de Marseille (Criminal Court, Marseille, France) to suspended terms of imprisonment of 18 and 15 months, together with EUR 10 000 in fines, they lodged appeals before the cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence, France). That court questioned the conformity with EU law of the French legislation prohibiting the marketing of CBD lawfully produced in another Member State, when it is extracted from the *Cannabis sativa* plant in its entirety and not solely from its fibre and seeds.

The Court found that EU law, in particular the provisions on the free movement of goods, precludes national legislation such as that at issue in the main proceedings.

As a first step, the Court ruled on the law applicable to the situation at issue.

In that regard, it dismissed the relevance of the regulations relating to the common agricultural policy. [88] That secondary legislation applies only to the 'agricultural products' listed in Annex I to the Treaties. CBD extracted from the *Cannabis sativa* plant in its entirety cannot be regarded as an agricultural product, unlike, for example, raw hemp. It therefore does not fall within the scope of those regulations.

However, the Court observed that the provisions on the free movement of goods within the European Union (Articles 34 and 36 TFEU) are applicable, since the CBD at issue in the main proceedings cannot be regarded as a 'narcotic drug'. In arriving at that conclusion, the Court first recalled that persons who market narcotic drugs cannot rely on the freedoms of movement since such marketing is prohibited in all the Member States, with the exception of strictly controlled trade to be used for medical and scientific purposes. Next, the Court noted that, to define the terms 'drug' or 'narcotic drug', EU law [89] makes reference inter alia to two United Nations conventions: the Convention on Psychotropic Substances [90] and the Single Convention on Narcotic Drugs. [91] CBD, however, is not mentioned in the former and, while it is true that a literal interpretation of the latter might lead to its being classified as a drug, in so far as it is a cannabis extract, such an interpretation would be contrary to the general spirit of that convention and to its objective of protecting 'the health and welfare of mankind'. The Court noted that, according to the current state of scientific knowledge, which it is necessary to take into account, unlike tetrahydrocannabinol (commonly called THC), another hemp cannabinoid, the CBD at issue does not appear to have any psychotropic effect or any harmful effect on human health.

87| Order of 22 August 1990 implementing Article R. 5132-86 of the Public Health Code in respect of cannabis (JORF of 4 October 1990, p. 12041), as interpreted by the circular of the Ministry of Justice of 23 July 2018 concerning the legal regime applicable to establishments offering cannabis products for public sale (coffee shops) (2018/F/0069/FD2).

88| Regulation (EU) No 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No 637/2008 and Council Regulation (EC) No 73/2009 (OJ 2013 L 347, p. 608); Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

89| Reference made inter alia by Article 1(1)(a) of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ 2004 L 335, p. 8).

90| United Nations Convention on Psychotropic Substances, 1971, concluded in Vienna on 21 February 1971 (*United Nations Treaty Series*, vol. 1019, No 14956).

91| United Nations Single Convention on Narcotic Drugs, 1961, concluded in New York on 30 March 1961, as amended by the 1972 Protocol (*United Nations Treaty Series*, vol. 520, No 7515).

As a second step, the Court found that the provisions on the free movement of goods preclude legislation such as that at issue. The prohibition on marketing CBD constitutes a measure having equivalent effect to quantitative restrictions on imports, prohibited by Article 34 TFEU. The Court nevertheless pointed out that that legislation could be justified on one of the grounds of public interest laid down in Article 36 TFEU, such as the objective of protecting public health invoked by the French Republic, provided that that legislation is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it. While that latter assessment is for the national court to carry out, the Court provided two insights in that regard. First, it noted that it seems that the prohibition on marketing would not affect synthetic CBD, which has the same properties as the CBD at issue and could be used as a substitute for the latter. If that circumstance were proved, it would be such as to indicate that the French legislation was not appropriate for attaining, in a consistent and systematic manner, the objective of protecting public health which it pursues. Secondly, the Court accepted that the French Republic was indeed not required to demonstrate that the dangerous property of CBD was identical to that of certain narcotic drugs. However, the national court must assess available scientific data in order to make sure that the real risk to public health alleged does not appear to be based on purely hypothetical considerations. A decision to prohibit the marketing of CBD, which indeed constitutes the most restrictive obstacle to trade in products lawfully manufactured and marketed in other Member States, can be adopted only if that risk appears sufficiently established.

In connection with the free movement of goods, reference should also be made to the judgment in ***TÜV Rheinland LGA Products and Allianz IARD*** (C-581/18, EU:C:2020:453), delivered on 11 June 2020. [92]

2. Free movement of workers

In the judgment in ***Jobcenter Krefeld*** (C-181/19, EU:C:2020:794), delivered on 6 October 2020, the Court, sitting as the Grand Chamber, clarified the rights enjoyed by a former migrant worker with dependent children attending school in the host Member State, in the light of Regulations No 492/2011 [93] and No 883/2004 [94] and Directive 2004/38. [95]

JD is a Polish national who has lived, since 2013, with his two minor daughters in Germany, where the latter attend school. In 2015 and 2016, JD held various paid positions in that Member State before becoming unemployed. From September 2016 to June 2017, the family received, inter alia, basic social-protection benefits provided for by German legislation, namely 'subsidiary unemployment benefits' for JD (*Arbeitslosengeld II*) and 'social allowances' for his children (*Sozialgeld*). On 2 January 2018, JD again secured full-time employment in Germany.

92| That judgment is presented in Section II 'Citizenship of the Union'.

93| Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

94| Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrigendum OJ 2004 L 200, p. 1).

95| 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, corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

JD applied to the competent German authority, Jobcenter Krefeld, for continued payment of those benefits for the period from June to December 2017. However, Jobcenter Krefeld rejected his application on the ground that, during the period at issue, JD had not retained his status as worker and was residing in Germany as a jobseeker. JD brought an action against that decision, which was upheld. Jobcenter Krefeld then brought an appeal before the Landessozialgericht Nordrhein-Westfalen (Higher Social Court of North Rhine-Westphalia, Germany).

After finding that the relevant social protection benefits could be classified as a 'social advantage' within the meaning of Regulation No 492/2011, the Court held, in the first place, that that regulation precludes national legislation which automatically and in all circumstances bars a former migrant worker and his or her children from receiving such benefits when they are entitled, under that regulation, [96] to an independent right of residence by virtue of those children attending school.

In arriving at that conclusion, the Court first of all observed that the right of residence enjoyed by the children of a (former) migrant worker in order to safeguard their right of access to education and the derived right of residence of the parent who is their carer originally has its source in the status of that parent as a worker. However, once acquired, that right becomes an independent right and must be maintained after the loss of that status. The Court then held that persons in possession of such a right of residence also enjoy the right to equal treatment with nationals as regards the grant of social advantages, provided for by Regulation No 492/2011, [97] even where they can no longer rely on the status of worker from which they derived their initial right of residence. That interpretation thus ensures that a person who intends to leave his or her Member State of origin with his or her family in order to travel to and work in another Member State is not exposed to the risk that, should he or she lose his or her job, the schooling of his or her children would have to be interrupted and he or she would have to return to his or her country of origin, because of his or her inability to claim the social benefits provided for in national law which would enable his or her family to have sufficient means of subsistence.

Lastly, the Court found that the host Member State cannot rely, in a case such the case at hand, on the derogation from the principle of equal treatment in relation to social assistance provided for by Directive 2004/38. [98] That derogation makes it possible to refuse to grant assistance to certain categories of persons, such as those who enjoy, under that directive, a right of residence by virtue of seeking employment in the host Member State, in order to prevent those persons becoming an unreasonable burden on the social assistance system of that Member State. That derogation must be interpreted strictly and applies only to persons whose right of residence is based solely on that directive. In that case, it is true that the interested persons enjoy a right of residence based on that directive [99] by virtue of the parent concerned being a jobseeker. However, since they are also able to invoke an independent right of residence under Regulation No 492/2011, that derogation cannot be relied on against them. Thus, domestic legislation which excludes them from any entitlement to social protection benefits establishes a difference in treatment in relation to social advantages as compared with nationals, which is contrary to that regulation. [100]

96| Article 10 of Regulation No 492/2011.

97| Article 7(2) of Regulation No 492/2011.

98| Article 24(2) of Directive 2004/38.

99| Article14(4)(b) of Directive 2004/38.

100| Article 7(2) of Regulation No 492/2011, read in conjunction with Article 10 thereof.

In the second place, the Court held that a (former) migrant worker and his or her children, who enjoy a right of residence based on Regulation No 492/2011 and who are covered by the social security system in the host Member State, also have the right to equal treatment stemming from Regulation No 883/2004. [101] Denying them any entitlement to the social-protection benefits at issue therefore constitutes a difference in treatment in relation to nationals. That difference in treatment is contrary to Regulation No 883/2004, [102] since the derogation provided for in Directive 2004/38 [103] cannot, for the same reasons as those set out by the Court in the context of Regulation No 492/2011, apply to the situation of such a worker and his or her children attending school.

Finally, reference should also be made to the judgments of 1 December 2020, ***Federatie Nederlandse Vakbeweging*** (C-815/18, EU:C:2020:976), in which the Court ruled on a case involving workers from Germany and Hungary who were employed as drivers under charter contracts for international transport operations, [104] and of 16 July 2020, ***AFMB and Others*** (C-610/18, EU:C:2020:565), in which the Court held that the employer of an international long-distance lorry driver is the undertaking that has actual authority over that driver, bears the corresponding wage costs and has the power to dismiss the driver, not the undertaking with which the long-distance lorry driver has entered into an employment contract. [105]

3. Freedom of establishment

In the judgment in ***I.G.I.*** (C-394/18, EU:C:2020:56), delivered on 30 January 2020, the Court interpreted, for the first time, Articles 12 and 19 of the Sixth Directive 82/891 ('the Sixth Directive'). [106] It held that those articles do not preclude the creditors of the company being divided whose credit interests antedate that division, who did not take advantage of the creditor protection tools provided for in the national legislation implementing Article 12 of that directive, from bringing an *actio pauliana* after the division has been implemented, in order to obtain a declaration that the division in question has no effect against them.

The dispute in the main proceedings was between the creditors of a company being divided and the newly formed company to which a part of the assets of the first company had been transferred. Taking the view that the division had caused the company being divided to lose a large part of its assets, those creditors brought an *actio pauliana* in order to obtain a declaration that the division in question has no effect against them and to bring enforcement or protective action in relation to the assets transferred. That being so, they did not avail themselves of the possibility of challenging the division laid down in the national legislation implementing the Sixth Directive.

101| Article 4 of Regulation No 883/2004.

102| Article 4 of Regulation No 883/2004.

103| Article 24(2) of Directive 2004/38.

104| That case is presented in Section VII.4.2 'Freedom to provide services and posting of workers'.

105| That case is presented in Section XVII.6 'Coordination of social security systems'.

106| Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ 1982 L 378, p. 47), as amended by Directive 2007/63/EC of the European Parliament and of the Council of 13 November 2007 (OJ 2007 L 300, p. 47).

As the *actio pauliana* exists in parallel with the creditor protection tools provided for by EU law, the referring court raised the question, in the first place, of the relationship between such an action and Article 12 of the Sixth Directive. Under that article, the laws of the Member States must provide for an adequate system of protection for the interests of the creditors of the companies involved in a division. To that end, the Member States must at least provide that such creditors are entitled to obtain adequate safeguards where the financial situation of the companies involved in the division makes such protection necessary. In that case, as the *actio pauliana* was not listed amongst the protection tools provided for in the national legislation implementing Article 12, the question arose as to whether the creditors in the main proceedings were entitled to bring such an action. In the second place, the referring court had doubts as to the interpretation of Article 19 of the Sixth Directive which lays down nullity rules for divisions. In particular, it asked whether the strict conditions for invoking the nullity of a division also apply to an *actio pauliana* which does not affect the validity of that division but merely allows for that division to be rendered unenforceable vis-à-vis the creditors that brought that action.

As regards the tools for the protection of the creditors of a company being divided, the Court noted that Article 12 of the Sixth Directive provides for a minimum system of protection for the interests of those creditors whose claims antedate the publication of the draft terms of division and have not yet fallen due at the time of such publication. Therefore, the Member States can provide for additional protection tools. Furthermore, it is not apparent from Article 12 that a failure to avail oneself of one of the protection tools provided for in that article prevents the creditors from making use of protection tools other than the ones set out in that article. Thus, the Court concluded, in the light of the objective of the Sixth Directive consisting in protecting creditors from any prejudice that may result from that division, that Article 12 of that directive does not exclude the possibility, for the creditors of the company being divided, of bringing an *actio pauliana*.

Nevertheless, the Court stated that the effects of such an action must not run counter to the purpose of that provision. In that regard, it noted that Article 12 does not require the protection for the creditors of newly formed companies to be equivalent to that provided for the creditors of a company being divided. Therefore, the minimum harmonisation, under the Sixth Directive, of the protection of the interests of the creditors of companies involved in a division does not preclude, within the context of a division by the formation of a new company, priority being given to the protection of the interests of creditors of the company being divided.

As regards the nullity rules for divisions provided for in Article 19 of the Sixth Directive, the Court interpreted the concept of 'nullity', which is not defined in that directive, taking into account the context in which that concept occurs and the purpose of the directive. According to the Court, that concept refers to actions seeking the annulment of an act, that result in its elimination and that have an effect *erga omnes*. The *actio pauliana* brought by the creditors in the main proceedings only allows for the division, in particular the transfer of certain assets referred to in the instrument of division, to be declared unenforceable against the creditors. It does not affect the validity of that division, does not result in its elimination and does not have an effect *erga omnes*. Therefore, it is not covered by the concept of 'nullity' referred to in Article 19 of the Sixth Directive. That provision thus does not preclude such an action being brought after the division has been implemented.

In the judgments in ***Vodafone Magyarország*** (C-75/18, EU:C:2020:139) and ***Tesco-Global Áruházak*** (C-323/18, EU:C:2020:140), delivered on 3 March 2020, the Grand Chamber of the Court held to be compatible with the principle of freedom of establishment and Directive 2006/112 [107] ('the VAT Directive') the special taxes levied in Hungary on the turnover of telecommunications operators and of undertakings active in the retail trade sector. The fact that those special taxes, the application of which to turnover is progressive (and steeply progressive in the case of the latter), are mainly borne by undertakings owned by persons of other Member

107| Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

States, due to the fact that those undertakings achieve the highest turnover in the Hungarian markets concerned, reflects the economic reality of those markets and does not constitute discrimination against those undertakings. The Court also held that, since the tax imposed on the telecommunications operators does not have all the essential characteristics of VAT, that tax cannot be treated as comparable to VAT and consequently does not jeopardise the functioning of the VAT system of the European Union, with the result that it is compatible with the VAT Directive.

Since questions were also referred to the Court on the compatibility of the Hungarian legislation introducing those special taxes with the EU rules on State aid, the Court initially gave a ruling on the admissibility of those questions. [108] In that regard, the Court recalled that taxes do not fall within the scope of the provisions of the TFEU concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure. For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules. In that case, the Court found, however, that the applications for exemption from the special taxes submitted by the applicant companies to the Hungarian tax authorities concerned general taxes, the revenue from which was transferred to the State budget, those taxes not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify. The Court concluded that the special taxes imposed on those applicant companies were not hypothecated to the exemption for which some taxable persons qualified, and consequently any illegality under EU State aid rules of such an exemption was not capable of affecting the legality of those special taxes themselves. Accordingly, the applicant companies could not rely, before the national courts, on that possible unlawfulness in order to avoid payment of those taxes.

Next, the Court examined whether the Hungarian legislation enacting the special taxes at issue constituted discrimination based on where companies have their registered office, which is prohibited by the provisions of the TFEU on freedom of establishment. In that regard, the Court, first, found that the parent companies of the applicants had their registered offices in the United Kingdom and in the Netherlands respectively, and that, since those parent companies conducted business in the Hungarian market through subsidiaries, their freedom of establishment could be affected by any restriction that affects those subsidiaries. The Court referred to its case-law on the prohibition of direct and indirect discrimination and then held that, in that case, the special taxes at issue made no distinction according to where companies have their registered office.

In that context, the Court stated, in the first place, that, since all the undertakings active in Hungary in the sectors concerned were liable to pay the taxes at issue and since the rates of taxation respectively applicable to the various bands of turnover applied to all those undertakings, the Hungarian legislation enacting those taxes did not establish any direct discrimination against undertakings owned by persons (natural or legal) of other Member States.

The Court, in the second place, determined whether the fact that the special taxes are (steeply) progressive may be considered to be a source of indirect discrimination against the latter undertakings.

In that regard, the Court found that, in relation to the tax years at issue, namely those covering the period from 1 April 2011 to 31 March 2015 in the *Vodafone Magyarország* case and from 1 March 2010 to 28 February 2013 in the *Tesco-Global Áruházak* case, the taxable persons that fell only within the base tax band, charged

108| In 2019, the General Court annulled two decisions of the Commission that classified as State aid the Polish tax in the retail sector and the Hungarian advertisement tax (judgments of the General Court of 16 May 2019, ***Poland* v *Commission*** (Joined Cases T-836/16 and T-624/17, EU:T:2019:338), and of 27 June 2019, ***Hungary* v *Commission*** (T-20/17, not published, EU:T:2017:203)). Those judgments are subject to appeal before the Court of Justice (C-562/19 P and C-596/19 P).

at 0%, were all taxable persons owned by Hungarian persons, whereas those falling within the higher tax bands were predominantly taxable persons owned by persons of other Member States. Accordingly, the greater part of the special tax was borne by taxable persons owned by persons of other Member States.

The Court recalled, however, that the Member States are free to establish the system of taxation that they deem the most appropriate and to establish progressive taxation on turnover, since the amount of turnover constitutes a criterion of differentiation that is neutral and a relevant indicator of a taxable person's ability to pay. In that context, the fact that the greater part of the special taxes at issue is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be sufficient ground for the conclusion that there is discrimination against them. That situation is due to the fact that the markets concerned in those cases are dominated by such taxable persons, who achieve the highest turnover in those markets. It is, accordingly, an indicator that is fortuitous, if not a matter of chance, which may arise whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by persons of other Member States or of non-Member States. Moreover, the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian persons, since any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band. Consequently, the (steeply) progressive rates of the special taxes at issue do not, inherently, create any discrimination, based on where companies have their registered office, between taxable persons owned by Hungarian persons and taxable persons owned by persons of other Member States.

Further, in the *Vodafone Magyarország* case, a question was referred to the Court on the compatibility of the introduction of the special tax on the turnover of telecommunications operators with the VAT Directive. [109] In that regard, the Court stated that it is necessary, in particular, to determine whether the tax in question has the effect of jeopardising the functioning of the common system of VAT by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT, which is the case when, inter alia, taxes have the essential characteristics of VAT. The Court found, however, that the Hungarian legislation enacting the special tax at issue did not provide for the charging of the tax at each stage of the production and distribution process or a right to deduction of the tax paid during the preceding stages of that process. Accordingly, since two of the four essential characteristics laid down by the Court in its case-law were not met by the special tax, the VAT Directive did not preclude the introduction of that tax.

In the judgment of 22 September 2020, ***Cali Apartments*** (Joined Cases C-724/18 and C-727/18, EU:C:2020:743), the Court, sitting as the Grand Chamber, ruled on the compatibility with Directive 2006/123 [110] of legislation of a Member State relating to activities consisting in the repeated short-term letting, for remuneration, whether on a professional or non-professional basis, of furnished accommodation to a transient clientele which does not take up residence there.

Cali Apartments SCI and HX each own a studio apartment located in Paris. Those studio apartments, which had been offered for rent on a website, had, repeatedly and without prior authorisation from the local authorities, been let for short periods to a transient clientele.

The tribunal de grande instance de Paris (Regional Court, Paris, France), hearing an application for interim relief, then, subsequently, the cour d'appel de Paris (Court of Appeal, Paris), on the basis of the French Construction and Housing Code, ordered the two owners to pay a fine and ordered that the use of the

109| Article 401.

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

properties in question be changed back to residential. That code provides, inter alia, that, in municipalities with more than 200 000 inhabitants and in the municipalities in Paris's three neighbouring departments, change of use of residential premises is subject to prior authorisation and the repeated short-term letting of furnished accommodation to a transient clientele which does not take up residence there constitutes such change of use. That code also provides that that authorisation, granted by the mayor of the municipality in which the property is located, may be subject to an offset requirement in the form of the concurrent conversion of non-residential premises into housing. Again according to that code, a decision adopted by the municipal council sets the conditions for granting authorisations and determining the offset requirements by quartier (neighbourhood) and, where appropriate, by arrondissement (district), in the light of social-diversity objectives, according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage.

In the context of appeals brought by the two owners against the judgments delivered by the cour d'appel de Paris (Court of Appeal, Paris), the Cour de cassation (Court of Cassation) made a reference to the Court of Justice for a preliminary ruling, so that it could rule on the compatibility of the national legislation in question with Directive 2006/123 on services in the internal market.

The Court held, in the first place, that Directive 2006/123 applies to legislation of a Member State relating to activities consisting in the repeated short-term letting, for remuneration, whether on a professional or non-professional basis, of furnished accommodation to a transient clientele which does not take up residence there. In that regard, it emphasised that such activities are covered by the concept of 'service' within the meaning of Article 4(1) of Directive 2006/123 and do not, moreover, correspond to any of the activities that are excluded from the scope of that directive by Article 2(2) thereof. In addition, it held that the legislation in question was not excluded from the scope of Directive 2006/123 on the ground that it would constitute legislation of general application which applies indiscriminately to all persons in the field of the development or use of land and, in particular, town planning. Although that legislation is intended to ensure a sufficient supply of affordable long-term rental housing, it is aimed only at persons engaging in a particular type of letting activity.

In the second place, the Court ruled that national legislation which makes the exercise of certain activities consisting in the letting of residential premises subject to prior authorisation is covered by the concept of 'authorisation scheme' within the meaning of Article 4(6) of Directive 2006/123, and not by the concept of 'requirement' within the meaning of Article 4(7) thereof. An 'authorisation scheme' is distinct from a 'requirement' inasmuch as it involves steps being taken by the service provider and a formal decision whereby the competent authorities authorise that service provider's activity, which is the case for the legislation in question.

In the third place, the Court stated that an 'authorisation scheme', such as that established by the legislation in question, must comply with the requirements set out in Section 1 of Chapter III of Directive 2006/123, and in particular in Article 9(1) and Article 10(2) of that directive, which requires an assessment, first, of whether the very principle of establishing such a scheme is justified, in light of Article 9 of that directive, and, then, of the criteria for granting the authorisations provided for by that scheme, in the light of Article 10 thereof.

Regarding the conditions laid down by Article 9(1) of Directive 2006/123, in particular the conditions that the authorisation scheme must be justified by an overriding reason relating to the public interest and that the objective pursued by that scheme cannot be attained by means of a less restrictive measure (proportionality criterion), the Court noted, first, that the legislation in question is intended to establish a mechanism for combating the long-term rental-housing shortage, the objective of which is to deal with the worsening conditions for access to housing and the exacerbation of tensions on the property markets, which constitutes an overriding reason relating to the public interest. Secondly, the Court found that the national legislation concerned was proportionate to the objective pursued. Its material scope is limited to a specific letting

activity, it excludes from its scope housing which constitutes the lessor's main residence, and the authorisation scheme which it establishes is of limited geographical scope. In addition, the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection, for example by way of a declaratory system accompanied by penalties, would not enable authorities to put an immediate and effective end to the rapid conversion trend which is creating a long-term rental-housing shortage.

As regards the requirements applicable, under Article 10(2) of Directive 2006/123, to the authorisation criteria laid down by the legislation concerned, the Court noted, with respect to, first, the requirement that those criteria must be justified by an overriding reason relating to the public interest, that they must, in principle, be regarded as justified by such a reason, inasmuch as they regulate the arrangements for determining, at local level, the conditions for granting the authorisations provided for by a scheme adopted at national level which itself is justified by that same reason.

With respect to, secondly, the requirement that those criteria be proportionate, the Court noted that the national legislation concerned provides the option to make the grant of authorisation sought subject to an offset requirement in the form of the concurrent conversion of non-residential premises into housing, the quantum of which is to be defined by the municipal council of the municipalities concerned in the light of the objective of social diversity and according to, inter alia, the characteristics of the markets for residential premises and the need to avoid exacerbating the housing shortage. Although such an option constitutes, in principle, a suitable instrument for pursuing those objectives, as it leaves it to the local authorities to decide whether to lay down an offset requirement and, if necessary, to determine the quantum of that requirement, it is for the national court to verify, first of all, whether that option is an effective response to the shortage of long-term rental housing that has been observed in the territories of those municipalities. Next, the national court must make sure that that option is not only appropriate for the local rental-market situation, but also compatible with the exercise of the letting activity in question. To that end, it must take into consideration the generally observed additional profitability of that activity as compared to the letting of residential premises and the practical arrangements enabling the offset requirement to be met in the local authority concerned, making sure that that requirement may be met by a number of offset mechanisms that are in line with reasonable, transparent and accessible market conditions.

Regarding, thirdly, the requirements of clarity, non-ambiguity and objectivity, the fact that the legislation in question does not define, in particular using numeric thresholds, the concept of the 'repeated short-term letting of furnished accommodation to a transient clientele which does not take up residence there' does not, in itself, constitute an element capable of demonstrating disregard for those requirements, provided that the local authorities concerned specify the terms corresponding to that concept in a way that is clear, unambiguous and objective. In the same vein, the fact that the national legislature confines itself to regulating the arrangements for a local authority determining the conditions for granting the authorisations provided for by a scheme by referring to the objectives which that authority must take into consideration cannot, in principle, lead to a finding that those conditions are insufficiently clear and objective, especially if the national legislation in question lays down not only the aims that must be pursued by the local authorities concerned but also the objective factors on the basis of which those authorities must determine those granting conditions.

Lastly, regarding, fourthly, the requirements that the conditions for granting the authorisations be transparent and accessible and be made public in advance, the Court emphasised that it was sufficient, for those requirements to be met, that all owners wishing to let furnished accommodation to a transient clientele which does not take up residence there be in a position to familiarise themselves fully with the conditions for granting an authorisation and any offset requirements laid down by the local authorities concerned, before committing to the letting activities in question, which the display of the minutes of municipal council meetings in the town hall and online via the website of the municipality concerned enables them to do.

Lastly, reference should also be made under this heading to the judgment in ***Commission* v *Hungary (Higher education)*** (C-66/18, EU:C:2020:792), [111] delivered on 6 October 2020, in which the Court ruled on the obligations arising for Hungary, in relation to national treatment, from the GATS, concluded within the framework of the World Trade Organisation (WTO).

4. Freedom to provide services and posting of workers

4.1. National tax provisions

By its judgment of 3 March 2020, ***Google Ireland*** (C-482/18, EU:C:2020:141), the Grand Chamber of the Court held that the freedom to provide services guaranteed by Article 56 TFEU does not preclude Hungarian legislation which imposes an obligation to submit a tax declaration on suppliers of advertising services established in a Member State other than Hungary for the purposes of their liability to Hungarian tax on advertising. That is the case despite the fact that suppliers of such services established in Hungary are exempt from that obligation since they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in Hungary.

However, the Court held that that principle precludes the part of Hungarian legislation which fines suppliers of advertising services established in a Member State other than Hungary for non-compliance with the obligation to submit a tax declaration in a series of fines issued within several days capable of amounting to several million euro, without the competent authority giving the suppliers concerned the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines. In that regard, the Court noted that the amount of the fine that would be imposed on a supplier of advertising services established in Hungary that has failed to comply with a similar obligation to submit a tax declaration or to register contrary to the general provisions of national tax legislation is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

In that case, Google Ireland, a company incorporated under Irish law which carries on an activity subject to the Hungarian tax on advertising, failed to comply with its obligation to submit a declaration in respect of that tax. On that ground, Google Ireland was initially fined 10 000 000 forint (HUF) (approximately EUR 31 000) and then, within a few days, received additional fines, which in total amounted to HUF 1 000 000 000 (approximately EUR 3 100 000). That sum corresponded to the maximum fine which could be imposed under Hungarian legislation for non-compliance with the obligation to submit a tax declaration. Google Ireland brought an action before the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary), contesting the compatibility with EU law of, first, the obligation for foreign suppliers of advertising services to submit a tax declaration and, secondly, the system of penalties connected with the failure to submit such a declaration. Those arguments led the referring court to make a reference to the Court of Justice for a preliminary ruling.

111| That case is presented in Section XX.2 'Breach of an agreement concluded within the framework of the WTO' and in Section I.3 'Freedom of the arts and sciences, right to education and freedom to conduct a business'.

The Court pointed out that the principle of freedom to provide services precludes any national rules which may make the provision of services between Member States more difficult than the provision of services purely within a Member State. That principle thus requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided.

Observing that the obligation to submit a tax declaration at issue in that case does not impinge on the exercise of the activity of advertising in Hungary and is applicable irrespective of the place of establishment of all suppliers of advertising services subject to the Hungarian tax on advertising, the Court held that that administrative formality does not, per se, constitute an obstacle to the freedom to provide services.

It could not be found in that case that there had been any difference in treatment capable of constituting a restriction on that fundamental freedom. While some suppliers, in particular those established in Hungary, are exempt from the obligation to submit a tax declaration, that is because they have already submitted a tax declaration or registered in respect of some form of direct or indirect tax levied in Hungary. That exemption does not have a deterrent effect, but prevents suppliers already registered from being required to complete a meaningless formality, since the purpose of the obligation to submit a tax declaration in relation to the tax on advertising is precisely to enable the Hungarian tax authority to identify those persons liable to that tax.

As regards penalties in the field of taxation, the Court noted that, although systems of penalties in the field of taxation fall within the competencies of the Member States in the absence of harmonisation at EU level, such systems should not have the effect of jeopardising the freedoms provided for by the TFEU.

In that context, the Court examined whether the penalties connected with failure to submit the tax declaration laid down by the legislation at issue in that case infringed the freedom to provide services. In that regard, the Court held that, strictly speaking, the system of penalties at issue applies without distinction to all taxpayers who fail to comply with their obligation to submit a tax declaration, irrespective of the Member State in which they are established. However, only taxpayers not resident in Hungary are, in reality, capable of being fined.

Indeed, suppliers of advertising services established in Hungary may be fined for failure to comply with similar obligations to submit a tax declaration and to register required of them under the general provisions of national tax legislation.

However, the system of penalties under the Law on the taxation of advertisements enables significantly higher fines to be issued than the system of fines provided for in the event of infringement, by a supplier of advertising services established in Hungary, of its obligation to register. Furthermore, neither the amount of the fines nor the time limits under the latter system are as stringent as those which apply in respect of the penalties provided for by the Law on the taxation of advertisements. It follows that that system of penalties constitutes a restriction on the freedom to provide services.

The Court went on to accept that the effectiveness of fiscal supervision and the effective collection of tax constitute overriding reasons in the public interest capable of justifying such a restriction, and that imposing sufficiently high fines is indeed likely to deter suppliers of advertising services who are subject to the obligation to register from failing to comply with that obligation. Nevertheless, the Court held that the system of penalties at issue was disproportionate. In that regard, the Court emphasised, in particular, the fact that that system does not provide for any link between the exponential increase, within particularly short periods of time, in the total amount of the fines and the seriousness of the failure to submit a tax declaration, and the fact that the taxpayer concerned would in effect be unable to avoid being subject to the maximum amount of the fine by complying with its obligation to submit a tax declaration prior to receiving the last decision to issue a fine by which that amount is reached.

4.2. Posting of workers

By its judgment in ***Federatie Nederlandse Vakbeweging*** (C-815/18, EU:C:2020:976), delivered on 1 December 2020, the Court, sitting as the Grand Chamber, ruled on a case in which workers from Germany and Hungary had been employed as drivers under charter contracts for international transport operations concluded between a transport undertaking with offices in Erp (Netherlands), Van den Bosch Transporten BV, and two companies owned by the same group, one incorporated under German law and the other under Hungarian law, to which the drivers were linked. As a rule, during the period concerned, the charter operations started in Erp and the journeys ended there, but most of the transport operations carried out under the charter contracts at issue took place outside the territory of the Netherlands. Van den Bosch Transporten, as member of the Netherlands Association for Goods Transport, was covered by the collective labour agreement applicable to that sector ('the "Goods Transport" CLA'), concluded between that association and the Federatie Nederlandse Vakbeweging (Netherlands Federation of Trade Unions; 'the FNV'). A second collective labour agreement, applicable inter alia to the professional goods transport by road sector, and the provisions of which were essentially identical to those of the 'Goods Transport' CLA, had been declared universally applicable, unlike the first collective labour agreement. However, under national law, undertakings covered by the 'Goods Transport' CLA were exempt from that second agreement, provided they complied with the first one.

According to the FNV, when Van den Bosch Transporten used drivers coming from Germany and Hungary, it had to apply to them the basic conditions of employment under the 'Goods Transport' CLA, in their capacity as posted workers within the meaning of Directive 96/71. [112] Since the basic conditions of employment stipulated in that agreement were not applied to those drivers, the FNV brought an action against those three transport undertakings, which was upheld at first instance by interim judgment. However, that judgment was set aside on appeal. The appeal court held, inter alia, that the charter operations at issue fell outside the scope of Directive 96/71, as the only matters covered by that directive were charter operations carried out, at least primarily, 'in the territory' of another Member State.

It was against that background that, on appeal by the FNV, the Hoge Raad der Nederlanden (Supreme Court, Netherlands) referred to the Court for a preliminary ruling a series of questions relating essentially to the conditions on which it may be concluded that workers are posted 'to the territory of a Member State' in the international road-transport sector.

The Court stated first of all that Directive 96/71 is applicable to the transnational provision of services in the road-transport sector. That directive applies, as a rule, to any transnational provision of services involving the posting of workers, irrespective of the economic sector concerned, and, unlike a classic liberalisation instrument, it pursues a series of objectives relating to the need to promote the transnational provision of services while ensuring fair competition and guaranteeing respect for the rights of workers. The fact that the legal basis of that directive does not include provisions relating to transport cannot therefore exclude from its scope the transnational provision of services in the sector of road-transport activities, in particular goods transport.

As regards, next, the status of the drivers concerned as posted workers, the Court recalled that, in order for a worker to be regarded as being posted 'to the territory of a Member State', the performance of his or her work must have a sufficient connection with that territory. The existence of such a connection is determined in the context of an overall assessment of factors such as the nature of the activities carried out by the worker

112| Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

concerned in that territory, the degree of connection between the worker's activities and the territory of each Member State in which the worker operates, and the proportion represented by those activities in the entire transport service.

In particular, the fact that a driver working in international road transport, who has been hired out by an undertaking established in one Member State to an undertaking established in another Member State, receives the instructions relating to his or her tasks, starts or finishes them at the place of business of that second undertaking is not sufficient in itself to consider that that driver has been posted to the territory of that other Member State for the purposes of Directive 96/71, provided that the performance of that driver's work does not have a sufficient connection with that territory on the basis of other factors.

The Court also stated that the existence of a group affiliation between undertakings that are parties to a contract for the hiring-out of workers does not, as such, determine the degree of connection between the performance of the work and the territory of a Member State to which those workers are sent. Therefore, the existence of such a group affiliation is not relevant in order to determine whether there has been a posting of workers.

As regards the specific case of cabotage operations, to which Directive 96/71 applies as stated in Regulation No 1072/2009, [113] the Court noted that those transport operations take place entirely within the territory of the host Member State, which permits the inference that the performance of the driver's work in the course of such operations has a sufficient connection with that territory. The duration of cabotage operations is irrelevant when determining whether there has been such a posting, without prejudice to the possibility available to Member States under that directive not to apply certain provisions of the directive, in particular as regards minimum rates of pay, when the length of the posting does not exceed one month.

Lastly, the Court recalled that, where workers are posted, Member States must, under that directive, ensure that the undertakings concerned guarantee workers posted to their territory a certain number of terms and conditions of employment laid down, inter alia, by collective agreements which have been declared universally applicable, namely those which must be observed by all undertakings in the geographical area and in the profession or industry concerned. The question of whether a collective agreement has been declared universally applicable must be assessed by reference to the applicable national law. The Court stated, however, that that definition also covers a collective labour agreement which has not been declared universally applicable, but compliance with which is a precondition, for undertakings covered by it, for exemption from another collective labour agreement which, for its part, has been declared universally applicable and the provisions of which are essentially identical to those of that other collective labour agreement.

By its judgments in ***Hungary* v *Parliament and Council*** (C-620/18, EU:C:2020:1001) and ***Poland* v *Parliament and Council*** (C-626/18, EU:C:2020:1000), of 8 December 2020, the Grand Chamber of the Court ruled on two cases involving Directive 96/71 concerning the posting of workers within the framework of the provision of services, [114] partly amended by Directive 2018/957. [115] The EU legislature endeavoured, by adopting Directive 2018/957, to ensure the freedom to provide services on a fair basis, by guaranteeing competition that would not be based on the application, in one and the same Member State, of terms and conditions of employment

113| Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (OJ 2009 L 300, p. 72).

114| Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

115| Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (OJ 2018 L 173, p. 16, corrigendum OJ 2019 L 91, p. 77).

at a level that is substantially different depending on whether or not the employer is established in that Member State, while offering greater protection to posted workers. To that end, Directive 2018/957 seeks to ensure that the terms and conditions of employment of posted workers are as close as possible to those of workers employed by undertakings established in the host Member State.

Following that logic, Directive 2018/957 made, inter alia, amendments to Article 3(1) of Directive 96/71, in relation to the terms and conditions of employment of posted workers. The effect of those amendments, guided by the principle of equal treatment, is, in particular, that those workers are no longer subject to the 'minimum rates of pay' fixed by the legislation of the host Member State, but to the 'remuneration' provided for by that legislation, the latter concept being wider than that of the minimum wage. Furthermore, where the effective duration of a posting exceeds 12 months or, exceptionally, 18 months, Directive 2018/957 required, by means of the insertion of Article 3(1a) into Directive 96/71, the application of almost all the terms and conditions of employment of the host Member State.

Hungary (Case C-620/18) and the Republic of Poland (Case C-626/18) each brought an action seeking the annulment of Directive 2018/957. Those Member States relied on, inter alia, pleas in law claiming the choice of an incorrect legal basis for the adoption of that directive, an infringement of Article 56 TFEU, guaranteeing the freedom to provide services, and an infringement of Regulation No 593/2008 [116] ('the Rome I Regulation'). By its judgments, the Court dismissed both actions in their entirety.

First, the Court stated that the EU legislature could rely, in the adoption of Directive 2018/957, on the same legal basis as that used for the adoption of Directive 96/71, namely Article 53(1) and Article 62 TFEU, [117] which permit, in particular, the adoption of directives seeking to make it easier to exercise the freedom to provide services.

As regards legislation which, like Directive 2018/957, amends existing legislation, it is important to take into account, for the purposes of identifying the appropriate legal basis, the existing legislation that it amends and, in particular, its objective and content. Further, where a legislative act has already coordinated the legislation of the Member States in a given EU policy area, the EU legislature cannot be denied the possibility of adapting that act to any change in circumstances or advances in knowledge. The Court referred, in that respect, to the successive enlargements of the European Union that have occurred since the entry into force of Directive 96/71, and to an impact assessment, produced in the context of the amendment of that directive. That assessment found that Directive 96/71 had given rise to an un-level playing field as between undertakings established in a host Member State and undertakings posting workers to that Member State, and to a segmentation of the labour market, because of a structural differentiation of rules on wages applicable to their respective workers. [118]

The Court stated that the fact that Article 53(1) and Article 62 TFEU empower the EU legislature to coordinate national rules which may, by reason of their heterogeneity, impede the freedom to provide services between Member States, cannot entail that that legislature need not also ensure due regard for, inter alia, the overarching objectives laid down in Article 9 TFEU. Those objectives include the requirements pertaining to the promotion of a high level of employment and the guarantee of adequate social protection.

116| Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6).

117| Directive 96/71 was adopted on the basis of Article 57(2) and Article 66 EC, which were replaced by the abovementioned articles of the TFEU.

118| Working document SWD(2016) 52 final of 8 March 2016, entitled 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and the Council amending Directive 96/71'.

Accordingly, in order best to achieve the objective pursued by Directive 96/71, given the changed circumstances, it was open to the EU legislature to adjust the balance inherent in that directive by strengthening the rights of posted workers in the host Member State so that competition between the undertakings posting workers to that Member State and the undertakings established in that State should develop on a more level playing field.

The Court also added, in that context, that Article 153 TFEU, which concerns solely the protection of workers and not the freedom to provide services within the European Union, could not constitute the legal basis of Directive 2018/957. Since that directive does not contain any harmonisation measures and does no more than coordinate the legislation of the Member States in relation to the posting of workers, prescribing the application of certain terms and conditions of employment laid down as mandatory by the host Member State, it cannot be contrary to the exception to the competences of the Union laid down in the initial paragraphs of Article 153 TFEU that is specified in Article 153(5) TFEU.

Secondly, the Court examined the plea in law concerning an alleged infringement of Article 56 TFEU, and, more specifically, the claim that Directive 2018/957 removes the competitive advantage, in terms of costs, enjoyed by the service providers established in some Member States. The Court stated in that connection that Directive 2018/957, in order to achieve its objective, undertakes a re-balancing of the factors affecting whether the undertakings established in the various Member States may compete with one another. However, that directive does not remove any competitive advantage which the service providers in some Member States may enjoy, since it in no way has the effect of eliminating all competition based on costs. The directive provides that posted workers are to be entitled to a set of terms and conditions of employment in the host Member State, including the constituent elements of remuneration rendered mandatory in that Member State. That directive does not, therefore, have any effect on the other cost components of the undertakings which post such workers, such as the productivity or efficiency of those workers, mentioned in recital 16 of that directive.

Thirdly, as regards the examination of the legality of the rules relating to the concept of 'remuneration' and the rules relating to long-term posting, laid down respectively in point (c) of the first subparagraph of Article 3(1) and in Article 3(1a) of the amended Directive 96/71, the Court recalled that, when an action is brought before the Courts of the European Union for the annulment of a legislative act such as Directive 2018/957, those courts must be satisfied solely, with regard to the substantive legality of that act, that it does not infringe the TEU and TFEU or the general principles of EU law and that it is not vitiated by a misuse of powers. With regard to judicial review of compliance with those conditions, the EU legislature has a broad discretion in areas, such as the legislation relating to the posting of workers, in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. In the light of that broad discretion, the Court held that, as regards the rule concerning long-term posting, the EU legislature did not commit any manifest error in holding that the consequence of a posting for a period in excess of 12 months should be that the personal situation of the posted workers concerned should to an appreciable degree more closely resemble that of workers employed by undertakings established in the host Member State.

Fourthly, the Court stated that the impact assessment, taken into consideration by the EU legislature in support of its position that the protection of posted workers provided for by Directive 96/71 was no longer appropriate, drew attention, in particular, to two circumstances which could reasonably have led the EU legislature to consider that the concept of 'minimum rates of pay' in the host Member State was no longer apt to ensure the protection of those workers. In the first place, the Court had adopted a broad interpretation

of that concept in the judgment in *Sähköalojen ammattiliitto*, [119] to include a number of elements in addition to the minimum wage provided for by the legislation of the host Member State. Consequently, it could be found, in the impact assessment, that the concept of 'minimum rates of pay', as interpreted by the Court, was significantly at odds with the widespread practice of undertakings posting workers to another Member State, that practice being to pay to those workers only the minimum wage. In the second place, it is clear from the impact assessment that, in the course of 2014, substantial differences in remuneration had come to light, in several host Member States, between workers employed by undertakings established in those Member States and the workers who were posted there.

Fifthly, the Court examined the alleged infringement of the Rome I Regulation by Article 3(1a) of Directive 96/71, as amended, which provides that, in the case of a posting that exceeds 12 months, the application of almost all the obligations laid down in the legislation of the host Member State to posted workers is to be mandatory, whatever the law applicable to the employment relationship. In that regard, the Court noted that Article 8(2) of the Rome I Regulation provides that, where a choice of law has not been made, the individual employment contract is to be governed by the law of the country in which or, failing that, from which the employee habitually carries out his or her work, that country not being deemed to change if the employee is temporarily employed in another country. However, Article 23 of the Rome I Regulation provides for the possibility of derogation from the conflict-of-law rules established by that regulation, where provisions of EU law lay down rules on the law applicable to contractual obligations in certain areas. Given both its nature and its content, Article 3(1a) of the amended Directive 96/71 constitutes a special conflict-of-law rule, within the meaning of Article 23 of the Rome I Regulation.

5. Free movement of capital

In the judgment in ***Commission* v *Hungary (Transparency of associations)*** (C-78/18, EU:C:2020:476), delivered on 18 June 2020, the Grand Chamber of the Court upheld the action for failure to fulfil obligations brought by the European Commission against that Member State. The Court held that, by imposing obligations of registration, declaration and publication on certain categories of civil-society organisations directly or indirectly receiving support from abroad exceeding a certain threshold and providing for the possibility of applying penalties to organisations that do not comply with those obligations, Hungary had introduced discriminatory and unjustified restrictions with regard to both the organisations at issue and the persons granting them such support. Those restrictions run contrary to the obligations on Member States in respect of the free movement of capital laid down in Article 63 TFEU and to Articles 7, 8 and 12 of the Charter, on the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.

In 2017, Hungary adopted a law which was presented as seeking to ensure the transparency of civil organisations receiving donations from abroad ('the Transparency Law'). [120] Under that law, those organisations have to register with the Hungarian courts as an 'organisation in receipt of support from abroad' where the amount of the donations sent to them from other Member States or from third countries over the course of a year exceeds a set threshold. When registering, they must also indicate, inter alia, the name of the donors whose support reached or exceeded the sum of HUF 500 000 (approximately EUR 1 400) and the exact amount of

119| Judgment of the Court of 12 February 2015, ***Sähköalojen ammattiliitto*** (C-396/13, EU:C:2015:86, paragraphs 38 to 70).

120| A külföldről támogatott szervezetek átláthatóságáról szóló 2017. évi LXXVI. törvény (Law No LXXVI of 2017 on the transparency of organisations which receive support from abroad).

the support. That information is then published on a freely accessible public electronic platform. Furthermore, the civil organisations concerned must state, on their homepage and in all their publications, that they are an 'organisation in receipt of support from abroad'.

The Commission brought an action for failure to fulfil obligations before the Court against Hungary, submitting that that law infringed both the TFEU and the Charter.

Ruling on the plea of inadmissibility raised by Hungary, the Court pointed out that the fact that the Commission makes the pre-litigation procedure subject to short time limits is not in itself capable of leading to the inadmissibility of the subsequent action for failure to fulfil obligations. Such a finding of inadmissibility is only to be made where the Commission's conduct made it more difficult for the Member State concerned to refute that institution's complaints and thus infringed the rights of the defence, which was not proven in that case.

As regards substance, the Court held, as a preliminary point, that Hungary was not justified in alleging that the Commission did not produce evidence of the Transparency Law's effects in practice on the free movement guaranteed under Article 63 TFEU. The existence of a failure to fulfil obligations may be proved, where it has its origin in the adoption of a legislative or regulatory measure whose existence and application are not contested, by means of a legal analysis of the provisions of that measure.

Going on to examine the merits of the Commission's complaints, the Court held, in the first place, that the transactions covered by the Transparency Law fell within the scope of the concept of 'movements of capital' in Article 63(1) TFEU and that the law in question constitutes a restrictive measure of a discriminatory nature. It establishes a difference in treatment between domestic and cross-border movements of capital which does not correspond to any objective difference in the situations at issue and which is apt to deter natural or legal persons established in other Member States or third countries from providing financial support to the organisations concerned. In particular, the Transparency Law applies, exclusively and in a targeted manner, to associations and foundations receiving financial support sent from other Member States or third countries, which it singles out by requiring them to declare themselves, to register and systematically to present themselves to the public under the designation 'organisations in receipt of support from abroad', subject to penalties which may extend to their dissolution. In addition, the measures which it lays down are such as to create a climate of distrust with regard to those associations and foundations. The public disclosure of information in relation to persons established in other Member States or in third countries which provide financial support to those associations and foundations is also such as to deter them from providing such support. Consequently, the obligations of registration, declaration and publication and the penalties provided for under the Transparency Law, viewed together, constitute a restriction on the free movement of capital, prohibited under Article 63 TFEU.

As regards the possible justification of that restriction, the Court pointed out that the objective consisting in increasing transparency in respect of the financing of associations may be considered to be an overriding reason in the public interest. Some civil-society organisations may, having regard to the aims which they pursue and the means at their disposal, have a significant influence on public life and public debate, warranting their financing being subject to measures intended to ensure its transparency, especially where such financing originates from third countries. However, in that case, Hungary did not demonstrate why the objective on which it relies, of increasing transparency in respect of the financing of associations, warrants the measures specifically implemented by the Transparency Law. In particular, those measures apply indiscriminately with regard to any financial support exceeding a certain threshold and to all the organisations falling within the scope of that law, instead of targeting those which are genuinely likely to have a significant influence on public life and public debate.

As to the grounds of public policy or public security mentioned in Article 65(1)(b) TFEU, the Court noted that such grounds may be relied upon in a given field in so far as the EU legislature has not completely harmonised the measures which seek to ensure their protection, and that they cover, in particular, the fight against money laundering, against the financing of terrorism and against organised crime. However, those grounds may not be relied upon unless there is a genuine, present and sufficiently serious threat to a fundamental interest of society. In that case, Hungary did not submit any argument such as to establish specifically that there is such a threat. Rather, the Transparency Law is founded on a presumption made on principle and indiscriminately that any financial support of civil organisations that is sent from abroad is intrinsically suspect.

The Court concluded that the restrictions stemming from the Transparency Law were not justified and therefore that Hungary had failed to fulfil its obligations under Article 63 TFEU.

In the second place, the Court examined whether the provisions of the Transparency Law complied with Articles 7, 8 and 12 of the Charter, with which a national measure must comply where the Member State which is the author of that measure intends to justify the restriction it contains by an overriding reason in the public interest or by a reason mentioned in the TFEU.

Concerning, first of all, the right to freedom of association, enshrined in Article 12(1) of the Charter, the Court pointed out that it constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life. In that case, the Court found that the measures provided for by the Transparency Law limited that right, inasmuch as they rendered significantly more difficult, in several respects, the action and the operation of the associations falling within the scope of that law.

As regards, next, the right to respect for private and family life, enshrined in Article 7 of the Charter, the Court recalled that it compelled public authorities to refrain from any unjustified interference in the life of persons. It observed that in that case the obligations of declaration and of publication laid down by the Transparency Law limited that right. So far as concerns the right to the protection of personal data laid down in Article 8(1) of the Charter, which is to some extent linked to the right to respect for private and family life, the Court noted that it precluded information in relation to identified or identifiable natural persons from being disseminated to third parties, whether that be to public authorities or the general public, unless that dissemination takes place in the context of fair processing meeting the requirements laid down in Article 8(2) of the Charter. Apart from in that situation, such dissemination, which constitutes the processing of personal data, must therefore be regarded as limiting the right to the protection of personal data guaranteed in Article 8(1) of the Charter. In that instance, the Transparency Law provides for the disclosure of personal data and Hungary did not submit that such disclosure was part of processing meeting the abovementioned requirements.

Addressing, lastly, the issue of the possible justification of the limitations to fundamental rights, the Court observed that, as was apparent from the analysis already carried out in the light of the TFEU, the provisions of the Transparency Law could not be justified by any of the objectives of general interest which Hungary relied upon.

VIII. Border controls, asylum and immigration

1. Border controls

By its judgment of 5 February 2020, ***Staatssecretaris van Justitie en Veiligheid (Signing-on of seamen in the Port of Rotterdam)*** (C-341/18, EU:C:2020:76), the Court held that, where a seaman who is a third-country national signs on with a ship in long-term mooring in a sea port of a State forming part of the Schengen Area, for the purpose of carrying out work on board, before leaving that port on that ship, an exit stamp must, where provided for in Regulation 2016/399 [121] ('the Schengen Borders Code'), be affixed to that seaman's travel documents not when he or she signs on, but when the master of that ship notifies the competent national authorities of the ship's imminent departure.

The judgment was given in proceedings between the Staatssecretaris van Justitie en Veiligheid (State Secretary for Justice and Security, Netherlands) and a number of seamen who are third-country nationals and who entered the Schengen Area through Schiphol International Airport in Amsterdam. Those proceedings concerned the refusal, confirmed by the State Secretary, to affix an exit stamp from the Schengen Area to the passports of those seamen at the time they signed on with ships in long-term mooring in the Port of Rotterdam. That refusal was based on the fact that the date on which the ships concerned would actually leave the port was not clear. According to the seamen, the effect of that refusal was that the duration of their authorised stay in the Schengen Area would run out more quickly, since they were authorised, in principle, to remain in that area only for a maximum period of 90 days within a 180-day period.

Against that background, the Court initially clarified when those seamen were to be regarded as having left the Schengen Area. In that respect, the Court first of all stated that it is apparent from the Schengen Borders Code that the mere fact that a person has crossed a 'border crossing point' within the meaning of that code cannot be understood as that person having exited the Schengen Area if he or she remains within the territory of a State forming part of that area. Furthermore, the Court emphasised the fact that the Schengen Borders Code is based on the premiss that checks on third-country nationals at a border crossing point will be followed shortly thereafter, even if the person concerned remains temporarily on the territory of the Member State concerned, by an actual crossing of the external border of the Schengen Area. From that perspective, a person reporting to a border crossing point of a sea port of a State forming part of the Schengen Area does not mean that he or she exits the Schengen Area, but reflects, at most, his or her intention to leave that area. Finally, the Court held that, so as not to allow a third-country national to remain in the Schengen Area beyond the maximum duration of his or her authorised stay, such a national cannot be regarded as having left the Schengen Area when he or she is still on the territory of a State forming part of that area. Thus, equating an exit from the Schengen Area with the crossing of an external border of that area, the Court concluded that a seaman who signs on with a ship in long-term mooring in the sea port of a State forming part of the Schengen Area, in order to stay in that port for all or part of the period during which he or she has been signed on to carry out his or her work on board, cannot be regarded as having left that area at the time of signing on.

The Court then went on clarify when, in a situation such as that at issue in the main proceedings, the exit stamp must be affixed by the competent national authorities. In that regard, it stated that, where it appears that checks on the persons concerned at a border crossing point will not be followed shortly thereafter by

121| 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). See, in particular, Article 11(1) of that regulation.

the crossing of an external border of the Schengen Area, it is important that the exit stamp is affixed to their travel documents by the competent national authorities at a time close to that crossing, in order to ensure that those authorities remain in a position to monitor actual compliance with short-stay limits in the Schengen Area. The Court then stated that a seaman recruited to work on board a ship in long-term mooring in a sea port of a State forming part of the Schengen Area, who does not intend, at the time of signing on with that ship, to leave that area shortly thereafter, is not therefore entitled to have an exit stamp affixed to his or her travel documents at the time of signing on. The Court held that it is only when the ship's departure from such a sea port to a place outside the Schengen Area becomes imminent that the exit stamp must be affixed to the travel documents. According to the Schengen Borders Code, it is the master of the ship who must notify the competent national authorities of that departure 'in due time', in accordance with the rules in force in the port concerned.

2. Asylum policy

Against the backdrop of the European migration crisis which has been holding sway for some years now and, in consequence, the arrival of a high number of applicants for international protection in the European Union, the Court continues to hear numerous cases relating to EU asylum policy. In that connection, five judgments deserve to be mentioned. Those judgments concern, first, the issue of placing applicants for international protection in transit zones and their relocation and, secondly, the procedures for lodging and processing applications for international protection.

2.1. Relocation of asylum applicants

In the judgment in ***Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)*** (C-715/17, C-718/17 and C-719/17, EU:C:2020:257), delivered on 2 April 2020, the Court upheld the actions for failure to fulfil obligations brought by the Commission against those three Member States seeking a declaration that, by failing to indicate at regular intervals, and at least every three months, an appropriate number of applicants for international protection who could be relocated swiftly to their respective territories and by consequently failing to implement their subsequent relocation obligations, those Member States had failed to fulfil their obligations under EU law. First, the Court concluded that there had been an infringement, by the three Member States concerned, of a decision adopted by the Council with a view to the relocation, on a mandatory basis, from Greece and Italy of 120 000 applicants for international protection to the other Member States of the European Union. [122] Secondly, the Court found that the Republic of Poland and the Czech Republic had also failed to fulfil their obligations under an earlier decision that the Council had adopted with a view to the relocation, on a voluntary basis, from Greece and Italy of 40 000 applicants for international protection to the other Member States of the European Union. [123] Hungary, for its part, was not bound by the relocation measures provided for under the latter decision.

122| Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80). The validity of that decision was the subject matter of Joined Cases C-643/15 and C-647/15, ***Slovakia and Hungary* v *Council***.

123| Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 239, p. 146).

In September 2015, having regard to the emergency situation linked to the arrival of third-country nationals in Greece and Italy, the Council adopted the abovementioned decisions ('the relocation decisions'). Pursuant to those decisions, [124] in December 2015, the Republic of Poland indicated that 100 persons could be swiftly relocated to its territory. However, it did not relocate those persons and it did not make any subsequent relocation commitment. Hungary, for its part, did not at any point indicate a number of persons who could be relocated to its territory pursuant to the relocation decision by which it was bound and did not relocate any persons. Lastly, in February and in May 2016, the Czech Republic indicated, pursuant to the relocation decisions, [125] that 50 persons could be relocated to its territory. Twelve persons were in fact relocated from Greece, but the Czech Republic did not make any subsequent relocation commitment.

By that judgment, the Court first of all rejected the argument raised by the three Member States concerned that the Commission's actions were inadmissible because, following the expiry of the period of application of the relocation decisions, on 17 and 26 September 2017 respectively, it was no longer possible for them to remedy the infringements alleged. In that connection, the Court recalled that an action for infringement is admissible where the Commission restricts itself to seeking a declaration as to the existence of the infringement alleged inter alia in situations, such as those at issue in those cases, in which the act of EU law whose infringement is alleged definitively ceased to be applicable after the expiry date of the period set in the reasoned opinion, namely 23 August 2017. Moreover, a declaration as to the failure to fulfil obligations is still of substantive interest, in particular, as establishing the basis of a responsibility that a Member State can incur, as a result of its default, as regards other Member States of the European Union or private parties.

As regards substance, the Republic of Poland and Hungary maintained inter alia that they were entitled to disapply the relocation decisions by virtue of Article 72 TFEU, according to which the provisions of the TFEU on the area of freedom, security and justice, which include in particular asylum policy, are 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. In that regard, the Court held that, inasmuch as Article 72 TFEU is a provision derogating from the general rules of EU law, it must be interpreted strictly. Thus, that article does not confer on Member States the power to depart from the provisions of EU law based on no more than reliance on the interests linked to the maintenance of law and order and the safeguarding of internal security, but requires them to prove that it is necessary to have recourse to that derogation in order to exercise their responsibilities on those matters.

In that context, the Court observed that, under the relocation decisions, national security and public order should be taken into consideration throughout the relocation procedure, until the actual transfer of the applicant for international protection. In that regard, the Court held that a wide discretion had to be accorded to the competent authorities of the Member States of relocation when they determine whether there are reasonable grounds for regarding a third-country national whose relocation is intended as a danger to their national security or public order. On that issue, the Court stated that the concept of 'danger to … national security or public order' within the meaning of the relocation decisions, [126] must be interpreted as covering both actual and potential threats to national security or public order. The Court nevertheless pointed out that, to rely on the abovementioned grounds, those authorities had to rely, following a case-by-case investigation, on consistent, objective and specific evidence that provides grounds for suspecting that the applicant in question represents an actual or potential danger. Consequently, it held that the arrangements provided by those decisions precluded, in the relocation procedure, a Member State from peremptorily

124| Article 5(2) of each of those decisions.

125| Article 5(2) of each of those decisions.

126| Article 5(4) and (7) of each of those decisions.

invoking Article 72 TFEU for the sole purposes of general prevention and without establishing any direct relationship with a particular case to justify suspending the implementation of or even ceasing to implement its obligations under those decisions.

Ruling subsequently on the plea derived by the Czech Republic from the malfunctioning of the relocation mechanism at issue, the Court held that it was not permissible if the objective of solidarity inherent to the relocation decisions and the binding nature of those acts was not to be undermined, for a Member State to be able to rely on its unilateral assessment of the alleged lack of effectiveness, or even the purported malfunctioning, of the relocation mechanism established by those acts in order to avoid any obligation to relocate people incumbent upon it under those acts. Lastly, drawing attention to the binding nature of the relocation decisions for the Czech Republic, as of their adoption and during their period of application, the Court stated that that Member State was required to comply with the relocation obligations imposed under those decisions irrespective of the provision of other types of aid to the Hellenic Republic and the Italian Republic.

2.2. Transit zones

In the judgment in ***Commission* v *Hungary (Reception of applicants for international protection)*** (C-808/18, EU:C:2020:1029), delivered on 17 December 2020, the Grand Chamber of the Court upheld the action for failure to fulfil obligations brought by the European Commission against that Member State.

In response to the migration crisis and to the ensuing arrival of large numbers of applicants for international protection, Hungary adapted its legislation on the right to asylum and return of illegally staying third-country nationals. Thus, a law of 2015 [127] provided, inter alia, for the creation of transit zones, situated at the Serbian-Hungarian border, [128] in which asylum procedures are applied. That law also introduced the concept of a 'crisis situation caused by mass immigration', leading, where such a situation is declared by the government, to the application of derogatory rules in the guise of general rules. In 2017, a new law [129] expanded the cases in which such a crisis situation could be declared and amended the provisions allowing derogation from the general provisions.

In 2015, the Commission had already expressed its doubts to Hungary as to the compatibility of its asylum legislation with EU law. The 2017 law raised additional concerns. The Commission criticised Hungary in particular for having, in disregard of the substantive and procedural safeguards provided for in Directive

127| Egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. törvény (Law No CXL of 2015 amending certain laws in the context of managing mass immigration) (*Magyar Közlöny* 2015/124).

128| The transit zones of Röszke and Tompa.

129| Határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes törvények módosításáról szóló 2017. évi XX. törvény (Law No XX of 2017 amending certain laws related to the strengthening of the procedure conducted in the guarded border area) (*Magyar Közlöny* 2017/39).

2013/32 [130] ('the Procedures Directive'), Directive 2013/33 [131] ('the Reception Directive') and Directive 2008/115 [132] ('the Return Directive'), restricted access to the international protection procedure, established a system of systematic detention of applicants for that protection and forcibly deported, to a strip of land at the border, illegally staying third-country nationals, without observing the guarantees provided for in the Return Directive. In that context, it brought an action for failure to fulfil obligations before the Court, seeking a declaration that a substantial part of Hungarian legislation in the area infringed certain provisions of those directives.

The Court upheld for the most part the Commission's action for failure to fulfil obligations.

As a preliminary point, the Court noted that it had already settled some of the issues raised by the action in its judgment in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, [133] delivered in the context of a reference for a preliminary ruling made by a Hungarian court. It also noted that, in order to comply with that judgment, Hungary had since closed its two transit zones. The Court emphasised, however, that that closure had no bearing on that action, the situation falling to be assessed at the date laid down by the Commission in its reasoned opinion for addressing shortcomings, namely 8 February 2018.

In the first place, the Court held that Hungary had failed to fulfil its obligation to ensure effective access to the procedure for granting international protection, [134] in so far as third-country nationals wishing to access, from the Serbian-Hungarian border, that procedure were in practice confronted with the virtual impossibility of making their application. That failure stems from a combination of the national legislation, according to which applications for international protection may, as a general rule, be made only in one of the two transit zones, and a consistent and generalised administrative practice, established by the Hungarian authorities, consisting in drastically limiting the number of applicants authorised to enter those zones each day. For the Court, the existence of that practice was sufficiently demonstrated by the Commission, which relied on a number of international reports. In that context, the Court recalled that the making of an application for international protection, prior to its registration, lodging and examination, is an essential step in the procedure for granting that protection and that Member States cannot delay it unjustifiably. On the contrary, Member States must ensure that the persons concerned are able to make an application, including at the borders, as soon as they declare their wish of doing so.

In the second place, the Court confirmed, as it recently held in its judgment in *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, that the obligation on applicants for international protection to remain in one of the transit zones for the duration of the procedure for examination of their application constitutes detention, within the meaning of the Reception Directive. [135] That matter having been clarified, the Court found that this system of detention had been established outside the cases set out in EU law and without observance of the guarantees which must normally govern it.

130| 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).

131| 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).

132| 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).

133| Judgment of the Court of 14 May 2020, ***Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*** (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367).

134| That obligation is apparent from Article 6 of the Procedures Directive, read in conjunction with Article 3 thereof.

135| Article 2(h) of that directive.

First, the Court recalled that the situations in which the detention of an applicant for international protection is authorised are listed exhaustively in the Reception Directive. [136] After analysing each of those situations, however, it concluded that the Hungarian system was not covered by any of them. The Court examined in particular the situation in which a Member State may detain an applicant for international protection in order to rule on his or her right of entry into its territory, that detention being able to take place in the context of procedures applied at the border, with a view to verifying, before granting a right of entry, whether the application is not inadmissible or whether it is unfounded for certain specific reasons. [137] The Court considered, however, that the conditions in which detention is authorised in the context of those border procedures were not fulfilled in that case.

Secondly, the Court emphasised that the Procedures and Reception Directives require, inter alia, that detention be ordered in writing with reasons, [138] that the specific needs of applicants identified as vulnerable and in need of special procedural guarantees be taken into account, in order that they receive 'adequate support', [139] and that minors be placed in detention only as a last resort. [140] Owing, in particular, to its systematic and automatic nature, however, the regime governing detention in the transit zones provided for under Hungarian legislation, which applies to all applicants other than unaccompanied minors under 14 years of age, does not allow applicants to enjoy those guarantees.

Moreover, the Court rejected Hungary's argument that the migration crisis justified derogating from certain rules in the Procedures and Reception Directives, with a view to maintaining public order and preserving internal security, in accordance with Article 72 TFEU. [141] In that regard, it recalled that that article must be interpreted strictly and considered that Hungary had not demonstrated sufficiently its necessity of having had recourse to it. In addition, the Court pointed out that the Procedures and Reception Directives already take into account the situation where a Member State must face a very significant increase in the number of applications for international protection, since they provide, by specific provisions, for the possibility of departing from some of the rules imposed in normal times.

In the third place, the Court held that Hungary had failed to fulfil its obligations under the Return Directive, in so far as Hungarian legislation allowed for the removal of third-country nationals staying illegally in the territory without prior compliance with the procedures and safeguards provided for in that directive. [142] On that point, the Court noted that those nationals were forcibly escorted, by the police, from the other side of a fence erected a few metres from the border with Serbia, to a strip of land devoid of any infrastructure. According to the Court, such forced deportation is equivalent to removal, within the meaning of the Return Directive, the persons concerned in practice having no choice other than to leave Hungarian territory afterwards and to go to Serbia. In that context, the Court recalled that an illegally staying third-country national falling within the scope of the Return Directive must be the subject of a return procedure, in compliance with the substantive and procedural safeguards established by that directive, before his or her

136| First subparagraph of Article 8(3) of that directive.

137| Article 8(3), first subparagraph, point (c), of the Reception Directive and Article 43 of the Procedures Directive.

138| Article 9(2) of the Reception Directive.

139| Article 24(3) of the Procedures Directive.

140| Article 11(2) of the Reception Directive.

141| That article provides that the provisions which appear under Title V of the TFEU, relating to the area of security, freedom and justice, are 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.

142| Those safeguards are laid down inter alia in Article 5 and Articles 6(1), 12(1) and 13(1) of the Return Directive.

removal, where appropriate, is carried out, it being understood that forced removal is to take place only as a last resort. Furthermore, for reasons similar to those set out above, the Court rejected Hungary's line of argument according to which it was allowed, pursuant to Article 72 TFEU, to derogate from the substantive and procedural safeguards established by the Return Directive.

In the fourth place, the Court considered that Hungary had not respected the right, conferred, in principle, by the Procedures Directive on any applicant for international protection, to remain in the territory of the Member State concerned after the rejection of his or her application, until the time limit within which to bring an appeal against that rejection has expired or, if an appeal has been brought, until a decision has been taken on it. [143] The Court noted that, when a 'crisis situation caused by mass immigration' has been declared, Hungarian legislation makes the exercise of that right subject to detailed rules not in conformity with EU law, in particular the obligation to remain in the transit zones, which resembles detention contrary to the Procedures and Reception Directives. On the other hand, when such a situation has not been declared, the exercise of that right is made subject to conditions which, while not necessarily contrary to EU law, are not defined in a sufficiently clear and precise manner to enable the persons concerned to ascertain the exact extent of their right and the compatibility of those conditions with the Procedures and Reception Directives to be assessed.

2.3. Lodging and processing of asylum applications

In the judgment in ***Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*** (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), delivered on 14 May 2020 in an urgent preliminary-ruling procedure, the Grand Chamber of the Court ruled on numerous questions concerning the interpretation of the Return, Procedures and Reception Directives in relation to the Hungarian legislation on the right to asylum and the return of illegally staying third-country nationals.

Those proceedings concerned Afghan nationals (Case C-924/19 PPU) and Iranian nationals (Case C-925/19 PPU) who, having arrived in Hungary via Serbia, lodged applications for asylum from the Röszke transit zone, on the Serbian-Hungarian border. Pursuant to Hungarian law, those applications were dismissed as inadmissible and decisions requiring the applicants to return to Serbia were adopted. However, the Republic of Serbia refused to readmit the persons concerned into its territory, on the ground that the conditions set out in the Agreement on readmission concluded with the European Union [144] were not met. Following that decision of the Republic of Serbia, the Hungarian authorities did not examine the substance of the applications referred to above, but amended the country of destination mentioned in the initial return decisions, replacing it with the respective country of origin of the persons concerned. Those persons then lodged objections against the amending decisions which were rejected. Although no provision is made for such a remedy under Hungarian law, the applicants brought an action before a Hungarian court for annulment of the decisions rejecting their objections to those amending decisions and to have the asylum authority ordered to conduct a new asylum procedure. They also brought actions for failure to act relating to their detention and continuing presence in the Röszke transit zone. They were initially obliged to stay in the sector of that transit zone reserved for applicants for asylum before being required, several months later, to stay in the sector of that zone reserved for third-country nationals whose asylum applications have been rejected, the sector which they were in when the request for a preliminary ruling was made.

143| Article 46(5) of the Procedures Directive.

144| Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to the Council Decision of 8 November 2007 (OJ 2007 L 334, p. 45).

In the first place, the Court examined the situation of the persons concerned in the Röszke transit zone, in the light of the rules governing both the detention of applicants for international protection (the Procedures and Reception Directives) and that of illegally staying third-country nationals (the Return Directive). In that regard, the Court first held that detaining the persons concerned in that transit zone must be regarded as a detention measure. In reaching that conclusion, it stated that the concept of 'detention', which has the same meaning in the context of the various directives cited above, refers to a coercive measure which presupposes the deprivation, and not a mere restriction, of the freedom of movement of the person concerned and isolates that person from the rest of the population, by requiring him or her to remain at all times within a limited and closed area. According to the Court, the conditions prevailing in the Röszke transit zone amount to a deprivation of liberty, inter alia because the persons concerned cannot lawfully leave that zone of their own free will in any direction whatsoever. In particular, they may not leave that zone for Serbia since such an attempt (i) would be considered unlawful by the Serbian authorities and would therefore expose them to penalties and (ii) might result in their losing any chance of obtaining refugee status in Hungary.

The Court then examined whether that detention complies with the requirements imposed by EU law. As regards the requirements related to detention, the Court held that, under Article 8 of the Reception Directive and Article 15 of the Return Directive respectively, neither an applicant for international protection nor a third-country national who is the subject of a return decision may be detained solely on the ground that he or she cannot meet his or her own needs. It added that Articles 8 and 9 of the Reception Directive and Article 15 of the Return Directive respectively preclude an applicant for international protection or a third-country national who is the subject of a return decision from being detained without the prior adoption of a reasoned decision ordering that detention and without the need for and proportionality of such a measure having been examined.

The Court also provided clarification on the requirements related to the continuation of detention and, more specifically, to the duration of detention. As regards applicants for international protection, it held that Article 9 of the Reception Directive does not require Member States to lay down a maximum period for continuing to detain such applicants. However, their national law must ensure that the detention lasts only for as long as the ground for detention remains applicable and that the administrative procedures associated with that ground are executed diligently. By contrast, in the case of third-country nationals who are the subject of a return decision, it is apparent from Article 15 of the Return Directive that their detention – even where it is extended – may not exceed 18 months and may be maintained only as long as removal arrangements are ongoing and are executed with due diligence.

Furthermore, as regards the detention of applicants for international protection in the particular context of a transit zone, it is also necessary to take account of Article 43 of the Procedures Directive. It follows from that provision that Member States may require applicants for international protection to stay at their borders or in one of their transit zones in order, inter alia, to examine, before taking a decision on the rights of entry of those applicants into their territory, whether their applications are admissible. A decision must nevertheless be adopted within four weeks, failing which the Member State concerned must grant the applicant the right to enter its territory and process his or her application according to the ordinary procedure of civil law. Therefore, although the Member States may, in the context of a procedure referred to in that Article 43, detain applicants for international protection who present themselves at their borders, that detention may not under any circumstances exceed four weeks from the date on which the application was lodged.

Lastly, the Court held that the lawfulness of a detention measure, such as the detention of a person in a transit zone, must be amenable to judicial review under Article 9 of the Reception Directive and Article 15 of the Return Directive respectively. Therefore, in the absence of national rules providing for such a review, the principle of the primacy of EU law and the right to effective judicial protection require the national court hearing the case to declare that it has jurisdiction to rule on the matter. Moreover, if, following its review,

the national court considers that the detention measure at issue is contrary to EU law, that court must be able to substitute its decision for that of the administrative authority which adopted the measure and order the immediate release of the persons concerned, or possibly an alternative measure to detention.

Furthermore, an applicant for international protection whose detention, which has been found to be unlawful, has ended must be able to rely on the material reception conditions to which he or she is entitled during the examination of his or her application. In particular, it is apparent from Article 17 of the Reception Directive that, if the applicant has no means of subsistence, he or she is entitled to either a financial allowance enabling him or her to find accommodation, or to housing in kind. To that end, Article 26 of the Reception Directive requires that such an applicant be able to bring an action before a court aimed at guaranteeing that right to accommodation, that court having the possibility of granting interim measures pending its final decision. If no other court has jurisdiction under national law, the principle of primacy of EU law and the right to effective judicial protection require, once again, the court seised to declare that it has jurisdiction to hear the action aimed at guaranteeing that right to accommodation.

In the second place, the Court ruled on the jurisdiction of the national court to hear an action for annulment brought by the persons concerned against the decisions rejecting their objections to the amendment of the country of return. In that regard, the Court stated that a decision amending the country of destination mentioned in the initial return decision is so substantial that it must be regarded as a new return decision. Under Article 13 of the Return Directive, the addressees of such a decision must then have an effective remedy against it, which must also be consistent with the right to effective judicial protection guaranteed by Article 47 of the Charter. To that end, the Court observed that, although Member States may make provision for return decisions to be challenged before authorities other than judicial authorities, the addressee of a return decision adopted by an administrative authority must, however, at a certain stage of the procedure, be able to challenge its lawfulness before at least one judicial body. In that case, the Court observed that the persons concerned could challenge the decisions taken by the aliens-policing authority amending their country of return only by lodging an objection before the asylum authority and that no subsequent judicial review was guaranteed. The asylum authority, which operates under the authority of the minister for policing, is part of the executive, so that it does not satisfy the condition of independence required of a court for the purpose of Article 47 of the Charter. In such circumstances, the principle of the primacy of EU law, as well as the right to effective judicial protection, require the national court hearing the case to declare that it has jurisdiction to hear the action seeking to challenge a return decision amending the initial country of destination, by disapplying, if necessary, any national provision which might prohibit it from doing so.

In the third place, the Court examined the ground of inadmissibility laid down in Hungarian legislation used to justify the rejection of the applications for asylum. That legislation allows such rejection where the applicant has arrived in Hungary via a country classified as a 'safe transit country' in which he or she is not exposed to persecution or to a risk of serious harm, or in which a sufficient degree of protection is guaranteed. Recalling its recent case-law, [145] the Court stated that such a ground is contrary to Article 33 of the Procedures Directive, before specifying the consequences thereof for the asylum procedure, in so far as the rejection of the asylum applications of the persons concerned, which is based on that unlawful ground, has already been confirmed by a final judicial decision. According to the Court, in such a case, it is apparent from the Procedures Directive, in conjunction, in particular, with Article 18 of the Charter, which guarantees the right to asylum, that the authority which has rejected the asylum applications is not required to review them of its own motion. However, the persons concerned may still lodge a new application, which will be classified as a 'subsequent application' for the purpose of the Procedures Directive. In that regard, although Article 33 of that directive provides that a subsequent application which does not refer to any new elements or findings may be regarded

145| Judgment of the Court of 19 March 2020, ***Bevándorlási és Menekültügyi Hivatal (Tompa)*** (C-564/18, EU:C:2020:218).

as inadmissible, the existence of a judgment of the Court finding that a ground of inadmissibility provided for in national legislation is contrary to EU law must be regarded as a new element. In addition, more generally, the Court held that the ground of inadmissibility provided for in Article 33 of that directive is not applicable where the asylum authority finds that the definitive rejection of the first application for asylum was contrary to EU law. That is necessarily the case where that conflict arises, as in that case, from a judgment of the Court of Justice or where it has been found incidentally by a national court.

In the judgment in ***Ministerio Fiscal (Authority likely to receive an application for international protection)*** (C-36/20 PPU, EU:C:2020:495), delivered on 25 June 2020 in an urgent preliminary-ruling procedure, the Court held that examining magistrates called upon to adjudicate on the detention of a third-country national without a legal right of residence fall within the concept of 'other authorities', within the meaning of the second subparagraph of Article 6(1) of the Procedures Directive, which are likely to receive applications for international protection, even though they are not competent, under national law, to register such applications. On that basis, examining magistrates are required to inform the applicant as to the specific procedures for lodging such an application. The Court also ruled that the fact that it is not possible to find accommodation in a humanitarian reception centre cannot justify holding an applicant for international protection in detention.

On 12 December 2019, a vessel carrying 45 third-country nationals, including VL, a Malian national, was intercepted by the Spanish Marine Rescue Service off the coast of Gran Canaria (Spain), where the third-country nationals were taken. The following day, an administrative authority ordered their removal and made a request for detention before the Juzgado de Instrucción nº 3 de San Bartolomé de Tirajana (Court of Preliminary Investigation No 3 of San Bartolomé de Tirajana, Spain). Once that court had informed him of his rights, VL stated his intention to apply for international protection. On account of the lack of available accommodation in a humanitarian reception centre, that court ordered that VL be detained in a detention centre for foreign nationals, where his application for international protection was to be processed. VL then appealed against the detention decision before that court, on the ground that it was incompatible with the Procedures Directive and the Reception Directive. In those appeal proceedings, the court made a reference to the Court of Justice for a preliminary ruling, inter alia, on whether it fell within the concept of 'other authorities', within the meaning of the second subparagraph of Article 6(1) of the Procedures Directive, and, accordingly, whether it was likely to receive applications for international protection. It also asked the Court to rule on the lawfulness of holding VL in detention.

In the first place, the Court stated that the literal interpretation of the term 'other authorities which are likely to receive such applications [for international protection]', within the meaning of that provision, and in particular the choice of the adjective 'other', testifies to the fact that the EU legislature intended to adopt a broad definition of those authorities which, without being competent to register applications for international protection, may nevertheless receive such applications. That phrase can, therefore, encompass both administrative and judicial authorities. That finding is supported by a contextual interpretation of that provision. One of the objectives of the Procedures Directive is to guarantee effective access, namely access that is as straightforward as possible, to the procedure for granting international protection. To prohibit a judicial authority from receiving applications for international protection would be to hinder the achievement of that objective, in particular with regard to very rapid procedures in which the applicant's hearing before a court or tribunal may be the first opportunity to exercise the right to make such an application. Consequently, the Court held that examining magistrates called upon to adjudicate on the detention of a third-country national without a legal right of residence with a view to his or her refoulement are among the 'other authorities' which are likely to receive applications for international protection.

In the second place, the Court examined the obligations incumbent on examining magistrates as 'other authorities'. It found that it follows from the second and third subparagraphs of Article 6(1) of the Procedures Directive, first, that examining magistrates are required to inform applicants for international protection of the specific procedures for lodging such an application. Accordingly, examining magistrates are acting in

accordance with the requirements of that directive where, on their own initiative, they inform third-country nationals of their right to apply for international protection. Secondly, where a third-country national has expressed his or her intention to make such an application before an examining magistrate, the latter must send the file to the competent authority for the purposes of registering that application so that that third-country national may benefit from the material reception conditions and health care provided for in Article 17 of the Reception Directive.

In the third place, the Court examined the compatibility of VL's detention with the Procedures and Reception Directives. It noted, first, that it follows from those directives that it is appropriate to adopt a broad definition of the term 'applicant for international protection', with the effect that a third-country national acquires that status from the point when he or she makes such an application. The Court also pointed out that the act of 'making' an application for international protection does not entail any administrative formalities. Accordingly, the fact that a third-country national has expressed his or her intention to apply for international protection before 'other authorities', such as an examining magistrate, is sufficient to confer the status of applicant for international protection on that person.

Consequently, the Court noted that, as from the date on which VL made his application for international protection, the conditions for his detention were governed by Article 26(1) of the Procedures Directive and Article 8(1) of the Reception Directive. It follows from a combined reading of those provisions that Member States cannot hold a person in detention on the sole ground that he or she is an applicant for international protection, and that the grounds for and conditions of detention, together with the guarantees given to applicants held in detention, must comply with the Reception Directive. Inasmuch as the first subparagraph of Article 8(3) of that directive lists exhaustively the various grounds which may justify recourse to detention and the fact that it is not possible to find a place in a humanitarian reception centre for an applicant for international protection does not correspond to any of the six grounds for detention referred to in that provision, VL's detention was, in that case, contrary to the requirements of the Reception Directive.

In the judgment in ***Addis*** (C-517/17, EU:C:2020:579), delivered on 16 July 2020, the Court held that Articles 14 and 34 of the Procedures Directive preclude legislation under which failure to comply with the obligation to give an applicant for international protection the opportunity of a personal interview before the adoption of a decision declaring the application to be inadmissible on the ground that international protection has already been granted by another Member State [146] does not lead to that decision being annulled and the case being remitted to the determining authority. According to the Court, it would be otherwise only where the applicant, in the appeal procedure against such a decision, has the opportunity to set out in person all of his or her arguments against the decision in a hearing which complies with the applicable conditions and fundamental guarantees set out in Article 15 of the directive, and those arguments are not capable of altering that decision.

In September 2011, the applicant in the main proceedings, who claimed to be an Eritrean national, entered Germany and applied for refugee status there. Since it was not, at first, possible to identify him on the basis of fingerprints owing to mutilation of his fingers, it was not until January 2013 that it became clear that the applicant in the main proceedings had previously obtained refugee status in Italy. By a decision of 18 February 2013, the Bundesamt für Migration und Flüchtlinge (Federal Office for Migration and Refugees, Germany; 'the Office'), first, rejected as inadmissible the application for asylum submitted by the applicant in the main proceedings and, secondly, ordered his deportation to Italy. The action brought against that decision was dismissed at first instance. However, on appeal, the measure ordering deportation to Italy was annulled since it had not been established that the Italian Republic remained prepared to take back the applicant after

146| Article 33(2)(a) of the Procedures Directive.

the expiry on 5 February 2015 of the residence permit and travel document issued to him by the Italian authorities. The appeal was dismissed as to the remainder. The applicant in the main proceedings brought an appeal against that judgment before the Bundesverwaltungsgericht (Federal Administrative Court), claiming, inter alia, that the Office was not entitled to dispense with conducting a personal interview with him before it adopted the decision of 18 February 2013.

The Court stated, first, that the Procedures Directive sets out unequivocally the obligation to give an applicant for international protection the opportunity of a personal interview before a decision is taken on his or her application and that that obligation applies to decisions on the admissibility of the application as well as to decisions on substance.

The Court pointed out that, where the determining authority is inclined to find that an application for international protection is inadmissible on the ground that international protection has already been granted by another Member State, the personal interview on the admissibility of the application is intended particularly to give the applicant the opportunity to present all of the factors which differentiate his or her personal situation. That enables the determining authority to evaluate the applicant's specific situation as well as the degree of his or her vulnerability, and to rule out the possibility that the applicant, if transferred to that other Member State, would be exposed to a substantial risk of suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter.

The Court noted, in that regard, that where the authorities of a Member State have available to them evidence produced by the applicant in order to establish the existence of such a risk in the Member State that has previously granted international protection, those authorities are required to assess, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights that is guaranteed by EU law, whether there are deficiencies which may be systematic or generalised, or which may affect certain groups of people. Furthermore, it cannot be entirely ruled out that an applicant for international protection may be able to demonstrate the existence of exceptional circumstances which are unique to him or her and which would mean that being sent back to the Member State which previously granted international protection would expose him or her, because of his or her particular vulnerability, to a risk of treatment that is contrary to Article 4 of the Charter.

Next, the Court noted that an exception to the rule requiring that a personal interview be conducted with the applicant on the admissibility of the application for international protection may be made only in the case of a subsequent application and that that was not the situation in that case.

Finally, as regards the legal consequences of a failure to comply with the obligation at issue to conduct a personal interview, the Court noted that, since the Procedures Directive does not expressly govern those legal consequences, they are governed by national law, provided that the principles of equivalence and effectiveness are observed. There was nothing before the Court capable of raising any doubts as to the compliance with the principle of equivalence of legislation such as that at issue in the main proceedings. The Court pointed out, as regards the principle of effectiveness, the fundamental importance which the EU legislature attaches to the personal interview in the asylum procedure, already at first instance, before the determining authority. In addition, it stated that the EU legislature attaches fundamental importance not only to such an interview being held, but also to the conditions under which that interview is to take place, in order to ensure that all applicants receive, depending on their gender and particular circumstances, appropriate procedural guarantees.

The Court held that, in those circumstances, it would be incompatible with the effectiveness of the Procedures Directive if the court or tribunal hearing the appeal were able to uphold a decision, which the determining authority adopted in breach of the obligation to give the applicant for international protection the opportunity of a personal interview, without itself conducting a hearing of the applicant in accordance with the conditions

and fundamental guarantees applicable in the case in question. Without such a hearing, the applicant's right to a personal interview under conditions which ensure appropriate confidentiality and allow the applicant to present the grounds for his or her application in a comprehensive manner would not be guaranteed at any stage of the asylum procedure.

The Court pointed out that the absence of a hearing cannot be compensated for by the opportunity that the applicant has in his or her appeal to set out in writing factors which call into question the validity of the decision declaring that his or her application for international protection is inadmissible, or by the obligation on the determining authority and on the court or tribunal hearing the appeal to investigate of its own motion all of the relevant facts. It stated that it was for the referring court to determine whether, in the procedure in the main proceedings, the opportunity was, or could still be, given to the applicant to be heard in full compliance with the applicable conditions and fundamental guarantees, in order to allow him to present his view in person and in a language with which he was familiar.

3. Immigration policy: visa applications

By its judgment in ***Minister van Buitenlandse Zaken*** (Joined Cases C-225/19 and C-226/19, EU:C:2020:951), delivered on 24 November 2020, the Grand Chamber of the Court ruled on a case in which an Egyptian national, living in Egypt (Case C-225/19), and a Syrian national, living in Saudi Arabia (Case C-226/19), had applied to the Minister van Buitenlandse Zaken (Minister for Foreign Affairs, Netherlands; 'the Minister') for 'Schengen' visas [147] in order to visit members of their respective families living in the Netherlands. Their applications were refused however and, in accordance with the Visa Code, that refusal was notified to them by means of a standard form, [148] containing 11 boxes to be ticked depending on the reason for the refusal. In that case, since the sixth box had been ticked, the visa refusal was based on the fact that the persons concerned had been considered to be a threat to public order, internal security, public health or the international relations of one of the Member States. [149] That refusal was the result of objections raised by Hungary and the Federal Republic of Germany, which had been consulted beforehand by the Netherlands authorities in the context of the procedure laid down by the Visa Code. [150] However, the forms sent to the persons concerned did not give any indication of the identity of those Member States, the specific ground for refusal out of the four possibilities (threat to public order, internal security, public health or the international relations of one of the Member States) or the reasons they had been considered to be such a threat.

The persons concerned lodged complaints with the Minister, which were rejected. They then brought actions [151] before the rechtbank Den Haag, zittingsplaats Haarlem (District Court, The Hague, sitting in Haarlem, Netherlands), arguing that they were deprived of effective judicial protection, since they were not able to challenge those decisions as to their substance. That court decided to ask the Court of Justice, first, about

147| Visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period. That visa is issued by a Member State, in accordance with Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the Visa Code').

148| Form contained in Annex VI to the Visa Code and referred to in Article 32(2) of that code.

149| Ground for refusal set out in Article 32(1)(a)(vi) of the Visa Code.

150| Prior consultation procedure laid down in Article 22 of the Visa Code.

151| Appeal provided for in Article 32(3) of the Visa Code.

the statement of reasons that must accompany a decision refusing a visa, where that refusal is justified by an objection raised by another Member State, and, secondly, about the possibility of reviewing that ground for refusal, in the context of an appeal against a decision refusing a visa, and the scope of such review.

In the first place, the Court held that a Member State which has adopted a decision refusing a visa because of an objection raised by another Member State must indicate, in that decision, the identity of the latter Member State and the specific ground for refusal based on that objection, accompanied, where appropriate, by the essence of the reasons for that objection.

In that regard, the Court pointed out that the characteristics of an appeal against a decision refusing a visa must be determined in accordance with Article 47 of the Charter, which guarantees the right to an effective remedy. Under that provision, the person concerned must be able to ascertain the reasons upon which the decision taken against him or her is based, either by reading the decision itself or by requesting and obtaining notification of those reasons. In addition, the Court stated that, even though the statement of reasons corresponding to the sixth box on the standard form is predefined, the competent national authority must indicate the necessary information in the section entitled 'Remarks'. Furthermore, it noted that there is a new standard form in which the various possible grounds for refusal, which were previously referred to indiscriminately, are now set out separately. [152]

In the second place, the Court held that the courts of a Member State which has adopted a decision refusing a visa because of an objection raised by another Member State cannot examine the substantive legality of that objection. That is why the Member State which has adopted the decision refusing a visa must also specify, in that decision, the authority which the applicant may contact in order to ascertain the remedies available to that end in the Member State which raised an objection.

In reaching that conclusion, the Court noted, first of all, that the purpose of the judicial review carried out by the courts of the Member State which has adopted the decision refusing a visa is indeed to examine the legality of that decision. However, the competent national authorities enjoy a wide discretion in the examination of visa applications, as regards the conditions for applying the grounds for refusal laid down in the Visa Code and the evaluation of the relevant facts. The judicial review of that discretion is therefore limited to ascertaining whether the contested decision rests on a sufficiently solid factual basis and verifying that it is not vitiated by a manifest error. In that regard, where the refusal of a visa is justified by the fact that another Member State has objected to the issuing of that visa, those courts must be able to verify that the procedure for prior consultation of the other Member States described in the Visa Code has been applied correctly and, in particular, to check whether the applicant was correctly identified as the subject of the objection concerned. Moreover, those courts must be able to verify that the procedural guarantees, such as the obligation to state reasons, have been respected. However, the review of the merits of the objection raised by another Member State is a matter for the national courts of that other Member State.

152| Annex III to Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation No 810/2009 (OJ 2019 L 188, p. 25).

IX. Judicial cooperation in civil matters

1. Regulations No 44/2001 and No 1215/2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

In the judgment in ***Rina*** (C-641/18, EU:C:2020:349), delivered on 7 May 2020, the Court held, first, that an action for damages, brought against private-law corporations engaged in the classification and certification of ships on behalf of and upon delegation from a third State, falls within the concept of 'civil and commercial matters', within the meaning of Article 1(1) of Regulation No 44/2001 [153] ('the Brussels I Regulation') and, therefore, within the scope of that regulation, provided that that classification and certification activity is not exercised under public powers, within the meaning of EU law. Secondly, the Court held that the principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court finds that such corporations have not had recourse to public powers within the meaning of international law.

In 2006, the vessel *Al Salam Boccaccio'98*, sailing under the flag of the Republic of Panama, sank in the Red Sea with the loss of over 1 000 lives. Relatives of the victims and survivors of the sinking brought an action before the Tribunale di Genova (District Court, Genoa, Italy) against Rina SpA and Ente Registro Italiano Navale ('the Rina companies'), that is to say, against the companies which carried out the classification and certification of the ship which sank and which have their seat in Genoa. The applicants claimed compensation for the pecuniary and non-pecuniary losses stemming from the Rina companies' civil liability, arguing that the classification and certification operations were the cause of the sinking. The Rina companies contended that the court seised lacked jurisdiction, relying on the principle of immunity from jurisdiction, since the classification and certification operations which they conducted were carried out upon delegation from the Republic of Panama and, therefore, were a manifestation of the sovereign powers of the delegating State. The court seised, raising the question of the jurisdiction of the Italian courts, referred a question for a preliminary ruling to the Court of Justice.

In the first place, the Court considered the interpretation of the concept of 'civil and commercial matters' within the meaning of Article 1(1) of the Brussels I Regulation, in the light of the ship classification and certification activities carried out by the Rina companies upon delegation from and on behalf of the Republic of Panama, in order to ascertain whether the Italian courts had jurisdiction under Article 2(1) of that regulation. [154] The Court, first, recalled that, although certain actions between a public authority and a person governed by private law may come within the scope of the Brussels I Regulation where the legal proceedings relate to acts performed without exercising public powers (*iure gestionis*), the position is otherwise where the public authority is acting in the exercise of its public powers (*iure imperii*). In that regard, the Court found that it is irrelevant that certain activities were carried out upon delegation from a State: the mere fact that certain

153| 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). That provision states, inter alia, that that regulation is to apply in civil and commercial matters.

154| Under that provision, persons domiciled in a Member State are, whatever their nationality, as a rule to be sued in the courts of that Member State.

powers are delegated by an act of a public authority does not imply that those powers are exercised *iure imperii*. The same is true of the fact that the operations at issue were carried out on behalf of and in the interest of the Republic of Panama, since the fact of acting on behalf of the State does not always imply the exercise of public powers. Furthermore, the fact that certain activities have a public purpose does not, in itself, constitute sufficient evidence to classify them as being carried out *iure imperii*. The Court emphasised therefore that, in order to determine whether the operations at issue in the main proceedings were carried out in the exercise of public powers, the relevant criterion was the recourse to powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals.

In that regard, the Court found that the classification and certification operations carried out by the Rina companies consisted solely in establishing whether the vessel examined met the requirements laid down by the applicable legislative provisions and, if so, in issuing the corresponding certificates. The interpretation and choice of the applicable technical requirements were for their part reserved to the authorities of the Republic of Panama. Admittedly, checks of the ship by a classification and certification society may, where appropriate, result in the certificate being withdrawn on the ground that the ship does not comply with those requirements. However, such a withdrawal does not stem from the decision-making power of those companies, which operate within a pre-defined regulatory framework. If, following the withdrawal of a certificate, a ship is no longer able to sail, that is because of the sanction which is imposed by law. Consequently, the Court concluded that, subject to the checks to be carried out by the referring court, the classification and certification operations carried out by the Rina companies could not be regarded as being carried out in the exercise of public powers within the meaning of EU law.

In the second place, the Court examined the possible effect, for the purposes of the applicability of the Brussels I Regulation, of the plea based on the principle of customary international law concerning immunity from jurisdiction. The Court noted that it had already ruled that, in the present state of international law, the immunity of States from jurisdiction is not absolute, but is generally recognised where the dispute concerns sovereign acts performed *iure imperii*. By contrast, it may be excluded if the legal proceedings relate to acts which do not fall within the exercise of public powers. The immunity from jurisdiction of bodies governed by private law, such as the Rina companies, is not generally recognised as regards classification and certification operations for ships, where they have not been carried out *iure imperii* within the meaning of international law. Consequently, the Court concluded that that principle does not preclude the application of the Brussels I Regulation in a dispute such as that at issue in the main proceedings, where the court seised finds that the classification and certification organisations at issue have not had recourse to public powers, within the meaning of international law.

By its judgment in ***Wikingerhof*** (C-59/19, EU:C:2020:950), of 24 November 2020, the Court, sitting as the Grand Chamber, ruled on a case in which the operator of a hotel in Germany had concluded, in 2009, a contract with Booking.com BV, a company governed by Netherlands law which has its seat in the Netherlands and operates an accommodation booking platform. That contract was a standard form contract provided by Booking.com, which stated, inter alia, the following: 'The hotel declares that it has received a copy of Version 0208 of the General Terms and Conditions … of Booking.com. These are available online at Booking.com … The hotel confirms that it has read and understood the terms and conditions and agrees to them. The terms and conditions form an integral part of this contract …'. Subsequently, and on several occasions, Booking.com amended its general terms and conditions, accessible on that company's Extranet.

Wikingerhof objected in writing to the inclusion in the contract at issue of a new version of the general terms and conditions that Booking.com had brought to the attention of its contracting partners on 25 June 2015. It claimed that it had had no choice but to conclude that contract and to suffer the effect of subsequent amendments to Booking.com's general terms and conditions by reason of the latter's strong position on the market for intermediary services and accommodation reservation portals, even though certain practices of Booking.com were unfair and therefore contrary to competition law.

Wikingerhof subsequently brought an action before the Landgericht Kiel (Regional Court, Kiel, Germany) seeking an injunction prohibiting Booking.com (i) from affixing to the price specified by Wikingerhof, without the latter's consent, the indication 'preferential price' or 'discounted price' on the accommodation reservation platform, (ii) from withholding from it the contact information provided by its contracting partners on that platform and (iii) from making the placement of the hotel which it operates in search requests dependent on the granting of commission in excess of 15%. The Landgericht Kiel (Regional Court, Kiel) concluded that it lacked territorial and international jurisdiction, a finding which was confirmed on appeal by the Oberlandesgericht Schleswig (Higher Regional Court, Schleswig, Germany). According to that latter court, apart from the fact that German courts had no general jurisdiction under Regulation No 1215/2012 [155] ('the Brussels Ia Regulation') because Booking.com had its seat in the Netherlands, neither the special jurisdiction of the court for the place of performance of the contractual obligation, under point 1(a) of Article 7 of the Brussels Ia Regulation, nor that of the court for the place where the harmful event occurred in matters relating to tort, delict or quasi-delict, under point 2 of Article 7 of that regulation, was established in that case.

In the appeal on a point of law (*Revision*) brought by Wikingerhof, claiming that the Oberlandesgericht Schleswig (Higher Regional Court, Schleswig) had erred in finding that the action in question did not come within its jurisdiction in matters relating to tort, delict or quasi-delict, the Bundesgerichtshof (Federal Court of Justice, Germany) in turn referred a question to the Court of Justice for a preliminary ruling.

The Court was thus asked whether point 2 of Article 7 of the Brussels Ia Regulation applies to an action seeking an injunction to stop certain practices implemented in the context of the contractual relationship between the applicant and the defendant, based on an allegation of abuse of a dominant position by the latter in breach of competition law.

In answer to that question, the Court noted that the applicability of either point 1(a) of Article 7 of the Brussels Ia Regulation or point 2 of Article 7 thereof depends, inter alia, on the examination, by the court hearing the action, of the specific conditions laid down by those provisions. Thus, where an applicant relies on one of those rules, it is necessary for the court hearing the action to ascertain whether the applicant's claims concern, irrespective of their classification under national law, matters relating to a contract or, on the contrary, matters relating to tort, delict or quasi-delict within the meaning of that regulation. In particular, in order to decide whether a claim between contracting parties is connected to 'matters relating to a contract' or to 'matters relating to tort or delict', within the meaning of the Brussels Ia Regulation, the court hearing the action must examine the obligation 'relating to a contract' or 'relating to tort, delict or quasi-delict' which constitutes the cause of action.

Thus, an action concerns matters relating to a contract within the meaning of point 1(a) of Article 7 of the Brussels Ia Regulation if the interpretation of the contract between the defendant and the applicant appears indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter. By contrast, where the applicant relies, in its application, on rules of liability in tort, delict or quasi-delict, namely breach of an obligation imposed by law, and where it does not appear indispensable to examine the content of the contract concluded with the defendant in order to assess whether the conduct of which the latter is accused is lawful or unlawful, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of the Brussels Ia Regulation.

155| Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

In that case, Wikingerhof relied, in its application, on an infringement of German competition law, which lays down a general prohibition of abuse of a dominant position, independently of any contract or other voluntary commitment. Thus, the legal issue at the heart of the case in the main proceedings was whether Booking.com committed an abuse of a dominant position within the meaning of German competition law. In order to determine whether the practices complained of against Booking.com were lawful or unlawful in the light of that law, it is not indispensable to interpret the contract between the parties to the main proceedings, such interpretation being necessary, at most, in order to establish that those practices actually occur.

The Court concluded that, subject to verification by the referring court, the action brought by Wikingerhof, in so far as it was based on the legal obligation to refrain from any abuse of a dominant position, was a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of the Brussels Ia Regulation.

2. Regulation No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

By its judgment in ***Landkreis Harburg (Subrogation of a public body to a maintenance creditor)*** (C-540/19, EU:C:2020:732), of 17 September 2020, the Court ruled on a case in which WV, resident in Vienna (Austria), was required under German civil law to pay maintenance to his mother, who lived in a care home for the elderly in Cologne (Germany). However, WV's mother regularly received benefits provided in place of maintenance from the Landkreis Harburg (Administrative District of Harburg, Germany) ('the applicant body') in accordance with the provisions of German social-security law. That body argued that, in accordance with those provisions, it was subrogated to the claims of WV's mother against WV in respect of the benefits that it had paid in her favour since April 2017. Under those provisions, claims that are the subject of such subrogation must be enforced before the civil courts.

Accordingly, the applicant body brought an action for recovery of maintenance against WV before the German civil courts on the basis of Regulation No 4/2009, [156] which governs, inter alia, international jurisdiction in matters relating to maintenance obligations; specifically, it relied on Article 3(b) of that regulation, which provides that the court for the place where the creditor is habitually resident is to have jurisdiction. The first-instance court held that the German courts did not have international jurisdiction to rule on the action, since jurisdiction based on the provision referred to above could be invoked only by the individual to whom maintenance is owed. However, the appellate court found that the applicant body could invoke that jurisdiction as transferee of maintenance claims. Hearing an appeal on a point of law (Revision) brought by WV against that decision, the Bundesgerichtshof (Federal Court of Justice) referred a question to the Court of Justice for a preliminary ruling, seeking to ascertain whether the public body at issue had the right, in the circumstances of this case, to bring an action before the court for the place where the creditor – namely WV's mother – had her habitual residence.

In its judgment, the Court held that that a public body which seeks to recover, by way of an action for recovery, sums paid in place of maintenance to a maintenance creditor, and to which the claims of that maintenance creditor against the maintenance debtor have been transferred by way of subrogation, may validly invoke the jurisdiction of the court for the place where the creditor is habitually resident. In reaching that conclusion,

156| 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).

the Court examined Article 3 of Regulation No 4/2009, which designates which courts have jurisdiction to rule in matters relating to maintenance obligations in Member States, in the light of its wording, objectives and the scheme of which it forms part.

The Court found that the wording of paragraphs (a) and (b) of Article 3 of Regulation No 4/2009 does not specify that the action must be brought by the maintenance creditor himself or herself before the courts identified in that article. Accordingly, that article does not, subject to the objectives and scheme of that regulation being observed, preclude a claim relating to a maintenance obligation from being brought by a public body, to which the claims of that creditor have been transferred by way of statutory subrogation, before one or the other of those courts. Neither the objectives nor the scheme of Regulation No 4/2009 preclude the court for the place where the creditor is habitually resident from having jurisdiction to rule on such a claim.

In the first place, acknowledging that that court has jurisdiction to rule on that claim is consistent with the objectives pursued by Regulation No 4/2009, which include both proximity between the competent court and the maintenance creditor and the objective of facilitating as far as possible the recovery of international maintenance claims. In particular, that objective would be undermined if a public body subrogated to the claims of the maintenance creditor were deprived of the right to invoke the jurisdiction criteria provided for in favour of the applicant in matters relating to maintenance obligations, in Article 3(a) and (b) of Regulation No 4/2009, both where the defendant is resident within the European Union and, as the case may be, where the defendant is resident in the territory of a third State. Furthermore, acknowledging that such a body may validly bring an action before the courts identified in Article 3(b) of Regulation No 4/2009 would in no way undermine the objective of the proper administration of justice, which is also pursued by that regulation. That objective must be understood, in particular, from the point of view of the interests of the litigant, whether claimant or defendant, who must be able to benefit, inter alia, from easier access to justice and predictable rules on jurisdiction. The transfer of the maintenance creditor's rights to such a body impairs neither the interests of the maintenance debtor nor the predictability of the applicable rules of jurisdiction.

In the second place, the fact that a public body to which a maintenance creditor's claims are transferred by way of statutory subrogation is allowed to bring an action before the courts where the creditor is habitually resident is also consistent with the scheme of Regulation No 4/2009 and with its background. In that regard, the Court noted that Article 64 of that regulation specifically envisages intervention by a public body, as an applicant, either acting in the place of an individual to whom maintenance is owed or as a body to which reimbursement is owed for benefits provided in place of maintenance. In particular, Article 64(3)(a) states that that public body is entitled to seek the recognition and declaration of the enforceability or claim the enforcement of a decision given against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance. That provision means that such a public body has already been given the opportunity to bring an action before the courts identified in Article 3(b) of Regulation No 4/2009, so that that court may issue a decision in matters relating to maintenance obligations.

X. Judicial cooperation in criminal matters

In relation to judicial cooperation in criminal matters, nine judgments deserve to be mentioned. Six of them involve European arrest warrants within the meaning of Framework Decision 2002/584/JHA. [157] The seventh concerns the concepts of 'judicial authority' and 'issuing authority' in relation to European investigation orders in criminal matters. The eighth relates to the confiscation of crime-related proceeds, instrumentalities and property. The ninth and last judgment deals with compensation for the victims of crime.

1. European arrest warrant

1.1. Execution of European arrest warrants and conditions for surrender

In the judgment in ***X (European arrest warrant – Double criminality)*** (C-717/18, EU:C:2020:142), delivered on 3 March 2020, the Grand Chamber of the Court held that Article 2(2) of Framework Decision 2002/584 requires that, in order to ascertain whether the offence for which a European arrest warrant has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of least three years, as it is defined in the law of that Member State, the executing judicial authority must take into account the law of that Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued, and not in the version in force at the time of issue of that arrest warrant. That ascertainment proves necessary in so far as, according to that provision, the execution of European arrest warrants issued for certain offences punishable by a custodial sentence or a detention order for a maximum period of at least three years cannot be subject to verification of the double criminality of the act, that is to say, to the condition that those offences must be punishable also under the law of the executing Member State.

In 2017, the Audiencia Nacional (National High Court, Spain) convicted X, inter alia, for acts, committed in 2012 and in 2013, constituting the offence of glorification of terrorism and humiliation of the victims of terrorism, set out in Article 578 of the Spanish Criminal Code in the version in force at the time of those acts. It imposed on him the maximum prison sentence of two years stemming from that version of the Spanish criminal law provision. However, in 2015, that provision was amended and now provides for a custodial sentence of a maximum of three years.

X having left Spain for Belgium, the Audiencia Nacional (National High Court) issued, in 2018, a European arrest warrant against him for the offence of 'terrorism', which features in the list of offences concerned by the removal of verification of the double criminality of the act. The Hof van beroep te Gent (Court of Appeal, Ghent, Belgium), hearing an appeal in the procedure for the execution of that arrest warrant, decided to make a reference for a preliminary ruling to the Court of Justice on account of the doubts it entertained as to the version of Article 578 of the Spanish Criminal Code to be taken into account (the one applicable to the

157| 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').

facts in the main proceedings or the one applicable at the date of issue of the European arrest warrant) for determining whether the condition setting the threshold of a custodial sentence for a maximum period of at least three years was satisfied in the case at hand.

The Court first of all noted that the wording of Article 2(2) of Framework Decision 2002/584 does not specify which version of the law of the issuing Member State must be taken into account where that law has been the subject of amendments between the date of the facts at issue and the date of issue, or execution, of the European arrest warrant. In particular, the use of the present indicative in that provision does not support the conclusion that the version to be taken into account is the one in force at the time that arrest warrant was issued.

Next, so far as concerns the context in which that provision occurs, the Court observed that Article 2(1) of Framework Decision 2002/584 provides, inter alia, that a European arrest warrant may be issued for sentences of at least four months. That minimum threshold can refer only to the sentence actually imposed in the conviction decision in accordance with the law of the issuing Member State applicable to the facts giving rise to that decision and not to the sentence which could have been passed under the law of that Member State applicable at the date of issue of that arrest warrant. The same must hold for the execution of a European arrest warrant pursuant to Article 2(2) of Framework Decision 2002/584. First of all, the interpretation whereby the executing judicial authority should take into account the law of the issuing Member State applicable at a different date, according to whether that authority verifies whether the European arrest warrant could be issued in accordance with Article 2(1) of that framework decision or whether that arrest warrant must be executed without verification of the double criminality of the act pursuant to Article 2(2) of that framework decision, would undermine the consistent application of those two provisions.

Moreover, the interpretation whereby the version of the law of the issuing Member State to be taken into account is the one applicable to the facts in question is borne out by Article 8 of Framework Decision 2002/584. That provision provides inter alia that the European arrest warrant contains information on the penalty imposed or the prescribed scale of penalties for the offence under the law of the issuing Member State, such information having to be set out in accordance with the form contained in the annex to Framework Decision 2002/584. It is apparent from that form that that information concerns the sentence 'imposed', such that that sentence is the one which, depending on the case, is liable to be imposed or has actually been imposed in the conviction decision and, thus, the one resulting from the version of the law of the issuing Member State which is applicable to the facts in question.

The Court also noted that that interpretation of Article 2(2) of Framework Decision 2002/584 is supported by the purpose of that framework decision, namely, to facilitate and accelerate judicial cooperation by establishing a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law. Accordingly, the executing judicial authority must be able to rely on the information on the length of the sentence set out in the European arrest warrant itself. Requiring that authority to verify whether the law of the issuing Member State which is applicable to the facts at issue has not been amended subsequent to the date of those facts, first, would run counter to the purpose of Framework Decision 2002/584 and, secondly, would be contrary to the principle of legal certainty, in view of the difficulties that authority may encounter in identifying the various versions of that law that might be relevant.

Lastly, the Court emphasised that the fact that the offence at issue cannot give rise to surrender without verification of the double criminality of the act pursuant to Article 2 (2) of Framework Decision 2002/584 does not necessarily mean that execution of the European arrest warrant has to be refused. The executing judicial authority is under the responsibility to examine the criterion of double criminality of the act set out in Article 2(4) of Framework Decision 2002/584 in the light of that offence.

In the judgment in ***SF (European arrest warrant – Guarantee of return to the executing State)*** (C-314/18, EU:C:2020:191), delivered on 11 March 2020, the Court ruled, first, that, when the Member State executing a European arrest warrant makes the return of one of its nationals or residents, in respect of whom such a warrant has been issued for the purposes of criminal proceedings, subject to the condition that that person will be returned to that Member State in order to serve there the custodial sentence or detention order imposed on him or her in the issuing Member State, that latter Member State must, in principle, return that person as soon as the sentencing decision has become final. The position will be different only where concrete grounds relating to the rights of defence of the person concerned or the proper administration of justice make his or her presence essential in the issuing Member State pending a definitive decision on any procedural steps coming within the scope of the criminal proceedings relating to the offence on the basis of which the European arrest warrant has been issued. Secondly, the Court held that the executing Member State can, in order to enforce that custodial sentence or detention order, adapt the duration of that sentence only within the strict conditions set out in Article 8(2) of Framework Decision 2008/909. [158]

That judgment was delivered in the context of proceedings relating to the execution, in the Netherlands, of a European arrest warrant issued by a United Kingdom judge for the purposes of criminal proceedings against a Netherlands national. In the Netherlands, the public prosecutor had requested the issuing judicial authority to provide the guarantee provided for in Article 5(3) of Framework Decision 2002/584, consisting in a commitment given, prior to the surrender, that the person concerned would, if convicted, be returned to the executing Member State in order to serve there the custodial sentence or detention order that might be imposed on him. [159] In response, the United Kingdom Home Office stated that, if the person concerned were to be sentenced to a measure involving deprivation of liberty in the United Kingdom, he would be returned to the Netherlands as soon as the criminal proceedings and any other proceedings relating to the offence underlying the European arrest warrant were concluded. That authority also stated that a transfer under Framework Decision 2002/584 did not, in its opinion, allow the Netherlands to alter the duration of the sentence which might be imposed in the United Kingdom.

First, in respect of the time at which the person who is the subject of a European arrest warrant, the execution of which is subject to the provision of a guarantee within the meaning of Article 5(3) of Framework Decision 2002/584, must be returned to the executing Member State in order to serve there the custodial sentence or detention order imposed on him or her in the issuing Member State, the Court first of all noted that that time was not specified in the provision. That said, it emphasised the particular weight attached by the EU legislature, both under that provision and under Framework Decision 2008/909, to the prospects of the social rehabilitation of the national or resident of the executing Member State, by allowing him or her to serve, in its territory, the custodial sentence or detention order to be imposed on him or her in the issuing Member State after his or her surrender pursuant to the European arrest warrant. The Court underlined the importance of the fact that, in such a situation, the issuing Member State must return that person as soon as the sentencing decision in question has become final. The Court nevertheless stated that, at that time, if

158| Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), as amended by Framework Decision 2009/299. Specifically, under Article 8(2) of Framework Decision 2008/909, 'where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State'.

159| Pursuant to that provision, 'where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State'.

it were to be established that the person concerned is required to be present in the issuing Member State by reason of other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the European arrest warrant, the objective of facilitating the social rehabilitation of the person concerned must be balanced against both the effectiveness of the criminal prosecution and the safeguarding of the procedural rights of the person concerned.

Secondly, as regards the option for the competent authority of the executing Member State, provided in Article 8(2) of Framework Decision 2008/909, to adapt the sentence imposed in the issuing Member State, the Court pointed out that that option was strictly regulated by that provision, stating that Article 8 lays down the sole exceptions to the obligation to recognise the judgment forwarded and to enforce the sentence, which is to correspond in its length and nature to the sentence imposed in the judgment delivered in the issuing Member State. The Court thus rejected the interpretation of Article 25 of Framework Decision 2008/909 [160] according to which, in the situation of a person who has been surrendered to the issuing Member State in return for a guarantee of return, an adaptation of the sentence by the executing Member State beyond the situations contemplated under Article 8 of that framework decision may be allowed.

By its judgment in ***Generalbundesanwalt beim Bundesgerichtshof*** (C-195/20 PPU, EU:C:2020:749), delivered on 24 September 2020, the Court ruled on a case in which XC had been prosecuted in Germany in three separate sets of criminal proceedings.

First, on 6 October 2011, he was sentenced by a local court to a combined custodial sentence of one year and nine months. That sentence was suspended on probation.

Secondly, in 2016, criminal proceedings were instituted in Germany against XC for an offence committed in Portugal. Since XC was in Portugal, the Staatsanwaltschaft Hannover (Public Prosecutor's Office, Hanover, Germany) issued a European arrest warrant in order to prosecute XC for that offence. The Portuguese executing authority authorised XC's surrender to the German judicial authorities. XC received a custodial sentence of one year and three months. During the execution of that sentence, the suspension on probation of the sentence imposed in 2011 was revoked.

On 22 August 2018, the Staatsanwaltschaft Flensburg (Public Prosecutor's Office, Flensburg, Germany) asked the Portuguese executing authority to renounce the application of the specialty rule and consent to the execution of the sentence imposed in 2011. Under that rule, laid down in Article 27(2) of Framework Decision 2002/584, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered. However, Article 27(3)(g) provides that the specialty rule does not apply where the executing judicial authority which surrendered the person gives its consent.

On 31 August 2018, in the absence of any response from the Portuguese executing judicial authority, XC was released. On 18 September 2018, he went to the Netherlands and later to Italy. The next day, the Staatsanwaltschaft Flensburg (Public Prosecutor's Office, Flensburg) issued a new European arrest warrant against XC for the purposes of executing the judgment of 6 October 2011. XC was arrested in Italy on the basis of that European arrest warrant. The Italian executing authority agreed to surrender him to the German authorities.

160| Pursuant to that provision, 'without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, *mutatis mutandis* to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned'.

Thirdly, on 5 November 2018, the Amtsgericht Braunschweig (Local Court, Brunswick, Germany) issued an arrest warrant for the purposes of conducting a criminal investigation into a third case involving XC relating to an offence committed in Portugal in 2005 ('the arrest warrant of 5 November 2018'). In December 2018, the Staatsanwaltschaft Braunschweig (Public Prosecutor's Office, Brunswick, Germany) asked the Italian executing judicial authority also to give consent for XC to be prosecuted for that offence. That authority granted the request.

XC was remanded in custody in Germany from 23 July 2019 to 11 February 2020 pursuant to the national arrest warrant. During that period, by judgment of 16 December 2019, XC was convicted of the offence committed in Portugal in 2005 and he received a combined custodial sentence of seven years, taking into account the judgment of 6 October 2011.

XC brought an appeal on a point of law (*Revision*) against the judgment of 16 December 2019 before the referring court, the Bundesgerichtshof (Federal Court of Justice), relying, in particular, on the specialty rule laid down in Framework Decision 2002/584. He claimed, in essence, that since the Portuguese executing authority had not consented to his prosecution for the offence committed in Portugal in 2005, the German authorities were not entitled to prosecute him. In view of that argument, the referring court was uncertain whether the arrest warrant of 5 November 2018 could be maintained or had to be annulled.

By its judgment, delivered in the context of the urgent preliminary-ruling procedure, the Court ruled that Article 27(2) and (3) of Framework Decision 2002/584 must be interpreted as meaning that the specialty rule provided for in Article 27(2) does not preclude a measure involving deprivation of liberty taken against a person referred to in a first European arrest warrant on the basis of an offence different to that which constituted the basis for his or her surrender under that warrant and prior to that offence, when that person's departure from the Member State which issued the first European arrest warrant was voluntary and he or she was surrendered to that Member State under a second European arrest warrant issued after that departure for the purposes of executing a custodial sentence, provided that, under the second European arrest warrant, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty.

In that regard, the Court observed that it is apparent from a literal interpretation of Article 27(2) of Framework Decision 2002/584 that the specialty rule laid down in that article is closely connected to the surrender resulting from the execution of a specific European arrest warrant, to the extent that the wording of that provision refers to a single 'surrender'. That interpretation is borne out by a contextual interpretation of that provision, since other provisions of Framework Decision 2002/584 [161] also establish that the specialty rule is connected to the execution of a specific European arrest warrant. In those circumstances, the requirement that consent be given by both the executing judicial authority of the first European arrest warrant and the executing judicial authority of the second European arrest warrant would hinder the effectiveness of the surrender procedure, thereby undermining the objective pursued by Framework Decision 2002/584, namely that of simplifying and accelerating surrenders between the judicial authorities of the Member States.

Therefore, since, in that case, XC's departure from Germany was voluntary, once he had served his sentence in that Member State for the offence referred to in the first European arrest warrant, he was no longer entitled to rely on the specialty rule relating to the first European arrest warrant. In so far as, in that case, the only surrender relevant to the assessment of compliance with the specialty rule is the one carried out on the

161| In particular, Article 1(1), defining the European arrest warrant in the light of the specific objective it pursues, and Article 8(1), requiring a European arrest warrant to be specific as to the nature and legal classification of the offence to which it refers and to describe the circumstances in which it was committed.

basis of the second European arrest warrant, the consent required in Article 27(3)(g) of Framework Decision 2002/584 must be given only by the executing judicial authority of the Member State which surrendered the prosecuted person on the basis of that European arrest warrant.

In the judgment in ***Generalstaatsanwaltschaft Hamburg*** (C-416/20 PPU, EU:C:2020:1042), delivered on 17 December 2020, the Court ruled on a case in which TR, a Romanian national, had been prosecuted in two separate sets of criminal proceedings. As the person concerned had absconded to Germany, the proceedings in respect of him, both at first instance and on appeal, has been conducted in his absence. He was nevertheless aware of at least one set of proceedings and had been represented in those proceedings by counsel of his choice, at first instance, and by court-appointed counsel, on appeal. The trials resulted in two convictions imposing custodial sentences. For the purpose of executing those sentences, the Romanian authorities issued European arrest warrants. TR, who was in Hamburg (Germany), was detained on 31 March 2020.

On 28 May 2020, the Hanseatisches Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany) decided to give effect to the European arrest warrants. TR objected, arguing that the Romanian authorities refused to guarantee that the criminal proceedings at issue would be reopened. That, in TR's view, was incompatible with the right of accused persons to be present at their trial [162] and, if they are absent, with their right to a retrial. [163] The German court was thus called upon to rule on the lawfulness of TR's surrender on the basis of the national provisions implementing Article 4a of Framework Decision 2002/584 on the European arrest warrant. Under that article, the executing judicial authority may refuse a European arrest warrant issued for the purpose of executing a custodial sentence handed down in absentia except in a number of specific situations included in a closed list. It was against that background that the national court decided to ask the Court of Justice about the possible impact of the failure to comply, in the issuing Member State, with the requirements relating to the right to a retrial, since that circumstance does not fall within one of the situations provided for in Article 4a.

In the context of the urgent preliminary-ruling procedure, the Court held that under Article 4a of Framework Decision 2002/584, the executing judicial authority may not refuse to execute a European arrest warrant solely because it has not received an assurance that, in the event of surrender to the issuing Member State, the right of the person concerned to a retrial [164] would be respected, where that person absconded to the executing Member State, thereby preventing him or her from being summoned in person, and did not appear at the trial.

In reaching that conclusion, the Court recalled that the situations in which the Member States may refuse to execute a European arrest warrant are exhaustively laid down [165] and that the executing judicial authority may not make the execution of a European arrest warrant subject to other conditions.

Having clarified that point, the Court noted, in the first place, that the absence of the person concerned at the trial which resulted in his or her conviction, on the basis of which a European arrest warrant has subsequently been issued, constitutes a ground for optional non-execution of that European arrest warrant.

162| That right is laid down in Article 8 of 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). Member States may however provide, subject to certain conditions, that proceedings be conducted in the absence of the person concerned.

163| That right is laid down in Article 9 of Directive 2016/343.

164| As defined in Articles 8 and 9 of Directive 2016/343.

165| Framework Decision 2002/584 distinguishes between cases of mandatory non-execution, listed in Article 3, and cases of optional non-execution, listed in Articles 4 and 4a.

However, since the amendment of Framework Decision 2002/584, [166] the scope of that ground is more limited; Article 4a exhaustively lists the situations in which the execution of such a warrant is deemed not to infringe the rights of the defence. In such cases, the executing judicial authority is required to execute the European arrest warrant. That is so in particular where the person concerned was aware of the scheduled trial, gave a mandate to a legal counsellor, appointed by the person concerned or by the State, and was indeed defended by that counsellor. [167]

In the second place, the Court held that if non-compliance by the issuing Member State with the provisions of EU law guaranteeing the right to a retrial were to preclude the execution of a European arrest warrant, the system established by Framework Decision 2002/584 would be circumvented. However, the Court pointed out that this in no way affects the obligation of the issuing Member State to comply with those provisions. Thus, if that Member State has in fact failed to transpose those provisions within the prescribed period or has not transposed them correctly, the person concerned may, in the event of surrender, rely on the directly effective provisions before the courts of that Member State.

In the third place, the Court made clear that the ground under consideration was a ground for optional non-execution. Accordingly, should the executing judicial authority find that the situation before it is not one of the situations precluding the possibility of refusing to execute a European arrest warrant issued for the purpose of enforcing a sentence handed down in absentia, it may take into account other circumstances enabling it to satisfy itself that the surrender of the person concerned does not entail an infringement of his or her rights of the defence. Where appropriate, it will then be able to surrender the person concerned. In that regard, the Court stated that the executing judicial authority may take account of the conduct of the person concerned, in particular the fact that he or she sought to evade service of the information concerning the criminal proceedings or the fact that he or she avoided all contact with court-appointed counsel.

In the judgment in ***Openbaar Ministerie (Independence of the issuing judicial authority)*** (Joined Cases C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033), delivered on 17 December 2020, the Court held that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland or of an increase in those deficiencies does not in itself justify the judicial authorities of the other Member States refusing to execute, for that reason alone, any European arrest warrant issued by a Polish judicial authority.

In August 2015 and February 2019, European arrest warrants were issued by Polish courts against two Polish nationals for the purposes of conducting a criminal prosecution and executing a custodial sentence, respectively. Since the persons concerned were in the Netherlands, the officier van justitie (representative of the public prosecution service, Netherlands), acting in accordance with Netherlands law, referred the requests for execution of those European arrest warrants to the rechtbank Amsterdam (District Court, Amsterdam, Netherlands).

However, that court had doubts as to whether it should accede to those requests. More specifically, it raised the question of the implications of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*, [168] which was delivered against the backdrop of the reforms of the Polish judicial system. In that judgment, the Court held that, by way of exception, the execution of a European arrest warrant may be

166| In its original version, that ground was set out in Article 5(1). That provision was repealed by Framework Decision 2009/299 and replaced, in Framework Decision 2002/584, by Article 4a.

167| Article 4a(1)(b) of Framework Decision 2002/584.

168| Judgment of the Court of 25 July 2018, ***Minister for Justice and Equality (Deficiencies in the system of justice)*** (C-216/18 PPU, EU:C:2018:586).

refused if it is established that the person concerned might, if he or she is surrendered to the Member State which issued the European arrest warrant, sustain a breach of his or her right to an independent tribunal, which is an essential component of the right to a fair trial. [169] Nevertheless, such a refusal is possible only following a two-step examination: having assessed in a general manner whether there is objective evidence of a risk of breach of that right, on account of systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary, the executing judicial authority must then determine to what extent such deficiencies are liable to have an actual impact on the situation of the person concerned if he or she is surrendered to the judicial authorities of that Member State.

On account of recent developments, [170] some of which occurred after the issue of the European arrest warrants in question, the rechtbank Amsterdam (District Court, Amsterdam) considered that the deficiencies in the Polish system of justice were such that the independence of all Polish courts and, consequently, the right of all individuals in Poland to an independent tribunal were no longer ensured. In that context, it was uncertain whether that finding was sufficient in itself to justify a refusal to execute a European arrest warrant issued by a Polish court, without there being any need to examine the impact of those deficiencies in the particular circumstances of the case.

In the context of the urgent preliminary-ruling procedure, the Court, sitting as the Grand Chamber, answered that point in the negative, thus confirming its case-law established in the judgment in *Minister for Justice and Equality (Deficiencies in the legal system)*.

In the first place, the Court held that systemic or generalised deficiencies affecting the independence of the issuing Member State's judiciary, however serious, are not sufficient on their own to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an 'issuing judicial authority' of a European arrest warrant, [171] a concept which implies, in principle, that the authority concerned acts independently.

In that regard, first, the Court observed that such deficiencies do not necessarily affect every decision that those courts may be led to adopt. The Court went on to state that, although limitations may in exceptional circumstances be placed on the principles of mutual trust and mutual recognition which underpin the operation of the European-arrest-warrant mechanism, denial of the status of 'issuing judicial authority' to all the courts of the Member State concerned by those deficiencies would lead to a general exclusion of the application of those principles in connection with the European arrest warrants issued by those courts. Moreover, such an approach would have other very significant consequences since it would imply, inter alia, that the courts of that Member State would no longer be able to submit references to the Court for preliminary rulings. [172] Lastly, the Court stated that its recent case-law according to which the public prosecutors' offices of certain Member States fail, in the light of their subordinate relationship to the executive, to provide sufficient

169| That right is guaranteed in the second paragraph of Article 47 of the Charter.

170| Alongside other factors, the referring court mentioned in particular the Court's recent case-law in this area (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), and of 26 March 2020, ***Miasto Łowicz and Prokurator Generalny*** (C-558/18 and C-563/18, EU:C:2020:234)), and the action for failure to fulfil obligations brought by the European Commission against Poland (Case C-791/19).

171| Within the meaning of Article 6(1) of Framework Decision 2002/584.

172| That approach would mean that no court of the issuing Member State would any longer be considered to satisfy the requirement of independence inherent in the concept of 'court or tribunal' within the meaning of Article 267 TFEU.

guarantees of independence to be regarded as 'issuing judicial authorities' [173] cannot be transposed to Member States' courts. In a Union based on the rule of law, the requirement that courts be independent precludes by its very nature any relationship of that type with the executive.

In the second place, the Court stated that the existence of or an increase in systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary, which are indicative of a risk of breach of the right to a fair trial, does not however permit the presumption [174] that the person in respect of whom a European arrest warrant has been issued will actually run such a risk if he or she is surrendered. Thus, the Court maintained the requirement of a two-step examination set out in the judgment in *Minister for Justice and Equality (Deficiencies in the legal system)* and stated that the finding of such deficiencies must indeed prompt the executing judicial authority to exercise vigilance but cannot dispense it from conducting, in accordance with the second step of that examination, a specific and precise assessment of the risk in question. That assessment must take account of the situation of the requested person, the nature of the offence in question and the factual context which forms the basis of the European arrest warrant, such as statements by public authorities which are liable to interfere with the way in which the individual case is handled. The Court pointed out in that regard that a general suspension of the European-arrest-warrant mechanism with regard to a Member State, which would make it permissible to refrain from carrying out such an assessment and to refuse automatically to execute European arrest warrants issued by that Member State, is possible only if the European Council formally declares that the Member State fails to respect the principles on which the Union is based. [175]

Furthermore, the Court specified that, where a European arrest warrant is issued for the purposes of criminal proceedings, the executing judicial authority must, where appropriate, take account of systemic or generalised deficiencies concerning the independence of the issuing Member State's judiciary which may have arisen after the European arrest warrant concerned was issued and assess to what extent those deficiencies are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which the person concerned will be subject. Where a European arrest warrant is issued with a view to the surrender of a requested person for the execution of a custodial sentence or a detention order, the executing judicial authority must examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the European arrest warrant have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that European arrest warrant.

Lastly, reference should be made to the judgment in ***Ruska Federacija*** (C-897/19 PPU, EU:C:2020:262), [176] delivered on 2 April 2020, and the judgment in ***Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)*** (C-398/19, EU:C:2020:1032), [177] delivered on 17 December 2020, in which the Court adjudicated on two cases relating to extradition in the context of the prohibition of obstacles to the free movement of Union citizens and to the developments in that respect concerning the European arrest warrant set out in particular in the line of authority devolving from the *Petruhhin* judgment. [178]

173| See, in particular, judgment of the Court of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456).

174| Under Article 1(3) of Framework Decision 2002/584.

175| That procedure is provided for in Article 7(2) TEU.

176| That judgment is presented in Section XX.3 'Extradition of a national of a Member State of the European Economic Area'.

177| That judgment is presented in Section II 'Citizenship of the Union'.

178| Judgment of the Court of 6 September 2016, ***Petruhhin*** (C-182/15, EU:C:2016:630).

1.2. Concept of executing judicial authority

By its judgment in ***Openbaar Ministerie (Forgery of documents)*** (C-510/19, EU:C:2020:953), delivered on 24 November 2020, the Court, sitting as the Grand Chamber, ruled on a case concerning a European arrest warrant issued in September 2017 by a Belgian investigating judge against AZ, a Belgian national, who was accused of forgery of documents, use of forged documents and fraud. In December 2017, AZ was arrested in the Netherlands and surrendered to the Belgian authorities pursuant to a decision of the rechtbank Amsterdam (District Court, Amsterdam). In January 2018, the investigating judge which issued the European arrest warrant issued an additional European arrest warrant for acts other than those for which AZ had been surrendered, thus requesting the competent Netherlands authorities to disapply the rule of speciality provided for by Framework Decision 2002/584. According to that rule, a person surrendered to the issuing Member State pursuant to a European arrest warrant may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered, unless the executing judicial authority has given its consent. [179] In February 2018, the officier van justitie (public prosecutor) for the Amsterdam District gave his consent to extend the scope of the prosecution in accordance with the additional European arrest warrant. AZ was thus prosecuted in Belgium in respect of the acts referred to in the initial European arrest warrant and the additional European arrest warrant and sentenced to a three-year prison term.

It was against that background that the hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), before which AZ had brought an appeal against his criminal conviction, raised the issue of whether the public prosecutor for the Amsterdam District could be considered to be an 'executing judicial authority' within the meaning of Framework Decision 2002/584, [180] and consequently to have the power to give the consent provided for by that framework decision.

Recently, the Court has ruled on several occasions on the concept of 'judicial authority' in the context of Framework Decision 2002/584 and, more specifically, on whether Member States' public prosecutors may be regarded as falling within the scope of that concept. It has thus found that such was the case of the Lithuanian, French, Swedish and Belgian public prosecutors' offices, [181] but not of the German public prosecutor's office. [182] Although all of those cases concerned the concept of 'issuing judicial authority' of a European arrest warrant [183] and not that of 'executing judicial authority', in that judgment the Court considered that its case-law in that field could be transposed.

In the first place, the Court stated that, like the concept of 'issuing judicial authority', the concept of 'executing judicial authority' is an autonomous concept of EU law and is not restricted to designating judges or courts. That concept also covers the judicial authorities which participate in the administration of criminal justice in

179| Article 27(2), (3)(g) and (4) of Framework Decision 2002/584.

180| The concept of 'executing judicial authority' is defined in Article 6(2) of Framework Decision 2002/584.

181| See, respectively, judgments of the Court of 27 May 2019, ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457); of 12 December 2019, ***Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyon and Tours)*** (Joined Cases C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077); of 12 December 2019, ***Openbaar Ministerie (Swedish Public Prosecutor's Office)*** (C-625/19 PPU, EU:C:2019:1078); and of 12 December 2019, ***Openbaar Ministerie (Public Prosecutor, Brussels)*** (C-627/19 PPU, EU:C:2019:1079).

182| See judgment of the Court of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456).

183| The concept of 'issuing judicial authority' is defined in Article 6(1) of Framework Decision 2002/584.

that Member State, which act independently in the exercise of the responsibilities inherent in the execution of a European arrest warrant, in particular in relation to the executive, and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection.

Thus, to determine the content of the concept of 'executing judicial authority', the Court upheld the same criteria as those developed in its case-law in relation to 'issuing judicial authorities', which it justified by the fact that the status and nature of those two judicial authorities are identical, although they exercise separate functions. The Court made several observations to reach that conclusion. It pointed out that the decision on the execution of a European arrest warrant, like that on the issue of a European arrest warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection, including the guarantee of independence. In addition, the Court found that the execution of a European arrest warrant is, just as the issue of a European arrest warrant, capable of prejudicing the liberty of the requested person in so far as that execution will lead to his or her arrest with a view to his or her surrender. Moreover, the Court added that, unlike the procedure for the issue of a European arrest warrant, for which there is a dual level of protection of fundamental rights, at the stage of the execution of the European arrest warrant, the intervention of the executing judicial authority constitutes the sole level of protection provided for by Framework Decision 2002/584 allowing the requested person to enjoy all the guarantees appropriate to the adoption of judicial decisions.

In the second place, the Court held that, irrespective of whether the judicial authority which gives its consent for the purposes of disapplying the rule of speciality must be the same as that which executed the European arrest warrant, that consent cannot be given by the public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive. Such a public prosecutor does not satisfy the necessary conditions to be characterised as an 'executing judicial authority'. According to the Court, to give the consent concerned and thus to disapply the rule of speciality, the intervention of an authority which satisfies those conditions is required. That decision is distinct from that relating to the execution of a European arrest warrant and leads, for the person concerned, to effects distinct from those of the latter decision. The Court observed in particular that, even if the person has already been surrendered to the issuing judicial authority, inasmuch as the consent requested concerns an offence other than that for which he or she was surrendered, it is liable to prejudice the liberty of the person concerned since it may lead to a heavier sentence.

The Court pointed out that, in that case, under Netherlands law, although the decision to execute the European arrest warrant is taken ultimately by a court, by contrast, the decision to grant the consent is taken exclusively by the public prosecutor. Since the latter may receive instructions in specific cases from the Netherlands Minister for Justice, he or she does not constitute an 'executing judicial authority'.

2. European investigation order in criminal matters

By its judgment in ***Staatsanwaltschaft Wien (Forged bank transfers)*** (C-584/19, EU:C:2020:1002), delivered on 8 December 2020, the Grand Chamber of the Court ruled on a case in which a criminal investigation for fraud had been opened against A and several unidentified persons by the Staatsanwaltschaft Hamburg (Public Prosecutor's Office, Hamburg, Germany). Those persons were all suspected of having, in July 2018, falsified 13 bank transfer orders using unlawfully obtained data, thus enabling the probable transfer of around EUR 9 800 to a bank account opened in A's name with an Austrian bank. In May 2019, during the

investigation of that case, the Hamburg Public Prosecutor's Office issued a European investigation order, [184] which it forwarded to the Staatsanwaltschaft Wien (Public Prosecutor's Office, Vienna, Austria), and by which it requested the latter to send it copies of the bank statements in question for the relevant period. However, under the Austrian Code of Criminal Procedure, the Austrian public prosecutor's office may not order such an investigative measure without prior court authorisation. Accordingly, at the end of May 2019, the Vienna Public Prosecutor's Office requested the Landesgericht für Strafsachen Wien (Regional Court in Criminal Matters, Vienna, Austria) to authorise that investigative measure.

Noting inter alia that, under German law on the organisation of the courts, the Hamburg Public Prosecutor's Office may receive instructions, including in individual cases, from the Justizsenator von Hamburg (Senator for Justice, Hamburg, Germany), that court was uncertain whether that European investigation order should be executed by the Austrian authorities. Its uncertainty related, more specifically, to the applicability, in the context of the Directive on the European investigation order, of the Court's recent case-law relating to the concept of 'issuing judicial authority' of a European arrest warrant, [185] within the meaning of Framework Decision 2002/584. Consequently, that court decided to ask the Court of Justice whether the public prosecutor's office of a Member State may be regarded as a 'judicial authority' having competence to issue a European investigation order, within the meaning of that directive, in spite of the fact that it is exposed to a risk of being subject to individual instructions or orders from the executive when adopting such an order.

The Court ruled that the concepts of 'judicial authority' and 'issuing authority', within the meaning of the Directive on the European investigation order, include the public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, even though they are in a relationship of legal subordination to the executive of that Member State, which exposes them to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order.

In that regard, the Court observed, as a preliminary point, that, under that directive, a European investigation order may be executed only if the authority which issued it is an 'issuing authority', [186] and that, where such an order is issued by an issuing authority other than a judge, a court, an investigating judge or a public prosecutor competent in the case concerned, it must be validated by a 'judicial authority' before being transmitted for the purposes of its execution in another Member State.

That clarification being made, the Court noted, first of all, that, unlike what is provided for in Framework Decision 2002/584, which uses the concept of 'issuing judicial authority' without specifying the authorities covered by that concept, the Directive on the European investigation order expressly includes public prosecutors among the authorities which, like a judge, court or investigating judge, fall within the concept

184| That European investigation order was issued in accordance with Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1; 'the Directive on the European investigation order').

185| Judgments of the Court of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 90), and of 27 May 2019, ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457, paragraph 57). In paragraph 90 of the judgment of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456), relating to German public prosecutor's offices, the Court ruled that the concept of 'issuing judicial authority', within the meaning of Framework Decision 2002/584, does not cover the public prosecutor's offices of a Member State which are exposed to the risk of being directly or indirectly subject to orders or individual instructions from the executive, in connection with the adoption of a decision to issue a European arrest warrant.

186| Within the meaning of Article 2(c) of the Directive on the European investigation order.

of 'issuing authority'. [187] Furthermore, the Court pointed out that, in that directive, the public prosecutor is also one of the 'judicial authorities' empowered to validate a European investigation order before it is forwarded to the executing authority, where that order has been issued by an issuing authority other than a judge, court, investigating judge or public prosecutor competent in the case concerned. [188] The Court stated that, in that directive, the classification of the public prosecutor as an 'issuing authority' or 'judicial authority' is not made subject to there being no relationship of legal subordination to the executive of the Member State to which the public prosecutor belongs.

Next, the Court emphasised that the issuing or the validation of a European investigation order is subject to a procedure and to guarantees distinct from those governing the issuing of a European arrest warrant. In particular, it observed that, pursuant to the Directive on the European investigation order, the public prosecutor who issues or validates such an order must take into account the principle of proportionality and the fundamental rights of the person concerned and that the order must be capable of being the subject of effective legal remedies, at least equivalent to those available in a similar domestic case. The Court also noted the possibility offered by that directive to the executing authority and, more broadly, to the executing State, of ensuring, by various mechanisms, that that principle and the fundamental rights of the person concerned are respected. The Court concluded that, both at the stage of the issuing or validation and of the execution of the European investigation order, the Directive on the European investigation order contains a set of safeguards to ensure the protection of the fundamental rights of the person concerned.

Lastly, the Court stated that the objective pursued by a European investigation order is distinct from that pursued by a European arrest warrant. While a European arrest warrant seeks the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European investigation order is to have one or several specific investigative measures carried out to obtain evidence. Thus, while some of those investigative measures may be intrusive, a European investigation order is not, however, unlike a European arrest warrant, such as to interfere with the right to liberty of the person concerned.

In the light of all those differences between Framework Decision 2002/584 and the Directive on the European investigation order, the Court held that the interpretation in its recent judgments [189] – according to which the concept of 'issuing judicial authority' within the meaning of that framework decision does not cover the public prosecutor's offices of a Member State which are exposed to the risk of being subject to individual instructions from the executive – is not applicable in the context of the Directive on the European investigation order.

187| As provided for in Article 2(c)(i) of the Directive on the European investigation order.

188| As set out in Article 2(c)(ii) of the Directive on the European investigation order.

189| Judgments of the Court of 27 May 2019, ***OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau)*** (C-508/18 and C-82/19 PPU, EU:C:2019:456), and of 27 May 2019, ***PF (Prosecutor General of Lithuania)*** (C-509/18, EU:C:2019:457).

3. Confiscation of crime-related proceeds, instrumentalities and property

In the judgment in ***'Agro In 2001'*** (C-234/18, EU:C:2020:221), delivered on 19 March 2020, the Court held that Framework Decision 2005/212 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, [190] does not preclude legislation of a Member State that provides that the confiscation of illegally obtained assets is ordered by a national court following proceedings which are not subject either to a finding of a criminal offence or, a fortiori, the conviction of the persons accused of committing such an offence.

That judgment was given in the context of proceedings between the Bulgarian Commission for the combating of corruption and for the confiscation of illegally obtained assets ('the Commission for the confiscation of assets'), and BP, a private person, and a number of natural and legal persons associated with or controlled by BP, concerning an application for the confiscation of assets obtained illegally by BP and those persons. Criminal proceedings had been brought against BP, in his capacity as chairman of the supervisory board of a Bulgarian bank, for having incited other persons to misappropriate funds of that bank between 2011 and 2014. At the time of the reference for a preliminary ruling, those proceedings had not given rise to any final conviction. Following an investigation against BP in particular, from which it became apparent that BP had financed the acquisition of assets by unlawful means, the Commission for confiscation of assets brought civil proceedings before the referring court seeking, inter alia, an order for the confiscation of assets held by BP and members of his family. According to BP and the other persons concerned, assets could be confiscated only on the basis of a final criminal conviction.

The Court rejected that line of reasoning. It stated that, having regard, in particular, to the aims and wording of the provisions of Framework Decision 2005/212, it must be held that that framework decision is to be regarded as an act aimed at obliging Member States to establish common minimum rules for confiscation of crime-related instrumentalities and proceeds, in order to facilitate the mutual recognition of judicial confiscation decisions adopted in criminal proceedings. Consequently, the Court held that Framework Decision 2005/212 does not govern the confiscation of the instrumentalities and proceeds derived from illegal activities ordered by a court of a Member State in the context of proceedings that do not concern the finding of one or more criminal offences. Taking the view that the decision that the referring court is called upon to adopt in the main proceedings does not fall within proceedings concerning one or more criminal offences, but within civil proceedings relating to assets that are alleged to have been obtained illegally, and which are conducted independently of such criminal proceedings, the Court held that that decision does not fall within the scope of Framework Decision 2005/212.

4. Compensation for the victims of crime

In the judgment in ***Presidenza del Consiglio dei Ministri*** (C-129/19, EU:C:2020:566), delivered on 16 July 2020, the Court, sitting as the Grand Chamber, held, in the first place, that the rules on non-contractual liability of a Member State for damage caused by a breach of EU law apply, on the ground that that Member State did not transpose, within the appropriate time, Article 12(2) of Directive 2004/80, [191] as regards victims residing in that Member State, on the territory of which the violent intentional crime was committed. In the second

190| Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68, p. 49).

191| Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims (OJ 2004 L 261, p. 15).

place, the Court held that a fixed rate of compensation granted to victims of sexual violence under the national scheme on compensation of victims of violent intentional crime cannot be classified as 'fair and appropriate', within the meaning of that same provision, if it is fixed without taking into account the seriousness of the consequences, for the victims, of the crime committed and does not therefore represent an appropriate contribution to the reparation of the pecuniary and non-pecuniary loss suffered.

In that case, in October 2005, BV, an Italian citizen residing in Italy, was the victim of sexual violence committed on the territory of that Member State. The EUR 50 000 that the perpetrators of that violence were ordered to pay to her, by way of damages and interest, could not be recovered as their whereabouts were unknown. In February 2009, BV brought a claim against the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy) for compensation for the harm that she alleged she had suffered as a result of the failure by the Italian Republic to transpose, within the appropriate time, Directive 2004/80. [192] In those proceedings, the Presidency of the Council of Ministers was ordered, at first instance, to pay BV the sum of EUR 90 000, which was reduced on appeal to EUR 50 000.

Hearing an appeal brought by the Presidency of the Council of Ministers, the referring court had doubts as to, first, the applicability of the rules on non-contractual liability of a Member State, owing to the late transposition of Directive 2004/80, as regards victims of violent intentional crime who are not in a cross-border situation. Secondly, that court had doubts as to whether the fixed sum of EUR 4 800, laid down in the Italian legislation [193] for the compensation of victims of sexual violence, was 'fair and appropriate' within the meaning of Article 12(2) of Directive 2004/80.

As regards the first of those questions, the Court first of all recalled the conditions for establishing the non-contractual liability of Member States for losses caused to individuals by breaches of EU law, namely that the EU law infringed must confer rights on individuals, there must be a sufficiently serious breach of that law and a causal link between the breach and the loss or harm suffered by the individuals. In that case, having regard to the wording, context and objectives of Article 12(2) of Directive 2004/80, the Court held in particular that, by that provision, the EU legislature had opted not for the establishment, by each Member State, of a specific compensation scheme restricted to victims of violent intentional crime who were in a cross-border situation only, but for the application, in favour of those victims, of national schemes on compensation to victims of violent intentional crime committed in the respective territories of the Member States. At the end of its analysis, the Court held that Directive 2004/80 imposes on each Member State the obligation to provide a scheme on compensation that covers all victims of violent intentional crime committed on its territory, and not only victims that are in a cross-border situation. The Court concluded from the foregoing that Directive 2004/80 confers the right to obtain fair and appropriate compensation not only on victims of crime who are in such a situation, but also on victims who habitually reside on the territory of the Member State in which the crime was committed. Consequently, provided that the two other aforementioned conditions are met, an individual has a right to compensation for loss caused to him or her by the breach, by a Member State, of its obligation under Article 12(2) of Directive 2004/80, irrespective of whether or not that individual was in a cross-border situation at the time he or she was the victim of the crime in question.

192| Under Article 12(2) of the directive, 'all Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims'.

193| It should be noted that, after the present claim for non-contractual liability was brought against the Italian Republic, that Member State established a scheme for the compensation of victims of violent intentional crime committed on Italian territory, irrespective of whether they reside in Italy or not. That scheme also covers, retroactively, crimes of that type committed from 1 July 2005 onwards.

As regards the second question, the Court held that, in the absence of any indication in Article 12(2) of Directive 2004/80 as to the amount of the compensation deemed to be 'fair and appropriate' compensation, that provision allows Member States discretion in that regard. While that compensation need not necessarily ensure the complete reparation of pecuniary and non-pecuniary loss suffered by the victims of violent intentional crime, it must not however be purely symbolic or manifestly insufficient having regard to the seriousness of the consequences, for those victims, of the crime committed. According to the Court, the compensation granted to such victims under that provision must, in fact, compensate to an appropriate extent the suffering to which they have been exposed. In that regard, the Court also stated that a fixed rate of compensation for such victims may be classified as 'fair and appropriate', provided that the compensation scale is sufficiently detailed so as to avoid the possibility that, having regard to the circumstances of a particular case, the fixed rate of compensation provided for a specific type of violence proves to be manifestly insufficient.

XI. Transport

In the judgment in ***Transportes Aéreos Portugueses*** (C-74/19, EU:C:2020:460), delivered on 11 June 2020, the Court defined the concepts of 'extraordinary circumstances' and 'reasonable measures' within the meaning of Regulation No 261/2004 [194] ('the Regulation on the rights of air passengers'). Accordingly, it held that, under certain conditions, the unruly behaviour of a passenger which led to the re-routing of the aircraft, causing delay to the flight, constitutes an 'extraordinary circumstance' and that an operating air carrier may rely on that 'extraordinary circumstance' which affected not the cancelled or delayed flight but an earlier flight operated by that air carrier using the same aircraft. The Court also held that the re-routing of a passenger by the air carrier by means of the next flight operated by that air carrier and leading that passenger to arrive the day after the day initially envisaged constitutes a 'reasonable measure' releasing that carrier from its obligation to pay compensation only if certain conditions are met.

The dispute in the main proceedings was between a passenger and the air carrier Transportes Aéreos Portugueses (TAP) concerning the latter's refusal to compensate the former for the harm caused as a result of the passenger's connecting flight being subject to a long delay in arrival at its final destination. The air carrier had refused to allow the claim for compensation on the ground that the delay to the flight concerned was the result of the unruly behaviour of a passenger on a previous flight operated using the same aircraft, which led to the re-routing of the aircraft, and that that circumstance had to be classified as 'extraordinary' within the meaning of the Regulation on the rights of air passengers, [195] which exempted it from its obligation to pay compensation under that regulation. [196]

The national court, hearing the case, had doubts as to the legal classification of the circumstance giving rise to that delay, as to whether an air carrier may rely on such a circumstance when it affected the aircraft which made the flight concerned, but on the occasion of a flight prior to that flight, and as to the reasonableness of the measures implemented by that carrier.

194| Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

195| Article 5(3) of the Regulation on the rights of air passengers.

196| Article 5(1)(c) and Article 7(1) of the Regulation on the rights of air passengers.

In that regard, the Court noted that an air carrier is not obliged to compensate passengers if it can prove that the flight cancellation or delay of three hours or more is caused by 'extraordinary circumstances' which could not have been avoided even if all reasonable measures had been taken and, where such circumstances do arise, that it adopted measures appropriate to the situation, deploying all its resources in terms of staff or equipment and the financial means at its disposal in order to avoid that situation from resulting in the cancellation or long delay of the flight in question, without the air carrier being required to make intolerable sacrifices in the light of the capacities of its undertaking.

In the first place, the Court noted that events may be classified as 'extraordinary circumstances', within the meaning of the Regulation on the rights of air passengers, if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control, both conditions being cumulative. Such circumstances may, in particular, occur in the case of security risks.

After pointing out that the unruly behaviour of a passenger which led to the re-routing of the aircraft in fact jeopardised the safety of the flight in question, the Court held that the behaviour in question was not inherent in the normal exercise of the air carrier's activity. Furthermore, such behaviour was not, in principle, under the control of the air carrier, since, first, the behaviour of a passenger and his or her reactions to the crew's requests are not foreseeable, and, secondly, on board an aircraft, both the commander and the crew have only limited means of controlling such behaviour.

However, the Court stated that the behaviour in question could not be regarded as beyond the actual control of the operating air carrier concerned, and therefore as an 'extraordinary circumstance', if it appeared that the carrier contributed to the occurrence of the behaviour or was in a position to anticipate it and take appropriate measures at a time when it was able to do so without significant consequences for the operation of the flight concerned, on the basis of warning signs of such behaviour. That may be the case in particular where the air carrier has taken on board a passenger already displaying behavioural problems before or even during boarding.

In the second place, the Court stated that an air carrier must be able, in order to be exempted from its obligation to compensate passengers in the event of a long delay or cancellation of a flight, to rely on an 'extraordinary circumstance' affecting a previous flight operated by that carrier using the same aircraft, provided that there is a direct causal link between the occurrence of that circumstance which affected a previous flight and the delay or cancellation of a subsequent flight, which it is for the national court to assess in the light of the facts available to it and taking into account, inter alia, the conditions of operation of the aircraft concerned.

In the third place, the Court considered that, in the event of the occurrence of an 'extraordinary circumstance', the air carrier, which seeks to be exempted from its obligation to compensate passengers, must deploy all the resources at its disposal to ensure reasonable, satisfactory and timely re-routing, including seeking alternative direct or indirect flights which may be operated by other air carriers, whether or not belonging to the same airline alliance, and arriving at a scheduled time that is not as late as the next flight of the air carrier concerned.

Consequently, the air carrier cannot be regarded as having deployed all the resources at its disposal by merely offering to re-route the passenger concerned to his final destination on the next flight operated by that carrier and arriving at the destination on the day following the day initially scheduled for his arrival, unless there was no available seat on another direct or indirect flight enabling that passenger to reach his final destination at a scheduled time that was not as late as the next flight of the air carrier concerned or the implementation of such re-routing constituted an intolerable sacrifice for that air carrier in the light of the capacities of its undertaking at the relevant time.

XII. Competition

1. Rules applying to undertakings

1.1. Agreements, decisions and concerted practices

In the field of agreements, decisions and concerted practices, three judgments are worthy of note. The first involves the applicability of the competition rules to settlement agreements with respect to disputes concerning patents. The second deals with the criteria for determining whether interbank agreements standardising the level of interchange fees adversely affect competition. The third and last judgment concerns the effects of commitments offered by an undertaking to a competition authority on the contractual rights of its contracting partners.

In the judgment in ***Generics (UK) and Others*** (C-307/18, EU:C:2020:52), delivered on 30 January 2020, the Court clarified the criteria applicable to the characterisation of settlement agreements with respect to disputes between the holder of pharmaceutical patents and manufacturers of generic medicines having regard to the prohibition on practices or agreements that have as their object or effect the restriction of competition (Article 101 TFEU) and the prohibition on abuse of a dominant position (Article 102 TFEU).

The Competition Appeal Tribunal (United Kingdom) sent to the Court a request for a preliminary ruling in a case concerning the examination of the lawfulness of a decision imposed by the Competition and Markets Authority (United Kingdom) on various manufacturers of generic medicines and the pharmaceutical group GlaxoSmithKline ('GSK') concerning settlement agreements with respect to patent disputes ('the contested decision'). GSK was the holder of a patent for the active pharmaceutical ingredient of the anti-depressant medicine paroxetine and of secondary patents protecting some processes for the manufacture of that ingredient. When GSK's principal patent expired in 1999, a number of manufacturers of generic medicines contemplated introducing generic paroxetine on the United Kingdom market. GSK brought infringement proceedings against those manufacturers of generic medicines, who, in turn, challenged the validity of one of GSK's secondary patents. GSK and the manufacturers of generic medicines thereafter concluded settlement agreements with respect to those disputes, whereby the latter chose to refrain, for an agreed period, from entering the market with their own generic medicines, in return for payments made by GSK ('the agreements at issue'). By the contested decision, the Competition and Markets Authority held that the agreements at issue infringed the prohibition on concluding agreements that restrict competition and constituted, on the part of GSK, an abuse of its dominant position in the relevant market. Consequently, the Competition and Markets Authority imposed financial penalties on the parties to those agreements.

The Court stated, first, that an agreement between undertakings is subject to the prohibition laid down by Article 101(1) TFEU only if it has a negative and appreciable effect on competition within the internal market, which presupposes that those undertakings are at least in a relationship of potential competition. With respect to manufacturers of generic medicines who had not yet entered the market at the time when such agreements were concluded, the Court stated that the required relationship of potential competition presupposes that it is demonstrated that there are real and concrete possibilities of access to the market. To that end, the Court held that it is necessary to assess, for each manufacturer concerned of generic

medicines, whether it has a firm intention and an inherent ability to enter the market, having regard to the preparatory steps it has taken, and that there are no insurmountable barriers to entry. Any patent rights do not constitute, in themselves, such barriers, according to the Court, since their validity can be contested.

As regards the concept of 'restriction of competition by object', the Court recalled that if the agreements at issue are to be so characterised, that presupposes a finding that those agreements reveal a sufficient degree of harm to competition, having regard to the content of their provisions, their objectives, and their economic and legal context. According to the Court, taking into consideration the appreciable fall in the sale price of the medicines concerned following the market entry of their generic version, that degree of harm may be identified where the transfers of value provided for by an agreement such as the agreements at issue cannot, because of their scale, have any explanation other than the commercial interest of the parties to the agreement not to engage in competition on the merits and, accordingly, act as an incentive to the manufacturers of generic medicines to refrain from entering the market concerned. For the purposes of characterisation as a 'restriction of competition by object', the Court also required that any pro-competitive effects arising from the agreements at issue be taken into consideration, provided that those effects are demonstrated. The Court made clear however that taking into consideration such effects is merely a part of the analysis of whether the agreement under examination causes a sufficient degree of harm. The Court concluded that it is for the national court to assess, with respect to each agreement under examination, whether the demonstrated pro-competitive effects are sufficient to permit a reasonable doubt as to whether it causes a sufficient degree of harm to competition.

As regards whether a settlement agreement such as those at issue may be characterised as a 'restriction of competition by effect', the Court stated that, in order to assess the existence of the potential or real effects of such an agreement on competition, it is necessary to determine how the market will probably operate and be structured in the absence of the concerted practice, but it is not necessary to establish the probability of the manufacturer concerned of generic medicines being successful in the patent proceedings or of a settlement agreement being concluded that is less restrictive of competition.

In response to the questions in relation to the concept of 'abuse of a dominant position', the Court held, first, that the product market must be determined taking into account also the generic versions of the medicine whose manufacturing process remains protected by a patent, provided that it can be established that their manufacturers are in a position to enter the market with sufficient strength to constitute a serious counterbalance to the manufacturer of originator medicines already on that market. Secondly, the Court stated that the finding of an abuse of a dominant position presupposes an adverse effect on the competitive structure of the market that exceeds the specific effects of each of the agreements concerned with respect to which penalties were imposed under Article 101 TFEU. More particularly, the Court observed that, taking into consideration the possible cumulative effects that were restrictive of competition of the various agreements, the conclusion of those agreements, in so far as it was part of an overall contract-oriented strategy, had a significant foreclosure effect on the market, depriving the consumer of the benefits of entry into that market of potential competitors manufacturing their own medicine and, therefore, reserving that market directly or indirectly to the manufacturer of the originator medicine concerned. The Court recalled, lastly, that such conduct can be justified if the party engaged in it proves that its anticompetitive effects may be counterbalanced, or outweighed, by advantages in terms of efficiency that also benefit consumers. For the purposes of that weighing of effects, the favourable effects on competition of the conduct concerned must be taken into consideration regardless of the objectives pursued by the party engaged in that conduct.

In the judgment in ***Budapest Bank and Others*** (C-228/18, EU:C:2020:265), delivered on 2 April 2020, the Court specified the applicable criteria in determining whether agreements concluded between financial institutions regarding the fees charged in respect of card payment transactions are practices or agreements having as their object the restriction of competition which are prohibited by Article 101 TFEU.

The Kúria (Supreme Court, Hungary) made a request for a preliminary ruling to the Court of Justice in a dispute between, on the one hand, the Gazdasági Versenyhivatal (Competition Authority, Hungary) and, on the other, two providers of card payment services – Visa and MasterCard – and six credit institutions concerning a decision adopted in 2009 by the Competition Authority. By that decision, the Competition Authority found, inter alia, that there was an anticompetitive agreement concerning 'interchange' fees and, therefore, imposed fines of various amounts on seven of the financial institutions party to the agreement and on Visa and MasterCard.

According to the information presented by the national court, interchange fees are amounts payable by the financial institutions providing economic operators with payment terminals ('the acquiring banks') to the financial institutions issuing the payment cards ('the issuing banks'), as members of the payment system offered by Visa or MasterCard, when a card payment transaction takes place. In April 1996, seven financial institutions representing a large part of the relevant national markets agreed to determine, for each category of operator, the minimum level of the service charge payable by operators. In October 1996, a second agreement ('the MIF Agreement') was adopted; that agreement was negotiated on behalf of Visa and MasterCard and sought to introduce a uniform amount for the interchange fees payable under those two payment systems. After examining the MIF Agreement, the Competition Authority found, in respect of the period beginning on the date of Hungary's accession to the European Union, that there was an infringement of Article 101 TFEU by all the financial institutions which successively joined up to the MIF Agreement and by Visa and MasterCard. In the Competition Authority's view, determining a uniform level and structure for the applicable interchange fee and, in the case of Visa and MasterCard, establishing a framework for that purpose in their respective internal rules constituted an agreement caught by the prohibition under Article 101 TFEU in that it not only had the object of restricting competition but, moreover, had a restrictive effect on competition.

The Court held, first, that Article 101(1) TFEU does not preclude anticompetitive conduct from being regarded as having as both its object and its effect the restriction of competition, within the meaning of that provision. Having been asked to clarify the relationship between those two categories of restrictions of competition, the Court recalled that coordination between undertakings involves a restriction of competition 'by object' where it reveals, in itself, a sufficient degree of harm, without there being any need to examine its effects on competition. However, where the same conduct is regarded as having both as its object and its effect the restriction of competition, it is incumbent on the competent authority or the court having jurisdiction to support its findings for that purpose with the necessary evidence and to specify to what extent that evidence relates to each type of restriction thus found to exist.

Next, the Court addressed the question of the classification that might be given to the agreement at issue in the light of Article 101(1) TFEU, having observed at the outset that the final assessment in that regard fell to the national court.

The Court stated, first of all, in the light of the content of the MIF Agreement, that that agreement had established a uniform amount for the interchange fees payable by the acquiring banks to the issuing banks in respect of payment transactions made using a card of one of the payment systems, thus affecting one aspect of competition both between the two payment systems under consideration and between the acquiring banks. The Court observed that, although the agreement at issue did not directly determine the service charges, a restriction 'by object' could nevertheless be acknowledged if such an agreement were to be viewed as indirect price fixing for the purposes of Article 101(1)(a) TFEU or as conduct presenting equivalent harm to competition within the internal market.

Having, however, found that the harm required for the purposes of classification as a restriction 'by object' was not necessarily apparent from the information submitted to the Court as regards the content of the agreement, the Court examined the information at its disposal concerning the objectives pursued by the

MIF Agreement. In the light of that information, the Court found that it could not be ruled out that the objective pursued by the MIF Agreement consisted not in guaranteeing a minimum threshold for charges but in establishing a degree of balance between the 'issuing' and 'acquiring' activities within each of the card-payment systems concerned in the case in point. In that regard, the Court considered it relevant that the parties to the agreement included both issuing banks and acquiring banks. If it were to become apparent from the verifications to be carried out in that regard by the national court that, by neutralising competition between the two card-payment systems concerned with regard to the interchange fees, the MIF Agreement had the effect of intensifying competition as regards other features of those systems, this would require, in the Court's view, that an assessment be conducted of the competition which would have existed on the market under consideration if the MIF Agreement had not been concluded and, therefore, an analysis of the effects of that agreement.

Accordingly, the Court took the view that it had not been provided with sufficient information to enable it to establish whether the neutralisation of competition with regard to the interchange fees revealed, in itself, a sufficient degree of harm on the part of the MIF Agreement so as not to require an examination of its effects, both as regards competition between the two card-payment systems and as regards competition on the acquiring market. The Court observed that a limitation, by the MIF Agreement, of the upwards pressure on interchange fees which would have occurred in the absence of an agreement was nevertheless relevant for the purposes of examining the existence of a restriction resulting from that agreement.

The Court thus interpreted Article 101(1) TFEU as meaning that an interbank agreement which fixes at the same amount the interchange fee payable, where a payment transaction by card takes place, to the banks issuing the card cannot be classified as an agreement which has 'as [its] object' the prevention, restriction or distortion of competition, within the meaning of that provision, unless that agreement, in the light of its wording, its objectives and its context, can be regarded as posing a sufficient degree of harm to competition to be classified thus, a matter which was for the referring court to determine.

In the judgment in ***Groupe Canal + v Commission*** (C-132/19 P, EU:C:2020:1007), delivered on 9 December 2020, the Court annulled a decision of the European Commission by which it had made binding, under Article 9 of Regulation No 1/2003, [197] commitments offered by an undertaking, in that case Paramount Pictures International Ltd and its parent company, Viacom Inc. (taken together, 'Paramount'). Paramount had concluded licensing agreements on audiovisual content with the main pay-TV broadcasters of the European Union, including Sky UK Ltd and Sky plc (taken together, 'Sky') and Groupe Canal + SA ('Groupe Canal +').

On 13 January 2014, the Commission opened an investigation into possible restrictions affecting the provision of pay-TV services under the licensing agreements in question, in order to assess the compatibility of those restrictions with Article 101 TFEU and Article 53 of the Agreement on the European Economic Area ('the EEA Agreement'). On 23 July 2015, that investigation led the Commission to send Paramount a statement of objections concerning certain clauses in the licensing agreements which Paramount had concluded with Sky. In that case, there were two related clauses, the first of which was intended to exclude or limit Sky's ability to respond favourably to unsolicited requests from consumers resident in the EEA but outside the United Kingdom and Ireland, for the purposes of the provision of television distribution services, while the second required Paramount to insert a clause into the agreements which it concluded with broadcasters established in the EEA but outside the United Kingdom, containing a similar prohibition in respect of those broadcasters in relation to such requests from consumers residing in the United Kingdom or in Ireland. In that regard, the Commission took the view that the agreements which, through such clauses, led to absolute territorial

197| 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).

exclusivity, were capable of constituting a restriction of competition 'as their object' within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement, in so far as they restored the partitions of national markets and frustrated the Treaty's objective of establishing a single market. By letter of 4 December 2015, the Commission communicated that assessment, together with a preliminary view, to Groupe Canal + in the latter's capacity as an interested third party.

For its part, Paramount offered commitments in order to address the concerns raised by the Commission. In that regard, Paramount stated that it was prepared, inter alia, no longer to comply with or act in order to enforce the clauses leading to the broadcasters' absolute territorial protection. Those clauses were in the licensing agreements concluded between Paramount and those broadcasters.

After receiving observations from other interested third parties, including Groupe Canal +, the Commission, by decision of 26 July 2016 [198] ('the decision at issue'), accepted the commitments offered and made them binding, as provided for in Article 9 of Regulation No 1/2003. Paramount then notified Groupe Canal + of the terms of the commitments which had been made binding, and of the implications of those commitments, in that case Paramount's intention no longer to ensure compliance with the absolute territorial exclusivity granted to Groupe Canal + on the French market. Taking the view that those commitments, entered into in proceedings involving only the Commission and Paramount, could not be relied on against Groupe Canal +, the latter brought an action before the General Court seeking annulment of the decision at issue, which was dismissed by judgment of 12 December 2018 [199] ('the judgment under appeal').

In its judgment of 9 December 2020, the Court of Justice found, in the appeal brought by Groupe Canal +, that the General Court had erred in law in its assessment of the proportionality of the adverse effects on the interests of third parties resulting from the decision at issue. Consequently, it set aside the judgment under appeal and, giving final judgment in the matter, also annulled the decision at issue. In that context, the Court provided fresh guidance on the relationship between the respective prerogatives of the Commission and the national courts in the implementation of EU competition rules.

In the first place, the Court of Justice held that the General Court was entitled to reject the plea in law alleging misuse of powers, which sought, in essence, to show that the Commission, by adopting the decision at issue, had circumvented the legislative process relating to the issue of geo-blocking. In that regard, the Court of Justice agreed in particular with the General Court's analysis that, so long as the legislative process relating to the issue of geo-blocking had not resulted in the adoption of a legislative text, that process was without prejudice to the powers conferred on the Commission by Article 101 TFEU and Regulation No 1/2003. In that case, it was common ground that the decision at issue had been adopted under such powers, prior to the completion of the legislative process in question.

In the second place, the Court of Justice held that it was also on adequate grounds and without any error of law that the General Court had rejected the arguments of Groupe Canal + seeking to demonstrate that the relevant clauses were lawful in the light of Article 101(1) TFEU and that there was therefore no basis for the concerns which gave rise to the decision at issue. In so far as the licensing agreements in question contained clauses designed to eliminate the cross-border provision of broadcasting services for the audiovisual content concerned and, to that end, conferred on broadcasters absolute territorial protection guaranteed by reciprocal obligations, the General Court was entitled to find that such clauses were, without prejudice to any decision definitively finding the existence or absence of an infringement of Article 101(1) TFEU following a thorough

198| Decision of the European Commission of 26 July 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.40023 – Cross-border access to pay-TV).

199| Judgment of the General Court of 12 December 2018, ***Groupe Canal +* v *Commission*** (T-873/16, EU:T:2018:904).

examination, such as to give rise to competition concerns for the Commission. In the same vein, the Court of Justice emphasised the preliminary nature of the assessment of the anticompetitive nature of the conduct at issue in the context of a decision adopted under Article 9 of Regulation No 1/2003. Consequently, the General Court was also correct to find that Article 101(3) TFEU is applicable only if an infringement of Article 101(1) TFEU has first been found, with the result that it was not for it, in the context of the review of the lawfulness of a decision adopted under Article 9 of Regulation No 1/2003, to rule on complaints based on the conditions for the application of Article 101(3) TFEU.

In the third place, the Court of Justice endorsed the General Court's finding that the relevant clauses could validly raise competition concerns for the Commission as regards the whole of the EEA, without the Commission being under an obligation to analyse the relevant national markets one by one. In so far as the relevant clauses were intended to partition national markets, the General Court rightly pointed out that such agreements could jeopardise the proper functioning of the single market, thereby counteracting one of the principal objectives of the European Union, irrespective of the prevailing situation in the national markets.

Lastly, in the fourth place, the Court of Justice examined the complaint alleging that the General Court had erred in law, in particular in the light of the principle of proportionality, in its assessment of the effect of the decision at issue on the contractual rights of third parties such as Groupe Canal +. The Court of Justice pointed out, at the outset, that, in the context of Article 9 of Regulation No 1/2003, the Commission is required to verify commitments offered, not only from the perspective of whether they are appropriate to address its competition concerns, but also with regard to the effect of the commitments on the interests of third parties, so that those third parties' rights are not rendered meaningless. However, as the General Court itself observed, the Commission's decision to make binding an operator's commitment not to apply certain contractual clauses vis-à-vis its contracting partner, such as Groupe Canal +, which had only the status of interested third party, when that contracting partner did not consent to it, constituted an interference with the contractual freedom of that contracting partner and went beyond the provisions of Article 9 of Regulation No 1/2003.

In that context, the Court of Justice considered that the General Court could not refer such contracting partners to the national courts in order to have their contractual rights enforced without infringing the provisions of Article 16 of Regulation No 1/2003, which prohibit those courts from adopting decisions running counter to an earlier Commission decision on the matter. A decision of a national court requiring an operator to contravene its commitments which have been made binding by a Commission decision would clearly run counter to that decision. In addition, given that the second sentence of Article 16(1) of Regulation No 1/2003 requires national courts to avoid giving decisions which conflict with a decision contemplated by the Commission for the application, inter alia, of Article 101 TFEU, the General Court had also erred in law by holding that a national court could declare the relevant clauses compatible with Article 101 TFEU, even though the Commission could still, under Article 9(2) of Regulation No 1/2003, reopen the proceedings and, as it had initially envisaged, adopt a formal decision containing a formal finding that there had been an infringement.

Consequently, the Court of Justice concluded that the judgment under appeal was vitiated by an error of law as regards the assessment of the proportionality of the decision at issue in relation to the adverse effects on the interests of third parties, with the result that that judgment had to be set aside.

Taking the view that the state of the proceedings permitted final judgment to be given, the Court examined, lastly, the plea for annulment alleging infringement of the principle of proportionality. Drawing the consequences from the grounds for setting aside the judgment under appeal, the Court noted the essential character, in the scheme of the licensing agreements in question, of the obligations intended to ensure the territorial exclusivity granted to broadcasters which were affected by the commitments made binding by the decision at issue. The Court reached the conclusion that, by adopting the decision at issue, the Commission had

rendered the contractual rights of third parties meaningless, including the contractual rights of Groupe Canal + vis-à-vis Paramount, and had thereby infringed the principle of proportionality, with the result that the decision at issue had to be annulled.

1.2. Abuse of a dominant position (Article 102 TFEU)

By its judgment in ***SABAM*** (C-372/19, EU:C:2020:959), delivered on 25 November 2020, the Court provided guidance on the concept of 'abuse of a dominant position' in connection with royalties charged by a copyright-collecting society to users of protected works. The case in the main proceedings concerned SABAM, a commercial, profit-making company and the sole copyright-collecting organisation in Belgium. As such, it was responsible for, inter alia, collecting and distributing copyright royalties from the reproduction and communication to the public of musical works from its repertoire. Weareone.World and Wecandance are the organisers, respectively, of the Tomorrowland and Wecandance festivals, which take place every year ('the festival organisers'). Musical works from SABAM's repertoire were used at a number of those festivals in different years. With a view to securing payment of the royalties which it sought to claim in that respect from the festival organisers, SABAM calculated the amount due by applying one of two remuneration models which it was free to choose from. In that case, it chose the 'basic tariff'.

The basic tariff is calculated on the basis of either the gross revenue from ticket sales, after deducting booking fees and taxes due, or the artistic budget, whichever is higher. In addition, the basic tariff incorporates a staggered flat-rate system which allows festival organisers to obtain discounts depending on the number of musical works from SABAM's repertoire actually performed at the event, [200] provided that the organisers have forwarded the list of those works within a set period.

The festival organisers challenged the sums claimed, arguing that the royalties thus calculated did not correspond to the economic value of the services provided by SABAM, thereby infringing the prohibition on abuse of a dominant position laid down in Article 102 TFEU. SABAM subsequently brought proceedings before the ondernemingsrechtbank Antwerpen (Companies Court, Antwerp, Belgium) for an order requiring the festival organisers to pay the sums claimed. The organisers objected to the action, arguing that the remuneration model used by SABAM was unlawful in the light of Article 102 TFEU.

It was against that background that the Belgian court hearing the case decided to seek clarification from the Court of Justice on the concept of 'abuse of a dominant position'; it considered such clarification necessary to enable it to rule on the two disputed aspects of the remuneration model in question.

A collecting society, such as SABAM, which has a monopoly over the management of copyright relating to a category of protected works in the territory of a Member State, comes under the prohibition of abuse of a dominant position referred to in Article 102 TFEU. That being the case, the Court stated at the outset that it was for the national court to determine whether such an abuse exists in the light of all the circumstances of the case. Concerning the royalties imposed by a collecting society, the Court recalled that abuse, by the imposition of unfair trading conditions, [201] is likely to result from the excessive nature of the price charged, inasmuch as that price appears to have no reasonable relation to the economic value of the product supplied by such a society, namely making the entire repertoire of copyright-protected musical works which it manages

200| In the instant case, the flat-rate system provides for the application of one third or two thirds of the basic tariff where less than one third or less than two thirds of the musical works performed are in SABAM's repertoire.

201| Within the meaning of point (a) of the first paragraph of Article 102 TFEU.

available to users. In that regard, it is necessary, in particular, to strike an appropriate balance between the right of authors to receive suitable remuneration and the legitimate interests of users, by taking into account not only the economic value of the collection service as such, but also the nature and extent of the use of the works, and the economic value thus generated. [202] Thus, where the difference between the cost actually incurred and the price actually charged appears excessive, the assessment of whether or not the level of the royalties at issue is unfair must be based on a comparison with relevant factors, such as the prices charged in the past by the dominant undertaking in the same relevant market, the prices charged by that undertaking for different services or to different types of customers, or the prices charged by other undertakings for the same service or for comparable services in other Member States, provided that that comparison is made on a consistent basis.

It was in the light of those considerations that the Court went on to examine the two contested aspects of the remuneration model at issue.

As regards, in the first place, whether it is permissible to calculate royalties on the basis of a tariff applied to the gross revenue from the sale of admission tickets, the Court pointed out, first of all, that a remuneration model of a collecting society based on a percentage of revenue from a musical event must be regarded as a normal exploitation of copyright and has, in principle, a reasonable relation to the economic value of the service provided by that company. The same is true of a remuneration model, such as that at issue in the main proceedings, which does not permit the deduction from the revenue taken into account of all expenditure relating to the organisation of the festival which has no connection with the musical works performed there. The Court therefore held that the imposition of such a model by a collecting society does not, in principle, amount to abuse. In that regard, it pointed out that not only may it be particularly difficult to determine and quantify the expenditure which is unrelated to the musical works performed in an objective manner, but it may also be expensive to do so, in so far as the necessary checks could lead to a disproportionate increase in management costs. According to the Court, it would be otherwise only if the verifications to be carried out by the national court revealed that the royalties actually charged under the model in question were excessive in the light of all the circumstances of the case, including the royalty rate set and the basis of assessment to which that rate applied.

As regards, in the second place, the taking into account, when calculating the royalties charged, of the proportion of works performed which were taken from the repertoire of the collecting society in question, the Court recalled the need for all remuneration models to take account of the number of copyright-protected musical works actually used. In the instant case, it is true that a staggered flat-rate system, like the system at issue, takes account to a certain extent, albeit imprecisely, of those relative proportions. Such a system may nevertheless constitute abuse if there is an alternative method enabling the use of those works to be identified and quantified more precisely, without leading to a disproportionate increase in management costs. In those circumstances, the Court considered it permissible to have recourse to such a staggered flat-rate system provided that the national court was satisfied that established technical or economic obstacles would prevent a more precise determination of the proportion of the works performed from SABAM's repertoire.

202| See also Article 16(2) of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ 2014 L 84, p. 72).

On the issue of dominant positions, mention should also be made of the judgment of the Court of 30 January 2020, ***Generics (UK) and Others*** (C-307/18, EU:C:2020:52), concerning the applicability of the competition rules as provided for in Articles 101 and 102 TFEU to settlement agreements with respect to disputes concerning patents. [203]

1.3. Procedures for the implementation of the competition rules

By its judgment in ***Nexans France and Nexans* v *Commission*** (C-606/18 P, EU:C:2020:571), of 16 July 2020, the Court of Justice dismissed the appeal brought by Nexans France SAS and its parent company Nexans SA ('the appellants') against the judgment of the General Court of 12 July 2018 in Case T-449/14. [204] The appeal raised, in particular, the issue of the General Court's interpretation of the scope of the powers conferred on the Commission by Article 20 of Regulation No 1/2003 to conduct inspections in relation to cartels. [205]

The appellants, who are active in the sector concerning the production and supply of submarine and underground power cables, were the subject of a Commission decision finding an infringement of Article 101 TFEU in that sector ('the decision at issue'). [206] The decision at issue stated that the appellants had participated in a cartel involving, on the one hand, the allocation of territories and customers among the European, Japanese and South Korean producers ('the A/R configuration') and, on the other, the allocation of territories and customers by the European producers for projects to be carried out within Europe or allocated to the European producers ('the European configuration'). Consequently, the Commission imposed on the appellants fines exceeding EUR 70 000 000.

The Commission's investigation which led to the imposition of that fine included an inspection at the appellants' premises, where the Commission inspectors examined, in particular, certain employees' computers. They made a copy-image of the hard drives of those computers and, by reference to that, conducted a keyword search in the data contained on those computers using computer-investigation software. The inspectors subsequently decided to make a copy of selected data and to place the data on data-recording devices ('DRDs'). They also made three copy-images of a hard drive which were each recorded onto a separate DRD. The DRDs were placed in sealed envelopes and taken back to the Commission's offices in Brussels where the envelopes were opened and the DRDs examined in the presence of the appellants' representatives.

The action seeking annulment of the decision at issue lodged by the appellants before the General Court was dismissed in its entirety by the judgment of 12 July 2018, *Nexans France and Nexans* v *Commission*. In support of their appeal against that judgment, the appellants relied on five grounds of appeal, relating, first, to the General Court's rejection of their arguments concerning the conduct of the inspection in question and, secondly, the General Court's refusal to reduce the fines imposed on them.

First, in relation to the first ground of appeal, the Court examined whether the Commission, when conducting the inspection at the premises of the appellants, was entitled to make the copy-image of a hard drive and copies of sets of emails without carrying out a meaningful examination of those documents beforehand.

203| That judgment is presented in Section XII.1.1 'Agreements, decisions and concerted practices'.

204| Judgment of the General Court of 12 July 2018, ***Nexans France and Nexans* v *Commission*** (T-449/14, EU:T:2018:456).

205| 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).

206| Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 – Power cables).

Recalling that the EU legislature granted the Commission a certain discretion regarding its specific examination procedures, the Court confirmed the Commission's right to decide, depending on the circumstances, to examine data contained on the digital-data carrier of the undertaking under inspection by reference to a copy of such data. The Court explained that that right of the Commission, which falls within the scope of Article 20(2)(b) of Regulation No 1/2003, affects neither the procedural safeguards nor the other rights of the undertaking under inspection, provided that the Commission, after completing its examination, places on the file only documents which are relevant to the subject matter of the inspection. Like the General Court, the Court of Justice took the view that that was so in that case. The Court added that, having regard to the fact that the time required for processing electronic data may prove to be considerable, it is also in the interest of the undertaking concerned that the Commission relies, in conducting its examination, on a copy of those data, thereby enabling that undertaking to continue to use the original data and the media on which they are located as soon as that copy has been made, thereby reducing the interference in that undertaking's operations caused by the Commission's inspection.

Next, in relation to the second and third grounds of appeal, the Court examined whether the Commission had the power to continue the inspection in question at its premises in Brussels. The Court stated that to require the Commission to process such data exclusively at the premises of the undertaking under inspection could, in the case of particularly large volumes of data, have the effect of significantly extending the duration of the inspectors' presence at that undertaking's premises, which could hamper the effectiveness of the inspection and needlessly increase the interference in that undertaking's operations on account of the inspection. That being said, the Court explained that the Commission may make use of that possibility of continuing, at its premises in Brussels, its examination of the business records of the undertaking concerned only where it can legitimately take the view that it is justified in doing so in the interests of the effectiveness of the inspection or to avoid excessive interference in the operations of the undertaking concerned. In addition, the Court stated that that possibility is subject to the condition that such continuation does not give rise to any infringement of the rights of the defence and does not constitute an additional encroachment on the rights of the undertakings concerned. Such an encroachment would have to be identified if the continuation of that examination at the Commission's premises in Brussels gave rise to additional costs for the undertaking concerned solely as a result of that continuation. Consequently, where that continuation is capable of giving rise to such additional costs, the Commission may undertake that continuation only where it agrees to reimburse those costs if a duly reasoned request to that effect is presented by the undertaking concerned.

Thereafter, the Court of Justice examined the fourth ground of appeal and whether the General Court had erred in law regarding its assessment of how the amount of the fines was determined. The Court of Justice found that the General Court had not misapplied the principle of unlimited jurisdiction which empowers it, in addition to carrying out a review of legality with regard to the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. It held that the General Court was entitled to reach the conclusion that the alleged lack of effects of the infringement in question, as claimed by the appellants, was not capable, because of the other factors taken into consideration by the General Court, of persuading it to reduce the fines imposed on the appellants.

Finally, the Court of Justice gave a ruling on the fifth ground of appeal, concerning the General Court's finding that because of the appellants' participation in the European cartel configuration, which had increased the harm to competition caused by the A/R configuration of that cartel, the Commission was entitled to increase the gravity factor used to calculate the amount of the fines imposed on them by 2%. In that regard, the Court of Justice found that the close connection between those two configurations did not alter the fact that the European cartel configuration constituted, by its very nature, a separate commitment to allocating projects not inherent in the A/R cartel configuration. Therefore, the finding that that additional harm to competition could legitimately be punished by an increased fine was not vitiated by an error of assessment.

Since none of the grounds of appeal put forward by the appellants in support of their appeal could succeed, the Court dismissed the appeal in its entirety.

2. State aid

Four judgments deserve to be mentioned under this heading. Two of them concern the applicability of the State aid rules. The other two judgments concern review procedures: the first deals with observance of the procedural rights of interested parties in State aid review procedures while the second relates to the requirement to give the Commission prior notice of aid measures.

2.1. Applicability of State aid rules

By its judgment of 11 June 2020, ***Commission and Slovak Republic* v *Dôvera zdravotná poist'ovňa*** (C-262/18 P and C-271/18 P, EU:C:2020:450), the Grand Chamber of the Court of Justice set aside the judgment of the General Court of 5 February 2018, *Dôvera zdravotná poist'ovňa* v *Commission*, [207] and, giving final judgment in the case, dismissed the action for annulment brought by the Slovak health insurance body Dôvera zdravotná poist'ovňa a.s. ('Dôvera') against the Commission's decision of 15 October 2014 concerning State aid allegedly granted by the Slovak Republic to two other Slovak health-insurance bodies ('the decision at issue'). [208] The Court thereby confirmed its case-law regarding the inapplicability of the State aid rules to health-insurance bodies operating under State supervision in the context of a social security scheme that pursues a social objective and applies the principle of solidarity.

In 1994, the Slovak health-insurance system changed from a unitary system, with a single State-owned health insurer, to a pluralistic model in which both public and private bodies could operate. Under Slovak legislation which entered into force on 1 January 2005, those bodies, whether State-owned or in private ownership, must have the legal status of a profit-seeking joint stock company governed by private law. During the period from 2005 to 2014, Slovak residents could choose between several health-insurance bodies, including Všeobecná zdravotná poisťovňa a.s. ('VšZP') and Spoločná zdravotná poisťovňa a.s. ('SZP'), which merged on 1 January 2010 and whose sole shareholder is the Slovak State, and Dôvera and Union zdravotná poist'ovňa a.s., whose shareholders are private-sector entities.

Following a complaint lodged by Dôvera on 2 April 2007 concerning State aid allegedly granted by the Slovak Republic to SZP and to VšZP, the Commission initiated the formal investigation procedure. In the decision at issue, the Commission found, however, that the activity carried out by SZP and VšZP was non-economic in nature and that those bodies were consequently not undertakings within the meaning of Article 107(1) TFEU, with the result that the measures to which the complaint related could not constitute State aid. The action for annulment which Dôvera brought against that decision was upheld by the General Court, in particular on the ground that the Commission had misapplied the concepts of 'undertaking', within the meaning of Article 107(1) TFEU, and 'economic activity' with respect to VšZP and SZP.

207| Judgment of the General Court of 5 February 2018, ***Dôvera zdravotná poist'ovňa* v *Commission*** (T-216/15, not published, EU:T:2018:64).

208| Commission Decision (EU) 2015/248 of 15 October 2014 on the measures SA.23008 (2013/C) (ex 2013/NN) implemented by Slovak Republic for Spoločná zdravotná poisťovňa, a.s. (SZP) and Všeobecná zdravotná poisťovňa, a.s (VZP) (OJ 2015 L 41, p. 25).

Two appeals against that judgment of the General Court were brought by the Commission and the Slovak Republic before the Court of Justice, which recalled that the prohibition of State aid laid down in Article 107(1) TFEU concerns only the activities of undertakings, the concept of 'undertaking' covering any entity engaged in an economic activity, irrespective of the legal status of that entity and the way in which it is financed. However, by stating that the activity carried out by VšZP and SZP in the context of the Slovak compulsory health-insurance scheme, the characteristics of which reflect those of a social security scheme that pursues a social objective and applies the principle of solidarity under State supervision, was economic in nature, the General Court had made several errors of law.

In that regard, the Court of Justice made clear that, for the purposes of assessing whether an activity carried out in the context of a social security scheme is non-economic in nature, it must be ascertained, in particular, whether and to what extent the scheme in question may be considered to be applying the principle of solidarity and whether the activity of the insurance bodies managing such a scheme is subject to State supervision.

On the basis of those considerations, the Court of Justice noted that, contrary to the findings of the General Court, the existence of a certain amount of competition as regards the quality and scope of services provided in the Slovak compulsory health-insurance scheme, such as the ability of insurers to offer insured persons additional services on a free-of-charge basis and the freedom of insured persons to choose their insurer and to switch once a year, is not such as to call into question the social and solidarity-based nature of the activity carried out by the insurance bodies in the context of a scheme applying the principle of solidarity under State supervision. As regards the existence of a certain amount of competition between insurance bodies when procuring the relevant services, the Court added that, when determining the nature of the activity of an entity, there is no need to dissociate the activity of purchasing goods or services from the subsequent use to which they are put, the nature of the activity of the entity concerned being determined according to whether or not the subsequent use amounts to an economic activity.

Since the General Court had erroneously found that the elements of competition referred to above were such as to affect the social and solidarity character of the activity carried out by VšZP and SZP, the Court of Justice upheld the appeals of the Commission and the Slovak Republic and set aside the judgment under appeal. Finding, moreover, that the state of the proceedings was such that it could give final judgment in the matter and that it should do so, the Court of Justice then itself examined the action for annulment brought by Dôvera against the decision at issue.

In that regard, the Court noted that membership of the Slovak health-insurance scheme is compulsory for all Slovak residents, that the amount of contributions is fixed by law in proportion to the income of the insured persons and not to the risk they represent on account of their age or state of health, and that all insured persons have the right to the same level of benefits set by law, so that there is no direct link between the amount of the contributions paid by the insured person and that of the benefits provided. In addition, the insurance bodies are required to ensure that every Slovak resident who requests it has health-insurance cover, regardless of the risk resulting from that person's age or state of health, and the scheme also provides for a mechanism for equalisation of the costs and risks. Thus, that health-insurance scheme has, according to the Court, all the characteristics of the principle of solidarity.

Having found the Slovak compulsory health-insurance scheme also to be subject to State supervision, the Court further noted that the presence of competitive elements in that scheme is secondary, as compared with the scheme's social, solidarity and regulatory aspects, and that the ability of insurance bodies to seek, use and distribute profits is strictly framed by legal obligations the purpose of which is to preserve the viability and continuity of compulsory health insurance.

In the light of all those considerations, the Court held that the Commission was justified in concluding, in the decision at issue, that the Slovak compulsory health-insurance scheme pursues a social objective and applies the principle of solidarity under State supervision. The Commission was also entitled, therefore, to find that the activity of VšZP and SZP within that scheme was not of an economic nature and, accordingly, that those bodies could not be classified as undertakings within the meaning of Article 107(1) TFEU.

In the judgment in ***Austria* v *Commission*** (C-594/18 P, EU:C:2020:742), delivered on 22 September 2020, the Court, sitting as the Grand Chamber, confirmed the decision of the Commission of 8 October 2014 [209] by which the Commission had approved aid which the United Kingdom was planning for Hinkley Point C nuclear power station, located in Somerset, on the United Kingdom coast ('Hinkley Point C'), with the aim of creating new nuclear-energy-generating capacity. Hinkley Point C is scheduled to enter into service in 2023, with an operational life of 60 years. The aid, which is in three parts, is envisaged for the future operator of Hinkley Point C, NNB Generation Company Limited ('NNB Generation'), a subsidiary of EDF Energy plc.

The first of the measures at issue is a 'contract for difference', [210] which is intended to ensure price stability for electricity sales during the operational phase of Hinkley Point C. The second is an agreement between NNB Generation's investors and the United Kingdom's Secretary of State for Energy and Climate Change, guaranteeing compensation in the event of an early shutdown of the nuclear power station on political grounds. The third consists of a credit guarantee by the United Kingdom on bonds to be issued by NNB Generation and is intended to ensure the timely payment of principal and interest of qualifying debt.

In its decision, the Commission classified those three measures as State aid compatible with the internal market pursuant to 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 provided that it does not adversely affect trading conditions to an extent contrary to the common interest.

The Republic of Austria sought the annulment of that decision before the General Court, which, however, dismissed its action by judgment of 12 July 2018. [211]

Hearing an appeal brought by the Republic of Austria, [212] the Court of Justice was, essentially, called upon to answer the previously unaddressed question of whether the construction of a nuclear power station may benefit from State aid approved by the Commission pursuant to Article 107(3)(c) TFEU. Dismissing the appeal, the Court answered that question in the affirmative.

The Court, first of all, pointed out that, in order to be declared compatible with the internal market under Article 107(3)(c) TFEU, State aid must meet two conditions, the first being that it must be intended to facilitate the development of certain economic activities or of certain economic areas and the second being that it must not adversely affect trading conditions to an extent contrary to the common interest. That provision

209| Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (OJ 2015 L 109, p. 44).

210| The parties to that contract are NNB Generation and Low Carbon Contracts Ltd, an entity that will be funded through a statutory obligation on all licensed electricity suppliers collectively.

211| Judgment of the General Court of 12 July 2018, ***Austria* v *Commission*** (T-356/15, EU:T:2018:439).

212| As was the case before the General Court, the Grand Duchy of Luxembourg intervened in support of the Republic of Austria in the proceedings before the Court of Justice, whereas the Czech Republic, the French Republic, Hungary, the Republic of Poland, the Slovak Republic and the United Kingdom intervened in support of the Commission.

does not, however, require planned aid to pursue an objective of common interest. Accordingly, the Court rejected as unfounded the Republic of Austria's various arguments to the effect that the construction of a new nuclear power station does not constitute an objective of common interest.

The Court also confirmed that, in the absence of specific rules in the Euratom Treaty, the rules of the TFEU on State aid are applicable in the nuclear-energy sector. Furthermore, contrary to what the General Court held, the Euratom Treaty does not preclude the application in that sector of the rules of EU law on the environment, with the result that State aid for an economic activity falling within the nuclear-energy sector that is shown upon examination to contravene environmental rules cannot be declared compatible with the internal market. The error of law thereby committed by the General Court had no effect, however, on the soundness of the judgment under appeal, since the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability, relied on by the Republic of Austria in support of its action for annulment, cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant. Such an approach would not be compatible with the second subparagraph of Article 194(2) TFEU, from which it follows that a Member State is free to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, and which does not preclude that choice from being nuclear energy.

Next, the Court of Justice rejected the Republic of Austria's argument that the General Court had defined the relevant economic activity for the purposes of Article 107(3)(c) TFEU incorrectly. In that regard, the Court held that the generation of nuclear energy, which the measures at issue are intended to develop, does indeed constitute an economic activity within the meaning of that provision. The Court, furthermore, pointed out that identification of the product market within which the activity covered by the aid falls is relevant when verifying that the aid does not adversely affect trading conditions to an extent contrary to the common interest, which is the second condition upon which that provision makes the compatibility of aid dependent. In that instance, the Commission had identified the liberalised market for the generation and supply of electrical power as being the market affected by the planned measures.

Nor did the General Court err in law in holding that, while the existence of a failure of the market concerned by the planned aid may be a relevant factor for declaring the aid compatible with the internal market, the absence of such a failure does not necessarily mean that the aid is incompatible with the internal market.

So far as concerns the review of the proportionality of the planned aid for Hinkley Point C, the Court of Justice, first of all, pointed out that the General Court had examined the proportionality of the measures at issue in the light of the United Kingdom's electricity supply needs whilst rightly confirming that the United Kingdom was free to determine the composition of its own energy mix. When examining the condition that the planned aid must not adversely affect trading conditions to an extent contrary to the common interest, the Commission did not, moreover, have to take into account the negative effect which the measures at issue may have on the implementation of the principle of protection of the environment, the precautionary principle, the 'polluter pays' principle and the principle of sustainability relied on by the Republic of Austria. Without prejudice to the check that the activity supported does not infringe the rules of EU law on the environment, examination of that condition does not require the Commission to take into account any negative effects other than the negative effects of the aid on competition and trade between Member States.

Finally, the Court of Justice confirmed that, when checking that the measures at issue were compatible with the internal market, neither the Commission nor the General Court was required to characterise them formally as 'investment aid', which may satisfy the conditions for application of Article 107(3)(c) TFEU, or 'operating aid', the authorisation of which under that provision is in principle precluded.

2.2 Review procedures

In the judgment in ***Commission* v *Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo*** (C-56/18 P, EU:C:2020:192), of 11 March 2020, the Court of Justice set aside the judgment of the General Court of 17 November 2017, G*mina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* v *Commission*, [213] which had annulled in part a decision of the Commission on State aid [214] ('the decision at issue') on account of infringement of the procedural rights of the interested parties.

That case arose from capital injections made in 2007 by the Gmina Masto Gdynia (municipality of Gdynia, Poland) and the Gmina Kosakowo (municipality of Kosakowo, Poland) in favour of the company Port Lotniczy Gdynia Kosakowo sp. z o.o. which had been created with the aim of converting the military airport of Gdynia-Oksywie (Poland) into a civil airport. Those injections were intended to cover both the investment costs and subsequent operating costs. The Republic of Poland notified the Commission of that funding measure in 2012. Following a formal investigation procedure initiated in 2013, the Commission adopted an initial decision on 11 February 2014 [215] in which it found that that measure constituted State aid and therefore ordered its recovery. In the decision at issue, the Commission withdrew the decision of 11 February 2014 and replaced it.

After noting that the 'operating aid' aspect of the funding measure in question had been examined in the light of different guidelines and derogations in the two successive decisions, the General Court held, in its judgment of 17 November 2017, that the interested parties in the case had not been given an opportunity to submit comments effectively in that regard, with the result that their procedural rights had been infringed. Finding that respect for the procedural rights of the interested parties was an essential procedural requirement within the meaning of Article 263 TFEU, the General Court annulled the decision at issue inasmuch as it classified the funding measure in question as State aid, and ordered recovery of the aid.

Hearing an appeal brought by the Commission, the Court of Justice held, in the first place, that the General Court had erred in law in classifying respect for the procedural rights of the interested parties in the case as an essential procedural requirement, the infringement of which would in itself result in the annulment of the decision at issue, without it being necessary to establish that that infringement had any effect on the content of the decision at issue. The Court of Justice pointed out, in that regard, that the procedural rights enjoyed by interested parties in procedures for reviewing State aid are separate from the rights of defence which Member States have as parties to such procedures. It follows, according to the Court, that interested parties must be given an opportunity to submit comments where the Commission intends to base its decision on new principles introduced by a new legal regime. However, the Court emphasised that a procedural irregularity, such as infringement of the procedural rights of the interested parties, entails the annulment of the decision only if it is shown that, in the absence of such irregularity, the decision being challenged might have been substantially different. The Court of Justice inferred from this that the General Court had erred in law in basing the annulment of the decision at issue on the mere infringement of the procedural rights of the interested parties, without examining, as requested by the Commission, whether the decision at issue had an autonomous legal basis which was not affected by the change in legal regime.

213| Judgment of the General Court of 17 November 2017, ***Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo* v *Commission*** (T-263/15, EU:T:2017:820).

214| Commission Decision (EU) 2015/1586 of 26 February 2015 on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) – Poland – Setting up the Gdynia-Kosakowo airport (OJ 2015 L 250, p. 165).

215| Decision 2014/883/EU on the measure SA.35388 (13/C) (ex 13/NN and ex 12/N) – Poland – Setting up the Gdynia-Kosakowo Airport (OJ 2014 L 357, p. 51).

The Court of Justice ruled out, in the second place, that the new principles applied in the decision at issue could have affected the meaning of that decision. The Court pointed out that the General Court could not simply identify the amendments to the legal regime applied, but ought to have ascertained whether those amendments had any effect on the meaning of the decision. The Court of Justice noted that the finding that the operating aid was incompatible with the internal market had been based, in the decision at issue, on the incompatibility of the investment aid with the internal market. After examining the reasoning of the decision at issue, the Court held that such a conclusion was based on the actual provisions of the Treaty and not on an application of guidelines, so that the amendment of those guidelines could not have affected the meaning of the decision at issue.

The Court of Justice therefore concluded that the infringement of the procedural rights of the interested parties in that case could not have affected the content of the decision at issue, with the result that the judgment of the General Court had to be set aside. The Court of Justice referred the case back to the General Court for it to rule on the aspects of the action which had not yet been examined.

By its judgment in ***Viasat Broadcasting UK*** (C-445/19, EU:C:2020:952), delivered on 24 November 2020, the Grand Chamber of the Court ruled on the obligation for national courts to order a recipient of State aid implemented without prior notification to the Commission under Article 108(3) TFEU to pay illegality interest. That case concerned TV2, a Danish broadcasting company with a public-service mission of producing and broadcasting national and regional television programmes. To accomplish that task, TV2 received financing from licence fee resources as well as advertising revenue paid via the TV2 fund, controlled by the State. That aid was not notified to the Commission by the Kingdom of Denmark and was implemented before the definitive decision had been made that the aid was compatible with the internal market on the basis of Article 106(2) TFEU, since it was necessary to the performance of the public-service task entrusted to TV2.

Relying on the failure to notify that aid and its premature implementation in breach of Article 108(3) TFEU, Viasat, a competitor of TV2, brought an action before the referring court, the Østre Landsret (High Court of Eastern Denmark, Denmark), seeking to have TV2 pay illegality interest in respect of the period during which the aid concerned was unlawful, namely the period from its implementation in 1995 until 20 April 2011, the date on which the Commission adopted its final decision finding the grant of unlawful but compatible aid. [216] According to Viasat, in the absence of the unlawful aid, TV2 would have had to pay that interest if it had borrowed the amount of that aid on the market pending the adoption of the Commission's final decision.

It was in those circumstances that the Court of Justice was asked whether the obligation for national courts to order a recipient of aid implemented in breach of Article 108(3) TFEU to pay illegality interest applies also where the Commission has found that the unlawful aid is compatible on the basis of Article 106(2) TFEU. The referring court also asked whether that obligation applied to aid that TV2 had transferred to affiliated undertakings and to aid received by it from a publicly controlled undertaking.

In the first place, as regards the relationship between Article 108(3) TFEU and Article 106(2) TFEU, the Court recalled first of all that where the Commission adopts a final decision finding unlawful aid to be compatible, while the national courts are not bound to order its recovery, they are however, under EU law, bound to order its recipient to pay interest in respect of the period of unlawfulness of that aid. Indeed, implementation of aid in breach of Article 108(3) TFEU gives the aid recipient an undue advantage consisting, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it

216| Commission Decision 2011/839/EU on the measures implemented by Denmark (C 2/03) for TV2/Danmark (OJ 2011 L 340, p. 1). The Court dismissed the action seeking annulment of that decision by its judgment of 9 November 2017, ***Viasat Broadcasting UK* v *TV2/Danmark*** (C-657/15 P, EU:C:2017:837).

had to borrow that amount on the market pending the Commission's final decision, and, secondly, in the improvement of its competitive position as against the other operators in the market while the aid concerned was unlawful.

Next, the Court pointed out that the question whether a measure must be categorised as State aid occurs upstream of the question which consists in examining, where necessary, if incompatible aid as provided for in Article 107 TFEU is nevertheless necessary to the performance of the tasks assigned to the recipient of the measure at issue, under Article 106(2) TFEU. Therefore, the Commission must, before any consideration of a measure under that provision, be in a position to review whether that measure constitutes State aid, which requires prior notification of the intended measure to that EU institution, in accordance with the first sentence of Article 108(3) TFEU.

Furthermore, the Court clarified that any exception to that notification requirement must be explicitly provided for and that the performance of the tasks of an undertaking entrusted with the operation of a service of general economic interest cannot, in itself, justify an exemption from that requirement.

Therefore, aid for such an undertaking remains, in the absence of an express exemption, subject to the prior notification requirement laid down in the first sentence of Article 108(3) TFEU, so that Member States are obliged not to implement that aid until the Commission has taken a final decision in relation to it. Failure to comply with those requirements means the aid concerned is unlawful, so that the recipient of that aid cannot have either a legitimate expectation that the grant of that aid is lawful or a legitimate expectation that the advantage it derives from the non-payment of interest, due in respect of the period during which the aid is unlawful, is itself lawful.

Thus, according to the Court, in order to ensure the effectiveness of that notification requirement as well as proper and full consideration of State aid by the Commission, national courts are bound to draw all the consequences from non-compliance with that requirement and to adopt measures to remedy them, which includes the obligation, for the recipient of unlawful aid, to pay illegality interest in respect of that aid, even if the recipient is an undertaking entrusted with the operation of a service of general economic interest in accordance with Article 106(2) TFEU.

In the second place, as regards the amount to take into account for the interest calculation, the Court stated that the EU Courts had confirmed that the Commission decision was valid and had made a definitive ruling that the resources obtained from the licence fees paid to TV2, and subsequently transferred to its regional stations, [217] as well as the advertising revenue transferred to TV2 via the TV2 fund, [218] constituted State aid in accordance with Article 107(1) TFEU. Therefore, the amounts of those resources and that revenue received by TV2 and which form part of the aid implemented in breach of Article 108(3) TFEU must also give rise to the payment of illegality interest in respect of that aid.

217| By its judgment of 9 November 2017, ***TV2/Danmark* v *Commission*** (C-649/15 P, EU:C:2017:835), the Court of Justice dismissed TV2's appeal against the General Court's judgment of 24 September 2015, ***TV2/Danmark* v *Commission*** (T-674/11, EU:T:2015:684), and thereby confirmed that the General Court's review was correct in so far as it held that those resources constituted State aid granted to TV2.

218| By its judgments of 9 November 2017, ***Commission* v *TV2/Danmark*** (C-656/15 P, EU:C:2017:836), and of 9 November 2017, ***Viasat Broadcasting UK* v *TV2/Danmark*** (C-657/15 P, EU:C:2017:837), the Court of Justice annulled the judgment of 24 September 2015, ***TV2/Danmark* v *Commission*** (T-674/11, EU:T:2015:684), in so far as it had annulled Decision 2011/839 to the extent that the Commission had concluded in that decision that the advertising revenues for 1995 and 1996 which were paid to TV2 via the TV2 fund constituted State aid.

XIII. Fiscal provisions

In the field of taxation, four judgments – which concern indirect taxation and, in particular, the interpretation of the VAT Directive [219] – deserve to be mentioned. [220] The first relates to the place where taxable transactions are carried out in cases of the supply of goods with transport. The second deals with the taxable amount while the third concerns exemptions on exportation. The fourth and last judgment concerns the rules governing the exercise of the right to deduct value added tax (VAT).

1. Place of taxable transactions – Supply of goods with transport

In the judgment in ***KrakVet Marek Batko*** (C-276/18, EU:C:2020:485), delivered on 18 June 2020, the Court interpreted, for the first time, Article 33 of the VAT Directive and the concept of goods 'dispatched or transported by or on behalf of the supplier', within the meaning of that provision, in the context of double taxation due to the different treatment, by two Member States, of the same transaction, a supply of goods involving cross-border dispatch or transport. That classification has an effect on the determination of the place where the taxable transaction is carried out and of the Member State responsible for the purposes of collecting VAT.

The Court was also asked about the scope of the obligation of cooperation between the tax authorities of the Member States with regard to determining the place of supply of the goods at issue, pursuant to Regulation No 904/2010, [221] and had to rule on whether it is possible for the tax authorities of the Member State in which the goods are located when the transport ends to come, regarding the same transaction, to a different conclusion from that of the tax authorities of the Member State in which the supplier is established, resulting in double taxation of the taxable person.

In that case, KrakVet, a company incorporated under Polish law that sells products for animals, offered its clients residing in Hungary, via its website, the possibility of entrusting delivery of goods to a Polish carrier that worked in collaboration with it, those clients remaining, however, free to choose another carrier. If the purchaser chose to make use of the recommended carrier, he or she would conclude a contract with that carrier, which delivered the goods to the warehouses of two courier companies established in Hungary, from which the goods were distributed by a Hungarian carrier to the final consumers. Payment of the price of the goods was made upon delivery to the courier service or by advance payment into a bank account.

As the Polish tax authorities took the view that the place of taxation of KrakVet's commercial activities was in Poland, KrakVet paid VAT in that country. However, the Hungarian tax authorities carried out *a posteriori* checks of the VAT returns and initiated administrative tax proceedings against KrakVet, in the course of which those authorities consulted the Polish tax authorities. At the end of those proceedings, the Hungarian tax

219| Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

220| In that regard, reference should also be made to the judgments of 3 March 2020, ***Vodafone Magyarország*** (C-75/18, EU:C:2020:139) and ***Tesco-Global Áruházak*** (C-323/18, EU:C:2020:140), presented in Section VII.3 'Freedom of establishment', and the judgment of 6 October 2020, ***État luxembourgeois (Judicial protection against requests for information in tax law)*** (Joined Cases C-245/19 and C-246/19, EU:C:2020:795), concerning a procedure for the exchange of information on request in tax matters, presented in Section I.2 'Right to an effective remedy and right to a fair trial'.

221| Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax (OJ 2010 L 268, p. 1).

authorities found that the VAT on goods transported in Hungary had to be paid in Hungary and required KrakVet to pay a sum corresponding to the difference in taxation of VAT, a penalty and late-payment interest, plus a fine for failure to comply with its obligations to register with the Hungarian tax authorities.

KrakVet challenged before the referring court the decision issued by the Hungarian tax authorities that resulted in it paying VAT twice, claiming that it was contrary to EU law.

The Court ruled, first of all, that the VAT Directive and the relevant provisions of Regulation No 904/2010 do not preclude the tax authorities of a Member State from being able, unilaterally, to subject transactions to VAT treatment different from that under which they have already been taxed in another Member State. It thus pointed out that that regulation is confined to enabling administrative cooperation for the purposes of exchanging information that may be necessary for the tax authorities of the Member States and does not therefore govern the powers of those authorities to carry out the classification of the transactions concerned under the VAT Directive. That regulation does not lay down an obligation requiring the tax authorities of two Member States to cooperate in order to reach a common solution as regards the treatment of a transaction for VAT purposes and does not provide that the tax authorities of one Member State are bound by the classification given to that transaction by the tax authorities of another Member State. The correct application of the VAT Directive must however make it possible to avoid double taxation and to ensure fiscal neutrality. Where there is divergence between the Member States in the tax treatment of a transaction, it is therefore for the national courts to refer the matter to the Court of Justice for the purposes of interpreting the provisions of EU law. If it transpires that VAT has already been overpaid in a Member State, the right to a refund of charges levied in that Member State in breach of the rules of EU law is the consequence and complement of the rights conferred on individuals by provisions of EU law as interpreted by the Court. The Member State concerned is therefore required, in principle, to repay charges levied in breach of EU law.

Next, the Court examined the rules laid down by the VAT Directive with regard to determining the place where taxable transactions are carried out in cases of supply of goods with transport. The Court recalled that, in accordance with Article 32 of that directive, where goods are dispatched or transported by the supplier, or by the customer, or by a third person, the place of supply is deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer begins. However, by way of derogation, Article 33 of that directive provides that the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends is deemed to be, subject to certain conditions, the place where the goods are located at the time when dispatch or transport of the goods to the customer ends.

Since consideration of the economic and commercial reality is a fundamental criterion for the application of the common system of VAT, the Court held that when, as in that case, goods sold by a supplier established in one Member State to purchasers residing in another Member State are delivered to those purchasers by a carrier recommended by that supplier, but with which the purchasers are free to enter into a contract for the purpose of that delivery, those goods must be regarded as dispatched or transported 'by or on behalf of the supplier' and the supply must be regarded as falling within the scope of Article 33 of the VAT Directive where the supplier's role is predominant in terms of initiating and organising the essential stages of the dispatch or transport of those goods.

Lastly, the referring court took the view that the situation at issue in the main proceedings raised the question whether it was possible to regard KrakVet's practice as abusive, KrakVet having benefited from the lower rate of VAT of the Member State in which it is established, since the provisions laid down by Article 33 of the VAT Directive were not applied to it. In that regard, the Court ruled that it is not necessary to find that transactions by which goods sold by a supplier are delivered to purchasers by a company recommended by that supplier constitute an infringement of the law when, on the one hand, there is a connection between the supplier and that company, but, on the other hand, the purchasers remain free to make use of another

company or personally collect the goods, since those circumstances are not liable to affect the finding that the supplier and the transport company recommended by it are independent companies which engage, on their own behalf, in genuine economic activities.

2. Taxable amount for VAT

By its judgment in ***E. (VAT – Reduction of the taxable amount)*** (C-335/19, EU:C:2020:829), delivered on 15 October 2020, the Court ruled on a case in which E., a VAT-registered company established in Poland, pursued a business involving the provision of tax advice and charged VAT at the standard rate on the services provided. E. sent one of its customers, registered as a taxable person for VAT purposes, a VAT invoice in respect of services taxable in Polish territory. That customer was wound up after the expiry of the payment deadline, while remaining registered as a taxable person for VAT purposes. As the invoice was not settled, E. submitted to the Minister for Finance a request for a tax ruling in order to ascertain whether, despite the fact that its customer had been wound up after the supply of the services concerned had been carried out, it was entitled, on the ground that the other conditions laid down by the national VAT legislation were satisfied, to a reduction in the VAT-taxable amount on account of non-payment of the debt arising from the invoice.

By a tax ruling, the Minister for Finance replied to that request in the negative. The minister stated that Article 90 of the VAT Directive conferred on taxable persons the right to reduce the VAT-taxable amount only under conditions determined by each Member State. Those conditions are laid down by the national VAT legislation. According to the Minister for Finance, if one of those conditions, such as the requirement that the debtor must not be the subject of winding-up proceedings, is not satisfied, the taxable person is not entitled to rely on the right to a reduction by deriving it directly from EU law.

After unsuccessfully challenging the tax ruling before the Polish court with jurisdiction at first instance, E. appealed on a point of law to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland), on the ground that the court of first instance had wrongly held that the disputed provisions of the national VAT legislation did not infringe the requirements resulting from EU law.

The relevant provisions of national legislation make the right of the taxable person to reduce the VAT-taxable amount in the case of a debt which is likely to be irrecoverable subject to the condition that, on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return seeking that reduction is filed, the debtor is registered as a taxable person for VAT purposes and is not subject to insolvency or winding-up proceedings and that, on the day preceding that on which the adjusted tax return is filed, the creditor is itself still registered as a taxable person for VAT purposes. Article 90(1) of the VAT Directive, which refers inter alia to cases of total or partial non-payment of the price after the supply which gave rise to the payment of VAT takes place, requires the Member States to reduce, in accordance with the conditions which they lay down, the taxable amount and, consequently, the amount of VAT payable by the taxable person whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person. Article 90(2) of the VAT Directive allows Member States to derogate from the rule referred to in Article 90(1) of that directive in situations of total or partial non-payment of the transaction price.

As it had doubts as to the discretion granted to the Member States to determine, in their national law, the conditions for the application of the provisions of Article 90 of the VAT Directive, the national court referred questions to the Court of Justice for a preliminary ruling on the interpretation of that provision.

The Court held that Article 90 of the VAT Directive precludes national legislation such as that at issue in that case.

In reaching that conclusion, it considered whether the restriction that the conditions laid down by that national legislation entail for taxable persons such as E. was justified by the need to take account of the uncertainty as to whether the non-payment is definitive.

The Court ruled that conditions which make the reduction of the VAT-taxable amount conditional on the registration of the debtor as a taxable person for VAT purposes on the day of delivery of the goods or provision of the services and on the creditor and the debtor retaining their status as taxable persons on the day preceding that on which the adjusted tax return is filed cannot be justified by that need. It further specified that, while it is true that the right of a taxable person to reduce the taxable amount after the conclusion of a transaction implies the obligation for the other party to that transaction, for its part, to adjust the amount of VAT deductible, the guarantee of a symmetrical reduction in the VAT-taxable amount payable and in the amount of VAT deductible does not depend on whether the two parties are liable to VAT. Furthermore, it held that the requirement that the creditor and debtor be subject to VAT cannot be justified either by the prevention of irregularities or abuses or in the light of the provisions of Article 273 of the VAT Directive. [222]

As regards the condition making the reduction of the tax base contingent on the debtor not being the subject of insolvency or winding-up proceedings on the day of delivery of the goods or provision of the services and on the day preceding that on which the adjusted tax return is filed, the Court held that, by depriving the creditor of its right to a reduction on the ground that it cannot be established that the debt was definitely irrecoverable before the end of the insolvency or winding-up proceedings, that condition takes account of the inherent uncertainty as to whether the non-payment is definitive. However, such uncertainty could also be taken into account by granting the reduction of the VAT-taxable amount when the creditor demonstrates, before the end of the insolvency or winding-up proceedings, a reasonable probability that the debt will not be honoured, even if that taxable base is re-evaluated upwards in the event that payment nonetheless occurs. Such a rule would be an equally effective means of attaining the objective pursued, while being less onerous for the creditor.

Finally, the Court noted that, since Article 90(1) of the VAT Directive has direct effect, a taxable person such as E., who does not satisfy the national conditions which do not comply with that provision, may rely on that provision before the national courts against the State in order to obtain a reduction in the taxable amount, it being for the national court before which proceedings have been brought to set aside those conditions which do not comply, in accordance with the principle of the primacy of EU law.

3. Exemptions on exportation

By its judgment in ***BAKATI PLUS*** (C-656/19, EU:C:2020:1045), delivered on 17 December 2020, the Court ruled on a case concerning exemptions on exportation laid down in the Hungarian VAT Law. The applicant in the main proceedings, BAKATI PLUS ('Bakati'), is an undertaking incorporated under Hungarian law whose annual turnover, as from 2015, rose from HUF 50 000 000 (approximately EUR 140 000) to HUF 1 000 000 000 (approximately EUR 2 784 000). In 2016, its business essentially consisted in deliveries of large quantities of food products, cosmetics and cleaning products to 20 individuals.

222| Article 273 states that 'Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

The option under the first paragraph may not be relied upon in order to impose additional invoicing obligations over and above those laid down in Chapter 3'.

The purchasers of the goods transported them to Serbia, by private car, as personal luggage from a warehouse which they had leased in Hungary close to the border with Serbia, in which the invoices and VAT-refund application forms for foreign travellers, drawn up by Bakati, were handed over to the purchasers with the goods concerned in return for the purchase price.

Under the Hungarian VAT Law, supplies of goods dispatched or transported from Hungary to a third country outside the European Union are exempt from VAT, subject to certain conditions. Supplies of goods to be carried in the personal luggage of foreign travellers are specifically exempt under that law.

The customers took advantage of that latter exemption by returning to Bakati the VAT-refund application form stamped by the customs office of exit, stating that the goods had left the territory of the European Union. On receipt of that form, Bakati refunded to the customers the VAT which they had paid at the time of purchase. In its VAT returns for 2016, Bakati included as the sum to be deducted from the tax payable the VAT refunded to those customers, in a total amount of HUF 339 788 000 (approximately EUR 946 000).

During an inspection, the tax authority found that the purchases in question exceeded the customers' individual and family needs and that they had been made with a view to the resale of the goods purchased, which meant that those goods could not constitute personal luggage within the meaning of the Hungarian VAT Law. The tax authority also took the view that Bakati could not benefit from the exemption on any other basis under that law, since it had not completed the customs formalities and did not have the documents necessary for that purpose. The tax authority accordingly required Bakati, by decision of 27 June 2018, to pay the VAT difference, together with a tax penalty and default interest.

That decision was upheld by decision of the Appeals Directorate of the tax administration, following which Bakati brought an action before the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary) seeking annulment of the decision of the Appeals Directorate.

For the purposes of the application of the Hungarian VAT Law, the provisions of which relating to exemptions on exportation correspond, in essence, to Articles 146 and 147 of the VAT Directive, the referring court submitted several questions to the Court of Justice for a preliminary ruling on the interpretation of those provisions.

In the first place, the Court examined whether goods which an individual who is not established within the European Union carries with him or her outside the European Union for commercial purposes, with a view to their resale in a third State, are covered by the exemption provided for in Article 147 of the VAT Directive for 'goods to be carried in the personal luggage of travellers'.

In that regard, while pointing out that the exemptions provided for by the VAT Directive constitute independent concepts of EU law, the Court found that the abovementioned terms, in their usual meaning, refer to goods, generally small in size or quantity, which individuals take with them or acquire during a journey, which they need during that journey and which are for their private use or for use by their family.

Examining the context in which those terms are used, the Court inferred from the conditions for the application of the exemption provided for in Article 147 of the VAT Directive that the potential beneficiary of that exemption is a natural person, not acting as an economic operator, which indicates that the exemption cannot apply to exports of a commercial nature. Since VAT exemptions must be interpreted strictly, and having regard, moreover, to the specific objective of promoting tourism pursued by that article and the legislative evolution of the provision now contained in that article, the Court concluded that the exemption for goods to be carried in the personal luggage of travellers does not apply to goods which an individual who is not established within the European Union takes with him or her outside the European Union for commercial purposes, with a view to their resale in a third State.

In the second place, the Court ruled that Article 146(1)(b) and Article 147 of the VAT Directive do not preclude national case-law under which, in the case where the conditions for the VAT exemption for goods to be carried in the personal luggage of travellers are not satisfied, but the goods concerned have actually been transported outside the European Union by the purchaser, the tax authority is obliged to examine whether the VAT exemption provided for in Article 146(1)(b) applies to the supply at issue, even though the applicable customs formalities have not been carried out and even though, at time of the purchase, the purchaser did not intend to have that exemption applied.

A transaction such as that at issue in the main proceedings constitutes a supply of goods, within the meaning of Article 146(1)(b) of the VAT Directive, provided that it satisfies the objective criteria defining such a supply, namely that the right to dispose of the goods as owner has been transferred to the purchaser, that the supplier establishes that those goods have been dispatched or transported outside the European Union and that, as a result of that dispatch or transport, the goods have physically left the territory of the European Union. Compliance with the customs formalities applicable to exports or the fact that the purchaser's intention, at the time of purchase, was to secure application not of the exemption provided for in Article 146(1)(b), but of the exemption in Article 147 of the VAT Directive, have no bearing on the classification as a supply of goods for export.

Lastly, the Court examined whether the abovementioned provisions of the VAT Directive, and the principles of fiscal neutrality and proportionality, preclude the tax authority from automatically refusing to grant a taxable person the VAT exemption provided for in those provisions where it finds that that taxable person has, in bad faith, issued the form on the basis of which the purchaser relied on the exemption provided for in Article 147, although it is established that the goods concerned have left the territory of the European Union.

The Court pointed out that failure to comply with a formal requirement can result in loss of entitlement to a VAT exemption only in two situations: (i) where the infringement of a formal requirement prevents the production of conclusive evidence that the substantive requirements governing the application of that exemption have been satisfied, or (ii) where it is established that the taxable person knew or should have known that the transaction in question was involved in fraudulent activity jeopardising the functioning of the common system of VAT.

In that case, the non-compliance with customs formalities could not lead to the loss of entitlement to the VAT exemption provided for in Article 146(1)(b) of the VAT Directive. First, it was common ground that the goods had actually been exported, as evidenced by a stamp affixed by the customs office of exit to the forms submitted, even though those forms were intended for the application of the exemption provided for in Article 147, and that the supply therefore satisfied, by virtue of its objective characteristics, the conditions for the exemption provided for in Article 146(1)(b) of the VAT Directive.

Secondly, the fact that Bakati had participated in the infringement of Article 147(1) of the VAT Directive did not entail a loss of tax revenue for the European Union and could not be regarded as jeopardising the functioning of the common system of VAT. Such an infringement could not, therefore, be penalised by the refusal to grant a VAT exemption for exports that have actually taken place, without excluding the possibility of the infringement being subject to proportionate administrative penalties under national law.

4. Rules governing the exercise of the right to deduct VAT

In the judgment in ***Agrobet CZ*** (C-446/18, EU:C:2020:369), delivered on 14 May 2020, the Court held that Articles 179, 183 and 273 of the VAT Directive, [223] read in the light of the principle of fiscal neutrality, do not preclude a national law that does not provide for the possibility, for the tax administration, of granting, before the end of a tax-investigation procedure relating to a VAT return stating an excess for a specified tax period, a refund of the part of the excess relating to transactions not covered by that procedure at the time of its opening, in so far as it is not possible to determine in a clear, precise and unequivocal manner that excess VAT, the amount of which may be lower than that relating to operations not covered by that procedure, will remain regardless of the outcome of that procedure.

In that case, a Czech company had lodged two VAT returns for the tax periods corresponding to the months of December 2015 and January 2016, with each stating a VAT excess. The Czech tax authorities subsequently initiated tax-investigation procedures that were limited to certain operations covered by those two VAT returns, namely those relating to rapeseed oil from Poland. Since that rapeseed oil had been marketed in the Czech Republic in an unmodified form before being delivered to Poland again by the company concerned, the Czech tax administration had doubts regarding compliance with the conditions necessary for the company to be able to benefit from the VAT exemption on deliveries of rapeseed oil and to be able to deduct the input VAT paid on the relevant purchases. In complaints brought against the initiation of those procedures, the Czech company claimed that, since the tax administration's doubts concerned only a small part of the declared excess VAT, the retention of the entirety of that excess was incompatible with EU law. The tax administration argued, as confirmed by the referring court, that since the Czech Code of Tax Procedure did not expressly provide for the possibility of issuing a partial tax assessment, it could not adopt such a power in the absence of any legal basis and that, since the excess VAT related to the entire tax period, it could only be treated as an indivisible whole.

In its judgment, the Court first recalled that, under the VAT Directive, the taxable person is to make the deduction by subtracting from the total amount of VAT due for a given tax period the total amount of VAT in respect of which, during the same period, the right of deduction has arisen. Where, for a given tax period, the amount of deductions exceeds the amount of VAT due, the excess may be refunded or carried forward to the following period and Czech law opted for refunds. The Court held that, while it is true that such excess VAT may only appear in the VAT return as a single figure, that does not mean that the excess must be considered to constitute an inseparable whole that is impossible to divide into a disputed part and an undisputed part relating respectively to specific operations covered or not by a tax-investigation procedure. The VAT Directive does not preclude the partial or split carryover or refund of the excess VAT and draws a clear distinction between the substantive requirements of the right to deduct VAT and the formal requirements of that right. Thus, the obligation to comply with the rules governing the exercise of the right to deduct VAT when submitting a VAT return does not prevent the taxable person, in the absence of any contrary provisions in that directive, from subsequently exercising, in a partial manner, the rights and material claims deriving, for each transaction, from the substantive requirements of the right to deduct.

223| Articles 179, 183 and 273 of that directive relate to the right to deduct VAT and the refund of deductions exceeding that of the VAT due for a tax period.

The Court also recalled that those rules may not infringe the principle of fiscal neutrality. Rules that do not enable a taxable person to target a part of the excess VAT, which it considers to be undisputed, would amount to preventing it from claiming the existence of such an undisputed part and from being able to claim a refund of that part by forcing it to bear, in part, the burden of the tax, which is not in accordance with the principle of fiscal neutrality.

The Court concluded from this that, read in the light of the principle of fiscal neutrality, the VAT Directive may not be interpreted as meaning that it excludes, in principle, the possibility of identifying, for a tax period, an undisputed part of the excess VAT indicated on a VAT return that is likely to give rise to a partial carryover or refund of that excess.

As regards, next, the conditions under which it may be considered that a part of the excess VAT is undisputed in the context of a tax-investigation procedure, the Court noted that it is possible to regard part of that excess as undisputed only if the amount of tax due and the amount of deductible tax relating to those transactions are themselves undisputed.

In that respect, the Court noted that the tax administration must ensure not only that, at the end of that procedure, the amount of tax due and the amount of deductible tax corresponding to transactions not covered by said procedure will not be likely to vary from the amounts declared by the taxable person, but also that the elements which contributed to the calculation of the part of the excess claimed to be undisputed cannot be called into question before the end of the procedure and that it will therefore not be required to broaden the scope of the latter to include all or part of the operations that were originally not covered by the procedure.

Lastly, the Court considered that the possibility for the taxable person to claim that part of the excess VAT for a taxable period is undisputed in order to obtain a refund before the end of the tax-investigation procedure does not automatically imply an obligation on the tax administration to refund or carryover that part in advance, even when it accepts that part to be undisputed. Such an obligation is conditional upon the existence of excess VAT relating to the entire tax period in question. Thus, that obligation, since it relates to a specific tax period, must not exist only with regard to the amount of tax due and the amount of deductible tax corresponding to the transactions not covered by that procedure, identified as being undisputed by the tax administration, but with regard to the part of the excess VAT that will remain regardless of the outcome of the tax-investigation procedure and which, alone, may, ultimately, be regarded as undisputed. In that respect, the Court noted that that undisputed part of the excess VAT may, where appropriate, be less than the part of the excess claimed by the taxable person and relating to those amounts.

Furthermore, the Court held that national legislation, such as the Czech legislation, which, in the context of measures adopted by a Member State under Article 273 of the VAT Directive, does not authorise a taxable person to provide evidence establishing the existence of an undisputed part of the excess VAT or authorise the tax administration to take a decision in that regard, would be contrary to the principle of good administration and would therefore not be compatible with the VAT Directive.

XIV. Approximation of laws

1. Copyright

In the area of copyright, three judgments are worthy of mention. The first concerns the interpretation of the concept of 'addresses' of persons who have infringed an intellectual property right. In the second judgment, the Court ruled, in the context of the use of phonograms in the European Union, on the limitation of the right to a single equitable remuneration applicable to nationals of States outside the EEA. The third judgment concerns the interpretation of the concepts of 'phonogram' and 'reproduction of a phonogram' and also deals with the right to a single equitable remuneration where an audiovisual work incorporating a phonogram or a reproduction of a phonogram has been communicated to the public.

In the judgment in ***Constantin Film Verleih*** (C-264/19, EU:C:2020:542), delivered on 9 July 2020, the Court ruled that, where a film is uploaded onto an online video platform without the copyright holder's consent, Directive 2004/48 [224] does not oblige the judicial authorities to order the operator of the video platform to provide the email address, IP address or telephone number of the user who uploaded the film concerned. The directive, which provides for disclosure of the 'addresses' of persons who have infringed an intellectual property right, covers only the postal address.

In 2013 and 2014, the films 'Parker' and 'Scary Movie 5' were uploaded onto the video platform YouTube without the consent of Constantin Film Verleih, the holder of the exclusive exploitation rights in respect of those works in Germany. Those films were viewed tens of thousands of times. Constantin Film Verleih then demanded that YouTube and Google, the latter being the parent company of the former, with which users must first register by means of a user account, provide it with a set of information relating to each of the users who had uploaded those films. The two companies refused to provide Constantin Film Verleih with information about those users, in particular their email addresses and telephone numbers, as well as the IP addresses used by them, both at the time when the files concerned were uploaded and when they last accessed their Google/YouTube account.

The dispute in the main proceedings turned on whether such information was covered by the term 'addresses' within the meaning of Directive 2004/48. That directive provides that judicial authorities may order disclosure of information on the origin and distribution networks of the goods or services which infringe an intellectual property right. That information includes, inter alia, the 'addresses' of producers, distributors and suppliers of the infringing goods or services.

The Court found, in the first place, that the usual meaning of the term 'address' refers only to the postal address, that is to say, the place of a given person's permanent address or habitual residence. It follows that that term, when it is used without any further clarification, as in Directive 2004/48, does not refer to the email address, telephone number or IP address. In the second place, the *travaux préparatoires* [225] that led to the adoption of Directive 2004/48 contain nothing to suggest that the term 'address' should be understood

224| Article 8(2)(a) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum OJ 2004 L 195, p. 16).

225| Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights of 30 January 2003 (COM(2003) 46 final), Opinion of the European Economic and Social Committee of 29 October 2003 (OJ 2004 C 32, p. 15) and Report of 5 December 2003 by the European Parliament (A5-0468/2003) on that proposal.

as referring not only to the postal address but also to the email address, telephone number or IP address of the persons concerned. In the third place, an examination of other EU legal acts referring to email addresses or IP addresses reveals that none of them uses the term 'address', without further details, to designate the telephone number, IP address or email address.

That interpretation is, according to the Court, consistent with the purpose of the provision of Directive 2004/48 on the right to information. In view of the minimum harmonisation concerning the enforcement of intellectual property rights in general, such harmonisation is limited, according to that provision, to narrowly defined information. Furthermore, the aim of that provision is to reconcile compliance with various rights, inter alia the right of holders to information and the right of users to protection of personal data.

In those circumstances, the Court concluded that the term 'addresses' contained in Directive 2004/48 does not cover, in respect of a user who has uploaded files which infringe an intellectual property right, his or her email address, telephone number and IP address used to upload those files or the IP address used when the user's account was last accessed.

The Court nevertheless stated that the Member States have the option to grant holders of intellectual property rights the right to receive fuller information, provided, however, that a fair balance is struck between the various fundamental rights involved and compliance with the other general principles of EU law, such as the principle of proportionality.

In its judgment in ***Recorded Artists Actors Performers*** (C-265/19, EU:C:2020:677), delivered on 8 September 2020, the Grand Chamber of the Court ruled on a case involving Recorded Artists Actors Performers Ltd (RAAP), a collective management organisation for performers, and Phonographic Performance (Ireland) Ltd (PPI), a collective management organisation for phonogram producers. Those undertakings had entered into an agreement stipulating how fees payable in Ireland for the playing in public – in bars and other publicly accessible places – or the broadcasting of recorded music were, after being paid by the users to PPI, to be shared with the performers and, for that purpose, be paid on in part by PPI to RAAP. The parties were in disagreement in relation to the operation of that agreement as regards fees paid to PPI where the music was performed by a person who was neither a national nor a resident of a Member State of the EEA. RAAP took the view that all the fees payable had to be shared, without having regard to the performer's nationality and place of residence. If RAAP's position were followed, performers from third States would be paid in Ireland in any event although, according to PPI, which relied in that regard on Irish law, that would not be the case where Irish performers do not receive equitable remuneration in third States.

The Court held that, where phonograms are used in the European Union, Directive 2006/115 [226] precludes a Member State from excluding from the performers entitled to a single equitable remuneration performers who are nationals of States outside the EEA. In addition, it explained that reservations notified by third States pursuant to the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty ('the WPPT') [227] do not in themselves limit the right of those performers from third States to a single equitable remuneration in the European Union. [228] Although such limitations may be introduced by the EU legislature, provided that they are consistent with the right to intellectual property, which is protected by Article 17(2)

226| Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376, p. 28).

227| World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WPPT) (OJ 2000 L 89, p. 15), adopted in Geneva on 20 December 1996 and approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

228| Under Article 15(3) of the WPPT.

of the Charter, Directive 2006/115 does not contain such a limitation and therefore precludes a Member State from limiting the right to a single equitable remuneration in respect of performers and producers who are nationals of third States. Furthermore, the Court stated that Directive 2006/115 also precludes only the producer of the phonogram concerned receiving remuneration, without sharing it with the performer who has contributed to that phonogram.

The Court stated, first, that the right to a single equitable remuneration ensures the application of Article 15(1) of the WPPT [229] in EU law and cannot be limited by the national legislature solely to nationals of the EEA Member States.

In that regard, the Court stated that Article 8(2) of Directive 2006/115, which confers within the framework of rights related to copyright a right that is compensatory in nature, lays down an obligation to ensure remuneration that is equitable and shared between the phonogram producer and the performer. That obligation applies where the use of the phonogram or of a reproduction thereof takes place in the European Union. The directive lays down no condition under which the performer or phonogram producer should be a national of an EEA Member State or any other condition requiring a connection to EEA territory, such as domicile, residence or the place where the creative or artistic work is carried out.

On the contrary, according to the Court, it follows from the context and objectives of Directive 2006/115 and the primacy of international agreements concluded by the European Union that Article 8(2) of the directive must be interpreted, as far as possible, in a manner consistent with the WPPT. The Court pointed out in that regard that that international agreement, which forms an integral part of the EU legal order, in principle obliges the European Union and its Member States to grant the right to a single equitable remuneration also to nationals of other contracting parties to the WPPT. That obligation arises from Article 15(1) of the WPPT and from the national treatment guaranteed by Article 4 of the WPPT and Article 4 of the Rome Convention. [230]

Secondly, the Court explained that reservations notified by third States under Article 15(3) of the WPPT do not in themselves lead in the European Union to limitations of the right to a single equitable remuneration in respect of nationals of those third States. It is true that the Court stated that, in the light of the principle of reciprocity enshrined in the Vienna Convention, [231] the European Union and its Member States are not required to grant the right to a single equitable remuneration without limitation. According to the Court, the need to safeguard fair conditions of involvement in recorded music is capable of justifying a limitation of the right to such remuneration.

However, that right related to copyright constitutes an intellectual property right protected by Article 17(2) of the Charter. Consequently, any limitation on the exercise of that right must be provided for by law clearly and precisely, in accordance with Article 52 of the Charter. According to the Court, the mere existence of a reservation under the WPPT does not fulfil that requirement. Therefore, it is for the EU legislature alone, which has exclusive external competence in the matter, to decide on such a limitation.

229| Article 15(1) of the WPPT provides that performers and producers of phonograms are to enjoy the right to a single equitable remuneration on the broadcasting or any communication to the public of phonograms published for commercial purposes.

230| International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, concluded in Rome on 26 October 1961.

231| Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331).

Thirdly, the Court held that it follows from the very wording of Article 8(2) of Directive 2006/115 that both performers and phonogram producers are entitled to a single equitable remuneration, as that remuneration is 'shared' between them. Therefore, that provision precludes the law of a Member State from excluding the performer from a single equitable remuneration.

In its judgment in ***Atresmedia Corporación de Medios de Comunicación*** (C-147/19, EU:C:2020:935), delivered on 18 November 2020, the Court held that the single equitable remuneration must not be paid when an audiovisual work, in which a phonogram or a reproduction of that phonogram has been incorporated, is communicated to the public.

Atresmedia Corporación de Medios de Comunicación SA ('Atresmedia') is an undertaking which owns a number of television channels and broadcasts, on those channels, audiovisual works incorporating phonograms. The Asociación de Gestión de Derechos Intelectuales and Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España are entities which manage, respectively, the intellectual property rights of phonogram producers and those of performers. On 29 July 2010, those entities brought an action against Atresmedia seeking payment of compensation for acts of communication to the public of phonograms published for commercial purposes or reproductions of those phonograms. They submitted that the communication to the public of audiovisual works by Atresmedia gave rise to the right to the single equitable remuneration provided for in the directives on certain rights related to copyright. [232]

According to Article 8(2) of those directives, a single equitable remuneration must be paid by the user if a phonogram published for commercial purposes, or a reproduction of that phonogram, is communicated to the public. That remuneration is shared between the relevant performers and the phonogram producers.

The Court was called upon to determine whether an audiovisual recording containing the fixation of an audiovisual work must be classified as a 'phonogram' or 'reproduction of that phonogram' within the meaning of the directives on certain rights related to copyright.

As regards the concept of 'phonogram', the Court noted that, in the absence of a definition in the abovementioned directives or in other EU directives in the area of copyright law, that concept must be interpreted in the light of the Rome Convention and the WPPT. The Rome Convention [233] and the WPPT [234] preclude a fixation of sounds incorporated in an audiovisual work from being covered by the concept of 'phonogram'.

Consequently, the Court stated that a phonogram incorporated in an audiovisual work loses its status as a 'phonogram' in so far as it forms part of that work. It noted, however, that that fact has no effect on the rights in that phonogram were it to be used independently from the audiovisual work. In that case, the Court found that the phonograms had been incorporated into audiovisual works with the authorisation of the rightholders concerned and in return for remuneration paid to them in accordance with contractual arrangements. In addition, it was not argued that those phonograms had been reused independently from the audiovisual work in which they were incorporated. In those circumstances, the Court held that an audiovisual recording containing the fixation of an audiovisual work could not be classified as a 'phonogram'.

232| Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) and Directive 2006/115.

233| Article 3(b) of the Rome Convention defines 'phonogram' as any 'exclusively aural' fixation of sounds of a performance or of other sounds.

234| Under Article 2(b) of the WPPT, 'phonogram' means the 'fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work'.

As regards the concept of 'reproduction of a phonogram', the Court found that the definition of 'reproduction' in the Rome Convention refers to the act of making a reproduction of a fixation. [235] The element triggering the right to the single equitable remuneration is not the act of making a reproduction. It is the communication to the public of a work fixed on a phonogram or on a reproduction of that phonogram, such a reproduction having to be understood, in the context of the provisions at issue, as a copy of the phonogram resulting from such an act of reproduction. Given that an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a 'phonogram', the Court pointed out that such a recording also cannot constitute a reproduction of a phonogram.

The Court held, therefore, that the communication to the public of an audiovisual recording containing the fixation of an audiovisual work does not give rise to the right to a single equitable remuneration.

That conclusion does not, however, deprive performers and phonogram producers of the possibility of obtaining remuneration for the broadcast of a phonogram. The remuneration for the related rights in the phonograms is paid, when phonograms or reproductions of phonograms are incorporated in the audiovisual works concerned, by means of contractual arrangements concluded between the holders of the rights in phonograms and the producers of such works.

2. Intellectual and industrial property

In the field of intellectual property, four judgments are worthy of note. The first three concern EU trade mark law while the fourth concerns patent law. The first judgment involves the interpretation of the concept of 'bad faith' and considers whether a trade mark may be declared invalid on the ground that the identification of the goods or services concerned by it lacks clarity and precision. In the second judgment, the Court set out the criteria for assessing the likelihood of confusion in relation to an EU collective mark. The third judgment concerns the absence of consent on the part of the proprietor of a mark to the registration applied for by an agent or representative under its own name. The fourth and last judgment deals with the interpretation of the concepts of 'product' and 'first authorisation to place [a] product on the market as a medicinal product' in connection with an application for a supplementary protection certificate.

In the judgment in ***Sky and Others*** (C-371/18, EU:C:2020:45), delivered on 29 January 2020, the Court held, first of all, that a Community trade mark or national trade mark, falling within the scope of Regulation No 40/94 [236] or First Directive 89/104, [237] cannot be declared invalid on the ground that terms used to designate the goods and services in respect of which that trade mark was registered lack clarity and precision. Next, the Court clarified the conditions under which a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constitutes bad faith.

235| Article 3(e) of the Rome Convention defines 'reproduction' as 'the making of a copy or copies of a fixation'.

236| Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended by Council Regulation (EC) No 1891/2006 of 18 December 2006 (OJ 2006 L 386, p. 14), repealed and replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) and subsequently by 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).

237| First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), repealed and replaced by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25) and subsequently by Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1).

Lastly, the Court held that First Directive 89/104 did not preclude a provision of national law which requires the applicant for registration of a trade mark to state that he or she intends to use that trade mark in respect of the goods and services for which registration is sought.

In that case, the Sky companies – the proprietors of several Community marks and one United Kingdom trade mark which include the word 'Sky' – brought an action for infringement against the SkyKick companies. In the context of those proceedings, the SkyKick companies filed a counterclaim for a declaration that the trade marks at issue in the main proceedings were invalid. In support of that counterclaim, they contended that those trade marks had been registered in respect of goods or services that were not specified with sufficient clarity and precision. The High Court of Justice (England & Wales) (United Kingdom), hearing the case, asked the Court of Justice whether such a lack of clarity and precision constituted a ground for invalidity of a registered trade mark. In addition, the SkyKick companies contended that the trade marks at issue had been registered in bad faith because the Sky companies did not intend to use them in relation to all of the goods and services covered by the registration. The referring court then enquired as to the scope of the concept of 'bad faith'. It also asked whether the obligation of the proprietor to state that he or she intends to use the trade mark applied for, laid down under United Kingdom law, [238] was compatible with EU law.

First, after finding that the trade marks at issue fell within the scope *ratione temporis* of Regulation No 40/94 and First Directive 89/104, the Court pointed out that Articles 7(1) and 51(1) of that regulation and Article 3 of that directive listed exhaustively the absolute grounds for invalidity of a Community trade mark and of a national trade mark. However, the lack of clarity and precision of the terms used to designate the goods or services covered by the trade mark registration is not included among those grounds. Consequently, the Court held that such a lack of clarity cannot be considered a ground for total or partial invalidity, within the meaning of the abovementioned provisions. It added that the judgment in *Chartered Institute of Patent Attorneys* [239] cannot be interpreted as recognising additional grounds for invalidity, not mentioned in Regulation No 40/94 and First Directive 89/104. In subsequent judgments, [240] the Court had stated that the judgment in *Chartered Institute of Patent Attorneys* did not apply to trade marks already registered at the date of that judgment's delivery and provided clarifications only on the requirements relating to new EU trade mark registration applications.

In addition, the Court held that the lack of clarity and precision of the terms designating the goods or services referred to by a trade mark registration cannot be considered as contrary to public policy. [241] The concept of 'public policy' cannot be construed as relating to characteristics concerning the trade mark application itself, regardless of the characteristics of the sign for which registration as a trade mark is sought.

Secondly, as regards whether a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constitutes bad faith, [242] the Court held that such an application amounts to bad faith if the applicant for registration of the mark had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark. Furthermore, the Court clarified that when the absence of the intention to

238| Section 32(3) of the Trade Marks Act 1994.

239| Judgment of the Court of 19 June 2012, ***Chartered Institute of Patent Attorneys*** (C-307/10, EU:C:2012:361).

240| Judgments of the Court of 16 February 2017, ***Brandconcern v EUIPO and Scooters India*** (C-577/14 P, EU:C:2017:122, paragraphs 29 and 30), and of 11 October 2017, EUIPO v Cactus (C-501/15 P, EU:C:2017:750, paragraph 38).

241| Within the meaning of Article 7(1)(f) of Regulation No 40/94 and Article 3(1)(f) of First Directive 89/104.

242| Within the meaning of Article 51(1)(b) of Regulation No 40/94 and Article 3(2)(d) of First Directive 89/104.

use the trade mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that application constitutes bad faith only in so far as it relates to those goods or services. In addition, such bad faith cannot be presumed and is established only if there are objective, relevant and consistent indicia to support this.

Thirdly, the Court concluded that First Directive 89/104 must be interpreted as not precluding a provision of national law under which an applicant for registration of a trade mark must state that the trade mark is being used in relation to the goods and services for which registration is sought, or that he or she has a bona fide intention that it should be so used, in so far as the infringement of such an obligation does not constitute, in itself, a ground for invalidity of a trade mark already registered.

By its judgment in ***Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi* v *EUIPO*** (C-766/18 P, EU:C:2020:170), delivered on 5 March 2020, the Court of Justice, hearing an appeal against a judgment of the General Court, ruled on a case involving the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi, proprietor of the EU collective mark HALLOUMI, registered for cheeses.

An EU collective mark is a specific type of EU trade mark, described as collective when the mark is applied for and capable of distinguishing the goods or services of the members of the association which is the proprietor of the mark from those of other undertakings.

Relying on that collective mark, its proprietor brought opposition proceedings against the registration as an EU trade mark of the figurative sign comprising the word element 'BBQLOUMI', applied for by a Bulgarian company in relation, inter alia, to cheese. The European Union Intellectual Property Office (EUIPO), responsible for the examination of applications for registration of EU trade marks, dismissed that opposition on the ground that there was no likelihood of confusion between the mark applied for 'BBQLOUMI' and the earlier collective mark HALLOUMI as regards the origin of the goods. The proprietor of the collective mark at issue then brought proceedings against that EUIPO decision before the General Court, which, after having found that that mark had a weak distinctive character because the term 'halloumi' designates a type of cheese, also held that there was no likelihood of confusion. [243]

The Court of Justice first gave a ruling on the applicability, to cases concerning an earlier collective mark, of the case-law establishing for individual EU marks the criteria in the light of which the likelihood of confusion, within the meaning of Article 8(1)(b) of the Regulation No 207/2009, must be assessed. [244]

In that regard, the Court ruled that, where the earlier mark is a collective mark, the essential function of which is to distinguish the goods or services of the members of the association which is its proprietor from those of other undertakings, [245] the likelihood of confusion must be understood as being the risk that the public might believe that the goods or services covered by the earlier trade mark and those covered by the trade mark applied for all originate from members of the association which is the proprietor of the earlier trade mark or, as the case may be, from undertakings economically linked to those members or to that association. Although, in the event of opposition based on a collective mark, the essential function of collective marks must be taken into account in order to understand what is meant by 'likelihood of confusion', the fact

243| Judgment of the General Court of 25 September 2018, ***Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi* v *EUIPO – M. J. Dairies (BBQLOUMI)*** (T-328/17, not published, EU:T:2018:594).

244| Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1), as amended (replaced by 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)).

245| In accordance with Article 66(1) of Regulation No 207/2009.

remains that the case-law establishing, for EU individual marks, the criteria with regard to which the existence of such a likelihood must be assessed in practice is applicable to cases concerning an earlier collective mark. None of the characteristics of EU collective marks justifies derogation, in the event of opposition based on such a mark, from the assessment criteria of the likelihood of confusion which emerge from that case-law.

Next, the proprietor of the collective mark at issue claimed that the distinctiveness of the earlier mark should be assessed differently where that mark is an EU collective mark.

The Court rejected that argument noting that the requirement of distinctiveness [246] also applies to EU collective marks. Articles 67 to 74 of the Regulation No 207/2009, which concern EU collective marks, do not contain any provisions to the contrary. Consequently, those marks must in any event, whether intrinsically or through use, be distinctive.

Furthermore, the Court pointed out that Article 66(2) of that regulation is not an exception to that requirement of distinctiveness. While that provision permits, by way of derogation from Article 7(1)(c) of that regulation, [247] registration as EU collective marks of signs which may serve to designate the geographical origin of goods or services, it does not, on the other hand, allow the signs thus registered to be devoid of distinctiveness. Where an association applies for registration, as an EU collective mark, of a sign which may designate a geographical origin, it must ensure that that sign has elements which enable the consumer to distinguish the goods or services of its members from those of other undertakings.

Finally, as regards the assessment of the likelihood of confusion, the Court noted that the likelihood of confusion must be assessed globally, taking into account all factors relevant to the circumstances of the case.

It is apparent from the judgment under appeal that the General Court had relied on the premiss that, in the case of an earlier mark of weak distinctive character, the existence of a likelihood of confusion must be ruled out as soon as it is established that the similarity of the marks at issue, in itself, does not permit such a likelihood to be established. The Court of Justice ruled that such a premiss was incorrect since the fact that the distinctive character of an earlier mark is weak does not preclude the existence of a likelihood of confusion. Accordingly, it was necessary to examine whether the low degree of similarity of the marks at issue was offset by the higher degree of similarity, or even identity, of the goods covered by those marks. The Court of Justice took the view that, since the assessment made by the General Court did not satisfy the requirement to carry out a global assessment which takes account of the interdependence of the relevant factors, the General Court had committed an error of law.

Consequently, the Court of Justice set aside the judgment of the General Court and referred the case back to it so that a further examination of the existence of a likelihood of confusion could be carried out.

246| The requirement of distinctiveness is laid down in Article 7(1)(b) and (3) of Regulation No 207/2009, pursuant to which marks which are devoid of distinctive character are not to be registered, unless the trade mark has become distinctive in relation to the goods or services for which registration is requested in consequence of the use which has been made of it.

247| Article 7(1)(c) of Regulation No 207/2009 provides that trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service are not to be registered.

By its judgment in ***EUIPO* v *John Mills*** (C-809/18 P, EU:C:2020:902), delivered on 11 November 2020, the Court of Justice, hearing an appeal lodged by EUIPO, set aside the judgment of the General Court and ruled that the application of Article 8(3) of Regulation No 207/2009 is not limited solely to the situation in which the earlier mark and the mark applied for by the agent or representative of the proprietor of the earlier mark are identical.

Jerome Alexander Consulting Corp. is the proprietor of the American word mark 'MAGIC MINERALS BY JEROME ALEXANDER', designating the goods 'Face powder featuring mineral enhancements'. John Mills Ltd is responsible, under a distribution agreement, for distributing the goods of Jerome Alexander Consulting within the European Union and worldwide. On 18 September 2013, John Mills applied, in its own name, for registration of the word sign 'MINERAL MAGIC' as a European Union trade mark for cosmetics. Jerome Alexander Consulting filed a notice of opposition relying on Article 8(3) of Regulation No 207/2009, according to which 'a trade mark shall not be registered where an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name without the proprietor's consent'.

The opposition was rejected. However, the Board of Appeal of EUIPO annulled the Opposition Division's decision and refused registration of the mark MINERAL MAGIC. In that regard, the Board of Appeal found that that mark had been applied for by John Mills in its capacity as an 'agent' and without the proprietor's consent. It also noted that the goods covered by the marks at issue were identical or similar and that the signs were similar.

John Mills brought an action before the General Court, which annulled the Board of Appeal's decision on the ground that Article 8(3) of Regulation No 207/2009 applies only where marks are identical.

First, the Court found that Article 8(3) of Regulation No 207/2009 does not explicitly state whether it applies only in the case where the mark applied for by an agent or representative is identical to the earlier mark.

Secondly, the Court's examination of the *travaux préparatoires* revealed that it cannot be inferred from these that the scope of that provision is limited solely to cases in which the marks at issue are identical. By contrast, it is apparent from the *travaux préparatoires* that Article 8(3) of Regulation No 207/2009 reflects the choice of the EU legislature to reproduce, in essence, Article 6 *septies*(1) of the Paris Convention. [248] The General Court should have taken into account the *travaux préparatoires* relating to that convention, [249] from which it is apparent that the mark applied for by the agent or representative of the proprietor of the earlier mark may also be covered by the Paris Convention where the mark applied for is similar to that earlier mark.

Thirdly, the Court stated that a different interpretation would have the effect of calling into question the general scheme of Regulation No 207/2009, in that it would result in the proprietor of a mark being deprived of the possibility of opposing the registration of a similar mark by his or her agent or representative, even though the latter would be entitled to file a notice of opposition to the application for subsequent registration of the initial mark by that proprietor on the ground of its similarity to the mark registered by the agent or representative of that proprietor.

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

249| Proceedings at the Lisbon Conference, held from 6 to 31 October 1958 for the purpose of revising the Paris Convention, during which Article 6 *septies* was introduced.

Fourthly, the Court found that the objective of Article 8(3) of Regulation No 207/2009 is to prevent the misuse of the earlier mark by the agent or representative of the proprietor of that mark, as those persons may improperly benefit from the effort and investment which the proprietor himself or herself has made. Such misuse is also likely to occur where the marks at issue are similar.

Lastly, the Court found that the action brought by John Mills was in a state ready to be adjudicated on and it gave a final ruling.

John Mills criticised the Board of Appeal for finding that it was an 'agent' of Jerome Alexander Consulting. According to the Court, the concepts of 'agent' and 'representative' must be interpreted broadly, so as to cover all forms of relationship based on a contractual agreement under which there is some agreement or commercial cooperation between the parties of a kind that gives rise to a fiduciary relationship by imposing on the applicant, whether expressly or implicitly, a general duty of trust and loyalty as regards the interests of the proprietor of the earlier mark. In that regard, the Court found that John Mills was a preferred distributor of Jerome Alexander Consulting goods and that there was a non-competition clause and provisions relating to the intellectual property rights with respect to those goods. The Board of Appeal was therefore right to find that John Mills was an 'agent' of Jerome Alexander Consulting.

With regard to the assessment of similarity between the marks at issue, the Court emphasised that, for the purposes of applying Article 8(3) of Regulation No 207/2009, similarity is not determined on the basis of the existence of a likelihood of confusion. So far as the goods are concerned, the Court recalled that the essential function of a trade mark is to indicate the commercial origin of the goods or services covered. Consequently, the application of Article 8(3) of Regulation No 207/2009 cannot be precluded where the goods or services covered by the mark applied for and those covered by the earlier mark are similar.

In that case, the Court held that the signs at issue were similar and that the goods were, in part, identical and, in part, similar. Accordingly, the action brought by John Mills was dismissed in its entirety.

By its judgment in ***Santen*** (C-673/18, EU:C:2020:531), delivered on 9 July 2020, the Court, sitting as the Grand Chamber, ruled on whether a marketing authorisation (MA) application may be regarded as the first MA for the product as a medicinal product, within the meaning of Article 3(d) of Regulation No 469/2009 [250] ('the Regulation concerning the SPC for medicinal products'), where it covers a new therapeutic application of an active ingredient, or of a combination of active ingredients, and that active ingredient or combination has already been the subject of an MA for a different therapeutic application.

Santen, a pharmaceutical laboratory specialising in ophthalmology, holds a European patent, filed on 10 October 2005 ('the basic patent at issue'), which protects an ophthalmic emulsion in which the active ingredient is ciclosporin, an immunosuppressive agent. On 19 March 2015, that laboratory also obtained an MA granted by the European Medicines Agency (EMA) for the medicinal product marketed under the name 'Ikervis', the active ingredient of which is likewise ciclosporin.

On the basis of the basic patent at issue and that MA, on 3 June 2015, Santen filed an application for an SPC covering a product called 'Ciclosporin' for the purposes of its use in the treatment of keratitis. By decision of 6 October 2017, the Director-General of the Institut national de la propriété industrielle (the National Institute for Industrial Property, France) (INPI) rejected that application for an SPC, taking the view that the MA at issue was not the first MA for ciclosporin.

250| Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (OJ 2009 L 152, p. 1). Article 3(d) of that regulation provides that a supplementary protection certificate (SPC) is to be granted if, in the Member State in which the application for the SPC is submitted and at the date of that application the MA obtained by a product, as a medicinal product, is the first MA for that product, as a medicinal product.

Seised of an action for annulment brought by Santen against that decision, the cour d'appel de Paris (Court of Appeal, Paris) referred a question to the Court of Justice on the interpretation of the concept of 'first MA as a medicinal product' for the purposes of Article 3(d) of the Regulation concerning the SPC for medicinal products. That court requested the Court of Justice, inter alia, to make clear the scope of the concepts of 'different therapeutic application' and 'therapeutic application within the limits of the protection conferred by the basic patent', set out in the judgment in *Neurim Pharmaceuticals (1991)*. [251] In that judgment, the Court had held that the mere existence of an earlier MA obtained for a veterinary medicinal product does not preclude the grant of an SPC for a different therapeutic application of the same product for which an MA has been granted, provided that the application is within the limits of the protection conferred by the basic patent relied upon for the purposes of the application for the SPC. [252]

In the first place, in its judgment of 9 July 2020, the Court considered whether the concept of 'product' [253] is dependent on the therapeutic application of the active ingredient. The Court observed in that regard that, for the purposes of the application of the Regulation concerning the SPC for medicinal products, that concept refers to the active ingredient or combination of active ingredients of a medicinal product. In addition, it stated that the scope of that concept need not be limited, in the absence of any definition of the concept of 'active ingredient' in that regulation, only to one of the therapeutic applications to which such an active ingredient or combination of active ingredients may give rise. The Court pointed out that although the protection conferred on a product by an SPC extends only to the product covered by an MA, it covers any use of that product as a medicinal product which was authorised before the expiry of the SPC. [254] In those circumstances, the Court concluded that the fact that an active ingredient, or a combination of active ingredients, is used for the purposes of a new therapeutic application does not confer on it the status of a distinct product where the same active ingredient, or the same combination of active ingredients, has been used for the purposes of a different, already known, therapeutic application.

In the second place, the Court explained the concept of 'first MA for the product, as a medicinal product' in Article 3(d) of the Regulation concerning the SPC for medicinal products. It thus noted that, in order to define that concept, there is no need to take into account the limits of the protection of the basic patent. The EU legislature intended, in establishing the SPC regime, to promote the protection of pharmaceutical research leading to the first placing on the market of an active ingredient or a combination of active ingredients as a medicinal product, and not to promote the protection of all research giving rise to the grant of a patent and the marketing of a new medicinal product. Thus, the Court concluded that an MA cannot be considered to be the first MA, for the purpose of Article 3(d) of that regulation, where it covers a new therapeutic application of an active ingredient, or of a combination of active ingredients, and that active ingredient or combination has already been the subject of an MA for a different therapeutic application.

251| Judgment of the Court of 19 July 2012, ***Neurim Pharmaceuticals (1991)*** (C-130/11, EU:C:2012:489).

252| Judgment in ***Neurim Pharmaceuticals (1991)*** (C-130/11, EU:C:2012:489, point 1 of the operative part).

253| As provided for in Article 1(b) of the Regulation concerning the SPC for medicinal products.

254| Article 4 of the Regulation concerning the SPC for medicinal products.

3. Public procurement

In the judgment in ***Hungeod and Others*** (Joined Cases C-496/18 and C-497/18, EU:C:2020:240), delivered on 26 March 2020, the Court held that the Public Procurement directives [255] authorise Member States to adopt national legislation which allows a monitoring authority to initiate of its own motion, on grounds of protection of the European Union's financial interests, a review procedure in order to monitor infringements of public-procurement rules. In that regard, the Court stated that, where provision is made for such a procedure, it comes within the scope of EU law since the public contracts which are the subject of such a procedure come within the material scope of the Public Procurement directives. Accordingly, the Court held that those review procedures must comply with the general principles of EU law and, in particular, the general principle of legal certainty.

The Court also held that that principle precludes, in such a review procedure initiated by an authority of its own motion, new national legislation from providing that, in order to review the legality of amendments to public contracts, such a procedure must be initiated within the limitation period laid down in the new legislation, even though the limitation period provided for by the previous legislation, which was applicable on the date of those amendments, has expired.

In that case, Budapesti Közlekedési, a public transit company, had published on 30 September 2005 and 3 January 2009, respectively, two calls for tenders in the *Official Journal of the European Union* for the award of two separate public contracts in connection with the construction of Line 4 of the metro in Budapest, Hungary. The estimated value of those public contracts exceeded the Community thresholds and they received financial assistance from the European Union. The contract under the first call for tenders was awarded to the undertakings Hungeod and Sixense. The contract was signed on 1 March 2006. On 5 October 2009, the contracting parties decided to amend the contract, claiming that unforeseeable circumstances had arisen. A notice of the modification of the contract was published in the *Közbeszerzési Értesítő (Public Procurement Journal)* on 18 November 2009.

The contract under the second call for tenders was awarded to Matrics Consults Ltd and the corresponding contract was signed on 14 May 2009. It was terminated on 16 November 2011 by Budapesti Közlekedési with effect from 31 December 2011.

In August 2017, the Hungarian arbitration panel of the Public Procurement Authority ('the Arbitration Panel'), to which the matter had been referred by the President of the Public Procurement Authority, ordered Budapesti Közlekedési and the holders of the two public contracts to pay a fine for infringement of the legislation in force relating to amendments to public contracts. Those orders were issued under the Hungarian Law on public procurement, which entered into force on 1 November 2015. That new legislation authorises, in respect of a public contract concluded before that legislation entered into force, the monitoring authority to initiate of its own motion, irrespective of the limitation periods laid down by previous national legislation,

255| 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); Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1992 L 76, p. 14); Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (OJ 2007 L 335, p. 31); Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65); and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243) (together, 'the Public Procurement directives').

an investigation into public-procurement infringements committed before the new legislation entered into force in order to have the Arbitration Panel establish that an infringement has been committed and impose a penalty.

By two requests for a preliminary ruling, the Fővárosi Törvényszék (Budapest High Court, Hungary), before which actions had been brought by Budapesti Közlekedési and the holders of the two public contracts against the Arbitration Panel's decision, referred questions to the Court of Justice concerning the compatibility with EU law, and in particular with the principle of legal certainty, of the power provided for by the 2015 Law on public procurement to review amendments made, before that law entered into force, to public-procurement contracts, even where the limitation period laid down by previous national legislation for the review of amendments had already expired.

First, the Court pointed out that, although Directives 89/665 and 92/13 require that remedies should be available to the undertakings concerned, with a view to ensuring the effective application of the EU rules on the award of public contracts, those remedies cannot however be regarded as envisaging all possible remedies in public-procurement matters. Furthermore, as regards those two directives, the Court held that the provisions [256] which provide that Member States are to ensure that a contract is declared ineffective by a body that is independent of the contracting authority serve only to strengthen the review procedures which those directives require the Member States to implement and must therefore be interpreted as neither requiring Member States to provide for, nor precluding them from providing for, the existence of remedies in favour of national monitoring authorities.

In addition, the Court held that the provisions of Directives 2014/24 and 2014/25, [257] which require Member States to ensure that the application of public-procurement rules is monitored by one or more authorities, bodies or structures, contain minimum requirements. Accordingly, the Court concluded that those provisions do not prohibit the Member States from providing for the existence of review procedures in favour of national monitoring authorities which allow those authorities to obtain a declaration of their own motion that there have been infringements of public-procurement rules. However, the Court stated that where such an automatic review procedure is provided for, it comes within the scope of EU law since the public contracts which are the subject of such a review come within the material scope of the Public Procurement directives. Consequently, that procedure must comply with EU law, including the general principles of EU law, of which the general principle of legal certainty forms part.

Regarding that last aspect, the Court pointed out, secondly, that the principle of legal certainty requires that rules of law be clear, precise and predictable in their effect, in particular where they may have negative consequences for individuals and undertakings. Moreover, that principle precludes rules from being applied retroactively, irrespective of whether such application might produce favourable or unfavourable effects for the person concerned. It requires that any factual situation be examined in the light of the legal rules existing at the time when the situation obtained, the new rules thus being valid only for the future and also applying, save for derogation, to the future effects of situations which came about during the period of validity of the old law. Furthermore, the Court noted that, as regards limitation periods specifically, it is clear from its case-law that, in order to fulfil their function of ensuring legal certainty, they must be fixed in advance and be sufficiently foreseeable.

256| Article 2d of Directives 89/665 and 92/13, inserted by Directive 2007/66.

257| Article 83(1) and (2) of Directive 2014/24 and Article 99(1) and (2) of Directive 2014/25.

In that case, the Court held that, by allowing procedures to be initiated by an authority of its own motion with regard to amendments made to public contracts where those procedures were time-barred under the relevant provisions of the 2003 Law on public procurement applicable to those amendments, the relevant provision of the 2015 Law on public procurement was not intended to cover existing legal situations, but was a provision with retroactive effect. It is true that EU law exceptionally allows an act to be recognised as having retroactive effect when the purpose to be attained so demands and when the legitimate expectations of the persons concerned are duly respected. However, the Court held that the principle of the protection of legitimate expectations precludes amendments to national legislation which allow a national monitoring authority to initiate a review procedure even though the limitation period provided for by previous legislation, which was applicable on the date of those amendments, has expired.

4. Foodstuffs

In the judgment in ***Dr. Willmar Schwabe*** (C-524/18, EU:C:2020:60), delivered on 30 January 2020, the Court clarified, first, the scope of the concept of 'accompanying' a reference to general, non-specific benefits of a nutrient or food on health, within the meaning of Article 10(3) of Regulation No 1924/2006 on nutrition and health claims, [258] which the Court classified as a 'general' health claim, and, secondly, that of the obligation to produce scientific evidence in support of such a 'general' health claim.

That judgment was given in proceedings between a company which markets a food supplement and another company which produces and markets competing products concerning the alleged misleading nature of the packaging of that food supplement. The front of the packaging of that product displayed a 'general' health claim, whereas the specific health claim appeared only on the back of that packaging and there was no clear reference, such as an asterisk, between the two.

First, the Court addressed the interpretation of the 'accompanying' requirement, within the meaning of Article 10(3) of Regulation No 1924/2006, from which it follows, in essence, that any 'general' health claim must be accompanied by a specific health claim. [259] The Court stated, at the outset, that that requirement is subject to strict interpretation, having regard to the fact that that provision establishes a derogation from the principle of health claims set out in Article 10(1) of Regulation No 1924/2006. Next, the Court emphasised that, under Commission Implementing Decision 2013/63, [260] the specific health claim accompanying the 'general' health claim must appear 'next to' or 'following' it. In the light of those factors, the Court concluded that the concept of 'accompanying' requires not only that the specific health claim should clarify the content of the 'general' health claim, but also that the location of those two claims on the packaging of the product should enable an average consumer who is reasonably well informed and reasonably attentive and circumspect to understand the link between those claims.

Thus, according to the Court, that concept comprises both a substantive and visual dimension. As regards, on the one hand, its substantive dimension, the Court stated that that concept requires the content of the 'general' health claim and the specific health claim to match, implying, in essence, that the former is fully

258| Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2006 L 404, p. 9).

259| Included in the lists provided for in Articles 13 or 14 of Regulation No 1924/2006.

260| Commission Implementing Decision 2013/63/EU of 24 January 2013 adopting guidelines for the implementation of specific conditions for health claims laid down in Article 10 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council (OJ 2013 L 22, p. 25), point 3 of the Annex.

supported by the latter. In that connection, it held that food business operators must present, in a clear and accurate manner, the specific health claims supporting the 'general' health claims that they use. As regards, on the other hand, the visual dimension of the concept of 'accompanying', the Court held that it refers to the immediate perception, by the average consumer, who is reasonably well informed and reasonably attentive and circumspect, of a direct visual link between the 'general' health claim and the specific health claim, which requires, in principle, spatial proximity or immediate vicinity between them. However, the Court stated that, where the specific health claims do not appear in their entirety on the same side of the packaging as the 'general' health claim which they are intended to substantiate due to their large size or length, the requirement for a direct visual link could be satisfied, exceptionally, by means of a clear reference, such as an asterisk, where that ensures, in a manner that is clear and perfectly comprehensible to the consumer, that, in spatial terms, the content of the 'general' health claim and the specific health claims which support it match.

Secondly, the Court held that a 'general' health claim, within the meaning of Article 10(3) of Regulation No 1924/2006 must satisfy the scientific evidential requirements laid down by that regulation. [261] In that regard, according to the Court, it is sufficient that 'general' health claims be accompanied by specific health claims that are supported by generally accepted scientific evidence which has been verified and authorised, provided that the latter claims are included in the list provided for in Article 13 or Article 14 of that regulation.

5. Combating late payment in commercial transactions

In the judgment in ***Commission* v *Italy (Directive combating late payment)*** (C-122/18, EU:C:2020:41), delivered on 28 January 2020, the Grand Chamber of the Court held that the Italian Republic had infringed Directive 2011/7 on combating late payment in commercial transactions, [262] in that that Member State had not ensured that its public authorities, when they were debtors in such transactions, effectively complied with periods for payment not exceeding 30 or 60 calendar days, as laid down in Article 4(3) and (4) of that directive.

The Commission, having received a series of complaints from Italian economic operators and associations of economic operators which denounced the excessively long periods in which Italian public authorities systematically pay their invoices pertaining to commercial transactions with private operators, brought an action against the Italian Republic before the Court for failure to fulfil its obligations.

The Italian Republic argued, in defence, that Directive 2011/7 requires Member States only to guarantee, in their legislation transposing that directive and in contracts governing commercial transactions in which the debtor is one of their public authorities, maximum periods for payment in conformity with Article 4(3) and (4) of that directive and to provide for the right of creditors, in the event of non-compliance with those periods, to late-payment interest and compensation for recovery costs. According to that Member State, those provisions do not, however, require Member States to guarantee effective compliance with those periods by their public authorities in all circumstances.

The Court, first of all, rejected that argument, taking the view that Article 4(3) and (4) of Directive 2011/7 also requires Member States to ensure effective compliance, by their public authorities, with the periods for payment it prescribes. The Court noted inter alia that, in the light of the large number of commercial

261| Recitals 14, 17 and 23 and Articles 5 and 6 of Regulation No 1924/2006.

262| Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (OJ 2011 L 48, p. 1).

transactions in which public authorities are the debtors of undertakings and the costs and difficulties created for undertakings by those authorities' late payments, the EU legislature intended to impose increased obligations on Member States as regards transactions between undertakings and public authorities.

Next, the Court rejected the argument of the Italian Republic according to which public authorities cannot engage the liability of the Member State to which they belong when acting in a commercial transaction (*jure privatorum*) outside their public powers. Such an interpretation would render ineffective Directive 2011/7, in particular Article 4(3) and (4) thereof, which specifically places Member States under the obligation to ensure effective compliance with the periods for payment prescribed therein in commercial transactions where the debtor is a public authority.

Lastly, the Court emphasised that the fact – assuming it were established – that the situation involving the public authorities' late payments in commercial transactions covered by Directive 2011/7 was improving could not prevent the Court from holding that the Italian Republic had failed to fulfil its obligations under EU law. In accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, namely, in the case at hand, on 16 April 2017.

XV. Internet and electronic commerce

In 2020, the Court delivered three particularly important judgments in the field of protection of personal data. Those judgments, which raise questions relating to respect for fundamental rights, are presented in Section I.4 'Protection of personal data'. [263] One judgment concerning open Internet access must also be mentioned under this heading. [264]

263| The first judgment, delivered on 16 July 2020 in ***Facebook Ireland and Schrems*** (C-311/18, EU:C:2020:559), concerns the transfer of personal data from the European Union to the United States. Two other judgments, delivered on 6 October 2020 in ***Privacy International*** (C-623/17, EU:C:2020:790) and ***La Quadrature du Net and Others*** (Joined Cases C-511/18, C-512/18 and C-520/18, EU:C:2020:791), deal, moreover, with the limits imposed on the retention of and access to personal data in the field of electronic communications, in the context of safeguarding national security and combating serious crime and terrorism. Those judgments are presented under Section I.4 'Protection of personal data'. In that regard, reference should also be made to the judgment in ***J & S Service*** (C-620/19, EU:C:2020:1011), delivered on 10 December 2020, in which the Court held that it did not have jurisdiction to answer questions referred for a preliminary ruling on the interpretation of the GDPR, on the ground that the case concerned data relating to legal persons. That judgment is presented in Section V.4 'References for a preliminary ruling'.

264| The following judgments are also worthy of note under this heading: judgment in ***Google Ireland*** (C-482/18, EU:C:2020:141), delivered on 3 March 2020, in which the Court held that the freedom to provide services guaranteed by Article 56 TFEU does not preclude national legislation which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising (presented in Section VII.4. 'Freedom to provide services and posting of workers'); judgment in ***Constantin Film Verleih*** (C-264/19, EU:C:2020:542), delivered on 9 July 2020, in which the Court was required to interpret Directive 2004/48 in a case involving the uploading of a film to an online video platform without the copyright holder's consent (presented in Section XIV.1 'Copyright'); and judgment in ***Wikingerhof*** (C-59/19, EU:C:2020:950), delivered on 24 November 2020, in which the Court ruled on a case where a company governed by German law operating a hotel in Germany had concluded a contract with a company governed by Netherlands law operating an online accommodation-booking platform (presented in Section IX.1 'Regulations No 44/2001 and No 1215/2012 concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters').

In the judgment of 15 September 2020, ***Telenor Magyarország*** (Joined Cases C-807/18 and C-39/19, EU:C:2020:708), the Court, sitting as the Grand Chamber, interpreted for the first time Regulation 2015/2120, [265] which enshrines the fundamental principle of an open Internet (more colloquially known as 'net neutrality').

Telenor, a company established in Hungary, provides Internet-access services in particular. The services offered to its customers include two packages with preferential access (known as 'zero tariff'), and the specific feature of those packages is that the data traffic generated by certain specific applications and services does not count towards the consumption of the data volume purchased by customers. In addition, once that volume of data has been used up, those customers may continue to use those specific applications and services without restriction, while measures blocking or slowing down data traffic are applied to the other available applications and services.

After initiating two procedures to verify whether those two packages complied with Regulation 2015/2120 laying down measures concerning open Internet access, the Hungarian National Media and Communications Office adopted two decisions by which it found that those packages did not comply with the general obligation of equal and non-discriminatory treatment of traffic laid down in Article 3(3) of that regulation and that Telenor had to put an end to those measures.

The Fővárosi Törvényszék (Budapest High Court), hearing two actions brought by Telenor, decided to refer the matter to the Court of Justice for a preliminary ruling in order to ascertain how to interpret and apply Article 3(1) and (2) of Regulation 2015/2120, which safeguards a number of rights [266] for end users of Internet-access services and prohibits providers of such services from putting in place agreements or commercial practices limiting the exercise of those rights, and Article 3(3), which lays down a general obligation of equal and non-discriminatory treatment of traffic.

As regards, in the first place, the interpretation of Article 3(2) of Regulation 2015/2120, read in conjunction with Article 3(1) of that regulation, the Court observed that Article 3(1) provides that the rights which it safeguards for end users of Internet-access services are intended to be exercised 'via their internet access service', and that Article 3(2) requires that such a service does not entail any limitation of the exercise of those rights. In addition, it follows from Article 3(2) of Regulation 2015/2120 that the services of a given provider of Internet-access services must be assessed in the light of that requirement by the national regulatory authorities, [267] subject to review by the competent national courts, and taking into consideration both the agreements concluded by that provider with end users and the commercial practices in which it engages.

In that context, after providing a series of general clarifications on the meaning of the concepts of 'agreements', 'commercial practices' and 'end users' [268] contained in Regulation 2015/2120, the Court found that the conclusion of agreements, by which given customers subscribe to a package combining a 'zero tariff' and

265| Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open Internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1).

266| Right for end users to access and use applications, content and services, but also the right to provide applications, content and services and to use terminals of their choice.

267| On the basis of Article 5 of Regulation 2015/2120.

268| The concept of 'end user' encompasses all legal entities or natural persons using or requesting a publicly available electronic communications service. It also includes both natural or legal persons who use or request Internet-access services in order to access content, applications and services, as well as those who rely on Internet access to provide content, applications and services.

measures blocking or slowing down the traffic linked to the use of 'non-zero tariff' services and applications, is liable to limit the exercise of end users' rights, within the meaning of Article 3(2) of Regulation 2015/2120, on a significant part of the market. Such packages are liable to increase the use of the favoured applications and services and, accordingly, to reduce the use of the other applications and services available, having regard to the measures by which the provider of the Internet-access services makes that use technically more difficult, if not impossible. Furthermore, the greater the number of customers concluding such agreements, the more likely it is that, given its scale, the cumulative effect of those agreements will result in a significant limitation of the exercise of end users' rights, or even undermine the very essence of those rights.

In the second place, as regards the interpretation of Article 3(3) of Regulation 2015/2120, the Court found that, in order to make a finding of incompatibility with that provision, no assessment of the effect of measures blocking or slowing down traffic on the exercise of end users' rights is required. Article 3(3) does not lay down such a requirement in order to assess whether the general obligation of equal and non-discriminatory treatment of traffic in that provision has been complied with. In addition, the Court held that, where measures blocking or slowing down traffic are based not on objectively different technical quality of service requirements for specific categories of traffic, but on commercial considerations, those measures must in themselves be regarded as incompatible with Article 3(3).

Consequently, packages such as those under review by the referring court are, generally, liable to infringe both paragraphs 2 and 3 of Article 3 of Regulation 2015/2120, it being specified that the competent national authorities and courts may examine those packages at the outset in the light of Article 3(3).

XVI. Economic and monetary policy

The judgment in ***Council and Others* v *K. Chrysostomides & Co. and Others*** (Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, EU:C:2020:1028), delivered by the Grand Chamber of the Court on 16 December 2020, concerns financial assistance granted to the Republic of Cyprus that was conditional on the restructuring of its banking sector.

During the first months of 2012, several banks established in Cyprus, including Cyprus Popular Bank ('Laïki') and Trapeza Kyprou Dimosia Etaireia (Bank of Cyprus; 'BoC'), encountered financial difficulties. On 25 June 2012, the Republic of Cyprus presented a request for financial assistance to the President of the Euro Group, which stated that such assistance would be provided by either the European Financial Stability Facility or the European Stability Mechanism (ESM) in the context of a macroeconomic adjustment programme that was to be defined in a memorandum of understanding. The negotiation of that memorandum was conducted by the European Commission together with the ECB and the International Monetary Fund (IMF), on the one hand, and the Cypriot authorities, on the other. On 26 April 2013, a memorandum of understanding was thus signed by the Commission on behalf of the ESM, the Minister for Finance of the Republic of Cyprus and the Governor of the Central Bank of Cyprus, and this enabled the ESM to grant financial assistance to the Republic of Cyprus.

A number of individuals and companies that held deposits with Laïki or BoC or were shareholders or bondholders of those banks took the view that the Council of the European Union, the Commission, the ECB and the Euro Group had, in the context of that memorandum of understanding, required the Cypriot authorities to adopt, maintain or continue to implement measures that caused a substantial reduction in the value of

their deposits, shares or bonds. They therefore brought actions to establish non-contractual liability before the General Court in order to be compensated for the losses which they claimed to have suffered because of those measures.

By two judgments of 13 July 2018, *K. Chrysostomides & Co. and Others* v *Council and Others* and *Bourdouvali and Others* v *Council and Others* [269] ('the judgments under appeal'), the General Court, first of all, dismissed the pleas of inadmissibility raised by the Council concerning the actions for damages brought by the individuals and companies concerned against the Euro Group. Next, as regards the first condition which must be met in order for the European Union to incur non-contractual liability pursuant to the second paragraph of Article 340 TFEU, a condition which relates to the unlawfulness of the conduct alleged against the EU institution and requires that a sufficiently serious breach of a rule of law intended to confer rights on individuals be established, it held that the individuals and companies that had brought those actions had not succeeded in demonstrating an infringement of their right to property, of the principle of the protection of legitimate expectations or of the principle of equal treatment. As the first condition for establishing non-contractual liability of the European Union was not met in that instance, the General Court dismissed the actions.

Hearing appeals brought by the Council (Cases C-597/18 P and C-598/18 P) and by the individuals and companies concerned (Cases C-603/18 P and C-604/18 P) and cross-appeals brought by the Council (in Cases C-603/18 P and C-604/18 P), the Court set aside the judgments under appeal inasmuch as they dismissed the pleas of inadmissibility raised by the Council to the extent that those pleas related to the actions brought by those individuals and companies against the Euro Group and against Article 2(6)(b) of Decision 2013/236. [270] On the other hand, it dismissed the appeals of those individuals and companies.

As regards, in the first place, the appeals brought by the Council in Cases C-597/18 P and C-598/18 P, the Court pointed out that, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU, there must be unlawful conduct by an 'EU institution', a concept which encompasses not only the EU institutions listed in Article 13(1) TEU but also all the EU bodies, offices and agencies that have been established by or under the Treaties and are intended to contribute to the achievement of the European Union's objectives.

In that connection, the Court observed, first, that the Euro Group is an intergovernmental body for coordinating the economic policies of the Member States whose currency is the euro ('MSCE'). Secondly, the Euro Group cannot be equated with a configuration of the Council and is characterised by its informality. Thirdly, it does not have any competence of its own or the power to punish a failure to comply with the political agreements concluded within it. The Court of Justice concluded from this that the General Court was wrong to hold that the Euro Group was an 'EU' body established by the Treaties, whose conduct would be capable of giving rise to non-contractual liability of the European Union.

It added that, since the political agreements concluded within the Euro Group are given concrete expression and are implemented by means, in particular, of acts and action of the EU institutions, inter alia of the Council and the ECB, individuals are not denied their right, enshrined in Article 47 of the Charter, to effective judicial

269| Judgments of the General Court of 13 July 2018, ***K. Chrysostomides & Co. and Others* v *Council and Others*** (T-680/13, EU:T:2018:486) and ***Bourdouvali and Others* v *Council and Others*** (T-786/14, not published, EU:T:2018:487).

270| Council Decision 2013/236/EU of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth (OJ 2013 L 141, p. 32). That decision provides for a series of measures and outcomes with a view to correcting the budget deficit of the Republic of Cyprus and to restoring the soundness of its financial system. The cross-appeals brought by the Council related specifically to Article 2(6)(b) of the decision, which states that the macroeconomic adjustment programme for the Republic of Cyprus is to provide for 'establishing an independent valuation of the assets of [BoC] and [Laïki] and quickly integrating the operations of [Laïki] into [BoC]. The valuation shall be completed quickly so as to enable the completion of the deposit-equity swap at [BoC]'.

protection, given that, as indeed happened in that instance, they may bring an action to establish non-contractual liability of the European Union against those institutions in respect of the acts or conduct that the latter adopt following such political agreements. The Court pointed out, in particular, that it is for the Commission, as guardian of the Treaties, to ensure that such political agreements are in conformity with EU law, and that any inaction on the part of the Commission in that regard is liable to result in non-contractual liability of the European Union being invoked.

So far as concerns, in the second place, the Council's cross-appeals in Cases C-603/18 P and C-604/18 P, those cross-appeals were intended to contest the determination of the General Court that, first, the Council, by means of Article 2(6)(b) of Decision 2013/236, required the Cypriot authorities to maintain or continue to implement the conversion of uninsured deposits in BoC into shares and, secondly, those authorities had no margin of discretion for that purpose.

The Court of Justice observed that Article 2(6)(b) of Decision 2013/236 does not lay down specific rules for the implementation of that conversion, with the result that the Cypriot authorities had a significant margin of discretion in that regard, in particular for the purpose of determining the number and value of the shares to be allocated to BoC's depositors in exchange for their uninsured deposits with that bank. Consequently, it held that the General Court had erred in law in finding that the Republic of Cyprus had no margin of discretion under that provision for the purpose of defining the specific rules for that conversion.

So far as concerns, in the third place, the appeals brought by the individuals and companies concerned in Cases C-603/18 P and C-604/18 P, those individuals and companies contended that a sufficiently serious breach of their right to property, of the principle of the protection of legitimate expectations, and of the principle of equal treatment was attributable to the acts and conduct of the EU institutions, with the result that the first condition giving rise to non-contractual liability by the European Union was met.

In that regard, the Court pointed out, first of all, that the right to property [271] is not an absolute right and may be subject to limitations. [272] It took the view, in particular, that as it had already held in its judgment in *Ledra Advertising and Others* v *Commission and ECB*, [273] the measures referred to in the memorandum of understanding of 26 April 2013 could not be regarded as constituting a disproportionate and intolerable interference impairing the right to property of the individuals and companies concerned.

Next, the Court held that the fact that, during the early phases of the international financial crisis, the grant of financial assistance to other MSCE was not subject to the adoption of specific measures could not be regarded as an assurance capable of having engendered a legitimate expectation on the part of the shareholders, bondholders and depositors of Laïki and BoC that that would also be the case in the context of the grant of financial assistance to the Republic of Cyprus.

Finally, after noting that the general principle of equal treatment requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified, the Court held that there had been no infringement of that principle. It found that the companies and individuals concerned were not in a situation comparable to that of the Central Bank of Cyprus, whose action is guided exclusively by public-interest objectives, to that of depositors in the Greek

271| Article 17 of the Charter.

272| Article 52 of the Charter.

273| Judgment of the Court of 20 September 2016, ***Ledra Advertising and Others* v *Commission and ECB*** (C-8/15 P to C-10/15 P, EU:C:2016:701).

branches of Laïki and BoC, to that of depositors in those two banks whose deposits did not exceed EUR 100 000, to that of the depositors and shareholders of banks of other MSCE which benefited from financial assistance before the Republic of Cyprus or to that of members of the Cypriot cooperative banking sector.

In conclusion, the Court dismissed in their entirety the appeals brought by the companies and individuals concerned (Cases C-603/18 P and C-604/18 P), set aside the judgments under appeal inasmuch as they dismissed the pleas of inadmissibility raised by the Council to the extent that those pleas related to the actions against the Euro Group and against Article 2(6)(b) of Decision 2013/236 and, giving final judgment on those pleas, [274] upheld them.

274| Pursuant to the second sentence of the first paragraph of Article 61 of the Statute.

XVII. Social policy

In relation to social policy, several judgments deserve to be mentioned. They concern the principle of equal treatment in employment and social security, the protection of fixed-term workers, the organisation of working time, the protection of employees in the event of the insolvency of their employer, the posting of workers and the coordination of social security systems. [275]

1. Equal treatment in employment and social security

In the judgment in ***Associazione Avvocatura per i diritti LGBTI*** (C-507/18, EU:C:2020:289), delivered on 23 April 2020, the Court, sitting as the Grand Chamber, held that statements made by a person during an audiovisual programme, according to which that person would never recruit persons of a certain sexual orientation to that person's undertaking or wish to use the services of such persons, fall within the material scope of Directive 2000/78 [276] ('the anti-discrimination directive') and, more particularly, within the concept of 'conditions for access to employment or to occupation' within the meaning of Article 3(1)(a) of that directive, even if no recruitment procedure had been opened, nor was planned, at the time when those statements were made, provided, however, that the link between those statements and the conditions for access to employment or to occupation within the undertaking is not hypothetical.

In that case, a lawyer had stated, in an interview given during a radio programme, that he would not wish to recruit homosexual persons to his firm nor to use the services of such persons in his firm. Having taken the view that that lawyer had made remarks constituting discrimination on the ground of the sexual orientation of workers, an association of lawyers that defends the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in court proceedings brought proceedings against him for damages. The action having been successful at first instance and that ruling having been upheld on appeal, the lawyer appealed in cassation, against the judgment delivered in the appeal, before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), which sought a preliminary ruling from the Court of Justice on, inter alia, the interpretation of the concept of 'conditions for access to employment and to occupation', within the meaning of the anti-discrimination directive.

After recalling that that concept must be given an autonomous and uniform interpretation and cannot be interpreted restrictively, the Court interpreted that concept by reference to its judgment in *Asociația Accept*. [277]

275| Reference should also be made to the following decisions: judgment of 6 October 2020, ***Jobcenter Krefeld*** (C-181/19, EU:C:2020:794), presented in Section VII.2 'Free movement of workers'; judgments of 8 December 2020, ***Hungary*** **v** ***Parliament and Council*** (C-620/18, EU:C:2020:1001) and ***Poland*** **v** ***Parliament and Council*** (C-626/18, EU:C:2020:1000), presented in Section VII.4 'Freedom to provide services and posting of workers'; and judgment of 29 October 2020, Veselības ministrija (C-243/19, EU:C:2020:872), presented in Section I.1 'Freedom of religion'.

276| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). That directive is a specific expression, in the field covered by it, of the general prohibition of discrimination laid down in Article 21 of the Charter.

277| Judgment of the Court of 25 April 2013, ***Asociația Accept*** (C-81/12, EU:C:2013:275).

Thus, the Court, inter alia, made clear that statements suggesting the existence of a homophobic recruitment policy do fall within the concept of 'conditions for access to employment or to occupation', even if they come from a person who is not legally capable of recruiting staff, provided that there is a non-hypothetical link between those statements and the employer's recruitment policy.

Whether such a link exists must be assessed by the national courts on the basis of all the circumstances characterising those statements. Relevant criteria in that regard are the status of the person making the statements and the capacity in which he or she made them, which must establish that that person has or may be perceived as having a decisive influence on the employer's recruitment policy. The national courts must also take into account the nature and content of the statements concerned and the context in which they were made, in particular their public or private character.

According to the Court, the fact that that interpretation of 'conditions for access to employment … or to occupation' may entail a possible limitation on the exercise of freedom of expression does not call that interpretation into question. The Court noted, in that regard, that freedom of expression is not an absolute right and that its exercise may be subject to limitations, provided that these are provided for by law and respect the essence of that right and the principle of proportionality. That principle involves verifying whether those limitations are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Those conditions were met in that case, given that the limitations resulted directly from the anti-discrimination directive and were applied only for the purpose of attaining its objectives, namely to safeguard the principle of equal treatment in employment and occupation and the attainment of a high level of employment and social protection. In addition, the interference with the exercise of freedom of expression did not go beyond what was necessary to attain the objectives of that directive, in that only statements that constitute discrimination in employment and occupation are prohibited. Furthermore, the limitations arising from the anti-discrimination directive are necessary to guarantee the rights in matters of employment and occupation of the persons covered by that directive. The very essence of the protection afforded by that directive in matters of employment and occupation could become illusory if statements falling within the concept of 'conditions for access to employment … and to occupation', within the meaning of that directive, fell outside its scope because they were made in the context of an audiovisual entertainment programme or constitute the expression of a personal opinion of the individual who made them.

Lastly, the Court ruled that the anti-discrimination directive does not preclude Italian legislation which automatically gives standing to bring proceedings for the enforcement of obligations under the directive and, where appropriate, to obtain damages, to an association of lawyers whose objective, according to its statutes, is the judicial protection of persons having a certain sexual orientation and the promotion of the culture and respect for the rights of that category of persons, on account of that objective and irrespective of whether it is a for-profit association, in circumstances that are capable of constituting discrimination, within the meaning of that directive, against that category of persons and it is not possible to identify an injured party.

The Court made clear in that regard that although the directive does not require an association such as that at issue in the main proceedings to be given such standing where no injured party can be identified, it does give the Member States the option of introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment than those which it contains. It is therefore for the Member States which have chosen that option to decide under which conditions an association may bring legal proceedings for a finding of discrimination and for a sanction to be imposed. It is in particular for them to determine whether the for-profit or non-profit status of the association is to have a bearing on the assessment of its standing to bring such proceedings, and to specify the scope of such an action, in particular the sanctions

that may be imposed at the end of it, such sanctions being required, in accordance with Article 17 of the anti-discrimination directive, to be effective, proportionate and dissuasive, regardless of whether there is any identifiable injured party.

2. Protection of fixed-term workers

In the judgment in ***Sánchez Ruiz and Others*** (Joined Cases C-103/18 and C-429/18, EU:C:2020:219), delivered on 19 March 2020, the Court found that Member States and/or the social partners cannot exclude from the concept of 'successive fixed-term employment contracts or relationships' provided for in Clause 5 of the framework agreement on fixed-term work [278] ('the framework agreement') a situation in which a worker recruited on the basis of a fixed-term employment relationship, namely until the vacant post to which he or she is recruited is definitively filled, has occupied the same post continuously over several years in the context of several appointments and has continuously performed the same functions. The continued occupation by that worker of that vacant post was the consequence of the employer's failure to comply with its legal obligation to organise, within the relevant deadline, a selection procedure seeking definitively to fill that vacant post, as a result of which his or her employment relationship was implicitly extended from year to year. In the event of abuse, by a public employer, of successive fixed-term employment relationships, the fact that the worker concerned consented to the establishment and/or the renewal of those employment relationships is not capable, from that perspective, of removing any abusive element of that employer's conduct, so that the framework agreement would not apply to that worker's situation.

In that case, a number of people had been employed over a long period of time in the context of fixed-term employment relationships within the health service of the Community of Madrid (Spain). Those workers sought recognition of their status as temporary regulated staff members or, in the alternative, as public employees enjoying a similar status, recognition which the Community of Madrid had refused them. On hearing actions brought by those workers against that Community's refusal, the Juzgado Contencioso-Administrativo nº 8 de Madrid (Administrative Court No 8 of Madrid, Spain) and the Juzgado Contencioso-Administrativo nº 14 de Madrid (Administrative Court No 14 of Madrid, Spain) referred several questions to the Court for a preliminary ruling concerning the interpretation, inter alia, of Clause 5 of the framework agreement.

In reaching that conclusion, the Court noted, first of all, that one of the objectives pursued by the framework agreement is to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, and that it is for Member States and/or the social partners to determine, in accordance with the objective, the aim and the practical effect of that framework agreement, the conditions under which those employment contracts or relationships are to be regarded as 'successive'. It then took the view that an interpretation to the contrary would allow precarious employment of workers for years and would risk having the effect not only of excluding a large number of fixed-term employment relationships from the benefit of the protection sought by Directive 1999/70 and by the framework agreement, by removing from the objective pursued by that directive and that framework agreement a large part of its substance, but also of permitting the abusive use of such relationships by employers in order to meet permanent and long-term staffing needs.

278| Framework agreement on fixed-term work, concluded on 18 March 1999, annexed to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

Moreover, the Court held that Clause 5 of the framework agreement conflicts with national legislation and case-law, in terms of which the successive renewal of fixed-term employment relationships is considered to be justified for 'objective reasons', on the sole ground that the renewal responds to the reasons for recruitment referred to in that legislation, namely grounds of necessity, urgency or for the development of programmes of a temporary, cyclical or extraordinary nature, in so far as such national legislation and case-law do not prevent the employer concerned from responding, in practice, by such renewals, to permanent and long-term staffing needs. In that regard, the Court found that the national legislation and case-law in question did not prescribe a general and abstract authorisation to have recourse to successive fixed-term employment contracts but limited the conclusion of such contracts or relationships for the purposes of satisfying, in essence, temporary requirements. In practice, however, the successive appointments of the workers concerned did not respond to the simple, temporary requirements of the Community of Madrid but sought to satisfy permanent and long-term staffing needs within the health service of that Community. In that regard, the Court stated that, according to the referring courts, a structural problem exists in the Spanish public-health service that is reflected in the high percentage of temporary workers and in the disregard of the legal obligation to fill, on a permanent basis, the temporary posts covered by that staff.

The Court next ruled that it is for the national courts to assess whether certain measures, such as the organisation of selection procedures seeking definitively to fill posts occupied on a temporary basis by workers employed in the context of fixed-term employment relationships, the conversion of the status of those workers to 'non-permanent workers of indefinite duration' and the grant to those workers of compensation equal to that paid in the event of unfair dismissal, constitute appropriate measures for preventing and, where appropriate, penalising abuses resulting from the use of successive fixed-term employment contracts or relationships or equivalent legal measures. The Court nonetheless provided clarification designed to guide those courts in their assessments.

Moreover, the Court found that, in the event of abuse by a public employer of successive fixed-term employment relationships, the fact that the worker concerned consented to the establishment and/or renewal of those employment relationships is not capable, from that perspective, of removing the abusive element from that employer's conduct, so that the framework agreement would not be applicable to that worker's situation. In that regard, the Court held that the objective of the framework agreement consisting in seeking to place limits on successive recourse to fixed-term employment contracts or relationships is based implicitly but necessarily on the premiss that the worker, by reason of his or her position of weakness vis-à-vis the employer, is likely to be the victim of abusive use, by the employer, of successive fixed-term employment relationships, even though that worker freely consented to the establishment and renewal of those employment relationships and may, for that same reason, be dissuaded from expressly asserting his or her rights vis-à-vis the employer. The Court then took the view that Clause 5 of that framework agreement would be devoid of all practical effect if the fixed-term workers were deprived of the protection which it guarantees to them on the sole ground that they had freely consented to the conclusion of successive fixed-term employment relationships.

The Court found, lastly, that EU law does not oblige a national court hearing a dispute between a worker and that worker's public employer not to apply national legislation that is inconsistent with Clause 5(1) of the framework agreement since, as that clause does not have direct effect, it cannot be relied on, as such, in the context of a dispute under EU law, in order to disapply a provision of national law that runs counter to it.

3. Organisation of working time

In the judgment in ***Fetico and Others*** (C-588/18, EU:C:2020:420), delivered on 4 June 2020, the Grand Chamber of the Court held that Articles 5 and 7 of Directive 2003/88 concerning certain aspects of the organisation of working time [279] do not apply to national rules which do not allow workers to claim certain types of paid special leave entitling them to time off from work in order to meet specific needs and obligations where those needs and obligations arise during weekly rest periods or periods of paid annual leave guaranteed by those articles.

That case had its origin in disputes between employers and employees relating to the conditions governing the application of paid special leave provided for by a collective agreement of a group of Spanish companies which gave effect to the minimum requirements of the Spanish legislation on the status of workers. Those days of special leave enable the workers to meet specific needs or obligations such as marriage, the birth of a child, hospitalisation, surgery or the death of a close relative, as well as the performance of trade-union-representation functions. To enable their members to have the actual benefit of that special leave, a number of trade unions sought a court ruling recognising that workers are entitled to claim that leave even where the needs and obligations which that leave is designed to meet arise during periods when those workers do not have to work by reason of the weekly rest period or period of paid annual leave. In their view, any other approach would be likely to undermine the minimum weekly rest period and the period of paid annual leave guaranteed by Articles 5 and 7 of Directive 2003/88.

The referring court was doubtful that a refusal to grant a worker the right to take special leave where the event giving an entitlement to leave occurs during weekly rest periods or periods of paid annual leave would be compatible with Directive 2003/88. Consequently, it submitted questions to the Court of Justice on the connection between the weekly rest periods or periods of paid annual leave provided for in Articles 5 and 7 of that directive and the special leave governed by Spanish law. In that context, the referring court made reference to, inter alia, the case-law of the Court of Justice on the overlapping of rights to annual leave with, inter alia, the right to leave granted in the event of illness.

First, the Court found that the special leave at issue falls within the scope not of Directive 2003/88 but rather of the exercise, by a Member State, of its own competences. However, the exercise by a Member State of its own competences cannot have the effect of undermining the actual benefit of the minimum weekly rest periods and periods of paid annual leave guaranteed by that directive.

In that context, the Court recalled its case-law relating to the overlapping of paid annual leave and sick leave. In accordance with that case-law, given the differing purposes of those two types of leave, a worker who is on sick leave during a period of previously scheduled annual leave has the right, at his or her request and in order that he or she may actually use the annual leave, to take that leave at a time which does not coincide with the period of sick leave.

However, the paid special leave at issue cannot be regarded as comparable to sick leave, the purpose of which is to enable a worker to recover from an illness. Entitlement to that paid special leave depends on two cumulative conditions, namely, the occurrence of one of the events specified in the body of rules providing for that leave, on the one hand, and the fact that the needs or obligations justifying the grant of leave arise during a working period, on the other. That leave is inextricably linked to working time as such and, consequently, workers may not take advantage of such leave during weekly rest periods or periods of paid annual leave.

279| 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).

The Court added that Articles 5 and 7 of Directive 2003/88 do not oblige a Member State to grant such special leave solely by reason of the occurrence of one of the events concerned during a weekly rest period or a period of paid annual leave while excluding, consequently, the other conditions laid down by the national rules governing the entitlement to and the granting of that leave. Such an obligation would amount to ignoring the fact that that special leave stands outside the legal regime established by Directive 2003/88.

Furthermore, the Court observed that certain types of special leave at issue, including those for accident, serious illness, hospitalisation or surgery of a family member, fall, in part, within the scope of the revised Framework Agreement on parental leave annexed to Directive 2010/18, [280] and in particular the scope of Clause 7 thereof. [281] In that regard, the Court stated that it is, admittedly, apparent from settled case-law that a period of leave guaranteed by EU law cannot affect the right to take another period of leave guaranteed by EU law which has a different purpose from the former. However, the minimum rights laid down in Clause 7 do no more than provide that workers are to be entitled to time off from work on grounds of *force majeure* for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable, and consequently those rights cannot be treated as the equivalent of leave guaranteed by EU law.

4. Protection of workers in the event of the insolvency of their employer

In the judgment of 9 September 2020, ***TMD Friction EsCO*** (Joined Cases C-674/18 and C-675/18, EU:C:2020:682), the Court gave a ruling on accrued rights to retirement pensions under a supplementary occupational pension scheme, in the context of transfers of undertakings subject to insolvency proceedings, in the light of Articles 3 and 5 of Directive 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses, [282] and of Article 8 of Directive 2008/94 on the protection of employees in the event of the insolvency of their employer. [283]

In the cases pending before the referring court, two German citizens had been employed by a company incorporated under German law, since 1996 and 1968, respectively. That company granted to its employees a pension under a supplementary occupational pension scheme. When the business activities of that company were transferred, the employment contracts of the appellants in the main proceedings were transferred to another company, TMD Friction. Insolvency proceedings relating to the assets of that company were opened, but its business activity was maintained. Thereafter, the insolvency administrator transferred some business activities of TMD Friction to an entity which was subsequently itself renamed TMD Friction, other business activities being transferred to another company, TMD Friction EsCo.

280| Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13).

281| Point 1 of that clause provides, in essence, that workers have the right to time off from work on grounds of *force majeure* for urgent family reasons in the case of illness or accident making the immediate attendance of the worker indispensable.

282| Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

283| Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).

Pensions-Sicherungs-Verein (the occupational pension guarantee association), a body governed by private law which ensures payment of occupational pensions in the event of an employer's insolvency in Germany, informed one of the appellants in the main proceedings that, due to his age, namely his being 29 years old at the time when the insolvency proceedings were opened, he had not yet acquired any definitive right to old-age pension benefits. Consequently, he brought an action against TMD Friction claiming that that company should be ordered, in the future, when he reaches the retirement age at which he will qualify for those pension benefits, to pay him an old-age pension the amount of which takes into consideration the periods of employment that he completed before the opening of insolvency proceedings. The second appellant in the main proceedings, for his part, had received, since 1 August 2015, a retirement pension of EUR 145.03 per month paid by TMD Friction EsCo under the supplementary occupational pension scheme. He brought an action against that company, claiming that it should be ordered to pay him a higher occupational retirement pension. The two transferee companies contested the actions, arguing that, in the event of a transfer of an undertaking after the opening of insolvency proceedings concerning the assets of the transferor, the transferee is liable only for the portion of the old-age pension that is based on periods of service carried out after the opening of insolvency proceedings. The actions having been dismissed both at first instance and on appeal, the appellants in the main proceedings brought an appeal before the referring court, the Bundesarbeitsgericht (Federal Labour Court, Germany), on a point of law (*Revision*).

The Court, first, stated that the objective of Directive 2001/23 is to protect employees by ensuring the safeguarding of their rights in the event of a change of employer and to ensure, as far as possible, that contracts of employment or employment relationships continue unchanged with the transferee, but that that directive does not provide for complete harmonisation of national legislation in this area. The Court stated, further, that that directive also seeks to ensure a fair balance between the interests of employees, on the one hand, and those of the transferee, on the other. As regards the provisions of that directive specifically relating to transfers of an undertaking after the opening of insolvency proceedings, the Court held that Article 5(1) of Directive 2001/23 was not applicable to the insolvency proceedings at issue in the main proceedings, which, since their objective was the continuation of the transferor's business activities following their transfer, did not constitute proceedings instituted with a view to the liquidation of the assets of the transferor. As regards Article 5(2)(a) of that directive, the Court held that the national legislation at issue in the main proceedings did not fall within the scope of that provision, given that that national legislation could not be regarded as concerning obligations owed by the transferor before the date of the transfer or before the opening of insolvency proceedings. While the rights to a retirement pension under the supplementary occupational pension scheme had already conferred prospective entitlement before the opening of insolvency proceedings, the benefit of the retirement pension will be realised only on the occurrence, after the opening of those insolvency proceedings, of the pensionable event.

The Court emphasised, however, that the Member States, in the event of a transfer of an undertaking after the opening of insolvency proceedings, may always take advantage of the derogations provided for in Article 3(4) of the directive. The Court stated that that provision does not prohibit bringing about a partial transfer to the transferee of the obligation to give effect to the rights of the employees to a retirement pension under a supplementary occupational pension scheme. The protection of employees with respect to their rights conferring immediate or prospective entitlement must, in any event, be at a level that is at least equivalent to the level of protection required by Article 8 of Directive 2008/94.

Consequently, the Court held that Directive 2001/23, in the light of, inter alia, Article 3(4)(a) and (b), does not preclude, in the event of the transfer of an undertaking subject to insolvency proceedings, national legislation which provides that, on the occurrence, after the opening of insolvency proceedings, of the pensionable event conferring eligibility for a retirement pension under a supplementary occupational pension scheme, the transferee is not liable for an employee's rights conferring prospective entitlement to that retirement pension where those rights have accrued in respect of periods of employment that predated the opening of the insolvency proceedings. That conclusion is, however, subject to the condition that, with respect to the

portion of the amount for which the transferee is not liable, the measures adopted to protect the interests of the employees are at a level that is at least equivalent to the level of protection required under Article 8 of Directive 2008/94.

The Court, secondly, examined the extent of the obligation on the occupational pension guarantee association according to whether or not rights conferring prospective entitlement to old-age benefits were definitive at the time of the opening of insolvency proceedings and the basis of the calculation of the amount with respect to the portion of the benefits for which that body is liable. In that regard, the Court stated, in the first place, with respect to the minimum protection required by Article 8 of Directive 2008/94, that that protection requires a former employee to receive, in the event of the insolvency of his or her employer, at least half of the old-age benefits deriving from accrued pension rights under a supplementary occupational pension scheme, and that that provision obliges Member States to guarantee, in that event, to each former employee compensation corresponding to at least one half of the value of his or her rights acquired under such a scheme. Similarly, that minimum protection precludes a manifestly disproportionate reduction of an employee's occupational old-age benefits that seriously affects the ability of the person concerned to meet his or her needs. That would be the case if a reduction in old-age benefits were suffered by a former employee who, as a result of the reduction, is living, or would have to live, below the at-risk-of-poverty threshold determined by the European Statistical Office (Eurostat) for the Member State concerned. Accordingly, that minimum protection requires a Member State to guarantee, to a former employee who is subject to such a reduction of his or her old-age benefits, compensation in an amount which, without necessarily covering all the losses suffered, is such as to prevent their being manifestly disproportionate. The Court also stated that Article 8 of Directive 2008/94 is intended to ensure that the long-term interests of employees are protected.

Next, the Court concluded that it follows from that article that the calculation of the amount of the benefit, of which at least 50% must be granted to the former employee, must take proper account of the periods of employment completed in the employ of the transferor, during which the rights to old-age benefits were accrued, and of the employee's gross remuneration at the time when such rights could be exercised. Moreover, the Court held that any other interpretation would render it impossible to determine whether there is any need to mitigate the consequences of a reduction in those benefits suffered by a former employee who, as a result of that reduction, is living, or would have to live, below the at-risk-of-poverty threshold determined in the Member State concerned.

The Court concluded that Article 3(4)(b) of Directive 2001/23, read together with Article 8 of Directive 2008/94, must be interpreted as precluding national legislation which provides that, on the occurrence of an event that confers eligibility to old-age benefits under a supplementary occupational pension scheme after the opening of insolvency proceedings in the course of which a transfer of an undertaking has been made, with respect to the portion of those benefits for which the transferee is not liable, the insolvency guarantee body established under national law is not required to intervene where the rights conferring prospective entitlement to old-age benefits had not already become definitive at the time when those insolvency proceedings were opened, if the consequence of that legislation is that the employees are deprived of the minimum protection guaranteed by that article. In the same context, Article 3(4)(b) precludes legislation which provides that, for the purposes of determining the amount relating to the portion of those benefits liability for which falls on that body, the calculation of that amount is to be based on the gross monthly remuneration earned by the employee concerned at the time when those insolvency proceedings were opened.

Thirdly, as regards the direct effect of Article 8 of Directive 2008/94, the Court recalled its recent case-law [284] and held that that article is capable of having direct effect and can be relied on in proceedings against a body governed by private law, designated by the Member State concerned as the body that guarantees occupational pensions against the risk of insolvency of employers. That effect is, however, subject to the condition that (i) in the light of the task of guarantor with which that body has been charged and the circumstances in which it performs that task, that body can be treated as equivalent to the State, and (ii) that task does actually cover the types of old-age benefits for which the minimum protection prescribed in Article 8 is sought. The Court added that it is for the referring court to determine whether that applied to the cases in the main proceedings.

5. Posting of workers

In its judgment in ***CRPNPAC and Vueling Airlines*** (Joined Cases C-370/17 and C-37/18, EU:C:2020:260), delivered on 2 April 2020, the Grand Chamber of the Court was called on to interpret Regulation No 574/72 [285] in the context of an alleged fraud vitiating the issue, under Regulation No 1408/71, [286] of E 101 social security certificates (certificates attesting the posting of workers). The Court held that the national courts or tribunals of the Member State to which the workers are posted, when they are in possession of evidence of such a fraud, may make a definitive finding of that fraud and disregard those certificates only where certain clearly specified conditions are met. Furthermore, a civil court of that Member State may not hold liable to pay damages an employer who has been the subject of a criminal conviction, contrary to EU law, due to the use of such certificates, solely on the ground of that criminal conviction.

The disputes in the main proceedings concerned E 101 certificates used by the airline Vueling Airlines SA ('Vueling'), which has its registered office in Barcelona (Spain), for its flying personnel (flight and cabin crew) employed at the Paris-Charles de Gaulle Airport at Roissy (France). In 2014, Vueling acquired a criminal conviction for having employed those persons without affiliating them to the French social security system. The flight and cabin crew had been affiliated to the Spanish social security system and the rules relating to the posting of workers were applied to them. The French criminal courts had disregarded the E 101 certificates obtained from the competent Spanish institution on the ground that those certificates, issued on the basis of Article 14(1)(a) of Regulation No 1408/71, on the posting of workers, [287] ought, in their opinion, to have

284| Judgment of the Court of 19 December 2019, ***Pensions-Sicherungs-Verein*** (C-168/18, EU:C:2019:1128).

285| Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition, Series I 1972(I), p. 160), in the version as amended and updated by Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1).

286| Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition, Series I 1971(II), p. 98), in the version as amended and updated by Regulation No 118/97, as amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 100, p. 1).

287| Under that provision, a person employed in the territory of a Member State by an undertaking to which he or she is normally attached and who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking, remains as a general rule subject to the legislation of the former Member State.

been issued under Article 14(2)(a)(i) of that regulation, [288] and consequently the flight and cabin crew at issue ought to have been subject to French social security legislation. According to those courts, Vueling was guilty of fraud against the social security system.

In that instance, civil proceedings had been brought before the referring courts against Vueling in respect of the same facts. On the one hand, the Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (the retirement fund for civil aviation flying personnel; CRPNPAC) and, on the other, a former pilot employed by Vueling, claimed that they had suffered loss due to the failure to affiliate workers to the social security system in France. In those circumstances, the referring courts were uncertain as to the power of the criminal courts to make a finding of fraud and to disregard the E 101 certificates, and as to the effect of that criminal conviction on the claims for compensation.

First, as regards the power of a court of the host Member State to make a finding of fraud and to disregard E 101 certificates, the Court, first, noted that, in that instance, the French social security institutions and the French courts might reasonably have taken the view that they had concrete evidence indicating that the E 101 certificates at issue had been fraudulently obtained or relied on, since the flight and cabin crew concerned fell, in reality, within the scope of Article 14(2)(a)(i) of Regulation No 1408/71 and should therefore have been subject to the French social security system. The Court stated however that that evidence was not a sufficient basis on which the institutions or courts of the host Member State could make a definitive finding of fraud and disregard those certificates. An E 101 certificate is, as a general rule, binding for as long as it has not been withdrawn or declared invalid by the issuing institution. If the competent institution of the host Member State has doubts as to the regularity of the issue of a certificate, it must contact the institution of the issuing Member State within the procedure of dialogue provided for in Article 84(a)(3) of Regulation No 1408/71. The issuing institution must then review the grounds for that issue and, where necessary, withdraw the certificate.

The Court emphasised that, especially where there is suspicion of fraud, the implementation of that procedure of dialogue is of particular importance. Consequently, where there is concrete evidence of fraud, the competent institution of the host Member State must not unilaterally make a finding of fraud, but rather promptly initiate the procedure of dialogue. The courts of the host Member State, for their part, cannot ignore the existence of that procedure. They may make a finding of fraud and disregard E 101 certificates only after they are satisfied, first, that the procedure of dialogue has been promptly initiated and, secondly, that the issuing institution has failed to undertake a review and to make a decision, within a reasonable time, on the information submitted to it by the competent institution of the host Member State, cancelling or withdrawing the certificates, where necessary. If the court concerned discovers that the procedure of dialogue has not been initiated, it must take all legal measures available to it to ensure that the competent institution of the host Member State does initiate that procedure.

Secondly, the Court considered the issue of whether a finding of fraud made by a criminal court which, contrary to EU law, failed to verify that the procedure of dialogue had been initiated may be binding on a civil court which is, as a general rule, bound by the principle that a decision which has the authority of res judicata in criminal proceedings also has that authority in civil proceedings. While recognising the importance of the principle of res judicata, the Court held that the principle of the effectiveness of EU law precludes a civil court from being bound by the findings of fact and the legal classifications and interpretation adopted by the criminal courts that are in breach of EU law. Accordingly, while the conviction of the employer by the criminal courts cannot be called into question, notwithstanding its incompatibility with EU law, neither that

288| That provision concerns workers who, as members of the flying personnel of an undertaking that operates international transport services for passengers, are employed in the territory of two or more Member States and are employed by a branch which that undertaking has established in the territory of a Member State other than that where it has its registered office.

conviction nor the definitive finding of fraud and interpretations of law, made in breach of EU law, can, conversely, be sufficient to allow the civil courts to uphold claims for damages brought by those adversely affected by the conduct of that employer.

Lastly, reference should also be made under this heading to the judgments of 8 December 2020, ***Hungary* v *Parliament and Council*** (C-620/18, EU:C:2020:1001) and ***Poland* v *Parliament and Council*** (C-626/18, EU:C:2020:1000), [289] in which the Court ruled on the posting of workers in the light of Directive 96/71, as amended by Directive 2018/957. [290]

6. Coordination of social security systems

In its judgment in ***AFMB*** (C-610/18, EU:C:2020:565), delivered on 16 July 2020, the Grand Chamber of the Court held that the employer of an international long-distance lorry driver, for the purposes of Regulations No 1408/71 and No 883/2004, [291] is the undertaking that has actual authority over that driver, that bears, in reality, the cost of his or her wages and that has actual power to dismiss him or her, and not the undertaking with which that long-distance lorry driver has entered into an employment contract and which is formally named in that contract as being his or her employer.

In the main proceedings, AFMB Ltd, a company established in Cyprus, had concluded with transport undertakings established in the Netherlands agreements whereby it undertook, in consideration of a commission, to take charge of the management of the heavy goods vehicles operated by those undertakings, on behalf of and at the risk of those undertakings. AFMB had also concluded employment contracts with international long-distance lorry drivers residing in the Netherlands, in which AFMB was named as their employer. The long-distance lorry drivers concerned were employed, on behalf of the transport undertakings, in two or more Member States, and also in one or more States of the European Free Trade Association (EFTA).

AFMB and the drivers challenged decisions of the Raad van bestuur van de Sociale verzekeringsbank (Board of Management of the Social Insurance Bank, Netherlands; 'the Svb') whereby the Netherlands social security legislation was stated to be applicable to those drivers. In the view of the Svb, only the transport undertakings established in the Netherlands ought to be regarded as the employers of those drivers, and consequently the Netherlands legislation was applicable, while AFMB and the drivers considered that AFMB ought to be regarded as the employer and that, since its registered office is in Cyprus, Cypriot legislation was applicable.

Against that background, the referring court, emphasising the crucial importance of that issue for the purposes of determining the national social security legislation applicable, sought from the Court clarification concerning who – either the transport undertakings or AFMB – should be considered to be the 'employer' of the drivers concerned. Under Regulations No 1408/71 and No 883/2004, persons, such as the drivers at issue, who are employed in two or more Member States but do not work principally in the territory of the Member State where they reside, are subject, for social security purposes, to the legislation of the Member State in which the employer has its registered office or place of business.

289| Those cases are presented in Section VII.4 'Freedom to provide services and posting of workers'.

290| Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

291| Regulation No 883/2004, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4), and in particular Article 13(1)(b) thereof.

The Court first observed that Regulations No 1408/71 and No 883/2004 do not, for the purposes of determining the meaning of the concepts of 'employer' and 'personnel', make any reference to national legislation or practice. Consequently, those concepts must be given an autonomous and uniform interpretation, which takes into account not only the wording of the relevant provisions but also their context and the objective pursued by the legislation in question.

As regards the terms used and the context, the Court stated that the relationship between an 'employer' and the 'personnel' employed implies the existence of a hierarchical relationship. Furthermore, the Court stated that account must be taken of the objective situation of the employed person concerned and all the circumstances of his or her work. In that regard, while the conclusion of an employment contract may indicate the existence of a hierarchical relationship, that circumstance alone cannot permit a definitive conclusion that there exists such a relationship. It remains necessary to have regard not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertaking in question are performed in practice. Accordingly, whatever the wording of the contractual documents, it is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker.

In the view of the Court, if an interpretation were to be based solely on formal considerations, such as the conclusion of an employment contract, that would amount to allowing employers to transfer the place which is to be regarded as relevant to the determination of which national social security legislation is applicable, when such a transfer does not, in reality, contribute to the objective, pursued by Regulations No 1408/71 and No 883/2004, of guaranteeing that workers can genuinely exercise their right to freedom of movement. While noting that the aim of the system introduced by those regulations is, indeed, solely to promote the coordination of national social security legislations, the Court nonetheless considered that the objective pursued by those regulations would be likely to be undermined if the interpretation adopted were to make it easier for employers to make use of purely artificial arrangements in order to exploit the EU legislation with the sole aim of obtaining an advantage from the differences that exist between the national rules.

In that instance, the Court held that the drivers appeared to be members of the personnel of the transport undertakings and that those undertakings appeared to be their employers, with the consequence that the Netherlands social security legislation seemed to be applicable to them, although that was a matter to be determined by the referring court. Those drivers, before the conclusion of the employment contracts with AFMB, had been chosen by the transport undertakings themselves and were employed, after the conclusion of those contracts, on behalf of and at the risk of those undertakings. Furthermore, the actual cost of their wages was borne, via the commission paid to AFMB, by the transport undertakings. Lastly, the transport undertakings seemed to have the actual power of dismissal and some of the drivers had, prior to the conclusion of the employment contracts with AFMB, previously been employed by those undertakings.

XVIII. Consumer protection

Three judgments are worthy of note in the field of consumer protection. They concern the interpretation of Directive 93/13 [292] ('the Unfair Contract Terms Directive'). The first judgment concerns the interpretation of the exclusion provided for contractual terms reflecting mandatory statutory or regulatory provisions and

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

the powers of national courts when verifying the transparency of a contractual term and in connection with a possible finding that a contractual term is unfair. The second deals with the scope of the *ex officio* examination by national courts of whether a contractual term is unfair and the obligations on those courts to take investigative measures when conducting that examination. The third judgment concerns the interpretation of the concept of 'consumer'. [293]

In its judgment in ***Gómez del Moral Guasch*** (C-125/18, EU:C:2020:138), delivered on 3 March 2020, the Court, sitting as the Grand Chamber, held that a contractual term in a mortgage-loan agreement concluded between a consumer and a seller or supplier, pursuant to which the interest rate to be paid by the consumer varies according to the reference index based on mortgage loans granted by Spanish savings banks ('the reference index') – that index being provided for by Spanish law – falls within the scope of the Unfair Contract Terms Directive. Indeed, that term does not reflect mandatory statutory or regulatory provisions within the meaning of Article 1(2) of that directive. The Court also stated that the Spanish courts were required to verify that the term was plain and intelligible, irrespective of whether or not Spanish law had implemented the option open to Member States, under Article 4(2) of the Unfair Contract Terms Directive, of providing that the assessment of the unfairness of a term is not to relate, inter alia, to the definition of the main subject matter of the contract. Lastly, if those courts were to find that such a term was unfair, they could, in order to protect the consumer from particularly unfavourable consequences liable to arise from the annulment of the loan agreement, replace that index with a supplementary index provided for by Spanish law.

That judgment concerns a request for a preliminary ruling from the Juzgado de Primera Instancia nº 38 de Barcelona (Court of First Instance No 38, Barcelona, Spain). Mr Marc Gómez del Moral Guasch had brought an action before that court concerning the alleged unfairness of a contractual term governing the variable ordinary and remunerative interest rate in the mortgage-loan agreement he had concluded with the banking institution Bankia SA. Under that term, the interest rate to be paid by the consumer varied according to the reference index. That reference index was provided for by national legislation and was able to be applied to mortgage loans by credit institutions. However, the Spanish court stated that the indexing of the variable interest rates calculated on the basis of the reference index was less favourable than that calculated on the basis of the average Euro Interbank Offered Rate (Euribor), which was used in 90% of mortgage loans taken out in Spain and involved an additional cost of around EUR 18 000 to EUR 21 000 per loan.

In the first place, the Court recalled that terms reflecting mandatory statutory or regulatory provisions are excluded from the scope of the directive. [294] Nevertheless, the Court observed that, subject to verification by the Spanish court, the national legislation applicable in that case did not require, for variable-interest-rate loans, the use of an official reference index, but merely established the conditions to be satisfied by 'the reference indices or rates' in order for them to be able to be used by credit institutions. The Court concluded that a contractual term in a mortgage-loan agreement, which provides that the interest rate applicable to the loan is based on one of the official reference indices provided for by the national legislation that may be applied by credit institutions to mortgage loans, falls within the scope of the directive, where that national legislation does not provide either for the mandatory application of that index independently of the choice of the parties to the contract or for the supplementary application thereof in the absence of other arrangements established by those parties.

293| Mention should also be made under this heading of the judgment of 11 June 2020, ***Transportes Aéreos Portugueses*** (C-74/19, EU:C:2020:460), which concerns the exemption from the obligation on air carriers to pay compensation to passengers in the event of the occurrence of an extraordinary circumstance, particularly the concept of 'reasonable measures' taken by those carriers enabling them to be released from that obligation. That judgment is presented in Section XI 'Transport'.

294| Article 1(2) of the Unfair Contract Terms Directive.

In the second place, the Court looked at the powers of the national courts when verifying the transparency of a contractual term relating to the main subject matter of a contract. In that connection, Article 4(2) of the directive states that assessment of the unfair nature of the terms is not to relate, inter alia, to the definition of the main subject matter of the contract, in so far as the terms are in plain, intelligible language. [295] The Spanish court had doubts as to whether a national court could verify whether or not a term such as that at issue did meet the transparency requirement laid down in the directive even where that provision of the directive had not been transposed into domestic law. In that regard, the Court noted that contractual terms must always satisfy the requirement for plain, intelligible drafting. [296] According to the Court, that requirement also applies when a contractual term falls within the scope of the abovementioned provision even if the Member State concerned, in that case the Kingdom of Spain, has failed to transpose that provision into its legal system. It follows that the courts of a Member State are always required to verify that a contractual term relating to the main subject matter of a contract is plain and intelligible.

In the third place, the Court found that, in order to comply with the transparency requirement for the purposes of the directive, [297] a contractual term setting a variable interest rate in a mortgage-loan agreement not only must be formally and grammatically intelligible but must also enable an average consumer, who is reasonably well informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations. Information that is particularly relevant in that regard includes (i) the fact that essential information relating to the calculation of that rate is easily accessible to anyone intending to take out a mortgage loan, on account of the publication of the method used for calculating that rate in the official journal of the Member State concerned, and (ii) the provision by the seller or supplier of data relating to past fluctuations of the index on the basis of which that same rate is calculated.

In the fourth and last place, with regard to the powers of the national court relating to a possible finding that a contractual term is unfair within the meaning of the Unfair Contract Terms Directive, the Court recalled that that directive [298] does not preclude the national court from removing, in accordance with the principles of contract law, an unfair term in a contract concluded between a seller or supplier and a consumer by replacing it with a supplementary provision of national law in cases where the invalidity of the unfair term would require the court to annul the contract in its entirety, thereby exposing the consumer to particularly unfavourable consequences. In general, the consequence of such an annulment of the contract would be that the outstanding balance of the loan would become due forthwith, which would be likely to be in excess of the consumer's financial capacities and, as a result, would tend to penalise the consumer rather than the lender who, as a consequence, might not be dissuaded from inserting such terms in its contracts. In that case, the Spanish legislature, since the conclusion of the loan agreement at issue, had introduced a 'replacement' index which, subject to verification by the referring court, was supplementary. In those circumstances, the Court considered that the directive [299] does not preclude the national court, where an unfair contractual term setting a reference index for calculating the variable interest of a loan is null and void, from replacing that index with the replacement index applicable in the absence of an agreement to the contrary between

295| Article 4(2) of the Unfair Contract Terms Directive, which refers to terms relating to the main subject matter of the contract or to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other.

296| Article 5 of the Unfair Contract Terms Directive.

297| Article 4(2) and Article 5 of the Unfair Contract Terms Directive.

298| Article 6(1) of the Unfair Contract Terms Directive.

299| Article 6(1) and Article 7 of the Unfair Contract Terms Directive.

the parties to the contract, in so far as the mortgage-loan agreement in question is not capable of continuing in existence if the unfair term is removed and annulment of that agreement in its entirety would expose the consumer to particularly unfavourable consequences.

In the judgment in ***Lintner*** (C-511/17, EU:C:2020:188), delivered on 11 March 2020, the Court addressed the scope of the obligations on a national court, first, to examine of its own motion whether the contractual terms of a loan agreement denominated in a foreign currency concluded between a consumer and a seller or supplier are unfair and, secondly, to take *ex officio* investigative measures as regards that examination, for the purposes of the Unfair Contract Terms Directive.

That judgment was delivered in the context of a request for a preliminary ruling made by the Fővárosi Törvényszék (Budapest High Court). [300] Mrs Lintner had brought an action before that court concerning the allegedly unfair nature of certain terms in a foreign-currency mortgage-loan contract which she had concluded with a bank. Under those terms, the bank had the right to amend the loan contract unilaterally. Having dismissed the action, the referring court – following an appeal brought by the applicant – had the case referred back to it by the competent court of appeal for the purposes of examining of its own motion the contractual terms that the applicant had not challenged in her initial action, relating, in particular, to the notarial certificate, the grounds for termination and certain fees payable by the applicant.

In the first place, the Court ruled that the national court is not obliged to examine of its own motion and individually all the other contractual terms which were not challenged by that consumer in order to ascertain whether they can be considered to be unfair, but must examine only those terms connected to the subject matter of the dispute, as delimited by the parties. Thus, the Court stipulated that that examination must respect the limitations of the subject matter of the dispute, understood as being the result that a party pursues by its claims, in the light of the heads of claim and pleas in law put forward to that end by the parties. Accordingly, it is within those limits that the national court is called upon to examine of its own motion a contractual term in order to prevent the consumer's claims from being rejected by a potentially final decision when they could have been upheld had the consumer not, for lack of knowledge, omitted to invoke the unfair nature of that term. The Court also stated that, in order for the effectiveness of the protection afforded to consumers under that directive not to be compromised, the national court must not interpret the claims put before it in a formalistic manner, but must, instead, comprehend their content in the light of the pleas in law relied on in support of them.

As regards, in the second place, the implementation of the *ex officio* examination of whether a term is unfair, the Court ruled that if the elements of law and fact in the file before the national court give rise to serious doubts as to the unfair nature of certain clauses which were not invoked by the consumer but which are related to the subject matter of the dispute, that court must take *ex officio* investigative measures in order to complete that case file, by asking the parties, in observance of the principle of *audi alteram partem*, to provide it with the clarifications or documents necessary for that purpose.

In the third and last place, the Court ruled that, while all the other terms of the contract that the consumer concluded with a professional should be taken into consideration in order to assess whether the contractual term forming the basis of a consumer's claim is unfair, taking such terms into account does not entail, as such, an obligation on the national court hearing the case to examine of its own motion the unfairness of all those terms.

300| It is part of a series of cases which have come before the Court relating to the Hungarian framework on consumer credit agreements denominated in a foreign currency. See, in particular, judgments of the Court of 31 May 2018, ***Sziber*** (C-483/16, EU:C:2018:367); of 20 September 2018, ***OTP Bank and OTP Faktoring*** (C-51/17, EU:C:2018:750); and of 14 March 2019, ***Dunai*** (C-118/17, EU:C:2019:207).

In the judgment in ***Condominio di Milano, via Meda*** (C-329/19, EU:C:2020:263), delivered on 2 April 2020, the Court held that the Unfair Contract Terms Directive does not preclude a national case-law interpretation of the transposition of that directive according to which its protective rules of consumer law apply to a contract with a seller or supplier concluded by a commonhold association, such as a *condominio*, notwithstanding that such a subject of the law does not fall within its scope.

That judgment was delivered following a request for a preliminary ruling from the Tribunale di Milano (District Court, Milan, Italy) ('the referring court'). A commonhold association, the condominio di Milano, via Meda ('Condominio Meda'), represented by its administrator, had concluded a contract for the supply of thermal energy with the company Eurothermo. Under a term of that contract, Meda Condominio was, in the event of late payment, required to pay default interest at the rate of 9.25% from the expiry of the period for payment of the balance. Condominio Meda challenged the order for payment of late-payment interest under that contract term before the referring court claiming that that term was unfair and that it was a consumer within the meaning of the Unfair Contract Terms Directive. In that case, the referring court considered that that term was unfair but was uncertain whether it was permissible to regard a commonhold association, such as the *condominio* under Italian law, as a consumer within the meaning of the directive.

In the first place, as regards the definition of 'consumer', [301] the Court noted that two cumulative conditions must be satisfied in order for a person to fall within its scope, namely that that person is a natural person and that he or she carries out his or her activity for non-professional purposes. As regards the first of those conditions, the Court held that, as EU law currently stands, the concept of 'ownership' has not been harmonised at EU level and differences may exist between the Member States. Consequently, the Court added that the Member States remain free to regard, or not to regard, a commonhold association as a 'legal person' in their respective national systems. The Court therefore held that a commonhold association, such as the *condominio* in Italian law, did not satisfy the first condition as a result of which it did not fall within the definition of 'consumer', so that the contract between that commonhold association and a supplier or seller was precluded from the scope of the Unfair Contract Terms Directive.

In the second place, the Court examined whether national case-law which applies the rules of consumer protection to contracts concluded by a *condominio* with a seller or supplier is consistent with the spirit of the framework of consumer protection in the European Union. In that regard, the Court noted that the Unfair Contract Terms Directive provides for partial minimum harmonisation of national laws on unfair terms, leaving Member States the option to afford consumers a higher level of protection through national provisions that are more stringent than those of that directive, provided that they are compatible with the TFEU. [302] Thus, the Court pointed out that case-law, guided by the objective of affording greater protection to consumers, extending the scope of that protection to subjects of the law, such as the *condominio* under Italian law, which is not a natural person under national law and thus not a 'consumer' within the meaning of the Unfair Contract Terms Directive, furthers the objective of consumer protection pursued by that directive. Such an interpretation must nevertheless ensure a maximum degree of protection for consumers and must not be precluded by the Treaties.

301| Article 2(b) of the Unfair Contract Terms Directive.

302| Article 169(4) TFEU; recital 12 and Article 8 of the Unfair Contract Terms Directive.

XIX. Environment

1. Assessment of the effects of certain plans and programmes on the environment

By the judgment in ***A and Others (Wind turbines at Aalter and Nevele)*** (C-24/19, EU:C:2020:503), delivered on 25 June 2020, the Court, sitting as the Grand Chamber, ruled on the interpretation of Directive 2001/42 [303] and gave important clarifications as to the instruments that are subject to the assessment prescribed by that directive and as to the consequences flowing from a failure to carry out an assessment.

The Court received that request for interpretation in the context of proceedings between the neighbours of a site located on the territory of the Aalter and Nevele communes (Belgium), proposed for the installation of a wind farm, and the Gewestelijke stedenbouwkundige ambtenaar van het departement Ruimte Vlaanderen, afdeling Oost-Vlaanderen (regional town planning official of the Flanders Department of Land Planning, East Flanders Division, Belgium), concerning the grant by that official of development consent for the purpose of the installation and operation of five wind turbines ('the consent at issue'). The grant, on 30 November 2016, of the consent at issue had been subject, inter alia, to certain conditions laid down by the provisions of an order of the Flemish Government and a circular on the installation and operation of wind turbines being satisfied.

In support of an action seeking the annulment of the consent at issue brought before the Raad voor Vergunningsbetwistingen (Council for consent disputes, Belgium), the applicants alleged, in particular, a breach of Directive 2001/42, on the ground that the order and the circular, on the basis of which the consent had been granted, had not been subject to an environmental assessment. The official who had granted the consent at issue considered, on the contrary, that the order and circular in question were not required to be subject to such an assessment.

In its judgment, the Court recalled that Directive 2001/42 covers plans and programmes, and modifications to them, which are prepared or adopted by an authority of a Member State, in so far as they are 'required by legislative, regulatory or administrative provisions'. [304] Furthermore, that directive makes the obligation to subject a specific plan or a programme to an environmental assessment conditional on the plan or programme being likely to have significant effects on the environment. [305]

In the first place, as regards the concept of 'plans and programmes required by legislative, regulatory or administrative provisions', the Court held that an order and a circular adopted by the government of a federated entity of a Member State, both of which contain various provisions on the installation and operation of wind turbines, are covered by that concept.

303| Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30).

304| Article 2(a) of Directive 2001/42.

305| Article 3(1) of Directive 2001/42.

It is clear from the established case-law of the Court that plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required' within the meaning, and for the application, of Directive 2001/42. [306] Thus, a measure must be regarded as 'required' where the legal basis of the power to adopt the measure is found in a particular provision, even if the adoption of that measure is not, strictly speaking, compulsory. [307]

Invited by the referring court and the United Kingdom Government to reconsider that line of case-law, the Court noted first of all that to restrict the condition referred to in Article 2(a), second indent, of Directive 2001/42 only to 'plans and programmes' whose adoption is compulsory would be likely to confer a marginal scope on that concept and would not enable the effectiveness of that provision to be maintained. According to the Court, having regard to the diversity of situations that arise and the wide-ranging practices of national authorities, the adoption of plans or programmes and modifications to them is often neither imposed as a general requirement, nor left entirely to the discretion of the competent authorities. Moreover, the high level of protection for the environment that Directive 2001/42 seeks to ensure by subjecting plans and programmes that are likely to have a significant effect on the environment to an environmental assessment meets the requirements of the Treaties and of the Charter on the protection and improvement of the quality of the environment. [308] Those objectives would be likely to be compromised by a strict interpretation, which would allow a Member State to circumvent that requirement for an environmental assessment by refraining from providing that competent authorities are required to adopt such plans and programmes. Finally, the Court observed that a broad interpretation of the concept of 'plans and programmes' was consistent with the European Union's international undertakings. [309]

Next the Court examined whether the order and circular in question satisfied the condition in Article 2(a), second indent, of Directive 2001/42. In that regard it observed that the order had been adopted by the Flemish Government in its capacity as the executive authority of a federated Belgian entity, pursuant to a legislative power. In addition, the circular, which provided a framework for the competent authorities' discretion, also emanated from the Flemish Government and amended, by extending or derogating from them, the provisions of the order, subject to the verifications which it was for the national court to carry out as to its exact legal nature and effect. The Court therefore concluded that the order and, subject to those verifications, the circular were covered by the concept of 'plans and programmes', in that they must be regarded as 'required' within the meaning of Directive 2001/42.

In the second place, as regards whether the order and the circular had to be subject to an environmental assessment in accordance with Directive 2001/42, on the ground that they would be likely to have significant effects on the environment, the Court held that those instruments, both of which contain various provisions regarding the installation and operation of wind turbines, including measures on shadow flicker, safety and noise level standards, are instruments that must be subject to such an environmental assessment.

306| Judgments of the Court of 22 March 2012, ***Inter-Environnement Bruxelles and Others*** (C-567/10, EU:C:2012:159, paragraph 31); of 7 June 2018, ***Thybaut and Others*** (C-160/17, EU:C:2018:401, paragraph 43); and of 12 June 2019, ***Terre wallonne*** (C-321/18, EU:C:2019:484, paragraph 34).

307| Judgment of the Court of 7 June 2018, ***Inter-Environnement Bruxelles and Others*** (C-671/16, EU:C:2018:403, paragraphs 38 to 40).

308| Article 3(3) TEU, Article 191(2) TFEU and Article 37 of the Charter.

309| Such as those flowing from Article 2(7) of the Convention on environmental impact assessment in a transboundary context, signed in Espoo (Finland) on 26 February 1991.

In that regard, the Court considered that the importance and scope of the requirements laid down in the order and circular in question regarding the installation and operation of wind turbines were sufficiently significant for the determination of the conditions subject to which consent would be granted for the installation and operation of wind farms, whose environmental impact was undeniable. It added that that interpretation could not be called into question by the particular legal nature of the circular.

In the third and last place, as regards the possibility of maintaining the effects of those instruments and the consent, adopted in breach of Directive 2001/42, the Court recalled that Member States are required to eliminate the unlawful consequences of such a breach of EU law. The Court underlined that, having regard to the need to ensure the uniform application of EU law, it alone could, in exceptional cases, for overriding considerations in the general interest, allow temporary suspension of the ousting effect of a rule of that law that had been infringed, provided that a national law empowers the national court to maintain certain effects of such acts in the context of the dispute before it. Consequently, the Court held that, in circumstances such as those in that case, the national court could maintain the effects of the order and the circular, and the consent that was adopted on the basis of those instruments, only if the national law permitted it to do so in the proceedings before it and if the annulment of that consent would be likely to have significant implications for the electricity supply of the whole of the Member State concerned, in that case in Belgium. However, and in any event, the possible maintenance of those effects could continue only for the period of time strictly necessary to remedy that illegality, which it was for the national court, if necessary, to assess.

2. Limit values applicable to concentrations of PM10 particulate matter

In the judgment in ***Commission*** **v** ***Italy (Limit values – PM10)*** (C-644/18, EU:C:2020:895), delivered on 10 November 2020, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations claiming that the Italian Republic had failed to comply with its obligations under EU law by exceeding the limit values applicable to concentrations of PM10 particulate matter.

In 2014, the European Commission launched an infringement procedure against the Italian Republic for having systematically and persistently exceeded, in a certain number of zones in Italy, the limit values for PM10 particulate matter laid down by Directive 2008/50 [310] ('the Air Quality Directive').

The Commission considered, first, that since 2008, the Italian Republic had systematically and persistently exceeded, in the zones concerned, the daily and annual limit values applicable to concentrations of PM10 particulate matter, under Article 13(1) of the Air Quality Directive, read in conjunction with Annex XI thereto. Secondly, the Commission complained that the Italian Republic had failed to fulfil its obligation under Article 23(1) of that directive, read in conjunction with Annex XV thereto, to adopt appropriate measures to ensure compliance with the limit values for concentrations of PM10 particulate matter in all the zones concerned.

Taking the view that the explanations provided in that regard by the Italian Republic during the pre-litigation procedure were insufficient, the Commission brought an action for failure to fulfil obligations before the Court on 13 October 2018.

310| 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).

In the first place, as regards the complaint alleging systematic and persistent infringement of the provisions of Article 13(1) of, and Annex XI to, the Air Quality Directive, the Court held that complaint to be well founded, in the light of the evidence adduced by the Commission for the periods and zones covered by the proceedings. In that regard, the Court noted, at the outset, that the fact of exceeding the limit values for PM10 particulate matter was in itself sufficient to establish failure to comply with the abovementioned provisions of that directive. Moreover, in that case, the Court found that, from 2008 to 2017 inclusive, the daily and annual limit values for PM10 particulate matter had been exceeded in the zones concerned on a very regular basis. According to the Court, the fact that the limit values in question were not exceeded in certain years in the period under consideration does not prevent a finding, in such a situation, of systematic and persistent failure to comply with the provisions at issue. Indeed, according to the very definition of 'limit value' in the Air Quality Directive, that value must, in order to avoid, prevent or reduce harmful effects on human health and/or the environment as a whole, be attained within a given period and not be exceeded once attained. Furthermore, the Court stressed that, when such a finding is made, as in that case, it is irrelevant whether the failure to fulfil obligations is the result of intention or negligence on the part of the Member State responsible, or of technical or structural difficulties encountered by it, unless it is established that there were exceptional circumstances whose consequences could not have been avoided despite all the steps taken. In that case, having failed to adduce such proof, the Italian Republic could not therefore rely on the variety of sources of air pollution in order to claim that some of them were not attributable to it, such as, for example, those potentially influenced by sectoral European policies, or topographical and climatic features of certain of the zones concerned. Finally, the Court ascribed no relevance to the fact relied on by the Italian Republic that, in the light of the whole of the Italian territory, the extent of the zones to which the Commission's complaints related was limited. It stated in that regard that exceedance of the limit values for PM10 particulate matter, even in a single zone, is sufficient in itself for a possible finding of failure to comply with the abovementioned provisions of the Air Quality Directive.

In the second place, the Court also held that the complaint alleging failure to adopt appropriate measures to limit the period of exceedance of the limit values for PM10 particulate matter, in accordance with the requirements of Article 23(1), read alone and in conjunction with Part A of Annex XV to the Air Quality Directive, was well founded. In that regard, it noted that, by virtue of those provisions, in the event of exceedance of those limit values after the deadline for their application, the Member State concerned is required to draw up an air-quality plan meeting the requirements of that directive, in particular the requirement to provide for appropriate measures to ensure that the period during which the limit values are exceeded is kept as short as possible. It made clear, in that context, that although such an exceedance is not in itself sufficient to find that Member States have failed to fulfil their obligations under those provisions, and although Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is kept as short as possible.

In that case, the Court found that the Italian Republic had manifestly failed to adopt in good time the measures thus required. In support of its finding, it referred to the evidence in the case file demonstrating, in particular, that the exceedance of the daily and annual limit values for PM10 particulate matter had remained systematic and persistent for at least eight years in the zones concerned, that, despite the process under way aimed at attaining those limit values in Italy, the measures provided for in the air-quality plans submitted to the Court, in particular those designed to bring about structural changes specifically with regard to the main pollution factors, had, for the most part, been provided for only in recent updates of those plans, and that several of those plans set out a time frame for implementation that could last for several years, or even sometimes two decades, after the entry into force of those limit values. According to the Court, that situation, in itself, demonstrated that the Italian Republic had not implemented appropriate and effective measures to ensure that the period of time during which the limit values for PM10 particulate matter were exceeded was kept as short as possible. Moreover, whereas the Italian Republic considered it essential, in particular in the light of the principles of proportionality, subsidiarity and balance between public and private interests, to have

long deadlines so that the measures provided for in the various air-quality plans could produce their effects, the Court observed, on the contrary, that that approach was at variance both with the temporal references laid down by the Air Quality Directive in order to comply with the obligations set out therein and the importance of the objectives of protection of human health and the environment pursued by that directive. While recognising that Article 23(1) of the Air Quality Directive cannot require that the measures adopted by a Member State must ensure immediate compliance with those limit values in order for them to be regarded as appropriate, the Court made clear that the Italian Republic's approach was tantamount to allowing for a generalised, potentially indefinite extension of the deadline for complying with those values, even though they had been set precisely with a view to attaining those objectives.

3. Habitats Directive

In its judgment in ***Alianța pentru combaterea abuzurilor*** (C-88/19, EU:C:2020:458), delivered on 11 June 2020, the Court ruled on the territorial scope of the system of strict protection of certain animal species provided for in Article 12(1) of Directive 92/43 [311] ('the Habitats Directive'). In that connection, the Court confirmed that that system of strict protection laid down in respect of the species listed in point (a) of Annex IV to that directive, such as the wolf, also applies to specimens that leave their natural habitat and stray into human settlements.

In 2016, employees of an animal-protection association, accompanied by a veterinary surgeon, captured and relocated, without prior authorisation, a wolf which had been present on the property of a resident of a village in Romania situated between two major sites protected under the Habitats Directive. The relocation of the captured wolf to a nature reserve did not, however, go to plan and the wolf managed to escape to a nearby forest. A criminal complaint was filed in respect of offences associated with the unsafe capture and relocation of a wolf. In the context of those criminal proceedings, the referring court was unclear as to whether the protection provisions contained in the Habitats Directive applied to the capture of wild wolves on the outskirts of a town or city or on the territory of a local authority.

The Court recalled, first, that Article 12(1)(a) of the Habitats Directive requires Member States to take the necessary measures to establish a system of strict protection of protected animal species, 'in their natural range', prohibiting all forms of deliberate capture or killing of specimens of those species 'in the wild'.

As regards the territorial scope of that prohibition, the Court noted that, so far as concerns protected animal species which, like the wolf, occupy vast stretches of territory, the concept of 'natural range' is greater than the geographical space that contains the essential physical or biological elements for their life and reproduction, and therefore corresponds to the geographical space in which the animal species concerned is present or to which it extends in the course of its natural behaviour. It follows that the protection provided for in Article 12(1) of the Habitats Directive does not comprise any limits or borders, with the result that a wild specimen of a protected animal species which strays close to or into human settlements, passing through such areas or feeding on resources produced by humans, cannot be regarded as an animal that has left its 'natural range'. That interpretation is supported by the definition set out in Article 1(1)(f) of the Convention on the Conservation of Migratory Species of Wild Animals, [312] according to which the concept of the 'range' of a species means any and all areas that that species crosses.

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

312| Convention on the Conservation of Migratory Species of Wild Animals, signed in Bonn on 23 June 1979 and concluded on behalf of the Community by Council Decision 82/461/EEC of 24 June 1982 (OJ 1982 L 210, p. 10).

Consequently, according to the Court, the wording of Article 12(1)(a) of the Habitats Directive, which prohibits the deliberate capture or killing of specimens of protected species 'in the wild', does not allow human settlements to be excluded from the scope of the protection under that provision. The use of the words 'in the wild' is intended only to specify that the prohibitions laid down in that provision do not necessarily apply to specimens kept in a lawful form of captivity.

The interpretation that the protection provided for in Article 12(1)(a) of the Habitats Directive does not comprise any strict limits or borders is also of such a nature as to allow the objective pursued by that provision to be attained. It is in fact a matter of protecting the species concerned not only in certain places – which are defined restrictively – but also of protecting specimens of those species living in nature or in the wild which therefore play a part in natural ecosystems. In that connection, the Court noted, moreover, that in many regions of the European Union, such as that at issue in that case, wolves live in areas occupied by humans, with the human impact on those spaces thus resulting in wolves partially adapting to those new conditions. Furthermore, the development of infrastructure, illegal logging, farming and certain industrial activities contribute to the pressure exerted on the wolf population and its habitat.

Consequently, the Court held that the obligation strictly to protect protected animal species applies to the entire 'natural range' of those species, whether they are in their natural habitat, in protected areas or in proximity to human settlements.

As regards the management of situations that may arise where a specimen of a protected animal species comes into contact with humans or their property, in particular conflicts that are the result of human occupation of natural spaces, the Court recalled, next, that it is for the Member States to adopt a full legislative framework which, in accordance with Article 16(1)(b) and (c) of the Habitats Directive, can include measures intended to prevent significant damage, inter alia, to crops or farming and measures taken in the interests of public health and safety or for other imperative reasons of overriding public interest, including those of a social or economic nature.

Thus, the Court considered that the capture and relocation of a specimen of a protected animal species, such as a wolf, can be carried out only under a derogation adopted by the competent national authority on the basis of Article 16(1)(b) and (c) of the Habitats Directive, in particular on the grounds of public safety.

4. Environmental liability

In the judgment in ***Naturschutzbund Deutschland – Landesverband Schleswig-Holstein*** (C-297/19, EU:C:2020:533), delivered on 9 July 2020, the Court held that corporations governed by public law may be liable for environmental damage caused by activities carried out in the public interest pursuant to a statutory assignment of tasks, such as the operation of a pumping station for the purpose of draining agricultural land.

In the course of 2006 to 2009, part of the Eiderstedt peninsula, located in the western part of the *Land* of Schleswig-Holstein (Germany), was classified as a 'protection area' on account, inter alia, of the presence of the black tern, a protected aquatic bird. According to the management plan, the protection area in respect of that species remained for the most part managed traditionally as grassland over extensive areas. The Eiderstedt peninsula had to be drained for the purposes of settlement and agricultural use. In order to do this, Deich- und Hauptsielverband Eiderstedt, a water and soil association established in the legal form of a corporation governed by public law, operated a pumping station which drained the entire area thus covered. Those pumping operations, which had the effect of taking the water level down, fell within its task of maintaining surface waters, which had been entrusted to it by statute as a public-law obligation.

Taking the view that, by operating that pumping station, Deich- und Hauptsielverband Eiderstedt had caused environmental damage harming the black tern, an environmental-protection association, Naturschutzbund Deutschland – Landesverband Schleswig-Holstein, requested measures to limit and remedy that damage from the District of Nordfriesland, a request which was refused. The association relied in support of its request on the German legislation adopted in order to transpose Directive 2004/35 on environmental liability. [313] That directive establishes a framework of environmental liability with a view to preventing and remedying, inter alia, environmental damage caused by occupational activities to the species and natural habitats covered, in particular, by the Habitats Directive [314] and Directive 2009/147 [315] ('the Birds Directive').

The second indent of the third paragraph of Annex I to Directive 2004/35 permits the Member States, however, to provide that owners and operators are exempt from liability where the damage caused to the species and natural habitats results from 'normal management' of the site concerned. The Federal Republic of Germany made use of that power.

It was in that context that the Bundesverwaltungsgericht (Federal Administrative Court), hearing a case concerning the refusal of the environmental protection association's request, decided to ask the Court whether and in what circumstances an activity such as the operation of a pumping station for the purpose of draining agricultural land could be regarded as forming part of the 'normal management of a site' within the meaning of Directive 2004/35. The referring court also requested the Court to state whether such an activity could, as it is carried out in the public interest pursuant to a statutory assignment of tasks, be regarded as an 'occupational activity' within the meaning of Directive 2004/35.

In its judgment, the Court stated that the concept of 'normal management of sites' must be understood as encompassing any measure which enables good administration or organisation of sites hosting protected species or natural habitats that is consistent, inter alia, with commonly accepted agricultural practices.

In that regard, the Court explained that management of a site hosting protected species and natural habitats, as referred to in the Habitats Directive and the Birds Directive, can be regarded as 'normal' only if it complies with the objectives and obligations laid down in those directives and, in particular, with all the management measures adopted by the Member States on the basis of those directives, such as those contained in the habitat records and target documents referred to in the second indent of the third paragraph of Annex I to Directive 2004/35. Accordingly, the Court held that normal management of a site may, in particular, include agricultural activities carried out on the site, including their essential complements such as irrigation and drainage and, therefore, the operation of a pumping station.

The Court explained, in addition, that a court called upon to assess whether or not a management measure is normal may, where the management documents for the site do not contain sufficient guidance, assess those documents in the light of the objectives and obligations laid down in the Habitats Directive and the Birds Directive and with the assistance of domestic legal rules that have been adopted to transpose those directives or, failing this, are compatible with the spirit and purpose of those directives.

313| Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56).

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

315| Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7).

Furthermore, the Court noted that, as provided in the second indent of the third paragraph of Annex I to Directive 2004/35, normal management of a site may also result from a previous practice that is carried out by the owners or operators of that site. The Court declared that that rule covers management measures which, on the date on which the damage occurs, have been carried out for a sufficiently long period of time and are generally recognised and established so that they may be regarded as usual for the site concerned, provided, however, that they do not call into question compliance with the objectives and obligations laid down in the Habitats Directive and the Birds Directive.

As regards the question whether an activity that a corporation governed by public law carries out in the public interest pursuant to a statutory assignment of tasks, such as the operation of a pumping station for the purpose of draining agricultural land, may constitute an 'occupational activity' within the meaning of Directive 2004/35, the Court confirmed that that term covers all activities carried out in an occupational context, as opposed to a purely personal or domestic context, irrespective of whether or not those activities are market-related or competitive in nature.

XX. International agreements

Three judgments should be mentioned in relation to international agreements. The first required the Court to rule on whether it had jurisdiction to interpret an arbitration agreement concluded between two Member States. In the second judgment, it adjudicated on the obligations of a Member State, in relation to national treatment, under the GATS, concluded within the framework of the WTO. [316] In the third judgment, the Court ruled on the obligations of a Member State under EU law vis-à-vis a national of a third State that is a member of the EFTA and a party to the EEA Agreement.

1. Jurisdiction of the Court of Justice concerning the interpretation of an international agreement

In the judgment in ***Slovenia* v *Croatia*** (C-457/18, EU:C:2020:65), delivered on 31 January 2020, the Grand Chamber of the Court declared that it lacked jurisdiction to rule on the action brought by the Republic of Slovenia, on the basis of Article 259 TEU, for a declaration that the Republic of Croatia had failed to fulfil its obligations under EU law by not complying with obligations stemming for the latter Member State from an arbitration agreement concluded with the Republic of Slovenia that was intended to resolve the border dispute between those two States and from an arbitration award defining the sea and land borders between the two States. However, the Court stated that its lack of jurisdiction was without prejudice to any obligation arising – for each of those two Member States, both in their reciprocal relations and vis-à-vis the European

316| Reference should also be made under this heading to the following judgments: judgment of 25 June 2020, ***A and Others (Wind turbines at Aalter and Nevele)*** (C-24/19, EU:C:2020:503), in which the Court ruled on the interpretation of Directive 2001/42 in the light of the Convention on environmental impact assessment in a transboundary context, signed in Espoo (Finland) on 26 February 1991 (presented in Section XIX.1 'Assessment of the effects of certain plans and programmes on the environment'), and the judgments of 8 September 2020, ***Recorded Artists Actors Performers*** (C-265/19, EU:C:2020:677), and of 18 November 2020, ***Atresmedia Corporación de Medios de Comunicación*** (C-147/19, EU:C:2020:935), in which the Court – sitting as the Grand Chamber in the first of those two cases – was required to interpret the directives on certain rights related to copyright in the light of the Performances and Phonograms Treaty (WPPT) of WIPO and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (presented in Section XIV.1 'Copyright').

Union and the other Member States – from Article 4(3) TEU to strive sincerely to bring about a definitive legal solution to the dispute between them consistent with international law, in order to ensure the effective and unhindered application of EU law in the territorial areas concerned. In order to achieve this, they may use one or other means of settling their dispute, including, as the case may be, its submission to the Court under a special agreement pursuant to Article 273 TFEU.

In order to resolve the issue of establishment of their common borders following the proclamation of their respective independence vis-à-vis the Socialist Federal Republic of Yugoslavia, the Republic of Croatia and the Republic of Slovenia concluded an arbitration agreement in November 2009. Under that agreement, which entered into force a year later, the two States undertook to submit that dispute to the arbitral tribunal established by the agreement, whose award would be binding on them. Following a procedural issue that arose before the arbitral tribunal, on account of unofficial communications in the course of the arbitral tribunal's deliberations between the arbitrator appointed by the Republic of Slovenia and that State's Agent before the arbitral tribunal, the Republic of Croatia took the view that the tribunal's ability to make an award independently and impartially was compromised. It therefore informed the Republic of Slovenia, in July 2015, that it considered the Republic of Slovenia to be responsible for material breaches of the arbitration agreement. Consequently, relying on the Vienna Convention on the Law of Treaties, [317] it decided to terminate the arbitration agreement immediately. The arbitral tribunal nevertheless decided that the arbitration proceedings should continue and made an arbitration award in June 2017, by which it defined the sea and land borders between the two States concerned. The Republic of Croatia did not execute that arbitration award. In July 2018, the Republic of Slovenia brought an action for failure to fulfil obligations before the Court. It contended, first of all, that the Republic of Croatia had infringed a number of obligations owed by it under primary law [318] by failing to comply with its obligations stemming from the arbitration agreement and the arbitration award, in particular by not observing the border set by the award. Furthermore, it asserted that the Republic of Croatia had thereby also infringed a number of provisions of secondary law. [319]

Ruling on the plea of inadmissibility raised by the Republic of Croatia, the Court pointed out that it lacks jurisdiction to give a ruling on the interpretation of an international agreement concluded by Member States whose subject matter falls outside the areas of EU competence and on the obligations arising under it for them. The Court then inferred from this that it lacks jurisdiction to rule on an action for failure to fulfil obligations, whether it is brought under Article 258 or Article 259 TFEU, where the infringement of the provisions of EU law that is pleaded in support of the action is ancillary to the alleged failure to comply with obligations resulting from such an agreement.

317| Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, vol. 1155, p. 331).

318| The provisions in question are Article 2 and Article 4(3) TEU.

319| It thus pleaded infringements of Article 5(2) of Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22); the system of control, inspection and implementation in respect of the rules laid down by Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1) and by Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy (OJ 2011 L 112, p. 1); Articles 4 and 17, read in conjunction with Article 13, of the Schengen Borders Code; and Article 2(4) and Article 11(1) of Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning (OJ 2014 L 257, p. 135).

The Court found that the infringements of EU law pleaded by the Republic of Slovenia either resulted from the alleged failure by the Republic of Croatia to comply with the obligations stemming from the arbitration agreement and from the arbitration award made on the basis of that agreement or were founded on the premiss that the land and sea border between those two Member States had been determined by that award.

Noting that, in the case in point, the arbitration award had been made by an international tribunal set up under a bilateral arbitration agreement governed by international law, the subject matter of which did not fall within the areas of EU competence and to which the European Union was not a party, the Court observed that neither the arbitration agreement nor the arbitration award formed an integral part of EU law. It stated in that context that the reference, made in neutral terms by a provision of the Act of Accession of Croatia to the European Union, to that arbitration award could not be interpreted as incorporating into EU law the international commitments made by both Member States within the framework of the arbitration agreement.

Accordingly, the Court held that the infringements of EU law pleaded were, in the case in point, ancillary to the alleged failure by the Republic of Croatia to comply with the obligations arising from the bilateral agreement at issue. Stating that an action under Article 259 TFEU for failure to fulfil obligations can only relate to a failure to comply with obligations stemming from EU law, the Court held that it therefore lacked jurisdiction to rule, in the action brought by the Republic of Slovenia, on an alleged failure to comply with the obligations arising from the arbitration agreement and the arbitration award, which were the source of that Member State's complaints regarding alleged infringements of EU law.

Finally, noting the competence reserved to the Member States, in accordance with international law, in respect of the geographical demarcation of their borders and the fact that, under the arbitration agreement, it is for the parties to that agreement to take the steps necessary to implement the arbitration award, the Court held that it was not for it to examine, in the action brought by the Republic of Slovenia, the question of the extent and limits of the respective territories of that Member State and Croatia, by applying directly the border determined by the arbitration award in order to verify the truth of the infringements of EU law at issue.

2. Breach of an agreement concluded within the framework of the WTO

In the judgment in ***Commission* v *Hungary (Higher education)*** (C-66/18, EU:C:2020:792), delivered on 6 October 2020, the Court, sitting as the Grand Chamber, upheld the action for failure to fulfil obligations brought by the European Commission against that Member State. The Court held, first, that by making the exercise, in Hungary, of teaching activities leading to a qualification by higher-education institutions situated outside the EEA subject to the existence of an international treaty between Hungary and the third country in which the institution concerned has its seat, Hungary had failed to comply with the commitments in relation to national treatment given under the GATS, concluded within the framework of the WTO. [320] That requirement was also contrary to the provisions of the Charter relating to academic freedom, the freedom to found higher-education institutions and the freedom to conduct a business. [321]

320| Article XVII of the GATS.

321| Article 13, Article 14(3) and Article 16 of the Charter. The aspects of the judgment relating to those provisions are presented in Section I.3 'Freedom of the arts and sciences, right to education and freedom to conduct a business'.

Secondly, the Court held that, by making the exercise, in Hungary, of the activities of foreign higher-education institutions, including institutions having their seat in another Member State of the EEA, subject to the condition that they offer higher education in the country in which they have their seat, Hungary had failed to comply with its national treatment commitments under the GATS and with its obligations in respect of the freedom of establishment, [322] the free movement of services [323] and the abovementioned provisions of the Charter.

On 4 April 2017, Hungary adopted, as a matter of urgency, a law amending the Law on higher education [324] ('the 2017 Law on higher education'), which was presented as being intended to safeguard the quality of higher education teaching activities, and the main object of which was to reform the licensing regime applicable to foreign higher-education institutions. Regardless of whether or not they had been previously approved, such institutions were henceforth subject to new requirements, including those examined by the Court.

The Commission brought an action for failure to fulfil obligations before the Court against Hungary, claiming that the 2017 Law on higher education was incompatible both with the commitments undertaken by Hungary within the framework of the GATS and with the freedom of establishment, the free movement of services and the provisions of the Charter relating to academic freedom, the freedom to found higher-education institutions and the freedom to conduct a business.

First of all, the Court rejected the grounds of inadmissibility put forward by Hungary. As regards the short time limits imposed by the Commission during the pre-litigation procedure, the Court, confirming its case-law on that point, [325] examined the actual conduct of that procedure and concluded that Hungary had not established that its rights of defence had been infringed as alleged. Furthermore, it observed that the contested time limits had been set taking into consideration the imminent entry into force of the provisions at issue, which was originally scheduled for 1 January 2018. The Court also considered that the Hungarian Government could not reasonably rely on the illegitimacy of the political intentions ascribed to the Commission, namely to protect the particular interests of the Central European University, since the question as to whether it is appropriate to initiate an infringement procedure is entirely within the Commission's discretion, which, as such, is not subject to judicial review by the Court.

The Court went on to declare that it had jurisdiction to hear and determine complaints alleging infringements of WTO law. In that regard, having recalled that any international agreement entered into by the European Union is an integral part of EU law, the Court confirmed that to be the case as regards the Agreement establishing the WTO, of which the GATS is part. Next, with respect to the relationship between the exclusive competence of the European Union in the area of common commercial policy and the broad competence of the Member States in the area of education, the Court made clear that commitments entered into under the GATS, including those relating to the liberalisation of trade in private educational services, fall within the common commercial policy. Moreover, in addressing the Hungarian Government's arguments as to the exclusivity of the interpretative powers conferred, in particular, on the bodies constituting the WTO's dispute-settlement system, the Court emphasised that not only did the existence of the WTO's own dispute

322| Article 49 TFEU.

323| Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ 2006 L 376, p. 36).

324| Nemzeti felsőoktatásról szóló 2011. évi CCIV. törvény módosításáról szóló 2017. évi XXV. törvény (Law No XXV of 2017 amending Law No CCIV of 2011 on national higher education).

325| See, in particular, judgment of the Court of 18 June 2020, ***Commission* v *Hungary (Transparency of associations)*** (C-78/18, EU:C:2020:476, paragraph 30 and the case-law cited).

settlement system not preclude the Court from accepting, in the context of infringement proceedings, jurisdiction to hear and determine complaints alleging infringements of WTO law – in that instance, the GATS – but the exercise of that jurisdiction was in fact entirely consistent with the obligation of each member of the WTO, including the European Union, to ensure observance of its obligations under the law of that organisation. The Court pointed out that the European Union may find itself incurring international liability as a result of any failure by a Member State to comply with its obligations under the GATS.

Similarly, the Court set out the specific implications, for the exercise of its own jurisdiction, of the provisions of international conventions that are binding on the European Union, and of the rules and principles of general customary international law, the binding nature of which for the European Union was noted at the outset. Thus, in the light of the codified principles of general international law in relation to a State's liability for an internationally wrongful act, the Court observed that the assessment of the conduct of a Member State which the Court must make in infringement proceedings, including in the light of WTO law, is not binding on other members of the WTO, nor can it affect any later assessment that the WTO's Dispute Settlement Body (DSB) might be called upon to make. Thus, according to the Court, neither the European Union nor the Member State concerned could rely on a judgment delivered by the Court at the end of infringement proceedings in order to avoid their obligation to comply with the legal consequences which WTO law attaches to rulings of the DSB.

Having thus accepted jurisdiction, the Court proceeded to examine the Commission's complaints. First, as regards the assessment, in the light of Article XVII of the GATS on national treatment, of the requirement that there be a prior international treaty, the Court found at the outset that, in the field of higher-education services, Hungary was fully committed to according the national treatment provided for in that article, notwithstanding a reservation in respect of the market-access commitment (Article XVI), to the effect that the establishment of education institutions in Hungary is subject to prior authorisation. According to WTO law, such a prior-authorisation reservation aimed at limiting the market-access commitment undertaken can apply to national treatment only in so far as it relates to a measure that is inconsistent both with the market access obligation and with that relating to national treatment. In that case, the general nature of the prior-authorisation reservation by which Hungary sought to limit its market-access commitment was not discriminatory, so that Hungary could not rely on it with respect to the national treatment obligation.

Next, the Court stated that the conclusion of an international treaty, as required by the 2017 Law on higher education, imposes on the foreign providers concerned an additional condition for the supply of higher-education services in Hungary, the fulfilment of that condition being in the discretion of the Hungarian authorities, which is sufficient to establish a modification of the conditions of competition to the detriment of the institutions concerned and in favour of Hungarian institutions. Lastly, the Court considered that the explanations given by the Hungarian Government in relation to the objectives of the requirement at issue were not sufficient to justify it, in the light of Article XIV of the GATS. As regards Hungary's reliance on the protection of public order, Hungary had not established, in a specific and detailed manner, that there was a genuine and sufficiently serious threat affecting a fundamental interest of Hungarian society. In addition, in so far as the requirement at issue sought to prevent deceptive practices, the Court ruled that it constituted a means of arbitrary discrimination because of the decisive nature of the political will of the Hungarian authorities as regards that requirement being met. That justification on Hungary's part also, therefore, could not be accepted.

Furthermore and in any event, the Court ruled that the requirement at issue was disproportionate, observing that it applied indiscriminately, including to institutions already present on the Hungarian market.

Secondly, the Court examined the requirement that education activities be offered in the State of origin. So far as concerns, first of all, the commitment undertaken by Hungary under Article XVII of the GATS, the Court, having shown the competitive disadvantage resulting from the requirement at issue for the institutions

concerned, noted again the insufficiency of the explanations provided by the Hungarian Government in relation to the objectives that might justify its necessity. For reasons similar to those adopted in the analysis of the first complaint, the Court therefore concluded that, in so far as that requirement applied to higher-education institutions established in a third-country member of the WTO, it infringed that provision. In addition, in so far as the requirement applied to education institutions which have their seat in another Member State of the European Union, the Court found there to be an unjustified restriction both of the freedom of establishment guaranteed by Article 49 TFEU and of the free movement of services covered by Article 16 of Directive 2006/123. Lastly, in so far as the requirement at issue was presented as being intended to ensure the high quality of higher education, the Court observed that the activities required, the quality of which remained to be established, did not in any way prejudge the quality of the education offered in Hungary, and such an objective was not, therefore, sufficient to justify the requirement at issue.

3. Extradition of a national of a Member State of the European Economic Area

In the judgment in ***Ruska Federacija*** (C-897/19 PPU, EU:C:2020:262), delivered on 2 April 2020 in an urgent preliminary-ruling procedure, the Grand Chamber of the Court adjudicated on the obligations of a Member State called upon to rule on an extradition request made by a third State concerning a national of a State that is not a member of the European Union but which is a member of EFTA and a party to the EEA Agreement. [326] The Court held that the requested Member State was required first of all to verify, in accordance with Article 19(2) of the Charter, that, in the event of extradition, the person concerned would not run the risk of being subject to the death penalty, torture, or other inhuman or degrading treatment or punishment. In the context of that verification, a particularly substantial piece of evidence was the fact that the person concerned, before acquiring the nationality of the EFTA State in question, had been granted asylum by that State, precisely on account of the criminal proceedings which are the basis of the extradition request. In addition, the Court held that, before proposing to execute that request, that Member State must inform the EFTA State concerned, so as to enable it to seek the surrender of its national, provided that that EFTA State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory.

In that case, on 20 May 2015, Interpol's bureau in Moscow issued an international wanted-persons notice in respect of a Russian national. On 30 June 2019, that national, who in the meantime had acquired Icelandic nationality, was arrested in Croatia on the basis of that international wanted persons notice. On 6 August 2019, the Croatian authorities received an extradition request from the Russian Federation. The Croatian court responsible for ruling on the extradition considered that the legal conditions for extradition were satisfied and therefore decided to allow it.

The person concerned then sought to have that decision set aside before the Vrhovni sud (Supreme Court, Croatia). In that context, he invoked the risk of torture and inhuman or degrading treatment or punishment if he were extradited to Russia and the fact that, before acquiring Icelandic nationality, the Republic of Iceland had recognised his status as a refugee, precisely on account of the criminal proceedings to which he was subject in Russia. He also alleged a failure to apply the *Petruhhin* judgment [327] correctly, in which the Court had held that when a Member State receives an extradition request concerning an EU citizen, a national of another Member State and located in its territory, it must inform the latter Member State and, should it so

326| Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3).

327| Judgment of the Court of 6 September 2016, ***Petruhhin*** (C-182/15, EU:C:2016:630).

request, surrender that citizen, in accordance with Framework Decision 2002/584, [328] provided that the Member State of which the citizen holds the nationality has jurisdiction to prosecute him or her for offences committed outside his or her national territory.

In that case, the Vrhovni Sud (Supreme Court) asked the Court of Justice whether the interpretation given in the *Petruhhin* judgment should be followed in a situation concerning someone who was not an EU citizen but an Icelandic citizen, Iceland being an EFTA State which is party to the EEA Agreement.

In the first place, the Court examined whether EU law applied to that situation. In that regard, it stated that, since it did not concern an EU citizen who had moved to a Member State other than that of his or her nationality, but a national of a third State, Article 18 TFEU (non-discrimination on grounds of nationality) and Article 21 TFEU (freedom of movement and residence of EU citizens), which were interpreted in the *Petruhhin* judgment, did not apply in that case. However, the situation did properly fall within the scope of application of EU law and, more specifically, that of the EEA Agreement, which, as an international agreement concluded by the European Union, is an integral part of EU law. In reaching that conclusion, the Court first pointed out that the Republic of Iceland enjoyed a special relationship with the European Union since, in addition to being a member of the Schengen Area and a party to the EEA Agreement, that third State participated in the common European asylum system and had concluded with the European Union an Agreement on the surrender procedure. [329] The Court then observed that Article 36 of the EEA Agreement guarantees the freedom to provide services and does so in a manner that is identical, in essence, to Article 56 TFEU. Finally, it held that the freedom to provide services, within the meaning of both Article 56 TFEU and the EEA Agreement, includes the freedom to travel to another State to receive services there, which was the situation in that case, as the Icelandic national concerned wished to spend his holidays in Croatia and thus to receive services there related to tourism.

In the second place, after stating that the provisions of the Charter were also applicable, since the situation at issue was covered by EU law, the Court clarified the protection offered by Article 19(2) of the Charter, under which no one may be extradited to another State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Therefore, the Court held that a Member State that receives an extradition request must verify, before executing that extradition, that it would not prejudice the rights laid down by that article. In that regard, it emphasised that, in that case, the fact that the person concerned had been granted asylum in Iceland was a particularly substantial piece of evidence for the purposes of that verification. That was all the more the case since that grant was based precisely on the criminal proceedings which were the basis of the extradition request. Therefore, in the absence of specific facts, such as significant changes in the situation in Russia or evidence demonstrating that the person concerned had concealed those criminal proceedings at the time he applied for asylum, the decision of the Icelandic authorities granting that application must lead the Republic of Croatia to refuse the extradition.

In the third place, if the Member State that received the extradition request considers that the Charter does not preclude its execution, the Court recalled that national rules prohibiting the extradition of nationals of that Member State, as is the case in Croatia, give rise to a difference in treatment in that they result in not

328| 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).

329| Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2006 L 292, p. 2), which was approved, on behalf of the European Union, by Article 1 of Council Decision 2014/835/EU of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (OJ 2014 L 343, p. 1), and which entered into force on 1 November 2019.

granting nationals of other EFTA States, which are parties to the EEA Agreement, the same protection against extradition. Thus, those rules are liable to affect the freedom to provide services, within the meaning of Article 36 of the EEA Agreement. The Court next observed that such a restriction can be justified only where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions. In that case, the objective of preventing the risk of impunity of persons who are present in a territory other than that in which they are alleged to have committed the offence of which they are accused is a legitimate one. Furthermore, rules that allow the extradition of those persons to a third State appear appropriate to achieve that objective. However, as regards the proportionality of such a restriction, the Court considered that priority should be given to the exchange of information with the EFTA State of which the person concerned is a national, in order to give it the opportunity of issuing a request for the surrender of its national for the purpose of prosecution. As regards the Republic of Iceland, since Framework Decision 2002/584 was not applicable, such surrender could be proposed on the basis of the Agreement on the surrender procedure, the provisions of which are very similar to those of that framework decision.

Thus, in conclusion, the Court held that the outcome upheld in the *Petruhhin* judgment must be applied by analogy to an Icelandic national who, as regards a third State seeking his extradition, is in a situation that is objectively comparable to that of a citizen of the European Union to whom, in accordance with Article 3(2) TEU, the European Union offers an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured.

XXI. Common foreign and security policy

By its judgment of 6 October 2020, ***Bank Refah Kargaran* v *Council*** (C-134/19 P, EU:C:2020:793), the Grand Chamber of the Court ruled on a case in which the financial funds and resources of an Iranian bank, Bank Refah Kargaran ('the appellant'), had been frozen in 2010 and 2011 in connection with the restrictive measures introduced by the European Union in order to compel the Islamic Republic of Iran to end proliferation-sensitive nuclear activities and the development of nuclear-weapon delivery systems. That freezing of funds had been effected by the entry of the bank on the list of entities involved in nuclear proliferation set out in the annexes to various decisions successively adopted by the Council pursuant to the Common Foreign and Security Policy (CFSP) under Article 29 TEU. Those CFSP decisions were subsequently implemented by various regulations adopted by the Council on the basis of Article 215 TFEU.

The appellant obtained, on the ground that the statement of reasons was inadequate, the annulment of all of those measures, in so far as they concerned it. [330] Subsequently, in November 2013, its name was re-entered, on the basis of an amended statement of reasons, on the list set out in the annex to various Council decisions and regulations adopted under Article 29 TEU and Article 215 TFEU, respectively. The General Court did not, however, uphold the bank's action for, inter alia, their annulment in so far as those measures concerned it.

On 25 September 2015, the appellant brought a fresh action, this time seeking damages from the European Union for the harm caused, in its view, by the adoption and maintenance of the restrictive measures concerning it which were annulled in the annulment judgment. In its judgment of 10 December 2018, [331] the General

330| Judgment of the General Court of 6 September 2013, ***Bank Refah Kargaran* v *Council*** (T-24/11, EU:T:2013:403; 'the annulment judgment').

331| Judgment of the General Court of 10 December 2018, ***Bank Refah Kargaran* v *Council*** (T-552/15, not published, EU:T:2018:897).

Court, first, declared that it had no jurisdiction to hear and determine an action for damages for the harm allegedly caused by the adoption of CFSP decisions under Article 29 TEU. Secondly, in so far as the action for damages sought reparation for the harm allegedly caused by the adoption of regulations under Article 215 TFEU, the General Court dismissed that action as unfounded on the ground that a sufficiently serious breach of a rule of law had not been proven.

It was in those circumstances that the appellant brought an appeal before the Court of Justice seeking, in essence, to have it invalidate the assessment by the General Court of the merits of the action for damages and, exercising its power to dispose of the case, rule on the merits by granting the appellant the form of order sought.

The Court of Justice dismissed that appeal despite finding that the General Court had erred in law by declaring that it lacked jurisdiction to hear and determine the action for damages for the harm allegedly suffered by the appellant as a result of the CFSP decisions adopted under Article 29 TEU.

In the first place, the Court of Justice examined of its own motion the question whether the Courts of the European Union have jurisdiction to hear and determine an action for damages for harm allegedly caused by restrictive measures in so far as such a question is a matter of public policy. In that case, the Court of Justice held, on the one hand, that the General Court was fully entitled to declare that it had jurisdiction to hear and determine the claim for damages for the harm allegedly suffered by the appellant as a result of the restrictive measures taken against it pursuant to regulations based on Article 215 TFEU. On the other hand, the General Court had erred in law by declaring that it lacked jurisdiction to hear and determine that action, in so far as the harm allegedly suffered by the appellant resulted from CFSP decisions adopted under Article 29 TEU.

As far as concerns the CFSP, the rules governing the jurisdiction of the Courts of the European Union have, since the entry into force of the Treaty of Lisbon, been characterised by an exclusion in principle [332] tempered by two exceptions, [333] one of which relates to the assessment of the validity of Council decisions adopting restrictive measures. [334] Although that exception does not expressly mention an action for damages, the Court nevertheless relied on the necessary coherence of the system of judicial protection in order to interpret the scope of its assessment.

From that point of view, the Court stated, first of all, that that system of jurisdiction of the EU Courts in matters relating to the CFSP diverges from the primary task of the EU Courts, namely to ensure compliance with the rule of law. [335] As such, that special scheme must be interpreted strictly. Furthermore, in so far as an action for damages forms part of an entire system for judicial protection subject to constitutional requirements, [336] it contributes to the effectiveness of that protection and therefore necessitates an assessment

332| The last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU.

333| The first exception concerns compliance with Article 40 TEU (the last sentence of the second subparagraph of Article 24(1) TEU and the second paragraph of Article 275 TFEU).

334| The second paragraph of Article 275 TFEU, read in conjunction with the last sentence of the second subparagraph of Article 24(1) TEU, concerning actions, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, relating to the review of the legality of Council decisions adopted on the basis of provisions relating to the CFSP which provide for restrictive measures against natural or legal persons.

335| Article 19 TEU.

336| The Court referred to the principle of effective judicial protection, as reaffirmed in Article 47 of the Charter, as well as to the importance of the rule of law referred to in Articles 2 and 21 TEU, in respect of the European Union's external action, to which Article 23 TEU refers.

capable of preventing any lacuna in judicial protection and thus of ensuring the overall coherence of the system of that protection. In that case, the Court noted that, despite the relationship established by Article 215 TFEU between the regulations adopted on that basis and CFSP decisions adopted under Article 29 TEU, the restrictive measures adopted in legal acts do not necessarily match, so that a lacuna in judicial protection could result from the EU judicature not having jurisdiction to hear and determine an action for damages in respect of restrictive measures provided for by CFSP decisions. In those circumstances, it took the view that the General Court had erred in law in holding that an action for damages for the harm allegedly suffered by a natural or legal person as a result of restrictive measures provided for by CFSP decisions fell outside its jurisdiction.In the second place, the Court of Justice examined the grounds of appeal put forward by the appellant to invalidate the General Court's assessment of the merits of the action for damages, in so far as it did not find that there had been unlawful conduct capable of giving rise to non-contractual liability on the part of the European Union.

According to the Court of Justice, first, the General Court was fully entitled to hold that the inadequacy of the statement of reasons for the legal acts imposing restrictive measures concerning the appellant was not in itself such as to give rise to that liability.

Having clarified and reaffirmed the scope of that case-law principle, the Court nonetheless pointed out that the obligation to state reasons, which is an essential procedural requirement, must be distinguished from the question whether the reasons are well founded. It follows that the European Union may be found liable where the Council has not substantiated the reasons for the measures adopted, which affects the substantive legality of the measure, provided that a plea to that effect is raised in support of the action for damages.

Secondly, in that context, the Court of Justice dismissed the grounds of appeal by which the appellant maintained that the General Court had erred in not holding that the Council's failure to comply with its obligation to provide the appellant with the evidence adduced against it, as set out in the annulment judgment, was such as to give rise to non-contractual liability on the part of the European Union. It is clear from the annulment judgment that that line of argument related solely to the plea concerning the obligation to state reasons.

Ultimately, having found that the error of law vitiating the General Court's assessment of the scope of its jurisdiction did not warrant the annulment of the judgment under appeal, in so far as its operative part was well founded, the Court of Justice dismissed the appeal in its entirety.

XXII. European civil service

Three judgments deserve to be mentioned under this heading. The first concerns the procedure for appointing judges to the Civil Service Tribunal. The second relates to the right to paid annual leave of officials and members of the contract staff of the European Commission posted in third countries. The third judgment deals with the waiver of immunity from legal proceedings of an official. [337]

337| Reference should also be made under this heading to the judgment of 25 June 2020, ***SatCen* v *KF*** (C-14/19 P, EU:C:2020:492), concerning, inter alia, the staff regulations of the European Union Satellite Centre and respect for the rights of the defence in connection with the adoption by that body of a decision terminating the contract of one of its staff members. That judgment is presented in Section V.3 'Actions for annulment'.

1. Procedure for appointing judges to the Civil Service Tribunal

In its judgment of 26 March 2020 in ***Review Simpson* v *Council and HG* v *Commission*** (Joined Cases C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), the Court of Justice, sitting as the Grand Chamber, carried out a review [338] of the judgments of the General Court in *Simpson* v *Council and HG* v *Commission* [339] ('the judgments under review'). In that review, it ruled that the General Court's judgments, in so far as they found that the irregularity affecting the procedure for the appointment of a judge of the Civil Service Tribunal had resulted in a breach of the principle of the lawful judge, [340] affected the unity and consistency of EU law. While recognising that there was an irregularity in the appointment procedure at issue, the Court of Justice considered that that irregularity could not by itself justify the setting aside of the decisions adopted by the panel of judges of the Civil Service Tribunal to which the judge concerned had been assigned. The judgments under review were set aside and the cases referred back to the General Court.

In that case, in anticipation of the expiry of the terms of office of two Judges of the Civil Service Tribunal, Mr Van Raepenbusch and Mr Kreppel, a public call for applications had been launched on 3 December 2013. Following that call, the selection committee [341] drew up a list of six candidates. No public call for applications was published in anticipation of the expiry of the term of office of a third judge of the Civil Service Tribunal, Ms Rofes i Pujol.

On 22 March 2016, the Council of the European Union appointed three judges to the Civil Service Tribunal: Mr Van Raepenbusch, Mr Sant'Anna and Mr Kornezov. For the purpose of appointing judges to those three posts, the Council used the list of candidates drawn up following the public call for applications of 3 December 2013, including for the vacant post previously occupied by Ms Rofes i Pujol ('the third post'), even though the public call for applications did not refer to that post. Mr Sant'Anna and Mr Kornezov were attached to the Second Chamber of the Civil Service Tribunal for the period from 14 April to 31 August 2016.

After appeals were brought before the General Court, two decisions of the Second Chamber of the Civil Service Tribunal [342] ('the contested decisions') were set aside by the judgments under review, on the ground that the Chamber had been improperly constituted. By decisions of 17 September 2018, [343] the Reviewing Chamber of the Court of Justice held that the judgments should be reviewed in order to determine whether they affect the unity or consistency of EU law.

338| Decisions handed down by the General Court of the European Union on appeal against decisions of the Civil Service Tribunal may, following a proposal by the First Advocate General, exceptionally be subject to review by the Court of Justice where there is a serious risk of the unity or consistency of EU law being affected. The review procedure is provided for in Article 256(2) TFEU and in Article 62 et seq. of the Statute.

339| Judgments of the General Court of 19 July 2018, ***Simpson* v *Council*** (T-646/16 P, not published, EU:T:2018:493), and of 19 July 2018, ***HG* v *Commission*** (T-693/16 P, not published, EU:T:2018:492).

340| The principle of the lawful judge is enshrined in the first sentence of the second paragraph of Article 47 of the Charter. That article provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

341| The selection committee is the committee referred to in Article 3(3) of Annex I to the Statute. It was asked to give its opinion on candidates' suitability to perform the duties of judge at the Civil Service Tribunal and to append to that opinion a list of candidates having the most suitable experience.

342| Order of the Civil Service Tribunal of 24 June 2016, ***Simpson* v *Council*** (F-142/11 RENV, EU:F:2016:136), and judgment of the Civil Service Tribunal of 19 July 2016, ***HG* v *Commission*** (F-149/15, EU:F:2016:155).

343| Decisions of the Court of 17 September 2018, ***Review Simpson* v *Council*** (C-542/18 RX, EU:C:2018:763), and of 17 September 2018, ***Review HG* v *Commission*** (C-543/18 RX, EU:C:2018:764).

In the first place, the Court stated that the plea alleging the irregularity of the composition of the panel of judges that had delivered the contested decisions had to be verified of the court's own motion. The guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent the cornerstone of the right to a fair trial. That right means that every court is obliged to check whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. Such a doubt did indeed exist in that case since the composition of the panel of judges had been found to be irregular in an earlier judgment of the General Court. [344] It follows that the General Court did not err in examining of its own motion the regularity of that composition in the judgments under review.

In the second place, the Court ruled that the irregularity in the appointment procedure resulted exclusively from the Council's disregard for the public call for applications of 3 December 2013. In that connection, the Court confirmed that the Council had disregarded the legal framework which it had itself laid down when it published that public call for applications and with which it was obliged to comply. However, the use of the list of candidates for the purpose of making the appointment to the third post appeared otherwise to have accorded with the rules governing the procedure for the appointment of judges to the Civil Service Tribunal. In particular, the list in question contained the names of twice as many candidates as the number of judges who were appointed on the basis of that list. In addition, there was nothing to cast doubt on compliance with the requirement that judges of the Civil Service Tribunal must be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office, or with the requirement that the list had to indicate the candidates having the most suitable high-level experience. Moreover, the irregularity at issue did not permit the inference that the appointment of the judge to the third post had resulted in an unbalanced composition of the Civil Service Tribunal in terms of geographical distribution or representation of national legal systems.

In the third place, the Court held that that irregularity did not constitute a breach of the principle of the lawful judge laid down in the first sentence of the second paragraph of Article 47 of the Charter. An irregularity committed during the appointment of judges within the judicial system concerned entails a breach of that principle, particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process, thus giving rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.

The appointment of a judge to the third post complied with the fundamental rules for the appointment of judges to the Civil Service Tribunal. In that context, the mere fact that the Council used the list drawn up following the public call for applications of 3 December 2013 to fill the third post was not sufficient to establish an infringement of a fundamental rule of the procedure for appointing judges to the Civil Service Tribunal that was of such a kind and of such gravity as to create a real risk that the Council made unjustified use of its powers, undermining the integrity of the outcome of the appointment process and thus giving rise to a reasonable doubt as to the independence and the impartiality of the judge appointed to the third post, or of the Chamber to which he was assigned. Consequently, the General Court erred in law by setting aside the contested decisions solely on the basis of the irregularity in the appointment procedure at issue.

In the fourth and final place, the Court held that the error of law vitiating the judgments under review affected the unity and consistency of EU law. Those judgments could constitute precedents which could have repercussions for other cases in which the appointment of a member of a panel of judges and, more generally,

344| Judgment of the General Court of 23 January 2018, ***FV* v *Council*** (T-639/16 P, EU:T:2018:22).

the right to an independent and impartial tribunal previously established by law is put in issue. That right is fundamental and cuts across all subject areas in the EU legal order, the interpretation and the consistency of which must be ensured by the Court of Justice.

2. Right to paid annual leave

In its judgment in ***Commission and Council* v *Carreras Sequeros and Others*** (Joined Cases C-119/19 P and C-126/19 P, EU:C:2020:676), delivered on 8 September 2020, the Grand Chamber of the Court upheld the appeals brought by the Commission (Case C-119/19 P) and by the Council (Case C-126/19 P) against the judgment of the General Court of 4 December 2018, ***Carreras Sequeros and Others* v *Commission*** (T-518/16, EU:T:2018:873), annulling the decisions of the Commission establishing, for 2014, the number of days of paid annual leave of officials and members of the contract staff of the Commission posted in third countries.

Mr Carreras Sequeros and the other parties to the proceedings before the Court of Justice ('Carreras Sequeros and Others') are officials or members of the contract staff of the Commission who were posted in third countries before 1 January 2014. When their personnel files were updated to take account of the first indent of the second paragraph of the new Article 6 of Annex X to the Staff Regulations of Officials of the European Union ('the Staff Regulations'), [345] they were allocated 36 working days of annual leave for 2014 compared with 42 for the previous year. Carreras Sequeros and Others submitted complaints, which were rejected by the appointing authority or by the authority empowered to conclude contracts of employment, as appropriate.

In their action before the General Court, Carreras Sequeros and Others applied for the new Article 6 of Annex X to the Staff Regulations to be declared unlawful and for the Commission's decisions reducing their annual leave as from 2014 ('the decisions at issue') to be annulled. The General Court upheld the action and annulled those decisions on the ground that the Commission was not entitled to rely on the new Article 6 of Annex X to the Staff Regulations in order to adopt the decisions at issue, since, by significantly reducing the length of leave of officials and other members of staff serving in third countries, that article could not be regarded as being compatible with the nature and purpose of the right to annual leave, according to Article 31(2) of the Charter, read in the light of Directive 2003/88. [346]

345| Since Article 1(70)(a) of Regulation (EU, Euratom) No 1023/2013 of the European Parliament and of the Council of 22 October 2013 amending the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union (OJ 2013 L 287, p. 15) came into effect on 1 January 2014, Article 6 of Annex X to the Staff Regulations has provided, in respect of officials serving in third countries:

'An official shall, per calendar year, be entitled to annual leave of two working days [compared with three and a half working days previously] for each month of service.

Notwithstanding the first paragraph of this Article, officials posted already in a third country on 1 January 2014 shall be entitled to:

– three working days from 1 January 2014 until 31 December 2014;

– two and half working days from 1 January 2015 until 31 December 2015.'

The first indent of the second paragraph of the new Article 6 of Annex X to the Staff Regulations is thus a transitional provision that organises the progressive shift toward the definitive annual leave regime established by the first paragraph of that article, in order, in particular, to avoid or to mitigate the effects of a sudden change in the old regime for the members of staff concerned who were already serving in third countries on 1 January 2014, such as Carreras Sequeros and Others.

346| 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).

Having heard the appeals brought before it, the Court of Justice considered, first of all, that the General Court was fully entitled to rule admissible the objection of illegality that was raised by Carreras Sequeros and Others and which related to the entire system of annual leave provided for in the new Article 6 of Annex X to the Staff Regulations, including the definitive stage applicable as from 2016. The Court ruled in that respect that, since the very nature of a transitional period is to organise the progressive shift from one regime to another, the transitional period provided for in the second paragraph of the new Article 6 of Annex X to the Staff Regulations was only justified by the adoption of the definitive regime established by the first paragraph of that article. In those circumstances, the decisions at issue constituted implementing measures in respect of the regime established with effect from 1 January 2014 by that new Article 6 of Annex X to the Staff Regulations and had a direct legal connection with that regime as a whole.

Next, the Court of Justice ruled on the nature and purpose of the right to annual leave set out in Article 31(2) of the Charter. In that respect, it noted that it follows from the explanations relating to that provision that the reference to Directive 2003/88 refers to the provisions of that directive which reflect and clarify the fundamental right to an annual period of paid leave. That is true of Article 7(1) of Directive 2003/88, which lays down a right to paid annual leave of at least four weeks and which must, without prejudice to the more favourable provisions contained in the Staff Regulations, be applied to officials and other members of staff of the EU institutions. Consequently, and contrary to what was held by the General Court, a provision of EU law which, like the new Article 6 of Annex X to the Staff Regulations, and notwithstanding the fact that it gradually deprives the persons concerned of a certain number of days of paid annual leave, still ensures that they are entitled to paid annual leave of more than the minimum of four weeks cannot be regarded as adversely affecting the fundamental right to paid annual leave. The Court of Justice added that, in those circumstances, a provision such as the new Article 6 of Annex X to the Staff Regulations is capable of ensuring that the dual purpose of the right to annual leave is fulfilled, that is to say, to enable the worker to rest from carrying out the work he or she is required to do and to enjoy a period of relaxation and leisure. The Court of Justice therefore upheld the appeals and set aside the judgment of the General Court.

Lastly, giving final judgment in the case at first instance, the Court of Justice rejected as unfounded all the pleas submitted before the General Court by Carreras Sequeros and Others, including those alleging breach of the principles of equal treatment and protection of legitimate expectations and infringement of the right to respect for private life.

As regards the principle of equal treatment, which is applicable to the law governing the EU civil service, the Court of Justice noted that the EU legislature had taken into account the special situation that distinguishes officials and other members of staff serving in third countries from staff posted in the European Union. It ensured that it remained possible for those officials and other members of staff to request a special rest leave in addition to the right to paid annual leave for which every official or other member of the staff of the European Union is eligible under the Staff Regulations.

As to the principle of protection of legitimate expectations, the Court of Justice recalled that the legal link between an official and the EU administration is based on the Staff Regulations and not on a contract. Therefore, the rights and obligations of those officials may be altered at any time by the EU legislature. Moreover, the right to rely on that principle presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the persons concerned by the competent authorities of the European Union. In that case, however, it was not established that any assurance had been given by those authorities that Article 6 of Annex X to the Staff Regulations would never be altered.

As regards the right to respect for private and family life, the Court of Justice essentially highlighted the existence in the Staff Regulations of a series of provisions that specifically take account of the particular family situation of officials and other members of staff serving in third countries. It added that the assessment of the legality of an EU act in the light of fundamental rights cannot be based on claims relating to the consequences of that act in the specific case of an applicant.

3. Waiver of immunity from legal proceedings

By its judgment in ***Commission* v *RQ*** (C-831/18 P, EU:C:2020:481), delivered on 18 June 2020, the Court of Justice set aside the General Court's judgment in *RQ* v *Commission* [347] upholding the action for annulment brought by RQ, the former Director-General of the European Anti-Fraud Office (OLAF), against Decision C(2016) 1449 final of the Commission of 2 March 2016 waiving his immunity from legal proceedings. The Court of Justice referred the case back to the General Court as it was not in a position to give judgment in the case.

In 2012, a manufacturer of tobacco products lodged a complaint with the Commission which contained serious allegations of attempted bribery involving a member of the Commission. OLAF, of which RQ was at that time the Director-General, opened an administrative investigation and, with a view to gathering additional evidence, asked a witness to conduct a telephone conversation with a person ostensibly involved in the alleged attempted bribery. That telephone conversation was carried out with the consent of and in the presence of RQ, using a mobile phone on OLAF premises. After the closure of that administrative investigation, a criminal complaint was lodged before a Belgian court, invoking inter alia the alleged unlawful interception of telephone communications. For the purposes of investigating that complaint, the competent Belgian investigating magistrate asked the Commission to waive the immunity of RQ, in order to question him as an accused person. After the Commission had acceded to that request, RQ brought an action for annulment of the decision waiving his immunity from legal proceedings. The General Court upheld that action on the ground that the Commission had infringed RQ's right to be heard, without being able entirely to exclude the possibility that the contested decision might have been different in the absence of that infringement.

Following an appeal brought before it by the Commission, the Court first confirmed that the decision waiving the immunity of an official constitutes an act adversely affecting a person, within the meaning of Article 90(2) of the Staff Regulations, against which an action may be brought before the EU Courts. In that regard, the Court pointed out that, by removing the protection conferred on an official by immunity from legal proceedings laid down in Article 11(a) of Protocol No 7, [348] a decision waiving that immunity lays that official open to measures such as those ordering detention and the bringing of legal proceedings against him or her under the general law of the Member States. The fact that the privileges and immunities from legal proceedings granted to officials are solely in the interests of the European Union takes nothing away from the fact that waiving the immunity of an official brings about a distinct change in his or her legal position by depriving him or her of the benefit of that immunity and, consequently, constitutes an act adversely affecting that official.

After recalling that the right to be heard is affirmed not only in Articles 47 and 48 of the Charter but also in Article 41 thereof, the Court then confirmed that the Commission was obliged to hear RQ before adopting the decision waiving his immunity from legal proceedings, even though that immunity of officials serves

347| Judgment of the General Court of 24 October 2018, ***RQ* v *Commission*** (T-29/17, EU:T:2018:717).

348| Protocol (No 7) on the privileges and immunities of the European Union (OJ 2010 C 83, p. 266).

solely to safeguard the interests of the European Union. While that latter circumstance may imply that the arguments which the official concerned can validly put forward against the waiver of his immunity should be limited, it cannot justify not hearing that official before his immunity from legal proceedings was waived.

With regard to the restrictions that may be placed on the rights recognised by the Charter, such as the right to be heard, the Court pointed out that Article 52(1) of the Charter requires that any limitations should be provided for by law and respect the essence of the fundamental right in question. In addition, that provision requires that, in accordance with the principle of proportionality, the limitations should be necessary and genuinely meet objectives of general interest recognised by the European Union.

In that respect, the Court pointed out that, even if, in a case such as that of RQ, the absence of a hearing before the adoption of the decision waiving his immunity could be justified by the confidentiality of investigations, laid down in the Belgian Code of Criminal Procedure, such justification must nevertheless be reserved for exceptional cases. It cannot be presumed that every criminal investigation systematically entails a risk of attempts to conceal evidence and indicia by the persons concerned, or of fraudulent arrangements between them, justifying the fact that they are not informed in advance of an investigation concerning them. According to the Court of Justice, it follows that the General Court acted correctly in holding that, before concluding that there was an exceptional case justifying the waiver of RQ's immunity without first hearing him, the Commission ought, in accordance with the principle of sincere cooperation with the national authorities concerned, to have implemented measures ensuring, as far as possible, that the right of the person concerned to be heard would be respected, without jeopardising the interests which the confidentiality of investigations seeks to safeguard.

The Court of Justice also found that the General Court had not erred in law in ruling that the fact that RQ was not heard before the contested decision was adopted went beyond what was necessary to achieve the objective of ensuring the confidentiality of investigations and, consequently, did not respect the essence of his right to be heard. In that respect, the Court confirmed inter alia that, in a case such as that of RQ, the Commission is obliged to obtain from the national authorities sufficiently persuasive evidence to justify a serious infringement of his right to be heard. Such an approach does not, by its very nature, constitute interference with the procedure of the Member State concerned, which is bound by the obligation of sincere cooperation laid down in Article 4(3) TEU.

As regards the legal consequences of the infringement of RQ's right to be heard, the Court pointed out, however, that an infringement of the rights of the defence will lead to the annulment of the decision taken at the conclusion of the administrative procedure in question only if, in the absence of that irregularity, that procedure might have led to a different outcome. In order to assess the impact of the infringement of RQ's right to be heard on the legality of the decision waiving his immunity from legal proceedings, only considerations relating to the interests of the service matter. Therefore, RQ should have shown that it could not have been entirely ruled out that the Commission's decision would have been different if he had been able to put forward arguments and elements relating to the interests of the service. Since RQ did not raise any argument before the General Court to that effect, the General Court erred in law when it found that the infringement of RQ's right to be heard justified the annulment of the decision waiving his immunity from legal proceedings.

C Activity of the Registry of the Court of Justice in 2020

An overview of the main statistical trends over the past year and the measures taken in response to the public-health crisis

By Mr **Marc-André Gaudissart**, Deputy Registrar

As the President observed in the foreword to this annual report, 2020 will be etched in memory as a dark year in the history of the 21st century. Following the withdrawal of a Member State from the European Union, a public-health crisis of unprecedented proportions turned the world and the lives of its inhabitants upside down.

Europe, like other continents, was hit hard by the coronavirus pandemic and, in the space of just a few weeks, the EU institutions had to display a remarkable capacity to adapt and innovate. The EU's judicial institution was no exception. On account of the speed at which the virus spread and the measures taken by Member States to counteract it, a number of significant adjustments had to be made to the rules and the functioning of the Court of Justice and the General Court to ensure that they could continue to fulfil their essential mission in a context fraught with uncertainty. Before setting out, as we do each year, the main statistical trends over the past year (II), it is therefore appropriate to give a brief account of the main measures taken by the institution to deal with that unprecedented crisis which explain, to a very large extent, the results obtained (I).

I. Measures taken in response to the public-health crisis

One of the first measures which had to be taken in March, when it became clear that the number of infections in the European Union was increasing exponentially, was to minimise people-to-people contacts and journeys and to encourage, as far as possible, remote working and electronic communications. Concrete expression was given to that decision on 13 March 2020, when all staff of the institution were requested to stay away from the Court's buildings – except in specific cases and where necessary, such as for hearings or deliberations – and to work from home, in close consultation with the members of the courts and management staff of the institution. Implemented in just a few days, that decision required many colleagues who were not accustomed to such a working method to draw on their skills of adaptation, sometimes quite considerably, but thanks to the commitment of all staff and effective IT tools, the Court was able to continue to function under conditions very similar to those in pre-crisis times.

Given the global dimension of the crisis, it is no surprise that the same considerations guided the Court's approach to the parties. In the beginning, the Court received a number of requests for deferral of the time limits for lodging statements or written observations and initially granted those requests on a case-by-case basis. Then, on 19 March 2020, the decision was taken to extend by one month all the time limits prescribed in pending proceedings, except for the time limits in cases of particular urgency, such as those subject to the urgent preliminary-ruling procedure or the expedited procedure. Based on the second paragraph of

Article 45 of the Protocol on the Statute of the Court of Justice of the European Union ('the Statute'), that measure, which involved treating the coronavirus pandemic as a case of *force majeure*, was unanimously welcomed by parties' representatives. Although the measure inevitably led to a slight increase in the overall duration of proceedings before the Court, it nevertheless enabled the parties to participate in the written part of the procedure under more favourable conditions, as the lockdown and distancing measures taken by national health authorities had made the preparation of parties' statements and consultations between their representatives a much more complex task than before.

In the same vein, the public-health crisis also had an undeniable impact on the oral part of the procedure. When not themselves infected by the virus, parties' representatives (and interpreters) found it increasingly difficult to travel to Luxembourg to attend hearings. Those difficulties were at times the result of the decision taken by a number of Member State authorities to close their borders or restrict their nationals' freedom of movement, and at other times the result of last-minute flight cancellations by airlines flying to Luxembourg or airports in the vicinity of the Grand Duchy. After postponing several hearings scheduled for February and March 2020, the Court was therefore forced to cancel or postpone all hearings scheduled to take place between mid-March and the end of May.

To avoid undue delay in the handling of those cases, particularly preliminary-ruling proceedings in which the resolution of the dispute at national level depends on the Court's answer to the questions put by the referring court, the Court quickly decided to replace a number of those hearings with questions requiring a written answer, allowing the parties or all the interested persons referred to in Article 23 of the Statute to state their views on the statements or observations lodged during the written part of the procedure and on the Court's additional questions. That novel solution, which was sometimes suggested by the parties themselves, enabled the Court to mitigate the temporary impossibility of holding hearings and to dispose of a substantial number of pending cases, but clearly not all cases could be dealt with under such a procedure. For that reason, hearings resumed in situ as soon as the public-health situation allowed, on 25 May 2020. Two important changes in that regard merit special attention as compared with the situation in March.

First, the resumption of hearings was accompanied by the implementation of the most stringent health-protection measures possible, designed both to protect the health of those participating in hearings and to ensure that hearings proceed as smoothly as possible. Those measures obviously cover the obligation to wear a mask and observance of the most stringent preventive strategies and social-distancing rules, but they also made it possible for parties' representatives to plead without moving – and, if need be, without a gown – from the place allocated to them in the hearing room and provide for the systematic cleaning and disinfection of the microphones, tables and chairs used during the hearing, in order to prevent any risk, even indirect, of infection.

Secondly, it should be noted that, in the space of just a few weeks, considerable human, technical and financial resources were deployed by the institution to enable parties who were absolutely unable to travel to Luxembourg for reasons related to the pandemic to plead remotely, by videoconference. Between 25 May and 31 December 2020, that pioneering solution was used in more than 50 cases! As with the use of questions requiring a written answer, the use of videoconferencing has been of invaluable assistance in this public-health crisis, despite the fact that, due to the circumstances, remote pleading does not permit the same degree of interaction and spontaneity as during a visual exchange with the members of the chamber hearing the case and the other parties present in the hearing room and, moreover, is subject to certain limitations or constraints linked, in particular, to the multilingual context in which the Court functions.

For the sake of completeness, I would also like to state, on a final note, that for the first time in its history, the Court also used videoconferencing to hold its weekly general meetings – at which the members of the Court decide on the action to be taken on the procedural proposals contained in the preliminary reports prepared, in each case, by a judge-rapporteur – and to organise numerous deliberations. Depending on their

complexity, cases which reached the deliberations stage during the public-health crisis were thus deliberated on in writing or orally, with oral deliberations taking the form of either a physical meeting of the members of the chamber hearing the case, or remote participation in those deliberations by videoconference, or a combination of those two methods (whereby some members met in person on the institution's premises while others took part in the deliberations by videoconference).

All of the above measures – coupled with the institution's extensive preparations for crisis situations, in particular through the adoption of continuity plans and the establishment of appropriate organisational structures – account for the positive statistics for the past year, notwithstanding a crisis of a scale and complexity never before witnessed.

II. Main statistical trends over the past year

New cases

First of all, the number of cases brought before the Court in 2020 is, unsurprisingly, significantly down on last year's figures. The number of new cases in 2020 – **735** – is indeed lower than the very high number of cases brought before the Court in 2019 (966), but very close to the number of new cases in 2017 (739). That drop is clearly directly linked to the public-health crisis since the number of references for a preliminary ruling fell dramatically during the first few months of 2020, at a time when the courts of the Member States were also feeling the full brunt of the pandemic and the measures taken by those States to counteract it extended as far, in some cases, as the complete closure of official buildings and the total cessation of judicial activity. The reduction in the number of new cases is also due to the substantial decline in the number of appeals brought against decisions of the General Court: only 131 appeals, appeals against interim measures and appeals on intervention were lodged with the Court of Justice in 2020, while in 2019 it received more than double that figure (266).

In comparison with those significant developments, the number of direct actions brought before the Court remained relatively stable (37 in 2020 as opposed to 41 in 2019), but the breakdown of those actions differs significantly. The number of actions for failure to fulfil obligations fell from 35 in 2019 to 18 in 2020, whereas the number of actions for annulment almost quadrupled, from 5 in 2019 to 19 in 2020. That increase appears, however, to be more temporary in nature; no fewer than 15 actions were brought in October alone against the regulations and directives adopted by the European Parliament and the Council on 15 July 2020 in the field of road transport.

Finally, reference must be made to a request for an Opinion (1/20) submitted by the Kingdom of Belgium in December concerning the compatibility with the Treaties of the draft modernised Energy Charter Treaty and, in particular, the applicability, within the European Union, of the dispute settlement mechanism provided for in that Treaty.

Although fewer requests were made for a preliminary ruling in 2020 (556 compared to 641 in 2019), those requests still account for 75% of all cases brought before the Court during the past year. Readers will see that, once again, they covered a wide range of subjects reflecting the diversity of the areas governed by EU law and came from almost all Member States. As in previous years, Germany tops the 'geographical' ranking of references for a preliminary ruling made in 2020, but this time it is followed not by Italy or Spain – which were severely affected by the pandemic – but by Austria, whose courts turned to the Court of

Justice on 50 occasions. Third place in the ranking was taken by Italy and fourth place by Poland, whose courts submitted a number of references in 2020 still on the subject of the consequences of the reform of the judicial system in Poland and its compatibility with the rules and principles of EU law.

It should also be noted that the United Kingdom courts made 17 requests for a preliminary ruling to the Court of Justice during the past year, despite that State's withdrawal from the European Union and the European Atomic Energy Community at midnight on 31 January 2020. Those requests, more than half of which were submitted in the final weeks of 2020, are based on Article 86(2) of the withdrawal agreement concluded between the abovementioned parties, under which 'the Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period'. They testify to the vitality of the dialogue that the Court of Justice maintains with the courts of that State and cover areas as diverse as competition, taxation, citizenship and judicial cooperation in civil and criminal matters.

Lastly, although their numbers fell slightly compared to the previous year, urgent cases still took up a not inconsiderable share of the Court's resources: in 2020, no fewer than 59 requests were made for the application of the urgent preliminary-ruling procedure or the expedited procedure. The expedited procedure was used in three cases (one preliminary ruling and two appeals), while the urgent procedure was triggered in nine cases concerning, essentially, the interpretation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. [1]

Cases disposed of

Although the number of new cases fell, the number of cases disposed of by the Court in 2020 remained very high: no fewer than **792 cases** were disposed of in the past year. While that represents a decrease of 9% on the previous year which, with 865 cases disposed of, marked an all-time high in the Court's history, it must be viewed in the context of the unprecedented situation in which the EU Courts found themselves, torn between the need to ensure the continuity of their mission, more necessary than ever in times of crisis and uncertainty, and the equally pressing need to protect the health of those entrusted with fulfilling that mission, which, as noted above, led to the cancellation or postponement of numerous hearings and the adoption of stringent containment measures.

Without going into detail here on the cases disposed of in 2020 and their scope – in this respect, reference is made to the section of the annual report dealing with developments in the case-law over the past year – a number of elements will be of particular interest to the reader when reviewing the figures and statistics set out below.

The first element is the type of cases disposed of in 2020. Although the Court ruled on fewer preliminary-ruling cases in 2020 (534) than in 2019 (601), the number of appeals disposed of by the Court in 2020 (204) is almost on a par with the number of appeals disposed of in 2019 (210). Those figures are clearly ascribable to the very high volume of appeals brought before the Court in 2019, but are also due to the sustained activity of the chamber determining whether appeals may proceed in relation to appeals, under Article 58a of the Statute, lodged in the field of intellectual property. Over the past year, the chamber referred to in Article 170b of the Rules of Procedure of the Court adopted no fewer than 37 orders not to allow an

1| OJ 2002 L 190, p. 1.

appeal to proceed, while the Vice-President adopted 3 orders of inadmissibility, the appellant having failed either to attach to the appeal the mandatory request that the appeal be allowed to proceed, or to put that request in order within the time limit set by the Registry.

As in 2019, in 2020 the Court disposed of a significant number of preliminary-ruling cases by way of order, either on the basis of Article 53(2) of its Rules of Procedure (23 cases) or on the basis of Articles 99 or 100 of those rules (44 and 4 cases respectively), but, if we leave aside the abovementioned prior-admission mechanism, the number of appeals disposed of by order in 2020 (32) was significantly lower than in 2019 (80). [2] That difference is due to the increased complexity of the cases submitted to the Court in the context of those appeals and by the Court's desire to take advantage, in some of those cases, of the insights provided by the Advocate General's Opinion.

By contrast, 2020 confirmed the trend observed over the past two years with regard to the distribution of cases between the different categories of court formation. In 2020, the Grand Chamber of the Court disposed of 71 cases – slightly down on the number of cases disposed of by that formation in 2019 (82) – while chambers of three judges and the chamber determining whether appeals may proceed disposed of no fewer than 345 cases in the past year, almost the same as the number of cases disposed of by those formations in 2019 (351). The number of cases dealt with by chambers of five judges in 2020 (251) decreased somewhat compared to the previous year (343), but this is due in part to the amendment of the rules governing the assignment of judges to chambers, decided in 2019, under which the Vice-President and Presidents of five-judge chambers are now also assigned to three-judge chambers and may therefore, where the case so permits, propose that the cases for which they are responsible be assigned to those court formations. On account of the public-health crisis, a number of cases referred to chambers of five judges were also delayed as a result of the hearings scheduled in those cases being postponed and, in some instances, as a result of those hearings being replaced by questions requiring a written answer. A significant number of cases referred to those court formations in 2020 were therefore still pending at the time of writing.

Finally, the figures relating to the duration of proceedings are very similar to 2019, which, given the public-health situation over the past year, is a considerable feat. Specifically, the average duration of preliminary-ruling proceedings was 15.8 months (15.5 months in 2019), while for direct actions and appeals it was 19.2 months (19.1 months in 2019) and 13.8 months (11.1 months in 2019). As indicated above, the increase in the duration of appeals in 2020 is mainly due to the less widespread use of orders to bring proceedings to an end, more appeals having been disposed of by judgment. Lastly, it should be noted that the average duration of appeals under the prior-admission mechanism stood at 3.2 months in 2020, while for cases dealt with under the urgent preliminary-ruling procedure that figure was 3.9 months.

Cases pending

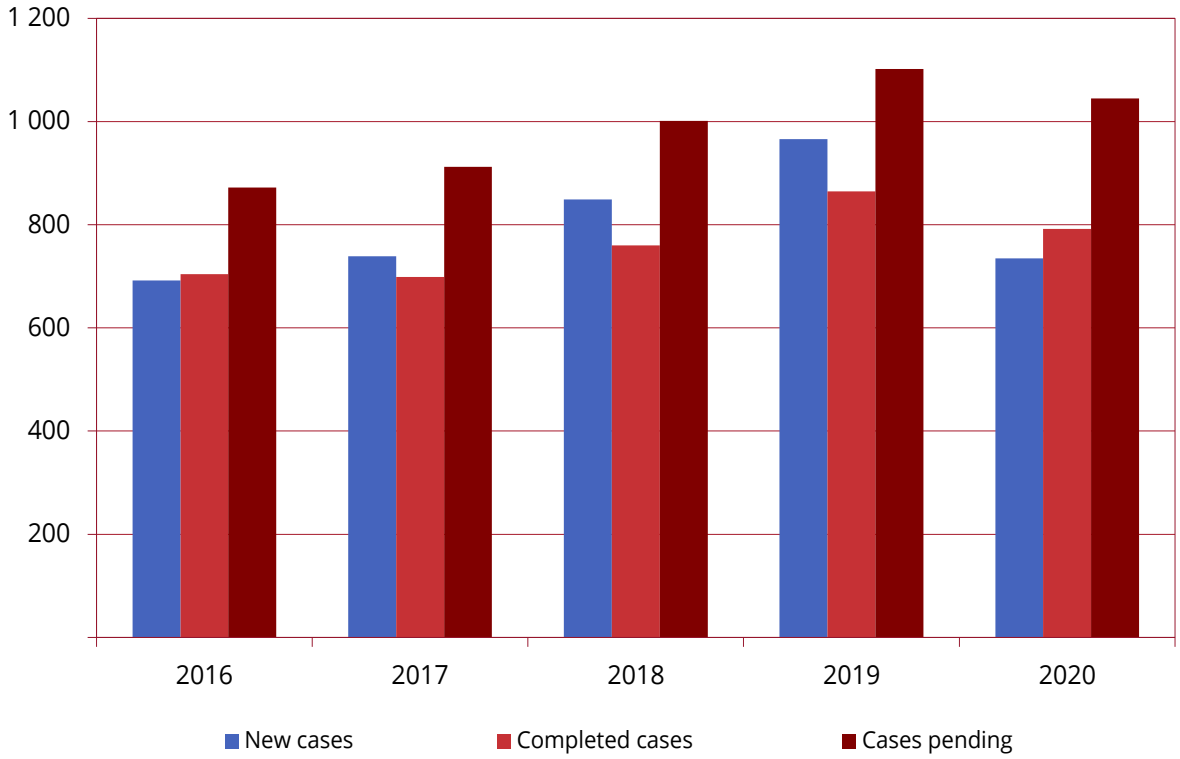
The decrease in the number of cases brought in 2020, coupled with the Court's high productivity that year, accounts for the reduction in stock. While the number of cases pending before the Court as of 31 December 2019 stood at 1 102, that figure fell to **1 045** one year later (964 cases, including the joinder of cases on the ground of similarity, just two fewer than the number of cases brought before the Court in 2019). The fact that no new request has yet been made for amendment of the Statute must be understood in the light of those figures.

2| Those figures do not include cases removed from the register or appeals against interim measures or on intervention which were closed during the years in question (6 in 2019 and 10 in 2020).

It is true that the statistics for a given year do not, on their own, portray a true picture of a court's workload and the changes observed during a given year may prove to be reversible, particularly in view of the impact which the public-health crisis and Brexit will surely have, for many years to come, on the European Union's legislative activity and on the disputes arising from that activity. Nevertheless, 2020 will always be regarded as an exceptional year in all respects and one that was certainly not conducive to launching major structural reforms or redefining how jurisdiction is shared between the Court of Justice and the General Court. A longer settling-in period is necessary in order to gauge all the effects of the reform of the Union's judicial architecture and before formulating, where appropriate, a new request for legislation pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union.

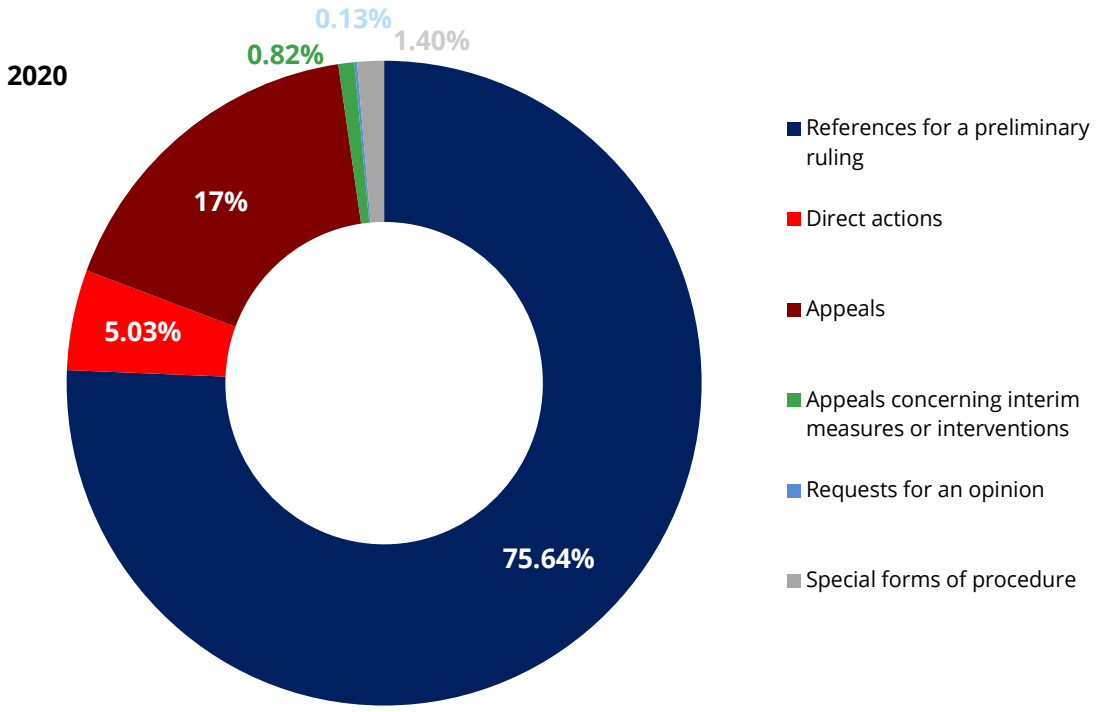
D Statistics concerning the judicial activity of the Court of Justice

I. General activity of the Court of Justice – New cases, completed cases, cases pending (2016-2020)



	2016	2017	2018	2019	2020
New cases	692	739	849	966	735
Completed cases	704	699	760	865	792
Cases pending	872	912	1 001	1 102	1 045

II. New cases – Nature of proceedings (2016-2020)



	2016	2017	2018	2019	2020
References for a preliminary ruling	470	533	568	641	556
Direct actions	35	46	63	41	37
Appeals	168	141	193	256	125
Appeals concerning interim measures or interventions	7	6	6	10	6
Requests for an opinion		1		1	1
Special forms of procedure [1]	12	12	19	17	10
Total	**692**	**739**	**849**	**966**	**735**
Applications for interim measures	3	3	6	6	3

1| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; failure to adjudicate; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

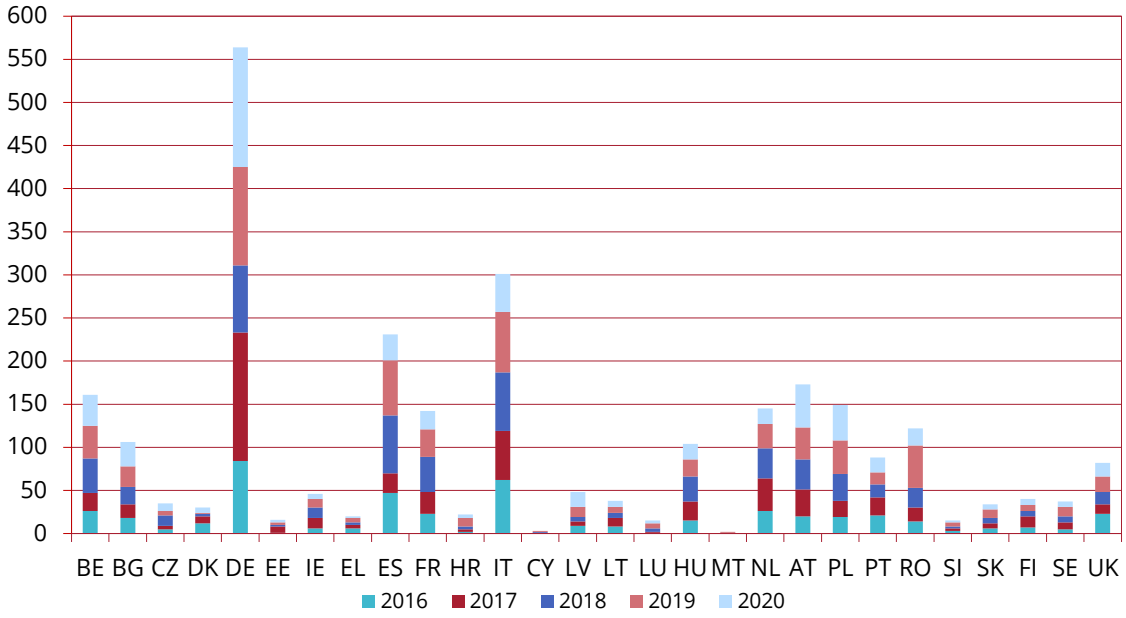
III. New cases – Subject matter of the action (2016-2020)

	2016	2017	2018	2019	2020
Access to documents	6	1	10	5	1
Accession of new States		1			
Agriculture	27	14	26	24	15
Approximation of laws	34	41	53	30	35
Arbitration clause		5	2	3	1
Area of freedom, security and justice	76	98	82	107	95
Citizenship of the Union	7	8	6	8	11
Commercial policy	20	8	5	10	8
Common fisheries policy	3	1	1	1	2
Common foreign and security policy	7	6	7	19	1
Company law	7	1	2	3	1
Competition	35	8	25	42	16
Consumer protection	23	36	41	72	37
Customs union and Common Customs Tariff	13	14	13	18	19
Economic and monetary policy	1	7	3	11	12
Economic, social and territorial cohesion		2	1	1	2
Education, vocational training, youth and sport		2			
Employment					1
Energy	3	2	12	6	7
Environment	30	40	50	47	23
External action by the European Union	4	3	4	4	4
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3	6	6	8	7
Free movement of capital	4	12	9	6	9
Free movement of goods	3	6	4	8	5
Freedom of establishment	16	8	7	8	22
Freedom of movement for persons	28	16	19	40	14
Freedom to provide services	15	18	37	12	11
Industrial policy	3	6	4	7	1
Intellectual and industrial property	66	73	92	74	51
Judicial cooperation in civil matters					1
Law governing the institutions	22	26	34	38	27
Principles of EU law	11	12	29	33	29
Public health	1	1	4	6	4
Public procurement	19	23	28	27	13
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	2	1	3	
Research and technological development and space	3	3	1		
Social policy	33	43	46	41	32
Social security for migrant workers	10	7	14	2	6
State aid	39	21	26	59	17
Taxation	70	55	71	73	65
Transport	32	83	39	54	99
TFEU	**676**	**719**	**814**	**910**	**704**
Safety control			1		
Protection of the general public			1	1	
Euratom Treaty			**2**	**1**	
Principles of EU law			1	1	
EU Treaty			**1**	**1**	
Law governing the institutions			2		
Privileges and immunities	2		2	3	2
Procedure	13	12	12	16	10
Staff Regulations	1	8	16	35	19
Others	**16**	**20**	**32**	**54**	**31**
OVERALL TOTAL	**692**	**739**	**849**	**966**	**735**

IV. New cases – Subject matter of the action (2020)

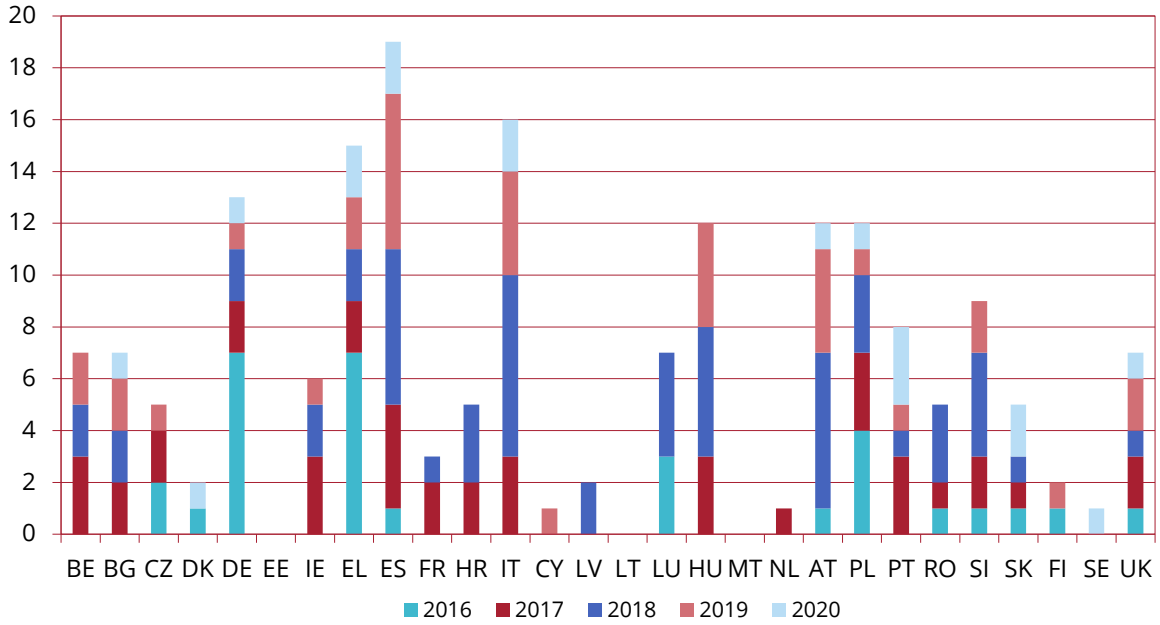
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Special forms of procedure	Total
Access to documents			1				**1**
Agriculture	8	1	6				**15**
Approximation of laws	35						**35**
Arbitration clause			1				**1**
Area of freedom, security and justice	95						**95**
Citizenship of the Union	10		1				**11**
Commercial policy	2		6				**8**
Common fisheries policy	2						**2**
Common foreign and security policy	1						**1**
Company law	1						**1**
Competition	12		4				**16**
Consumer protection	37						**37**
Customs union and Common Customs Tariff	19						**19**
Economic and monetary policy	2		8	2			**12**
Economic, social and territorial cohesion	1		1				**2**
Employment	1						**1**
Energy	3	1	3				**7**
Environment	16	7					**23**
External action by the European Union	3		1				**4**
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	3		4				**7**
Free movement of capital	9						**9**
Free movement of goods	5						**5**
Freedom of establishment	22						**22**
Freedom of movement for persons	13		1				**14**
Freedom to provide services	11						**11**
Industrial policy	1						**1**
Intellectual and industrial property	11		40				**51**
Judicial cooperation in civil matters	1						**1**
Law governing the institutions	2	5	15	4	1		**27**
Principles of EU law	29						**29**
Public health	2		2				**4**
Public procurement	13						**13**
Social policy	32						**32**
Social security for migrant workers	5	1					**6**
State aid	4	2	11				**17**
Taxation	61	4					**65**
Transport	83	16					**99**
TFEU	**555**	**37**	**105**	**6**	**1**		**704**
Privileges and immunities	1					1	2
Procedure			1			9	10
Staff Regulations			19				19
Others	**1**		**20**			**10**	**31**
OVERALL TOTAL	**556**	**37**	**125**	**6**	**1**	**10**	**735**

V. New cases – References for a preliminary ruling by Member State (2016-2020)



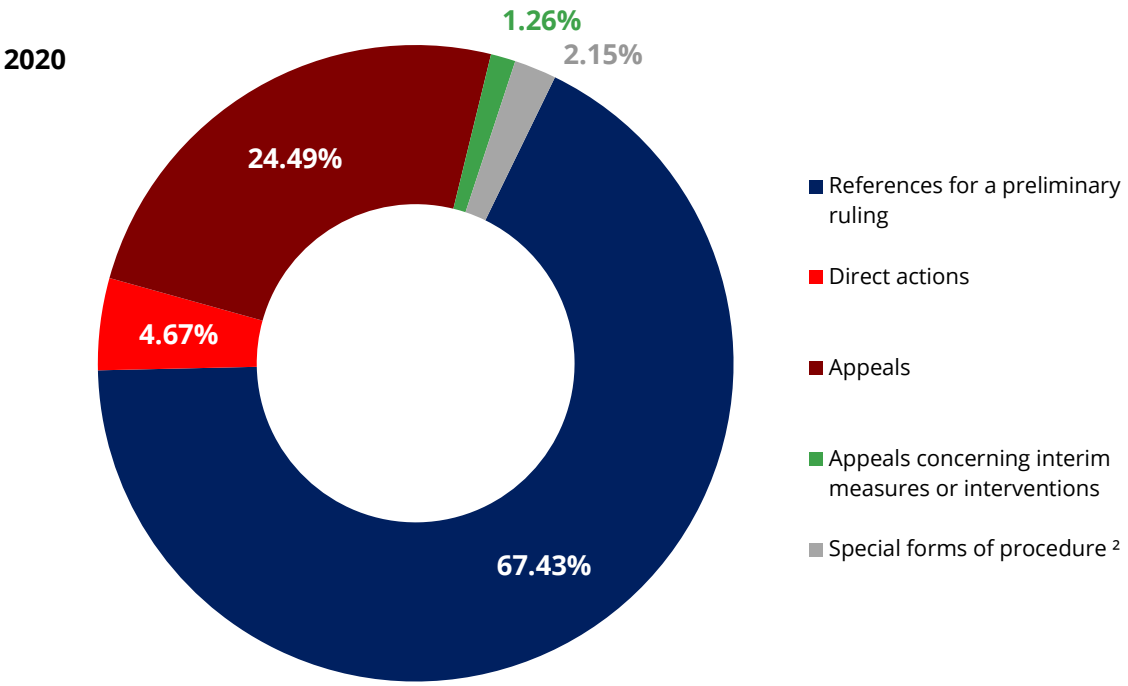
	2016	2017	2018	2019	2020	Total
Belgium	26	21	40	38	36	**161**
Bulgaria	18	16	20	24	28	**106**
Czech Republic	5	4	12	5	9	**35**
Denmark	12	8	3	1	6	**30**
Germany	84	149	78	114	139	**564**
Estonia	1	7	2	3	3	**16**
Ireland	6	12	12	10	5	**45**
Greece	6	4	3	5	2	**20**
Spain	47	23	67	64	30	**231**
France	23	25	41	32	21	**142**
Croatia	2	3	3	10	4	**22**
Italy	62	57	68	70	44	**301**
Cyprus			1	1		**2**
Latvia	9	5	5	12	17	**48**
Lithuania	8	10	6	7	7	**38**
Luxembourg	1	1	4	6	3	**15**
Hungary	15	22	29	20	18	**104**
Malta	1			1		**2**
Netherlands	26	38	35	28	18	**145**
Austria	20	31	35	37	50	**173**
Poland	19	19	31	39	41	**149**
Portugal	21	21	15	14	17	**88**
Romania	14	16	23	49	20	**122**
Slovenia	3	3	2	5	2	**15**
Slovakia	6	6	6	10	6	**34**
Finland	7	13	6	7	7	**40**
Sweden	5	8	7	11	6	**37**
United Kingdom	23	11	14	18	17	**83**
Total	**470**	**533**	**568**	**641**	**556**	**2 768**

VI. New cases – Actions for failure of a Member State to fulfil its obligations (2016-2020)



	2016	2017	2018	2019	2020	Total
Belgium		3	2	2		**7**
Bulgaria		2	2	2	1	**7**
Czech Republic	2	2		1		**5**
Denmark	1				1	**2**
Germany	7	2	2	1	1	**13**
Estonia						
Ireland		3	2	1		**6**
Greece	7	2	2	2	2	**15**
Spain	1	4	6	6	2	**19**
France		2	1			**3**
Croatia		2	3			**5**
Italy		3	7	4	2	**16**
Cyprus				1		**1**
Latvia			2			**2**
Lithuania						
Luxembourg	3		4			**7**
Hungary		3	5	4		**12**
Malta						
Netherlands		1				**1**
Austria	1		6	4	1	**12**
Poland	4	3	3	1	1	**12**
Portugal		3	1	1	3	**8**
Romania	1	1	3			**5**
Slovenia	1	2	4	2		**9**
Slovakia	1	1	1		2	**5**
Finland	1			1		**2**
Sweden					1	**1**
United Kingdom	1	2	1	2	1	**7**
Total	**31**	**41**	**57**	**35**	**18**	**182**

VII. Completed cases – Nature of proceedings (2016-2020) [1]

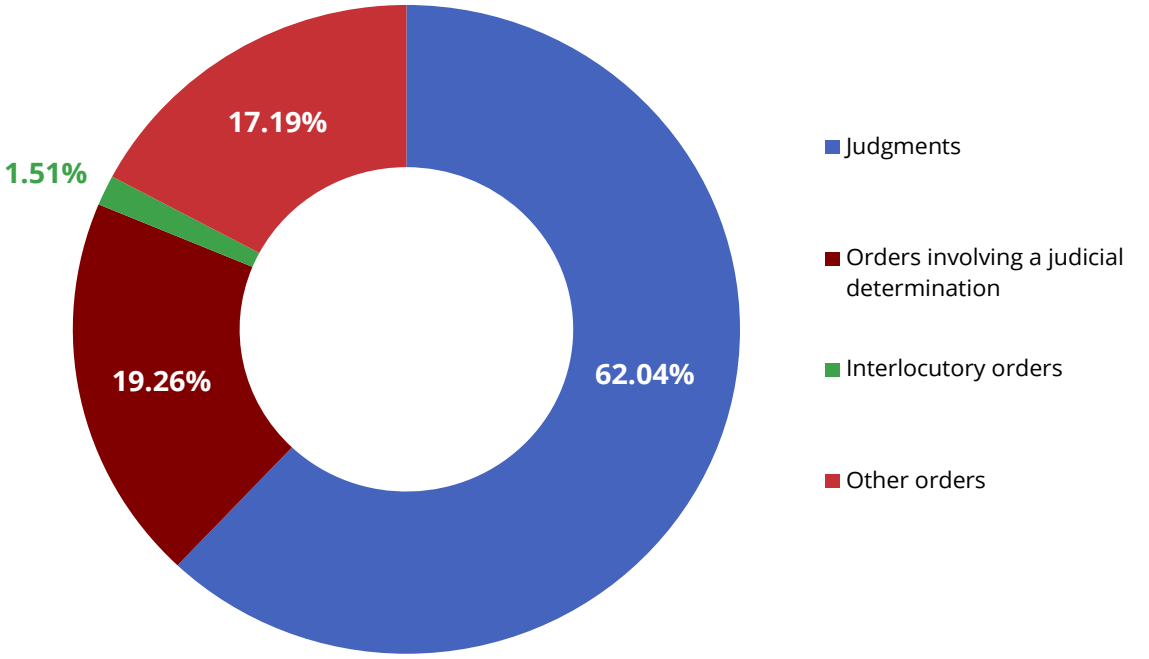


	2016	2017	2018	2019	2020
References for a preliminary ruling	453	447	520	601	534
Direct actions	49	37	60	42	37
Appeals	182	194	155	204	194
Appeals concerning interim measures or interventions	7	4	10	6	10
Requests for an opinion		3		1	
Special forms of procedure [2]	13	14	15	11	17
Total	**704**	**699**	**760**	**865**	**792**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; failure to adjudicate; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

VIII. Completed cases – Judgments, opinions, orders (2020) [1]



	Judgments	Orders involving a judicial determination [2]	Interlocutory orders [3]	Other orders [4]	Opinions	Total
References for a preliminary ruling	317	59		112		488
Direct actions	32		1	3		36
Appeals	101	66		10		177
Appeals concerning interim measures or interventions			10			10
Requests for an opinion						
Special forms of procedure		15				16
Total	**451**	**140**	**11**	**125**		**727**

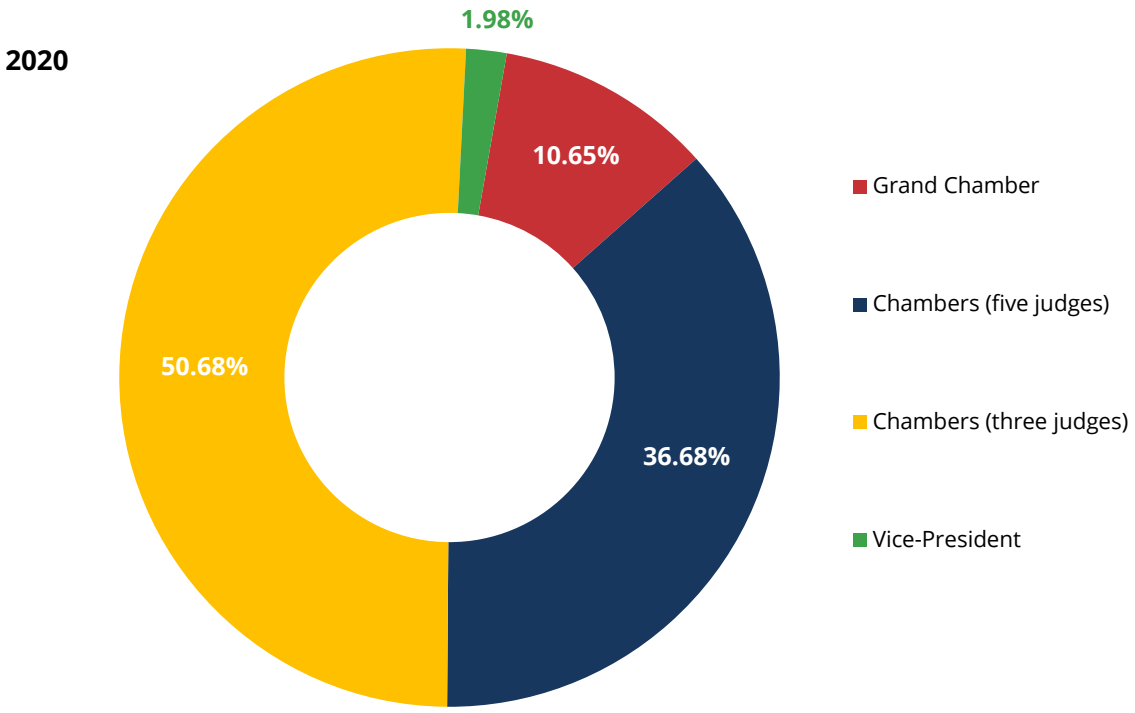
1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

3| Orders made following an application on the basis of Articles 278 TFEU, 279 TFEU or 280 TFEU or the corresponding provisions of the EAEC Treaty, or following an appeal against an order concerning interim measures or intervention.

4| Orders terminating the case by removal from the register, declaration that there is no need to give a decision or referral to the General Court.

IX. Cases completed by judgments, by opinions or by orders involving a judicial determination – Bench hearing action (2016-2020) [1]



	2016			2017			2018			2019			2020		
	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total	Judgments/opinions	Orders [2]	Total
Full Court				1		1	1		1	1		1			
Grand Chamber	54		54	46		46	76		76	77		77	70		70
Chambers (five judges)	280	20	300	312	10	322	300	15	315	317	21	338	237	4	241
Chambers (three judges)	120	162	282	151	105	256	153	93	246	163	176	339	191	142	333
Vice-President		5	5		3	3		7	7		8	8		13	13
Total	**454**	**187**	**641**	**510**	**118**	**628**	**530**	**115**	**645**	**558**	**205**	**763**	**498**	**159**	**657**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

X. Cases completed by judgments, by opinions or by orders involving a judicial determination – Subject matter of the action (2016-2020) [1]

	2016	2017	2018	2019	2020
Access to documents	4	9	2	5	8
Accession of new States	1		1		
Agriculture	13	22	15	23	15
Approximation of laws	16	29	28	44	28
Arbitration clause			3	2	4
Area of freedom, security and justice	52	61	74	85	69
Citizenship of the Union	8	5	10	7	8
Commercial policy	14	14	6	11	4
Common fisheries policy	1	2	2	2	
Common foreign and security policy	11	10	5	8	16
Company law	1	4	1	1	3
Competition	30	53	12	20	17
Consumer protection	33	20	19	38	36
Customs union and Common Customs Tariff	27	19	12	12	16
Economic and monetary policy	10	2	3	7	3
Economic, social and territorial cohesion	2		1		1
Education, vocational training, youth and sport		2			
Energy		2	1	9	8
Environment	53	27	33	50	32
External action by the European Union	5	1	3	4	3
Financial provisions (budget, financial framework, own resources, combating fraud and so forth)	2	7	2	6	5
Free movement of capital	7	1	13	8	5
Free movement of goods	5	2	6	2	8
Freedom of establishment	27	10	13	5	6
Freedom of movement for persons	12	17	24	25	21
Freedom to provide services	14	13	21	23	13
Industrial policy	10	8	2	7	6
Intellectual and industrial property	80	60	74	92	76
Law governing the institutions	20	27	28	28	26
Principles of EU law	13	14	10	17	18
Public health	4	5		6	3
Public procurement	31	15	22	20	19
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	1	7	1	1	
Research and technological development and space	3	2	3	1	1
Social policy	23	26	42	36	25
Social security for migrant workers	5	6	10	12	6
State aid	26	33	29	20	28
Taxation	41	62	58	68	58
Trans-European networks	1				
Transport	20	17	38	25	22
TFEU	**626**	**614**	**627**	**730**	**617**
Protection of the general public				1	
Euratom Treaty				**1**	
Principles of EU law				1	1
EU Treaty				**1**	**1**
Law governing the institutions				2	
Privileges and immunities	1		1		4
Procedure	14	13	10	11	13
Staff Regulations		1	7	18	22
Others	**15**	**14**	**18**	**31**	**39**
OVERALL TOTAL	**641**	**628**	**645**	**763**	**657**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

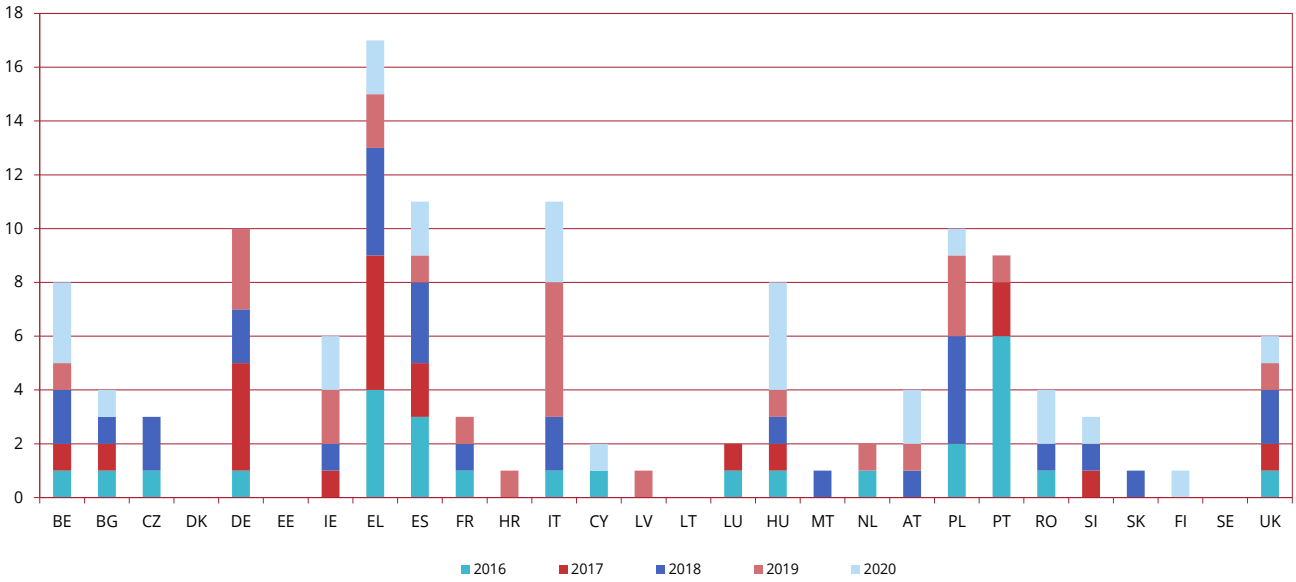
XI. Cases completed by judgments, by opinions or by orders involving a judicial determination – Subject matter of the action (2020) [1]

	Judgments/opinions	Orders [2]	Total
Access to documents	7	1	**8**
Agriculture	14	1	**15**
Approximation of laws	24	4	**28**
Arbitration clause	4		**4**
Area of freedom, security and justice	63	6	**69**
Citizenship of the Union	3	5	**8**
Commercial policy	2	2	**4**
Common foreign and security policy	16		**16**
Company law	3		**3**
Competition	14	3	**17**
Consumer protection	34	2	**36**
Customs union and Common Customs Tariff	14	2	**16**
Economic and monetary policy	1	2	**3**
Economic and social cohesion	1		**1**
Energy	8		**8**
Environment	28	4	**32**
External action by the European Union	1	2	**3**
Financial	5		**5**
Free movement of capital	4	1	**5**
Free movement of goods	7	1	**8**
Freedom of establishment	6		**6**
Freedom of movement for persons	18	3	**21**
Freedom to provide services	11	2	**13**
Industrial policy	6		**6**
Intellectual and industrial property	35	41	**76**
Law governing the institutions	14	12	**26**
Principles of EU law	11	7	**18**
Public health	1	2	**3**
Public procurement	12	7	**19**
Research and technological development and space	1		**1**
Social policy	22	3	**25**
Social security for migrant workers	6		**6**
State aid	21	7	**28**
Taxation	50	8	**58**
Transport	14	8	**22**
TFEU	**481**	**136**	**617**
Principles of EU law		1	**1**
EU Treaty		**1**	**1**
Privileges and immunities	1	3	**4**
Procedure		13	**13**
Staff Regulations	16	6	**22**
Others	**17**	**22**	**39**
OVERALL TOTAL	**498**	**159**	**657**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| Orders terminating proceedings other than those removing a case from the register, declaring that there is no need to give a decision or referring a case to the General Court.

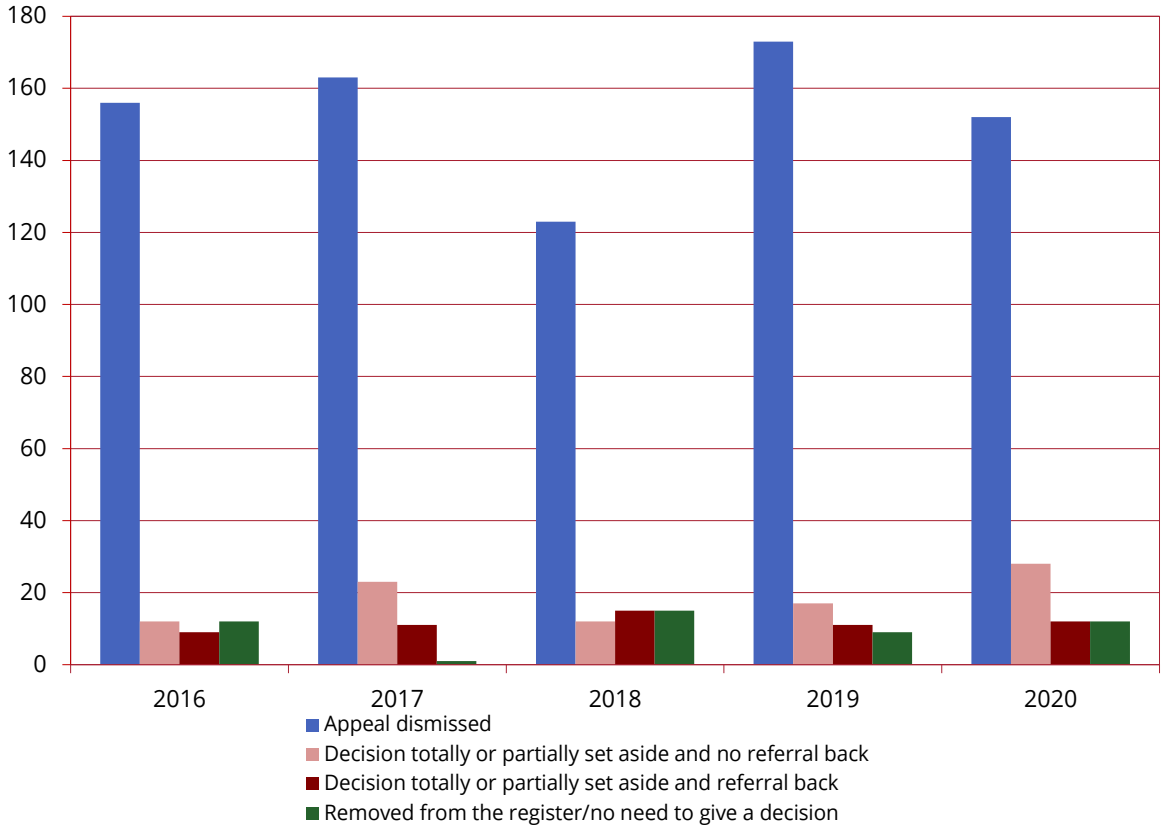
XII. Completed cases – Judgments concerning failure of a Member State to fulfil its obligations: outcome (2016-2020) [1]



	2016		2017		2018		2019		2020	
	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed	Infringement declared	Dismissed
Belgium	1		1		2		1		3	
Bulgaria	1		1		1				1	
Czech Republic	1				2			1		
Denmark						1				
Germany	1		4		2	1	3			1
Estonia										
Ireland			1		1		2		2	
Greece	4		5		4		2		2	
Spain	3		2		3		1	1	2	
France	1				1		1			
Croatia							1			1
Italy	1				2		5	1	3	
Cyprus	1								1	
Latvia							1			
Lithuania										
Luxembourg	1		1							
Hungary	1		1		1		1		4	
Malta		1			1					
Netherlands	1	1					1			
Austria		1			1	1	1		2	
Poland	2				4		3		1	
Portugal	6		2				1			1
Romania	1				1				2	
Slovenia			1		1				1	
Slovakia					1					
Finland									1	
Sweden										
United Kingdom	1	1	1		2		1		1	
Total	**27**	**4**	**20**		**30**	**3**	**25**	**3**	**26**	**3**

1| The figures given (net figures) represent the number of cases after joinder on the ground of similarity (a set of joined cases = one case).

XIII. Completed cases – Appeals: outcome (2016-2020) [1] [2]
(judgments and orders involving a judicial determination)

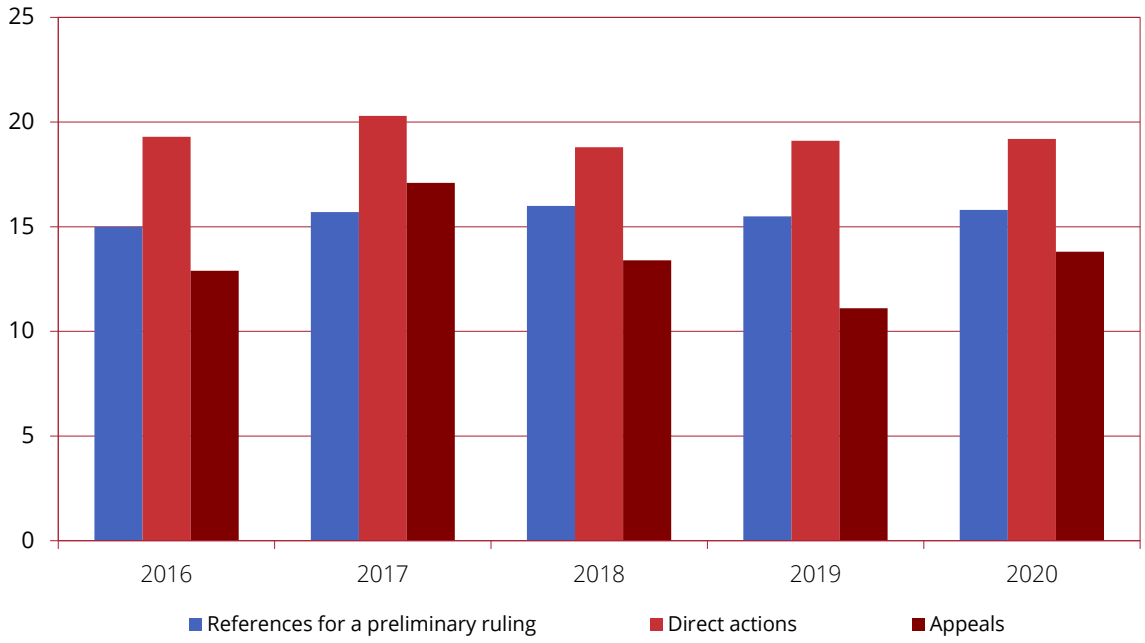


	2016			2017			2018			2019			2020		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Appeal dismissed	63	93	156	103	60	163	59	64	123	63	110	173	75	77	152
Decision totally or partially set aside and no referral back	12		12	23		23	11		12	17		17	28		28
Decision totally or partially set aside and referral back	9		9	11		11	14		15	9	2	11	12		12
Removed from the register/no need to give a decision		12	12		1	1		15	15		9	9		12	12
Total	**84**	**105**	**189**	**137**	**61**	**198**	**84**	**81**	**165**	**89**	**121**	**210**	**115**	**89**	**204**

1| More detailed information on appeals brought against the decisions of the General Court is included in the Statistics concerningthe Judicial Activity of the General Court.

2| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case). They also include the appeals referred to in Article 58a of the Protocol on the Statute of the Court of Justice of the European Union and declared inadmissible or not allowed to proceed pursuant to Articles 170a or 170b of the Rules of Procedure. For more detailed information on the mechanism referred to in Article 58a of the Statute, see Table XX of the present report.

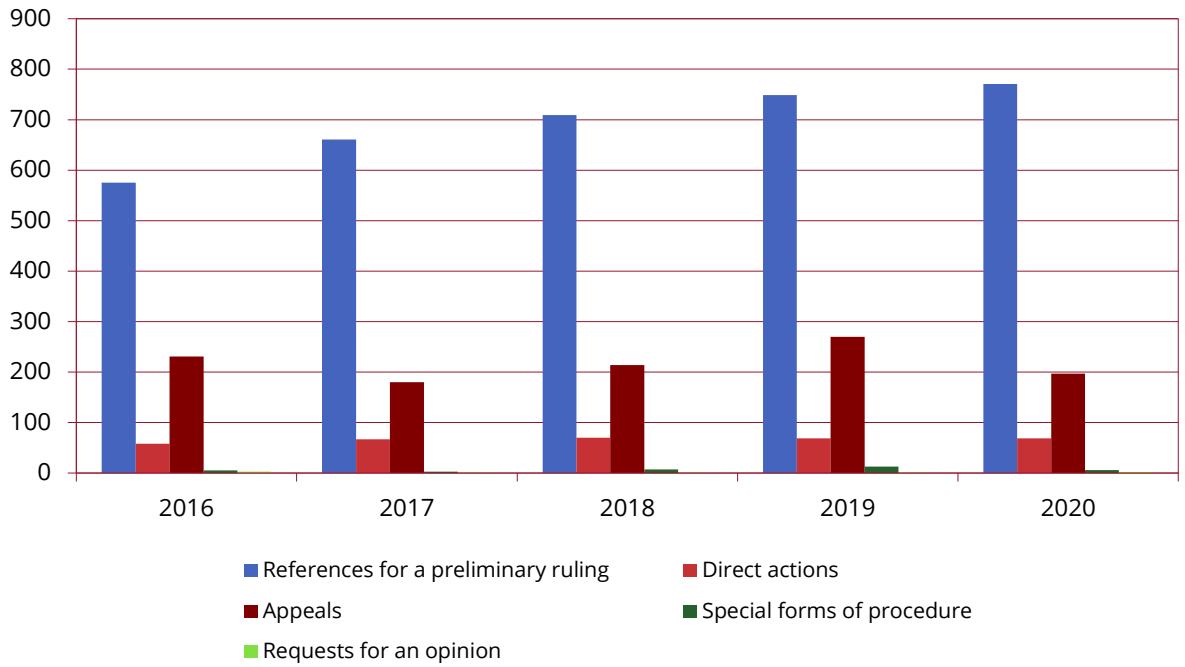
XIV. Completed cases – Duration of proceedings in months (2016-2020) [1] (judgments and orders involving a judicial determination)



	2016	2017	2018	2019	2020
References for a preliminary ruling	15	15.7	16	15.5	15.8
Urgent preliminary-ruling procedure	2.7	2.9	3.1	3.7	3.9
Expedited procedures	4	8.1	2.2	9.9	
Direct actions	19.3	20.3	18.8	19.1	19.2
Expedited procedures			9	10.3	
Appeals	12.9	17.1	13.4	11.1	13.8
Expedited procedures	10.2				

1| The following types of cases are excluded from the calculation of the duration of proceedings: cases involving an interlocutory judgment or a measure of inquiry; opinions; special forms of procedure (namely legal aid, taxation of costs, rectification, failure to adjudicate, application to set aside a judgment delivered by default, third-party proceedings, interpretation, revision, examination of a proposal by the First Advocate General to review a decision of the General Court, attachment procedure and cases concerning immunity); cases terminated by an order removing the case from the register, declaring that there is no need to give a decision or referring the case to the General Court; proceedings for interim measures and appeals concerning interim measures and interventions.

XV. Cases pending as at 31 December – Nature of proceedings (2016-2020) [1]

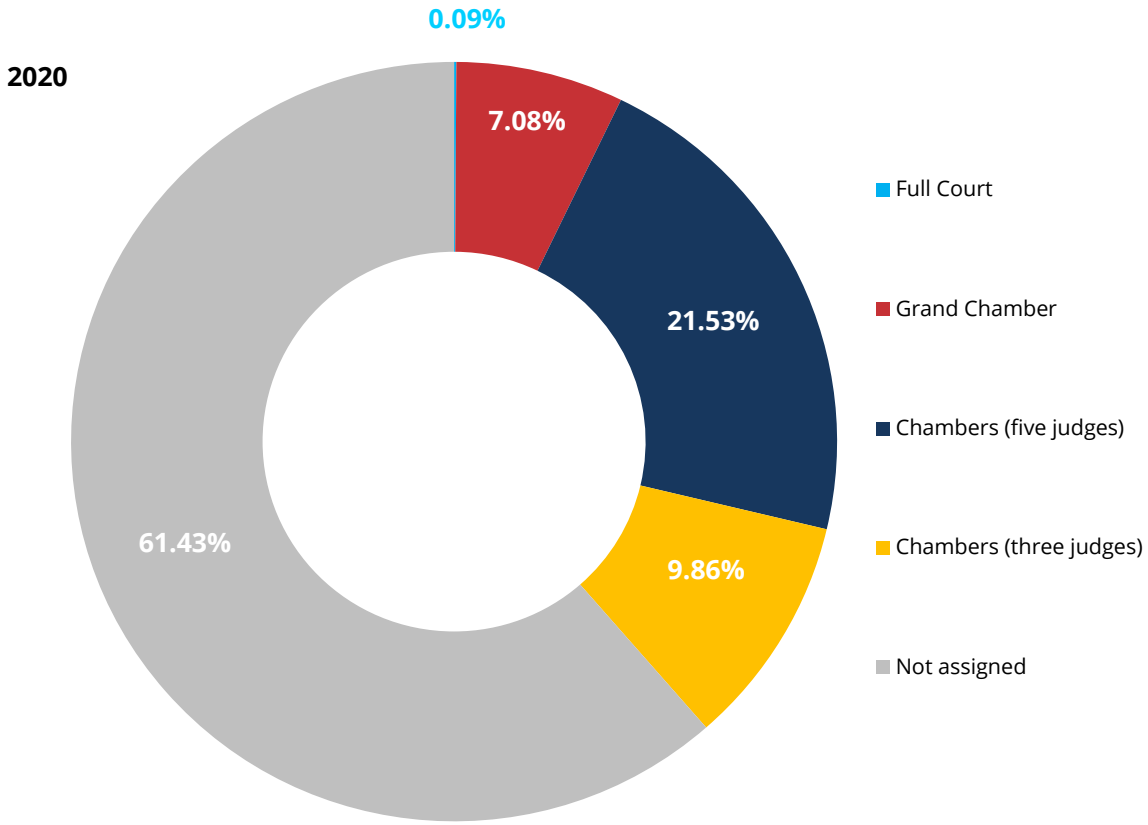


	2016	2017	2018	2019	2020
References for a preliminary ruling	575	661	709	749	771
Direct actions	58	67	70	69	69
Appeals	231	180	214	270	197
Special forms of procedure [2]	5	3	7	13	6
Requests for an opinion	3	1	1	1	2
Total	**872**	**912**	**1 001**	**1 102**	**1 045**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

2| The following are considered to be 'special forms of procedure': legal aid; taxation of costs; rectification; failure to adjudicate; application to set aside a judgment delivered by default; third-party proceedings; interpretation; revision; examination of a proposal by the First Advocate General to review a decision of the General Court; attachment procedure; cases concerning immunity.

XVI. Cases pending as at 31 December – Bench hearing action (2016-2020) [1]



	2016	2017	2018	2019	2020
Full Court	1		1		1
Grand Chamber	40	76	68	65	74
Chambers (five judges)	215	194	236	192	225
Chambers (three judges)	75	76	77	130	103
Vice-President	2	4	1	4	
Not assigned	539	562	618	711	642
Total	**872**	**912**	**1 001**	**1 102**	**1 045**

1| The figures given (gross figures) represent the total number of cases, without account being taken of the joinder of cases on the ground of similarity (one case number = one case).

XVII. Expedited procedures (2016-2020)

Requests for an expedited procedure [1]

	2016	2017	2018	2019	2020	Total
References for a preliminary ruling	20	30	33	50	40	**173**
Direct actions		1	3	3		**7**
Appeals	1		1	4	2	**8**
Special forms of procedure				1		**1**
Total	**21**	**31**	**37**	**58**	**42**	**189**

Requests for an expedited procedure – outcome [2]

	2016	2017	2018	2019	2020	Total
Granted	4	4	9	3	3	**23**
Not granted	12	30	17	56	34	**149**
Not acted upon [3]	4	1	3	1	3	**12**
Decision pending	4		8	6	8	**26**
Total	**24**	**35**	**37**	**66**	**48**	**210**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning a request for the expedited procedure, irrespective of the year in which such a request was made.

3| There was no need to give a formal ruling on the request because the case was removed from the register or completed by judgment or order.

XVIII. Urgent preliminary-ruling procedure (2016-2020)

Requests for the urgent preliminary-ruling procedure to be applied [1]

	2016	2017	2018	2019	2020	Total
Judicial cooperation in civil matters		5	5		2	**12**
Judicial cooperation in criminal matters	7	6	8	10	8	**39**
Police cooperation				4		**4**
Borders, asylum and immigration	5	4	5	5	6	**25**
Others			1	1	1	**3**
Total	**12**	**15**	**19**	**20**	**17**	**83**

Requests for the urgent preliminary-ruling procedure to be applied – outcome [2]

	2016	2017	2018	2019	2020	Total
Granted	9	4	12	11	11	**47**
Not granted	4	11	7	7	8	**37**
Decision pending				2		**2**
Total	**13**	**15**	**19**	**20**	**19**	**86**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning a request for the urgent procedure to be applied, irrespective of the year in which such a request was made.

XIX. Proceedings for interim measures (2016-2020)

Applications for interim measures [1]

	2016	2017	2018	2019	2020	Total
Agriculture	1			1		**2**
Competition			1	3		**4**
Environment	1	1				**2**
Industrial policy		1				**1**
Law governing the institutions			2			**2**
Principles of EU law			1		1	**2**
Public procurement		1				**1**
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)				1		**1**
Research and technological development and space	1					**1**
State aid			2	1	1	**4**
Transport					1	**1**
Total	**3**	**3**	**6**	**6**	**3**	**21**

Applications for interim measures – outcome [2]

	2016	2017	2018	2019	2020	Total
Granted	2	1	5	1	1	**10**
Not granted	3		3	4	2	**12**
Decision pending		2		1	1	**4**
Total	**5**	**3**	**8**	**6**	**4**	**26**

1| The figures mentioned in this table refer to the number of requests made during the year in question, irrespective of the year in which the relevant case was brought.

2| The figures mentioned in this table refer to the number of decisions taken, during the year in question, concerning an application for interim measures, irrespective of the year in which such an application was made.

XX. Appeals referred to in Article 58a of the Statute (2019-2020)

Appeals brought against a decision of the General Court concerning the decision of an independent board of appeal

	2019	2020	Total
European Union Intellectual Property Office	36	40	**76**
Community Plant Variety Office	2		**2**
Total	**38**	**40**	**78**

Decisions as to whether the appeal should be allowed to proceed [1]

	2019	2020	Total
Allowed to proceed			
Not allowed to proceed	27	37	**64**
Inadmissible	2	3	**5**
Not acted upon		1	**1**
Total	**29**	**41**	**70**

1| The figured in this table refer to the number of decisions taken during the year in question, irrespective of the year in which the request that the appeal be allowed to proceed was made.

XXI. General trend in the work of the Court (1952-2020) – New cases and judgments or opinions

Year	New cases [1]							Judgments/opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1953		4				4		
1954		10				10		2
1955		9				9	2	4
1956		11				11	2	6
1957		19				19	2	4
1958		43				43		10
1959		46			1	47	5	13
1960		22			1	23	2	18
1961	1	24			1	26	1	11
1962	5	30				35	2	20
1963	6	99				105	7	17
1964	6	49				55	4	31
1965	7	55				62	4	52
1966	1	30				31	2	24
1967	23	14				37		24
1968	9	24				33	1	27
1969	17	60				77	2	30
1970	32	47				79		64
1971	37	59				96	1	60
1972	40	42				82	2	61
1973	61	131				192	6	80
1974	39	63				102	8	63
1975	69	61			1	131	5	78
1976	75	51			1	127	6	88
1977	84	74				158	6	100
1978	123	146			1	270	7	97
1979	106	1 218				1 324	6	138
1980	99	180				279	14	132
1981	108	214				322	17	128
1982	129	217				346	16	185
1983	98	199				297	11	151
1984	129	183				312	17	165
1985	139	294				433	23	211
1986	91	238				329	23	174

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1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

Year	New cases [1]							Judgments/opinions [2]
	References for a preliminary ruling	Direct actions	Appeals	Appeals concerning interim measures or interventions	Requests for an opinion	Total	Applications for interim measures	
1987	144	251				395	21	208
1988	179	193				372	17	238
1989	139	244				383	19	188
1990	141	221	15	1		378	12	193
1991	186	140	13	1	2	342	9	204
1992	162	251	24	1	2	440	5	210
1993	204	265	17			486	13	203
1994	203	125	12	1	3	344	4	188
1995	251	109	46	2		408	3	172
1996	256	132	25	3		416	4	193
1997	239	169	30	5		443	1	242
1998	264	147	66	4		481	2	254
1999	255	214	68	4		541	4	235
2000	224	197	66	13	2	502	4	273
2001	237	187	72	7		503	6	244
2002	216	204	46	4		470	1	269
2003	210	277	63	5	1	556	7	308
2004	249	219	52	6	1	527	3	375
2005	221	179	66	1		467	2	362
2006	251	201	80	3		535	1	351
2007	265	221	79	8		573	3	379
2008	288	210	77	8	1	584	3	333
2009	302	143	105	2	1	553	1	376
2010	385	136	97	6		624	3	370
2011	423	81	162	13		679	3	370
2012	404	73	136	3	1	617		357
2013	450	72	161	5	2	690	1	434
2014	428	74	111		1	614	3	416
2015	436	48	206	9	3	702	2	399
2016	470	35	168	7		680	3	412
2017	533	46	141	6	1	727	3	466
2018	568	63	193	6		830	6	462
2019	641	41	256	10	1	949	6	491
2020	556	37	125	6	1	725	3	451
Total	**11 914**	**9 171**	**2 778**	**150**	**29**	**24 042**	**382**	**12 894**

1| The figures mentioned in this table relate to all the cases brought before the Court with the exception of special forms of procedure.

2| The figures mentioned in this column refer to the number of judgments or opinions delivered by the Court, with account being taken of the joinder of cases on the ground of similarity (a set of joined cases = one case).

XXII. General trend in the work of the Court (1952-2020) – New references for a preliminary ruling by Member State per year

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1961																			1											**1**
1962																			5											**5**
1963																1			5											**6**
1964												2							4											**6**
1965					4					2									1											**7**
1966																			1											**1**
1967	5				11					3						1			3											**23**
1968	1				4					1		1							2											**9**
1969	4				11					1						1														**17**
1970	4				21					2		2							3											**32**
1971	1				18					6		5				1			6											**37**
1972	5				20					1		4							10											**40**
1973	8				37					4		5				1			6											**61**
1974	5				15					6		5							7									1		**39**
1975	7			1	26					15		14				1			4									1		**69**
1976	11				28		1			8		12							14									1		**75**
1977	16			1	30		2			14		7							9									5		**84**
1978	7			3	46		1			12		11							38									5		**123**
1979	13			1	33		2			18		19				1			11									8		**106**
1980	14			2	24		3			14		19							17									6		**99**
1981	12			1	41					17		11				4			17									5		**108**
1982	10			1	36					39		18							21									4		**129**
1983	9			4	36		2			15		7							19									6		**98**
1984	13			2	38		1			34		10							22									9		**129**
1985	13				40		2			45		11				6			14									8		**139**
1986	13			4	18		4	2	1	19		5				1			16									8		**91**
1987	15			5	32		2	17	1	36		5				3			19									9		**144**
1988	30			4	34				1	38		28				2			26									16		**179**
1989	13			2	47		1	2	2	28		10				1			18			1						14		**139**
1990	17			5	34		4	2	6	21		25				4			9			2						12		**141**
1991	19			2	54		2	3	5	29		36				2			17			3						14		**186**
1992	16			3	62			1	5	15		22				1			18			1						18		**162**

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1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Others [1]	Total
1993	22			7	57		1	5	7	22		24				1			43			3						12		**204**
1994	19			4	44		2		13	36		46				1			13			1						24		**203**
1995	14			8	51		3	10	10	43		58				2			19	2		5					6	20		**251**
1996	30			4	66			4	6	24		70				2			10	6		6				3	4	21		**256**
1997	19			7	46		1	2	9	10		50				3			24	35		2				6	7	18		**239**
1998	12			7	49		3	5	55	16		39				2			21	16		7				2	6	24		**264**
1999	13			3	49		2	3	4	17		43				4			23	56		7				4	5	22		**255**
2000	15			3	47		2	3	5	12		50							12	31		8				5	4	26	1	**224**
2001	10			5	53		1	4	4	15		40				2			14	57		4				3	4	21		**237**
2002	18			8	59			7	3	8		37				4			12	31		3				7	5	14		**216**
2003	18			3	43		2	4	8	9		45				4			28	15		1				4	4	22		**210**
2004	24			4	50		1	18	8	21		48				1	2		28	12		1				4	5	22		**249**
2005	21		1	4	51		2	11	10	17		18				2	3		36	15	1	2				4	11	12		**221**
2006	17		3	3	77		1	14	17	24		34			1	1	4		20	12	2	3			1	5	2	10		**251**
2007	22	1	2	5	59	2	2	8	14	26		43			1		2		19	20	7	3	1		1	5	6	16		**265**
2008	24		1	6	71	2	1	9	17	12		39	1	3	3	4	6		34	25	4	1				4	7	14		**288**
2009	35	8	5	3	59	2		11	11	28		29	1	4	3		10	1	24	15	10	3	1	2	1	2	5	28	1	**302**
2010	37	9	3	10	71		4	6	22	33		49		3	2	9	6		24	15	8	10	17	1	5	6	6	29		**385**
2011	34	22	5	6	83	1	7	9	27	31		44		10	1	2	13		22	24	11	11	14	1	3	12	4	26		**423**
2012	28	15	7	8	68	5	6	1	16	15		65		5	2	8	18	1	44	23	6	14	13		9	3	8	16		**404**
2013	26	10	7	6	97	3	4	5	26	24		62	3	5	10		20		46	19	11	14	17	1	4	4	12	14		**450**
2014	23	13	6	10	87		5	4	41	20	1	52	2	7	6		23		30	18	14	8	28	4	3	8	3	12		**428**
2015	32	5	8	7	79	2	8	2	36	25	5	47		9	8	7	14		40	23	15	8	18	5	5	4	7	16	1	**436**
2016	26	18	5	12	84	1	6	6	47	23	2	62		9	8	1	15	1	26	20	19	21	14	3	6	7	5	23		**470**
2017	21	16	4	8	149	7	12	4	23	25	3	57		5	10	1	22		38	31	19	21	16	3	6	13	8	11		**533**
2018	40	20	12	3	78	2	12	3	67	41	3	68	1	5	6	4	29		35	35	31	15	23	2	6	6	7	14		**568**
2019	38	24	5	1	114	3	10	5	64	32	10	70	1	12	7	6	20	1	28	37	39	14	49	5	10	7	11	18		**641**
2020	36	28	9	6	139	3	5	2	30	21	4	44		17	7	3	18		18	50	41	17	20	2	6	7	6	17		**556**
Total	**955**	**189**	**83**	**202**	**2 780**	**33**	**130**	**192**	**621**	**1 073**	**28**	**1 627**	**9**	**94**	**75**	**105**	**225**	**4**	**1 094**	**643**	**238**	**220**	**231**	**29**	**66**	**135**	**158**	**672**	**3**	**11 914**

1| Case C-265/00, ***Campina Melkunie*** (Cour de justice Benelux/Benelux Gerechtshof).
Case C-196/09, ***Miles and Others*** (Complaints Board of the European Schools).
Case C-169/15, ***Montis Design*** (Cour de justice Benelux/Benelux Gerechtshof).

XXIII. General trend in the work of the Court (1952-2020) – New references for a preliminary ruling by Member State and by court or tribunal

			Total
Belgium	Cour constitutionnelle	44	
	Cour de cassation	100	
	Conseil d'État	101	
	Other courts or tribunals	710	**955**
Bulgaria	Върховен касационен съд	7	
	Върховен административен съд	28	
	Other courts or tribunals	154	**189**
Czech Republic	Ústavní soud		
	Nejvyšší soud	11	
	Nejvyšší správní soud	36	
	Other courts or tribunals	36	**83**
Denmark	Højesteret	37	
	Other courts or tribunals	165	**202**
Germany	Bundesverfassungsgericht	2	
	Bundesgerichtshof	267	
	Bundesverwaltungsgericht	155	
	Bundesfinanzhof	347	
	Bundesarbeitsgericht	50	
	Bundessozialgericht	77	
	Other courts or tribunals	1 882	**2 780**
Estonia	Riigikohus	15	
	Other courts or tribunals	18	**33**
Ireland	Supreme Court	41	
	High Court	47	
	Other courts or tribunals	42	**130**
Greece	Άρειος Πάγος	13	
	Συμβούλιο της Επικρατείας	62	
	Other courts or tribunals	117	**192**
Spain	Tribunal Constitucional	1	
	Tribunal Supremo	108	
	Other courts or tribunals	512	**621**
France	Conseil constitutionnel	1	
	Cour de cassation	148	
	Conseil d'État	153	
	Other courts or tribunals	771	**1 073**
Croatia	Ustavni sud		
	Vrhovni sud	2	
	Visoki upravni sud	1	
	Visoki prekršajni sud		
	Other courts or tribunals	25	**28**

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Italy	Corte Costituzionale	5	
	Corte suprema di Cassazione	173	
	Consiglio di Stato	225	
	Other courts or tribunals	1 224	**1 627**
Cyprus	Ανώτατο Δικαστήριο	4	
	Other courts or tribunals	5	**9**
Latvia	Augstākā tiesa (Senāts)	24	
	Satversmes tiesa	6	
	Other courts or tribunals	67	**94**
Lithuania	Konstitucinis Teismas	2	
	Aukščiausiasis Teismas	25	
	Vyriausiasis administracinis teismas	29	
	Other courts or tribunals	19	**75**
Luxembourg	Cour constitutionnelle	1	
	Cour de cassation	29	
	Cour administrative	33	
	Other courts or tribunals	42	**105**
Hungary	Kúria	35	
	Fővárosi Ítélőtábla	8	
	Szegedi Ítélötábla	4	
	Other courts or tribunals	178	**225**
Malta	Qorti Kostituzzjonali		
	Qorti tal-Appell		
	Other courts or tribunals	4	**4**
Netherlands	Hoge Raad	304	
	Raad van State	132	
	Centrale Raad van Beroep	71	
	College van Beroep voor het Bedrijfsleven	166	
	Tariefcommissie	35	
	Other courts or tribunals	386	**1 094**
Austria	Verfassungsgerichtshof	5	
	Oberster Gerichtshof	151	
	Verwaltungsgerichtshof	116	
	Other courts or tribunals	371	**643**
Poland	Trybunał Konstytucyjny	1	
	Sąd Najwyższy	41	
	Naczelny Sąd Administracyjny	56	
	Other courts or tribunals	140	**238**
Portugal	Supremo Tribunal de Justiça	17	
	Supremo Tribunal Administrativo	72	
	Other courts or tribunals	131	**220**
Romania	Înalta Curte de Casație și Justiție	23	
	Curtea de Apel	112	
	Other courts or tribunals	96	**231**

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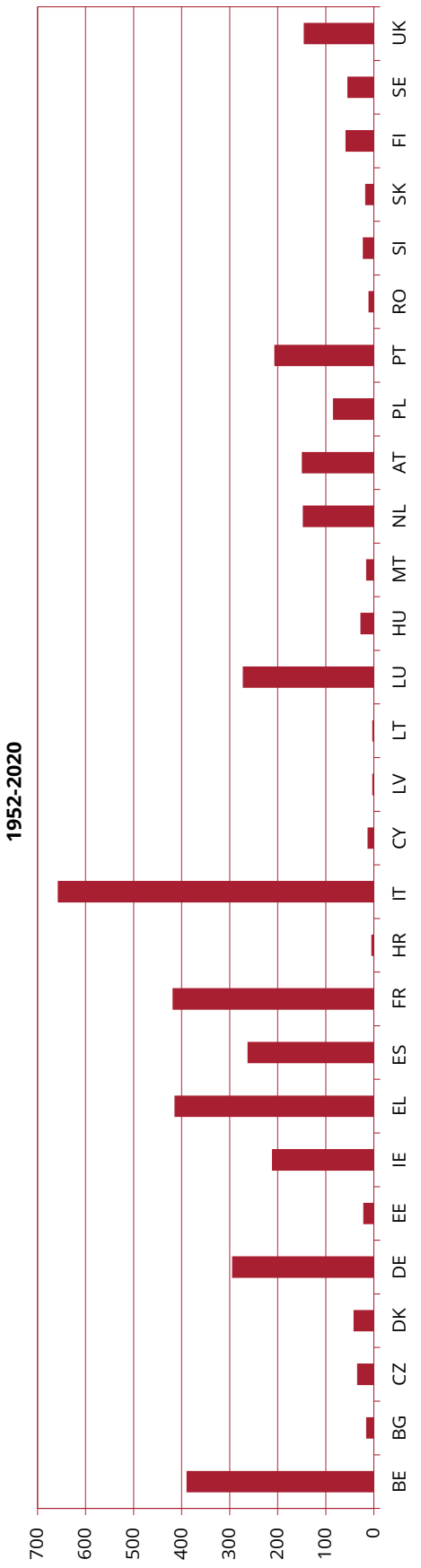
Slovenia	Ustavno sodišče	2	
	Vrhovno sodišče	19	
	Other courts or tribunals	8	**29**
Slovakia	Ústavný súd	1	
	Najvyšší súd	25	
	Other courts or tribunals	40	**66**
Finland	Korkein oikeus	27	
	Korkein hallinto-oikeus	67	
	Työtuomioistuin	5	
	Other courts or tribunals	36	**135**
Sweden	Högsta Domstolen	26	
	Högsta förvaltningsdomstolen	40	
	Marknadsdomstolen	5	
	Arbetsdomstolen	4	
	Other courts or tribunals	83	**158**
United Kingdom	House of Lords	40	
	Supreme Court	19	
	Court of Appeal	94	
	Other courts or tribunals	519	**672**
Others	Cour de justice Benelux/Benelux Gerechtshof [1]	2	
	Complaints Board of the European Schools [2]	1	**3**
Total			**11 914**

1| Case C-265/00, ***Campina Melkunie***.
Case C-169/15, ***Montis Design***.

2| Case C-196/09, ***Miles and Others***.

XXIV. General trend in the work of the Court (1952-2020) – Actions for failure to fulfil obligations brought against the Member States



	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK	Total
	390	16	35	42	295	22	212	415	263	419	5	658	13	3	3	273	28	16	148	150	85	207	11	23	18	59	55	146	**4 010**

XXV. Activity of the Registry of the Court of Justice (2016-2020)

Type of intervention	2016	2017	2018	2019	2020
Documents entered in the register of the Registry	93 215	99 266	108 247	113 563	107 697
Pages lodged by e-Curia [1]	–	–	153 977	217 687	166 614
Procedural documents lodged by e-Curia (percentage)	75%	73%	75%	80%	79%
Hearings convened and organised	270	263	295	270	157
Sittings for the delivery of Opinions convened and organised	319	301	305	296	269
Judgments, opinions and orders terminating the proceedings served on the parties	645	654	684	785	726
Minutes of hearings drawn up (oral submissions, Opinions and judgments)	1 001	1 033	1 062	1 058	877
Notices in the OJ concerning new cases	660	679	695	818	601
Notices in the OJ concerning completed cases	522	637	661	682	759

1| Reliable data unavailable for 2016 and 2017.

E Composition of the Court of Justice

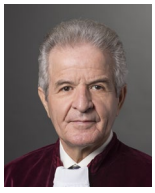

K. Lenaerts
President


R. Silva de Lapuerta
Vice-President


J.-C. Bonichot
President of the First Chamber


A. Arabadjiev
President of the Second Chamber


A. Prechal
President of the Third Chamber


M. Vilaras
President of the Fourth Chamber


E. Regan
President of the Fifth Chamber


M. Szpunar
First Advocate General


M. Ilešič
President of the Tenth Chamber


L. Bay Larsen
President of the Sixth Chamber


N.J. Cardoso da Silva Piçarra
President of the Ninth Chamber

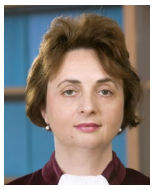

A. Kumin
President of the Seventh Chamber


N. Wahl
President of the Eighth Chamber


J. Kokott
Advocate General


E. Juhász
Judge


T. von Danwitz
Judge

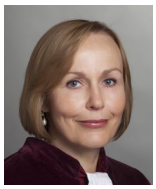

C. Toader
Judge


M. Safjan
Judge


D. Šváby
Judge


S. Rodin
Judge


F. Biltgen
Judge


K. Jürimäe
Judge

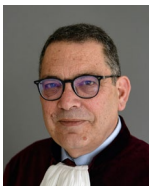

C. Lycourgos
Judge

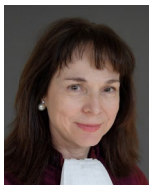

M. Campos Sánchez-Bordona
Advocate General


H. Saugmandsgaard Øe
Advocate General


M. Bobek
Advocate General


E. Tanchev
Advocate General


P.G. Xuereb
Judge


L.S. Rossi
Judge


G. Hogan
Advocate General


G. Pitruzzella
Advocate General


I. Jarukaitis
Judge


P. Pikamäe
Advocate General


N. Jääskinen
Judge


J. Richard de la Tour
Advocate General


A. Rantos
Advocate General


I. Ziemele
Judge


J. Passer
Judge


A. Calot Escobar
Registrar

I. Changes in the Composition of the Court of Justice in 2020

12 February 2020

A formal sitting took place at the Court of Justice on 12 February 2020, on the occasion of the departure from office of Christopher Vajda.

Formal sitting on 23 March 2020

By decision of 11 March 2020, the representatives of the governments of the Member States appointed, as Advocate General at the Court of Justice, for the period from 23 March 2020 to 6 October 2024, Jean Richard de la Tour, replacing Yves Bot, who died on 9 June 2019.

Upon taking up his duties, Mr Richard de la Tour took his oath in a ceremony held by videoconference on 23 March 2020 due to the exceptional circumstances of the public-health crisis.

Sitting on 10 September 2020

By decision of 2 September 2020, the representatives of the governments of the Member States appointed, as Advocate General at the Court of Justice, for the period from 7 September 2020 to 6 October 2021, Athanasios Rantos, replacing Eleanor Sharpston.

Mr Rantos took his oath in open court on 10 September 2020 during which judgments and Opinions of the Court of Justice were delivered.

Formal sitting on 6 October 2020

By decision of 2 September 2020, the representatives of the governments of the Member States appointed, as Judges at the Court of Justice, for the period from 7 September 2020 to 6 October 2024, Ineta Ziemele, replacing Egils Levits, and, for the period from 6 October 2020 to 6 October 2024, Jan Passer, replacing Jiří Malenovský.

On the occasion of, first, the departure from office of Mr Malenovský and, secondly, the taking of the oath and entry into office the new Members of the Court of Justice, a formal sitting took place at the Court of Justice on 6 October 2020.

II. Order of Precedence as at 31 December 2020

K. LENAERTS, President
R. SILVA DE LAPUERTA, Vice-President
J.-C. BONICHOT, President of the First Chamber
A. ARABADJIEV, President of the Second Chamber
A. PRECHAL, President of the Third Chamber
M. VILARAS, President of the Fourth Chamber
E. REGAN, President of the Fifth Chamber
M. SZPUNAR, First Advocate General
M. ILEŠIČ, President of the Tenth Chamber
L. BAY LARSEN, President of the Sixth Chamber
N. PIÇARRA, President of the Ninth Chamber
A. KUMIN, President of the Seventh Chamber
N. WAHL, President of the Eighth Chamber
J. KOKOTT, Advocate General
E. JUHÁSZ, Judge
T. von DANWITZ, Judge
C. TOADER, Judge
M. SAFJAN, Judge
D. ŠVÁBY, Judge
S. RODIN, Judge
F. BILTGEN, Judge
K. JÜRIMÄE, Judge
C. LYCOURGOS, Judge
M. CAMPOS SÁNCHEZ-BORDONA, Advocate General
H. Saugmandsgaard ØE, Advocate General
M. BOBEK, Advocate General
E. TANCHEV, Advocate General
P.G. XUEREB, Judge
L.S. ROSSI, Judge
G. HOGAN, Advocate General
G. PITRUZZELLA, Advocate General
I. JARUKAITIS, Judge
P. PIKAMÄE, Advocate General
N. JÄÄSKINEN, Judge
J. RICHARD DE LA TOUR, Advocate General
A. RANTOS, Advocate General
I. ZIEMELE, Judge
J. PASSER, Judge

A. CALOT ESCOBAR, Registrar

Chapter 2
General Court

A Activity of the General Court in 2020

By Mr **Marc van der Woude**, President of the General Court

2020 will forever be etched in our memories as the year of the Covid-19 pandemic. That health crisis, which struck the whole world and did not spare our host State, was a heavy blow for the General Court and for those working to fulfil its mission. The Members of the General Court, and also the officials and other staff who serve them on a daily basis, had, like all of our fellow citizens, to face unprecedented challenges in their personal and professional lives.

Since 13 March 2020, the Court has profoundly and continuously reviewed its internal working methods in order to adapt to the uncertainties of the crisis. Thanks, in particular, to the unfailing dedication and competence of the services of the institution and of its Registry, it transformed itself within a matter of weeks into a virtual working platform enabling the efficient accomplishment of all the functions necessary for the continuity of the public administration of justice. From the very first days of the outbreak, the Court placed the new constraints imposed on litigants at the centre of its judicial policy, first, by implementing a policy of time limits adapted to the health context and, secondly, by adopting measures allowing remote participation in hearings by means of a videoconferencing system. Nine months later, dozens of hearings have, for the first time, involved remote participants.

Naturally, for an international court made up, in its full composition, of 54 Judges from 27 Member States and different legal cultures, where the location of the proceedings and thus of the oral nature of hearings remains central, the crisis has had profound effects. The flow of debate cannot always be the same in the virtual world. In addition, a number of hearings could not take place as envisaged, in spite of the new videoconferencing capacities, and were therefore postponed, sometimes on several occasions. The figure of 748 cases closed reflects that situation. It must also be emphasised that, coming as it did six months after its triennial renewal of September 2019 and the completion of the final stage of the reform provided for in Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, [1] the pandemic has not yet allowed the Court to reap all the benefits of that reform and of the structural measures adopted in autumn 2019, notably in terms of specialisation of the Chambers in disputes relating to the civil service and to intellectual property.

However, 2020 is a source of satisfaction in numerous areas, foremost among these being the average duration of proceedings, which continues to fall and has reached a record duration of 15.4 months for all categories of cases and 18.1 months for cases closed by judgment. The objective of reducing the duration of proceedings set out in recital 5 of Regulation 2015/242 thus appears to have been largely achieved. In addition, the Court decided to refer a record number of 135 cases to extended formations, proof of a continuing intensification of judicial review. From a human point of view, the 14 new Judges who arrived in September 2019 and their cabinets have settled in remarkably well in spite of the health conditions with which we are all familiar. It should also be mentioned that the Court finalised the reorganisation of its Members' cabinets, with effect from 1 January 2021, by deciding that each Judge would have two legal secretaries and that each of the 10 Chambers would have three additional legal secretaries in order to optimise the allocation of its resources.

1| OJ 2015 L 341, p. 14.

In 2020 the General Court saw the departure of three of its Members, namely Judge I. Forrester on 31 January, owing to the withdrawal of the United Kingdom from the European Union, Judge I. Labucka on 25 February and Judge J. Passer, who joined the Court of Justice on 6 October 2020. Following their departure, the number of Judges actually sitting at the Court came, on 31 December 2020, to 49, whereas the Court had envisaged that its 10 Chambers would be organised on the basis of a composition of 54 Judges, 52 of whom would sit in eight Chambers of five Judges and two Chambers of six Judges. The present composition means, conversely, that, of the 10 Chambers, seven are composed of five Judges and three of only four Judges. On this last point, it should be noted that the Court is seriously affected by the renewal of a part of its Members every three years and by any delays in the nomination procedures at national level. Furthermore, following the reform of the judicial architecture of the European Union provided for by Regulation 2015/2422, the stability of the composition of the Court is of increased importance. It would therefore be desirable, in the interest of the European Union, but also of its Member States, for the Court to be able to welcome new Members as soon as possible.

While the pandemic will no doubt continue to weigh further on the judicial activity, 2021 must be the year in which the Court exploits the full potential of the reform provided for by Regulation 2015/2422. In that regard, the Report of 21 December 2020 on the functioning of the General Court, provided for in Article 3(1) of that regulation, constitutes a roadmap the conclusions of which the Court largely supports and the outlook of which the Court endorses, as is clear from its comments annexed to that report. It should also be noted that certain recommendations echo numerous measures that have recently been adopted or are already under consideration in order to strengthen in the short term the quality and rapidity of decisions. The matters thus being considered, which are essential for the future of the Court, will be completed without diverting the Court from its specific mission, conferred by European Union primary law, of offering individuals, within a reasonable time, effective judicial protection against the acts of the institutions. It is in this way that the Court partakes fully in ensuring respect for the principles of the rule of law in the European Union.

B Case-law of the General Court in 2020

Innovations in the case-law

By Vice-President **Savvas Papasavvas**

2020 will remain an unusual year in many respects. From a general point of view, the year was marked by the emergence of an unprecedented health crisis, but also by the withdrawal – now effective – of the United Kingdom from the European Union. From the General Court's point of view, it was also certainly an unusual year, as it had to find various solutions to maintain, in spite of the constraints, the richness of its discussions, the holding of its hearings, the quality of its judgments and the delivery of its judgments within a reasonable time. Although the total number of cases determined fell slightly, the tendency of the Chambers of the Court to take advantage of the opportunity provided by Article 50 of the Statute of the Court of Justice of the European Union to sit in Chambers of five Judges where the cases merit such treatment was confirmed. As regards the substantive issues addressed by the Court during the year, it must be stated that 2020 witnessed the emergence of a number of important innovations in the case-law.

Thus, the Court was called upon to deal for the first time with the consequences of the referendum of 23 June 2016 in which the citizens of the United Kingdom voted in favour of the withdrawal of their country from the European Union. In that regard, in the order in ***Schindler* v *Commission*** (T-627/19, EU:T:2020:335), made on 14 July 2020, the Court held that the European Commission had no power to adopt an act allowing United Kingdom nationals residing in Member States other than the United Kingdom to keep their European citizenship beyond the date of the withdrawal of their country from the European Union. That withdrawal also gave rise to the judgment in ***Brown* v *Commission*** (T-18/19, EU:T:2020:465), delivered on 5 October 2020, even though the principles which it established are applicable irrespective of the nationality of the official in question. On that occasion, the Court, ruling in the extended five-Judge composition, defined the circumstances in which an official who acquires the nationality of the country of employment during the course of his career could, on that ground, have his entitlement to the expatriate allowance withdrawn, in the light of the conditions for granting laid down in Article 4(1) of Annex VII to the Staff Regulations of Officials of the European Union.

In relation to access to documents, the Court held for the first time, in the judgment in ***Campbell* v *Commission*** (T-701/18, EU:T:2020:224), delivered on 28 May 2020, that the obligation for the Commission to identify the documents requested was a precondition of the application of a general presumption of confidentiality by the institution concerned. By that judgment, the Court, ruling in extended composition, annulled the Commission decision refusing to grant the applicant access to the documents relating to Ireland's compliance with its obligations under three framework decisions of the Council of the European Union relating to the area of freedom, security and justice. The Court thus considered that, by not identifying in the contested decision the documents covered by the applicant's request for access, the Commission had misapplied the general presumption of confidentiality applicable to documents concerning an EU Pilot Procedure. It concluded that, in so doing, the Commission had committed an error of law in the application of the exception relating to the protection of the purpose of inspections, investigations and audits within the meaning of the third indent of Article 4(2) of Regulation (EC) No 1049/2001. [1]

1| 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).

As regards economic and monetary policy, and more particularly the prudential supervision of credit institutions, the Court, in the judgment in ***VQ* v *ECB*** (T-203/18, EU:T:2020:313), delivered on 8 July 2020, heard the first action against a decision of the European Central Bank (ECB) imposing a penalty on a credit institution on the basis of Article 18(1) of Regulation (EU) No 1024/2013. [2] On that occasion, the Court considered that, in that case, the conditions were satisfied for the ECB to adopt a decision imposing a fine in the amount of EUR 1 600 000 on the applicant on the ground that the applicant, between 1 January 2014 and 7 November 2016, had not complied with the obligation to obtain the permission of the competent authority before repurchasing Common Equity Tier 1 instruments, provided for by Regulation (EU) No 575/2013. [3] In addition, it held that the ECB had been right to consider that the applicant did not meet the conditions laid down in Regulation (EU) No 468/2014 [4] for publication to be done anonymously and had therefore published on its website, without anonymising the applicant's name, the fine imposed, pursuant to the provisions of Regulation No 1024/2013. In the judgment in ***Crédit agricole* v *ECB*** (T-576/18, EU:T:2020:304), delivered on the same day, on the other hand, the Court upheld the action brought by Crédit agricole SA, a credit institution subject to prudential supervision, solely in so far as the ECB had imposed on it a fine of EUR 4 300 000. In so doing, the Court considered that the factors taken into account to determine the amount of the fine were not stated in the initial decision imposing that fine and that that decision was therefore vitiated by an inadequate statement of reasons which, pursuant to settled case-law, could not be remedied by the subsequent communication of the missing information.

Furthermore, in the field of the civil service, the Court, in the judgment in ***Aquino and Others* v *Parliament*** (T-402/18, EU:T:2020:13), delivered on 29 January 2020, ruled on the legality of the decision of 2 July 2018 by which the Director-General of Personnel of the European Parliament had requisitioned, for 3 July 2018, interpreters and conference interpreters, among which were certain of the applicants, even though they were on strike. Relying on the Charter of Fundamental Rights of the European Union, and in particular on Article 52 thereof, the Court considered that the requisition measures at issue represented a limitation of the right to strike that was not provided for by law. It therefore annulled the contested decision.

In the judgment in ***International Skating Union* v *Commission*** (T-93/18, EU:T:2020:610), delivered on 16 December 2020, the Court examined for the first time a Commission decision finding that rules adopted by an international sports federation restricted competition. In addition, the judgment addresses for the first time the question whether the fact that the Court of Arbitration for Sport has exclusive jurisdiction to review the legality of the decisions adopted by a sports federation (without any possibility of a subsequent full review before a court of a Member State) and the fact that recourse to such arbitration is mandatory constitute circumstances liable to reinforce a restriction of competition.

2| 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).

3| Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1).

4| 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 (SSM Framework Regulation) (ECB/2014/17) (OJ 2014 L 141, p. 1).

Lastly, in the judgment in ***Portugal* v *Commission*** (T-292/18, EU:T:2020:18), delivered on 30 January 2020, the Court dealt for the first time with the concept of 'national court' within the meaning of Articles 32 and 33 of Regulation (EC) No 1290/2005 [5] and Article 54 of Regulation (EU) No 1306/2013. [6] In order to dismiss the action before it, the Court considered that the competent department of the Portuguese tax authorities in question could not be classified as a 'national court' since it did not carry out judicial functions, but merely functions of an administrative nature, that it was not charged with resolving disputes or monitoring the legality of the debt certificate issued by the Portuguese paying agency and, moreover, that it did not meet the requirement of independence.

All in all, the case-law of the General Court in 2020, as intense as it is rich, reflects this exceptional year marked, in particular, by a health crisis, which has already raised and will undoubtedly again raise numerous legal questions on which the Court will have to adjudicate in the coming years.

5| Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

6| Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 13).

I. Judicial proceedings

1. *Locus standi*

By the orders in ***Nord Stream 2* v *Parliament and Council*** (T-526/19, under appeal, [1] EU:T:2020:210) and ***Nord Stream* v *Parliament and Council*** (T-530/19, EU:T:2020:213), made on 20 May 2020, the Court dismissed as inadmissible the actions brought by Nord Stream 2 AG and Nord Stream AG, respectively, seeking annulment of Directive 2019/692. [2] [3]

Nord Stream AG is a company governed by Swiss law in which the Russian company PJSC Gazprom has a 51% shareholding and which owns and operates the Nord Stream (commonly known as Nord Stream 1) pipeline which ensures the flow of gas between Vyborg (Russia) and Lubmin (Germany), near Greifswald (Germany). The construction of that pipeline was completed in 2012, and it is to be operated for a period of 50 years.

Nord Stream 2 AG is a company governed by Swiss law wholly owned by the Russian public joint stock company Gazprom. It is responsible for the planning, construction and operation of the Nord Stream 2 pipeline, which runs parallel to the Nord Stream 1 pipeline.

On 17 April 2019, the European Parliament and the Council of the European Union adopted Directive 2019/692 amending Directive 2009/73 concerning common rules for the internal market in natural gas. [4] That directive entered into force on 23 May 2019 and required the Member States fulfilling the criteria set out in Article 2 thereof, including, in particular, the Federal Republic of Germany, to adopt the national measures necessary to transpose it by 24 February 2020 at the latest.

From the entry into force of the amending directive, pipeline operators such as Nord Stream AG and Nord Stream 2 AG now have, potentially, a part of their gas transmission lines, in that instance the part located between a Member State and a third State up to the territory of the Member States or the territorial sea of that Member State, made subject to Directive 2009/73 and the provisions of national legislation transposing that directive. This means that those operators have, inter alia, an obligation to unbundle transmission systems and transmission system operators and to introduce a system of non-discriminatory third-party access to gas transmission and distribution systems on the basis of published tariffs.

By its orders, the Court upheld the pleas of inadmissibility raised by the Parliament and the Council pursuant to Article 130(1) of its Rules of Procedure, and, accordingly, dismissed the actions as inadmissible, thereby rendering the applications to intervene submitted by Estonia, Latvia, Lithuania, Poland and the European Commission devoid of purpose.

1| Case C-348/20 P, ***Nord Stream 2* v *Parliament and Council***.

2| Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (OJ 2019 L 117, p. 1) ('the amending directive').

3| In Case T-526/19, the action brought by Nord Stream 2 AG sought annulment of the amending directive in its entirety, whereas, in Case T-530/19, the action brought by Nord Stream AG sought annulment of a provision of that directive requiring the national regulatory authorities to decide on certain requests for derogation by 24 May 2020 at the latest.

4| Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211, p. 94).

The Court held, in the first place, that Nord Stream 2 AG and Nord Stream AG were not directly concerned by the amending directive.

The Court noted, in that regard, that it was only through the intermediary of the national measures transposing that directive that the Member States were required to adopt by 24 February 2020 at the latest that operators such as those who had brought the actions in question would be or were subject, under the conditions agreed on by those Member States, to obligations under Directive 2009/73. However, in that instance, first, regarding the Federal Republic of Germany, in whose territory the sections of the Nord Stream and Nord Stream 2 pipelines concerned were located, there were no such national transposing measures on the date the actions were brought. Secondly, the Member States had a margin of discretion in implementing the provisions of the amending directive.

The amending directive enables the national regulatory authorities to grant exemptions or derogations from certain provisions of Directive 2009/73, as amended, to major new gas infrastructure, on the one hand, and to gas transmission lines between the Member States and third countries completed before 23 May 2019, on the other. The Court observed that it was for the Member States to adopt national measures enabling the operators concerned to ask to benefit from those derogations, determining precisely the conditions for obtaining those derogations in the light of the general criteria laid down by Article 49a of Directive 2009/73, as amended, and regulating the procedure in such a way as to enable their national regulatory authorities to decide on such requests within the period laid down by the amending directive, namely until 24 May 2020. In addition, for the purpose of implementing those conditions, the national regulatory authorities had a wide discretion as regards the grant of such derogations and any specific conditions to which those derogations may be subject.

The Court also specified that, although, now, the applicants' activities were partly governed by EU law, in that instance by Directive 2009/73, as amended, that fact was in any event simply the result of their choice to develop and maintain their activity in the territory of the European Union, in that instance in the territorial sea of one of the Member States of the European Union. However, the amending directive, as such and since its entry into force, had not produced immediate and concrete effects on the legal situation of operators such as the applicants and, a fortiori, not before the expiry of the deadline for its transposition.

In Case T-530/19, the Court held, in the second place, that Nord Stream AG was also not individually concerned by the amending directive.

In that regard, the Court noted, in particular, that Nord Stream AG did not have a right to operate and/or continue to operate the Nord Stream dual pipeline system free from any regulatory constraints of the European Union, at the very least as regards the part of that gas transmission line located in the territory of the European Union, in that instance in the territorial sea of a Member State.

The Court concluded from this that the fact, highlighted by Nord Stream AG, that, when the amending directive was adopted, that company was part of a limited, identified or identifiable, circle of operators concerned by the extension of the territorial and/or material scope of Directive 2009/73 did not permit a finding that it was individually concerned by the amending directive, given that the application of that directive was subject to objective criteria defined by the EU legislature, including the criterion requiring gas transmission lines in respect of which certain derogations had been requested to have been completed and operational by 23 May 2019, the date on which it entered into force.

In Case T-526/19, the Court also specified, in response to the line of argument alleging infringement of the right to an effective judicial remedy, that it was open to the operator in question to request a derogation from the competent regulatory authority, in that instance the German regulatory authority, and, if appropriate,

to challenge that authority's decision before a German court by claiming that the amending directive was invalid and causing that court to put questions to the Court of Justice in that regard by way of questions referred for a preliminary ruling.

In that same case, the Court also upheld the objection raised by the Council pursuant to Article 130(2) of the Rules of Procedure, as well as an additional request from that institution, both of which sought the removal from the file of documents which had been produced by Nord Stream 2 AG in connection with its action without the authorisation of the institution concerned, whether as author or addressee. The documents in question were an opinion from the Council's Legal Service, recommendations made by the Commission and addressed to the Council for the adoption of a decision concerning international negotiations with a third country, and, regarding the second procedural issue, comments from the Federal Republic of Germany sent to the permanent representatives of the Council in the context of the legislative procedure for adopting the amending directive.

In deciding on those procedural issues, the Court, in that instance, upheld the Council's requests, drawing on the provisions of Regulation No 1049/2001, [5] given that the fact that they are not applicable does not preclude recognition of the fact that they have a certain indicative value according to the recent case-law of the Court of Justice. [6]

It thus found, inter alia, concerning the documents to which the Council had refused to grant the access sought by one of Nord Stream 2's employees, that the Council was fully entitled, first, to rely on the protection of legal advice, and, secondly, to consider that disclosure of the recommendations referred to above would specifically and actually undermine the protection of the public interest as regards the international relations of the European Union.

Concerning the comments made by the Federal Republic of Germany in the context of the legislative procedure, the Court noted that, although the applicant had suggested that it had received those documents from a permanent representative of a Member State within the Council, it had nonetheless failed to indicate which one; nor had it relied on the consent of the permanent representative of the Federal Republic of Germany in his capacity as the author of those documents. Lastly, it also did not appear, for the purposes of Regulation No 1049/2001, that that Member State had tacitly or explicitly given its consent to those comments being sent to the applicant (Nord Stream 2) either before or after the partial refusal by the Council to grant the requests from the applicant's employee.

By its order of 10 September 2020, ***Cambodia and CRF* v *Commission*** (T-246/19, EU:T:2020:415), the Court, ruling in extended composition, adjudicated in a case concerning the regulation applying a scheme of tariff preferences, [7] under which the European Union grants developing countries preferential access to its market in the form of reductions in the normal Common Customs Tariff duties, which consists of a general regime and two special regimes. The 'Everything But Arms' regime ('the EBA regime') is a special regime for the least developed countries.

5| 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).

6| Judgment of the Court of Justice of 31 January 2020, ***Slovenia* v *Croatia*** (C-457/18, EU:C:2020:65).

7| Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (OJ 2012 L 303, p. 1).

Under the EBA regime, imports into the European Union of Indica rice originating in Cambodia and Myanmar/Burma ('the product concerned') benefited from a full suspension of Common Customs Tariff duties. Following a request from certain Member States seeking the adoption of safeguard measures in respect of the product concerned, the Commission initiated a safeguard investigation and concluded that that product was imported in volumes and at prices that were causing serious difficulties to the EU industry. The Commission decided, in adopting Implementing Regulation 2019/67 [8] ('the contested regulation'), to reintroduce temporarily the Common Customs Tariff duties on imports of the product concerned and introduced a progressive reduction in the rate of duty applicable over a period of three years.

The Kingdom of Cambodia and the Cambodia Rice Federation (CRF), an association that defends the interests of the Cambodian rice industry, brought an action before the Court for annulment of the contested regulation and the Commission raised a plea of inadmissibility. In support of its plea of inadmissibility, the Commission claimed, primarily, that the Kingdom of Cambodia and the CRF do not satisfy the requirements for standing to bring proceedings for the purposes of the fourth paragraph of Article 263 TFEU. In the alternative, the Commission submitted that the Kingdom of Cambodia and the CRF have no personal interest in bringing proceedings against the contested regulation.

However, the Court dismissed that plea of inadmissibility.

As regards standing to bring proceedings, the Court recalled that, under the fourth paragraph of Article 263 TFEU, any natural or legal person has standing to bring proceedings for annulment of an act which is not addressed to them, where that act is of direct and individual concern to them or, in the specific case of a regulatory act not entailing implementing measures, if that act is of direct concern to them. In that case, without ruling on whether the contested regulation constitutes a regulatory act not entailing implementing measures, the Court examined whether the Kingdom of Cambodia and the CRF could be classified as natural or legal persons directly and individually concerned by the contested regulation, which was not addressed to them.

In that regard, the Court, in the first place, confirmed that the expression 'any natural or legal person' in the fourth paragraph of Article 263 TFEU must be understood as also covering States which are not members of the European Union, such as the Kingdom of Cambodia. Such a purposive interpretation is consistent with the principle of effective judicial protection and the objective of that provision, which is to grant adequate judicial protection to all persons, natural or legal, who are directly and individually concerned by acts of the institutions of the European Union. In addition, although non-Member States may not claim the status of litigant conferred on the Member States by the EU system, they may nevertheless bring proceedings under the right of action conferred on legal persons. Moreover, neither the fourth paragraph of Article 263 TFEU nor any other provision of primary law excludes third States from the right to bring an action for annulment.

In the second place, the Court found that the Kingdom of Cambodia and the CRF, in so far as the latter is acting on behalf of one of its exporting members which was identified by the Commission in the contested regulation and of its exporting members identified and concerned by the procedure which led to the adoption of that regulation, are directly and individually concerned by that regulation, within the meaning of the fourth paragraph of Article 263 TFEU.

In accordance with settled case-law, direct concern requires, first, that the contested measure directly affects the legal situation of the natural or legal person and, secondly, that it leaves no discretion to the addressees who are entrusted with the task of implementing it. By temporarily terminating the preferential access to

8| Implementing Regulation (EU) 2019/67 of 16 January 2019 imposing safeguard measures with regard to imports of Indica rice originating in Cambodia and Myanmar/Burma (OJ 2019 L 15, p. 5).)

the EU market enjoyed, on the one hand, by the Kingdom of Cambodia as a country benefiting from a full suspension of Common Customs Tariff duties and, on the other hand, by exporting members of the CRF which benefited from such preferential access to the EU market by means of a special scheme of tariff preferences, the contested regulation changes both the legal and the economic conditions under which the marketing of Indica rice originating in Cambodia takes place on the EU market. The contested regulation therefore directly and substantially affects the legal position of the Kingdom of Cambodia and that of the members of the CRF identified or concerned. Furthermore, while it is true that the contested regulation lays down measures that apply primarily to importers established in the European Union, those measures have the effect of limiting the access of the Cambodian State and the exporting members of the CRF to the EU market, without the Member States having any discretion of their own in that regard.

According to the case-law, individual concern arises where a natural or legal person's legal situation is affected by the act in question by reason of certain attributes peculiar to him or her, or by reason of a factual situation which differentiates him or her from all other persons and thereby distinguishes him or her individually in the same way as the addressee of such a decision. In that regard, the Court pointed out that the legislative nature of a contested act does not preclude it from being of direct and individual concern to certain interested legal or natural persons. Therefore, the fact that the contested regulation seeks to reintroduce the Common Customs Tariff duties with respect to all imports of the product concerned into the European Union does not in fact make it impossible for the Kingdom of Cambodia, or for the members of the CRF identified or concerned, to be individually concerned by that regulation.

In that case, the individual concern of the Kingdom of Cambodia results from the fact that, as a beneficiary country of the EBA regime, identified in the contested regulation, which played an active part in the procedure leading to the adoption of the contested regulation, and in respect of which the consequences of the safeguard measures were taken into account for the purpose of setting the Common Customs Tariff duties, it forms part of a closed class of operators and is in a situation which is differentiated from that of any other person. The same applies to the members of the CRF, exporters of Indica rice originating in Cambodia to the European Union, since they were expressly named in the contested regulation and participated in the procedure leading to the adoption of that regulation, in which information relating to their business activities was used to impose the safeguard measures against them and for which the consequences of those measures were taken into account for the purpose of setting the Common Customs Tariff duties, irrespective of the fact that the safeguard measures were introduced by reference to the Kingdom of Cambodia and not by reference to those exporters.

As regards their interest in bringing proceedings, the Court concluded that the Kingdom of Cambodia and the CRF have an interest in seeking the annulment of the contested regulation. The annulment of the Common Customs Tariff duties reintroduced by that regulation on imports into the European Union of Indica rice originating in Cambodia is liable to procure an advantage to the Kingdom of Cambodia and the members of the CRF identified in or concerned by the procedure which led to the adoption of that regulation.

2. Breach of essential procedural requirements

By its judgment of 23 September 2020, ***Landesbank Baden-Württemberg* v *SRB*** (T-411/17, under appeal, [9] EU:T:2020:435), delivered by a Chamber ruling in extended composition, the Court annulled the decision of the Single Resolution Board (SRB) [10] determining the 2017 *ex ante* contributions to the Single Resolution Fund (SRF), in so far as that decision concerns the applicant, Landesbank Baden-Württemberg, a German credit institution.

The case was brought in the context of the second pillar of the Banking Union, concerning the Single Resolution Mechanism established by Regulation No 806/2014. [11] In particular, it concerns the SRF established by that regulation. [12] The SRF is funded by the contributions of institutions raised at national level by way of, inter alia, *ex ante* contributions. [13] By decision of 11 April 2017, the SRB, pursuant to Regulation No 806/2014, adopted the contested decision, determining the amount of the 2017 *ex ante* contribution in respect of each institution, including the applicant, to be transferred to the SRF. By assessment notice of 21 April 2017, the German resolution authority informed the applicant of that decision and set out the amount to be paid. Disputing that decision in several respects, the applicant brought the present action before the Court.

First of all, regarding *locus standi*, the Court held that, although the decisions of the SRB on the calculation of the *ex ante* contributions to the SRF are addressed, in accordance with the applicable legislation, to the national resolution authorities, those decisions are, unquestionably, of direct and individual concern to the institutions which owe those contributions. It follows that the applicant has standing to bring an action for annulment of the decision of the SRB.

Next, after pointing out that the Courts of the European Union are required to raise of their own motion the plea relating to matters of public policy alleging breach of essential procedural requirements, and that such a breach includes, inter alia, the failure to authenticate the contested act and an absence of or inadequate statement of reasons, the Court went on to assess the requirement that the contested decision be authenticated.

In that regard, it held that, in that case, that requirement is not met, as the SRB did not produce any evidence that the annex to the contested decision, containing the amounts of the *ex ante* contributions and therefore constituting an essential component of that decision, was authenticated. More specifically, the Court emphasised, inter alia, that, since that annex is an electronic document, it could not have been signed except electronically. However, the SRB did not produce any version of the annex with such a signature, even though that annex is in no way inextricably linked to the text of the contested decision signed by hand by the president of the SRB. The Court also rejected the other arguments of the SRB seeking to show that the annex had been authenticated by other means.

9| Cases C-584/20 P, ***Commission* v *Landesbank Baden-Württemberg and SRB***, and C-621/20 P, ***SRB* v *Landesbank Baden-Württemberg***.

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

11| 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).

12| Article 67(1) of Regulation No 806/2014.

13| Article 67(4) of Regulation No 806/2014.

After upholding the plea alleging infringement of the requirement that acts be authenticated, the Court considered it appropriate to rule on the pleas relied on by the applicant alleging infringement of the obligation to state reasons, infringement of the right to effective judicial protection and illegality of certain provisions of Delegated Regulation 2015/63, [14] examining those pleas together.

The Court noted that the contested decision contained barely any information regarding the calculation of the applicant's contribution, beyond the explanations in general terms contained in the text of the decision. As for the other document referred to, concerning the details of the calculation of the *ex ante* contributions, on the assumption that it was in fact created by the SRB, it did not contain any information sufficient to verify the accuracy of the applicant's contribution. The Court did not dispute the confidential nature, relied on by the SRB, of the data relating to the other institutions taken into account for the purposes of calculating that contribution. However, it noted that, to the extent that the calculation of the applicant's contribution was based interdependently on those data, that calculation was inherently opaque. The Court concluded that the method of calculation applied adversely affects the applicant's ability to dispute the contested decision effectively.

In that case, after having set out the case-law according to which (i) the obligation to state reasons applies to all acts which may be the subject of an action for annulment, (ii) the obligation to preserve professional secrecy cannot justify deficiencies in the statement of reasons and (iii) the obligation to preserve business secrets cannot be given so wide an interpretation that the obligation to provide a statement of reasons is thereby deprived of its essential content, the Court held that the statement of reasons given to the applicant does not enable it to verify the amount of its contribution, although that is the essential part of the contested decision in so far as the applicant is concerned. The decision puts the applicant in a position where it cannot know whether that amount has been calculated correctly or whether it should dispute the amount before the Court, without however being able, as it is nonetheless required to do in the context of a legal challenge, to identify, with regard to that amount, the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded.

Lastly, as regards the plea of illegality raised by the applicant with regard to Delegated Regulation 2015/63, the Court, having regard to the Commission's argument that it cannot thus dispute the legality of the contested decision since the method of calculation stemmed from Regulation No 806/2014 and Directive 2014/59, [15] in respect of which the applicant did not raise a plea of illegality, assessed the method of calculation. It concluded that the fact that the calculation of the applicant's *ex ante* contribution is opaque and that the applicant is therefore not in a position to verify its accuracy is a consequence, at least in part, of the method of calculation defined by the Commission itself in Delegated Regulation 2015/63, without that method having been imposed on it by the legislature. The Court held that the infringement of the obligation to state reasons stemmed, in respect of the part of the calculation of the *ex ante* contribution relating to the risk adjustment, from the illegality of certain provisions [16] of that regulation.

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

15| 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).

16| Articles 4 to 7 and 9 of and Annex I to Delegated Regulation 2015/63.

The Court added that, in any event, since the requirement to provide a sufficiently specific statement of reasons, enshrined in Article 296 TFEU, is one of the fundamental principles of EU law, compliance with which it is for a court to ensure by, of its own motion if need be, raising an issue of failure to fulfil that obligation and that, in breach of that obligation, the applicant does not have sufficient information to verify the accuracy of its contribution, the SRB cannot remedy such a breach by relying on secondary legislation.

Having regard to the foregoing considerations, the Court held that the contested decision must also be annulled on the ground that the obligation to state reasons has been infringed, as has the right to effective judicial protection.

3. Default procedure

In the judgment in ***Malacalza Investimenti* v *ECB*** (T-552/19, EU:T:2020:294), delivered on 25 June 2020, the Court annulled the decision of the European Central Bank (ECB), [17] which, pursuant to Decision 2004/258, [18] had refused to grant the applicant, Malacalza Investimenti Srl, access to documents relating to the decision of the Governing Council of the ECB of 1 January 2019 placing Banca Carige SpA under temporary administration.

The applicant, a company incorporated under Italian law, is the main shareholder of Banca Carige, of which it directly holds 27.555% of the share capital and of which it appointed the majority of the members of the board of directors. Following the resignation on 22 December 2018 of several members of the board of directors of Banca Carige, the ECB placed that company under temporary administration by decision of 1 January 2019. On 15 January 2019, the applicant submitted to the ECB an application for access [19] to several documents relating to that ECB decision. The decision of 1 January 2019 was not published and the reasons for it were not known to the applicant. By decision of 13 March 2019, the ECB rejected the application for access in its entirety. On 8 April 2019, the applicant submitted a confirmatory application, [20] requesting a review of the ECB decision of 13 March 2019. In its confirmatory application, the applicant pointed out that extracts from a document presented as the decision of 1 January 2019 had been published, in the form of photographs, on the website of an Italian daily newspaper. It therefore submitted that the extracts contained in them could no longer be regarded as confidential since, having been published, they were now in the public domain.

On 12 June 2019, the ECB rejected the applicant's confirmatory application in its entirety. The ECB first took the view that some of the documents came within the exception under Article 4(1)(c) of Decision 2004/258, holding that that exception contained a general presumption of confidentiality covering all cases coming within the scope of its prudential supervision task. Secondly, with respect to the remaining documents requested, the ECB justified the refusal to grant access on the basis of the exception under Article 4(1)(c) of Decision 2004/258, in conjunction with that under the first indent of Article 4(2) of that decision, by stating that the disclosure of documents obtained or prepared in the context of the ongoing supervision of Banca Carige could harm the commercial interests of that company, since the information contained in those documents was not publicly known and reflected an essential element of that company's current commercial

17| ECB Decision LS/LdG/19/185 of 12 June 2019.

18| Decision 2004/258/EC of the ECB of 4 March 2004 on public access to ECB documents (OJ 2004 L 80, p. 42).

19| Under Article 6 of Decision 2004/258.

20| Under Article 7(2) of Decision 2004/258.

position. Having identified no overriding public interest that would justify disclosure of the documents in question, the ECB rejected the request for access to those documents without carrying out a concrete and individual examination of each of them.

Adjudicating on an action for annulment of that decision and an application for an expedited procedure, the Court first held that a single extension on account of distance is applied for the purposes of calculating the period for lodging the defence when an application for an expedited procedure is rejected. The Court found that the period for lodging the defence, which, if it had granted the applicant's application for an expedited procedure, would have expired on 30 September 2019, had expired on 30 October 2019 and that, in that instance, the ECB had lodged the defence on 6 November 2019, that is to say, seven days after the expiry of the prescribed period. Under the Rules of Procedure of the General Court, [21] where a defendant on whom an application initiating proceedings has been duly served has failed to respond to the application within the prescribed time limit, the applicant may apply to the Court for judgment by default. Therefore, the Court is to give judgment in favour of the applicant, unless it is manifestly clear that the Court has no jurisdiction to hear and determine the action or that the action is manifestly inadmissible or manifestly lacking any foundation in law. [22]

In that regard, after determining that it did not manifestly lack jurisdiction to rule on the present action and that the action could not be regarded as being manifestly inadmissible, the Court recognised that several arguments submitted by the applicant were not manifestly lacking any foundation in law.

In support of its action, the applicant rightly submitted, first, that the existence of such a general presumption of confidentiality, derived from Article 4(1)(c) of Decision 2004/258, which, according to the ECB, allows the ECB to keep confidential decisions by which it has placed a credit institution under temporary administration, had not hitherto been recognised or established by the case-law. In addition, the applicant submitted that the provisions referred to by the ECB in the contested decision [23] could not be interpreted as imposing an absolute obligation of confidentiality on the ECB. On the contrary, according to the applicant, under those provisions, in certain situations, the disclosure of information could be justified. Secondly, the applicant submitted that an examination of the extracts of the decision of 1 January 2019 which had been published made it possible to establish that the content of that decision was not confidential, since it concerned information which Banca Carige, as a company listed on the regulated markets, was required to publish. According to the applicant, that fact had an impact on the assessment of the risks presented by disclosure.

In the light of the foregoing considerations, the Court decided to grant the applicant the form of order which it sought and, consequently, to annul the contested decision.

21| Article 123(1) of the Rules of Procedure of the General Court.

22| Article 123(3) of the Rules of Procedure of the General Court.

23| That is to say, Article 27 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), Article 53 et seq. 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 Article 84 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).

II. Institutional law

In 2020, in the vast area of institutional law, the Court had occasion to rule, first, on an action concerning the Commission's refusal to adopt a decision maintaining the European citizenship of certain United Kingdom nationals and, secondly, on an action for failure to act brought by a member of the Senate of the Czech Republic seeking a declaration that the European Council had unlawfully failed to exclude the Prime Minister of that Member State, on the ground of an alleged conflict of interest, from meetings of the European Council. In addition, the Court examined the European Parliament's decisions to reduce the amount of the pensions of a number of former Members of the European Parliament elected in Italy and ruled on the action brought by a Member of the European Parliament against the Parliament's declaration that his seat had fallen vacant.

By its order of 14 July 2020, ***Shindler and Others* v *Commission*** (T-627/19, EU:T:2020:335), the Court declared inadmissible the action challenging the Commission's refusal to adopt a decision maintaining the European citizenship of certain nationals of the United Kingdom.

On 23 June 2016, the citizens of the United Kingdom of Great Britain and Northern Ireland voted in a referendum in favour of the withdrawal of their country from the European Union. On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the European Union pursuant to Article 50(2) TEU. Subsequently, the European Council, in agreement with the United Kingdom, adopted several decisions [24] extending the period, prescribed by Article 50(3) TEU, at the end of which the Treaties were due to cease to apply to the United Kingdom if no agreement setting out the arrangements for its withdrawal was concluded. Under Article 1 of Decision 2019/584, that period was due to expire, in principle, on 31 October 2019.

On 31 July 2019, several United Kingdom nationals residing in Italy or in France ('the applicants') sent a letter to the European Council and to the Council of the European Union. On 1 August 2019, they sent an essentially identical letter to the European Commission. In those letters, the applicants, inter alia, drew the attention of the three institutions referred to above to the situation of United Kingdom nationals residing in Member States other than the United Kingdom and having built a private and family life there, asking those institutions to 'declare that they had failed to act' as a result of their 'unlawful failure to protect the European citizenship of [those nationals]'. Moreover, they requested that those three institutions take, before the planned withdrawal of the United Kingdom on 31 October 2019, a decision maintaining the European citizenship of those nationals beyond the date of that withdrawal, irrespective of whether or not an agreement setting out the arrangements for that withdrawal was concluded. By letter signed on 11 September 2019, the Commission replied to the letter of 1 August 2019 ('the letter of 11 September 2019'). In that letter, it declined the invitation to act contained in the letter of 1 August 2019, noting that the Treaties did not allow it to take a decision such as that requested by the applicants.

The applicants then brought an action before the Court. That action contains, first, a claim for failure to act under Article 265 TFEU. Secondly, it contains a claim for annulment of the '… Commission's express refusal of [11] September 2019 to acknowledge a failure to act' that the applicants, when requested by the Court, defined as a claim for annulment under Article 263 TFEU.

The Court dismissed the applicants' action, after finding that both the claim for failure to act and the claim for annulment were inadmissible.

24| Inter alia, Decisions (EU) 2019/476 of 22 March 2019 (OJ 2019 L 80 I, p. 1) and (EU) 2019/584 of 11 April 2019 (OJ 2019 L 101, p. 1).

Regarding the claim for annulment, the applicants had asked the Court to annul the decision contained in the letter of 11 September 2019, by which the Commission had, in essence, refused to adopt a decision maintaining, as from the withdrawal of the United Kingdom from the European Union and irrespective of whether or not an agreement setting out the arrangements of that withdrawal was concluded, the European citizenship of certain UK nationals who did not, at that time, have the nationality of an EU Member State. In support of that claim, the applicants had raised three pleas disputing the loss of EU citizenship by those nationals.

As a preliminary matter, the Court verified of its own motion that the applicants had an interest in raising those three pleas. In that regard, it recalled that it is settled case-law that, first, an applicant cannot have a legitimate interest in the annulment of a decision where it is already certain that that decision which concerns it cannot be other than reconfirmed and, secondly, a plea for annulment is inadmissible on the ground of lack of interest in bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction. Thus, an applicant cannot establish an interest in a claim for annulment of a decision refusing to act on a given matter on the basis of a given plea where the institution concerned does not, in any event, have any competence to act on that matter.

The Court next noted that, in that case, were the decision contained in the letter of 11 September 2019 to be annulled on the basis of the pleas raised by the applicants, the applicants would be able to obtain satisfaction only if the Commission itself subsequently adopted a binding act maintaining, as from the withdrawal of the United Kingdom from the European Union, the European citizenship of certain UK nationals.

In that regard, after having recalled that, pursuant to Article 13(2) TEU, each institution is to act within the limits of the powers conferred on it in the Treaties, the Court found that no provision in the Treaties or in secondary legislation authorises the Commission to adopt binding acts the purpose of which is to confer European citizenship on certain categories of persons. That finding is supported by the fact that that institution has, in principle, only a power of proposal in accordance with Article 17(2) TEU.

Therefore, the Court held that, irrespective of whether or not the withdrawal of the United Kingdom from the European Union could result in the loss of European citizenship by all United Kingdom nationals not holding, at the time of that withdrawal, the nationality of a Member State, the Commission did not have, in that case, any competence to adopt a binding act maintaining, as from that withdrawal, the EU citizenship of certain categories of persons and was required to refuse to adopt the act requested by the applicants. It follows that, were the decision contained in the letter of 11 September to be annulled on the basis of the pleas raised by the applicants, the Commission would manifestly lack competence and would be able only to take a new decision refusing to adopt the act requested by the applicants. The Court then explained that such an annulment would thus not be capable of giving the applicants satisfaction, meaning that the latter have not demonstrated a legitimate interest in raising the pleas referred to above.

The Court concluded that those pleas had to be rejected as inadmissible and, as a result, that the claim for annulment, since it was not supported by any admissible plea, was itself manifestly inadmissible.

In its order of 17 July 2020, ***Wagenknecht* v *European Council*** (T-715/19, under appeal, [25] EU:T:2020:340), the Court held that the action for failure to act brought by a member of the Senate of the Czech Republic seeking a declaration that the European Council had unlawfully failed to exclude the Prime Minister of that Member State, on the ground of an alleged conflict of interest, from meetings of the European Council was inadmissible and, in any event, manifestly unfounded.

25| Case C-504/20 P, ***Wagenknecht* v *European Council***.

In that case, on 5 June 2019, Mr Lukáš Wagenknecht ('the applicant'), a member of the Senate of the Czech Republic, had requested the European Council to exclude the Prime Minister of that Member State, Mr Andrej Babiš, from meetings of the European Council concerning the financial perspective negotiations. [26] That request was based on the alleged conflict of interest of Mr Andrej Babiš, which allegedly arose from his personal and family interests in the undertakings of the Agrofert group, active in, inter alia, the agri-food sector, since those undertakings received subsidies coming from the EU budget.

On 24 June 2019, the European Council responded to the call to act, explaining to the applicant that, since the EU Treaty [27] intangibly laid down the composition of the European Council, it did not have discretion to decide who was to be the representative of each Member State within that institution or to decide whom, as between the Head of State or the Head of Government, it was to invite to a meeting of the European Council. In those circumstances, it was not in a position to exclude the Prime Minister of the Czech Republic from the meetings to which the applicant referred. On 2 July 2019, by email, the applicant requested clarification of that reply. That email remained unanswered. He then brought an action under Article 265 TFEU for a declaration that the European Council had failed to act in that it had unlawfully failed to act in response to the call to act.

In the first place, the Court pointed out that, for his or her action for failure to act to be admissible, [28] an applicant must establish either that he or she would be the addressee of the act which the institution complained of allegedly failed to adopt in respect of him or her, or that that act would have directly and individually concerned him or her in a manner analogous to that in which the addressee of such an act would be concerned. He or she must also show an interest in bringing proceedings, the existence of which presupposes that the action must be liable, if successful, to procure a personal advantage for him or her. In that instance, the Court found that the act the adoption of which by the European Council was requested by the applicant would not have been an act addressed by that institution to the applicant, but a decision of that institution addressed to the Czech Prime Minister. Moreover, the Court pointed out that, even if the applicant relies on his status as a member of the Senate of the Czech Republic in order to act in the public interest, he must still prove a personal interest, actual and existing, in a finding that the European Council has failed to act, as alleged. Since the applicant has failed to demonstrate such an interest, the condition relating to his direct and individual concern in the light of the measures sought from the European Council was not, in any event, satisfied.

In the second place, the Court recalled that Article 265 TFEU refers to failure to act in the sense of failure to take a decision or to define a position, not to the adoption of a measure different from that desired or considered necessary by the persons concerned. Thus, the Court held that the action for failure to act brought by the applicant was inadmissible on the ground that the European Council had explained, in clear terms, why it could not act in the manner requested of it. That definition of its position brought the failure to act to an end and such a refusal then constituted an act open to challenge by an action for annulment. [29] However, the applicant has not sought to bring such an action. In addition, the Court stated that the applicant's email of 2 July 2019 could not be regarded as a new call to act in respect of which the European Council subsequently failed to act.

26| The financial perspective negotiations in question concerned the multiannual financial framework 2021/2027.

27| In application of Article 15(2) TEU.

28| Actions for failure to act are provided for in Article 265 TFEU, which provides, in its third paragraph: 'Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.'

29| Under Article 263 TFEU.

In the third place, the Court added that the action was, in any event, manifestly unfounded. It pointed out that the European Council has no leeway when inviting the Heads of State or Heads of Government of the Member States to its meetings. [30] It is the responsibility of the Member States to adopt national measures, including constitutional measures, enabling it to be determined whether they should be represented, at European Council meetings, by their respective Heads of State or Heads of Government and, if necessary, whether there are grounds to prevent one of them from representing his respective Member State. That conclusion is all the more valid since the EU is required to respect the national identity of the Member States inherent in their fundamental political and constitutional structures. [31] In consequence, the Court held that it was clear that, by refusing to act in response to the call to act and irrespective of whether the representative of the Czech Republic has a conflict of interest, the European Council did not disregard the third paragraph of Article 265 TFEU.

In the fourth and last place, as regards the allegations relating to the Czech Prime Minister's alleged conflict of interest, the Court pointed out that the regularity of the payments made by the European Union in the context of the funds granted, in its name and on its behalf, in the Member States, falls within the scope of the EU rules applicable to those funds.

By its judgment of 15 October 2020, ***Coppo Gavazzi and Others* v *Parliament*** (T-389/19 to T-394/19, T-397/19, T-398/19, T-403/19, T-404/19, T-406/19, T-407/19, T-409/19 to T-414/19, T-416/19 to T-418/19, T-420/19 to T-422/19, T-425/19 to T-427/19, T-429/19 to T-432/19, T-435/19, T-436/19, T-438/19 to T-442/19, T-444/19 to T-446/19, T-448/19, T-450/19 to T-454/19, T-463/19 and T-465/19, EU:T:2020:494), delivered by a Chamber ruling in extended composition, the Court ruled on the decisions of the European Parliament to reduce the amount of the pensions of a number of former Members of the European Parliament elected in Italy (or those of their surviving spouses) with effect from 1 January 2019, in application of national decision No 14/2018. [32]

Ms Maria Teresa Coppo Gavazzi and several other natural persons, former Members of the European Parliament elected in Italy or their surviving spouses ('the applicants'), receive a retirement pension or a survivor's pension, respectively. In January 2019, the Parliament informed the applicants that it would be required to apply Decision No 14/2018 and, accordingly, to recalculate the amount of their pensions, in particular in application of the rules governing the payment of expenses and allowances to Members of the European Parliament ('the PEAM Rules') establishing the 'identical pension' rule. [33] Under that rule, the level and conditions of the provisional pension must be identical to those applicable to the pension received by Members of the lower house of the parliament of the Member State for which the Member of the European Parliament in question was elected. Thus, by several notes of 11 April 2019 and the final decision of 11 June 2019 [34] (together 'the contested decisions') of the Parliament's Directorate-General for Finance ('the author of the contested decisions'), the applicants were informed that the amount of their pensions would be adjusted, in application of the 'identical pension' rule laid down in the PEAM Rules and Decision No 14/2018,

30| In application of Article 15(2) TEU.

31| In accordance with Article 4(2) TEU.

32| Decision of 12 July 2018, adopted by the Ufficio di Presidenza della Camera dei deputati (Office of the Presidency of the Chamber of Deputies, Italy) ('Decision No 14/2018'). The legality of that decision is currently being examined by the Consiglio di giurisdizione della Camera dei deputati (Jurisdiction Council of the Chamber of Deputies, Italy).

33| Article 2(1) of Annex III to those rules.

34| The final decision concerns only Mr Florio, the applicant in Case T-465/19.

in line with the reduction in similar pensions paid in Italy to former national Members of Parliament by the Chamber of Deputies. The contested decisions also stated that the amount of the applicants' pensions would be adjusted in April 2019 and would have retroactive effect to 1 January 2019.

The applicants brought actions for annulment of those decisions, relying on pleas alleging, in particular, that the author of the decisions lacked competence, that the decisions had no legal basis, that there was an error of law in the classification of Decision No 14/2018 and that there had been a breach of a number of general principles of EU law.

The Court dismissed those actions.

Ruling, in the first place, on the limits of its jurisdiction in the context of an action for annulment, [35] the Court made clear that it did not have jurisdiction to rule on the legality of Decision No 14/2018 in so far as that decision was an act adopted by a national authority. On the other hand, it observed that it had jurisdiction to examine whether Article 75 of the implementing measures for the Statute for Members of the European Parliament, relating, in particular, to old-age pensions [36] ('the implementing measures') and the provisions of the PEAM Rules establishing the 'identical pension' rule [37] failed to comply with the higher-ranking rules of EU law. Likewise, the Court further stated that it could examine the compatibility with EU law of both the contested decisions and the application by the Parliament, on the basis of the identical pension rule, of the provisions of Decision No 14/2018.

Addressing, in the second place, the plea alleging a lack of competence on the part of the author of the contested decisions, the Court recalled that the Bureau of the Parliament has general competence in relation to financial matters concerning Members. [38] Thus, the administration of the Parliament may be accorded the power to adopt individual decisions in the area of financial matters concerning Members, since it is the Bureau of the Parliament which lays down the limits of that power and the detailed rules for its exercise. In the light of that division of powers, the Court emphasised that the Parliament may confer on its administration the power to adopt individual decisions in relation to pension rights and to fix the amount of pensions. Consequently, the Court concluded that the author of the contested decisions was competent, in its capacity as body authorised by subdelegation for budgetary matters relating to old-age pensions, to adopt the contested decisions.

In the third place, the Court rejected the plea alleging misapplication of Article 75 of the implementing measures, holding that the Parliament had properly relied on that provision and on the 'identical pension' rule in adopting the contested decisions. Thus, it noted, first of all, that the 'identical pension' rule was still applicable to the applicants, by way of derogation from the rules laid down in the implementing measures, according to which the PEAM Rules expired on the date on which the Statute for Members entered into force, namely on 14 July 2009. [39] Next, the Court emphasised that, while the two paragraphs making up Article 75 of the implementing measures concern the right to an old-age pension of former Members of the European Parliament, their respective scopes are different.

35| Article 263 TFEU.

36| By decisions of 19 May and 9 July 2008, the Bureau of the Parliament adopted implementing measures for the Statute for Members of the European Parliament (OJ 2009 C 159, p. 1).

37| Article 2(1) of Annex III to the PEAM Rules.

38| In accordance with Article 25(3) of the Parliament's Rules of Procedure.

39| Article 74, read in conjunction with Article 75, of the implementing measures.

First, the first subparagraph of Article 75(1) of the implementing measures applies to former Members of the Parliament who were in receipt of their old-age pensions prior to the date of entry into force of the Statute for Members, that is to say, before 14 July 2009, and who continue after that date to come under the pension arrangements established by Annex III to the PEAM Rules ('Annex III'). Ruling on the situation of those Members, the Court noted that, under the 'identical pension' rule, the Parliament is required to determine the level and conditions of the old-age pension of a former Member of the European Parliament on the basis of those defined under the applicable national law, in that instance on the basis of the rules defined in Decision No 14/2018. That obligation falls on the Parliament, which has no discretion to apply an independent method of calculation, throughout the period of payment of old-age pensions, subject to compliance with the higher-ranking norms of EU law, including the general principles of law and the Charter of Fundamental Rights of the European Union ('the Charter'). Furthermore, the Court concluded that reduction in the amount of pensions, in application of those rules, does not undermine the old-age pension rights acquired by their recipients, since neither the first subparagraph of Article 75(1) nor Annex III guarantees that the amount of those pensions is immutable. According to the Court, the acquired pension rights referred to in that Article 75 must not be confused with an alleged right to receive a fixed amount of pension.

Secondly, Article 75(2) of the implementing measures applies to former Members who began to receive their old-age pensions after the date of entry into force of the Statute for Members and ensures that the old-age pension rights acquired up to that date will be maintained. [40] However, the Court noted that that provision, [41] which clearly distinguishes 'old-age pension rights acquired' from 'pensions', does not guarantee that the amount of that pension will be unchanged, in the sense that that amount cannot be revised. Moreover, the Court emphasised that the two requirements which former Members must satisfy in order to be able to draw their retirement pensions [42] are intended solely to set conditions for the actual payment of those pensions without however guaranteeing that their amount will not be changed. Furthermore, those requirements both pertain solely to the applicants, and not the Parliament.

In the fourth and last place, the Court rejected the plea alleging breach of a number of general principles of EU law and of the Charter. Thus, the Court emphasised, first of all, that the Parliament was required to calculate and, where appropriate, update the pensions of Italian former Members of the European Parliament, drawing the consequences of Decision No 14/2018, unless the application of that decision resulted in a breach of the Charter [43] or of those general principles. Next, ruling on the breach of the principle of legal certainty, the Court acknowledged that the contested decisions had retroactive effects, in particular preceding their date of adoption, namely 1 January 2019. However, it pointed out that this was explained by the obligation of the Parliament to apply the 'identical pension' rule. [44] In application of that rule and, consequently, of the provisions of Decision No 14/2018, the applicants were no longer entitled to claim, as from that date, the benefit of their pensions, as had been calculated before that date. As regards the complaint alleging breach of the principle of legitimate expectations, the Court noted that the Parliament had not strayed from the precise and unconditional assurance given to the applicants when they joined the pension scheme organised by Annex III, consisting in guaranteeing them an 'identical pension' to that of national Members of Parliament.

40| First sentence of Article 75(2) of the implementing measures.

41| Second sentence of Article 75(2) of the implementing measures.

42| Namely, satisfying the relevant provisions of national law applicable to the grant of the old-age pension and having applied for payment of that pension.

43| Article 51(1).

44| Provided for in Article 2(1) of Annex III to the PEAM Rules.

In addition, as regards the complaint alleging breach of the right to property, [45] the Court observed that, in reducing the amount of the applicants' pensions, the Parliament did not deprive the applicants of a part of their pension rights or alter the content of those rights. Next, the Court concluded that that restriction of the applicants' right to property is justified, particularly in the light of the requirements set out in the Charter. In that respect, it noted, first, that the right to property cannot be interpreted as giving rise to a right to a pension of a specific amount. Secondly, it emphasised that that restriction, which is provided for by law, may be justified (i) by the objective of general interest pursued by Decision No 14/2018, which is to rationalise public expenditure in the context of budgetary constraints, an objective which has already been recognised in the case-law as justifying a breach of fundamental rights, and (ii) by the legitimate interest, explicitly stated in Annex III, of awarding the applicants pensions the level and conditions of which are identical to those of the pensions received by Members of the Chamber of Deputies.

Lastly, ruling on the breach of the principle of equal treatment, the Court rejected the assertion that the Parliament, in breach of that principle, treated the applicants as former Members of the Chamber of Deputies. In that respect, it found that the applicants had not proved that their situation was fundamentally different from that of former Members of the Chamber of Deputies. In addition, the Court rejected the assertion that the Parliament treated the applicants differently from other former Members of the European Parliament, elected in France or Luxembourg, who were also covered by the pension scheme organised by Annex III. [46] Thus, it held that the applicants were not in the same situation as that of other former Members of the European Parliament elected in France or in Luxembourg, since, in particular, those Members' pensions were not intended to be governed by the rules laid down by Italian law, but by other national rules which are specifically applicable to them.

By its order of 15 December 2020, ***Junqueras i Vies* v *Parliament*** (T-24/20, EU:T:2020:601), the Court declared inadmissible the action brought by Mr Oriol Junqueras i Vies ('the applicant') against the establishment by the European Parliament that his seat had fallen vacant. That Catalan politician had been placed in provisional detention in Spain in the context of criminal proceedings brought against him for his participation in the organisation of the referendum on self-determination held in 2017 in the autonomous community of Catalonia. During the trial stage of those proceedings, he was elected to the European Parliament in the elections held on 26 May 2019.

Following the judgment of 14 October 2019, by which the Tribunal Supremo (Supreme Court, Spain) sentenced the applicant to 13-year term of imprisonment and, for the same period, total disqualification from carrying out public duties and functions, the Central Electoral Board, by its decision of 3 January 2020, declared the applicant ineligible. In addition, by its order of 9 January 2020, the Tribunal Supremo (Supreme Court) found that, in the light of the judgment of the Court of Justice of 19 December 2019, *Junqueras Vies*, [47] there was no need to request the Parliament to waive the immunity enjoyed by the applicant in his capacity as Member of the European Parliament, on the ground, inter alia, that, when the applicant had been declared to have been elected, the criminal proceedings against him had ended and deliberation had commenced. The Tribunal Supremo (Supreme Court) stated that, in so far as the applicant had acquired the status of Member of the European Parliament at the time when the criminal proceedings were already at the judgment stage, he could not rely on immunity to preclude the continuation of those proceedings. In addition, a Member of the

45| Article 17(1) of the Charter.

46| Provided for in Annex III to the PEAM Rules.

47| The judgment of the Court of Justice of 19 December 2019, ***Junqueras Vies*** (C-502/19, EU:C:2019:1115) was delivered in response to a request for a preliminary ruling from the Tribunal Supremo (Supreme Court), made in the context of an action brought by Mr Junqueras i Vies before that court in which he relied on the immunities provided for in Article 9 of Protocol (No 7) on the Privileges and immunities of the European Union (OJ 2012 C 326, p. 266).

European Parliament had, in the meantime, on behalf of the applicant, requested the President of the Parliament to take an initiative, as a matter of urgency, on the basis of Article 8 of the Parliament's internal rules, confirming the applicant's immunity and refusing to declare his seat vacant.

At the plenary session of 13 January 2020, the President of the Parliament announced, following the decision of the Central Electoral Board and the order of the Tribunal Supremo (Supreme Court) referred to above, the establishment that the applicant's seat had fallen vacant.

By his action before the Court, Mr Junqueras i Vies requested the annulment both of that announcement, by the President of the Parliament, of the establishment that his seat had fallen vacant and the alleged rejection, by the President of the Parliament, of the request of a Member of the European Parliament to take an initiative confirming the applicant's immunity.

The Court declared that neither of those acts could be considered a challengeable act and, consequently, dismissed the applicant's action as inadmissible.

In the first place, as regards the establishment, announced by the President of the Parliament, that the applicant's seat had fallen vacant, the Court observed that the Parliament has no power to review the decision of the authorities of a Member State declaring that a Member of the European Parliament's term has ceased pursuant to national law and the ensuing decision that the seat has fallen vacant, the institution merely being informed of that vacancy by the national authorities. Nor is the Parliament empowered, according to the Court, to refuse to take account of the national authorities' decision establishing that vacancy.

Thus, at the plenary session of 13 January 2020, the President of the Parliament merely informed the institution of a pre-existing legal situation resulting exclusively from the decisions of the Spanish authorities. In view of its purely informative nature, that declaration is therefore not amenable to an action for annulment.

Moreover, the Court recalled that verification of the national authorities' compliance with the procedures prescribed by national law and EU law is not within the competence of the Parliament but within the jurisdiction of the Spanish courts and, as the case may be, of the Court of Justice when an action for failure to fulfil obligations is brought before it against the Member State to which those authorities belong.

In the second place, as regards the alleged refusal by the President of the Parliament of the request to take an initiative confirming the applicant's immunity, the Court observed that this was in reality a non-existent act, so the claim for its annulment must be dismissed as inadmissible. That request was neither expressly nor implicitly refused by the President of the Parliament. According to the Court, the absence of an express reply to that request does not constitute an implied decision of refusal since, in that instance, there was no period at the end of which an implied decision would be deemed to have been taken and no exceptional circumstances that would enable such a decision to be considered to exist.

The Court added that, in any event, the initiatives which the President of the Parliament may take on the basis of Rule 8 of the Rules of Procedure of that institiution constitute opinions which are not binding on the national authorities to which they are addressed. Furthermore, it follows from that rule that the President of the Parliament is in no way required to take an initiative confirming the immunity of a Member of the Parliament and that he has discretion in that regard, even when that Member is arrested or has his or her freedom of movement curtailed in apparent breach of his or her privileges and immunities. That discretion precludes the applicant from requiring the President of the Parliament to take an initiative as a matter of urgency confirming his or her immunity. Thus, the alleged refusal, by the President of the Parliament, of the request to take an initiative to confirm the applicant's immunity cannot be regarded as a challengeable act capable of being the subject of an action for annulment.

III. Competition rules applicable to undertakings

1. Developments in the area of Article 101 TFEU

By its judgments of 5 October 2020, ***Casino, Guichard-Perrachon and AMC* v *Commission*** (T-249/17, under appeal, [48] EU:T:2020:458), ***Intermarché Casino Achats* v *Commission*** (T-254/17, not published, under appeal, [49] EU:T:2020:459), and ***Les Mousquetaires and ITM Entreprises* v *Commission*** (T-255/17, under appeal, [50] EU:T:2020:460), the Court, ruling in extended composition, adjudicated in a case in which the European Commission, having received information concerning exchanges of information between a number of undertakings and associations of undertakings in the food and non-food distribution sector, had adopted, in February 2017, a series of decisions ordering several companies to submit to inspections [51] ('the inspection decisions'). Those decisions were adopted pursuant to Article 20(1) and (4) of Regulation No 1/2003 on the implementation of the rules on competition, [52] which determines the powers of the Commission as regards inspections.

In the course of its inspections, the Commission, inter alia, visited the offices of the companies concerned, where copies of the content of computer equipment were made. Having regard to their reservations as to the inspection decisions and the inspection procedures, a number of companies inspected [53] brought actions seeking annulment of those decisions. In support of their actions, the applicant companies raised, in particular, a plea of illegality against Article 20 of Regulation No 1/2003 and alleged breach of the obligation to state the reasons for the inspection decisions and of their right to the inviolability of the home. Certain of the applicants disputed, in addition, the legality of the seizure and copying of data relating to the private lives of their employees and managers and the refusal to return those data. [54]

48| Case C-690/20 P, ***Casino, Guichard-Perrachon and AMC* v *Commission***.

49| Case-693/20 P, ***Intermarché Casino Achats* v *Commission***.

50| Case C-682/20 P, ***Les Mousquetaires and ITM Entreprises* v *Commission and Council***.

51| Case T-249/17 concerns Commission Decision C(2017) 1054 (final) of 9 February 2017 ordering Casino, Guichard-Perrachon and all the companies directly or indirectly controlled by them to submit to an inspection (Case AT.40466 – Tute 1). Case T-254/17 (not published) concerns Commission Decision C(2017) 1056 (final) of 9 February 2017, ordering Intermarché Casino Achats and all the companies directly or indirectly controlled by it to submit to an inspection (Case AT.40466 – Tute 1). Case T-255/17 concerns, principally, Commission Decision C(2017) 1361 (final) of 21 February 2017 ordering Les Mousquetaires and all the companies directly or indirectly controlled by them to submit to an inspection (Case AT.40466 – Tute 1) and Commission Decision C(2017) 1360 (final) of 21 February 2017 concerning the same companies (Case AT.40467 – Tute 2) and, in the alternative, Commission Decision C(2017) 1057 (final) of 9 February 2017 ordering Intermarché and all the companies directly or indirectly controlled by it to submit to an inspection (Case AT.40466 – Tute 1) and Commission Decision C(2017) 1061 (final) of 9 February 2017 concerning the same companies (Case AT.40467 – Tute 2).

52| 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).

53| The applicant companies are Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC) (Case T-249/17); Intermarché Casino Achats (Case T-254/17) and Les Mousquetaires and ITM Entreprises (Case T-255/17).

54| Those applicants are Les Mousquetaires and ITM Entreprises in Case T-255/17.

With regard to the latter challenge, raised in Case T-255/17, the Court declared it inadmissible. In its reasoning, it pointed out that all undertakings have a duty to ensure the protection of the persons whom they employ and that of their private lives, particularly as regards the processing of personal data. Thus, an inspected undertaking may be called upon to ask the Commission not to seize certain data which harms the private lives of its employees or managers or to seek the return of those data from the Commission. Accordingly, where an undertaking claims protection on the basis of respect for the private lives of its employees or managers in order to oppose the seizure of computer equipment or communication equipment and the copying of the data held therein, the Commission's decision by which it refuses that request has legal effects on that undertaking. Nonetheless, in that case, in the absence of any prior request for protection made by the applicants, the seizure of the equipment at issue and the copying of the data contained in that equipment could not give rise to the adoption of a challengeable decision by which the Commission refused, even impliedly, such a request for protection. Furthermore, in the Court's view, the request for the return of the private data at issue was not couched in sufficiently precise terms to enable the Commission usefully to define its position in respect of it, such that the applicants had not, at the date on which the action was brought, received any response from the Commission capable of constituting a challengeable act.

With regard to the merits of the actions, the Court, after having recalled and specified the rules and principles which govern Commission inspection decisions in competition law, annulled in part those against which the applicants had brought their actions.

In the first place, the Court rejected the plea of illegality raised against Article 20(1) and (4) of Regulation No 1/2003, which provisions relate, respectively, to the Commission's general power to carry out inspections and to the obligation on undertakings and associations of undertakings to submit to those inspections when ordered to do so by a decision. In support of that plea of illegality, in each case, the applicants relied on a breach of the right to an effective remedy. In Cases T-249/17 and T-254/17, they also alleged infringement of the principle of equality of arms and the rights of the defence.

As regards the complaint alleging infringement of the right to an effective remedy, the Court recalled that that right, guaranteed in Article 47 of the Charter, corresponds to Article 6(1) and Article 13 of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'), such that the provisions of that convention and the case-law of the European Court of Human Rights ('the ECtHR') must be taken into account when interpreting and applying that provision of the Charter. [55] In accordance with the case-law of the ECtHR, the existence of a right to an effective remedy requires four conditions to be satisfied: the existence of an effective judicial review of the facts and of points of law (requirement of effectiveness), the possibility for an individual to obtain an appropriate remedy where an unlawful act has taken place (requirement of efficiency), the certainty of access to proceedings (requirement of certainty) and judicial review within a reasonable time (requirement of a reasonable time). In that regard, it is clear from the Court's examination that the system for monitoring the manner in which the inspection operations are carried out, comprising all the legal remedies made available to inspected undertakings, [56] satisfies those four requirements. The complaint alleging disregard of the right to an effective remedy was therefore rejected as unfounded.

The complaint alleging infringement of the principle of equality of arms and of the rights of the defence was rejected on the basis of settled case-law in accordance with which, at the preliminary investigation stage, the Commission cannot be required to specify the indicia which justify the inspection of an undertaking

55| Article 52 of the Charter and explanations relating to that provision.

56| Action for annulment, proceedings for interim relief, action to establish non-contractual liability.

suspected of anticompetitive practices. Such an obligation would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defence of the undertaking concerned.

In the second place, in the examination of the plea alleging infringement of the obligation to state reasons, the Court recalled that inspection decisions must state the presumed facts which the Commission intends to investigate, namely what it is looking for and the matters to which the inspection must relate (description of the suspected infringement, that is to say, the market thought to be affected, the nature of the suspected competition restrictions and the sectors covered by the alleged infringement). That obligation to state specific reasons is intended to make clear that the inspection is justified and to enable the undertakings concerned to understand the scope of their duty to cooperate while, at the same time, preserving the rights of the defence. In each case, the Court found, in particular, that the inspection decisions stated clearly and in detail that the Commission was of the view that it had sufficiently serious indicia which led it to suspect anticompetitive practices.

In the third place, with regard to the plea alleging breach of the right to the inviolability of the home, the Court recalled that, in order to ensure that an inspection decision is not arbitrary, the EU Courts must ascertain that the Commission had sufficiently serious indicia to suspect an infringement of the rules of competition by the undertaking concerned.

In order to be able to ascertain the above, the Court had requested the Commission, by the adoption of measures of organisation of procedure, to communicate to it the documents containing the indicia justifying the inspections and the Commission complied with that request within the time limit prescribed. An 'additional response' from the Commission, containing other documents relating to such indicia, was, however, rejected as inadmissible in the absence of valid justification for late lodgment.

With regard to the form of the indicia which justified the inspection decisions, the Court pointed out that, although the indicia obtained before an inspection were subject to the same formalities as the gathering of evidence of an infringement in the context of an open investigation, the Commission must comply with the rules governing its investigatory powers where no investigation, within the meaning of Regulation No 1/2003, [57] has yet been formally opened and it has not used its investigatory powers, that is to say, when it has not adopted any measure alleging that an infringement has been committed, in particular an inspection decision. It is for that reason, contrary to the applicants' submissions, that the Court held that the rules on the requirement to record interviews [58] do not apply before an investigation has been opened by the Commission. Thus, interviews with suppliers carried out before an investigation is opened are capable of constituting indicia even if they have not been recorded. If the position were otherwise, the detection of anticompetitive practices would be seriously undermined as a result of the dissuasive effect which the requirement that a formal questioning be recorded may have on the willingness of witnesses to provide information and report infringements. In addition, in the Court's view, those interviews with suppliers constitute evidence available to the Commission from the date on which they took place and not from the point at which they are reported, as the applicants argue.

With regard to the tenor of the indicia which justified the inspection decisions, the Court noted that, having regard to the necessary distinction between proof of a concerted practice and indicia justifying inspections for the purpose of gathering such proof, the threshold at which it is recognised that the Commission has

57| Chapter V of Regulation No 1/2003.

58| Article 19(1) of Regulation No 1/2003 and Article 3 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).

sufficiently serious indicia must necessarily be lower than that allowing a finding of a concerted practice. In the light of those considerations, it found that the Commission had sufficiently serious indicia to suspect a concerted practice involving exchanges of information relating to rebates obtained on the markets for the supply of certain everyday consumer goods and the prices on the market for the sale of services to manufacturers of branded products. However, in the absence of such indicia as regards exchanges of information concerning the future commercial strategies of the undertakings under suspicion, the Court upheld the plea alleging infringement of the right to the inviolability of the home as regards that second infringement and therefore annulled the inspection decisions in part.

By its judgment of 16 December 2020, ***International Skating Union* v *Commission*** (T-93/18, EU:T:2020:610), the Court, ruling in extended composition, adjudicated on a case involving the International Skating Union (ISU), the sole international sports federation recognised by the International Olympic Committee (IOC) for the purpose of managing and administering figure skating and speed skating. The ISU also carries out a commercial activity that entails the organisation of various speed skating events in the context of the most important international competitions, such as the European and World Championships and the Winter Olympic Games.

In 2014, the Korean company Icederby International Co. Ltd sought to organise a speed skating competition involving events in a new format in Dubai (United Arab Emirates). Since the ISU had not authorised that event, that organiser found it difficult to ensure the participation of professional speed skaters, which led it to abandon its plan. Skaters affiliated to national federations that are members of the ISU are subject, under the ISU's statutes, to a pre-authorisation system, which includes 'eligibility rules'. Under those rules, in the version applicable to that period, the participation of a skater in an unauthorised competition exposed him or her to a penalty of a lifetime ban from any competition organised by the ISU.

Having received a complaint lodged by two Netherlands professional speed skaters, the European Commission considered, in its decision of 8 December 2017 59 ('the contested decision'), that the ISU's eligibility rules were incompatible with EU competition rules (Article 101 TFEU), in so far as their object was to restrict the possibilities for professional speed skaters to take part freely in international events organised by third parties and, therefore, deprived those third parties of the services of athletes necessary in order to organise those competitions. The Commission, consequently, ordered the ISU, subject to a periodic penalty payment, to put an end to the infringement thus found, without, however, imposing a fine on it.

The ISU brought an action against the contested decision before the Court. The Court, called upon to rule for the first time on a Commission decision finding that rules adopted by a sports federation do not comply with EU competition law, confirmed that the classification of a restriction of competition by object established by the Commission in respect of the rules at issue was well founded, but partially annulled the contested decision as regards the corrective measures imposed on the ISU.

In the first place, the Court found that the Commission was right to conclude that the eligibility rules have as their object the restriction of competition within the meaning of Article 101 TFEU.

In that regard, the Court found, first of all, that the situation in which the ISU found itself was capable of giving rise to a conflict of interest. On the one hand, the ISU carries out a regulatory function, by virtue of which it has the power to adopt rules in the disciplines for which it is responsible, and, thus, to authorise competitions organised by third parties, while, on the other hand, in the context of its commercial activity, the ISU itself organises the most important speed skating competitions in which professional skaters must

59| Commission Decision C(2017) 8230 final, adopted on 8 December 2017 relating to proceedings under Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (Case AT/40208 – International Skating Union's Eligibility rules) (OJ 2018 C 148, p. 9).

participate in order to earn their living. In that regard, the Court considered that the obligations binding on a sports federation in the exercise of its regulatory function under Article 101 TFEU are those consistently set out in the case-law relating to the application of Articles 102 and 106 TFEU, 60 with the result that, in those circumstances, the ISU is required to ensure, when examining applications for authorisation, that third-party organisers of speed skating competitions are not unduly deprived of access to the relevant market, to the extent that competition on that market is distorted.

Having stated the above, the Court then examined the Commission's assessment concerning the content of the eligibility rules. It found at the outset that those rules do not expressly set out the legitimate objectives that they pursue and have set out authorisation criteria, which moreover are not exhaustive, only since 2015. In those circumstances, the requirements applied as from that date cannot all be regarded as clearly defined, transparent, non-discriminatory and reviewable authorisation criteria which, as such, would be capable of ensuring the organisers of competitions effective access to the relevant market. Consequently, the Court considered that the ISU had retained, including after the adoption of authorisation criteria in 2015, broad discretion to refuse to authorise competitions proposed by third parties.

Furthermore, as regards the system of penalties, the Court stressed that the severity of the penalties provided for is a particularly relevant element when identifying potential obstacles to the proper functioning of competition on the relevant market. Such severity may dissuade athletes from taking part in competitions not authorised by the ISU, including where there is no legitimate reason that would justify such a refusal to grant authorisation. In that instance, the Court considered that the penalties provided for by the eligibility rules, even after those rules were relaxed in 2016, were disproportionate. Since that date, not only had the categories of infringements remained ill defined, but the duration of the penalties incurred, inter alia in the event of participation in unauthorised third-party competitions, remained severe given the average length of a skater's career.

Finally, the Court examined the Commission's assessment concerning the objectives pursued by the eligibility rules. In that regard, the Court recalled that the protection of the integrity of the sport constitutes a legitimate objective recognised in Article 165 TFEU. The Court consequently acknowledged that it was legitimate for the ISU to establish rules seeking both to avoid the risks of manipulation of competitions liable to result from sports betting and to ensure that sporting competitions meet common standards. However, in that instance, the fact remained that the rules adopted by the ISU went beyond what was necessary to achieve such objectives and, accordingly, were not proportionate to those objectives. Consequently, the Commission was correct to consider that the restrictions deriving from the pre-authorisation system cannot be justified by the objectives in question.

In the light of all of those considerations, the Commission was therefore right to conclude that the eligibility rules revealed a sufficient degree of harm, in particular with regard to their content, to be regarded as restricting competition by object.

In the second place, the Court ruled on the legality of the corrective measures imposed by the contested decision in order to bring an end to the infringement found and upheld in part the applicant's claims for annulment in that regard, in so far as the Commission had required, subject to a periodic penalty payment, substantial modification of the ISU's arbitration rules in the event that the pre-authorisation system was retained.

60| Judgments of the Court of Justice of 1 July 2008, ***MOTOE*** (C-49/07, EU:C:2008:376, paragraphs 51 and 52), and of 28 February 2013, ***Ordem dos Técnicos Oficiais de Contas*** (C-1/12, EU:C:2013:127, paragraphs 88 and 92).

In that regard, the Court noted that the Commission considered that those arbitration rules, which confer on the Court of Arbitration for Sport in Lausanne (Switzerland) exclusive jurisdiction to hear appeals against ineligibility decisions and make such arbitration binding, reinforced the restrictions of competition caused by the eligibility rules. In so far as the Commission had drawn, in that regard, on the Guidelines on the method of setting fines 61 and, more specifically, on the concept of an 'aggravating circumstance' contained therein, the Court stressed that only unlawful conduct or circumstances which render the infringement more harmful can justify an increase in the penalty imposed for an infringement of EU competition law. In that instance, the Court considered that there were no such unlawful circumstances. The Commission was therefore not entitled to consider that the ISU's arbitration rules constituted an aggravating circumstance.

2. Developments in the area of Article 102 TFEU

By its judgment of 18 November 2020, ***Lietuvos geležinkeliai* v *Commission*** (T-814/17, EU:T:2020:545), the Court, ruling in extended composition, adjudicated in a case involving Lietuvos geležinkeliai AB ('LG'), the national railway company of Lithuania. LG manages the railway infrastructure and at the same time provides rail transport services in Lithuania. In its capacity as a provider of rail transport services, LG concluded, in 1999, a commercial agreement with Orlen Lietuva AB ('Orlen'), a Lithuanian oil company owned by the Polish oil company PKN Orlen S.A., to provide rail transport services to Orlen in Lithuania. That agreement concerned in particular the transport of oil products from a large refinery belonging to Orlen located in Bugeniai, in the north-west of Lithuania, close to the border with Latvia, to the Lithuanian seaport of Klaipėda for the purpose of transporting those products to Western Europe.

Following a dispute which arose in 2008 between LG and Orlen concerning the rates for rail transport services covered by the agreement, Orlen explored the possibility of switching its seaborne export business from Klaipėda to the seaports of Riga and Ventspils, in Latvia, and, in that context, of entrusting the transport of its products from the Bugeniai refinery to Latvijas dzelzceļš, the national railway company of Latvia ('LDZ'). In order to transport its freight to the Latvian seaports, Orlen intended to use a railway line which ran from its refinery to Rengė, in Latvia ('the Short Route'), a line which it had until then used to serve the Latvian and Estonian markets.

Because of a deformation of the track along several dozens of metres on the Short Route, LG, in its capacity as railway infrastructure manager, suspended traffic on a 19-km long section of that route ('the Track in dispute') on 2 September 2008. From 3 October 2008, LG completely removed the Track in dispute, finishing that task before the end of October 2008.

Subsequently, as it believed that LG did not intend to repair the Track in dispute in the short term, Orlen was forced to abandon its plans to use LDZ's services. [62]

Following a complaint lodged by Orlen, the European Commission, by decision of 2 October 2017, concluded that, by removing the Track in dispute, LG had abused its dominant position as manager of Lithuanian railway infrastructure since it prevented LDZ from entering the market for rail transport of oil products from Orlen's

61| Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

62| At the hearing, LG and LDZ did, however, confirm that the work to reconstruct the Track in dispute had finally started and was due to be completed in December 2019 and that the Track in dispute was to be reopened to traffic before the end of February 2020.

refinery to the seaports of Klaipėda, Riga and Ventspils ('the market in question'). In respect of that infringement, the Commission imposed a fine of EUR 27 873 000 on LG and ordered it to bring the infringement of EU competition law to an end. LG brought an action against the Commission's decision before the Court.

The Court found, first of all, that, in its capacity as Lithuania's railway infrastructure manager, in a dominant position, LG is responsible under EU law and national law for granting access to public railway infrastructure and for ensuring the good technical condition of that infrastructure, and for ensuring safe and uninterrupted rail traffic and, in the event of disturbance to rail traffic, for taking all necessary measures to restore the normal situation. Furthermore, that undertaking holds a dominant position on the market for the management of railway infrastructure, which derives from a former statutory monopoly, and it has not invested in the railway network, which belongs to the Lithuanian State.

In that context, the Court took the view that the conduct in question, namely the removal of the Track in dispute, cannot be assessed in the light of the case-law established in relation to refusal to provide access to essential facilities, which sets a higher threshold for finding that a practice is abusive than that applied in the contested decision. In fact, such conduct must be analysed as an act capable of hindering market entry by making access to the market more difficult and thus leading to an anticompetitive foreclosure effect.

Next, the Court confirmed that LG had not succeeded in demonstrating that, after the deformation in question on the Track in dispute had appeared and after the detailed assessment of the condition of the entire track in dispute had been carried out, the track was in a state which would justify its immediate and complete removal. In that regard, the Court considered that the Commission was correct to find that problems relating to a 1.6 km section of the 19 km of the Track in dispute could not justify its complete and immediate removal. In any event, the applicable regulatory framework imposed on LG not only the obligation to guarantee the safety of its railway network but also the obligation to minimise disruption and to improve the performance of that network.

With regard to LG's argument that it was more economically advantageous immediately to remove the Track in dispute entirely and then immediately to reconstruct it in full – which LG claimed to have been its initial intention – than to carry out immediate targeted repairs followed by a full but staggered reconstruction, the Court observed that, without having the necessary funds to begin the reconstruction work and without having taken the normal preparatory steps for such works to be carried out, LG had no reason to remove the Track in dispute in great haste. Similarly, the Commission did not err in establishing that the removal of a railway track before the renovation works had even begun constituted highly unusual conduct in the rail sector.

In addition, the Court confirmed that, as LG had a dominant position not only as railway infrastructure manager but also on the market in question, it had a special responsibility not to impair genuine, undistorted competition on that market. Therefore, when deciding on the solution to the deformation of the Track in dispute, LG ought to have taken its responsibility into account and avoided eliminating all prospect of the Track in dispute being returned to service in the short term. However, by removing the entire Track in dispute, LG did not assume that responsibility since its conduct made access to the market in question more difficult.

As regards the impact of the removal of the Track in dispute on LDZ's ability to transport Orlen's oil products destined for seaborne export from the refinery to the Latvian seaports, the Court observed that the fact of having to use a longer route in Lithuania which is busier than the Lithuanian section of the Short Route involved higher risks for LDZ of conflicts in train paths, uncertainty as to the quality and cost of additional rail services as well as risks arising from a lack of information and transparency regarding market entry conditions and, thus, greater dependence on the Lithuanian railway infrastructure manager. In addition, the Court noted that, in 2008 and 2009, the costs of transporting Orlen's oil products were higher on the longer

routes to the Latvian seaports than on the route to Klaipėda. Consequently, the Commission cannot be accused of any error of assessment in reaching the conclusion that the longer routes to the Latvian seaports would not have been competitive by comparison with the route to Klaipėda.

In those circumstances, the Court essentially dismissed LG's action in its entirety. However, in the exercise of its unlimited jurisdiction to set the amount of fines, the Court, having regard to the gravity and duration of the infringement, considered it appropriate to reduce the amount of the fine imposed on LG from EUR 27 873 000 to EUR 20 068 650.

3. Developments in the area of mergers

By the judgment in ***CK Telecoms UK Investments* v *Commission*** (T-399/16, under appeal, [63] EU:T:2020:217), delivered on 28 May 2020, the Court, ruling in extended composition, annulled the decision by which the Commission [64] had opposed the implementation of a proposed concentration between two of the four mobile telephone operators active in the retail market for mobile telecommunications services in the United Kingdom.

That proposal, notified to the Commission on 11 September 2015, was intended to enable the applicant, CK Telecoms UK Investments Ltd ('Three'), an indirect subsidiary of CK Hutchison Holdings Ltd, to acquire sole control over Telefónica Europe Plc ('O2') and thus to become the main player in that market, ahead of the two remaining operators, EE Ltd, a subsidiary of BT Group plc ('BT/EE'), the former legacy operator, and Vodafone.

By the contested decision, the Commission had, pursuant to the Merger Regulation [65] and its own Guidelines on the assessment of horizontal mergers ('the Guidelines'), [66] declared the concentration incompatible with the internal market on the basis of three 'theories of harm'. It considered that the transaction would give rise to significant impediments to effective competition as a result of the existence of non-coordinated effects arising, first, from the elimination of important competitive constraints on the retail market (the first 'theory of harm'), which would probably have led to an increase in prices for mobile telephony services and a restriction of choice for consumers. Secondly, since the relevant market is characterised by the fact that BT/EE and Three, on the one hand, and Vodafone and O2, on the other, had concluded network-sharing agreements, the transaction would have had a negative influence on the quality of services for consumers, hindering the development of mobile network infrastructure in the United Kingdom (the second 'theory of harm'). Thirdly, since three mobile virtual network operators without their own network, Tesco Mobile, Virgin Mobile and TalkTalk ('the non-MNOs'), had concluded agreements giving them access to the network of another operator at wholesale prices, the concentration was likely to have significant non-coordinated effects on the wholesale market (the third 'theory of harm').

63| Case C-376/20 P, ***Commission* v *CK Telecoms UK Investments*.**

64| Commission Decision of 11 May 2016 declaring a concentration incompatible with the internal market (Case M.7612 – Hutchison 3G UK/Telefónica UK), notified under document C(2016) 2796, available in English, in its non-confidential version, at the following address: <https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf>. (Summary published in OJ 2016 C 357, p. 15).

65| Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

66| Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5).

The Court was thus called upon to rule, for the first time, on the conditions for the application of the Merger Regulation to a concentration on an oligopolistic market not involving the creation or strengthening of an individual or collective dominant position, but giving rise to non-coordinated effects.

After recalling the limits of the review of legality which it is responsible for carrying out on the complex assessments entailed by merger reviews, the Court first of all set out the applicable criteria to establish that such an operation would give rise to a 'significant impediment to effective competition', as required by Article 2(3) of the Merger Regulation, and provided clarification on the burden and standard of proof on the Commission in such a context. [67] The Court stated in particular that, in order that non-coordinated effects arising from a concentration may result in a significant impediment to effective competition, two cumulative conditions must be satisfied: the concentration must involve (i) the elimination of important competitive constraints that the merging parties exerted upon each other and (ii) a reduction of competitive pressure on the remaining competitors. It also stated that, in the context of the two-step prospective analysis which it was required to carry out in that regard, the Commission was not required to adduce evidence that the scenarios and theories of harm which it had identified would inevitably occur, but was required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration.

In that instance, the Court held that the Commission had not succeeded in proving that the notified concentration would generate non-coordinated effects capable of constituting significant impediments to effective competition, whether on the retail market, under the first and second theories of harm, or on the wholesale market, under the third theory.

Thus, the Court found, in the first place, that the Commission had made a number of errors in concluding, under the first theory of harm, that there were likely to be non-coordinated effects on the mobile telephony retail market arising from the elimination of important competitive constraints. It held, first of all, that the Commission had not established that Three was an 'important competitive force', the elimination of which would lead to a reduction in competitive pressure sufficient to establish the existence of a significant impediment to effective competition. By confusing the concepts of 'significant impediment to effective competition', [68] 'elimination of an important competitive constraint' [69] and 'elimination of an important competitive force', [70] the Commission considerably widened the scope of the rules on concentrations of undertakings and distorted the concept of 'important competitive force'. Moreover, the various factors taken into account by the Commission and on the basis of which it concluded that Three was an important competitive force or, at the very least, exerted an important competitive constraint on the market, whether in terms of the increase in the gross additional share in the light of its market shares, the increase in the number of its subscribers, the aggressive pricing policy which it might have pursued or the disruptive role it might have historically played on the market, are considered insufficient.

Similarly, the Court found that, although it was true that the relevant retail mobile telephony market was characterised by a low degree of product differentiation, with the result that the parties to the concentration and the other operators active on that market could be regarded as relatively close competitors, that factor

67| In accordance with Article 2(3) of the Merger Regulation, as interpreted in the light of recital 25 thereof.

68| The legal criterion referred to in Article 2(3) of the Merger Regulation.

69| The criterion referred to in recital 25 of the Merger Regulation.

70| The criterion from the Guidelines used in the contested decision.

alone was not sufficient to prove the elimination of the important competitive constraints that the parties to the concentration exerted upon each other and thus the existence of a significant impediment to effective competition.

Moreover, while acknowledging that the Commission could take into consideration indicators of upward pressure on prices, [71] in that they reflect the incentives for the parties to the concentration to increase their prices, the Court nevertheless held that its quantitative analysis lacked probative value, since the Commission had not demonstrated with a sufficient degree of probability that prices would rise 'significantly' following the elimination of the important competitive constraints. The Court also found that the Commission had not included in its quantitative analysis the efficiencies which the concentration could bring about. It held, lastly, that the Commission had not, in its overall assessment of the non-coordinated effects, at any point specified whether they would be 'significant' or would result in a significant impediment to effective competition.

The Court held, in the second place, that the Commission had also committed errors of law and of assessment in finding, under the second theory of harm, that there would be non-coordinated effects arising from the disruption to the network-sharing agreements.

On the basis of the principle that network-sharing agreements may have effects conducive to effective competition to the benefit of consumers, the Commission had examined the extent to which the concentration, by disrupting the existing agreements, was capable of eliminating their competitive dynamic. After examining the notifying parties' network consolidation plans and five other scenarios for the integration of the existing networks, the Commission had concluded that the operation was likely to give rise to non-coordinated anticompetitive effects on the retail market, an oligopolistic market with high barriers to entry. The operation could weaken the competitive position of the competitors which are partners in the network-sharing agreements and thus reduce their competitive pressure. Moreover, it was likely that it would lead to fewer industry-wide investments in network infrastructure, and therefore to a reduction in the degree of effective competition.

In that regard, the Court first of all observed that the novelty of that theory, by comparison with the Commission's previous decision-making practice, did not imply that it was unlikely or unfounded, and stated that it subscribed to that theory to a certain extent. However, it noted that BT/EE and Vodafone's ability to compete and incentives to invest would not depend decisively on the merged entity's investment decisions or on cost increases, but in particular on the level of competition that they would face, their financial resources and their strategies. It inferred from this that the possible misalignment of the interests of the partners in the network-sharing agreements, the disruption of those agreements following the concentration or the termination of those agreements did not constitute, in the instant case, and as such, a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

Noting that the competition rules of the European Union are primarily intended to protect the competitive process as such, and not competitors, the Court then examined the Commission's assessment of the effects of the concentration on the two competitors, BT/EE and Vodafone, taking into account the network consolidation plans concerning them respectively.

In the case of BT/EE, it held that the Commission had not succeeded in establishing that, by increasing the costs of maintaining and improving the network and by degrading its quality, the concentration would affect that undertaking's competitive position to such an extent as to constitute a significant impediment to effective competition. In that regard, the Court found, in particular, that the Commission had not adduced evidence that its theory of harm was based on a causal link between the alleged increase in fixed costs and that of

71| The so-called 'upward pricing pressure' or UPP analysis.

incremental costs, which would lead to fewer investments, to a deterioration in the quality of services offered on the market or, if they were passed on to consumers as higher prices, to a decrease in the competitive pressure of BT/EE and Vodafone on the market.

In Vodafone's case, after observing that the reduction in the competitive pressure that that undertaking was capable of exerting was not, in itself, sufficient to establish a significant impediment to effective competition in that instance, the Court held, inter alia, that the Commission had not proved to the requisite legal standard that any decision by Vodafone to restrict its investments in its own network would result in a sufficiently realistic and plausible manner from the merger, would alter the factors determining the state of competition on the markets affected and would, in that instance, 'significantly' impede effective competition on the relevant market.

Lastly, the Court held that the Commission had erred in law in finding that the increased transparency of the overall investments of mobile network operators brought about by the network-sharing agreements would reduce their incentive to invest in their networks and, consequently, their competitive pressure, without, however, defining the appropriate time frame within which it intended to establish the existence of a significant impediment to effective competition. The Commission analysed (i) the immediate effects of the concentration in the short and the medium term in the light of the temporary overlap of the two network-sharing agreements and (ii) its medium- and long-term effects in the light of the network consolidation plans. However, it did not take into account the fact that the parties to the concentration would not maintain two separate networks in the long term, even though it had mentioned that possibility on several occasions in the contested decision. The examination of the effects of a concentration on an oligopolistic market in the telecommunications sector which requires long-term investment and where consumers are often tied by contracts over several years presupposes a dynamic prospective analysis calling for account to be taken of any coordinated or unilateral effects over a relatively long period of time in the future. The Commission therefore erred in law in characterising the effect on overall network investments of increased transparency as non-coordinated effects.

Lastly, in the third place, the Court held that the Commission had not succeeded in establishing, under the third theory of harm, the existence of non-coordinated effects on the wholesale market.

In that regard, it observed, first of all, that the reduction in the number of mobile network operators from four to three was not in itself capable of establishing the existence of a significant impediment to competition, since a large number of oligopolistic markets exhibit a degree of competition which can be described as healthy. It went on to hold that, notwithstanding the fact that the Herfindahl-Hirschmann index, used to measure the degree of concentration in a market, exceeded in that case the thresholds below which it was in principle [72] precluded that the concentration would pose competition concerns, exceeding those thresholds did not imply, under paragraph 21 of the Guidelines, a presumption of the existence of competition concerns. However, noting that, in concluding that Three was an 'important competitive force' on the wholesale market, the Commission had relied not on its historical market shares and the concentration level, but on its gross add shares and the qualitative analysis of its importance on the wholesale market, the Court held that the Commission had not credibly explained why gross add shares were of such decisive importance in that case, or therefore proved, in the absence of a detailed examination of the facts, the existence of a significant impediment to effective competition.

The Court also found that, although it could be considered, in the light of its gross add share, that Three had the ability to compete with the other players in the wholesale market, that it was a credible competitor, that it had an influence on competition and that it had strengthened its position on the market, that was not

72| In accordance with paragraphs 19 to 21 of the Guidelines.

however sufficient either to establish the existence of a significant impediment to effective competition, in a context where its market share was, in reality, very low, or to conclude that it was an important competitive force. Lastly, the Court held that the Commission had not shown that the concentration would lead to a removal of the important competitive constraints which the parties had previously exerted upon each other.

By its judgment of 5 October 2020, ***HeidelbergCement and Schwenk Zement* v *Commission*** (T-380/17, EU:T:2020:471), the Court adjudicated in a case in which HeidelbergCement AG and Schwenk Zement KG ('the applicants') had on 5 September 2016 notified the Commission of a proposed concentration consisting in the acquisition, through their joint venture Duna-Dráva Cement Kft. ('DDC'), of control of the companies Cemex Hungária Építőanyagok Kft. and Cemex Hrvatska d.d. (together 'the target companies'). All of those companies operate in the building materials sector.

After having initiated the in-depth investigation procedure, the Commission declared the concentration transaction to be incompatible with the internal market. [73] In its decision, the Commission set out considerations relating, inter alia, to the Community dimension of the concentration, the relevant market, the effects of the concentration in terms of competition and the commitments of the merging parties. In asserting, more specifically, the Community dimension of the concentration, the Commission took into account the applicants' turnover, which exceeded EUR 250 million in the European Union, on the ground that they were the real players behind the concentration.

In support of their action for annulment of that decision, the applicants contested, inter alia, the assessment of the Community dimension of the notified concentration. In that regard, Article 1(2) of the EC Merger Regulation [74] requires that at least two undertakings concerned have, individually, a turnover in the European Union of more than EUR 250 million. They maintained that, in referring to their turnover in order to assert the Community dimension of the concentration led by their joint venture DDC, the Commission misinterpreted the scope of that provision.

That action was dismissed by the Court, which provided, in that connection, clarification on the concept of 'undertaking concerned' the turnover of which may be taken into account for the purpose of establishing the Community dimension of a concentration.

The Court recalled that, while the EC Merger Regulation does not define the notion of 'undertaking concerned' within the meaning of Article 1(2), the interpretation of that notion is dealt with in paragraphs 145 to 147 of the Commission's Consolidated Jurisdictional Notice. [75] Contrary to the applicants' assertion, neither those paragraphs, the principle of legal certainty nor the EC Merger Regulation preclude, for the purposes of appraising the Community dimension of a concentration implemented by a joint venture, the Commission from classifying the parent companies as the undertakings concerned when they are the real players behind the transaction.

73| Decision C(2017) 1650 final of 5 April 2017 (Case M.7878 – HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia).

74| Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) ('the EC Merger Regulation').

75| Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, (OJ 2008 C 95, p. 1, and corrigendum OJ 2009 C 43, p. 10) ('the Consolidated Jurisdictional Notice').

In that regard, the Court noted, in the first place, that, in order to ensure the effectiveness of merger control, it is necessary to take into account the economic reality of the real players behind a concentration in accordance with the circumstances of fact and of law specific to each case. Thus, the identification of the undertakings concerned is necessarily connected to the way in which the acquisition process was initiated, organised and financed in each individual case.

As regards the interpretation of paragraph 147 of the Consolidated Jurisdictional Notice, the Court stated, moreover, that it refers to two situations in which parent companies can be classified as undertakings concerned for the purposes of appraising the Community dimension of a concentration implemented by their joint venture. In the first situation, the joint venture is used as a mere vehicle. In the secondly, the parent companies are the real players behind the transaction. In that instance, the Commission had found that the transaction came within the second scenario.

In the second place, the Court ruled that neither the Consolidated Jurisdictional Notice itself nor its implementation by the Commission in that instance resulted in ambiguity that was contrary to the principle of legal certainty. According to the Court, paragraphs 145 to 147 of the Consolidated Jurisdictional Notice do not send out conflicting signals regarding the approach used by the Commission to determine the undertakings concerned by a concentration. In addition, the parties to a concentration, as diligent economic actors, may also, if required, take expert advice or contact the Commission's services in order to obtain informal guidance on the undertakings concerned by a transaction.

In the third place, the Court stated that, for the purposes of appraising the Community dimension of a concentration transaction, it is not necessary that the undertakings concerned whose turnover exceeds the thresholds provided stand on different sides of the transaction. After all, Article 1(2) of the EC Merger Regulation requires that at least two undertakings concerned have, individually, a turnover in the European Union of more than EUR 250 million, and not that those undertakings must be the acquirer and the target company.

By its judgment of 16 December 2020, ***American Airlines* v *Commission*** (T-430/18, EU:T:2020:603), the Court, ruling in extended composition, adjudicated on a case relating to a merger between US Airways Group and AMR Corporation ('the merger parties'), the latter being the parent company of the airline American Airlines. By clearance decision of 5 August 2013, [76] the Commission approved that merger, subject to certain conditions and obligations.

In order to respond to serious doubts expressed during the preliminary enquiry stage by the Commission regarding the compatibility of that transaction with the internal market, the merger parties had proposed a series of commitments aimed at reducing entry barriers to London Heathrow Airport ('LHR') and at facilitating the entry of a competitor on the London-Philadelphia route. Thus, they undertook to make LHR airline slots available to a new entrant on the London-Philadelphia route. Those commitments ('the airline slot commitments') were annexed to the Clearance Decision.

Although the LHR airline slots to be released were, in principle, to be used on the London-Philadelphia route, the airline slot commitments provided for the possibility for the new entrant to obtain Grandfathering rights allowing it to use those slots on any route to and from LHR. The new entrant could only acquire those Grandfathering rights, however, subject to an obligation that it would make 'appropriate use' of the slots for six consecutive International Air Transport Association (IATA) seasons ('the utilisation period').

76| Decision C(2013) 5232, final of 5 August 2013 (Case COMP/M.6607 – US Airways/American Airlines) (OJ 2013 C 279, p. 6) ('the Clearance Decision').

In implementing those commitments, a Slot Release Agreement was concluded between American Airlines and Delta Air Lines, which began operating the London-Philadelphia route in early summer 2015.

Taking the view that Delta Air Lines had made appropriate use of the slots during the utilisation period, the Commission granted it Grandfathering rights by a decision of 30 April 2018 [77] ('the contested decision'). In support of the assertion that the released slots had been appropriately used, the Commission found that Delta Air Lines had not misused those slots during the utilisation period.

American Airlines brought an action before the Court for annulment of that decision, invoking, inter alia, errors of law made by the Commission in interpreting Delta Air Lines' obligation to make 'appropriate use' of the slots released. According to American Airlines, 'appropriate use' must be understood as 'use in accordance with the bid' and not as an absence of 'misuse' of the slots released, as alleged by the Commission.

That action for annulment was, however, dismissed by the Court.

In its judgment, the Court adopted a literal and systematic interpretation of Delta Air Lines' obligation to make 'appropriate use' of the LHR airline slots released by American Airlines, while taking into account its purpose and context.

With respect to the literal interpretation of the term 'appropriate use', the Court noted that, in the original language of the airline slot commitments, namely English, the notion of 'misuse' does not necessarily have a negative connotation. The Commission, therefore, had not erred in taking the view that the term 'misuse' can be defined as 'an occasion when something is used in an unsuitable way or in a way that was not intended'. According to the Court, equating 'appropriate use' with 'absence of misuse' in the contested decision is, therefore, reconcilable with the wording of the provisions in question.

However, the interpretation advanced by American Airlines, according to which appropriate use is to be understood, in principle, as use 'in accordance with the bid', while reserving a certain margin of appreciation for the Commission in that respect, is, according to the Court, also reconcilable with the terms 'appropriate use'.

Since a mere literal interpretation of the airline slot commitments was not conclusive, the Court recalled that, to interpret a provision of EU law, account must be taken not only of the terms of that provision but also of its context and the objectives pursued by the legislation of which it forms part. Since the airline slot commitments form an integral part of the Clearance Decision, those principles are relevant when interpreting them. Thus, the Court stated that the airline slot commitments must be interpreted in the light of the Clearance Decision, within the general framework of EU law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under the Merger Regulation and the Implementing Regulation. [78]

In that respect, the Court highlighted the importance of the indications in the 'Form RM', which the parties had provided to the Commission together with their proposals for the airline slot commitments. In accordance with the Implementing Regulation, [79] that Form RM contains the information and documents necessary to enable the Commission to examine whether the commitments submitted by the parties are such as to render

77| Decision C(2018) 2788, final of 30 April 2018 (Case M.6607 US Airways/American Airlines).

78| Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (OJ 2008 C 267, p. 1).

79| Annex 4 to Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2004 L 133, p. 1, corrigendum OJ 2004 L 172, p. 9) ('the Implementing Regulation').

the concentration compatible with the internal market. To the extent that the Form RM derives from the Merger Regulation, the airline slot commitments, as annexed to the Clearance Decision, must also be interpreted in the light of the Form RM.

With regard to the Grandfathering rights over the LHR airline slots to be released, it follows from the Form RM provided by the parties that the commitments proposed by the merger parties are broadly similar to those provided for in the IAG/bmi Case. [80] However, unlike the commitments given in the IAG/bmi Case, the LHR airline slot commitments require that the released slots be used during the utilisation period 'in accordance with the bid'. Thus, American Airlines advanced a series of arguments aimed at demonstrating the relevance of the wording 'in accordance with the bid' in the airline slot commitments in interpreting the term 'appropriate use' and, therefore, in granting the Grandfathering rights.

Its arguments were, however, all rejected by the Court, for which the reference to the use of the slots 'in accordance with the offer' in the airline slot commitments only constitutes a minor linguistic change by comparison with the commitments given in the IAG/bmi Case and does not result in any change in the requirements for Grandfathering in relation to that case. According to the Court, that interpretation could be called into question only if the parties had brought to the attention of the Commission that the deviation in the wording from the proposed commitments constituted a substantial change from the commitments established in the IAG/bmi Case. The Form RM did not, however, address that point. Moreover, American Airlines had not presented any other useful evidence to demonstrate that the merger parties had brought that deviation to the Commission's attention.

Finally, the Court confirmed that the Commission's interpretation in the contested decision that 'appropriate use' is to be understood as the absence of 'misuse' was supported both by the systematic interpretation of the airline slot commitments and by their objective and their context. In the light of the foregoing, the Court dismissed the action for annulment in its entirety.

IV. State aid

1. Scope of the Commission's supervisory power

By its judgment of 9 September 2020, ***Kerkosand* v *Commission*** (T-745/17, EU:T:2020:400), the Court ruled on a case concerning a complaint lodged in 2013 by Kerkosand spol. s. r. o. In 2013, Kerkosand spol. s.r.o. ('the applicant') filed a complaint with the European Commission concerning investment aid granted to one of its competitors, the company NAJPI a. s. ('the beneficiary undertaking'). That aid had been granted under a Slovak aid scheme to support the deployment of innovative and advanced technologies in the industry and services covered by the provisions of the General Block Exemption Regulation concerning regional investment and employment aid. [81] Consequently, the aid granted to the beneficiary undertaking had not been notified. The applicant maintained before the Commission that the aid granted had been unlawful

80| Case COMP/M.6447 – IAG/bmi ('the IAG/bmi Case'), which gave rise to Commission Decision C(2012) 2320 of 30 March 2012 (OJ 2012 C 161, p. 2).

81| Article 13 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 [EC] (General block exemption Regulation) (OJ 2008 L 214, p. 3).

because it did not satisfy the conditions set out in the exemption regulation. Following contact with the Slovak authorities and the applicant, the complaint was rejected as unfounded by a Commission decision adopted in 2017 ('the contested decision'). The Court annulled that decision.

The judgment provides significant clarification on the scope of the Commission's supervisory duty concerning State aid. In that regard, the Court noted, first of all, that a complainant may initiate the preliminary examination phase by submitting a complaint or information concerning aid alleged to be unlawful. In accordance with the applicable rules, [82] the Commission is required to close that phase by a decision finding that there is no State aid, a decision not to raise any objections or a decision opening the formal stage of the examination. In that regard, contrary to the Commission's contention, the Court held that that obligation also applies when a complaint was brought by an interested party alleging that the conditions of an exemption regulation were inapplicable or incorrectly applied. In addition, the Court specified that, when the Commission receives a complaint alleging that certain provisions of an exemption regulation have not been observed, it is not only competent to ascertain whether the claims of the complainant are well founded but is also required to do so in order to determine whether the measure in question should have been notified to it and thus constitutes unlawful aid. If that were not the case, the national authorities would have excessive autonomy in implementing those provisions. In adopting exemption regulations, the Commission does not delegate its supervisory and decision-making powers concerning State aid to the national authorities, including as regards the handling of complaints, but fully retains its power of oversight, as regards, in particular, those authorities' observance of the fundamental obligation to notify aid measures and to prohibit their implementation.

Next, the Court held that, when the Commission is called upon to check whether the national authorities have correctly applied the provisions of an exemption regulation, the check it carries out is tantamount to a mere review of legality without the considerations falling within the discretion which it has only when it applies Article 107(3)(a) TFEU in an individual case. If it were otherwise, the immediate effect of the exemption from the obligation to notify aid laid down by the exemption regulations and the directly applicable and legally exhaustive nature of the exemption conditions would be called into question, which would undermine the direct applicability of the regulations and, accordingly, the principle of legal certainty. By contrast, if the Commission were to find that the national authorities incorrectly applied the conditions of an exemption regulation, so that the aid in question should have been notified, it would be required to assess the compatibility of the aid in the light of the provisions of the Treaty relating to State aid while taking into account the additional criteria of the guidelines.

The contested decision was annulled by the Court because the Commission did not open a formal investigation procedure despite the doubts [83] that it should have had in the investigation of the aid measure carried out at the preliminary stage. While the beneficiary undertaking received regional aid for a micro, small or medium-sized enterprise (SME), given inter alia the information provided by the applicant on the relationships of the beneficiary undertaking and other companies, the Commission should have had doubts about the beneficiary undertaking's classification as an SME. In that regard, in order to determine whether the criteria for an SME [84] were met, the Slovak authorities and the Commission were required, first, to determine precisely the relevant approved accounting period and year to make a joint calculation of the respective data for the

82| Article 4(2), (3) or (4) of Council Regulation (EU) No 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

83| Within the meaning of Article 4(4) of Regulation 2015/1589.

84| Article 2(1) of Annex I to Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1) provides that the category of SMEs is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

linked undertakings [85] and, secondly, to specify the company or companies that should be taken into consideration to that end. On that basis, they were required to assess whether or not during two consecutive accounting periods the relevant thresholds for classification of the beneficiary undertaking as an SME were exceeded. [86] In so far as the contested decision was silent in that regard, the Court found that there was no investigation or examination of the relevant factors for classification of the beneficiary undertaking as an SME. In addition, it stated that the lack of due diligence on the part of the Commission in investigating the situation of the linked undertakings cannot be justified by the argument that that institution could, without harbouring any doubts, trust the information submitted by the Slovak authorities, on the ground that they were bound by their duty of sincere cooperation. [87]

2. Aid in the transport sector

By the judgment in ***easyJet Airline* v *Commission*** (T-8/18, under appeal, [88] EU:T:2020:182), [89] delivered on 13 May 2020, the Court, ruling in extended composition, dismissed the action brought by easyJet Airline Co. Ltd ('the applicant') seeking annulment of the decision of the European Commission of 29 July 2016 declaring partly incompatible with the internal market the aid granted by Italy to various airlines serving Sardinia. [90] According to that decision, the aid scheme instituted, in Italy, by the Autonomous Region of Sardinia ('the Region') for the development of air transport constituted State aid granted not to the Sardinian airport operators, but to the airlines concerned.

On 13 April 2010, the Region had adopted Law No 10/2010, [91] subsequently notified by Italy to the Commission pursuant to Article 108(3) TFEU, which authorised the financing of the island's airports with a view to the development of air transport, inter alia through the de-seasonalisation of air routes to and from Sardinia. That law was implemented by a series of measures adopted by the executive of the Region, including Regional Council Decision No 29/36 of 29 July 2010 (together with the relevant provisions of Law No 10/2010, 'the measures at issue'). The measures at issue provided inter alia for the conclusion by the airport operators of agreements with the airlines with a view to improving the island's air service and promoting it as a tourist destination. They determined, moreover, the conditions and arrangements of reimbursement, by the Region, to the airport operators of the sums paid by those operators to the airlines under such agreements.

85| Within the meaning of Article 2(1) of Regulation No 651/2014 read in conjunction with Article 3(3) and Article 4(2) of Annex I to that regulation.

86| Article 4(2) of Annex I to Regulation No 651/2014.

87| Article 4(3) of the Treaty on the European Union.

88| Case C-343/20 P, ***easyJet Airline* v *Commission***.

89| See also, on the same topic, judgments of 13 May 2020, ***Volotea* v *Commission*** (T-607/17, under appeal, EU:T:2020:180) and ***Germanwings* v *Commission*** (T-716/17, EU:T:2020:181).

90| Commission Decision (EU) 2017/1861 of 29 July 2016 on State aid SA33983 (2013/C) (ex 2012/NN) (ex 2011/N) – Italy – Compensation to Sardinian airports for public service obligations (SGEI) (OJ 2017 L 268, p. 1).

91| Legge regionale n. 10 – Misure per lo sviluppo del trasporto aereo (Regional Law No 10 – Measures for the development of air transport) (*Bollettino ufficiale della Regione Autonoma della Sardegna No 12*, of 16 April 2010) ('Law No 10/2010').

On 29 July 2016, the Commission adopted a decision declaring the aid scheme established by the measures at issue partly incompatible with the internal market and ordering the recovery of the aid concerned from the airlines considered to be beneficiaries, which included the applicant. In support of its action for annulment, the applicant put forward several pleas alleging, inter alia, various manifest errors of assessment as well as infringement of the principle of legitimate expectations.

The Court first of all rejected the plea alleging a manifest error of assessment by the Commission as regards the classification of the payments, transferred by the airport operators to the applicant, as State resources the grant of which was imputable to the Italian State.

In that regard, the Court confirmed, in the first place, that the payments made by the airport operators to the airlines under the concluded agreements represented a mobilisation of State resources, in so far as the funds transferred by the Region to the airport operators had been those used to make the payments at issue. In order to support that finding, the Court relied primarily on the analysis of the arrangements prescribed by the measures at issue for reimbursement by the Region of the payments made by the airport operators to the airlines under the concluded agreements. The Court thereby noted the existence of a supervision mechanism which made reimbursement – in instalments – of the funds incurred conditional on the presentation of accounting and supporting reports establishing the conformity of the agreements, under which the payments had been made, with the objectives pursued by Law No 10/2010 and their proper implementation. According to the Court, the State nature of the resources thus transferred was called into question neither by the absence of determination, by Law No 10/2010, of the arrangements for transfer of the funds by the airport operators to the airlines nor by the alleged existence of other sources of funding of the airport operators. Having recalled that the objective pursued by State measures was irrelevant to the classification of those measures as 'aid' within the meaning of Article 107 TFEU, the Court also emphasised that, where an advantage originating from State resources has been transferred by the immediate recipient, in that case the airport operators, to a final beneficiary, it is irrelevant that that transfer was made by the recipient in accordance with commercial principles or, on the contrary, that that transfer met an objective of general interest. The Court inferred from this that the prohibition of State aid could apply to various payments made by the airport operators to the airlines under the measures at issue, even though those operators had not been vested with prerogatives of public authority or missions of general interest or appointed to administer the aid.

So far as concerns, in the second place, the imputability to the Region of the payments made by the airport operators to the benefit of the airlines, the Court observed that the degree of control exerted by the State over the grant of an advantage – as is apparent inter alia from the context in which the measure in question was taken, its compass, its content and the conditions which it contains – must also be taken into account for the purpose of ascertaining the involvement of the public authorities in its adoption, failing which the advantage granted cannot be imputed to them. Examining the contested decision in the light of those criteria, the Court then found that, in that instance, the degree of control exerted by the Region over the grant of the funds to the airlines demonstrated to the requisite legal standard its involvement in making the funds available. Indeed, even though the precise arrangements for allocating the funds obtained by each of the airport operators were not determined in Law No 10/2010, the fact remains that the decisions taken by the Regional Executive in application of that law enabled the Region to monitor closely the behaviour of the airport operators that had decided to request the financing measures provided for under the aid scheme at issue, whether through the prior approval of their plans of activities or through the conditions laid down for reimbursement of the sums transferred by those operators to the airlines. According to the Court, the exercise of such control by the Region proves that the financing measures at issue were imputable to it, including owing to the insertion – required by the Region – of penalty clauses into the agreements concluded between the airport operators and the airlines with a view to protecting public investment. Consequently, the Court approved the Commission's finding that the airport operators could be regarded as intermediaries between

the Region and the airlines, since they had transferred in full the funds received from the Region and had thus acted in accordance with the instructions received from the Region through the plans of activities approved by that region.

In examining the second plea, alleging a manifest error of assessment as regards the receipt of an advantage by the airlines, the Court held, in the first place, that the Commission had been right to categorise the measures at issue as an 'aid scheme' within the meaning of Article 1(d) of Regulation 2015/1589. After having recalled that such a categorisation cannot be applied to a set of provisions that require further implementing measures, the Court considered that an aid scheme may nevertheless consist of general provisions and their implementing provisions, provided that, taken as a whole, those provisions suffice to enable it to rule on the grant of individual aid. In the light of those principles, the Commission was entitled, in that instance, to determine the legal framework of the aid scheme at issue taking account of acts adopted subsequent to notification of the measures at issue, which were of no relevance to the thrust of the mechanism, but while excluding the plans of activities and the individual agreements between the airport operators and the airlines. Those were not further implementing measures, but already fell within the individualised implementation of the aid scheme at issue. The Court last specified that the absence of formal identification of the airlines as final and real beneficiaries of the aid at issue in Law No 10/2010 was no obstacle to the categorisation of the mechanism as an 'aid scheme', as the Commission could rely on all the elements of the mechanism put in place to support its conclusion.

The Court held, in the second place, that the Commission had been right not to examine the transactions between the airlines and the airport operators in the light of the market economy operator test. Indeed, those operators, which were not owned by the Region, had been essentially limited to implementing the aid scheme at issue put at their disposal by the Region. So far as concerns, on the other hand, the application of that test to the decisions of the Region, the Court found that the Region had not acted as an investor, given that it had put in place the aid scheme at issue solely with a view to the island's economic development. In so far as the Region acted as an acquirer of marketing services, the Court emphasised, moreover, that the existence of an advantage constituting aid can be excluded not on account of the existence of reciprocal commitments, but on account of the services at issue having been acquired in compliance with the public procurement rules laid down by EU law or, at least, after organising an open and transparent tender procedure guaranteeing observance of the principle of equal treatment between providers and the acquisition of services at market prices. In that instance, however, the calls for expressions of interest published prior to the conclusion of the agreements with the airlines were not regarded by the Court as equivalent to tender procedures, in the absence in particular of any selection according to precise criteria amongst the airlines that had responded to the calls.

After having rejected the pleas alleging manifest errors of assessment as regards whether the measures at issue distorted or threatened to distort competition, as regards whether they affected trade between Member States and as regards the absence of possibility of declaring them compatible with the internal market by way of derogation, pursuant to Article 107(3) TFEU, the Court ultimately held, in examining the fifth plea, that the Commission had likewise not disregarded the principle of legitimate expectations in ordering recovery of the amounts received by the applicant in performance of the contracts concluded with the airport operators under the measures at issue. It noted, in that regard, that the applicant could not have any legitimate expectation as to the legality of the aid, in so far as it was unlawful due to having been implemented without awaiting the Commission's pronouncement on the measures that had been notified to it, or as to the commercial nature of its contractual relations with the airport operators, since the applicant could not be unaware of the financing mechanisms provided for in Law No 10/2010, which had been the subject of an official publication at the national level, and, therefore, the State origin of the funds concerned.

3. Taxation of companies forming part of a multinational group

By its judgment of 15 July 2020, ***Ireland and Others* v *Commission*** (T-778/16 and T-892/16, under appeal, [92] EU:T:2020:338), the Court, ruling in extended composition, adjudicated on the fiscal rulings adopted by the Irish tax authorities on the taxable benefit allocated to the Irish branches of Apple Sales International (ASI) and Apple Operations Europe (AOE). On 11 June 2014, the European Commission opened a formal investigation procedure concerning those rulings, on the ground that they could constitute State aid. ASI and AOE, subsidiaries of the Apple Group, [93] are companies governed by Irish law, managed and controlled outside Ireland, which are not tax resident in Ireland and which have set up Irish branches. [94]

Following its investigation, the Commission, by a decision of 30 August 2016 [95] ('the contested decision'), concluded that the tax rulings issued by the Irish tax authorities constituted unlawful State aid incompatible with the internal market that had to be recovered from ASI and AOE. In order to come to that conclusion, concerning the selective advantage condition, the Commission used three separate lines of reasoning (primary, subsidiary and alternative) intended to demonstrate that the contested tax rulings had enabled ASI and AOE to reduce the amount of tax for which they were liable in Ireland during the period when those rulings were in force, namely the period from 1991 to 2014.

Hearing actions brought by Ireland, ASI and AOE, the Court annulled the contested decision. That judgment, which follows on from other cases relating to advance tax decisions (tax rulings), [96] provides clarification regarding the condition of selectivity of aid measures where Member States adopt such decisions.

In its judgment, the Court recalled that instances of intervention by the Member States in the field of direct taxation, even if they concern issues that have not been harmonised in the European Union, are not excluded from the scope of the rules on State aid control. In that regard, as the Commission is competent to ensure that those rules are complied with, it cannot be said to have exceeded its competences when assessing whether, in issuing the contested tax rulings, the Irish tax authorities had granted ASI and AOE favourable tax treatment by enabling them to reduce their chargeable profit by comparison with the chargeable profit of other corporate taxpayers in a comparable situation. When the Commission exercises that power, regarding tax measures, the examination of advantage overlaps with the examination of selectivity in so far as, in order for those two conditions to be satisfied, it must be shown that the contested tax measure leads to a reduction in the amount of tax which would normally have been payable by the beneficiary of the measure under the ordinary tax regime and would, therefore, have been applicable to other taxpayers in the same situation.

92| Case C-465/20 P, ***Commission* v *Ireland and Others***.

93| Within the Apple Group, Apple Operations International is a fully-owned subsidiary of Apple Inc., Apple Operations International fully owns the subsidiary AOE, which, in turn, fully owns the subsidiary ASI.

94| ASI's Irish branch is responsible for, inter alia, carrying out procurement, sales and distribution activities associated with the sale of Apple-branded products to related parties and third-party customers in the regions covering Europe, the Middle East, India and Africa and the Asia-Pacific region. AOE's Irish branch is responsible for the manufacture and assembly of a specialised range of computer products in Ireland, such as iMac desktops, MacBook laptops and other computer accessories, which it supplies to related parties for Europe, the Middle East, India and Africa.

95| Commission Decision (EU) 2017/1283 of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (OJ 2017 L 187, p. 1).

96| See, in particular, judgments of 14 February 2019, ***Belgique et Magnetrol International* v *Commission*** (T-131/16 and T-263/16, EU:T:2019:91); of 24 September 2019, ***Luxembourg and Fiat Chrysler Finance Europe* v *Commission*** (T-755/15 and T-759/15, EU:T:2019:670); and of 24 September 2019, ***Netherlands and Others* v *Commission*** (T-760/15 and T-636/16, EU:T:2019:669).

In that instance, the Court ruled that the Commission had not succeeded in showing that there was a selective advantage that had led to a reduction in the amount payable by ASI and AOE in the form of corporation tax in Ireland. According to the Court, each of the lines of reasoning used by the Commission in that regard was vitiated by errors affecting, by extension, the legality of the contested decision.

In the first place, regarding the Commission's primary line of reasoning, the Court endorsed that line of reasoning as regards the determination of the reference framework, the use of the arm's length principle and the Authorised OECD Approach. [97]

First, the Court found that the Commission had not erred in determining the reference framework for the purposes of examining the selective advantage condition. That reference framework is the ordinary rules of taxation of corporate profit, the objective of which is to tax the chargeable profits of companies carrying on activities in Ireland, be they resident or non-resident, integrated or stand-alone. In addition to providing for the taxation of resident companies, Irish tax law provides that non-resident companies are not to be taxed in Ireland, unless they carry on a trade there through a branch or agency, in which case they are to be taxed on any trading income arising directly or indirectly through or from the branch or agency, and from property or rights used by, or held by or for, the branch or agency, as well as on capital gains attributable to the branch or agency. [98] Accordingly, resident and non-resident companies carrying on a trade in Ireland through a branch are in a comparable situation in the light of the objective pursued by the Irish tax regime, namely the taxation of chargeable profits.

Secondly, the Court ruled that, since, under Irish tax law, the profit resulting from the trading activity of a branch of a non-resident company is to be taxed as if it were determined under market conditions, the Commission could validly rely on the arm's length principle in order to ascertain whether there was a tax advantage, even though that principle has not been formally incorporated into Irish law. The application of that principle enables the Commission to ascertain, in the exercise of its powers under Article 107(1) TFEU, whether the chargeable profit of a branch of a non-resident company is determined, for the purposes of corporation tax, in a manner that ensures that non-resident companies operating through a branch in Ireland are not granted favourable treatment by comparison with resident stand-alone companies whose chargeable profits reflect prices negotiated at arm's length on the market. Regarding the scope of the arm's length principle in the context of State aid control, the Court recalled that, although in that instance that principle is a tool enabling the Commission to ascertain whether there is a tax advantage, nevertheless the Commission cannot contend that there is a freestanding obligation for Member States to apply it horizontally and in all areas of their national tax law. In the absence of EU rules regarding the designation of bases of assessment and the spreading of the tax burden across the different factors of production and economic sectors, at this stage in the development of EU law, the Commission does not have the power independently to determine what constitutes the 'normal' taxation of an integrated undertaking while disregarding the national rules of taxation.

Thirdly, the Court held that the Commission could validly rely, in essence, on the Authorised OECD Approach [99] when it considered that, for the purposes of applying Irish tax law, the allocation of profits to the Irish branch of a non-resident company had to take into account the allocation of assets, functions and risks between the branch and the other parts of that company. In the contested decision, although the Commission did

97| OECD 2010 Report on the Attribution of Profits to Permanent Establishments, approved by the Council of the OECD on 22 July 2010.

98| Section 25 of the Taxes Consolidation Act 1997.

99| The Authorised OECD Approach is based on work carried out by groups of experts and reflects international consensus regarding profit allocation to permanent establishments; it is of practical significance when interpreting questions relating to that profit allocation.

not directly apply the provisions of the OECD Model Tax Convention or the guidance provided by the OECD on profit allocation or transfer pricing, nevertheless it relied, in essence, on the Authorised OECD Approach. In that regard, the Court found that, although the Authorised OECD Approach has not been incorporated into Irish tax law, in essence, there is an overlap between the functional and factual analysis conducted as part of the first step of the analysis proposed by that approach, on the one hand, and the application of the provisions of Irish tax law relating to non-resident companies, on the other.

By contrast, the Court noted that the Commission had erred regarding the application of the provisions of Irish tax law relating to non-resident companies. According to those provisions, profits derived from property, such as intellectual property licences, that is controlled by a non-resident company cannot be regarded, as such, as being chargeable profits attributable to the Irish branch of that company even if that property has been made available to that branch. When determining the profits of the branch, the relevant question is whether the Irish branch has control of that property. However, the Court found that, when the Commission considered that the Apple Group's intellectual property licences should have been allocated to the Irish branches in so far as ASI and AOE were regarded as having neither the employees nor the physical presence to manage them, it allocated profits using an 'exclusion' approach, which is inconsistent with the provisions of Irish tax law relating to non-resident companies. Moreover, according to the Court, when conducting its assessments concerning the activities within the Apple Group, the Commission did not succeed in showing that, in the light, first, of the activities and functions actually performed by the Irish branches of ASI and AOE and, secondly, of the strategic decisions taken and implemented outside those branches, the Apple Group's intellectual property licences should have been allocated to those Irish branches for the purpose of determining the annual chargeable profits of ASI and AOE in Ireland. Accordingly, the Court held that, in its primary line of reasoning, the Commission had not succeeded in showing that, by issuing the tax rulings, the Irish tax authorities had granted ASI and AOE an advantage.

In the second place, the Court came to the same conclusion regarding the subsidiary line of reasoning, according to which the profit allocation methods endorsed in the tax rulings had led to a result that departed from a reliable approximation of a market-based outcome in line with the arm's length principle. The Court emphasised, in its reasoning, that the mere non-observance of methodological requirements, in particular in connection with the OECD Transfer Pricing Guidelines, is not a sufficient ground for concluding that the calculated profit is not a reliable approximation of a market-based outcome, let alone that the calculated profit is lower than the profit that should have been obtained if the method for determining transfer pricing had been correctly applied. Thus, merely stating that there has been a methodological error is not sufficient, in itself, to demonstrate that the tax measures at issue have conferred an advantage on the beneficiaries of those measures. Indeed, the Commission must also demonstrate that the methodological errors that have been identified have led to a reduction in the chargeable profit and thus in the tax burden borne by those beneficiaries, by reference to the tax burden which they would have borne pursuant to the normal rules of taxation under national law had the tax measures in question not been adopted.

In that regard, although the Court pointed out the incomplete and occasionally inconsistent nature of the tax rulings resulting from defects in the methods for calculating the chargeable profits of ASI and AOE, nevertheless it ruled that the Commission had not succeeded in showing that the methodological errors to which it had referred with regard to the profit allocation methods endorsed by the tax rulings, in particular concerning the choice of the operating costs as the profit level indicator and the levels of return accepted by the tax rulings, had led to a reduction in ASI and AOE's chargeable profits in Ireland.

In the third and last place, regarding the alternative line of reasoning, the Court held, inter alia, that, in so far as the Commission had not succeeded in showing the existence of an advantage through its primary and subsidiary lines of reasoning, it could not, solely through its alternative line of reasoning, show that there was a selective advantage. Thus, according to the Court, even assuming that it were established that the tax authorities had discretion, the existence of such discretion did not necessarily mean that it had been used

to reduce the tax liability of the recipient of the tax ruling by comparison with the liability to which that beneficiary would normally have been subject. In any case, the Court maintained that the Commission had not succeeded in showing that the Irish tax authorities had exercised a broad discretion likely to favour ASI and AOE. In that regard, in order to reject the Commission's argument that those authorities' application of the tax provisions does not involve the use of any consistent criterion for the purpose of determining the profits to be allocated to the Irish branches of non-resident companies, the Court emphasised that, in order to apply those provisions, it is necessary to carry out an objective analysis of the facts, which corresponds, in essence, to the approach proposed by the OECD. In addition, the Court noted that the methodological defects that had been identified in the calculation of ASI's and AOE's chargeable profits were, in themselves, insufficient to show that the tax rulings had been the result of a broad discretion exercised by the Irish tax authorities.

V. Intellectual property

1. EU trade mark

a. Signs capable of constituting a trade mark

In the judgment in ***CEDC International* v *EUIPO – Underberg (Shape of a blade of grass in a bottle)*** (T-796/16, under appeal, [100] EU:T:2020:439), delivered on 23 September 2020, the Court ruled on the requirement that the representation of a three-dimensional mark in the certificate of registration be clear and precise, in terms of Article 4 of Regulation No 40/94. [101]

In that instance, Underberg AG had sought registration of an EU three-dimensional trade mark representing a blade of grass in a bottle, in relation to spirits and liqueurs. CEDC International sp. z o.o. sp. z o.o. ('the applicant') had filed a notice of opposition based on its earlier three-dimensional French mark, which was registered for alcoholic drinks ('the earlier mark').

The applicant's opposition and its subsequent appeal had been dismissed by the Opposition Division and by the Board of Appeal of the European Union Intellectual Property Office (EUIPO) respectively, on the ground that the applicant had not proved the nature of use of the earlier mark, that is to say, the use of that mark as registered or in a form which differed in elements which did not alter the distinctive character of that trade mark in the form in which it had been registered. Following an action brought by the applicant, the Court had annulled the Board of Appeal's decision, holding that it had not exercised its discretion to decide

100| Case C-639/20 P, ***CEDC International* v *EUIPO***.

101| Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1), itself replaced by 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)).

whether or not to take into account evidence of use submitted out of time. [102] By its second decision ('the contested decision'), the Board of Appeal once again dismissed the appeal, observing that that evidence in no way changed its previous decision.

Hearing an action against that decision, the Court held that, as regards the interpretation and application of the law on EU trade marks, the representation of the trade mark, which must be clear and precise, defines the scope of the protection conferred by the registration. In addition, any description which accompanies the representation must align with the representation as registered and cannot extend the scope of the mark thereby defined. That requirement that any description align with the representation is therefore a corollary of the requirement that the representation which defines the scope of the protection be clear and precise.

In that regard, the Court held that, in that instance, the description of the earlier mark, since it does not align with its representation, comprising a line and not a blade of grass as described, cannot serve to clarify it or make it more precise. [103] Indeed, only a more realistic representation of the blade of grass, or a true image of a blade of grass placed inside a bottle, could have clearly and precisely established its presence in that mark. Accordingly, the precise subject of the protection conferred by the earlier mark does not relate to a blade of grass.

Following those findings, the Court upheld the Board of Appeal's assessment that the use of the earlier three-dimensional French mark, as represented and registered, had not been proved.

By contrast, the complaint alleging infringement of the obligation to state reasons was upheld. [104] The Court held that the Board of Appeal, when providing the basis for the operative part of the contested decision rejecting all the grounds of opposition relied on, was not permitted to refer, for certain of those grounds, to the reasoning of an initial decision which had been annulled in its entirety by the Court, without examining and rejecting each of the grounds of opposition. Consequently, the Court annulled the contested decision solely with regard to the grounds which the Board of Appeal did not examine.

b. Marks devoid of distinctive character

By its judgment of 5 February 2020, ***Hickies* v *EUIPO (Shape of a shoe lace)*** (T-573/18, EU:T:2020:32), the Court dismissed the action brought against the decision of EUIPO which had refused registration of a three-dimensional mark consisting of the shape of a shoe lace, on the ground that it was devoid of any distinctive character.

102| Judgment of the General Court of 11 December 2014, ***CEDC International* v *OHIM – Underberg (Shape of a blade of grass in a bottle)*** (T-235/12, EU:T:2014:1058).

103| According to the description of the earlier mark, 'the mark consists of a bottle inside which a blade of grass is placed in the body of the bottle in an almost diagonally inclined position'.

104| Within the meaning of Article 75 of Regulation No 207/2009.

Hickies, the applicant, had applied for registration of a three-dimensional sign which takes the shape of a link which is represented in four illustrations from different angles. At one end of that link is an eyelet into which the button at the other end can be inserted to close that link. The mark applied for was considered by EUIPO to be devoid of any distinctive character [105] in respect of certain of the products for which registration was sought, in particular for shoe laces.

The applicant maintained inter alia that the mark applied for was a completely new type of fastening system and departed significantly from the norms and customs of the footwear sector. In that regard, in order to counter the examples cited by EUIPO, it claimed that the goods concerned were imitations and that none of the websites mentioned were sites of trade mark proprietors, but rather were online sales platforms well known as being used by counterfeiters as sales vehicles. In that regard, the Court held that the fact that online sales platforms are concerned in no way diminishes the probative value of the evidence provided by the examiner seeking to demonstrate the existence on the EU market of shapes similar to that forming the mark applied for. Moreover, even if some of those sites may be used for the sale of counterfeit goods, that possibility alone does not prove that the goods referred to by the links cited by EUIPO are counterfeit. In any event, the Court does not have jurisdiction to rule on the alleged counterfeiting.

Further, the applicant relied on the novelty of the product whose shape corresponded to that constituting the mark applied for. The Court held that, even if that novelty were established, that fact does not necessarily mean that that mark is distinctive. It recalled that signs commonly used for the marketing of the goods or services concerned are deemed incapable of identifying the origin of those goods or services. Nevertheless, that assertion cannot be interpreted *a contrario* to substantiate the conclusion that the mark applied for has distinctive character when it is not commonly used for the goods and services at issue. In fact, the assessment of an EU trade mark's distinctive character is not based on the originality or lack of use of that mark in the area covering the goods and services concerned.

In addition, the Court pointed out that the applicant's argument that there had been an infringement of the right to two EU designs by reason of the marketing of goods with a shape similar to that of the applicant's product, whose shape corresponded to that of which the mark applied for consists, did not affect the analysis of the intrinsic distinctiveness of the mark applied for. The protection of a design right does not imply that the shape concerned is distinctive, because the criteria for examining those two rights are fundamentally different. The protection of a design right concerns the appearance of a product that differs from existing designs and is based on the novelty of that design, namely the fact that no identical design has been publicly disclosed, and on its individual character. By contrast, in the case of a trade mark, while the shape of which the mark applied for consists must necessarily depart significantly from the norm or from the customs of the sector concerned in order for it to have distinctive character, the mere novelty of that shape is not sufficient to find that such a character exists, since the decisive criterion is the ability of that shape to fulfil the function of indicating commercial origin.

According to the Court, the Board of Appeal of EUIPO was also correct to downplay the importance of the design awards relied on by the applicant. The fact that goods benefit from a high-quality design does not necessarily mean that a mark consisting of the three-dimensional shape of those goods enables ab initio those goods to be distinguished from those of other undertakings. In addition, the experts making those awards may focus on very small differences, while the relevant public, with average attention in that instance, will not carry out an analytical examination of the shape at issue.

105| Within the meaning of Article 7(1)(b) of Regulation No 207/2009.

By its judgment of 25 November 2020, ***Brasserie St Avold* v *EUIPO (Shape of a dark bottle)*** (T-862/19, EU:T:2020:561), the Court adjudicated in a case in which Brasserie St Avold had designated the European Union for the international registration of a three-dimensional sign. The sign consists in the three-dimensional representation of a dark bottle with a cap seal. A white label is wrapped around the lower part of the bottle in an irregular manner, with the exception of a peak that points upwards and does not follow the shape of the body of the bottle in that part. Protection of the trade mark was sought for beverages. EUIPO refused protection of the international registration on the ground that the sign was devoid of any distinctive character within the meaning of Article 7(1)(b) of Regulation 2017/1001.

Hearing an action for annulment against EUIPO's decision, the Court dismissed the action. It provided clarification of the norms and customs of the sector in the context of the assessment of the distinctive character of three-dimensional trade marks consisting in the shape of the product or the shape of its packaging.

First of all, the Court recalled that, because the packaging of a liquid product represents a necessity for its commercialisation, the average consumer assigns, first of all, only that function. Only a trade mark which departs significantly from the norm or customs of the sector is not devoid of any distinctive character. Thus, where a three-dimensional trade mark consists of the shape of the product in respect of which registration is sought or of the shape of its packaging, the mere fact that that shape is a variant of a common shape of that type of product or of its packaging is not sufficient to establish that the mark is not devoid of any distinctive character.

Next, the Court found that EUIPO had established that the norm and customs in the beverages sector were characterised by a wide variety of shapes of labels and of methods of positioning them on bottles. The Court then made clear that, even on supposing that the majority of labels of the goods in question are rectangular in shape, affixed in their entirety to a part of the cylindrical body of the bottle, the norm and customs of the sector cannot be reduced to the single shape that is statistically the most widespread, but include all of the shapes which the consumer is used to seeing on the market.

Lastly, the Court emphasised that the label at issue is a mere possible variant of shapes which already exist. It does not diverge significantly from the norm or customs of the sector. The Court therefore held that the sign at issue is not capable of designating the origin of the goods in question. It therefore does not have the required minimum degree of distinctive character.

c. Mark of such a nature as to deceive the public

By its judgment in ***SolNova* v *EUIPO – Canina Pharma (BIO-INSECT Shocker)*** (T-86/19, EU:T:2020:199), delivered on 13 May 2020, the Court annulled in part EUIPO's decision on the ground that it had committed an error of assessment in finding that the word mark BIO-INSECT Shocker was not deceptive in respect of biocidal products.

SolNova AG, the applicant, had applied for a declaration of invalidity of the word mark BIO-INSECT Shocker in respect of all the goods covered by that mark, including biocidal products, on the ground, inter alia, that it was likely to deceive the public as to the nature or quality of the goods. EUIPO had dismissed that application on the ground that the contested mark was not likely to deceive the public, since the applicant had not proved that the mark could be classed as deceptive for the purposes of Article 7(1)(g) of Regulation No 207/2009 and a non-deceptive use of the mark was possible. In its action before the Court, the applicant claimed, in particular, that the contested mark was perceived by the relevant public as relating to organic goods or goods associated with respect for the environment.

First of all, the Court referred to its settled case-law under which the circumstances for refusing registration of marks of such a nature as to deceive the public, referred to in Article 7(1)(g) of Regulation No 207/2009, presuppose the existence of actual deceit or a sufficiently serious risk that the consumer will be deceived.

Next, having cited the provisions of Regulation No 528/2012 [106] defining the concept of biocidal product and laying down requirements for the labelling and advertising of such products, the Court found that it followed from those provisions that the presence of indications on a biocidal product, such as those for which the contested mark was registered, which give the impression that that product is natural, does not harm health or is environmentally friendly, is liable to mislead and deceive the consumer. The presence of such an indication on a biocidal product is therefore sufficient to establish a sufficiently serious risk that the consumer will be deceived.

In that connection, as regards the word 'bio' in the contested mark, the Court pointed out that that word had already acquired a highly suggestive connotation which, in general, refers to the idea of environmental protection, the use of natural materials or even ecological manufacturing processes.

Thus, the Court found that the presence of the word 'bio' on biocidal products is sufficient to establish a sufficiently serious risk that the consumer will be deceived.

Finally, the Court, contrary to EUIPO, held that the fact that a non-deceptive use of the mark is possible, even on the assumption that that were proved, cannot preclude an infringement of Article 7(1)(g) of Regulation No 207/2009.

d. Procedural issues

In 2020, the Court ruled on a number of occasions on questions relating to the procedure before EUIPO. It was inter alia called on to clarify the type of error that may lead to a correction, the detailed rules on suspension of the procedure, the conditions of admissibility of requests for restitutio in integrum and the impact of the withdrawal of the United Kingdom on the protection enjoyed by EU trade marks.

By its judgment of 28 May 2020, ***Aurea Biolabs* v *EUIPO – Avizel (AUREA BIOLABS)*** (T-724/18 and T-184/19, EU:T:2020:227), the Court dismissed the actions brought against the decisions of the Board of Appeal of EUIPO by which the latter, in an initial decision, found that there was a likelihood of confusion and, in a second decision, corrected the first decision by deleting a paragraph relating to the global assessment of the likelihood of confusion. In that judgment, the Court was required to clarify the type of error that may give rise to a correction.

In that case, Aurea Biolabs Pte Ltd, the applicant, had applied for the registration of the figurative mark AUREA BIOLABS for food supplements. Avizel SA brought opposition proceedings based on its earlier EU word mark AUREA, registered inter alia for skin care creams for medical use. By decision of 11 September 2018 ('the contested decision'), the Board of Appeal of EUIPO upheld the opposition on the ground that there was a likelihood of confusion and rejected the application for registration. It found inter alia that the goods covered by the marks at issue were similar to at least a low degree. However, in the global assessment of the likelihood of confusion, it indicated that the goods at issue had been considered identical. By decision of 29 January 2019, the Second Board of Appeal corrected the contested decision by deleting the paragraph concerning the identity of the goods.

106| Article 3(1)(a), Article 69(2) and Article 72(3) of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167, p. 1).)

In its action, the applicant claimed that the error at issue could not be the subject of a correction. It its contention, in the event of 'obvious errors', only the revocation of EUIPO decisions is possible.

In that regard, the Court first of all stated that the provision applicable to the correction of the contested decision was Article 102 of Regulation 2017/1001. [107] That article refers solely to 'manifest oversights'. Only Article 103 of that regulation, [108] governing the revocation of EUIPO decisions, refers to 'obvious error[s]'.

Next, the Court noted that, in the versions applicable previously, the provisions governing the correction and revocation of EUIPO decisions referred to 'obvious mistake' [109] and 'obvious procedural error', [110] respectively. As a result of those provisions, there is a difference in the type of error that may give rise to a correction or a revocation because of the distinction between the correction procedure and the revocation procedure.

The correction procedure does not involve the annulment of the corrected decision, but merely results in the correction of the errors contained therein by means of a correcting decision. Thus, corrections are limited to formal obvious mistakes which affect only the form of the decision taken and not its scope and substance. This is true of errors which are so obvious that no wording other than the corrected wording could be intended and of errors which do not justify invalidating or revoking the decision marred by them. By contrast, the adoption of a revocation decision is justified by errors which do not allow the operative part of the decision at issue to be maintained without a new analysis which will be carried out subsequently by the body which took that decision.

Finally, the Court considered that the difference between correction cases and revocation cases has not been called into question by the replacement of the expression 'obvious mistake' by 'manifest oversights' in Article 102 of Regulation 2017/1001. That replacement is precisely explained by the need to maintain the distinction between errors justifying correction and errors justifying revocation.

Consequently, the Court held that an error identified in a decision may be corrected, pursuant to Article 102 of Regulation 2017/1001, where it amounts to an incongruous element in a decision which is otherwise consistent and unambiguous, that is to say where it is clear that the error is the result of an oversight or a slip of the pen which clearly must be corrected in the way it is to be understood because no wording other than that resulting from the correction could have been envisaged.

In that instance, the fact that the correction did not consist in the inclusion of a paragraph which had been omitted but in the deletion of a paragraph of the contested decision does not in itself permit the inference that that correction was made in disregard of Article 102 of Regulation 2017/1001.

In order to determine whether the error at issue may give rise to a correction, the Court observed that it appeared in a paragraph restating the outcome of the comparative analysis of the goods at issue for the purpose of carrying out the global assessment of the likelihood of confusion. That restatement necessarily had to comply with the analysis relied on and thus establish a similarity to at least a low degree rather than

107| Article 102(1) of Regulation 2017/1001, entitled 'Correction of errors and manifest oversights', reads as follows: '1. [EUIPO] shall correct any linguistic errors or errors of transcription and manifest oversights in its decisions, or technical errors attributable to it in registering an EU trade mark or in publishing the registration of its own motion or at the request of a party' (OJ 2017 L 154, p. 1).

108| Article 103(1) of Regulation 2017/1001, entitled 'Revocation of decisions', provides: '1. Where [EUIPO] has made an entry in the Register or taken a decision which contains an obvious error attributable to the Office, it shall ensure that the entry is cancelled or the decision is revoked …'.

109| Rule 53 of Commission Regulation (EC) No 2868/95 of 13 December 1995, implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

110| Article 80 of Regulation No 207/2009.

the identity of the goods at issue. The error thus made could therefore evidently be corrected only in accordance with the analysis actually carried out by the Board of Appeal, which concluded that the goods were similar. The deletion of the paragraph relating to the identity of the goods in the contested decision was thus clearly necessary; accordingly, it can be classified as a legitimate correction of an error pursuant to Article 102 of Regulation 2017/1001.

Furthermore, the Court confirmed that the goods concerned were similar and held that there was a likelihood of confusion.

By its judgment of 28 May 2020, ***Cinkciarz.pl* v *EUIPO – MasterCard International (We IntelliGence the World and Others)*** (T-84/19 and T-88/19 to T-98/19, EU:T:2020:231), the Court annulled the decisions of the Board of Appeal of EUIPO on the ground that the Board of Appeal had failed to suspend the appeal proceedings at issue even though it had found that it was appropriate to do so, owing to the existence of ongoing parallel proceedings.

In that instance, the applicant, Cinkciarz.pl sp. z o.o., filed 12 applications for registration of EU figurative marks. MasterCard International, the intervener, filed notices of opposition to registration of those marks. The oppositions were based on seven earlier EU trade marks, including two figurative marks in black and white, representing intertwining circles and black and white circles, against which the applicant filed applications for a declaration of invalidity. Furthermore, proceedings concerning registration as a trade mark of the purely figurative sign €$, present in identical form as an element in 4 of the 12 marks at issue, were also pending before EUIPO. [111]

By 12 decisions, the Opposition Division, after having found that the signs at issue were not similar, rejected the oppositions. The Board of Appeal found that the signs at issue were visually similar to a low degree. It then annulled the decisions of the Opposition Division and remitted the cases to it, recommending that it suspend the opposition proceedings until final decisions were reached concerning the validity of the earlier trade marks in black and white and the registration of the purely figurative mark €$.

The applicant complained that the Board of Appeal had failed to suspend the various opposition proceedings even though it had found that it was appropriate to do so.

First of all, the Court recalled that the Board of Appeal may suspend opposition proceedings, either of its own motion or at the reasoned request of one of the parties, where a suspension is appropriate under the circumstances of the case. [112] In addition, the Board of Appeal's broad discretion in that regard restricts judicial review on the merits by the Courts of the European Union to ensuring that there is no manifest error of assessment or misuse of powers. The existence of parallel proceedings the outcome of which is liable to have an impact on the opposition proceedings does not mean that the latter must necessarily be suspended or that non-suspension is, in itself, sufficient to be categorised as a manifest error of assessment. The decision regarding suspension must follow upon a weighing up of the interests involved, in which the Board of Appeal must carry out the assessment, prima facie, of the likelihood that the potentially relevant parallel proceedings will result in a decision that would have an impact on the appeal proceedings.

111| Those proceedings gave rise to the judgment of 8 March 2018, ***Cinkciarz.pl* v *EUIPO (€$)*** (T-665/16, not published, EU:T:2018:125), by which the Court annulled, for failure to state reasons, the Board of Appeal's decision refusing to register the figurative mark €$. As a result of that judgment, the case was once again pending before a Board of Appeal.

112| Pursuant to Article 71(1) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018, supplementing Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union trade mark and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1).

Next, the Court noted that the Board of Appeal examined the appeals in question without stating reasons for its final decision not to suspend the proceedings, even though it found that it was appropriate to suspend them. Such findings corresponded to the assessment which was a condition of suspending the proceedings. Moreover, those findings meant that there were significant likelihoods that the parallel proceedings would lead to decisions that could have an impact on the appeal proceedings, which made the weighing up of the interests involved tend in favour of the applicant. Furthermore, since general, categorical assertions do not establish that the Board of Appeal effectively exercised the broad discretion that has been conferred on it, that must apply a fortiori where no reasoning is given in respect of the crucial assessment in the matter stemming from the weighing up of the interests involved, especially if the decision of the Board of Appeal contains ambivalent findings as to that assessment.

Lastly, the Court noted that the examination of whether to suspend the proceedings before the Board of Appeal must be carried out first before the examination of whether there is a likelihood of confusion. Consequently, if the Board of Appeal finds that it is appropriate to suspend the proceedings, it has no option other than to suspend them and may not therefore examine the appeal. The Court thus concluded that, since the Board of Appeal had found it appropriate to suspend the proceedings, it could not rule on the appeals and was unable to make any recommendation whatsoever to the Opposition Division, since any referral of the cases to the latter would mean examining the appeals and would therefore stem from an error of law.

By its judgment of 23 September 2020, ***Seven* v *EUIPO (7Seven)*** (T-557/19, EU:T:2020:450), the Court dismissed the action against the decision of the Board of Appeal of EUIPO, by which that Board of Appeal had rejected the application, filed by the licensee, for restitutio in integrum of the right to request the renewal of the mark 7Seven after the expiry of the prescribed period.

In that instance, the registration of the EU figurative mark 7Seven expired on 22 July 2017. A request for renewal could be submitted until 22 January 2018, in return for the payment of an additional fee for late payment. Seven7 Investment PTE Ltd, the proprietor of that mark, did not, however, request the renewal of the registration within the prescribed period. On 21 July 2018, Seven SpA, the applicant and the holder of a licence in respect of the mark at issue, filed an application for restitutio in integrum on the basis of Article 104 of Regulation 2017/1001 and requested that its right to request the renewal of the registration be re-established. The Board of Appeal of EUIPO rejected the applicant's application to have its rights re-established and confirmed the cancellation of the trade mark registration.

Hearing an action for annulment, the Court observed that there is no provision in Regulation 2017/1001 that precludes a 'party to the renewal proceedings' from being regarded as a 'party to proceedings before [EUIPO]', within the meaning of Article 104(1) of Regulation 2017/1001. [113] However, it in no way follows from Article 53(1) of that regulation [114] or from Article 104(1) thereof that the applicant, as the holder of a licence in respect of the mark at issue, is on the same legal footing, for the purposes of the renewal of its registration, as the proprietor of that mark, but, on the contrary, that, in the same way as any other person, the applicant must be expressly authorised by the proprietor of the mark at issue in order to be able to submit a request for renewal and must prove the existence of such authorisation.

113| Article 104(1) of Regulation 2017/1001 provides that 'the applicant for or proprietor of an EU trade mark or any other party to proceedings before the Office who, in spite of all due care required by the circumstances having been taken, was unable to comply with a time limit vis-à-vis [EUIPO] shall, upon application, have his rights re-established if the obstacle to compliance has the direct consequence, by virtue of the provisions of this Regulation, of causing the loss of any right or means of redress'.

114| Article 53(1) of Regulation 2017/1001 provide as follows: 'registration of the EU trade mark shall be renewed at the request of the proprietor of the EU trade mark or any person expressly authorised by him, provided that the fees have been paid'.

Next, the Court pointed out that the renewal procedure comes to an end when the period of six months following the expiry of the registration expires. [115] Consequently, in order to be regarded as a party to those proceedings under Article 53(1) of Regulation 2017/1001, the applicant had to obtain the express authorisation of the proprietor of the mark at issue in order to be able to request the renewal of the registration of that mark at a point in time before the expiry of the prescribed period.

In that instance, it was only after that period had expired that the applicant, on 17 July 2018, received an express authorisation from the proprietor of the mark. Consequently, according to the Court, the applicant could not be regarded either as a party to the renewal proceedings or as a 'party to proceedings before [EUIPO]'. It could not therefore file an application to have its rights re-established as a licensee which had lost a right and therefore had to be held to have acted before EUIPO solely in the name and on behalf of the proprietor of the mark. Consequently, it could not remedy the failure on the part of the proprietor of the mark at issue to renew unless it was shown that such a failure had occurred in spite of that proprietor's having exercised all due care.

The Court stated that that interpretation is the most apt to comply with the principle of effectiveness and meet the requirement of legal certainty. It ensures a clear determination and meticulous observance of the starting and end points of the periods referred to in Articles 53 and 104 of Regulation 2017/1001. Consequently, a proprietor of a mark who has failed to renew the registration of that mark within the prescribed period cannot circumvent the consequences of his own negligence by authorising a third party to file an application in order to have his right to request the renewal of the registration of an EU trade mark re-established after that period has expired. A licensee, for his part, cannot, first, apply to have his rights re-established on the sole ground that the proprietor of the mark has failed to act and has not complied with the time limit for requesting the renewal of the registration of that mark and, secondly, be permitted to go against the wishes of the proprietor of a mark who has consciously decided not to renew his registration.

Furthermore, according to Article 104(2) of Regulation 2017/1001, an application to have rights re-established must be filed in writing within two months of the removal of the obstacle to compliance with the time limit. In that regard, the Court held that the lack of an express authorisation from the proprietor of the mark does not constitute an obstacle to compliance within the meaning of Article 104 of that regulation.

In addition, the Court pointed out that the objective of recital 11 of Regulation 2017/1001 is to guarantee the mark as an indication of origin of the goods or services covered by the trade mark and not to guarantee the registration of an EU trade mark indefinitely where it has expired on account of failure to renew the registration of that mark. In accordance with the principle of availability, it is necessary to return to the public domain trade marks which are ultimately not, or no longer, used, so that other economic agents can register them and effectively derive all the economic benefits from them.

By its judgment of 16 December 2020, ***Forbo Financial Services* v *EUIPO – Windmöller (Canoleum)*** (T-3/20, EU:T:2020:606), the Court ruled on the probative value of a solemn declaration made by a lawyer. On 17 May 2017, Windmöller Flooring Products WFP GmbH filed an application for registration of the word sign Canoleum as a European Union trade mark. On 27 September 2017, Forbo Financial Services AG filed a notice of opposition to the registration of the trade mark applied for with EUIPO on the basis of its international word mark MARMOLEUM. It claimed that there was a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 207/2009. By decision of 12 February 2019, that opposition was rejected.

115| Pursuant to Article 53(3) of Regulation 2017/1001.

On 9 April 2019, Forbo Financial Services filed a notice of appeal with EUIPO. However, it did not file the statement setting out the grounds of appeal until 26 June 2019, which was outside the prescribed time limit. [116] In annex to that statement, it submitted an application for restitutio in integrum [117] in which it claimed that the lawyer responsible for its case file ('the first lawyer') had not been able to file the statement within the prescribed time limit due to a serious illness he had unforeseeably contracted. To substantiate that claim, Forbo Financial Services presented two solemnly affirmed statements, one from the lawyer and the other from his wife. By decision of 9 October 2019, the Board of Appeal dismissed the appeal as inadmissible. It held that the first lawyer had not provided sufficient evidence that he had taken the due care required by the circumstances. It criticised him, in particular, for having failed to produce a medical certificate.

Forbo Financial Services brought an action before the Court, which annulled the decision of the Boards of Appeal on the ground, in essence, that the Board of Appeal had, from the outset, denied all credibility to the two solemnly affirmed statements and dismissed the detailed explanations given therein.

First of all, the Court recalled that a solemnly affirmed statement constitutes admissible evidence. [118] In addition, it observed that a statement drawn up in the interests of its author has only limited evidential value and must be corroborated by additional evidence, which does not however allow the departments of EUIPO to conclude as a matter of principle that such a statement is, in itself, devoid of any credibility. The evidential value of such a statement depends on the circumstances of the case. The Board of Appeal, as a matter of fact, however, denied from the outset all credibility to the two solemnly affirmed statements at issue and, therefore, failed to take due consideration of the particular circumstances of the case.

Next, as regards the statement given by the first lawyer, the Court found that the Board of Appeal had disregarded the fact that that lawyer is a legal professional who is required to follow a code of ethics and uphold moral standards and who, if guilty of giving a solemnly affirmed statement that were false, would be subject to criminal sanctions harm to his reputation. The Court added that a solemnly affirmed statement made by a lawyer constitutes, in itself, solid evidence of the information provided therein, where it is clear, devoid of contradictions and consistent, and where there is no factual evidence capable of calling its truthfulness into question.

Furthermore, the Board of Appeal had not taken into account the fact that the illness which the first lawyer claimed to have been the reason the time limit was exceeded was a personal matter, and that he was best placed to provide information on that incident and, in particular, on the symptoms and ailments he had suffered.

As regards the solemnly affirmed statement given by the wife of the first lawyer, the Board of Appeal should also have taken into account the fact that the persons who witness an incident such as that which occurred in that instance are usually from the immediate circle of the person concerned, and that the wife of the first lawyer, like the lawyer himself, would be subject to criminal sanctions if she made a solemnly affirmed statement that was false.

Lastly, the Court emphasised that the Board of Appeal had failed to take into account that additional evidence liable to corroborate the content of the two solemnly affirmed statements, such as a medical certificate, could not reasonably be required or was unavailable. In that regard, the Court stated that the case concerned

116| Under the last sentence of Article 68(1) of Regulation 2017/1001, within four months of the date of notification of the decision, a written statement setting out the grounds of appeal is to be filed.

117| Under Article 104 of Regulation 2017/1001.

118| For the purposes of Article 97(1)(f) of Regulation 2017/1001.

a singular and accidental event which was personal to the person concerned, and that it was therefore different from the situations generally referred to in the case-law relating to the evidential value of solemnly affirmed statements, where the latter are presented to attest facts that are purely objective and not of a personal nature. The Court therefore annulled the Board of Appeal's decision.

By the judgment of 23 September 2020, ***Bauer Radio* v *EUIPO – Weinstein (MUSIKISS)*** (T-421/18, EU:T:2020:433), the Court ruled, first, on the effect of the United Kingdom's withdrawal from the European Union on the protection enjoyed by trade marks registered in that State and, secondly, on the admissibility of an action brought against the decision of the Board of Appeal of EUIPO remitting the case to the Opposition Division.

In that case, the intervener, Mr Simon Weinstein, applied for registration of the word mark MUSIKISS as an EU trade mark in respect of various services. The Opposition Division of EUIPO upheld in part the opposition which the applicant, Bauer Radio Ltd, had filed on the basis of earlier United Kingdom word and figurative marks KISS and dismissed the application for registration in respect of certain services on account of the likelihood of confusion between the mark applied for and those earlier marks. By decision of 14 March 2018 ('the contested decision'), the First Board of Appeal of EUIPO annulled the Opposition Division's decision and remitted the case to the Opposition Division for it to examine the applicant's claim that the earlier marks had a reputation. The applicant brought an action for annulment of the Board of Appeal's decision.

In the action before the Court, the intervener submitted that, since the opposition to registration of the EU trade mark MUSIKISS was based on earlier United Kingdom trade marks, in the event of the withdrawal of the United Kingdom from the European Union without an agreement, the opposition would have to be dismissed on the ground that the earlier United Kingdom trade marks would no longer enjoy the same protection and that, consequently, the action brought before the Court would be devoid of purpose. Furthermore, EUIPO and the intervener raised a plea of inadmissibility on the ground that the contested decision had not terminated the proceedings as regards the applicant and that, consequently, it could not be challenged in an action before the Court.

The Court first of all recalled that, on 1 February 2020, the withdrawal agreement, [119] which sets out the arrangements for the withdrawal of the United Kingdom from the European Union, had entered into force. Article 127 of that agreement provides for a transition period from 1 February to 31 December 2020, during which EU law continues to be applicable in the United Kingdom unless otherwise provided. According to the Court, it follows that Regulation 2017/1001 continues to be applicable to United Kingdom trade marks and that, accordingly, until the end of the transition period, the earlier marks registered by the applicant in the United Kingdom continue to receive the same protection as they would have received had the United Kingdom not withdrawn from the European Union. Consequently, in that instance, the earlier marks can still form the basis of an opposition to registration of the mark applied for. The Court therefore concluded that the United Kingdom's withdrawal did not affect the legal consequences of the contested decision vis-à-vis the applicant, with the result that the applicant retained its interest in seeking the annulment of that decision.

As regards the argument alleging a general principle of EU administrative law according to which an administrative act cannot be subject to review if it is not the expression of a final position of an EU administrative body, the Court stated that the Courts of the European Union had recognised no such general principle of law. While it is true that an action brought against a preparatory act is not admissible, since it is not brought against an act which constitutes the final position taken by the administrative body at the end of a procedure, the Courts of the European Union had previously recognised the admissibility of actions against acts which did not set out the final position of the administrative body but whose implications for the persons to whom

119| 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).

they were addressed justified their being regarded as more than merely preparatory acts. Furthermore, Article 72 of Regulation 2017/1001, which provides that 'actions may be brought before the Court against decisions of the Boards of Appeal in relation to appeals', does not distinguish between those decisions depending on whether or not they constitute the final position of the EUIPO bodies.

In that regard, the Court stated that, in that case, the Board of Appeal had, in any event, given a final decision on certain aspects of the dispute, which was binding in respect of those points on the Opposition Division tasked with considering the case following its remittal. Accordingly, the applicant had to be able to challenge the Board of Appeal's final conclusions, without having to wait for proceedings to continue before the Opposition Division so that it could then bring an appeal before the Board of Appeal and, if necessary, subsequently bring an action before the Court against the new decision. In those circumstances, the Court did not uphold that plea of inadmissibility. The Court then ruled on the merits of the applicant's claims and dismissed the action.

2. Designs

In the judgment in ***L. Oliva Torras* v *EUIPO – Mecánica del Frío (Vehicle couplings)*** (T-100/19, EU:T:2020:255), delivered on 10 June 2020, the Court defined the extent of the examination to be carried out by EUIPO in the context of an application for a declaration of invalidity of a Community design on the basis of Article 25(1)(b) of Regulation No 6/2002 [120] and ruled on the extent of EUIPO's obligation to state reasons in that regard. By its judgment, the Court annulled the decision of the Board of Appeal of EUIPO ('the contested decision') relating to invalidity proceedings between L. Oliva Torras ('the applicant') and Mecánica del Frío ('the intervener') with regard to the registered Community design representing a coupling to hitch refrigeration or air conditioning equipment to a motor vehicle.

In the first place, the Court noted that Article 25(1)(b) of Regulation No 6/2002 confers on the adjudicating bodies of EUIPO, in the context of the examination of an application for a declaration of invalidity, the competence to monitor compliance with the essential requirements for protection of the Community design, which are laid down in Articles 4 to 9 of that regulation. In that regard, the Court pointed out that those requirements are cumulative, so that failure to comply with only one of them could lead to the design at issue being declared invalid. Furthermore, those provisions entail the implementation of different legal criteria. Consequently, the Court ruled that the wording of Article 25(1)(b) of that regulation, read in the light of its context and objectives, must be interpreted as meaning that it does not necessarily imply an examination of compliance with all the requirements set out in Articles 4 to 9 of that regulation, but may imply, on the basis of the facts, evidence and observations submitted by the parties, solely an examination of compliance with only one or some of those requirements.

In the second place, the Court pointed out that it was in the light of the matters of fact and of law put forward in support of the applicant's application for a declaration of invalidity that the Board of Appeal had to determine the requirements of Articles 4 to 9 of Regulation No 6/2002 in respect of which the applicant was claiming non-compliance and which the Board of Appeal had to examine, taking account, where appropriate, of well-known facts and questions of law not raised by the parties but essential to the application of the relevant provisions. Thus, the Court held that the Board of Appeal had been wrong to take the view that, as

120| Article 25(1)(b) of Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1) provides that a Community design may be declared invalid only if it does not fulfil the requirements laid down in Articles 4 to 9 of that regulation.

the applicant's application for a declaration of invalidity was based on Article 25(1)(b) of Regulation No 6/2002, the applicant had intended to rely on the failure by the contested design to comply with all the requirements set out in Articles 5, 6, 8 and 9 of that regulation.

In the third place, the Court upheld the applicant's claim that the Board of Appeal had failed to decide on whether the contested design referred to a component part of a complex product which, once incorporated into that product, remained visible during the normal use of the product within the meaning of Article 4(2) and (3) of Regulation No 6/2002, [121] even though that issue had been addressed in the communication of 16 May 2018 [122] and in the subsequent observations of the parties.

The Court noted, first of all, that the conclusions of the Board of Appeal with regard to the application of that article did not clearly follow from the reasoning of the contested decision, either for the parties or for the EU judicature. In particular, the Court stated that the grounds relied on by EUIPO for the first time before the Courts of the EU and alleging that the applicant had not requested the application of Article 4(2) and (3) of Regulation No 6/2002 could not remedy the lack of reasoning in the contested decision.

Next, the Court pointed out that, first, the question of whether Article 4(2) and (3) of Regulation No 6/2002 was applicable in that instance was likely, in principle, to be of decisive importance in the context of the contested decision in the light of the potential impact of that question on the grounds and operative part thereof. Secondly, according to the Court, it was apparent from the communication of 16 May 2018 that the Board of Appeal had taken the view, at that stage of the procedure, that the claims made by the parties and the evidence provided in support of those claims proved that the requirements laid down in Article 4(2) and (3) of Regulation No 6/2002 were not fulfilled.

In that regard, the Court concluded that, although the Board of Appeal could not be considered to be bound by its communication of 16 May 2018, it was nevertheless for the Board of Appeal properly to state the reasons why it considered that it should depart from the conclusions of that communication, as that communication and the subsequent observations of the parties formed part of the context in which the Board of Appeal had adopted the contested decision. The Court pointed out, in particular, that it was not its place to act in lieu of the Board of Appeal in carrying out the examination of the arguments, facts and evidence submitted by the applicant, an examination which the Board of Appeal had to carry out for the purposes of determining whether the application of Article 4(2) and (3) of Regulation No 6/2002 was at issue in the dispute before it.

In the light of all the foregoing, the Court annulled the contested decision. However, it rejected, on the basis of the Edwin case-law, the applicant's request for alteration. [123]

121| Article 4(2) of Regulation No 6/2002 provides that 'a design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character:
(a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and
(b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character'.

122| Communication addressed to the parties by the Board of Appeal stating that the contested design should be declared invalid, as the requirements set out in Article 4 of Regulation No 6/2002 were not complied with.

123| Judgment of 5 July 2011, ***Edwin* v *OHIM*** (C-263/09 P, EU:C:2011:452).

3. Plant varieties

By its judgment in ***Siberia Oriental* v *CPVO (Siberia)*** (T-737/18, EU:T:2020:289), delivered on 25 June 2020, the Court dismissed the action for annulment brought against the decision of the Board of Appeal of the Community Plant Variety Office (CPVO), by which the latter had refused to amend the date of expiry of the Community protection of plant variety right in respect of the variety Siberia. In that judgment, the Court clarified the conditions of admissibility of actions brought against decisions of the CPVO and the concept of patent mistake requiring the correction of a decision.

In that case, on 2 August 1996 the CPVO granted Siberia Oriental BV, the applicant, Community plant variety rights in respect of the variety Siberia of the species *Lilium L.*, setting the date of expiry of that protection at 1 February 2018. That expiry date was entered in the Register of Community Plant Variety Rights. On 24 August 2017, Siberia Oriental BV, claiming that there had been an error in the calculation of the duration of that protection, applied to the CPVO to amend the date of expiry of the protection, replacing the date of 1 February 2018 with that of 30 April 2020. That application was declared inadmissible by the CPVO and subsequently by the Board of Appeal, on the grounds, first, that the period for bringing an appeal against the decision to grant plant protection had expired and, secondly, that an alleged error in the calculation of the date of expiry of the Community plant variety right could not be regarded as a patent mistake within the meaning of Article 53(4) of Regulation No 874/2009. [124]

In the first place, after recalling that the periods within which applications must be lodged are intended to safeguard the principle of legal certainty within the European Union by preventing measures which involve legal effects from being called into question indefinitely, the Court observed that the period for bringing actions against decisions of the CPVO was two months. In addition, only those decisions of the CPVO which, in the context of the grant of a Community plant variety right, set the date on which that right begins and ends are open to appeal. The Court found that the decision to grant protection had become definitive. In that context, the applicant cannot be allowed to reopen the period for appeal by claiming that its application for correction relates to the entering or deletion of information in the Register. A circumvention of the period for appeal by means of an application, after the expiry of that period, for an amendment to the Register would have the effect of undermining the definitive nature of the decision granting the right.

In the second place, the Court held that the amendment of the date of expiry of the Community plant variety right applied for by the applicant would affect the scope and substance of the original decision granting protection which set the duration of that protection. To make such an amendment presupposes that it is first determined how Regulation No 2100/94, [125] in particular its provisions relevant to the calculation of the term of protection, is to be interpreted. The concept of 'patent mistake', however, is limited to obvious formal mistakes whose incorrectness is clear from the body of the decision itself and which do not affect the scope and substance of the decision taken. Consequently, the Court held that the applicant's application for amendment could not be regarded as an application for correction of a linguistic error, an error of transcription or a patent mistake within the meaning of Article 53(4) of Regulation No 874/2009.

124| Article 53(4) of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the CPVO (OJ 2009 L 251, p. 3) provides that linguistic errors, errors of transcription and patent mistakes in decisions of the CPVO shall be corrected.

125| Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1).

VI. Common foreign and security policy – Restrictive measures

1. Ukraine

In its judgment in ***Klymenko* v *Council*** (T-295/19, EU:T:2020:287), delivered on 25 June 2020, the Court annulled a number of Council acts [126] relating to restrictive measures adopted in view of the situation in Ukraine which had extended the temporal validity of the list of persons, entities and bodies subject to those restrictive measures, in so far as the name of the applicant, the former Minister for Revenue and Duties of Ukraine, was maintained on that list.

The judgment was delivered in the context of proceedings relating to the restrictive measures adopted against certain persons, entities and bodies in view of the situation in Ukraine following the suppression of the demonstrations in Kiev in February 2014. The applicant's name had been placed on the list at issue on the ground that he was the subject of preliminary investigations in Ukraine for offences relating to the misappropriation of public funds and their unlawful transfer out of Ukraine. His name was maintained on the list on the ground that he was the subject of criminal proceedings brought by the Ukrainian authorities for misappropriation of public funds or assets and for abuse of office as a public office-holder. By the contested acts, the Council had extended the applicant's inclusion on the list at issue on identical grounds. The contested acts also stated that the applicant's rights of defence and right to effective judicial protection had been observed in the course of those criminal proceedings.

In support of his action, the applicant claimed, inter alia, that the Council had failed to verify that the Ukrainian authorities had observed his rights of defence and his right to effective judicial protection and had therefore made an error of assessment by adopting the contested acts.

The Court noted, first of all, that the Courts of the European Union must review the lawfulness of all Union acts in the light of fundamental rights. While the Council may base the adoption or the maintenance of restrictive measures on a decision of a third State, it must verify that that decision was taken in accordance, inter alia, with the rights of the defence and the right to effective judicial protection in the State in question. The Court also clarified that, while the fact that a third State is among the States which have acceded to the ECHR entails review, by the ECtHR, of the fundamental rights guaranteed by the ECHR, that fact cannot render that verification requirement superfluous.

In that instance, although the Council had mentioned, with reference to its duty to state reasons, the reasons for which it considered the decision of the Ukrainian authorities to initiate and conduct criminal proceedings for the misappropriation of public funds to have been adopted in accordance with the rights in question, the Court recalled that the duty to state reasons is distinguished from the examination of the merits of the statement of reasons, which goes to the substantive legality of the contested acts, which is subject to review by the Court.

126| In that instance, the annulment was sought of Council Decision (CFSP) 2019/354 of 4 March 2019 amending Decision 2014/119/CFSP (OJ 2019 L 64, p. 7) and Council Implementing Regulation (EU) 2019/352 of 4 March 2019 implementing Regulation (EU) No 208/2014 (OJ 2019 L 64, p. 1).

The Court held, first of all, in that regard, that it was not apparent from the decision of the examining magistrate of 5 October 2018 that the applicant's rights had been guaranteed, and nor was it apparent from the documents in the file that the Council had considered the information provided by the applicant.

The Court then clarified that, even though the Council claims that a judicial review was carried out in Ukraine in the course of the criminal proceedings and that several judicial decisions adopted in that context show that it was able to verify respect for the rights in question, such decisions are not capable, alone, of establishing that the decision of the Ukrainian judicial authorities to conduct criminal proceedings, on which the maintenance of the restrictive measures is based, was taken in accordance with the rights of the defence and the right to effective judicial protection. All the judicial decisions referred to by the Council fall within the scope of the criminal proceedings which justified the inclusion and maintenance of the applicant's name on the list and are merely incidental in the light of those proceedings, since they are by nature either restrictive or procedural in nature.

Lastly, the Court stated that the Council does not explain how the existence of those decisions permits the inference that the protection of the rights in question was guaranteed, even though the Ukrainian criminal proceedings, which were the basis of the restrictive measures at issue in 2014, were still at the preliminary investigation stage. In that connection, the Court referred to the ECHR and the Charter, according to which the principle of the right to effective judicial protection includes, inter alia, the right to a hearing within a reasonable time. The Court pointed out that the ECtHR had already held that infringement of that principle could be established, inter alia, where the investigation stage of criminal proceedings has been characterised by a certain number of periods of inactivity attributable to the authorities responsible for the investigation. The Court noted that, where a person has been subject to the restrictive measures at issue for several years, on account of the same criminal proceedings brought in the relevant third State, the Council is required to explore in greater detail the question of a possible breach by the authorities of that person's fundamental rights. Therefore, the Council should, at the very least, have indicated the reasons for which it was entitled to take the view that those rights had been respected in terms of whether the applicant's case had been heard within a reasonable time.

Consequently, the Court found that it had not been established that the Council had assured itself that the Ukrainian judicial authorities had complied with the applicant's rights of defence and his right to effective judicial protection in the criminal proceedings on which the Council had based its decision. It inferred that the Council had made an error of assessment by maintaining the applicant's name on the list at issue.

2. Syria

By its judgment of 23 September 2020, ***Kaddour* v *Council*** (T-510/18, EU:T:2020:436), the Court ruled in a case involving Mr Khaled Kaddour ('the applicant'), a businessman of Syrian nationality carrying out business activities, inter alia, in the telecommunications and oil sectors in Syria.

The applicant's name, which had initially been included on the lists of persons and entities subject to the restrictive measures taken against the Syrian Arab Republic by the Council in 2011, [127] was re-included in 2015 and had since been retained on those lists, [128] on account of his business activities, which allowed him

127| On that point, see judgment of 13 November 2014, ***Kaddour* v *Council*** (T-654/11, not published, EU:T:2014:947).

128| On that point, see judgments of 26 October 2016, ***Kaddour* v *Council*** (T-155/15, not published, EU:T:2016:628) and judgment of 31 May 2018, ***Kaddour* v *Council*** (T-461/16, not published, EU:T:2018:316).

to derive benefit from and provide support to the Syrian regime, and on account of his business relations with Mr Maher Al-Assad, the brother of President Bashar Al-Assad. Those grounds were based on (i) the criterion of leading businessperson operating in Syria, defined in Article 28(2)(a) of Decision 2013/255 [129] and Article 15(1a)(a) of Regulation No 36/2012, [130] and (ii) the criterion of association with the Syrian regime, defined in Article 28(1) of that decision and Article 15(1)(a) of that regulation. The applicant denied being a leading businessperson operating in Syria maintaining business relations with Mr Maher Al-Assad, or that he derives benefit from or provides support to the Syrian regime on account of his activities.

The Court dismissed the applicant's action for annulment of Decision 2018/778 [131] and Implementing Regulation 2018/774, [132] by way of which the applicant's name had been retained on the list of persons and entities subject to restrictive measures.

Whilst stating that the fact that there are multiple categories of persons defined by Article 28 of Decision 2013/255 does not preclude a person from falling into several categories at the same time and, therefore, from coming within the scope of different criteria contained in Article 28, the Court recalled, first of all, that the criterion of 'benefit derived from and support provided to the Syrian regime', that relating to a close association with that regime, laid down in Article 28(1) of that decision, and that of 'leading businesspersons operating in Syria', laid down in Article 28(2), constitute autonomous legal criteria that are separate from one another. With regard to the latter criterion, the Court recalled that it was also objective and sufficient, with the result that being a leading businessperson operating in Syria suffices for the application of the measures at issue, without the Council being required to specify that the person in question benefits from or provides support to the Syrian regime. The Court found in that connection that if the Council had specified that point, it had done so because it had also intended to apply the criterion laid down in Article 28(1) of Decision 2013/255, relating to the benefit derived from and support provided to the Syrian regime, to the person concerned. That requires that the ways in which that person derived benefit from or provided support to the Syrian regime be demonstrated, on the basis of a body of specific, precise and consistent evidence. The Court thereby found that the inclusion of the applicant's name was indeed based on three different grounds for inclusion.

The applicant claimed, moreover, that an error of assessment had been committed as to the relevance of the evidence submitted by the Council. The Court recalled in that regard that, in order to justify retaining a person's name on the lists in question, the Council was not prohibited from basing its decision on the same evidence that had previously justified the initial inclusion, re-inclusion or retention of that person's name on the lists in question, provided that (i) the grounds for inclusion remained unchanged and (ii) the context had not changed in such a way that that evidence was out of date. Since the grounds for inclusion had not, in that case, been amended and the applicant's factual situation, together with the situation in Syria, had not changed in such a way that the evidence previously submitted in 2016 in order to justify that the retention of the applicant's name on the lists was well founded was no longer relevant in 2018, the Court found that the Council was not required to adduce supplementary evidence in relation to that produced previously.

129| Council Decision 2013/255/CFSP of 31 May 2013 concerning restrictive measures against Syria (OJ 2013 L 147, p. 14), as amended by Council Decision (CFSP) 2015/1836 of 12 October 2015 (OJ 2015 L 266, p. 75).

130| Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ 2012 L 16, p. 1), as amended by Council Regulation (EU) 2015/1828 of 12 October 2015 (OJ 2015 L 266, p. 1).

131| Council Implementing Decision (CFSP) 2018/778 of 28 May 2018 amending Decision 2013/255/CFSP concerning restrictive measures against Syria (OJ 2018 L 131, p. 16).

132| Council Implementing Regulation (EU) 2018/774 of 28 May 2018 implementing Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria (OJ 2018 L 131, p. 1).

Consequently, it rejected the applicant's arguments seeking to dispute the relevance of that evidence in the light of its age or the lack of new corroborating evidence. The Court stated on that point that the fact that the Council had relied on documents that the Court had previously regarded, in a different case concerning the applicant, [133] as not satisfying the burden of proof did not deprive the Council of the possibility of relying on those documents, amongst other items of evidence, for the purposes of constituting a body of sufficiently specific, precise and consistent evidence to establish that the decision to retain the applicant's name on the lists at issue was well founded.

The applicant claimed, lastly, the benefit of the provisions of Article 27(3) and Article 28(3) of Decision 2013/255, and Article 15(1b) of Regulation No 36/2012, according to which the persons concerned are not to be included or retained on the lists by the Council where there is sufficient information to indicate that they are not, or are no longer, associated with the Syrian regime, do not exercise influence over it or do not pose a real risk of circumvention of the measures adopted. The Court found that the conditions set out in those provisions, which should be read in their context and in the light of the objectives of the measure at issue, were cumulative and did not apply to persons included on the lists in question on account of the criterion of association with the Syrian regime, laid down in Article 27(1) and Article 28(1) of Decision 2013/255, and in Article 15(1)(a) of Regulation No 36/2012. In any event, in that instance, the Court found that the condition relating to the absence or end of an association with the Syrian regime had not been satisfied, and it therefore rejected the applicant's claims in that connection and dismissed the action in its entirety.

VII. Economic, social and territorial cohesion

In the judgment in ***Portugal* v *Commission*** (T-292/18, EU:T:2020:18), delivered on 30 January 2020, the Court dismissed an action for partial annulment brought by the Portuguese Republic against Commission Implementing Decision (EU) 2018/304, [134] in that it excluded from European Union financing certain expenditure incurred by that Member State under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD), in the amount of EUR 1 052 101.05.

Article 32(5) of Regulation No 1290/2005 [135] provides that, if recovery of sums unduly paid following the occurrence of irregularity or negligence has not taken place within four years of the primary administrative or judicial finding, or within eight years where recovery action is taken in the national courts, 50% of the financial consequences of non-recovery are to be borne by the Member State concerned and 50% by the Union budget (the rule of shared financial responsibility for non-recovery, known as 'the 50/50 rule'). [136]

133| Judgment of 13 November 2014, ***Kaddour* v *Council*** (T-654/11, not published, EU:T:2014:947).

134| Commission Implementing Decision (EU) 2018/304 of 27 February 2018 excluding from European Union financing certain expenditure incurred by the Member States under the European Agricultural Guarantee Fund (EAGF) and under the European Agricultural Fund for Rural Development (EAFRD) (OJ 2018 L 59, p. 3).

135| Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy (OJ 2005 L 209, p. 1).

136| Article 32 of Regulation No 1290/2005 sets out the provisions specific to the EAGF. Article 33(8) of the same regulation contains a provision that is in substance equivalent with regard to the EAFRD. Those provisions were in substance repeated in Article 54 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy (OJ 2013 L 347, p. 549, and corrigendum OJ 2016 L 130, p. 6), which repealed and replaced Regulation No 1290/2005.

The basis of the contested decision is the Commission's finding, in the context of its mandate to investigate national procedures for recovery of undue payments brought following irregularities, that the Portuguese authorities miscategorised certain expenditure which had been incurred under the EAGF or the EAFRD and was to be recovered. The Commission took the view that the debts owed to the Portuguese paying agency, the recovery of which gave rise to an execution procedure by the Portuguese tax authorities, were miscategorised as debts in relation to which 'recovery action [was] taken in the national courts' within the meaning of Article 32(5). In its view, therefore, the 50/50 rule should be applied to those debts in the event of non-recovery within four years, and not merely in the event of non-recovery within eight years, as the Portuguese authorities contended.

Disagreeing with that interpretation, the Portuguese Republic applied for annulment of the contested decision, arguing that the forced recovery of sums owed in the context of administrative relationships is implemented in Portugal by means of the tax execution procedure, which ought to be regarded as judicial in nature. According to the Portuguese Republic, the 50/50 rule should therefore apply only if recovery has not taken place within eight years.

In support of its action for annulment of the contested decision, the Portuguese Republic raised a single plea of infringement of Articles 32 and 33 of Regulation No 1290/2005, and Article 54 of Regulation No 1306/2013, in that the Commission was wrong to take the view that the debts owed to the Portuguese paying agency in relation to which an execution procedure was brought by the tax authorities did not constitute debts in relation to which recovery action was taken in the national courts, within the meaning of those articles.

In dismissing the action, the Court first of all stated that the concept of 'national court', which is critical for the purpose of determining the scope of the 50/50 rule, cannot be left to individual Member States to assess, but requires autonomous and uniform interpretation throughout the Union which is to be arrived at taking account of the context of the provisions of which it is forms part, and of the aim pursued by Regulations Nos 1290/2005 and 1306/2013.

In order to interpret the concept of 'national court' in the aforementioned articles, the Court referred to the criteria set out by the Court of Justice for assessing whether a body making a reference for a preliminary ruling is a 'court or tribunal' for the purposes of Article 267 TFEU.

After having examined the attributes of the competent department of the Portuguese tax authorities in the light of those criteria, the Court found that such a department cannot be classed as a 'national court'. It does not carry out judicial functions, but merely functions of an administrative nature, nor is it charged with resolving disputes or monitoring the legality of the debt certificate issued by the Portuguese paying agency. Nor, further, does such a department satisfy the requirement of independence.

The Court thus concluded that, contrary to the submissions of the Portuguese Government, a tax execution procedure before the competent department of the tax authorities cannot be classified as a recovery action before the 'national courts' for the purposes of the aforementioned articles of Regulations Nos 1290/2005 and 1306/2013, at least in the absence of any intervention by the administrative and tax courts.

The Portuguese Republic should therefore have concluded the tax execution procedure before the competent department of the tax authorities within the mandatory four-year time limit set out in the aforementioned provisions. The Court accordingly found that the Commission could validly exclude certain expenditure from Union financing on the ground that it had been the subject of a tax execution procedure before the competent department of the tax authorities for more than four years.

VIII. Agriculture – Wine labelling

In the judgment in ***Slovenia* v *Commission*** (T-626/17, EU:T:2020:402), delivered on 9 September 2020, the Court, ruling in extended composition, dismissed Slovenia's action for annulment of Delegated Regulation (EU) 2017/1353 [137] ('the contested regulation'), pursuant to which the designation 'Teran' may be used, under strict conditions, to refer to a wine grape variety on the labels of wines produced in Croatia.

The action concerned the wine designation 'Teran', used in both Slovenia and Croatia. As from the accession of Slovenia to the European Union, that name could appear on the labels of certain Slovenian wines. It was used initially as an additional traditional name associated with Kras wine as a 'quality wine produced in specified regions'. The designation was subsequently recognised as a protected designation of origin (PDO).

As the name of the wine grape variety 'Teran' was also used in Croatia, Croatia had expressed its concerns, before its accession to the European Union, about whether it would be able to continue to use that name for labelling its wines after its accession, on account of the protection already afforded to the Slovenian designation. Following Croatia's accession, the European Commission then attempted, unsuccessfully, to find a negotiated solution between the Republic of Croatia and the Republic of Slovenia. Finally, almost four years after the accession of the Republic of Croatia to the European Union, the Commission used its powers to adopt a labelling derogation in order to enable the PDOs and existing labelling practices to co-exist peacefully once a PDO is registered or applicable. [138] It thus adopted the contested regulation in order to include the name 'Teran' in the list in Annex XV to Regulation No 607/2009. [139] That annex contained the list of wine grape varieties which contain or consist of a PDO or protected geographical indication that may, by way of derogation, appear on wine labels. The Commission adopted the contested regulation with retroactive effect from the date of the accession of Croatia to the European Union, on 1 July 2013. It is also apparent from the contested regulation that the designation 'Teran' may be used to refer to a wine grape variety on the labels of wines produced in Croatia, but only for the designation of origin 'Hrvatska Istra', and on condition that 'Hrvatska Istra' and 'Teran' appear in the same visual field and that the font size of the name 'Teran' is smaller than that of the words 'Hrvatska Istra'. Pursuant to Article 2 of the contested regulation, Croatian wines with the Croatian PDO 'Hrvatska Istra' produced before the entry into force of the contested regulation may continue to be sold until stocks are exhausted.

In support of its action, Slovenia raised, inter alia, having regard to the retroactive effect of the contested regulation, pleas alleging infringement of the second subparagraph of Article 100(3) of Regulation No 1308/2013 – which is the legal basis of the contested regulation – and infringement of the principles of legal certainty and the protection of legitimate expectations.

137| Commission Delegated Regulation (EU) 2017/1353 of 19 May 2017 amending Regulation (EC) No 607/2009 as regards the wine grape varieties and their synonyms that may appear on wine labels (OJ 2017 L 190, p. 5).

138| Initially pursuant to Article 118j of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1) and subsequently, as from 1 January 2014, pursuant to the second subparagraph of Article 100(3) of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671).

139| Commission Regulation (EC) No 607/2009 of 14 July 2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products (OJ 2009 L 193, p. 60).

First, regarding the legal basis of the contested regulation, the Court found that the Commission had indeed applied the second subparagraph of Article 100(3) of Regulation No 1308/2013 retroactively, which had not been provided for by the legislature. Nevertheless, it was appropriate to examine whether the contested regulation was vitiated by a substantial defect as a result of that retroactive application. In that regard, the Court held that the Commission had not made use of new powers as regards the period between 1 July 2013 and 1 January 2014. The second subparagraph of Article 100(3) of Regulation No 1308/2013 is a direct continuation of a similar provision of Regulation No 1234/2007, which was in force and applicable on the date of the accession of Croatia to the European Union. [140]

The Court next recalled that the provision constituting the legal basis of a measure and empowering the EU institution to adopt the measure at issue must be in force at the time when the measure is adopted. The only legal basis on which the Commission could rely in order to adopt the contested regulation was the second subparagraph of Article 100(3) of Regulation No 1308/2013. Moreover, the provisions of Regulations No 1234/2007 and No 1308/2013 concerned did not prescribe any time limit for action by the Commission. Having found that the Commission could not adopt the contested regulation before the accession of Croatia to the European Union in so far as it did not have any territorial jurisdiction before that date, the Court concluded that the Commission had acted in accordance with the general scheme and the wording of the provisions concerned.

Secondly, regarding the argument that the Commission failed to have regard to the principles of legal certainty, respect for acquired rights and the protection of legitimate expectations by giving retroactive effect to the contested regulation, the Court recalled that the principle of legal certainty precludes retroactive effect being given to EU measures, except where the objective pursued by the contested measure requires it to be given retroactive effect and the legitimate expectations of the persons concerned were duly respected.

In the first place, as regards the objective pursued by the contested regulation, the Court found that the purpose of that regulation was to protect legal labelling practices existing in Croatia on 30 June 2013 and to resolve the conflict between those practices and the protection of the Slovenian PDO 'Teran'. Therefore, it pursued an objective in the public interest, which made it necessary for it to be given retroactive effect. The Commission was not able to adopt the contested regulation before the date of the accession of Croatia to the European Union and had to place itself at the time of that accession in order to assess the existence of specific labelling practices. Moreover, it was legitimately able to attempt to find a negotiated solution between the two States, given the sensitive nature of the issue. Lastly, the Court emphasised that such retroactive effect was required because of the necessary continuity of legal labelling practices.

In the second place, the Court verified whether the Commission had led Slovenian wine producers to entertain well-founded expectations that no derogation with retroactive effect would be granted to Croatia concerning the use of the name 'Teran' on the labels of wines produced on its territory. After examining the relevant circumstances, it held that it could not be concluded that the Commission had given precise, unconditional and consistent assurances. It recalled that it was necessary for the contested regulation to be given retroactive effect, having regard to the circumstances of the case at hand. According to the Court, Slovenia had not established that the extent and details of the retroactive effect of the contested regulation had infringed the legitimate expectations of Slovenian wine producers.

140| Article 118j(3) of Regulation No 1234/2007.

IX. Protection of health

By its judgment of 23 September 2020, ***Medac Gesellschaft für klinische Spezialpräparate* v *Commission*** (T-549/19, EU:T:2020:444), the Court ruled on the decision to remove the medicinal product Trecondi-treosulfan from the Register of Orphan Medicinal Products.

By decision of the Commission of 23 February 2004, a potential treosulfan-based medicinal product, sponsored by the applicant, Medac Gesellschaft für klinische Spezialpräparate mbH, was designated as an orphan medicinal product and entered on the European Union Register of Orphan Medicinal Products in accordance with Regulation No 141/2000. [141]

On 13 October 2017, the applicant submitted to the European Medicines Agency (EMA) and, more specifically, to the Committee for Orphan Medicinal Products provided for in Regulation No 141/2000, a report on the maintenance of the designation of treosulfan as an orphan medicinal product at the time when the marketing authorisation (MA) was granted. Following the investigation procedure, on 20 June 2019 the Commission adopted a decision granting an MA for the treosulfan-based medicinal product under the commercial name Trecondi-treosulfan; [142] however, it decided that that product no longer met the criteria for designation established in Article 3 of Regulation No 141/2000 and that, therefore, it could not be designated as an orphan medicinal product. Thus, Article 3(1)(b) of Regulation No 141/2000 provides for alternative criteria for the designation of a medicinal product as an orphan medicinal product, namely that there exists no satisfactory method of diagnosis, prevention or treatment of the condition in question that has been authorised in the European Union (first alternative), or, if such a method exists, that the medicinal product in question will be of significant benefit, compared with existing satisfactory methods, to those affected by that condition (second alternative). In that context, after the final opinion of the Committee for Orphan Medicinal Products, the Commission found that, as regards the existence of a significant benefit, the applicant had established that Trecondi-treosulfan provided a significant benefit by comparison with the medicinal products busulfan (Busilvex) and thiotepa (Tepadina) but not by comparison with melphalan- and cyclophosphamide-based medicinal products. Consequently, the medicinal product Trecondi-treosulfan was removed from the European Union Register of Orphan Medicinal Products.

Hearing an action for annulment brought by the applicant against the contested decision, the Court, by its judgment of 23 September 2020, upheld the first two pleas relied on and, accordingly, annulled that decision in part in so far as it provided that the medicinal product Trecondi-treosulfan was no longer to be classified as an orphan medicinal product.

First of all, the Court stated that Regulation No 141/2000 provides as the first of the two alternative criteria for the designation of a medicinal product as an orphan medicinal product that there exists no satisfactory method of diagnosis, prevention or treatment of the condition in question that has been authorised in the European Union. According to that criterion, in order for a medicinal product to be eligible for classification as a 'satisfactory method' it must be 'authorised' in the European Union or in a Member State of the European Union for the same orphan 'condition' as that covered by the medicinal product for which an MA as an orphan

141| Regulation (EC) No 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products (OJ 2000 L 18, p. 1).

142| European Commission Implementing Decision C(2019) 4858 final of 20 June 2019 granting marketing authorisation for the medicinal product for human use 'Trecondi-treosulfan' under Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down [European Union] procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency (OJ 2004 L 136, p. 1).

medicinal product is sought. For the purposes of determining the scope of authorisation of a medicinal product in the European Union, the Court observed that, pursuant to Directive 2001/83, [143] no medicinal product may be placed on the market of a Member State unless an MA has been issued by the competent authorities of that Member State. [144] Next, with a view to the grant of an MA at national level, an application must be made to the competent authority and must include a summary of product characteristics (SmPC), [145] containing a set of information on the medicinal product in question in a specified order. The SmPC is approved by that authority at the time when the MA is granted and it forms part of the decision granting the MA, which defines the scope of the authorisation of the existing medicinal product. After an MA has been granted, Directive 2001/83 requires the MA holder to ensure that the product information is kept up to date with, in particular, the current scientific knowledge.

It follows, according to the Court, first, that the off-label use of a medicinal product cannot be regarded as being 'authorised' and, consequently, cannot constitute a 'satisfactory method' within the meaning of Regulation No 141/2000.

Secondly, the Court stated that, in order to determine whether the existing method referred to covers the same 'condition' as that covered by the orphan medicinal product which forms the subject of the application, account must be taken of all the essential elements surrounding authorised use of the existing method, and in particular its therapeutic indication and its target population, as defined in its SmPC, which cannot but be interpreted strictly. Thus, any variation to the SmPC must be further assessed in relation to the benefit/risk balance and the quality, safety and efficacy of the medicinal product for a proposed new indication must be subject, as appropriate, to clinical tests. Consequently, the MA for a medicinal product does not extend to the diagnosis, prevention or treatment of conditions or categories of patients that are not mentioned in its SmPC.

Thirdly, the Court emphasised that, where the medicinal product which is the subject of an application for an MA as an orphan medicinal product is intended for the diagnosis, prevention or treatment of conditions or categories of patients for which, at least in part, the reference medicinal products are not authorised, according to their respective SmPCs, those latter medicinal products cannot be regarded as being 'satisfactory methods' for those conditions or for those categories. Regard being had to the purpose of Regulation No 141/2000, which is to provide incentives for the research, development and placing on the market of medicinal products intended to treat rare conditions, the exclusion of a potential medicinal product from the benefits provided for by that regulation on the ground that 'satisfactory methods' exist only for a portion of the rare conditions covered by it is contrary to the intended purpose.

In addition, the Court emphasised that Regulation No 141/2000 allows, specifically when an MA is granted for an orphan medicinal product, account to be taken of cases of partial overlap with MAs for other medicinal products. [146] Thus, in so far as certain therapeutic indications for a medicinal product fulfil the criteria for designation set out in Article 3 of that regulation, that medicinal product is, in principle, eligible to be designated as an orphan medicinal product for those indications, whereas, as regards the indications in respect of which it does not fulfil the criteria set out in Article 3 of that regulation, a separate MA may be granted, outside the scope of that regulation.

143| 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).

144| In accordance with the first subparagraph of Article 6(1) of Directive 2001/83.

145| In accordance with Article 8(3)(j) of Directive 2001/83.

146| In accordance with Article 7(3) of Regulation No 141/2000.

After having examined whether, in that case, the treatment of the orphan condition and the categories of patients targeted by Trecondi-treosulfan are also covered by melphalan- and cyclophosphamide-based medicinal products, according to their respective SmPCs, the Court found that the SmPCs of the medicinal products under comparison show clear differences. It is clear from the description of the SmPC of Trecondi-treosulfan that the latter covers pathological conditions and populations which are not covered by the SmPCs of melphalan- and cyclophosphamide-based medicinal products. It follows that, for those pathological conditions and populations, melphalan- and cyclophosphamide-based medicinal products cannot be regarded as satisfactory methods within the meaning of the first alternative in Article 3(1)(b) of Regulation No 141/2000.

X. Energy

By its judgment of 18 November 2020, ***Aquind* v *ACER*** (T-735/18, EU:T:2020:542), the Court ruled in a case concerning the company Aquind Ltd ('the applicant'), the project promoter of an electrical interconnector connecting the British and French electricity transmission systems ('the Aquind interconnector'). It submitted a request in respect of that new interconnector to the European Union Agency for the Cooperation of Energy Regulators (ACER) for a temporary exemption from the general principles governing the use of revenue, the unbundling of transmission systems and transmission system operators, and third-party access to transmission or distribution systems. [147]

By decision of 19 June 2018, [148] ACER refused the request for exemption on the ground that the applicant did not satisfy the condition that the level of risk attached to the investment for that new interconnector must be such that that investment would not take place unless an exemption were granted. [149] In the context of assessing the risk attached to the investment, ACER considered in particular that it could not be said with certainty that there was a risk based on a lack of financial support, because the Aquind interconnector had obtained the status of project of common interest, enabling it to receive financial support provided for by legislation, [150] but not requested by the applicant. By decision of 17 October 2018, [151] the Board of Appeal of ACER upheld the Agency's decision and refused the request for an exemption for the Aquind interconnector.

In the context of the action for annulment brought by the applicant, the Court annulled the decision of the Board of Appeal. In that judgment, clarification was provided regarding the intensity of the review of decisions of ACER conducted by the Board of Appeal and the interpretation of the criterion relating to the level of risk attached to an investment in a new interconnector; a criterion which must be fulfilled in order for an exemption to be granted.

147| That request was submitted on the basis of Article 17 of Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003 (OJ 2009 L 211, p. 15).

148| ACER Decision No 05/2018 of 19 June 2018.

149| Condition laid down in Article 17(1)(b) of Regulation No 714/2009.

150| Article 12 of Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39).

151| Decision A-001-2018 of the Board of Appeal of ACER of 17 October 2018.

In the first place, the Court found that the Board of Appeal had erred in law by conducting only a limited review of the decision of ACER. In its view, by doing so, the Board of Appeal carried out a review of insufficient intensity in the light of the powers conferred on it by the legislature and made only limited and incomplete use of its discretion. The provisions on the organisation and powers of the Board of Appeal support the finding that that appellate body was not established to confine itself to a limited review of complex technical and economic assessments. In that regard, the Court noted that the Board of Appeal has, under the legislation establishing the Agency, [152] not only all the powers available to ACER itself, but also powers conferred on it as the Agency's appellate body. Accordingly, if the Board of Appeal chooses to remit the case to the Agency, it is capable of shaping the decisions taken by ACER, which is bound by the statement of reasons of the Board of Appeal. In addition, regarding requests for exemption, in so far as only decisions of the Board of Appeal may be the subject of an action for annulment before the Court, the fact that the applicant is barred from challenging the decision of ACER supports the finding that the Board of Appeal cannot carry out a limited review of the decision of the Agency that is equivalent to the judicial review conducted by the EU judicature. According to the Court, a limited review by the Board of Appeal of technical and economic assessments would lead the Court to conduct a limited review of a decision which would itself be the result of a limited review. However, a system of 'limited review of a limited review' fails to offer the guarantees of effective judicial protection which should be afforded to undertakings.

The Court also recalled that, as has already been held with regard to the Board of Appeal of ECHA, [153] the case-law according to which complex technical and economic assessments are subject to limited review by the Courts of the European Union does not apply to the review carried out by the appellate bodies of the agencies of the European Union. In its view, in the context of the review which it is called to carry out of the complex technical and economic assessments contained in a decision of ACER relating to a request for exemption, the Board of Appeal must, relying on the scientific expertise of its members, examine whether the arguments put forward by the appellant are capable of demonstrating that the considerations on which that decision of ACER is based are vitiated by errors.

In the second place, the Court found that the Board of Appeal, by requiring that a request for financial support be submitted in respect of investments connected with a project of common interest before a request for exemption is submitted, wrongly established an additional condition, which is not laid down in the legislation, for the grant of exemptions in respect of new interconnectors. [154] Indeed, although the existence of possible financial support for a project of common interest, such as the Aquind interconnector, may validly constitute a relevant criterion for assessing whether there is a risk attached to the investment which would justify an exemption from the regulated scheme, that criterion cannot constitute a separate condition which must be satisfied in order to obtain that exemption. Therefore, the absence of a prior request for financial support for a proposed interconnector with the status of project of common interest cannot, in itself, constitute a ground for concluding that the risk attached to the investment was not demonstrated. However, in the case of the Aquind interconnector, the Board of Appeal considered, in essence, that only a refusal of a request for financial support for that new interconnector supported the conclusion that there was a level of risk attached to the investment such that it justified the exemption being granted.

152| 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).

153| Judgment of 20 September 2019, ***BASF Grenzach* v *ECHA*** (T-125/17, EU:T:2019:638).

154| Article 17(1) of Regulation No 714/2009.

According to the Court, the key criterion which must guide the examination of the request for exemption is that of the 'level of risk attached to the investment' provided for in the legislation. [155] In that regard, it emphasises that the possibility of securing financial support for an interconnector that has obtained the status of project of common interest in no way automatically excludes the financial risk attached to the investment. However, in that case, the Board of Appeal and ACER, on the basis of hypothetical reasoning, implicitly presumed that the request for funding would lead to the grant of a financial advantage enabling the risk attached to the investment in the Aquind interconnector to be neutralised.

XI. Chemical products (REACH)

By its judgment of 16 December 2020, ***PlasticsEurop* v *ECHA*** (T-207/18, EU:T:2020:623), the Court dismissed the action against Decision ED 01/2018 of 3 January 2018 of the European Chemicals Agency (ECHA) supplementing the existing entry relating to bisphenol A on the list of substances identified with a view to their eventual inclusion in Annex XIV to Regulation No 1907/2006, [156] in the sense that that substance had been identified as an endocrine disruptor that may have serious effects on the environment within the meaning of Article 57(f) of that regulation.

PlasticsEurope is an international professional association which represents and defends the interests of its members, consisting of undertakings manufacturing and importing plastic goods. Five of those undertakings are active in placing bisphenol A on the market in the European Union. That association brought an action against ECHA's decision, in which it relied, inter alia, on the existence of several manifest errors of assessment in the identification of bisphenol A as a substance of very high concern under Article 57(f) of Regulation No 1907/2006.

The Court dismissed the action, ruling, inter alia, that ECHA correctly applied the weight of evidence approach. That judgment supplements the case-law resulting from the judgment in PlasticsEurope v ECHA (T-636/17). [157]

In the first place, the Court held that ECHA did not make a manifest error in the assessment of the relevant evidence for the identification of bisphenol A as an endocrine disruptor that may have serious effects on the environment.

First, the Court found that the identification of the substance as being of very high concern was carried out using the weight of evidence approach. The Court stated that that approach, together with the discretion enjoyed by ECHA in the identification of substances of very high concern, mean that ECHA may exclude studies which it does not deem relevant. A manifest error of assessment could be found only if the ECHA

155| Article 17(1)(b) of Regulation No 714/2009.

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

157| In the judgment of 20 September 2019, ***PlasticsEurope* v *ECHA*** (T-636/17, EU:T:2019:639), the Court dismissed the action brought by PlasticsEurope against ECHA's decision supplementing the existing entry relating to bisphenol A on the list of substances identified for eventual inclusion in Annex XIV to Regulation No 1907/2006 as meaning that that substance had been identified as an endocrine disruptor that may have serious effects on human health.

had completely and wrongly disregarded a reliable study, the inclusion of which would have altered the overall assessment of the evidence in such a way that the final decision would have been implausible. That was not the case here.

Secondly, the Court noted that there is no prohibition in principle on ECHA taking into consideration 'non-standard' or 'exploratory' studies in order to substantiate, in the weight of evidence approach, findings based on standard studies. Furthermore, it stated that an approach which, as a general rule, excluded the use of non-standard or exploratory studies would make it impossible to identify substances which pose a risk to the environment; this would run counter to the precautionary principle, on which the provisions of that regulation are based.

In the second place, the Court found that ECHA also did not make a manifest error of assessment in the identification of bisphenol A as an endocrine disruptor that may have serious effects on the environment giving rise to an equivalent level of concern to those of other substances listed in Article 57(a) to (e) of Regulation No 1907/2006.

First of all, in so far as concerns the assessment of the evidence, the Court noted that ECHA followed a transparent and systematic methodology and complied with the principle of scientific excellence. It carried out a weighting of the data drawn from a multitude of scientific studies, whilst taking the scientific reliability of each study into account. The Court found that it was the weight of evidence drawn from all of those data that permitted ECHA to reach its conclusions with regard to the intrinsic properties of bisphenol A as an endocrine disruptor.

The Court then rejected the argument that ECHA had failed to establish that there was scientific evidence of bisphenol A having serious effects on the environment on account of its endocrine disrupting properties, in accordance with Article 57(f) of Regulation No 1907/2006. In that connection, the Court recalled that the probability that a substance may have serious effects on the environment was sufficient to establish a causal link within the meaning of that article, [158] which does not require absolute proof of a causal relationship. [159] After examining the methodology followed, the Court upheld ECHA's finding as to the existence of a plausible biological link between the endocrine mode of action of bisphenol A and serious effects on the environment. Thus, it found that ECHA did not fail to apply the requisite standard of proof.

Lastly, in so far as concerns the determination of the equivalent level of concern, provided for in Article 57(f) of Regulation No 1907/2006, the Court noted that that article does not lay down any criterion as regards the nature of the concerns that may be taken into consideration for the purposes of identifying a substance such as that at issue. The Court then emphasised out that ECHA could not be criticised for having justified the level of concern raised by the effects of bisphenol A by relying on the uncertainties that it had identified for the determination of a safe level of exposure to that substance. Thus, the Court held that PlasticsEurope had failed to demonstrate how the ECHA had allegedly committed a manifest error of assessment.

XII. Supervision of the financial sector

In 2020, the Court, ruling in extended composition, delivered three significant judgments on the legality of decisions of the ECB in the context of the prudential supervision of credit institutions.

158| Judgment of the General Court, 11 May 2017, ***Deza* v *ECHA*** (T-115/15, EU:T:2017:329, paragraph 173).

159| Judgment of the General Court, 20 September 2019, ***PlasticsEurope* v *ECHA*** (T-636/17, EU:T:2019:639, paragraph 94).

In the judgment in ***Crédit agricole* v *ECB*** (T-576/18, under appeal, [160] EU:T:2020:304), delivered on 8 July 2020, the Court, ruling in extended composition, upheld the action brought by Crédit agricole SA, a credit institution under prudential supervision, for annulment of the decision of the ECB, [161] only in so far as it imposed on the applicant an administrative pecuniary penalty of EUR 4 300 000.

In that case, the ECB had adopted a decision imposing on the applicant an administrative pecuniary penalty under Regulation No 1024/2013 [162] for continued breach of the capital requirements laid down by Regulation No 575/2013. [163] In particular, the applicant had classified capital instruments as Common Equity Tier 1 (CET 1) instruments without having obtained prior authorisation from the competent authorities. The ECB considered that the requirements had been breached negligently and took the view that an administrative pecuniary penalty of EUR 4 300 000, which, according to the ECB, represented 0.0015% of the annual turnover of the group of which the applicant is part, constituted a proportionate penalty. The applicant, which disputed the legality of the decision both in so far as the ECB had found that there had been a breach by the applicant and in so far as it had imposed on the applicant an administrative pecuniary penalty, brought an action before the Court for annulment of that decision.

In the first place, in the context of the review of legality of the contested decision, in that it found that there had been a breach by the applicant, the Court interpreted the wording 'permission is granted by the competent authorities', which appears in the first subparagraph of Article 26(3) of Regulation No 575/2013 but is not defined in that regulation. According to the Court, it follows from a contextual and purposive interpretation of that provision that the credit institution must have obtained the permission of the competent authorities before classifying each of its issuances of capital instruments as CET 1.

In addition, in response to the applicant's objections that its conduct no longer constituted a breach after that provision was subsequently amended, pursuant to the principle of retroactive application of the less severe penalty, the Court acknowledged that that principle, which constitutes a general principle of EU law now enshrined in the Charter of Fundamental Rights of the European Union, may lead to the annulment of a decision imposing an administrative or criminal penalty should the legal framework be amended after the facts of the particular case but prior to the contested decision. However, the Court pointed out that that principle cannot be relied on when it is reviewing the legality of a measure that was adopted before the legal framework was amended. An institution cannot be criticised for having infringed, in its decision, rules of law that are not yet applicable. It is only when the Court exercises its power to alter the amount of the penalty imposed that a development in the legal framework subsequent to the contested decision may be taken into account by the Court for the purposes of assessing whether the amount is appropriate on the date when it issues its decision. In that instance, however, no such request for alteration was made.

160| Case C-456/20 P, ***Crédit agricole* v *ECB***.

161| Decision ECB-SSM-2018-FRCAG-76 adopted by the European Central Bank on 16 July 2018.

162| Article 18(1) 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).

163| Article 26(3) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68 and OJ 2013 L 321, p. 6).

Further, after noting that, according to the case-law, negligence refers to an unintentional act or omission by which the person responsible breaches his or her duty of care [164] and that, in order to determine whether there is negligence, it is necessary to take account, in particular, of the complexity of the provisions at issue and the professional experience of, and care taken by, the trader in question, [165] the Court stated that, in its capacity as a credit institution, the applicant should have demonstrated great care when implementing Regulation No 575/2013. According to the Court, a careful analysis of the provisions of that regulation would have made clear to the applicant what the exact scope of its obligations under that regulation were, and the Court therefore concluded that the ECB was right to find that the applicant's breach was negligent.

Lastly, as regards the applicant's claim that the requirements of the protection of the rights of the defence were not observed, the Court, applying, by analogy, the case-law concerning observation of the rights of the defence in enforcement proceedings for infringements in the area of competition, [166] held that those requirements were observed since the ECB sends the interested party a statement of objections setting out clearly all of the essential factors on which it relies before a supervisory decision is adopted. The decision must not hold the interested party liable for infringements other than those communicated to that party in the administrative procedure and must contain only those facts on which the interested party could express a view. However, the Court pointed out that the final decision need not necessarily be a copy of the statement of objections, because the assessments of fact or law in that statement of objections are purely provisional. Nevertheless, the rights of the defence will be infringed when, owing to an irregularity on the part of the ECB, the administrative procedure conducted by the ECB could have resulted in a different outcome, in particular when the interested party could have defended itself more effectively had there been no irregularities. In the light of those findings, the Court held that the applicant had been unable to demonstrate the unlawfulness of the contested decision in which it was found that there had been a breach by the applicant.

In the second place, in reviewing the legality of the contested decision in that it imposed an administrative pecuniary penalty on the applicant, the Court emphasised in particular the fundamental nature of the obligation to state reasons for the ECB's decisions in the area of prudential supervision. It stated that, taking account of the wide discretion conferred on the ECB by Regulation No 1024/2013 to determine the pecuniary penalty, and also the very high amount of the penalties incurred, it is essential that judicial review of the imposition and amount of the penalty can be carried out in order to determine whether they are effective, proportionate and persuasive. The Court pointed out that the statement of reasons for the decision must show the methodology used by the ECB and all of the relevant factors which were taken into account in determining the amount of the penalty.

However, it is apparent from the facts of that case that, while the ECB set out in its statement of defence and during the hearing the methodology applied and the factors taken into account to determine the amount of the penalty, that information was not included in the initial decision imposing the administrative pecuniary penalty. That decision was therefore vitiated by an inadequate statement of reasons which, pursuant to settled case-law, could not be remedied by the subsequent communication of the missing information.

Accordingly, the Court annulled, on the basis of an inadequate statement of reasons, the ECB's decision only in so far as it imposed on the applicant an administrative pecuniary penalty of EUR 4 300 000.

164| Judgment of 3 June 2008, ***The International Association of Independent Tanker Owners and Others*** (C-308/06, EU:C:2008:312, paragraph 75).

165| Judgment of 11 November 1999, ***Söhl & Söhlke*** (C-48/98, EU:C:1999:548, paragraph 56).

166| Judgment of 24 May 2012, ***MasterCard and Others* v *Commission*** (T-111/08, EU:T:2012:260, paragraphs 266 to 269 and the case-law cited).

In the judgment in ***VQ* v *ECB*** (T-203/18, EU:T:2020:313), delivered on 8 July 2020, the Court, ruling in extended composition, dismissed the action brought by VQ, a credit institution subject to prudential supervision, seeking annulment of the decision of the ECB [167] to the extent that, first, it imposed on the applicant an administrative pecuniary penalty for breach of European legislation on prudential supervision of credit institutions and, secondly, it decided to publish that penalty, without anonymising the applicant's name, on the ECB's website.

In that instance, the ECB had adopted a decision imposing an administrative pecuniary penalty in the amount of EUR 1 600 000 on the applicant on the ground that the latter had, between 1 January 2014 and 7 November 2016, breached the obligation to obtain the prior permission of the competent authority before repurchasing CET 1 instruments, provided for by Regulation No 575/2013. [168] Taking the view that the applicant did not meet the conditions set by the Single Supervisory Mechanism (SSM) Framework Regulation [169] for publication to be done anonymously, it had published on its website, without anonymising the applicant's name, the administrative pecuniary penalty imposed, pursuant to the provisions of Regulation No 1024/2013.

The applicant brought an action before the Court for annulment of that decision, disputing inter alia the fact that the ECB had not awaited the expiry of the period for bringing such an action before publishing the penalty imposed non-anonymously.

In the first place, the Court recalled that, under the provisions of Regulation No 1024/2013, [170] two cumulative conditions must be satisfied for the ECB to be able to impose an administrative pecuniary penalty: the breach committed must concern a relevant directly applicable act of EU law and the competent authorities must have the power to impose an administrative pecuniary penalty for that breach under EU law.

In that regard, the applicant merely disputing that the first of those two conditions had been satisfied, the Court found that it had indeed been satisfied in that instance. Regulation No 575/2013 contains a provision of a directly applicable act of EU law with unequivocal wording [171] imposing on credit institutions the obligation to seek prior permission before redeeming or repurchasing CET 1 instruments, enabling the ECB to exercise its power of review and to impose penalties in the event of breach of that obligation. Moreover, after having recalled that the ECB is obliged to observe the principle of proportionality where it decides to impose penalties and determines their amount, the Court found that the ECB had not infringed that principle when it had imposed an administrative pecuniary penalty on the applicant in view of the absence of reasonable doubt as to the interpretation of the relevant legislation.

In the second place, the Court considered that the wording of the provision [172] of the SSM Framework Regulation, which provides for the possibility of an anonymised or delayed publication of the penalties imposed by the ECB where 'disproportionate damage' might be caused to the entity at issue by non-anonymised

167| Decision ECB-SSM-2018-ESSAB-4, SNC 2016-0026 of the European Central Bank of 14 March 2018.

168| Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ 2013 L 176, p. 1, and corrigenda OJ 2013 L 208, p. 68, and OJ 2013 L 321, p. 6) – Article 77(a).

169| 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 (SSM Framework Regulation) (OJ 2014 L 141, p. 1). – Article 132(1).

170| Article 18(1) of Regulation No 1024/2013.

171| Article 77(a) of Regulation No 575/2013.

172| Article 132(1) of the SSM Framework Regulation.

publication, must be interpreted as establishing in principle the publication of every decision imposing an administrative pecuniary penalty containing, inter alia, the identity of the entity concerned. It is only exceptionally that decisions relating to that type of penalty will be published anonymously or that their publication can be delayed, the gravity of the breach in question not being a relevant consideration for the grant of that exception. After having noted that that interpretation was supported by other European instruments in the area of prudential supervision, [173] the Court concluded that the 'disproportionate' nature of the damage must be evaluated solely on the basis of an assessment of the consequences of the lack of anonymisation on the situation of the entity, irrespective of the gravity of the breach found against it.

In the third place, the Court considered that the obligation on the ECB to publish penalty decisions, in principle without anonymisation, without undue delay and irrespective of whether there might be the possibility of an appeal follows in a sufficiently clear and precise manner from the relevant provisions [174] and also, more generally, from the presumption of lawfulness and the binding nature of acts of the EU institutions and bodies, those acts producing legal effects until such time as they are withdrawn, annulled or declared invalid. Therefore, the ECB could not be criticised for not having awaited the expiry of the period for bringing the action for annulment, brought by the applicant, before implementing its penalty decision without undermining the presumption of lawfulness and the binding nature of acts of the EU institutions and bodies.

By its judgment of 9 September 2020, ***BNP Paribas* v *ECB*** (T-150/18 and T-345/18, EU:T:2020:394), the Court, ruling in extended composition, adjudicated in a case concerning BNP Paribas ('the applicant'), a credit institution classified as 'significant' and, accordingly, subject to the direct prudential supervision of the ECB. In connection with the financing of the Single Resolution Fund, the applicant opted for a contribution by means of irrevocable payment commitments ('IPCs'). [175] In carrying out its task of prudential supervision, the ECB adopted, on 19 December 2017, a decision [176] requiring the applicant to deduct from its own CET 1 capital 177 the cumulative amounts of its IPCs ('the contested measure').

The ECB based that decision on the finding that the applicant was treating its IPCs as off-balance-sheet items, causing a risk of an overvaluation of its CET 1 capital. The IPCs were not recorded as liabilities on the applicant's balance sheet and, as the guarantee attached to them was unavailable until the IPCs had been paid into the Single Resolution Fund, they could not be used to cover any losses connected with the applicant's business. The ECB took the view that that situation did not give an accurate view of the applicant's financial soundness since there was a difference between the amount of CET 1 capital declared by the applicant and the actual amount of the losses it was able to bear.

173| Namely Article 18(6) of Regulation No 1024/2013 and recital 38 and Article 68 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).

174| Namely Article 18(6) of Regulation No 1024/2013 and Article 132(1) of the SSM Framework Regulation.

175| The contributions which credit institutions are required to pay to the Single Resolution Fund may be paid by an immediate payment or an IPC. Under Article 70(3) 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), credit institutions must commit to pay the amount of the contribution to the Single Resolution Fund at the resolution authority's first request.

176| ECB Decision No ECB/SSM/2017-R0MUWSFPU8MPRO8K5P83/248 of 19 December 2017.

177| These funds are intended to ensure continuity of the business of a credit institution and to prevent situations of insolvency.

Following an action brought by the applicant before the ECB's Administrative Board of Review, the ECB replaced its decision of 19 December 2017 with a decision of 26 April 2018, [178] in which the section relating to IPCs remained unchanged. That decision was replaced on 1 March 2019 by a decision of 14 February 2019, [179] which imposed on the applicant a measure identical to the contested measure. The applicant brought before the Court two actions seeking the annulment in part of the ECB's decisions imposing that measure on it.

In its judgment of 9 September 2020, ruling in extended composition and after joining the two cases (T-150/18 and T-345/18), the Court annulled the ECB's decisions in part, on the grounds that the ECB had not carried out an individual supervisory review of the applicant's risk profile before imposing the contested measure on it.

First, the Court found that the decisions adopted by the ECB did not lack a legal basis, as the ECB had acted within the scope of its supervisory review and evaluation powers, which authorise it to require institutions to apply a specific provisioning policy or specific treatment of assets in terms of own funds requirements. [180]

Secondly, after having found that the sums put up as collateral for the payment of IPCs [181] were inextricably linked to the IPCs themselves, the Court rejected the applicant's argument that those IPCs could not be the subject of a prudential supervisory measure imposing special treatment in terms of own funds requirements on account of their treatment as off-balance-sheet items. The Court held that, although the contested measure did not relate directly to IPCs but to the sums put up as collateral for their payment, the fact that they were inextricably linked made it possible to extend that measure to IPCs.

However, to the use of such a measure required the ECB to carry out an individual examination of the applicant's risk profile and, in particular, of the arrangements, strategies and mechanisms implemented to address the risk resulting from the treatment of IPCs for accounting purposes. In that regard, the Court first of all found that the ECB established the level of the applicant's exposure to the risk arising from having subscribed to IPCs. Nevertheless, the Court considered that the ECB's reasoning – that the treatment of IPCs for accounting purposes as off-balance-sheet items was, in itself, problematic since it implied by definition an overvaluation of CET 1 capital – formed part of findings of a general nature which may apply to any credit institution opting for similar treatment of IPCs. Therefore, the Court found that the contested decisions did not refer to any individual examination by the ECB aimed at verifying whether the applicant had implemented arrangements, strategies or mechanisms with the aim of addressing the prudential risks associated with the treatment of IPCs as off-balance-sheet items.

Furthermore, holding that the contested measure had been adopted within the framework of the Supervisory Review and Evaluation Process (SREP), the Court concluded that that situation did not necessarily mean that an individual examination taking the applicant's specific circumstances into account had been carried out. In addition, the Court considered that, although the impact assessment carried out prior to the adoption of the contested decisions may be useful for the purposes of assessing the proportionality of the contested measure, it pursues a different logic and objective from those of an individual examination and cannot be equated with such an examination.

178| ECB Decision No ECB-SSM-2018-FRBNP-17 of 26 April 2018.

179| ECB Decision No ECB-SSM-2019-FRBNP-12 of 14 February 2019.

180| In accordance with Articles 16(1)(c) and 2(d) of Regulation No 1024/2013.

181| These sums take the form of a cash deposit of an amount equivalent to that of the IPCs, at the free disposal of the resolution authorities.

Consequently, the Court concluded that, in the absence of an examination going beyond the mere finding of the potential risk caused by the IPCs treated as off-balance-sheet items and an examination of the applicant's specific situation, in particular its risk profile and level of liquidity, and as no account was taken of possible factors to mitigate the potential risk, the ECB infringed its obligation to carry out an individual supervisory review of the applicant. [182]

XIII. Public procurement by the EU institutions

In the judgment in ***Securitec* v *Commission*** (T-661/18, EU:T:2020:319), delivered on 8 July 2020, the Court annulled the decision of the European Commission rejecting the tender submitted by Securitec as part of a public procurement tender procedure on the ground that a clause of the specifications was unlawful. That clause allowed the tender to be awarded on the basis of a declaration containing a commitment to provide, not later than five days after the contract had been signed, a certificate stating that the successful tenderer satisfied a condition of professional competenceessential to the performance of the contract.

In that instance, the Commission had launched a restricted tender procedure for the 'maintenance of security installations in buildings occupied and/or managed by the European Commission in Belgium and in Luxembourg'. As regards the selection of candidates, the specifications required, as part of the 'minimum criteria', that the technician who is 'head of site' hold a specific training certificate from the company Nedap. By way of supporting document, candidates could provide that certificate or a declaration of honour according to which, in the event that they were awarded the tender, the certificate would be obtained not later than five days after the contract had been signed. Lastly, the specifications stipulated that the contract would be awarded to the tender offering the lowest price of the tenders in order and satisfying the requisite conditions.

Having satisfied the selection criteria, Securitec, the applicant, was invited to submit its tender, which it did on 4 August 2018. It was then informed, by email of 7 September 2018, that the contract had been awarded to another company and that the amount of its tender had proved to be 48.55% higher than that of the successful tenderer. The applicant therefore requested the Commission to provide it with further information on the grounds for the rejection of its tender. In particular, it enquired as to whether the successful tenderer held the Nedap certification required in the specifications and whether it was using a subcontractor. On 17 September 2018, the Commission answered those questions by referring to the email of 7 September 2018, which, according to the Commission, contained all the information that had to be communicated to unsuccessful tenderers. The applicant brought an action for annulment of the decisions contained in the Commission's emails of 7 and 17 September 2018 rejecting its tender and refusing to provide it with the requested clarifications

In the first place, regarding the subject matter of the action, the Court stated that an action brought against a decision confirming an initial, non-final decision is admissible. The person concerned is entitled to challenge the original decision, the confirmatory decision or both. In that instance, as the action was brought within two months from receipt of the first decision contained in the email of 7 September 2018, the applicant could validly challenge both decisions.

In the second place, as regards the obligation to state reasons in public procurement procedures, the Court recalled that the contracting authority must communicate to each unsuccessful tenderer the grounds for the rejection of its tender and that, if such a tenderer who did no meet any of the exclusion criteria and

182| As provided for in Articles 4(1)(f) and 16(1)(c) and (2)(d) of Regulation No 1024/2013.

satisfied the selection criteria so requests in writing, the contracting authority must also communicate to it the characteristics and relative merits of the successful tender as well as the name of the tenderer and the value of the contract. The Court then found that those various elements had been communicated to Securitec by the email of 7 September 2018 and that that information was sufficient in the light of the obligation to state reasons, given that the sole award criterion was price. That email specified the name of the successful tenderer, the value of the contract, which could be deduced from the price difference of 48.55% between the two tenders, and indicated that the tender had been accepted because of its price.

In the third place, the Court dismissed the complaint alleging that the certification produced by the successful tenderer after the conclusion of the contract had not complied with the tender specifications, on the ground that such a complaint did not concern the award of the contract, which was at issue in the action, but the performance of the services forming the subject matter of the contract. It therefore did not concern the contested decisions.

In the last place, the Court recalled that it follows from Article 102(1) of Regulation No 966/2012 [183] and from Article 110(1) of the same regulation [184] that the contracting authority is obliged to ensure, at the latest at the time of the public contract, that the tenderer which submitted the best tender actually satisfied the conditions laid down in the tender specifications.

In that regard, the Court held that that obligation could not be fulfilled where the specifications allow the contract to be awarded on the basis of a declaration provided by a tenderer containing a commitment to satisfy, after the contract has been signed, a condition of technical and professional competence presented as a 'minimum' requirement for the performance of that contract. Such a clause undermines the principle of equal treatment between tenderers as it may lead to the contract being awarded to a tenderer which does not meet that requirement, whereas other participants, which have already completed that training at the time of the award, are not selected. Furthermore, verifying that the successful tenderer actually has the professional competence required to perform the contract only after the contract has been awarded would mean, contrary to legal certainty, that, should the successful tenderer prove unable to provide the certificate concerned, the contract would be terminated and a new procedure would then have to be organised.

Furthermore, the Court stated that the desire to spare costs for candidates cannot justify a derogation from equal treatment and legal certainty: the contract must be awarded to the undertaking whose tender is the most economically advantageous and which has proved its technical competence to perform it. Where the contracting authority wishes to broaden the number of participants in a public procurement procedure, it may provide for broader conditions of technical and professional competence.

In the light of the foregoing, the Court held that the clause in the tender specifications allowing verification of the Nedap certification condition to take place after the award of the contract was unlawful and annulled both of the contested decisions.

183| Article 102(1) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1) as amended by Regulation (EU, Euratom) 2015/1929 of the European Parliament and of the Council of 28 October 2015 (OJ 2015 L 286, p. 1), provides that public contracts financed in whole or in part by the budget are to respect the principles of transparency, proportionality, equal treatment and non-discrimination.

184| Article 110(1) of Regulation No 966/2012 provides that contracts are to be awarded on condition that the awarding authority has verified, in particular, that the candidate or tenderer meets the selection criteria set out in the contract documents.

XIV. Access to documents of the institutions

In the judgment in ***Bonnafous* v *Commission*** (T-646/18, EU:T:2020:120), delivered on 26 March 2020, the Court dismissed the applicant's action for annulment of the European Commission's decision of 9 October 2018, [185] which, pursuant to Regulation No 1049/2001, [186] had refused to grant the applicant access to the final 2018 audit report on human resources in the Education, Audiovisual and Culture Executive Agency (EACEA), dated 21 January 2018. This case gave the Court the opportunity to clarify certain aspects of the exception concerning the protection of the purpose of inspections, investigations and audits within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001. [187] [188]

On 30 July 2018, the applicant, Ms Laurence Bonnafous, a former member of the contract staff at the EACEA, sent an email to the European Commission's internal audit service, requesting access, pursuant to Regulation No 1049/2001, to the final audit report requested. On 9 October 2018, the Commission adopted the contested decision, by which it rejected the applicant's confirmatory application for access to the document. The Commission found, in essence, first, that the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, when interpreted in the light of the financial regulation, [189] precluded the premature disclosure of an audit report which risked jeopardising the serenity and independence of the audit in question by hindering the implementation, by the EACEA, of the recommendations contained within it and, secondly, that there was no overriding public interest to justify the non-application of that exception.

By her action for annulment of that Commission decision, the applicant disputes, in particular, the application of the exception under the third indent of Article 4(2) of Regulation No 1049/2001, and its interpretation in the light of the financial regulation, to the requested document, on the ground that the audit in the context of which the document was prepared had been completed by the time she requested access to the document. According to the applicant, it would be contrary to both the objective of Regulation No 1049/2001 and to the principle of transparency [190] to wait for the recommendations set out in a final audit report to be implemented before the documents relating to those recommendations could be disclosed without fear of hindering the purpose of that audit.

The Court rejected the applicant's arguments in that regard. After noting that Article 99(6) of the financial regulation provides that 'the reports and findings of the internal auditor … shall be accessible to the public only after validation by the internal auditor of the action taken for their implementation', the Court stated that Regulation No 1049/2001 and the financial regulation have different objectives. Thus, Regulation No 1049/2001 is designed to facilitate as far as possible the exercise of the right of access to documents and

185| Commission Decision C(2018) 6753 final of 19 October 2018 (Commission decision concerning confirmatory application for access to documents GESTDEM 2018/4141).

186| 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).

187| Under this provision, the institutions are to refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

188| See also, concerning access to documents of the ECB, Case ***Malacalza Investimenti* v *ECB*** (T-552/19, EU:T:2020:294), presented under the heading 'I.3. Default procedure'.

189| Article 99(6) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ 2012 L 298, p. 1) ('the financial regulation').

190| The principle of transparency is recognised by Article 15 TFEU and Article 42 of the Charter.

to promote good administrative practices. The financial regulation, for its part, is designed to define the financial rules applicable to the general budget of the European Union. At the same time, the Court pointed out that Regulation No 1049/2001 and the financial regulation do not contain any provision expressly giving one regulation primacy over the other. It follows from settled case-law that it cannot be excluded, as a matter of principle, that the exceptions under Article 4(2) of Regulation No 1049/2001 may be interpreted in the light of certain specific rules of EU law. In such a case, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables a coherent application of them.

The Court noted that the very purpose of Article 99(6) of the financial regulation is to restrict access to the reports and findings of the internal auditor, by safeguarding those documents from public disclosure until the internal auditor has validated the action taken for their implementation. In those circumstances, to permit general access, on the basis of Regulation No 1049/2001, to the reports of the internal auditor where the latter has not yet validated the action taken for their implementation would be likely to jeopardise the balance which the EU legislature sought to achieve in the financial regulation between the right of the public to access the documents of the institutions as widely as possible and the ability for the internal auditor to conduct audits properly.

Therefore, according to the Court, for the purposes of interpreting the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, it is necessary to apply a general presumption that disclosing the reports and findings of an internal auditor before he or she has validated the action taken for their implementation would undermine the purpose of the audits he or she carries out, although that presumption of harm does not rule out the possibility of the parties concerned demonstrating that a specific document disclosure of which has been requested is not covered by that presumption.

In any event, the Court noted that the fact that internal audit documents are covered by the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001, for as long as the action for implementing the audit in question remains to be validated by the internal auditor, restricts the fundamental right of the public to access the documents only in two limited respects. First, out of inspections, investigations and audits, that interpretation relates only to the specific category of audits carried out by the internal auditor. Secondly, the interpretation is limited in time, since it permits the EU institutions to refuse access to the reports and findings of those internal audits only until the internal auditor has validated the action taken for their implementation.

By its judgment in ***Campbell* v *Commission*** (T-701/18, EU:T:2020:224), delivered on 28 May 2020, the Court, ruling in extended composition, annulled the decision of the European Commission refusing to grant the applicant access to documents in relation to the compliance or non-compliance by Ireland with its obligations under three Council framework decisions relating to the area of freedom, security and justice [191] on the ground that, by failing to identify, in that contested decision, the documents covered by the applicant's request for access, the Commission had failed correctly to apply the general presumption of confidentiality applicable to documents that are part of an EU Pilot procedure and had therefore erred in law in its application of the exception relating to the protection of the purpose of inspections, investigations and audits, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

191| Commission Decision C(2018) 6642 final of 4 October 2018 refusing access to documents in relation to Ireland's compliance or non-compliance with its obligations under Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27), Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ 2008 L 337, p. 102) and Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (OJ 2009 L 294, p. 20).

In the case at hand, the applicant is an Irish national who, following his arrest in Ireland in December 2016 on the basis of a European arrest warrant issued by the Lithuanian authorities, had contested the surrender request from those authorities before the Irish courts.

In August 2018, the applicant had submitted to the Commission, pursuant to Regulation No 1049/2001, a request for access covering all documents held by it in relation to the compliance or non-compliance by Ireland with its obligations under the three abovementioned framework decisions. After having replied to the applicant that it did not possess any documents corresponding to his request, the Commission, by decision of 4 October 2018, had refused to grant him access to the requested documents on the basis of the third indent of Article 4(2) of Regulation No 1049/2001. The Commission had considered that those documents were part of a file relating to three 'EU Pilot procedures' in relation to the transposition by Ireland of the three framework decisions. Since no decision as to the outcome of those procedures had been adopted, the Commission considered that an infringement investigation against Ireland with regard to the transposition of the framework decisions was still ongoing and that public access to the requested documents would have negative consequences for the conduct of those procedures. It had concluded therefore that all of those documents were covered by the general presumption of confidentiality based on the exception in respect of the protection of the purpose of inspections, investigations and audits, laid down in Regulation No 1049/2001, which meant that a specific and individual examination of the content of each requested document was not necessary. In his application before the Court, the applicant submitted in particular that the application of that general presumption of confidentiality was illegal.

The Court first of all recalled the established case-law of the Court of Justice relating to the recognition of general presumptions of confidentiality that apply to certain categories of documents and, in particular, to the rules for applying a general presumption of confidentiality to documents that are part of an EU Pilot procedure.

In that regard, the Court stated that, more generally, although the application of a general presumption of confidentiality permits the institution to dispense with carrying out an individual examination of each document, it cannot, however, exempt it from indicating to the applicant which documents it identified as being part of a file covered by that presumption and from providing him or her with the list of those documents. In the absence of such an identification, the applicant would not be in a position to submit that a document is not covered by the general presumption of confidentiality and would therefore be unable to rebut it. It is only once the institution has identified which documents were covered by the request for access that it can classify them into categories according to their common characteristics, to the fact that they are of the same nature or to the fact that they belong to the same file and that it can then apply a general presumption of confidentiality to them.

Next, after applying those considerations to that case, the Court concluded that in order to apply the presumption relating to requested documents that are part of an EU Pilot procedure, the Commission was required, first of all, to identify in the contested decision the documents covered by the request for access, then to classify them by category or as part of a particular administrative file and, finally, to find that they were part of an EU Pilot procedure, hence permitting it to apply a general presumption.

In that case, the Court held that the formula used by the Commission in the contested decision was insufficient to enable the documents covered by the applicant's request for access to be identified and that the contested decision merely refused access to three EU Pilot procedures, but contained no justification with regard to the documents requested by the applicant. Therefore, in so far as the applicant did not know which documents the Commission had identified as corresponding to his request for access, he was unable to rebut the general presumption of confidentiality.

Finally, the Court observed that the identification, in the contested decision, of the documents covered by the request for access was also necessary to enable the Court to exercise its power of review and verify whether the Commission was justified in taking the view that the requested documents were part of an EU Pilot procedure.

XV. Civil service

1. Right to strike

In the judgment in ***Aquino and Others* v *Parliament*** (T-402/18, EU:T:2020:13), delivered on 29 January 2020, the Court, ruling in extended composition, stated that Article 55(1) of the Staff Regulations of Officials of the European Union ('the Staff Regulations') did not contain any precise and clear limitation on the exercise of the right to strike, nor did it envisage the requisitioning of staff in the event of a strike, which means that it could not serve as the legal basis for the requisition measures adopted by the European Parliament in that case.

The circumstances giving rise to that judgment are a strike by interpreters and conference interpreters of the European Parliament which took place in 2018 in response to the implementation, in the work programmes, of the decision of 14 July 2017 of the Secretary-General of the Parliament altering the working conditions of interpreters and conference interpreters of the Parliament. By decision of 2 July 2018 ('the decision of 2 July 2018'), the Parliament's Director-General for Personnel had requisitioned interpreters and conference interpreters, including some of the applicants, for 3 July 2018. The applicants had then, on the same day, brought an action before the Court requesting, first, the annulment of the decision of 2 July 2018 and also of future decisions having the same subject matter that might be subsequently adopted and, secondly, compensation for the damage they suffered.

As regards, first of all, the admissibility of the action, in so far as it was also directed against the decisions adopted after the action was brought, the Court declared the action inadmissible in respect of those decisions, as they could not be regarded as replacing or amending, for the purposes of Article 86(1) of the Rules of Procedure, the decision of 2 July 2018 which had been challenged initially.

As regards the claim for annulment, the Court then recalled that it follows from Article 28 of the Charter that workers and employers, or their respective organisations, have, in accordance with EU law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. It added that, according to the case-law, those provisions might apply in relations between the EU institutions and their staff. The Court further stated that it follows from Article 52(1) of the Charter that, to be regarded as complying with EU law, a limitation on a right protected by the Charter must satisfy three conditions, the first of these conditions being that the limitation must be provided for by law. The Court therefore examined whether the decision of 2 July 2018 constituted a limitation on the right to strike as protected by Article 28 of the Charter and, if so, whether such a limitation had been provided for by law.

It first found, in that regard, that the decision of 2 July 2018 constituted a limitation on the exercise of the right to strike guaranteed by Article 28 of the Charter. Next, noting that the decision of 2 July 2018 was based on Article 55(1) of the Staff Regulations and on the framework agreement signed on 12 July 1990 between

the Parliament and the trade union or professional organisations ('the framework agreement'), the Court examined whether those provisions were capable of constituting a sufficiently clear and precise legal basis within the meaning of Article 52(1) of the Charter.

The Court first noted that the Staff Regulations were silent on the matter of the right to strike. It then recalled that Article 55(1) of the Staff Regulations provided that 'officials in active employment shall at all times be at the disposal of their institution'. However, the Court noted that such a provision, which appears in Chapter 1, on hours of work, of Title 4, on working conditions of officials, neither lays down any precise and clear limitation on the exercise of the right to strike, nor, a fortiori, provides for the use of requisitions. It added that that provision therefore contains no clarification as to the scope of the limitation on the right to strike and cannot therefore serve as a legal basis for the requisition measures at issue. It concluded that Article 55(1) of the Staff Regulations could not serve as the legal basis for the requisitions in the decision of 2 July 2018.

As regards the framework agreement, the Court also noted that, under Article 8, the parties had undertaken to establish, in a protocol to be annexed to that agreement, a conciliation procedure to be implemented in the event of a cessation of work. However, since such a protocol had never been adopted, and as no other article of the framework agreement could serve as a legal basis for the requisition measures at issue, the Court concluded that Article 8 the framework agreement could not serve as law within the meaning of Article 52(1) of the Charter.

Consequently, the Court concluded that the requisition measures at issue constituted a limitation on the right to strike that was not provided for by law. It therefore annulled the decision of 2 July 2018.

Finally, with regard to the claims for damages, the Court noted that the applicants had been requisitioned for the day of 3 July 2018 without any legal basis authorising the Parliament to take such measures and had therefore been unable to exercise their right to strike for the duration of the requisitions. Moreover, it noted that those requisitions had been made at a late stage, the applicants not being informed of them until the evening before the day on which they were to be implemented. It concluded that those circumstances, which were regrettable to say the least, had caused non-material damage directly linked to the unlawfulness vitiating the decision of 2 July 2018. Consequently, it ordered the Parliament to pay each of the applicants requisitioned by the decision of 2 July 2018 the sum of EUR 500.

2. Freedom of expression

In the judgment in ***Sammut* v *Parliament*** (T-608/18, EU:T:2020:249), delivered on 10 June 2020, the Court adjudicated on the relationship between the right to freedom of expression and the duty of officials to give prior notice of their intention to publish any matter dealing with the work of the European Union, as provided for by Article 17a(2) of the Staff Regulations.

In 2016, the applicant, an official of the European Parliament, published in Malta a book entitled *L-Aqwa fl-Ewropa. Il-Panama Papers u l-Poter* (The best in Europe. The Panama Papers and Power). In 2017, he informed the Parliament of his intention to publish a second edition of this book. His request was deemed inadmissible in so far as, since it related to a second edition, it could not be considered to be a prior notice of the publication of this book. For this reason, his staff report for 2016 included a remark stating that he had failed to inform the Appointing Authority in advance about his intention to publish a book. Having submitted a request to the Reports Committee seeking, inter alia, the removal of this remark, the applicant was informed of the Parliament's decision not to accede to his request on this point ('the contested decision').

The applicant brought an action before the Court seeking (i) annulment of the contested decision and (ii) compensation for the material and non-material damage which he claimed to have suffered as a result of this decision. In support of his action, the applicant pleaded, inter alia, an infringement of the right to freedom of expression as well as an incorrect application of Article 17a(2) of the Staff Regulations, which concerns the duty of officials to give prior notice of their intention to publish any matter dealing with the work of the European Union.

As regards the right to freedom of expression, the Court recalled, first of all, that the officials and other employees of the European Union enjoy this right even in areas falling within the scope of the work of the EU institutions, which right extends to the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution. However, the exercise of this freedom can be made subject to certain restrictions that are necessary in a democratic society, such as the duty to inform in advance imposed on officials pursuant to Article 17a(2) of the Staff Regulations, which duty is intended to preserve the relationship of trust which must exist between the institution and its officials or other employees.

Next, as regards the scope of Article 17a(2) of the Staff Regulations, the Court held that the procedure that is to be followed in the context of this provision is made up of two separate stages. The first stage lays down the duty, for the official, to inform the Appointing Authority of his or her intention to proceed with the publication of any matter dealing with the work of the European Union, whereas the second stage lays down the duty, for the Appointing Authority, where it is able to demonstrate that the matter is liable seriously to prejudice the legitimate interests of the EU, to inform the official concerned, in writing, of any objections it might have concerning the publication in question within 30 days. Thus, the prior notice of the official's intention to publish any matter dealing with the work of the Union enables the institutions to exercise the supervision that they are required to carry out under the second paragraph of Article 17a(2) of the Staff Regulations. In view of the different detailed rules that apply to each of these two stages, the Court concluded that, contrary to the arguments put forward by the applicant, the ability of a matter seriously to prejudice the legitimate interests of the European Union is not a relevant criterion to be taken into consideration at the stage of notification of the intention to publish.

Lastly, as regards the subject matter of the book published by the applicant and its connection to the work of the European Union, the Court observed that, contrary to the applicant's submissions, the book did not deal purely and simply with a Maltese internal political discussion. In fact, the book in question dealt with the so-called 'Panama Papers' issue as well as with offshore companies. The work of the Committee of Inquiry set up by a Parliament decision [192] to investigate alleged contraventions in the application of EU law in relation to money laundering, tax avoidance and tax evasion ('the PANA Committee') was, inter alia, to evaluate the situation in all the Member States of the European Union in this respect, including in Malta. Therefore, the subject matter of the book in question concerned precisely the powers of the PANA Committee. That conclusion was supported by the title of the work (The Best in Europe. The Panama Papers and Power), which clearly placed it in a European context, by the reproduction of the EU flag on its cover and by several references to the work of the European Union as well as to important individuals with connections to the EU institutional framework. Lastly, even if it were to be held that the subject matter of the book in question was addressed mainly from a national point of view, in so far as it dealt with Maltese politics and politicians, it would still be the case that the latter were at the same time the subject of the PANA Committee's work.

192| Decision (EU) 2016/1021 of the European Parliament of 8 June 2016 on setting up a Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, its powers, numerical strength and term of office (OJ 2016 L 166, p. 10).

Consequently, the Court found that the subject matter of the book in question dealt with the work of the European Union, such that the Parliament was correct when it refused to withdraw the apposite remark from the applicant's staff report for 2016, without thereby infringing his right to freedom of expression, in so far as he had failed to notify the draft of his publication to the Appointing Authority, in accordance with Article 17a(2) of the Staff Regulations.

Having also rejected all the claims for damages brought by the applicant, the Court concluded that the application should be dismissed in its entirety.

3. Promotion

By its judgment in ***XH* v *Commission*** (T-511/18, under appeal, [193] EU:T:2020:291), delivered on 25 June 2020, the Court annulled the decision of the European Commission not to include the applicant in the list of officials promoted in the 2017 promotion exercise. The Court further awarded compensation to the official concerned for the non-material damage that she had suffered.

The applicant, an official of the European Anti-Fraud Office (OLAF), was recruited at grade AD 5 in a first OLAF unit, with effect from 1 July 2014, her recruitment being subject to a probationary period. Following internal difficulties that the applicant encountered with other members of that unit at the start of her probationary period, she was transferred to a second OLAF unit, with effect from 1 November 2014. An interim probation report indicating those difficulties was drawn up in December 2014 and was subsequently annexed to the end-of-probation report drawn up in March 2015.

On 10 February 2018, the applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations against the Appointing Authority's decision not to promote her in the 2017 promotion exercise ('the decision not to promote the applicant'/'the decision not to promote her'), which was rejected by decision of 7 June 2018.

In support of her action for annulment of the decision not to promote her, the applicant alleged, inter alia, that Article 45 of the Staff Regulations had been infringed, in so far as her interim probation report and end-of-probation report had been taken into account in the consideration of the comparative merits in the 2017 promotion exercise.

In that regard, the Court stated, in the first place, that it is apparent from Article 45(1) of the Staff Regulations and Article 4(1)(a) of the decision of the Commission laying down general provisions for implementing Article 45 of the Staff Regulations [194] that, for the purposes of the consideration of the comparative merits in a promotion exercise, the Appointing Authority is required to take into account, in particular, the appraisal reports that are drawn up for officials. Those appraisal reports constitute an essential criterion for assessment each time the official's career is taken into consideration for the purposes of adopting a decision concerning his or her promotion.

In the second place, the Court stated that, while it is true that the Appointing Authority has the possibility of taking into account other information concerning the administrative and personal situation of candidates for promotion, it may do so only in exceptional circumstances. Even if additional information could thus be

193| Case C-399/20 P, ***XH* v *Commission***.

194| Commission Decision C(2013) 8968 final of 16 December 2013 laying down general provisions for implementing Article 45 of the Staff Regulations, published in Administrative Notices No 55-2013 of 19 December 2013.

taken into account so as to remedy the lack of an appraisal report, that information must nevertheless be broadly comparable to the information included in appraisal reports, as regards its provenance, the procedure for drawing it up and its purpose. According to the Court, appraisal reports and reports drawn up during the probationary period have separate purposes and functions.

As regards, first, their respective functions, an appraisal report is intended in particular to provide the administration with periodic information, which is as complete as possible, on the performance of their duties by officials, whereas an end-of-probation report is principally intended to evaluate the probationary official's fitness to carry out the work corresponding to his or her post and to become an established official.

As regards, secondly, their purpose, the Court noted that the annual appraisal of an official, which, while focusing on performance, is carried out having regard to the objectives set in advance in agreement with the hierarchical superior, differs from the appraisal of a probationary official, which is carried out with a view to that official becoming established, so that the assessments contained in a probation report cannot be equated to or, therefore, be substituted for or compensate for those carried out in an appraisal report.

Finally, the Court stated that, while the appraisal reports are acts adversely affecting the official since they are capable of having an influence over the entire course of that official's career, that is not the case for measures relating to the progress of the official's probationary period, such as probation reports, the purpose of which is to prepare the decision of the administration whether to appoint the person concerned as an established official at the end of the probationary period or to dismiss that person, without producing effects of any kind following the adoption of such a decision.

Thus, the Court concluded that an end-of-probation report, even if it contains a certain number of observations on the official's or other staff member's fitness for work, cannot, in principle, be taken into account by a promotion committee.

Therefore, noting that, in that case, two appraisal reports had been drawn up in respect of the applicant, in the 2015 and 2016 exercises, and that the assessments contained in those reports constituted a proper basis for the consideration of the comparative merits provided for in Article 45(1) of the Staff Regulations, the Court held, first, that there were no exceptional circumstances justifying the taking into account of the end-of-probation report and the interim probation report annexed to it in the consideration of the applicant's comparative merits in the 2017 promotion exercise. Secondly, and in any event, the Court emphasised that, unlike the appraisal reports, the applicant's interim probation report was not drawn up either in order to allow for an objective appraisal of the applicant or in order to assist in assessing her career development and, moreover, contained unusual and harsh criticisms, which was a further reason for precluding the interim probation report and the end-of-probation report, to which the former was annexed, being taken into account in the consideration of the applicant's comparative merits.

Therefore, the Court concluded that the taking into account, on the part of the competent Appointing Authority, of the reports relating to the applicant's probationary period constituted an irregularity capable of vitiating the 2017 promotion procedure in so far as it concerned the applicant. Since the outcome of the 2017 promotion procedure could have been different in the absence of that procedural irregularity, the Court annulled the decision not to promote the applicant. The Commission was also ordered to pay to the applicant the sum of EUR 2 000 as compensation for the non-material damage that she had suffered.

4. Expatriation allowance

By the judgment in ***Brown* v *Commission*** (T-18/19, under appeal, [195] EU:T:2020:465), delivered on 5 October 2020, the Court, ruling in extended five-judge composition, clarified the circumstances in which officials who acquire the nationality of the country of employment during the course of their career can, on that ground, have their entitlement to the expatriation allowance withdrawn, in the light of the conditions for granting that allowance laid down in Article 4(1) of Annex VII to the Staff Regulations.

In that case, the applicant, Mr Colin Brown, began working at the Commission on 1 January 2001. He was at the time a national of the United Kingdom only. The Commission's Office for the 'Administration and Payment of Individual Entitlements' (PMO) granted him the expatriation allowance in the light of the conditions required of officials 'who are not and have never been nationals of the State in whose territory the place where they are employed is situated', pursuant to Article 4(1)(a) of Annex VII to the Staff Regulations.

On 23 June 2016, the citizens of the United Kingdom of Great Britain and Northern Ireland voted in a referendum in favour of the withdrawal of their country from the European Union. On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the European Union. In those circumstances, on 27 June 2017, the applicant applied for Belgian nationality, which he obtained on 3 November 2017. Having been informed of this, PMO communicated to the applicant, on 23 February 2018, its decision to withdraw his entitlement to the expatriation allowance and, consequently, to the payment of his travel expenses, on the ground that he had obtained the nationality of his country of employment, namely Belgium. By amending decision of 19 March 2018 ('the contested decision'), the effective date of the Decision of 23 February 2018 was set at 1 December 2017.

Since his complaint against the contested decision was unsuccessful, the applicant brought an action before the Court seeking annulment of the contested decision and reinstatement of the benefits at issue as of 1 December 2017. In support of his claim for annulment, the applicant raised four pleas in law, first, contesting the possibility of reviewing his right to the expatriation allowance both as a matter of principle and in the light of the specific circumstances of this case, and, secondly, alleging infringement of the principle of equal treatment and non-discrimination stemming, in particular, from the conditions for granting the allowance applied in the context of the review and from their interpretation.

In the first place, the Court held that PMO did not misinterpret Article 4(1)(a) of Annex VII to the Staff Regulations by taking the view that acquisition of the nationality of the country of employment in the course of a career must lead to a review of the right to the expatriation allowance. While that provision does not expressly provide for the possibility of such a review, the Court emphasised that, nevertheless, the administration cannot continue to pay the allowance every month where an event occurs that substantially alters the situation of the person receiving it in the light of the conditions for granting that allowance. In that case and in the absence of any provision to the contrary, the administration must review the situation.

In that regard, the Court observed that the interpretation of Article 4(1)(a) of Annex VII to the Staff Regulations supports that analysis, in so far as it does not indicate anything capable of precluding a review of the right to the expatriation allowance following the acquisition, by an official, of the nationality of the country of employment in the course of his or her career. First, since the negative condition relating to the nationality of the country of employment is formulated in the present tense, that wording does not rule out the fact that the official in question must continue to satisfy that condition throughout his or her career in order to remain entitled to the expatriation allowance. Secondly, as regards the legislature's choice of conditions for

195| Case C-675/20 P, ***Brown* v *Parliament and Council.***

granting the expatriation allowance, the Court noted, in the light of the travaux préparatoires [196] of the former Staff Regulations, [197] that the nationality requirement was adopted because it was precise and easy to apply, without ignoring its limitations, in particular in cases of dual nationality. Thus, taking account of the principle that provisions of EU law which confer entitlement to financial benefits must be interpreted strictly, the Court took the view that the exclusion of any review of the right to the expatriation allowance following acquisition, by an official, of the nationality of the country of employment in the course of a career would have required the provision in question to be drafted differently. Thirdly, the Court found that such a review is also in line with the purpose of the expatriation allowance, which is to compensate for the extra expense and inconvenience resulting from the fact that, throughout the course of their career, officials are away from their place of origin because they perform their duties with the European Union at their place of employment. In so far as the EU legislature was called upon to reflect that purpose in the definition of the conditions for granting the expatriation allowance, the Court observed, in the light of the wording adopted in that regard in Article 4(1)(a) of Annex VII to the Staff Regulations, that an official's integration resulting from the fact that, during the course of his or her career, that official has established his or her habitual residence in the country of employment and works there cannot prevent payment of the expatriation allowance. However, that choice does not apply in the event of acquisition of the nationality of the country of employment during the course of a career, given the special form of integration that such naturalisation entails.

Lastly, the Court rejected the argument by which the applicant criticised PMO for not declining to review his situation, given the reasons that led him to apply for naturalisation, which he presents as a constraint constituting *force majeure*. In that regard, having pointed out that the procedure for naturalisation followed by the applicant aimed to counter the risk of being required to resign, which he faced, as the case may be, in the event of the United Kingdom's withdrawal from the European Union, the Court considered that the review in question could not be deemed to have caused, with respect to the applicant, an unreasonable burden meeting the requirements of *force majeure* and, accordingly, one capable of relieving PMO of its obligation to review his situation. That was all the less so because the acquisition of Belgian nationality now fully guaranteed to the applicant that he would remain employed. In that regard, the Court recalled, lastly, that no one can make a claim to offset the effects of a Member State's withdrawal from the European Union.

In the second place, the Court held that neither the application to the applicant, in the context of the review, of the conditions for granting the allowance that were applicable to officials having the nationality of the country of employment nor the interpretation of those conditions infringed the principle of equality and non-discrimination.

The Court emphasised, first of all, that the difference in treatment resulting from the choice of nationality as the first criterion, in the exercise of the broad discretion conferred on the legislature for the purpose of laying down the conditions of employment of officials, does not appear to be manifestly inappropriate or arbitrary, in the light of the purpose of the expatriation allowance. In addition, the frequency of its payment, which, moreover, is not limited in time, requires compliance with the principle of equal treatment and non-discrimination, not only upon entering the service, but also whenever the right to the allowance is reviewed.

196| Council Information Notice of 11 December 1959.

197| Council Regulation No 31 (EEC), 11 (EAEC) of 18 December 1961 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition, Series I Volume 1959-1962, p. 135).

However, in view of the strict conditions imposed on officials who are nationals of the country of employment in order for them to be able to qualify for the expatriation allowance, namely the absence of any residence or professional activity in the European territory of that country during a 10-year reference period prior to entering the service, the Court did not find any reason exempting the applicant from this from the time of his naturalisation. Thus, from that date, he must be treated in the same way as any other Belgian national or former Belgian national whose residence in Belgium, even briefly, during the 10-year reference period, may preclude him from entitlement to the allowance under Article 4(1)(b) of Annex VII to the Staff Regulations. Conversely, the Court took the view that the situation of officials who acquired the nationality of the country of employment during the course of their career is no longer comparable to that of officials who have not expressed the intention of formalising their ties with that country by obtaining its nationality.

In any event, the Court rejected the argument alleging discrimination against officials who are nationals of the United Kingdom, after having verified that the interpretation criticised was followed, in practice, irrespective of the official's nationality initially taken into account and that, moreover, it was completely unrelated to any consideration as to how relations between the European Union and the United Kingdom developed. Finally, in response to the plea alleging infringement of the principle of equal treatment and non-discrimination stemming from a misinterpretation of Article 4(1)(b) of Annex VII to the Staff Regulations, the Court observed that the interpretation advocated, in that regard, is incompatible with the actual wording of that provision and with its scope, with the result that it had to be rejected.

Drawing the appropriate conclusions from these considerations, the Court rejected the other heads of claim and, consequently, dismissed the action in its entirety.

5. Social security

By its judgment in ***AW* v *Parliament*** (T-213/19, EU:T:2020:230) of 28 May 2020, the Court annulled the decisions of the European Parliament rejecting the requests for recognition of the occupational nature of certain diseases from which the applicant suffered, on the ground of the irregularity of the medical opinion issued by the Medical Committee.

The applicant, an official of the European Parliament, had submitted, pursuant to Articles 3 and 16 of the Common rules on the insurance against the risk of accident and of occupational disease ('the Insurance rules'), [198] several requests for recognition of the occupational nature of the diseases from which he suffered. Following notification by the Appointing Authority of two draft decisions refusing to recognise the occupational nature of the diseases in question, accompanied by the conclusions of Dr A, a doctor designated by the Appointing Authority, the applicant requested that the matter be referred to the Medical Committee in order for it give its opinion on those draft decisions. The applicant designated Dr B to represent him and submitted that doctor's reports setting out the contested medical questions to the Appointing Authority. The Medical Committee, composed of Dr B, Dr A and a third doctor, Dr C, met on 10 April 2018. On 12 April 2018, Dr B sent to Dr C certain documents initially submitted by the applicant in support of his requests for recognition of the occupational nature of the diseases in question, which had not been disclosed to the Medical Committee. By email of 16 May 2018, Dr C mentioned to Dr B that he had not taken account of those documents, in accordance with the instructions given by the European Parliament. Following the medical reports drawn up by the Medical Committee, the Appointing Authority rejected the requests for recognition

198| Common rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease drawn up by agreement between the institutions of the European Union pursuant to Article 73 Staff Regulations of Officials of the European Union.

of the occupational nature of the diseases in question ('the contested decisions'). The complaint submitted by the official against the contested decisions on the basis of Article 90(2) of the Staff Regulations of Officials of the European Union was also rejected by the Appointing Authority.

In support of his action for annulment, the applicant claimed that the Medical Committee did not have before it a complete file containing all the documents that he had submitted since the opening of the procedures for recognition of the occupational nature of the diseases in question. Therefore, according to the applicant, that committee did not have access to all the available documents liable to be of use in its assessments, in breach of Article 22(3) of the Insurance rules.

The Court first recalled that it follows from Article 22(3) of the Insurance rules that, for a Medical Committee validly to issue a medical opinion, it must be in a position to have notice of all the available documents liable to be of use in its assessments. However, in that instance it was common ground that the Parliament had not disclosed to the Medical Committee certain documents initially submitted by the applicant, including medical reports which concluded that the diseases in question were occupational in nature. According to the explanations which it provided in that regard, the Parliament had disregarded those documents after finding that some of them were identical to those already in its possession, that others were unrelated to the medical questions submitted, and, finally, that others contained similar information, that is to say, without being identical, they repeated the same information and conclusions it already had in its possession.

More specifically, in respect of the non-transmission of that last category of documents, the Court then found that the Parliament had made a medical assessment of the documents, which exceeded the scope of its powers. Where the insured person or those entitled under him or her request the Medical Committee to provide its opinion, the Parliament's sole task is to draw up the committee's terms of reference. Those terms of reference must refer to the committee the medical questions raised in the medical reports that the insured person or those entitled under him or her considered necessary to disclose to the doctor or doctors designated by the institution for the purposes of applying the provisions of the Insurance rules. It was therefore up to the applicant alone or to those entitled under him to assess the relevance of the medical reports removed from the file.

By deciding on medical matters with a view to drawing up the file submitted to the Medical Committee, the Parliament had consequently exceeded the scope of its powers and undermined the validity of the work of the Medical Committee. In those circumstances, the Medical Committee could not be considered to have been able to examine all the available documents liable to be of use in its assessments. Since the Medical Committee had carried out its task under improper circumstances, the reports which it had sent to the Appointing Authority at the end of its work were flawed.

Since the documents on which the Parliament had made a medical assessment were clearly linked to the applicant's illnesses, the Court found that it was not ruled out that, if the Medical Committee had been able to examine those documents and, where appropriate, to take them into account, its conclusions might have been different.

Since the contested decisions had been adopted on the basis of irregular reports of the Medical Committee, they were vitiated by a procedural defect such as to justify their annulment.

6. Time limit for instituting proceedings

By order of 31 July 2020 in ***TO*** **v** ***EEAS*** (T-272/19, EU:T:2020:361), the Court, ruling in extended composition, adjudicated in a case in which the European External Action Service (EEAS) informed the applicant, by decision of 15 June 2018, sent on the same date to her personal email address, that she did not fulfil all the conditions of employment [199] and therefore could not be recruited as a contract agent at the EEAS.

The applicant lodged a complaint pursuant to Article 90(2) of the Staff Regulations against that decision. The complaint was lodged by electronic means using the business email address of the applicant's legal counsel, a copy being sent to the applicant's personal email address.

By decision of 14 January 2019, the EEAS rejected the complaint and sent that decision to the applicant and her counsel, first via the Ares programme, a document management system that allows emails to be generated and sent to addressees who are not EEAS staff members, on 14 January 2019 at 17:46, and then by email on the same day at 17:52 and at 18:05.

On 25 April 2019, the applicant brought an action before the Court for annulment of the decisions of 15 June 2018 and 14 January 2019. The Court dismissed that action as manifestly inadmissible on the ground that it was out of time.

The Court recalled that the periods for lodging complaints and bringing actions referred to in Articles 90 and 91 of the Staff regulations are matters of public policy and that the Court must ascertain, of its own motion if need be, whether they have been complied with. The Court then took care to explain how to calculate the period for bringing proceedings, stating that, under Article 58(1)(b) of the Rules of Procedure of the General Court, that period does not begin to run until the end of the day of notification. The Court observed that, in that instance, if the contested decision was validly notified to the applicant on 14 January 2019, the three-month period for bringing proceedings would have started to run on 15 January at 00:00 and ended on 14 April at midnight. When increased by the 10-day extension on account of distance, the period for commencing proceedings would therefore have expired on 24 April at midnight. As a result, the application, which was filed on 25 April 2019, would be out of time.

The Court recalled that, in order for a decision to be validly notified for the purposes of the provisions of the Staff Regulations, it must not only have been communicated to its addressee, but the addressee must also have been given the opportunity to gain effective knowledge of its content.

In that regard, the Court observed that it is for the party claiming that the time limit has been exceeded to prove the date on which the period began to run. Various circumstances may provide proof that the addressee of a decision was able to gain effective knowledge of that decision, in particular where the institution concerned relies not on mere circumstantial evidence, but on direct evidence, including such evidence provided by the person concerned, indicating that, as addressee, he or she received an email via his or her email address and that it is possible, in all likelihood, that he or she opened it and thus duly became aware of that decision. The factual evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged.

199| Article 82 of the Conditions of Employment of Other Servants of the European Union.

The Court pointed out that sending an email does not in itself guarantee that it is actually received by the person to whom it is addressed. An email may not reach him or her for technical reasons. In addition, the Court took care to note that, even where an email actually reaches the person to whom it is addressed, it may not be received on the day on which it is sent.

In that regard, the Court found that not only had the applicant not alleged that there was a technical obstacle preventing her from receiving or consulting the emails from the EEAS at issue, but also that she had had the opportunity to check her email inbox and that, before and after the communication of the contested decision, she had used that inbox in the course of her exchanges with the EEAS and with her counsel.

Contrary to the applicant's argument that she probably became aware of the email at issue actually only on the morning of 15 January 2019, the Court stated that actual knowledge of the email is not decisive for the purpose of determining the moment at which time starts to run. In addition, the Court explained that to accept such a line of argument would be to acknowledge that, in the case where a decision is sent without a request for acknowledgement of receipt, the addressee has the right to choose the date at which he or she was given the opportunity to gain effective knowledge of the content of that decision. The principle of legal certainty, however, precludes the triggering of periods for bringing proceedings at the discretion of one of the parties.

In so far as the applicant had alleged that she or her counsel had, at the time of the alleged notification, namely at 18:05 on 14 January 2019, no obligation to check their respective inboxes, the Court noted that there is no generally applicable time slot within which a decision can be validly notified and outside of which a notification is invalid.

Consequently, the Court concluded that, in view of the evidence provided by the EEAS and the absence of any evidence provided by the applicant showing that she and her counsel were prevented from gaining effective knowledge of the emails received on 14 January 2019, the burden of proof had been met by the EEAS.

XVI. Actions for damages

By its judgment of 16 December 2020 in ***Industrial Química del Nalón* v *Commission*** (T-635/18, EU:T:2020:624), the Court, ruling in extended composition, adjudicated in a case concerning Industrial Química del Nalón, SA ('the applicant'), a company manufacturing pitch, coal tar, high temp ('CTPHT'). CTPHT is the residue from the distillation of high-temperature coal tar, a black solid composed primarily of a complex mixture of three or more membered condensed ring aromatic hydrocarbons.

In 2013, the applicant brought an action for the partial annulment of Commission Regulation No 944/2013, [200] in so far as it classified CTPHT as an Aquatic Acute 1 (H400) and Aquatic Chronic 1 (H410) substance. The Commission had carried out that classification following the opinion of the Risk Assessment Committee of the European Chemicals Agency ('the RAC'), which had applied the 'summation method' laid down in

200| Commission Regulation (EU) No 944/2013 of 2 October 2013 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 (OJ 2013 L 261, p. 5), as amended by Commission Regulation (EU) No 286/2011 of 10 March 2011 (OJ 2011 L 83, p. 1).

Annex I to Regulation No 1272/2008. [201] The application of that method, which aims to determine the aquatic toxicity hazard of a mixture of substances, is intended to attach more weight to the highly toxic constituents of CTPHT.

By its judgment of 7 October 2015, the Court upheld the action for partial annulment of Regulation No 944/2013. [202] According to the Court, the Commission had committed a manifest error of assessment in the classification of CTPHT in so far as it had based the classification solely on the criteria expressly provided for in Regulation No 1272/2008 for the application of the summation method. Thus, the Commission had failed to have regard to its discretion in that connection. On appeal, the Court of Justice confirmed the judgment of the Court. [203]

The applicant subsequently brought an action seeking compensation for the damage it claimed to have suffered as a result of the unlawful classification of CTPHT, corresponding to the costs of the adaptation of the packaging and the conditions for transportation and security.

That action was, however, dismissed by the Court. In that context, the Court examined, inter alia, whether the European Union can incur liability because the Commission failed to have regard to its own discretion when applying the summation method provided for by Regulation No 1272/2008. First of all, the Court recalled that, by limiting its analysis solely to the factors expressly provided for in respect of the application of the summation method when classifying CTPHT, the Commission had, according to the findings of the Court in its judgment of 7 October 2015, as upheld by the Court of Justice, made a manifest error of assessment. Given the Commission's broad discretion in that context, it should have examined other relevant factors, such as the low water solubility of CTPHT.

In order to assess whether that error amounts to unlawfulness capable of engaging the European Union's non-contractual liability, the Court next examined whether a rule of law intended to confer rights on individuals had been breached. In that respect, the Court found that the summation method, the rule infringed in that instance, is a methodological rule that does not confer any right stricto sensu on individuals.

According to the Court, it cannot, however, be ruled out that the breach of a rule such as the summation method, when it is capable of creating or strengthening obligations on individuals, can result in the European Union incurring liability, provided that it is capable of affecting the legal situation of the individuals concerned. Nevertheless, in that case, that question would arise only if the infringement of the summation method were sufficiently serious.

In that regard, the Court observed, in the first place, that the Commission had a broad discretion when classifying CTPHT. In such a case, a finding that a sufficiently serious breach has occurred can be made only after a finding of manifest error of assessment has been made, and is intended to identify the most serious and inexcusable errors that amount to a manifest and serious failure by an institution to have regard to the limits of its discretion.

In the second place, the Court emphasised the lack of clarity regarding the existence of a discretion on the part of the Commission in applying the summation method. First, the wording of Annex I to Regulation No 1272/2008 does not provide explicitly for the use of criteria for the application of the summation method other than those expressly referred to in that provision. Nor, in that regard, does the case-law does recognise

201| Point 4.1.3.5.5 of Annex I to Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006 (OJ 2008 L 353, p. 1).

202| Judgment of 7 October 2015, ***Bilbaína de Alquitranes and Others* v *Commission*** (T-689/13, not published, EU:T:2015:767).

203| Judgment of 22 November 2017, ***Commission* v *Bilbaína de Alquitranes and Others*** (C-691/15 P, not published, EU:C:2017:882).

a general rule that an institution is always required to take into account other factors when a piece of legislation establishing criteria does not specifically and expressly prohibit it from doing so. Secondly, the Court of Justice had itself highlighted the problems of interpretation connected to the classification of complex or multi-component substances such as CTPHT, precluding the Commission's conduct from being regarded as manifestly and seriously contrary to the rule infringed.

In the third place, the Court found that the error committed by the Commission appeared to be excusable. In the light of the complexity of the applicable regulatory framework, the rigorous application of the summation method by the Commission and the fact that the opinion of a group of experts such as the RAC was followed constitute a prudent approach. Moreover, that opinion, adopted by consensus, contained explanations regarding the accepted estimates.

The Commission's conduct was therefore close to that which could reasonably be expected from an administrative authority exercising ordinary care and diligence in a situation characterised by scientific complexity connected to the classification of a substance of unknown and complex composition such as CTPHT with the purpose of ensuring a high level of protection of human health and the environment, in full compliance with the precautionary principle. Neither the high result of the application of the summation method in that case nor the fact that no new classification of CTPHT has been made in order to correct the error made by the Commission can call that finding into question.

As the applicant had not shown that there had been a sufficiently serious breach of a rule of law such as to result in the European Union incurring non-contractual liability, the Court dismissed its action for damages in its entirety.

XVII. Applications for interim measures

In 2020, the Court received 38 applications for interim relief, which broadly corresponds to the figures for the previous year. [204] The number of orders adopted and cases closed showed a slight increase. In 2020, 45 orders were made, [205] versus 34 in 2019, and 43 cases were closed, versus 34 in 2019. In nine cases, the Court made a suspensory order under Article 157(2) of the Rules of Procedure.

The orders cover a wide range of fields, including, in particular, competition law and State aid (six cases), public procurement (six cases), institutional law (six cases) and public health (five cases).

As regards litigation in the area of economic and monetary policy, attention should be drawn to a case which arose out of a decision of the ECB of 14 November 2019 by which it, on the request of the Austrian financial markets supervisory authority, withdrew the authorisation as a credit institution of Anglo Austrian AAB Bank AG ('AAB Bank'). AAB Bank and its main shareholder brought an action for annulment against that decision and lodged an application for interim relief seeking its suspension or any other interim measure necessary

204| In 2019, the Court had received 37 applications for interim relief.

205| This figure corresponds to all orders made by the judge hearing applications for interim measures; it excludes orders determining that there is no need to adjudicate or orders removing a case from the register, but includes the orders adopted under Article 157(2) of the Rules of Procedure and orders made by the Vice President of the Court and the President of the Third Chamber, taking the place of the President of the Court in accordance with the combined provisions of Article 157(4) and Articles 11 and 12 of the Rules of Procedure, namely the orders of 3 March 2020, ***Junqueras i Vies* v *Parliament*** (T-24/20 R, not published, EU:T:2020:78), and of 4 September 2020, ***Sharpston* v *Council and Representatives of the Governments of the Member States*** (T-550/20 R, not published, EU:T:2020:416).

to preserve the status quo. After having suspended the decision by order adopted under Article 157(2) of the Rules of Procedure, the President of the Court dismissed the application for interim measures by order of 7 February 2020, ***Anglo Austrian AAB Bank and Belegging-Maatschappij 'Far-East' v ECB*** (T-797/19 R, not published, EU:T:2020:37).

The central issue in the case was whether the condition of urgency was satisfied. It will be recalled that interim measures may be granted only to avoid serious and irreparable harm being occasioned to the applicant before the Court has been able to adjudicate on the substance in the main proceedings. According to settled case-law, damage of a pecuniary nature cannot be considered to be such damage, save in exceptional circumstances, such as a situation in which the immediate enforcement of the contested decision would jeopardise the financial viability of the applicant. In that instance, the applicants were claiming that the withdrawal of banking authorisation effectively called into question AAB Bank's viability. The President of the Court did not accept that argument due to that bank's particular situation. He took the view that there could be no question of serious and irreparable damage, since the applicant had itself decided autonomously, first, to liquidate its banking business even before having its authorisation was withdrawn and returning the banking authorisation and, secondly, to pursue activities that were not subject to the obtention of such authorisation. Nor were the applicants, moreover, able to demonstrate the existence of a risk that the withdrawal of approval before the implementation of AAB Bank's autonomous decision would cause banking panic. The President of the Court observed in that regard that 50% of the bank's deposits had already been blocked.

As regards litigation in relation to the protection of confidentiality, mention should be made of three cases in which the President of the Court found it appropriate to specify the conditions justifying the grant of provisional protection to certain data or information.

The first case, which gave rise to the order of 12 August 2020, ***Indofil Industries (Netherlands) v EFSA*** (T-162/20 R, not published, EU:T:2020:366), concerns a request for confidential treatment of the conclusion of the peer review of the pesticide risk assessment of the active substance mancozeb, adopted pursuant to Article 13 of Implementing Regulation No 844/2012. [206] According to the conclusion of the European Food Safety Authority (EFSA), a safe use of the substance, which would exclude the possibility of harmful or unacceptable effects on human and animal health or on the environment, was not established. Following requests for confidential treatment of certain information in that conclusion, EFSA published a provisional sanitised version of the conclusion on its website. The application for interim relief had been lodged in the context of an action for annulment against the decision of the Executive Director of EFSA rejecting the request for internal review of the decision on the requests for confidential treatment.

The President of the Court dismissed the application on the ground that there was no prima facie case, without it being necessary to examine the condition relating to urgency or the weighing up of interests.

The President of the Court recalled that, as regards disputes concerning interim protection for information alleged to be confidential, it is insufficient, for the purpose of being granted interim measures, to have claimed that the information which is to be disclosed is confidential where such a claim does not satisfy the condition relating to a prima facie case.

206| Commission Implementing Regulation (EU) No 844/2012 of 18 September 2012 setting out the provisions necessary for the implementation of the renewal procedure for active substances, as provided for in Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market (OJ 2012 L 252, p. 26).

As a preliminary point, the President of the Court recalled the transparency requirements to which EFSA is subject pursuant to Regulations Nos 1107/2009 [207] and 178/2002, [208] according to which, in principle, the public is to be informed of the results of its activities and may therefore have access to its opinions.

The President of the Court next held that the question whether EFSA's scientific assessments and the Commission's decisions are well founded or not must be distinguished from the question whether the evidence on which the scientific assessments are based is confidential or not. The procedures governing requests for confidential treatment under Article 63 of Regulation No 1107/2009 are therefore not intended to ensure the accuracy or relevance of the scientific analysis. Consequently, any line of argument seeking to dispute the merits of the scientific assessment and the procedure which led to the adoption of EFSA's scientific conclusion cannot be regarded as relevant in the context of the analysis of the confidential nature of the information liable to be eligible for interim protection. In order for the information at issue to be treated as confidential, the person seeking interim relief is required to provide verifiable evidence to show that the disclosure of the information might undermine his commercial interests, or the protection of privacy and the integrity of the individual.

The President of the Court held that, in the light of the transparency obligations to which EFSA is subject and the lack of verifiable and convincing evidence relating to the confidential nature of the information in question, it cannot be asserted that disclosure of the information in question goes beyond what is necessary to achieve the objectives pursued by EFSA.

In two cases, giving rise to the orders adopted on 29 October 2020, ***Facebook Ireland* v *Commission*** (T-451/20 R, not published, EU:T:2020:515) and ***Facebook Ireland* v *Commission*** (T-452/20 R, not published, EU:T:2020:516), the President of the Court was called upon to adjudicate on the conditions justifying the grant of interim protection to data requested by the Commission in the context of procedures for the application of Article 18(3) and Article 24(1)(d) of Council Regulation No 1/2003. [209]

The President of the Court received two applications from Facebook Ireland Ltd for suspension of operation of two decisions by which the Commission had requested, in particular, a number of documents containing search terms or search query syntaxes.

In the examination of the prima facie case requirement, in the first place, the President of the Court recalled that the Commission is entitled to require the disclosure only of information which may enable it to investigate the presumed infringements which justify the conduct of the investigation and are set out in the request for information.

It was then found that the documents requested under the contested decision were identified on the basis of wide-ranging search terms, some of which consist of frequently used or very common words, and that it is therefore hardly surprising that the application of those search terms would lead to the obligation to produce documents unrelated to the subject matter of the request for information.

207| Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC (OJ 2009 L 309, p. 1).

208| Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1).

209| 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).

The President of the Court considered that, since the applicant must produce a large number of documents collected on its servers on the basis of search terms, the relevance of which will be assessed by the Commission only at a later stage, the request for information at issue is very similar to inspections on the basis of Article 20 of Regulation No 1/2003, in the course of which the Commission may make copies of potentially relevant electronic documents for the purposes of the investigation in order to examine them subsequently with a view to ascertaining their actual relevance for the investigation.

In the course of inspections pursuant to Article 20 of Regulation No 1/2003, which are considered by their very nature to be more invasive, the undertakings concerned enjoy certain procedural guarantees. It is provided, in particular, that undertakings which are the subject of an inspection may receive legal assistance. In addition, the Commission must respect the rights of the defence when it assesses whether the data are relevant to the subject matter of the inspection, before placing the documents found to be relevant in the file and deleting the remainder of the copied data.

No additional specific measures are provided for to ensure respect for the rights of the undertaking concerned in view of the number of documents requested and the strong likelihood that many of those documents will not be necessary for the purposes of the Commission's investigation. The President of the Court thus concluded that it could not be ruled out at that stage that, in the absence of a method of verification accompanied by appropriate and specific guarantees designed to safeguard the rights of the persons concerned, the Court ruling on the main action will find that the contested decision does not comply with Article 18(3) of Regulation No 1/2003.

In the second place, the President of the Court observed that the documents requested include documents which contain sensitive personal data. In that regard, the President of the Court observed that both Regulation 2018/1725 [210] and Regulation 2016/679 [211] provide for increased protection for data falling within certain specific categories, in particular data concerning an individual's health. In order for the collection and subsequent processing of personal data to be lawful under Article 5(a) of Regulation 2018/1725, that collection and processing must be necessary and proportionate to the exercise of the Commission's powers.

As regards the urgency requirement, the President of the Court noted that officials and other servants of the Commission are subject to strict obligations of professional secrecy under Article 339 TFEU, Article 28 of Regulation No 1/2003 and Article 17 of the Staff Regulations of Officials of the European Union. In the light of those obligations, the President of the Court concluded that urgency is established only as regards the purely personal documents containing sensitive personal data, on the ground that, since those data are shared only in the most private sphere, any undue extension of the circle of third parties who have knowledge of them may cause serious and irreparable harm to the persons concerned. As regards the irreversible nature of the harm, the President of the Court noted that the annulment of the contested decision could not reverse the effects of the disclosure of the data, since awareness of that information by the persons who have read it is immediate and irreversible.

As regards the requirement relating to the balancing of interests, first, the President of the Court observed that it is for the Commission to assess whether a particular item of information is necessary in order to enable it to bring to light an infringement of the competition rules. If the undertaking under investigation or

210| 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).

211| 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).

its lawyers could themselves establish which documents were, in their view, relevant for the purposes of its investigation, that would seriously undermine the Commission's powers of investigation, with the risk that documents that it might regard as relevant for the purposes of its investigation would be omitted and never presented to it, in the absence of any possibility of verification. Secondly, the President of the Court observed that the harm caused to the applicant because it is obliged to communicate documents containing sensitive personal data in breach of the right to privacy of individuals would entail the undue extension of the circle of persons with knowledge of that data in the absence of specific measures to protect the persons concerned.

In those circumstances, the President of the Court decided to uphold the applications in part, in so far as the contested decisions related to documents containing sensitive personal data and for as long as an ad hoc procedure had not been put in place. Under that procedure, first, it is for the applicant to identify the documents containing sensitive personal data and to communicate them to the Commission on a separate electronic medium. Secondly, those documents will be placed in a virtual data room which will be accessible to as limited a number as possible of members of the team responsible for the investigation, in the presence of an equivalent number of the applicant's lawyers. Thirdly, the members of the team responsible for the investigation will examine and select the documents in question, while giving the applicant's lawyers the opportunity to comment on them before placing the documents considered relevant on the file. In the event of disagreement as to the classification of a document, the contested document will not be added to the investigation file and the applicant's lawyers will have the right to explain the reasons for their disagreement. In the event of continuing disagreement, the applicant's lawyers may ask the Director for Information, Communication and Media in the Directorate-General for Competition to resolve the disagreement.

C Activity of the Registry of the General Court in 2020

By Mr **Emmanuel Coulon**, Registrar of the General Court

The first full year of operation of the General Court following the reform of the European Union's judicial architecture [1] was marked by the major crisis situation linked to the Covid-19 pandemic. In mid-March 2020, the Registry of the General Court was suddenly placed in an unprecedented situation. It was required to create the conditions for ensuring, in a context of major crisis, without interruption and over a long period, the continuity of the public administration of justice.

The Registry immediately made all the necessary arrangements to remain – irrespective of the circumstances – the foundation on which the Court relies in order to carry out its judicial function. The generalised working from home that was decided upon in order to protect individuals in the early days of the crisis and maintained until the end of 2020, subject to exceptions, [2] disrupted the modus operandi of the service. New internal procedures, accompanied by operational documentation, and monitoring and control tools were therefore put in place in a very short time. Working methods were adapted and interventions were made more transparent. Internal procedures involving the transfer of paper versions were replaced by computer input systems. These developments, some of which are suitable for inclusion in the framework of ongoing work to establish an integrated case management system, were designed with a view to their being maintained after the crisis. While managing the present, it was deemed essential to identify good practices and seek to put them on a permanent footing in order to prepare for the future. The crisis, as dramatic as it has been has also been an opportunity to make changes.

It is in those circumstances that the Registry carried out the tasks conferred on it, taking particular care to contribute to the consistency of the procedural decisions taken by the formations of the Court. To that end, it submitted coordinated proposals and created the conditions for a harmonised implementation of the judicial policy decisions adopted at the initiative of the President. The decisions taken by the formations of the Court were implemented, sometimes at very short notice. Hearings were able to take place, including with remote parties, after videoconferencing procedures were adopted as a crisis mechanism.

Judged by the general statistical data alone, 2020 does not immediately appear to be a special year. The number of cases brought (847) is lower than in 2019 (939), as is the number of cases closed (748 versus 874 in 2019), and the number of pending cases rose by 7%, with 1 497 versus 1 398 in 2019. The average duration of proceedings in cases determined by judgment or order continued to fall, from 16.9 months to 15.4 months.

The activity of the Registry, made more difficult by working from home, which required a greater commitment than previously, was nevertheless intense.

1| The reform was initiated by Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14), and Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants (OJ 2016 L 200, p. 137).

2| The possibility of attending the premises, in particular to prepare for hearings or to carry out certain tasks that could not be done at home, has been adjusted over time according to the evolution of the health situation. That possibility has always been restricted, and it remained extremely limited between March and December owing to the need to contain the number of persons simultaneously present *in situ*.

In the first place, it is important to note that communication with the parties' representatives never ceased. The use of e-Curia as the exclusive means of exchange between the parties' representatives and the Court facilitated the Registry's remote working, since, first, the mandatory use of e-Curia meant that all procedural documents lodged by the parties were immediately available, without interruption, and, secondly, the Registry was able to serve the majority of procedural documents on the parties electronically. [3] The number of pages of procedural documents lodged via e-Curia exceeded, for the first time, one million in the course of a year (1 146 664 pages, to be precise).

In the second place, the Registry undertook the pre-examination of 847 applications initiating proceedings (pre-examination including identification of connections between cases and of actions justifying dismissal for lack of jurisdiction or manifest inadmissibility), regularised 35% of those applications for failure to comply with procedural requirements, analysed procedural documents lodged by the parties and entered 51 413 of those documents in the register. It provided ongoing assistance to the Judges and to their staff, in particular by preparing 259 draft procedural orders.

In the third place, the number of communications sent to the cabinets informing them of an event or requesting the formations of the Court to adopt decisions on the further steps to be taken in the proceedings increased significantly. Of the 12 636 communications (electronic transmission files), 5 200 were drawn up to seek decisions, an increase of 37% compared to 2019 (3 807) and the highest number ever achieved.

In the fourth place, the number of cases in which measures of organisation of procedure, meant for putting a case in order, were adopted came to 664 for 1 488 concerned parties (versus 476 for 917 concerned parties in 2019, increases of 39% and 58%, respectively). That development is explained in part by the measure consisting in asking the main parties who had submitted a reasoned request for a hearing whether they intended to pursue that request in the light of the health crisis, that measure having been adopted in 120 cases and addressed to 255 parties.

In the fifth place, urgent proceedings, which are dealt with as a high priority, were significant, with:

- 38 applications for interim measures seeking suspension of execution or any other interim measure (37 in 2019) and 43 interim cases closed (34 in 2019);
- 22 applications for expedited procedures aimed at obtaining a swift resolution of the substance of the case (16 in 2019), 13 of which were allowed (none in 2019), particularly in proceedings linked to the crisis.

Finally, the Registry's services were provided at Chamber conferences, with the minutes containing the decisions to be implemented being drawn up afterwards. Held in the form of a written procedure after 13 March, they could be held by audioconference (a first!) from 26 March and by videoconference (a first!) from 20 April. Three hundred and thirty-one Chamber conferences were held in 2020 (334 in 2019), 252 of these being held during the crisis period between 16 March and 31 December. During that period, 46 conferences were held by written procedure, 42 by audioconferencing, 150 by videoconferencing and 14 in a mixed format.

3| As regards procedural documents that had to be served by post (notably decisions on requests for legal aid made by unrepresented natural persons), the Registry had to await the occasional passage of people at the service's premises in order to send documents, remaining dependent on the operation of national postal services.

I. Special point concerning hearings

The crisis led to a rethinking of the calendar and the organisation of hearings. First, all hearings that had been scheduled to take place after 16 March were cancelled. Then, all cancelled hearings were scheduled and new hearings were fixed. The implementation of those decisions, together with the numerous requests for postponement of the hearing and for the use of videoconferencing made by the parties on account of the health crisis, required the use of considerable resources and, for the majority of those operations, was carried out with a high degree of priority.

Videoconferencing was put in place as a crisis mechanism. The use of that method of participation by lawyers and agents representing the parties at the hearing was subject to their agreeing to its use in each case, to the impossibility of travel to Luxembourg for reasons related to the health crisis and to the need to meet technical prerequisites and to complete interpretation tests intended to ensure reliable and clear transmission, on the one hand, to guarantee compliance with the requirements of a fair trial and, on the other hand, to maintain the high quality of simultaneous interpretation.

Remarkably-coordinated internal procedures between the information technology directorate, the directorate of interpretation and the Registry, the robust management of requests made by the parties and of the decisions taken by Presidents of Chambers, the meticulous checking and manual entry of information, responding to requests (telephone in particular) from lawyers and agents concerning the organisation of hearings and the carrying out of preliminary tests with representatives were among the many actions carried out to enable the parties' representatives to participate in hearings remotely.

During the period between June and December 2020 [4] and for the hearings fixed for that period:

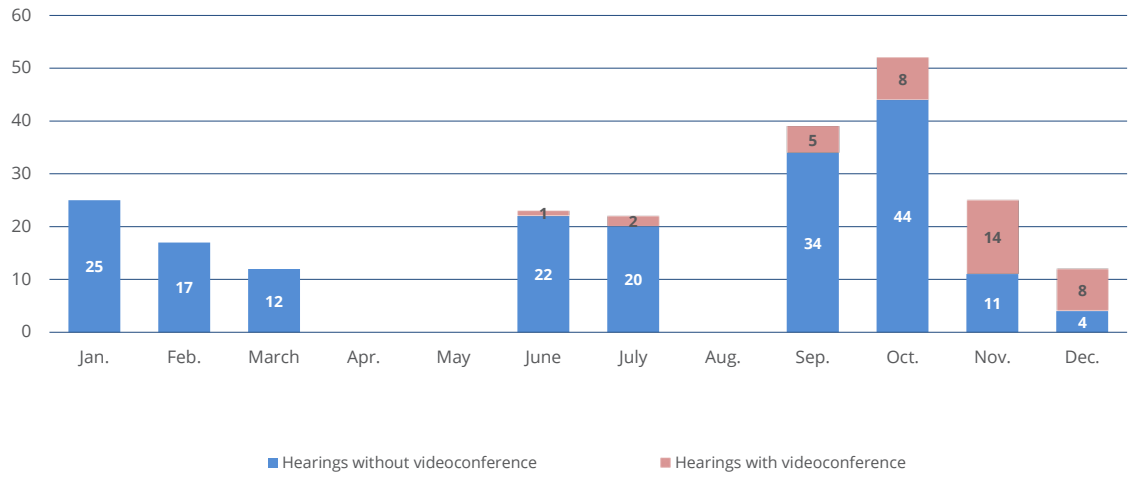
- 119 requests to postpone hearings and for use of videoconferencing by the parties on account of the health crisis were submitted;
- 82 decisions agreeing the use or proposing the use of videoconferencing (subject to completion of the technical and interpretation tests) were taken by the Court;
- 38 hearings [5] were held with videoconferencing (22 hearings with 1 party pleading remotely, 11 hearings with 2 parties pleading remotely and 5 hearings with 3 parties pleading remotely), out of a total of 173 hearings (or 22%).

The graph showing the monthly breakdown of hearings in 2020 illustrates very clearly the sharp variations the Court and its Registry had to deal with, with no hearings being held in April or May, whereas 52 hearings, with the Registry's services, were held in October, a number that had never previously achieved in a single month.

4| All hearings took place in strict compliance with a rigorous health protocol, to which the parties' attention was immediately drawn both by messages displayed on the Curia website (under the heading 'Covid-19 – Information' – Parties') and in the letters of notice to attend a hearing.

5| 46% of decisions to use or proposing to use videoconferencing therefore proved unsuccessful.

Number of hearings – by month in 2020 [6]



	Jan.	Feb.	March	Apr.	May	June	July	Aug.	Sep.	Oct.	Nov.	Dec.	**Total**
Hearings without videoconference	25	17	12			22	20		34	44	11	4	**189**
Hearings with videoconference						1	2		5	8	14	8	**38**
Total	**25**	**17**	**12**			**23**	**22**		**39**	**52**	**25**	**12**	**227**

Number of hearings excluding joined cases (several joined cases = one hearing).

For the whole of 2020, 227 hearings were held (for 335 pleaded cases), [6] versus 255 in 2019 (for 315 pleaded cases).

The year saw milestone moments in the Court's history, with the first hearing by videoconferencing with a single remote party taking place on 30 June and the first hearing by videoconferencing with none of the parties present in the courtroom taking place on 20 October.

Public access to the courtrooms has always been permitted in accordance with health requirements.

6| This difference is explained by the fact that some cases are joined for the purposes of the oral part of the procedure.

II. Special point concerning sittings for delivery of judgments

Provided for in the Statute of the Court of Justice of the European Union, sittings for delivery of judgments were maintained, but according to new arrangements from the month of March. The Court opted for groups of judgments to be delivered at regular intervals by the President or the Vice-President, assisted by the session registrar. Twenty-one sittings for delivery of judgments were held between 16 March and 16 December 2020.

III. Overview of other actions

The crisis and the measures for addressing can in no way overshadow several other events of the year. Reasons of brevity demand that a selection be made.

First of all, the prospect of the United Kingdom leaving the European Union without a withdrawal agreement being signed warranted the Registry's reaching out, as in 2019, to United Kingdom lawyers in order for them to make any necessary arrangements. The risk that they might no longer be able to represent a party before the Court from 1 February was, after all, very real. That outreach action was for nothing in the end since the agreement on the United Kingdom's withdrawal from the European Union ultimately signed on 24 January 2020 included provisions on the representation of parties applicable during the transitional period expiring on 31 December 2020, but it attests to the desire to maintain an ever-active dialogue with the parties' representatives. The United Kingdom having left the European Union with effect from 1 February 2020, the United Kingdom Judge of the General Court, Mr Forrester, finished his duties on the same date.

That departure, as well as that of Judge Labucka, of Latvian nationality, and that of Judge Passer, of Czech nationality, on 25 February and 6 October respectively, required rearranging the formations of the Court by decisions of the Court published in the Official Journal of the European Union and made available on the Curia website, reassigning cases at the judicial level and completing formalities at the administrative level.

Next, the Registry's service continued to be provided at meetings of the Judges, with convocations and the drafting of minutes, and the constituted bodies of the Court continued their work. The Registrar thus assisted the Presidency to conduct the work of the Plenary Conference, the Management Committee and the Conference of Presidents of Chambers. He also assisted the specific committees of the Court, in particular the 'Rules of Procedure' committee, whose work continued without interruption. Working methods were adapted to the circumstances, the written procedure or videoconferencing being chosen depending on needs.

In addition, the Registry observed its regulatory obligations, in particular those arising under the Financial Regulation, and took steps to give full effect to the environmental protection policy (EMAS). On that point, the digitalisation of internal procedures and a new printing policy adopted within the Registry led to a considerable reduction in paper consumption.

The protection of personal data pursuant to Regulation 2018/1725 [7] remained a priority. Specific actions and awareness operations were carried out within the Registry both in the framework of the administrative functions of the Registry and in the framework of the judicial functions of the Court, the Registrar being responsible in that regard for dealing with ex post facto requests for anonymity from natural persons who had been parties to a dispute.

During this turbulent period, the Registry received 809 written requests from citizens, to which it replied in the language used by the author, in accordance with the requirements of the European Code of Good Administrative Behaviour.

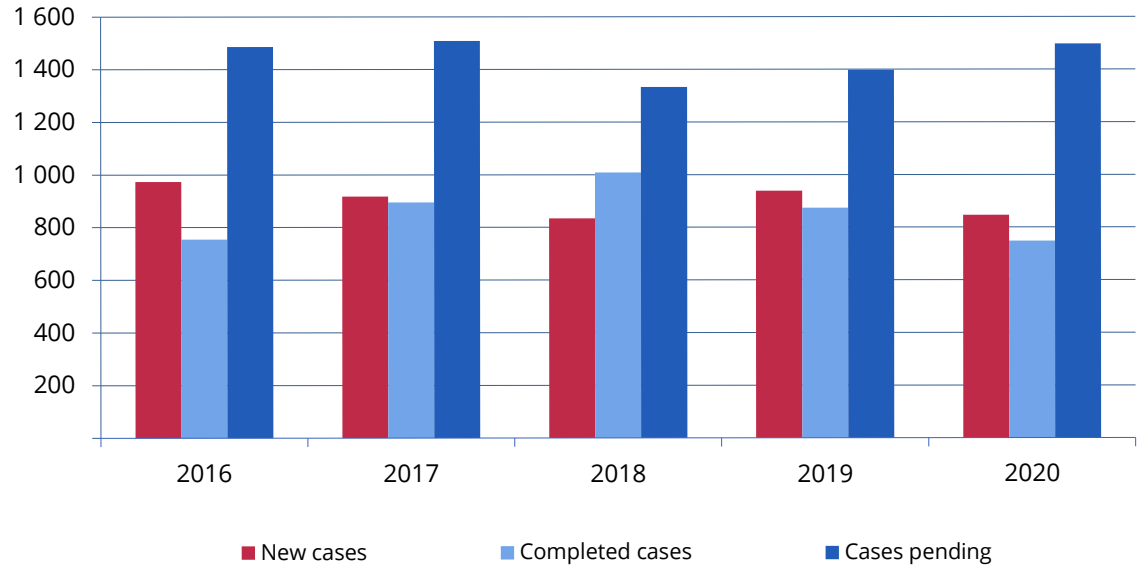
Lastly, separate from its contribution to the crisis bodies, the Registrar contributed through its representatives to the work carried out within the constituted bodies and working groups, in particular in the field of new technologies.

None of that would have been possible without staff who have shown themselves to be capable of rising to the challenge, united in effort and in action. Regularly informed by the Registrar, supported by the management of the service and assisted in their tasks by targeted documentation, the staff of the Registry (whose number was reduced from 72 to 69 budgetary posts under the third phase of the reform of the European Union's judicial architecture) have shown an exemplary level of professionalism.

7| 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).

D Statistics concerning the judicial activity of the General Court

I. General activity of the General Court – New cases, completed cases, cases pending (2016-2020) [1] [2]



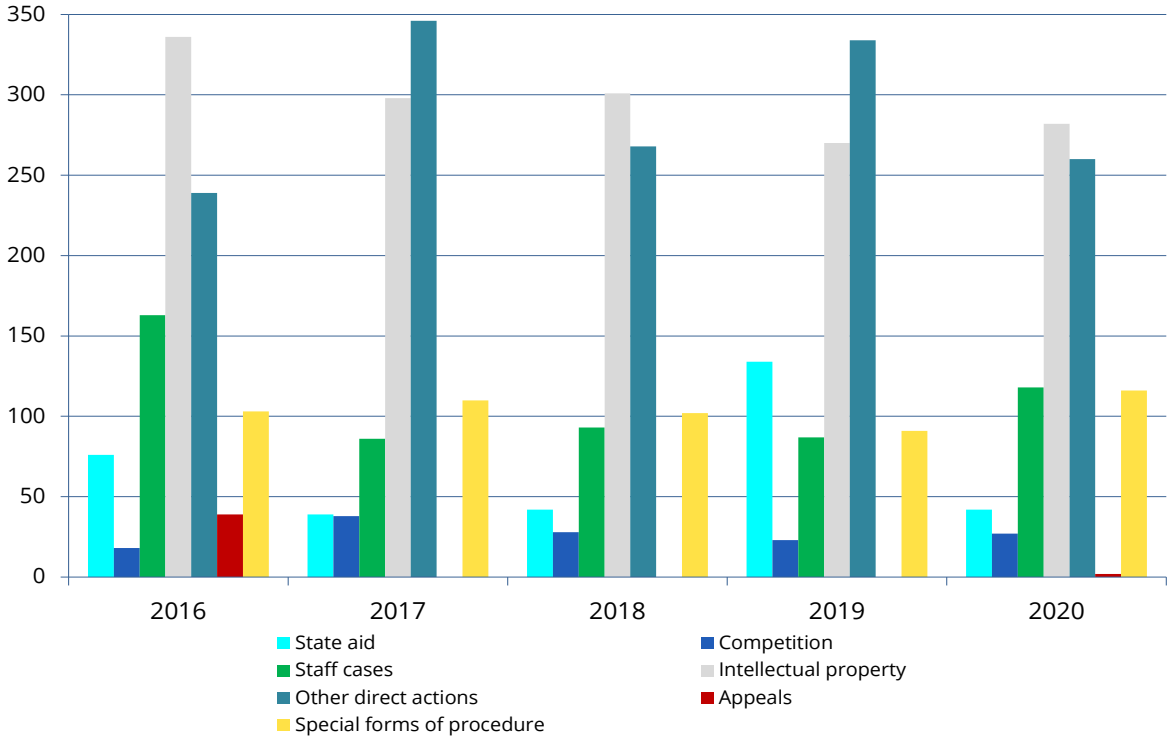
	2016	2017	2018	2019	2020
New cases	974	917	834	939	847
Completed cases	755	895	1 009	874	748
Cases pending	1 486	1 508	1 333	1 398	1 497

1| Unless otherwise indicated, this table and the following tables take account of special forms of procedure.

The following are considered to be 'special forms of procedure': application to set aside a judgment by default (Article 41 of the Statute of the Court of Justice; Article 166 of the Rules of Procedure of the General Court); third-party proceedings (Article 42 of the Statute of the Court of Justice; Article 167 of the Rules of Procedure); interpretation (Article 43 of the Statute of the Court of Justice; Article 168 of the Rules of Procedure); revision (Article 44 of the Statute of the Court of Justice; Article 169 of the Rules of Procedure); legal aid (Article 148 of the Rules of Procedure); rectification (Article 164 of the Rules of Procedure); failure to adjudicate (Article 165 of the Rules of Procedure); and dispute concerning the costs to be recovered (Article 170 of the Rules of Procedure).

2| Unless otherwise indicated, this table and the following tables do not take account of proceedings concerning interim measures.

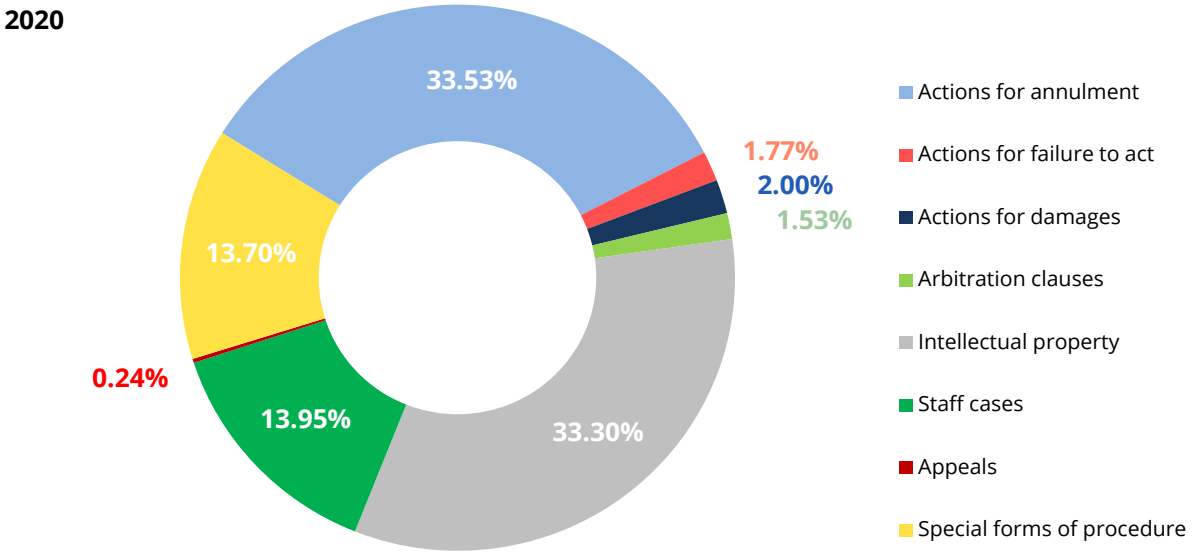
II. New cases – Nature of proceedings (2016-2020)



	2016 [1]	2017	2018	2019	2020
State aid	76	39	42	134	42
Competition	18	38	28	23	27
Staff cases	163	86	93	87	118
Intellectual property	336	298	301	270	282
Other direct actions	239	346	268	334	260
Appeals	39				2
Special forms of procedure	103	110	102	91	116
Total	**974**	**917**	**834**	**939**	**847**

1| On 1 September 2016, 123 staff cases and 16 special forms of procedure in that area were transferred to the General Court.

III. New cases – Type of action (2016-2020)

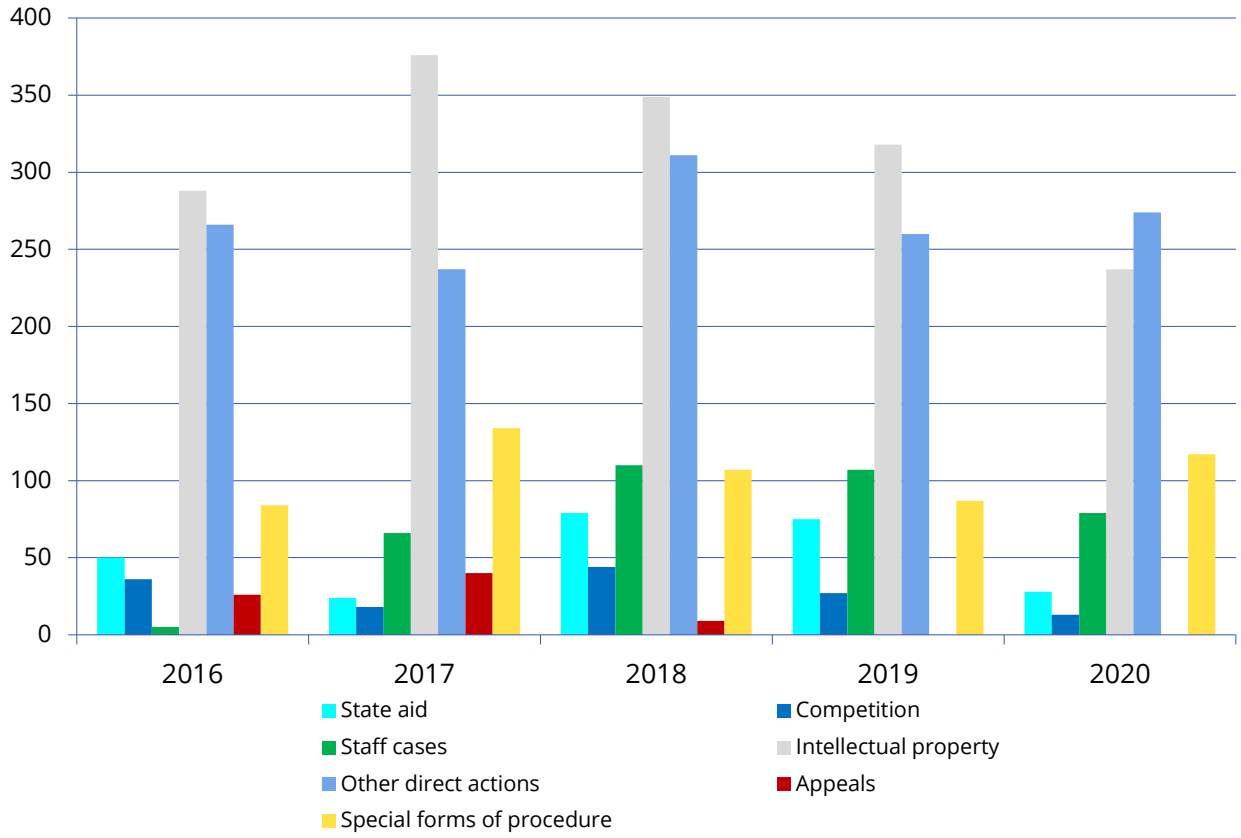


	2016	2017	2018	2019	2020
Actions for annulment	297	371	288	445	284
Actions for failure to act	7	8	14	14	15
Actions for damages	19	23	29	24	17
Arbitration clauses	10	21	7	8	13
Intellectual property	336	298	301	270	282
Staff cases	163	86	93	87	118
Appeals	39				2
Special forms of procedure	103	110	102	91	116
Total	**974**	**917**	**834**	**939**	**847**

IV. New cases – Subject matter of the action (2016-2020)

	2016	2017	2018	2019	2020
Access to documents	19	25	21	17	8
Agriculture	20	22	25	12	14
Approximation of laws	1	5	3	2	
Arbitration clause	10	21	7	8	15
Area of freedom, security and justice	7		2	1	
Citizenship of the Union				1	1
Commercial policy	17	14	15	13	27
Common fisheries policy	1	2	3		
Common foreign and security policy	1			1	
Company law					1
Competition	18	38	28	23	27
Consumer protection	1		1	1	3
Culture	1				
Customs union and Common Customs Tariff	3	1		2	
Economic and monetary policy	23	98	27	24	36
Economic, social and territorial cohesion	2	3		3	
Education, vocational training, youth and sport	1		1	1	
Energy	4	8	1	8	8
Environment	6	8	7	10	8
External action by the European Union	2	2	2	6	3
Financial provisions (budget, financial framework, own resources, combating fraud)	4	5	4	5	4
Free movement of capital	1		1		
Free movement of goods	1				
Freedom of establishment			1		
Freedom of movement for persons	1	1	1	2	
Freedom to provide services	1				1
Intellectual and industrial property	336	298	301	270	282
Law governing the institutions	52	65	71	148	65
Public health	6	5	9	5	8
Public procurement	9	19	15	10	13
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	6	10	4	6	7
Research and technological development and space	8	2	1	3	6
Restrictive measures (external action)	28	27	40	42	25
Social policy	1		1	1	
State aid	76	39	42	134	42
Taxation	2	1	2		
Trans-European networks		2	1	1	1
Transport			1	1	6
Total EC Treaty/TFEU	**669**	**721**	**638**	**761**	**611**
Special forms of procedure	103	110	102	91	116
Staff Regulations	202	86	94	87	120
OVERALL TOTAL	**974**	**917**	**834**	**939**	**847**

V. Completed cases – Nature of proceedings (2016-2020)



	2016	2017	2018	2019	2020
State aid	50	24	79	75	28
Competition	36	18	44	27	13
Staff cases	5	66	110	107	79
Intellectual property	288	376	349	318	237
Other direct actions	266	237	311	260	274
Appeals	26	40	9		
Special forms of procedure	84	134	107	87	117
Total	**755**	**895**	**1 009**	**874**	**748**

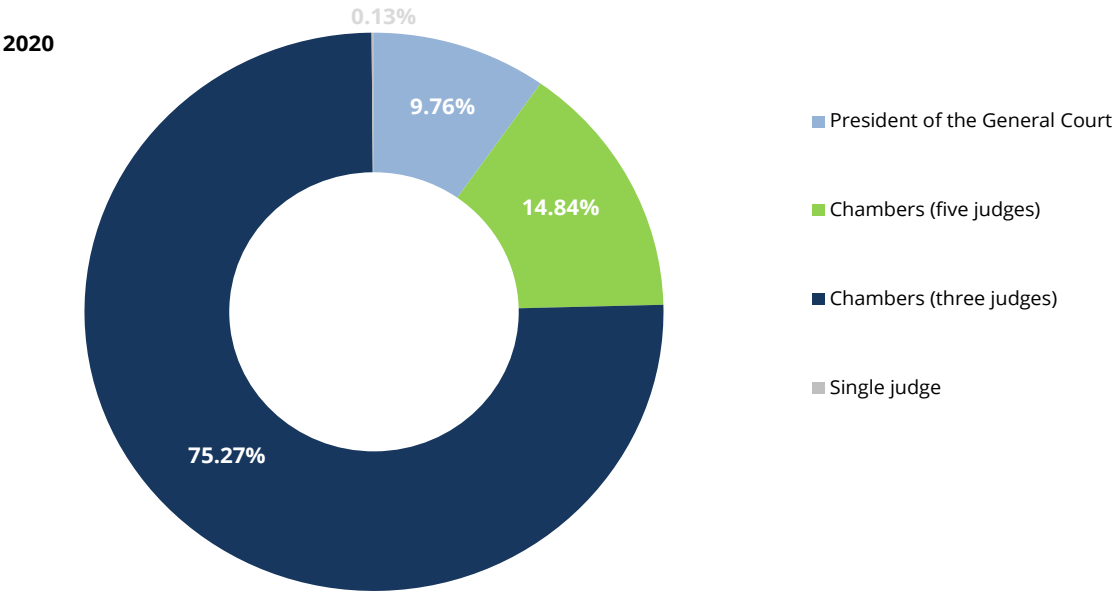
VI. Completed cases – Subject matter of the action (2020)

	Judgments	Orders	Total
Access to documents	10	4	14
Agriculture	9	6	15
Approximation of laws		3	3
Arbitration clause	4	2	6
Area of freedom, security and justice		2	2
Commercial policy	5		5
Common fisheries policy	1	1	2
Common foreign and security policy	1		1
Competition	11	2	13
Consumer protection		2	2
Customs union and Common Customs Tariff		2	2
Economic and monetary policy	14	4	18
Economic, social and territorial cohesion		1	1
Education, vocational training, youth and sport		1	1
Energy	1	4	5
Environment	1	5	6
External action by the European Union	1	1	2
Financial provisions (budget, financial framework, own resources, combating fraud)	4	5	9
Freedom of movement for persons		1	1
Intellectual and industrial property	187	50	237
Law governing the institutions	63	64	127
Public health	4	2	6
Public procurement	3	4	7
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	2	4
Research and technological development and space	1	1	2
Restrictive measures (external action)	28	4	32
Social policy	1		1
State aid	16	12	28
Total EC Treaty/TFEU	**367**	**185**	**552**
Special forms of procedure		117	117
Staff Regulations	47	32	79
OVERALL TOTAL	**414**	**334**	**748**

VII. Completed cases – Subject matter of the action (2016-2020) (Judgments and Orders)

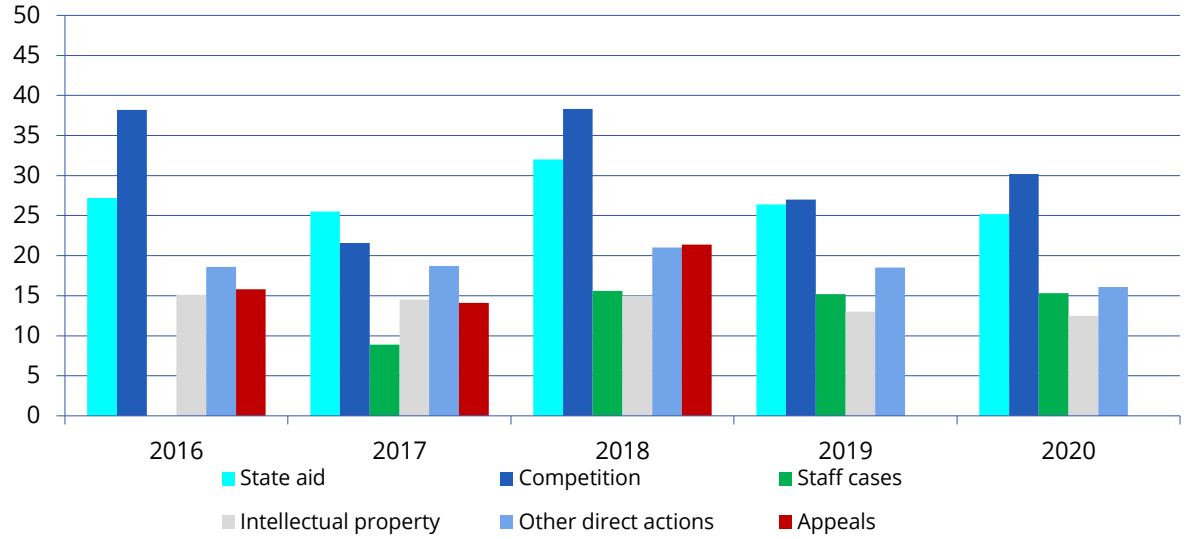
	2016	2017	2018	2019	2020
Access to documents	13	14	67	17	14
Agriculture	34	21	25	33	15
Approximation of laws	1	2	1	4	3
Arbitration clause	17	17	7	13	6
Area of freedom, security and justice		5	3		2
Citizenship of the Union				1	
Commercial policy	21	15	10	12	5
Common fisheries policy	2	2	2		2
Common foreign and security policy			1		1
Company law				1	
Competition	36	18	44	27	13
Consumer protection	1	1	1	1	2
Culture	1	1			
Customs union and Common Customs Tariff	3	5	1		2
Economic and monetary policy	2	6	16	13	18
Economic, social and territorial cohesion	1	12	4	2	1
Education, vocational training, youth and sport	1		3		1
Energy	3	3	6	3	5
Environment	4	3	11	6	6
External action by the European Union		4	2	3	2
Financial provisions (budget, financial framework, own resources, combating fraud)	1	5	5	4	9
Free movement of capital	1			1	
Free movement of goods	1				
Freedom of establishment				1	
Freedom of movement for persons		2	1	1	1
Freedom to provide services	1				
Intellectual and industrial property	288	376	349	318	237
Law governing the institutions	46	54	64	71	127
Public health	3	3	5	7	6
Public procurement	20	16	20	17	7
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	8	4	4	10	4
Research and technological development and space	6	12	7	3	2
Restrictive measures (external action)	70	26	42	30	32
Social policy	1		1	1	1
State aid	50	24	79	75	28
Taxation		3		2	
Trans-European networks	2		1	2	
Transport			1		
Total EC Treaty/TFEU	**638**	**654**	**783**	**679**	**552**
Special forms of procedure	84	134	107	87	117
Staff Regulations	33	107	119	108	79
OVERALL TOTAL	**755**	**895**	**1 009**	**874**	**748**

VIII. Completed cases – Bench hearing action (2016-2020)



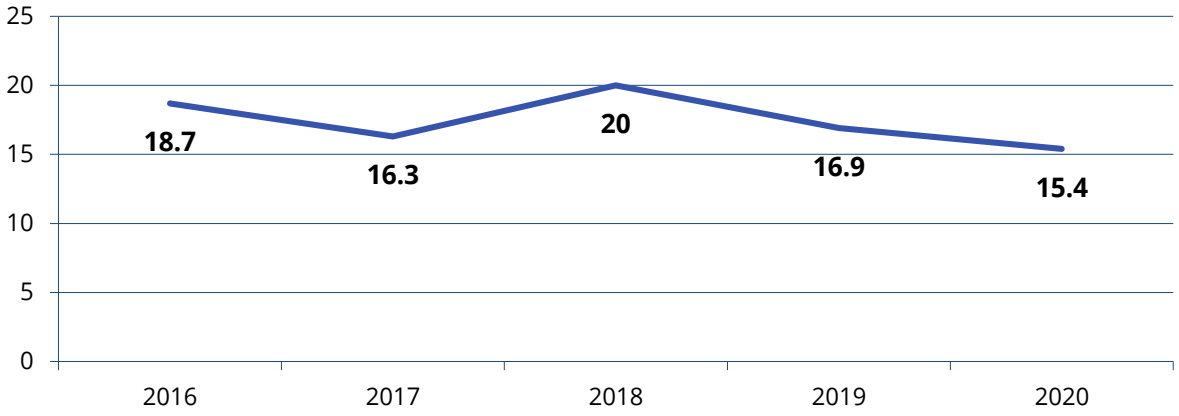
	2016			2017			2018			2019			2020		
	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total	Judgments	Orders	Total
Grand Chamber											1	1			
Appeal Chamber	25	13	38	29	17	46	9	2	11		2	2			
President of the General Court		46	46		80	80		43	43		47	47		73	73
Chambers (five judges)	10	2	12	13	5	18	84	3	87	50	9	59	104	7	111
Chambers (three judges)	408	246	654	450	301	751	546	317	863	499	261	760	309	254	563
Single judge	5		5				5		5	5		5	1		1
Total	**448**	**307**	**755**	**492**	**403**	**895**	**644**	**365**	**1 009**	**554**	**320**	**874**	**414**	**334**	**748**

IX. Completed cases – Duration of proceedings in months (2016-2020) [1] (Judgments and Orders)



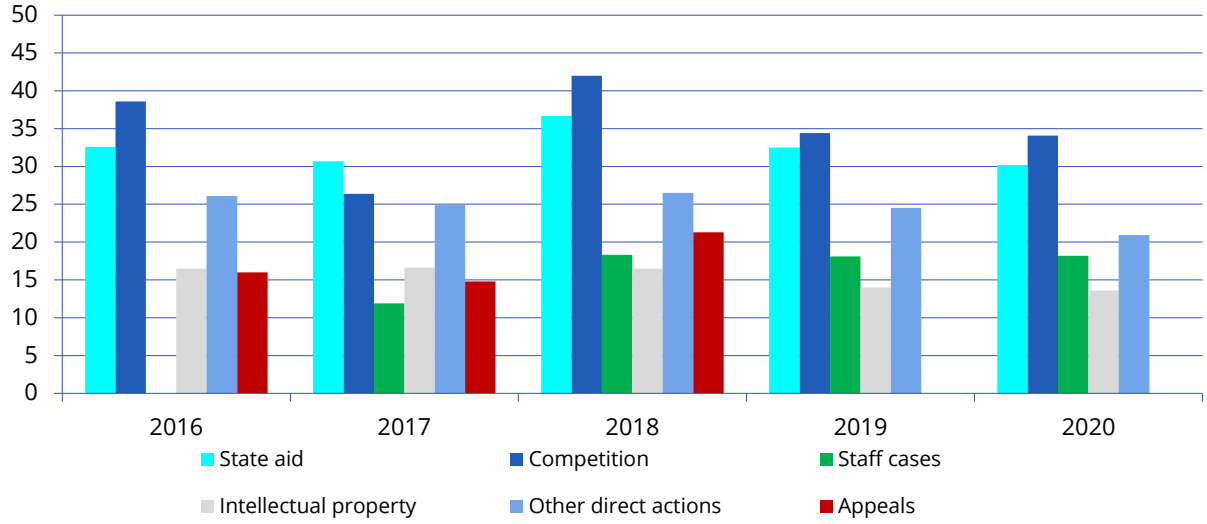
	2016	2017	2018	2019	2020
State aid	27.2	25.5	32	26.4	25.2
Competition	38.2	21.6	38.3	27	30.2
Staff cases		8.9	15.6	15.2	15.3
Intellectual property	15.1	14.5	15	13	12.5
Other direct actions	18.6	18.7	21	18.5	16.1
Appeals	15.8	14.1	21.4		
All cases	**18.7**	**16.3**	**20**	**16.9**	**15.4**

Duration of proceedings (in months)
All cases disposed of by way of judgment or order



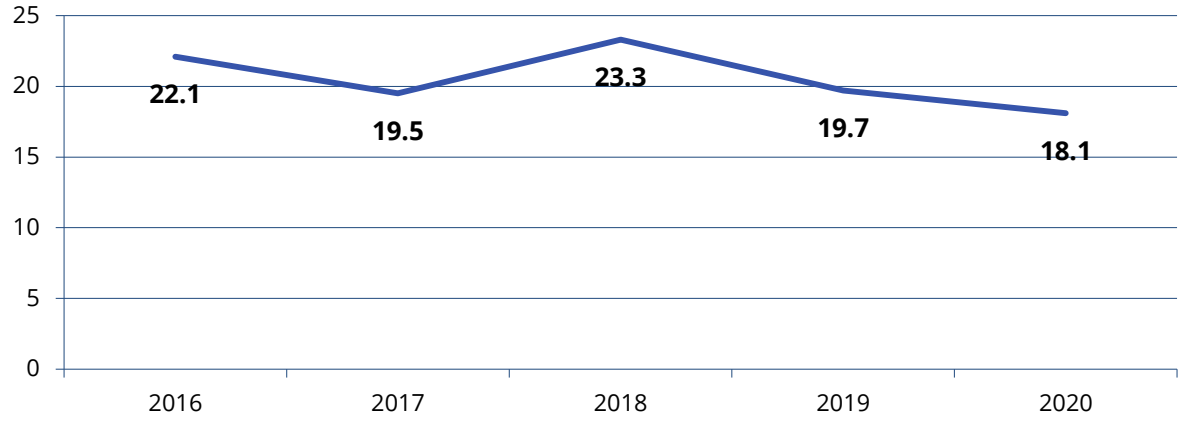
1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment or order is 21 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

X. Duration of proceedings in months (2016-2020) [1]
(Judgments)



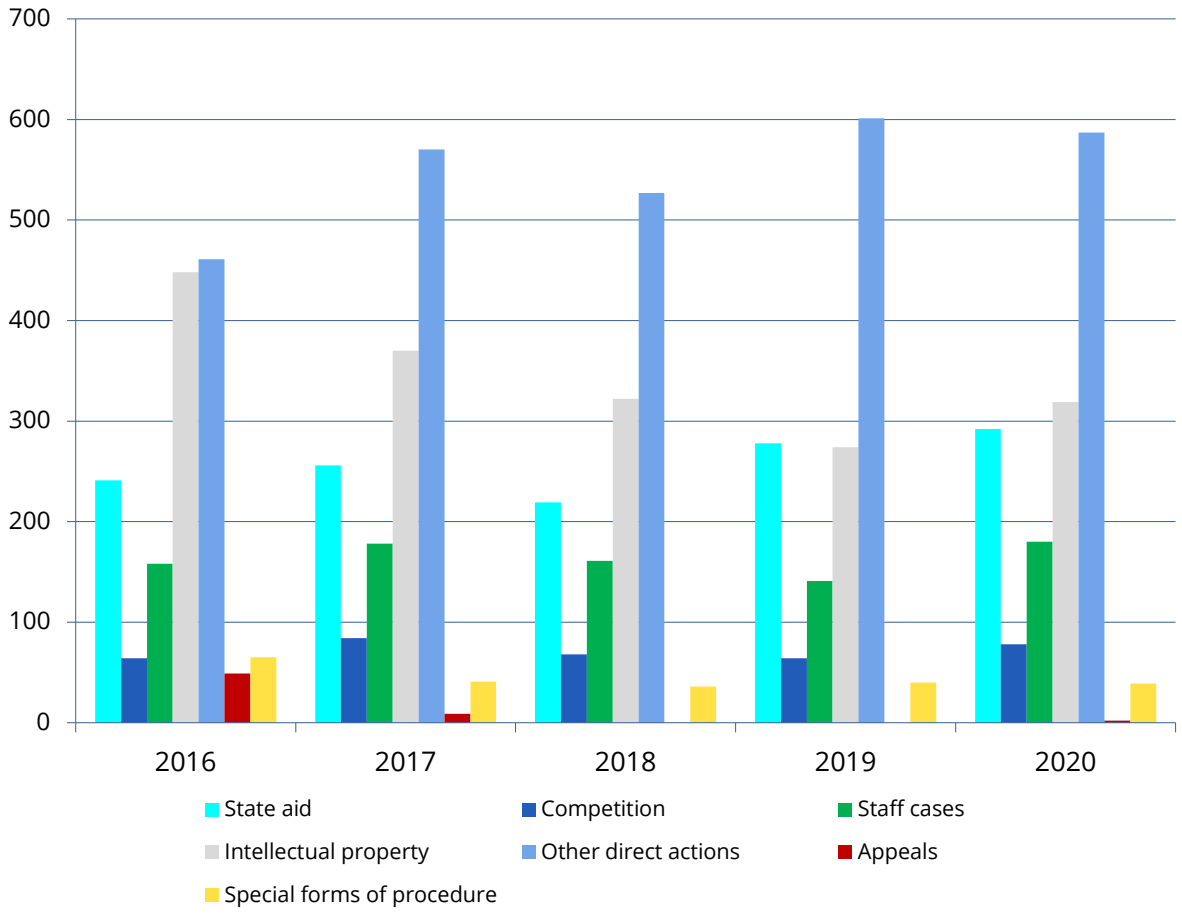
	2016	2017	2018	2019	2020
State aid	32.6	30.7	36.7	32.5	30.2
Competition	38.6	26.4	42	34.4	34.1
Staff cases		11.9	18.3	18.1	18.2
Intellectual property	16.5	16.6	16.5	14	13.6
Other direct actions	26.1	24.9	26.5	24.5	20.9
Appeals	16	14.8	21.3		
All cases	**22.1**	**19.5**	**23.3**	**19.7**	**18.1**

Duration of proceedings (in months)
All cases disposed of by way of judgment



1| The duration of proceedings is expressed in months and 10ths of months. The calculation of the average duration of proceedings does not take account of: cases ruled upon by interlocutory judgment; special forms of procedure; appeals concerning interim measures or interventions; staff cases transferred to the General Court on 1 September 2016.
The average duration of proceedings in the staff cases transferred to the General Court on 1 September 2016 which it disposed of by way of judgment is 24.1 months (taking into account the period before the Civil Service Tribunal and the period before the General Court).

XI. Cases pending as at 31 December – Nature of proceedings (2016-2020)

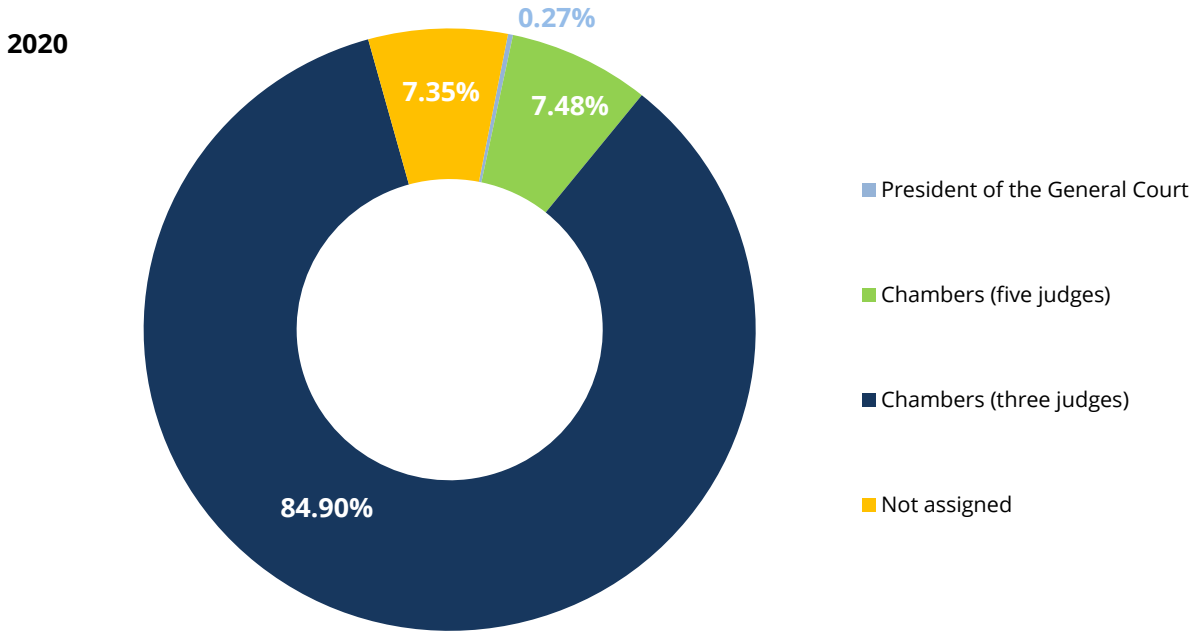


	2016	2017	2018	2019	2020
State aid	241	256	219	278	292
Competition	64	84	68	64	78
Staff cases	158	178	161	141	180
Intellectual property	448	370	322	274	319
Other direct actions	461	570	527	601	587
Appeals	49	9			2
Special forms of procedure	65	41	36	40	39
Total	**1 486**	**1 508**	**1 333**	**1 398**	**1 497**

XII. Cases pending as at 31 December – Subject matter of the action (2016-2020)

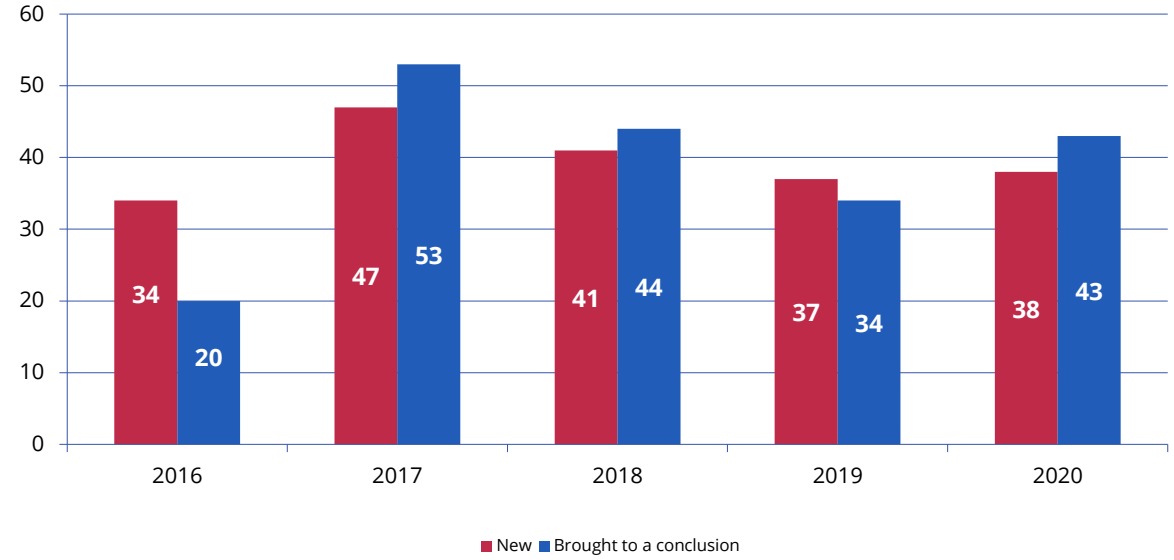
	2016	2017	2018	2019	2020
Access to documents	65	76	30	30	24
Agriculture	42	43	43	22	21
Approximation of laws	1	4	6	4	1
Arbitration clause	23	27	27	22	31
Area of freedom, security and justice	7	2	1	2	
Citizenship of the Union					1
Commercial policy	36	35	40	41	63
Common fisheries policy	1	1	2	2	
Common foreign and security policy	1	1		1	
Company law	1	1	1		1
Competition	64	84	68	64	78
Consumer protection	2	1	1	1	2
Culture	1				
Customs union and Common Customs Tariff	5	1		2	
Economic and monetary policy	24	116	127	138	156
Economic, social and territorial cohesion	15	6	2	3	2
Education, vocational training, youth and sport	3	3	1	2	1
Energy	4	9	4	9	12
Environment	7	12	8	12	14
External action by the European Union	4	2	2	5	6
Financial provisions (budget, financial framework, own resources, combating fraud)	10	10	9	10	5
Free movement of capital			1		
Freedom of establishment			1		
Freedom of movement for persons	1			1	
Freedom to provide services					1
Intellectual and industrial property	448	370	322	274	319
Law governing the institutions	85	96	103	180	118
Public health	7	9	13	11	13
Public procurement	24	27	22	15	21
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	8	14	14	10	13
Research and technological development and space	19	9	3	3	7
Restrictive measures (external action)	61	62	60	72	65
Social policy	1	1	1	1	
State aid	241	256	219	278	292
Taxation	2		2		
Trans-European networks		2	2	1	2
Transport				1	7
Total EC Treaty/TFEU	**1 213**	**1 280**	**1 135**	**1 217**	**1 276**
Staff Regulations	208	187	162	141	182
Special forms of procedure	65	41	36	40	39
OVERALL TOTAL	**1 486**	**1 508**	**1 333**	**1 398**	**1 497**

XIII. Cases pending as at 31 December – Bench hearing action (2016-2020)



	2016	2017	2018	2019	2020
Grand Chamber			1		
Appeal Chamber	51	11	1		
President of the General Court	12	1	1	9	4
Chambers (five judges)	23	100	77	88	112
Chambers (three judges)	1 253	1 323	1 187	1 218	1 271
Single judge			2		
Not assigned	147	73	64	83	110
Total	**1 486**	**1 508**	**1 333**	**1 398**	**1 497**

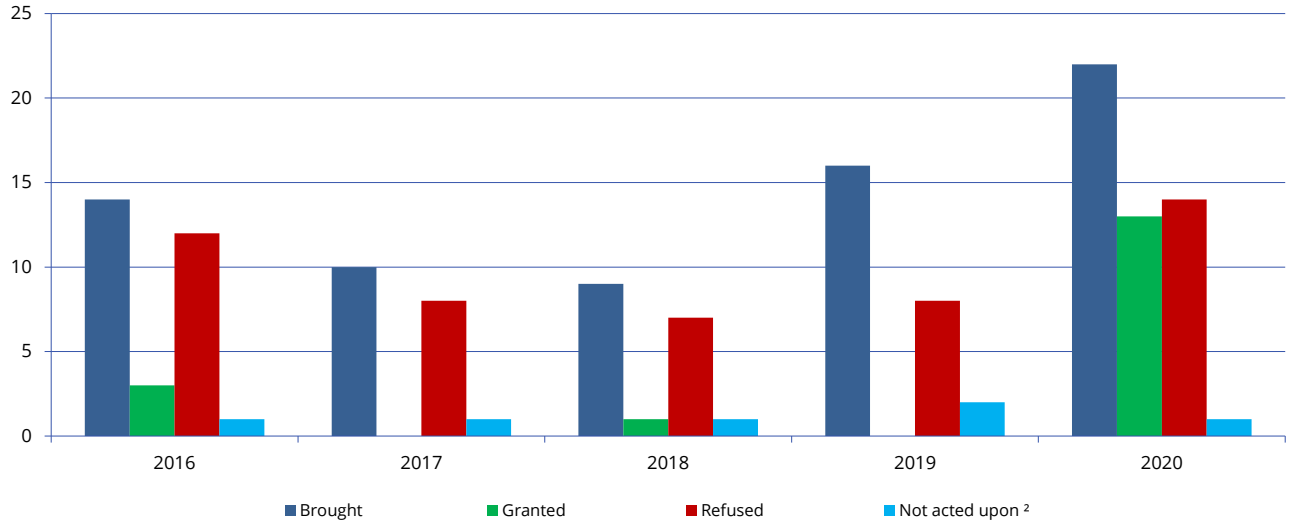
XIV. Miscellaneous – Proceedings for interim measures (2016-2020)



2020

	New applications for interim measures	Applications for interim measures brought to a conclusion	Outcome		
			Granted	Removal from the register/no need to adjudicate	Dismissed
Access to documents	1	1		1	
Agriculture	4	4			4
Arbitration clause	2	1			1
Competition	2	3	2		1
Customs union and Common Customs Tariff		1			1
Economic and monetary policy	2	2			2
Environment	3	3		1	2
Financial provisions (budget, financial framework, own resources, combating fraud)	2	2		1	1
Freedom of movement for persons		1			1
Law governing the institutions	6	7		2	5
Public procurement	6	9	1	1	7
Registration, evaluation, authorisation and restriction of chemicals (REACH Regulation)	2	1			1
Research and technological development and space	3	2			2
Staff Regulations	2	1			1
State aid	1	3			3
Trans-European networks	1	1			1
Transport	1	1			1
Total	**38**	**43**	**3**	**6**	**34**

XV. Miscellaneous – Expedited procedures (2016-2020) [1]

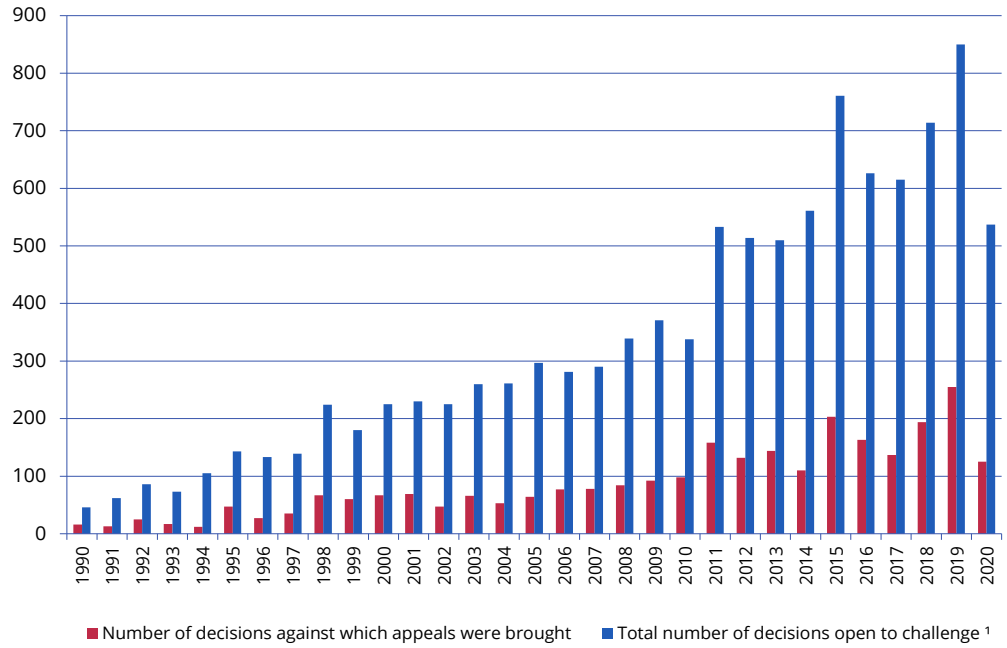


	2016					2017					2018					2019					2020				
	Of its own motion	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome			**Of its own motion**	**Brought**	Outcome		
			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]			Granted	Refused	Not acted upon [2]
Access to documents		2		2			2		1					1			2		2						
Agriculture												1		1											
Area of freedom, security and justice		3	3									1			1										
Commercial policy		1		1													1		1						
Competition		1		1			1		1			3	1	2			2		1				1		
Consumer protection												1								1					
Economic and monetary policy												1		1											
Financial provisions (budget, financial framework, own resources, combating fraud)																	1					1		2	
Free movement of goods		1			1																				
Intellectual and industrial property																	5							5	
Law governing the institutions		2		2			5		4	1							2		1	1		5	1	3	1
Public health		1		1																		2		2	
Public procurement		1		1			1		1																
Restrictive measures (external action)		1		1													1		1						
Staff Regulations		1		1			1		1			2		2								3	1	1	
State aid				2													2		2			11	10	1	
Total		**14**	**3**	**12**	**1**		**10**		**8**	**1**		**9**	**1**	**7**	**1**		**16**		**8**	**2**		**22**	**13**	**14**	**1**

1| The General Court may decide to deal with a case before it under an expedited procedure at the request of a main party or, since 1 July 2015, of its own motion.

2| The category 'Not acted upon' covers the following instances: withdrawal of the application for expedition, discontinuance of the action and cases in which the action is disposed of by way of order before the application for expedition has been ruled upon.

XVI. Miscellaneous – Appeals against decisions of the General Court to the Court of Justice (1990-2020)



	Number of decisions against which appeals were brought	Total number of decisions open to challenge [1]	Percentage of decisions against which appeals were brought
1990	16	46	35%
1991	13	62	21%
1992	25	86	29%
1993	17	73	23%
1994	12	105	11%
1995	47	143	33%
1996	27	133	20%
1997	35	139	25%
1998	67	224	30%
1999	60	180	33%
2000	67	225	30%
2001	69	230	30%
2002	47	225	21%
2003	66	260	25%
2004	53	261	20%
2005	64	297	22%
2006	77	281	27%
2007	78	290	27%
2008	84	339	25%
2009	92	371	25%
2010	98	338	29%
2011	158	533	30%
2012	132	514	26%
2013	144	510	28%
2014	110	561	20%
2015	203	761	27%
2016	163	626	26%
2017	137	615	22%
2018	194	714	27%
2019	255	850	30%
2020	125	537	23%

1| Total number of decisions open to challenge – judgments, orders concerning interim measures or refusing leave to intervene and all orders terminating proceedings other than those removing a case from the register or transferring a case – in respect of which the period for bringing an appeal expired or against which an appeal was brought.

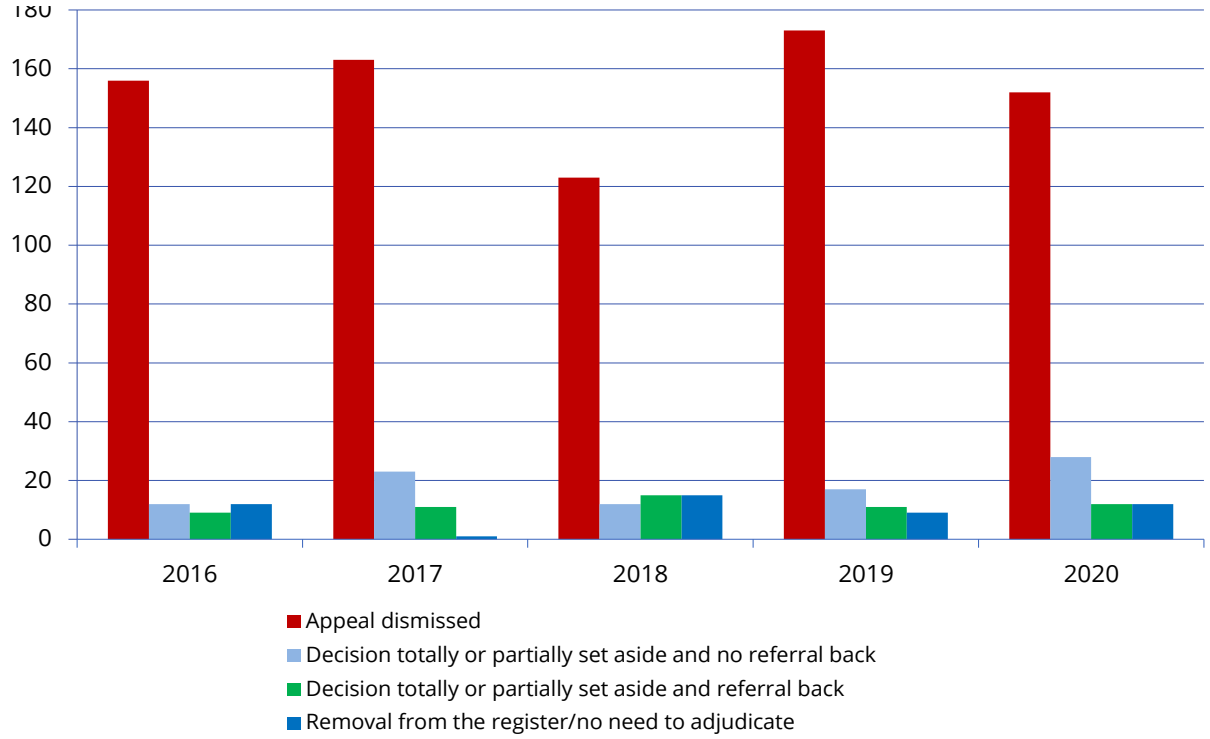
XVII. Miscellaneous – Distribution of appeals before the Court of Justice according to the nature of the proceedings (2016-2020)

	2016			2017			2018			2019			2020		
	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**	Decisions against which appeals were brought	Decisions open to challenge	**Appeals as a percentage**
State aid	23	56	**41%**	8	25	**32%**	20	55	**36%**	38	86	**44%**	9	25	**36%**
Competition	17	41	**41%**	5	17	**29%**	21	35	**60%**	28	39	**72%**	4	18	**22%**
Staff cases				8	37	**22%**	15	79	**19%**	32	110	**29%**	19	71	**27%**
Intellectual property	48	276	**17%**	52	297	**18%**	68	295	**23%**	57	315	**18%**	40	213	**19%**
Other direct actions	75	253	**30%**	61	236	**26%**	69	249	**28%**	97	297	**33%**	52	209	**25%**
Special forms of procedure				3	3	**100%**	1	1	**100%**	3	3	**100%**	1	1	**100%**
Total	163	626	**26%**	137	615	**22%**	194	714	**27%**	255	850	**30%**	125	537	**23%**

XVIII. Miscellaneous – Results of appeals before the Court of Justice (2020) (Judgments and Orders)

	Appeal dismissed	Decision totally or partially set aside and no referral back	Decision totally or partially set aside and referral back	Removal from the register/no need to adjudicate	Total
Access to documents	7	1			8
Agriculture	4	4	1		9
Approximation of laws	3				3
Arbitration clause	3		1		4
Citizenship of the Union	1				1
Commercial policy		1			1
Common foreign and security policy	14	2			16
Competition	8	2	1		11
Economic and monetary policy	3				3
Energy	1				1
Environment	3				3
External action by the European Union	1				1
Financial provisions (budget, financial framework, own resources, combating fraud)	1				1
Freedom of movement for persons	1				1
Intellectual and industrial property	48	8	2	6	64
Law governing the institutions	18	4			22
Principles of EU law	1		2		3
Privileges and immunities	2				2
Public health	3				3
Public procurement	1				1
Research and technological development and space			1		1
Staff Regulations	16	3	3	2	24
State aid	12	3	1	4	20
Taxation	1				1
Total	**152**	**28**	**12**	**12**	**204**

XIX. Miscellaneous – Results of appeals before the Court of Justice (2016-2020) (Judgments and Orders)



	2016	2017	2018	2019	2020
Appeal dismissed	156	163	123	173	152
Decision totally or partially set aside and no referral back	12	23	12	17	28
Decision totally or partially set aside and referral back	9	11	15	11	12
Removal from the register/no need to adjudicate	12	1	15	9	12
Total	**189**	**198**	**165**	**210**	**204**

XX. Miscellaneous – General trend (1989-2020)
New cases, completed cases, cases pending

	New cases [1]	Completed cases [2]	Cases pending on 31 December
1989	169	1	168
1990	59	82	145
1991	95	67	173
1992	123	125	171
1993	596	106	661
1994	409	442	628
1995	253	265	616
1996	229	186	659
1997	644	186	1 117
1998	238	348	1 007
1999	384	659	732
2000	398	343	787
2001	345	340	792
2002	411	331	872
2003	466	339	999
2004	536	361	1 174
2005	469	610	1 033
2006	432	436	1 029
2007	522	397	1 154
2008	629	605	1 178
2009	568	555	1 191
2010	636	527	1 300
2011	722	714	1 308
2012	617	688	1 237
2013	790	702	1 325
2014	912	814	1 423
2015	831	987	1 267
2016	974	755	1 486
2017	917	895	1 508
2018	834	1 009	1 333
2019	939	874	1 398
2020	847	748	1 497
Total	**16 994**	**15 497**	

1| 1989: the Court of Justice referred 153 cases to the newly created Court of First Instance (now the General Court).
1993: the Court of Justice referred 451 cases as a result of the first extension of the jurisdiction of the Court of First Instance.
1994: the Court of Justice referred 14 cases as a result of the second extension of the jurisdiction of the Court of First Instance.
2004-05: the Court of Justice referred 25 cases as a result of the third extension of the jurisdiction of the Court of First Instance.
2016: on 1 September 2016, 139 staff cases were transferred to the General Court.

2| 2005-06: the Court of First Instance referred 118 cases to the newly created Civil Service Tribunal.

XXI. Activity of the Registry of the General Court (2016-2020)

Type of act	2016	2017	2018	2019	2020
Procedural documents entered in the register of the Registry [1]	49 772	55 069	55 389	54 723	51 413
Applications initiating proceedings [2]	835	917	834	939	847
Staff cases transferred to the General Court [3]	139	–	–	–	–
Rate of regularisation of the applications initiating proceedings [4]	38.2%	41.2%	35.85%	35.04%	34.59%
Written pleadings (other than applications)	3 879	4 449	4 562	4 446	4 122
Applications to intervene	160	565	318	288	318
Requests for confidential treatment (of data contained in procedural documents) [5]	163	212	197	251	224
Draft orders prepared by the Registry [6] (manifest inadmissibility before service, stay/resumption, joinder of cases, joinder of a plea of inadmissibility with the substance of the case, uncontested intervention, removal from the register, finding of no need to adjudicate in intellectual property cases, reopening of the oral part of the procedure and rectification)	241	317	285	299	259
Chamber conferences	321	405	381	334	325
Minutes of hearings and records of delivery of judgment	637	812	924	787	589

1| This number is an indicator of the volume of work of the Registry, since each incoming or outgoing document is entered in the register. The number of procedural documents entered in the register must be assessed in the light of the nature of the proceedings within the Court's jurisdiction. As the number of parties to proceedings is limited in direct actions (applicant, defendant and, as the case may be, intervener(s)), service is effected only on those parties.

2| Any written pleadings lodged (including applications) must be entered in the register, placed on the case file, put in order where appropriate, communicated to the judges' chambers with a transmission sheet, which is sometimes detailed, then possibly translated and, lastly, served on the parties.

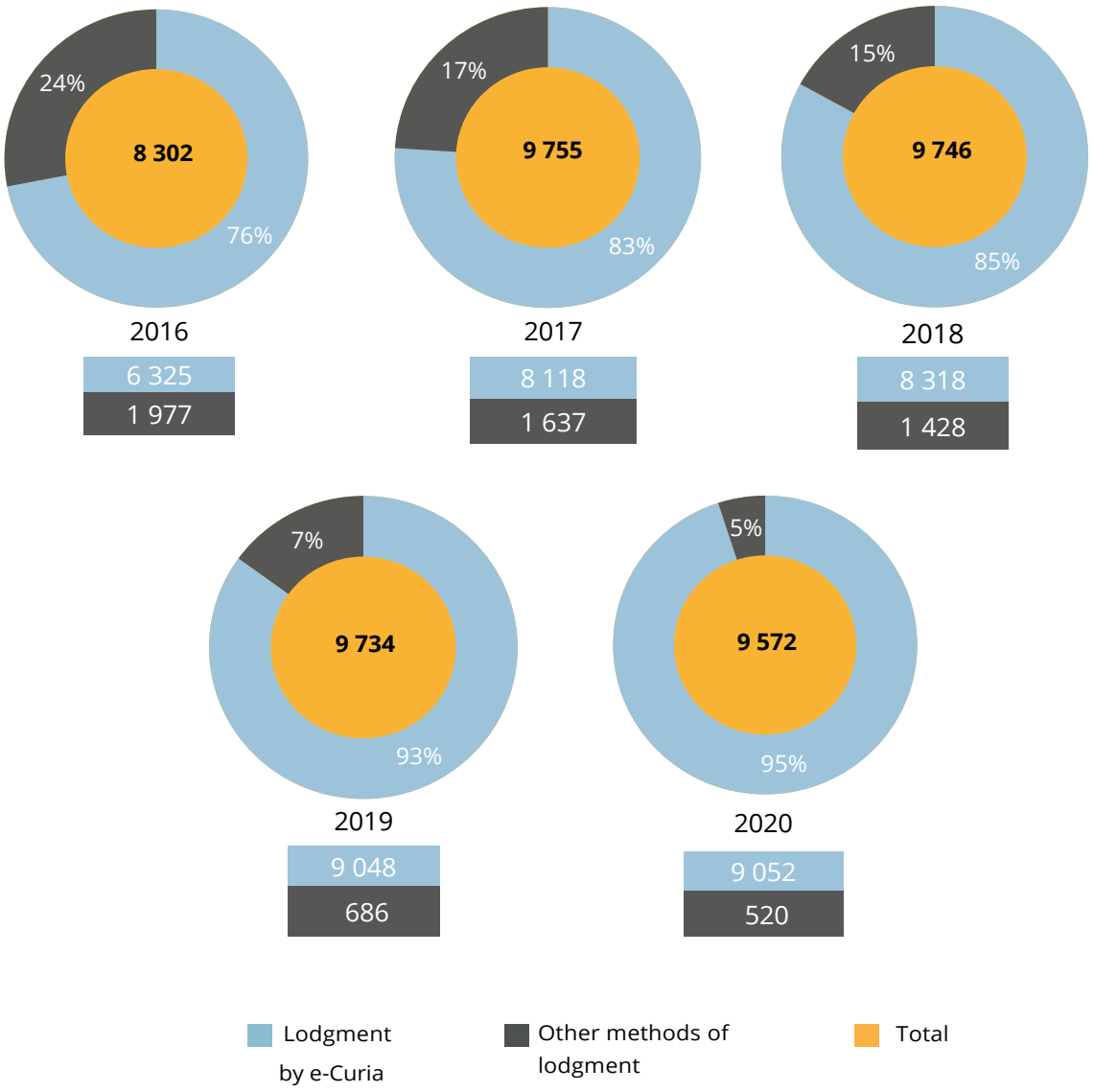
3| On 1 September 2016.

4| Where an application initiating proceedings (or any other written pleading) does not comply with certain requirements, the Registry ensures that it is put in order, as provided in the Rules of Procedure.

5| The number of requests for confidentiality is without prejudice to the amount of data contained in one or more pleadings for which confidential treatment is requested.

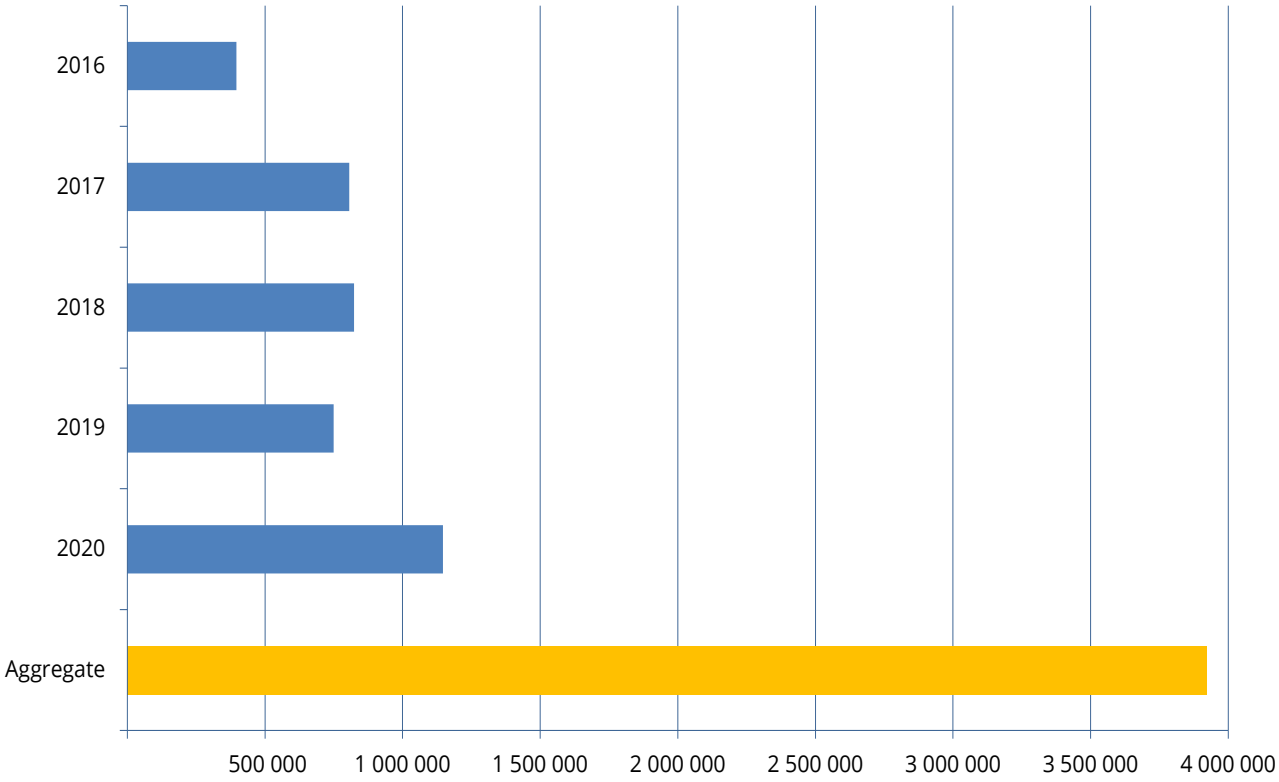
6| Since the entry into force, on 1 July 2015, of the new Rules of Procedure of the General Court, certain decisions that were previously taken in the form of orders (stay/resumption, joinder of cases, intervention by a Member State or an institution where confidentiality is not raised) have been taken in the form of a simple decision added to the case file.

XXII. Methods of lodging procedural documents before the General Court [1]



1| Since 1 December 2018, e-Curia has become the mandatory means of exchanging documents with the representatives of the parties in all proceedings before the General Court (without prejudice to the exceptions under the rules).

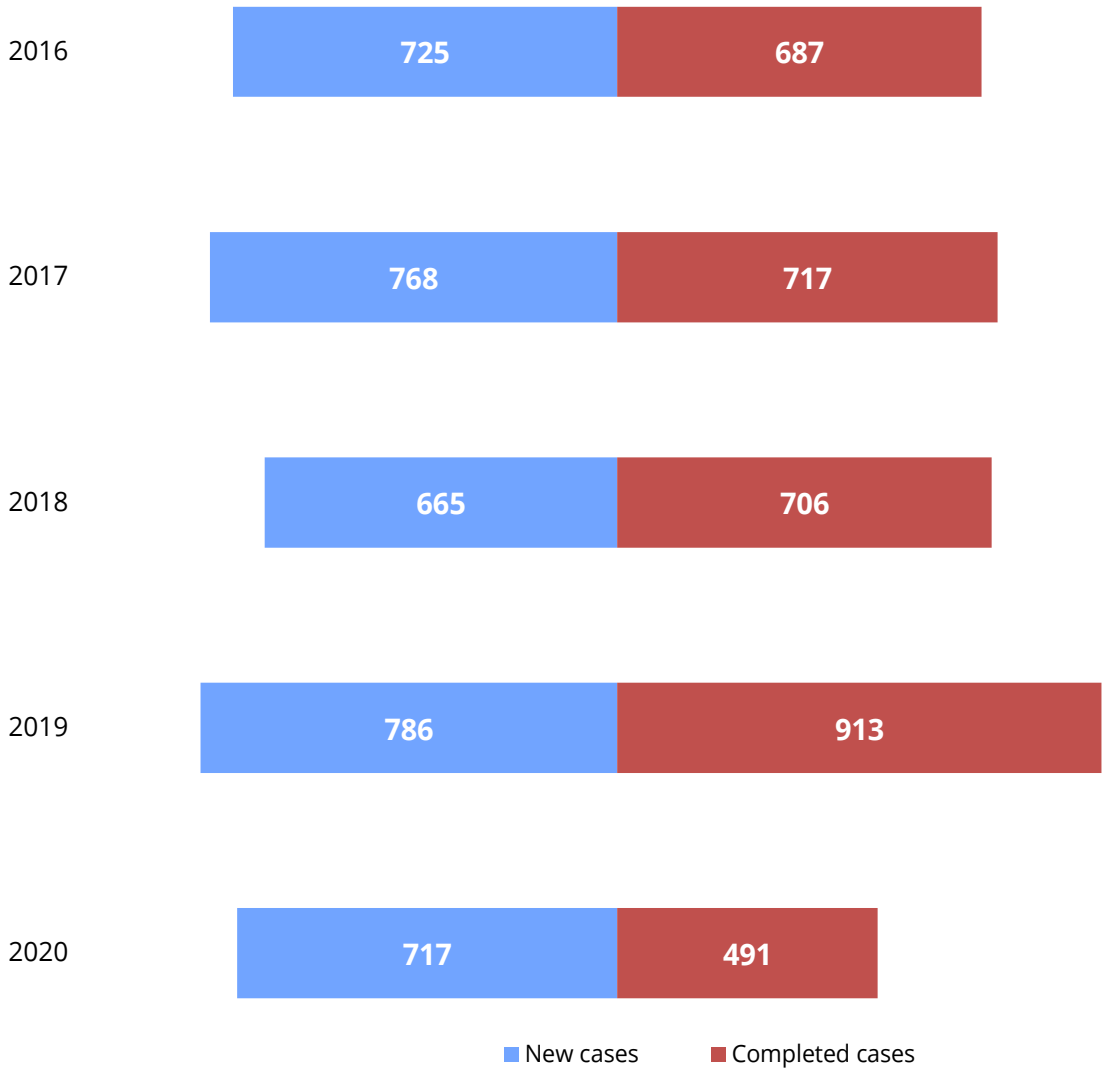
XXIII. Pages lodged by e-Curia (2016-2020) [1]



	2016	2017	2018	2019	2020	Aggregate
Pages lodged by e-Curia	396 072	805 768	823 076	749 895	1 146 664	**3 921 475**

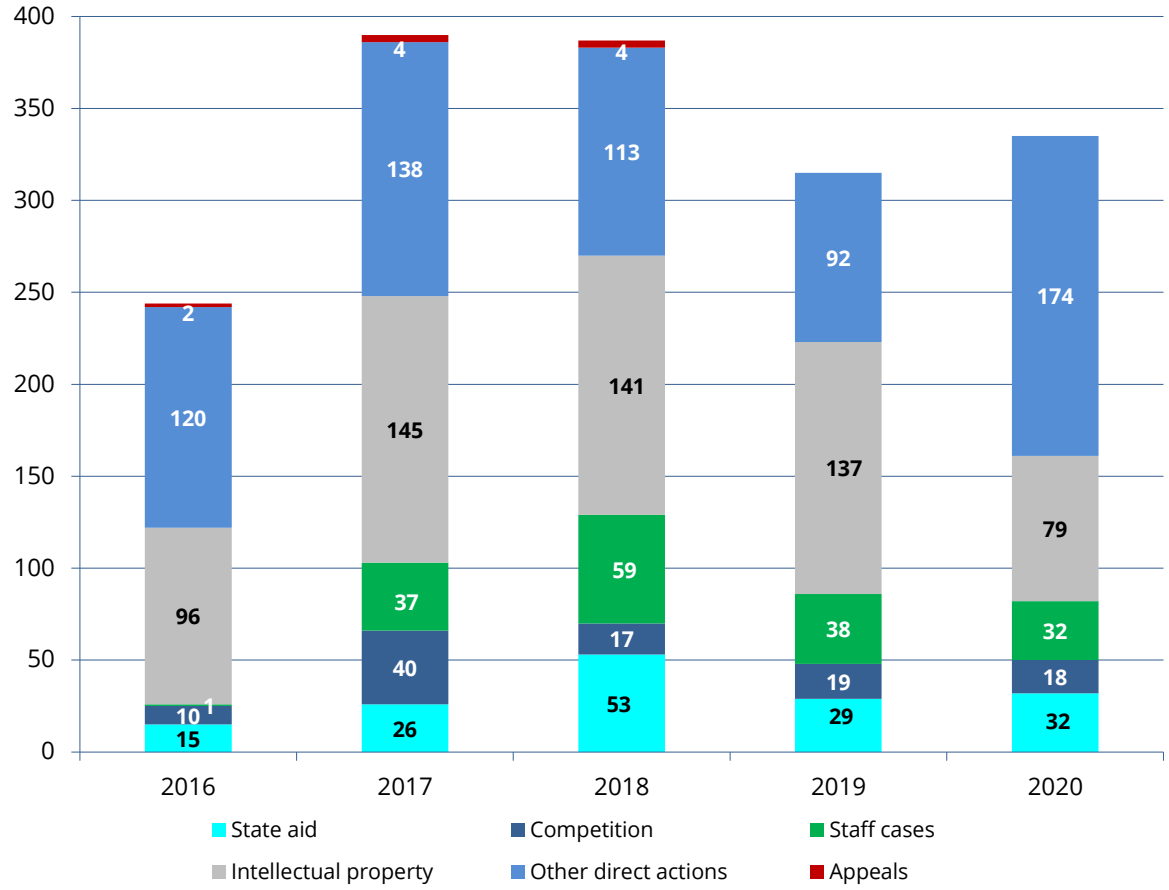
1| For the year 2016, the data do not include the number of pages of the applications initiating proceedings.

XXIV. Notices in the *Official Journal of the European Union* (2016-2020) [1]



1| In accordance with the Rules of Procedure (Articles 79 and 122), notices concerning new applications and decisions which close the proceedings must be published in the *Official Journal of the European Union*.

XXV. Cases pleaded (2016-2020)



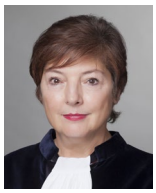
	2016	2017	2018	2019	2020
Total	244	390	387	315	335

E Composition of the General Court

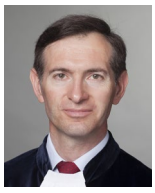

M. van der Woude
President


S. Papasavvas
Vice-President

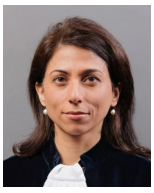

H. Kanninen
President of Chamber


V. Tomljenović
President of Chamber


A.M. Collins
President of Chamber


S. Gervasoni
President of Chamber

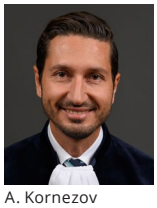

D. Spielmann
President of Chamber


A. Marcoulli
President of Chamber


R. da Silva Passos
President of Chamber


J. Svenningsen
President of Chamber


M.J. Costeira
President of Chamber


A. Kornezov
President of Chamber

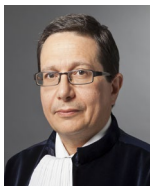

M. Jaeger
Judge


S. Frimodt Nielsen
Judge


J. Schwarcz
Judge

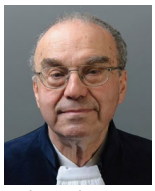

D. Gratsias
Judge


M. Kancheva
Judge


E. Buttigieg
Judge


V. Kreuschitz
Judge


L. Madise
Judge

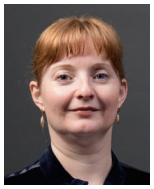

C. Iliopoulos
Judge


V. Valančius
Judge

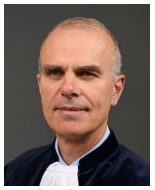

Z. Csehi
Judge


N. Półtorak
Judge

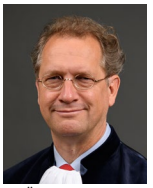

F. Schalin
Judge

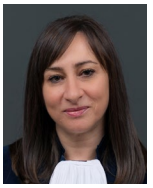

I. Reine
Judge


R. Barents
Judge


P. Nihoul
Judge


B. Berke
Judge

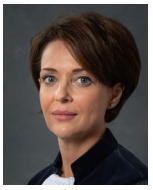

U. Öberg
Judge

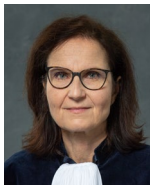

O. Spineanu-Matei
Judge


K. Kowalik-Bańczyk
Judge


C. Mac Eochaidh
Judge

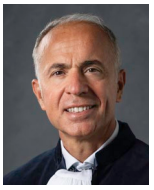

G. De Baere
Judge


R. Frendo
Judge


T. Pynnä
Judge


L. Truchot
Judge


J. Laitenberger
Judge


R. Mastroianni
Judge


J. Martín y Pérez de Nanclares
Judge

O. Porchia
Judge

G. Hesse
Judge

M. Sampol Pucurull
Judge

M. Stancu
Judge

P. Škvařilová-Pelzl
Judge

I. Nõmm
Judge

G. Steinfatt
Judge

R. Norkus
Judge

T. Perišin
Judge

E. Coulon
Registrar

I. Changes in the Composition of the General Court in 2020

31 January 2020

Ian Stewart Forrester, Judge at the General Court from 7 October 2015, left office on 31 January 2020.

25 February 2020

Ingrida Labucka, Judge at the General Court from 12 May 2004, left office on 25 February 2020.

6 October 2020

Jan Passer, Judge at the General Court from 19 September 2016, left office upon taking up his duties as Judge at the Court of Justice on 6 October 2020.

II. Order of Precedence as at 31 December 2020

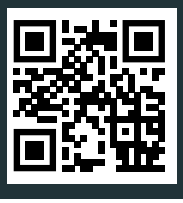
M. van der WOUDE, President of the General Court
S. PAPASAVVAS, Vice-President of the General Court
H. KANNINEN, President of Chamber
V. TOMLJENOVIĆ, President of Chamber
A.M. COLLINS, President of Chamber
S. GERVASONI, President of Chamber
D. SPIELMANN, President of Chamber
A. MARCOULLI, President of Chamber
R. da SILVA PASSOS, President of Chamber
J. SVENNINGSEN, President of Chamber
M.J. COSTEIRA, President of Chamber
A. KORNEZOV, President of Chamber
M. JAEGER, Judge
S. FRIMODT NIELSEN, Judge
J. SCHWARCZ, Judge
D. GRATSIAS, Judge
M. KANCHEVA, Judge
E. BUTTIGIEG, Judge
V. KREUSCHITZ, Judge
L. MADISE, Judge
C. ILIOPOULOS, Judge
V. VALANČIUS, Judge
Z. CSEHI, Judge
N. PÓŁTORAK, Judge
F. SCHALIN, Judge
I. REINE, Judge
R. BARENTS, Judge
P. NIHOUL, Judge
B. BERKE, Judge
U. ÖBERG, Judge
O. SPINEANU-MATEI, Judge
K. KOWALIK-BAŃCZYK, Judge
C. MAC EOCHAIDH, Judge
G. DE BAERE, Judge
R. FRENDO, Judge
T. PYNNÄ, Judge
L. TRUCHOT, Judge
J. LAITENBERGER, Judge
R. MASTROIANNI, Judge
J. MARTÍN Y PÉREZ DE NANCLARES, Judge
O. PORCHIA, Judge
G. HESSE, Judge
M. SAMPOL PUCURULL, Judge
M. STANCU, Judge
P. ŠKVAŘILOVÁ-PELZL, Judge
I. NÕMM, Judge
G. STEINFATT, Judge

R. NORKUS, Judge
T. PERIŠIN, Judge

E. COULON, Registrar

COURT OF JUSTICE
OF THE EUROPEAN UNION

Directorate for Communication
Publications and Electronic Media Unit



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