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CRUZ VILAÇA ADVOGADOS

IN THIS EDITION

FOREWORD

European Sports Model and Competitive Markets: Two Worlds Connected by *European Superleague Company* (C-333/21) and *International Skating Union* (C-124/21 P)

21 December 2023 was the day when certain rules enacted by major international sports governing bodies were found contrary to EU law by the Court of Justice (*European Superleague Company* (ESLC), C-333/21, *International Skating Union* (ISU), C-124/21 P, and *Royal Antwerp*, C-680/21), which will not be addressed in this foreword). This general statement was immediately interpreted by some as challenging the governance model chosen by those organisations, and celebrated by Superleague as endorsing its project.

These judgments are extremely rich, each paragraph worth being 'dissected'. They shed light not only on the Court's approach to the relationship between EU law and sports, but also on the provisions whose interpretation was sought, irrespective of the economic sector in which they apply. However, not all the answers were given. Namely, the Court made it clear that the existence, organisation and functioning of sports governing bodies as such were not being questioned (ESLC, para 75); and that its ruling in ESLC would not concern '*the compatibility of the Superleague project itself with [...] the Treaty*' (para 80).

Concerning the value of Article 165 of the Treaty on the Functioning of the European Union ('TFEU'), the Court clearly disagreed with Advocate General Rantos' Opinion, delivered more than one year ago. It clarified that Article 165 TFEU is neither a 'cross-cutting' nor a special rule vis-à-vis Articles 101 and 102 TFEU. Pursuant to the Court, Article 165 TFEU mainly confers on EU institutions a 'supportive' role in the field of sports. Still, the Court recognised that certain elements reflected in Article 165 TFEU, such as open competitions based on sporting merits and solidarity redistribution, are inherent in the European sports model and may constitute legitimate objectives, depending on the circumstances of the case. Moreover, those features are to be considered as part of the overall economic and legal context of a given practice, for the purposes of applying competition and free movement provisions.

The Court interpreted the contested rules in the light of Article 101 (in ESLC and ISU judgements), Article 102 TFEU and the rules on free movement (only in the ELSC judgment). Three rules were analysed: (i) the requirement of prior approval of all competitions organised by third parties; (ii) the conditions of participation of clubs and players in such competitions, including the application of sanctions; and (iii) the commercial exploitation of the rights associated with such events. In essence, the specific rules adopted were found to be in breach of EU law due to the lack of substantive and procedural framework. However, sports governing bodies still retain the power to pre-authorise third-party competitions, provided that the requirements laid down by the Court are observed (ESLC, para 151; ISU, para 136).

With regard to Article 102 TFEU (interpreted in the light of Article 106 TFEU), the Court made a sensible finding: any entity that de facto plays a dual role (of authorising third-party competitions

and organising its own competitions, including the exploitation of economic rights), with non-negligible social repercussions, must meet standards of good governance. It is irrelevant whether this power is self-attributed or delegated by Member States. Indeed, in the absence of public oversight, these requirements may indeed be 'all the more necessary'.

In addition, FIFA, UEFA and ISU rules were considered to be decisions of associations of undertakings within the meaning of Article 101(1) TFEU (ESLC, para 115; ISU, para 130). In the Court's view, given the absence of any substantive and procedural criteria, these rules restrict competition 'by object'. Such a finding used to serve the purpose of allocating the burden of proof (ESLC, para 160; ISU, para 100). Since 21 December, it also has significant substantive consequences: restrictions of competition 'by object' cannot be justified by the proportionate pursuit of legitimate objectives (usually known as *Wouters* and *Meca Medina* criteria).

This finding, as far as Article 101 TFEU is concerned, may not be that groundbreaking. What seems puzzling, however, is applying this reasoning to cases falling under Article 102 TFEU. Indeed, affirming the existence of abuses of a dominant position 'by object' or 'by its very nature' (ESLC, paras 131 and 148) casts doubt on the direction in which the case-law was heading so far. In judgments such as *Intel* (C-413/14 P), *MEO* (C-525/16) and more recently *Unilever Italia* (C-680/20) the Court appears to have rejected the existence of 'per se' abuses, requiring competition authorities to carefully assess the arguments put forward by undertakings to show that their conduct was not capable of restricting competition. The Court's statement in ESLC may be justified by the fact that both Articles 101 and 102 TFEU applied, and thus by the interest in ensuring a consistent interpretation between these provisions. However, the fact is that Article 101 is different from Article 102 TFEU, and this difference must be recognised. Doubts remain, thus. Only future judgments will clarify possible far-reaching consequences, both for the general application of Article 102 TFEU and for determining the scope of application of the Wouters test.

It seems undeniable that the judgments analysed limited the regulatory discretion of sports governing bodies. Furthermore, a strong subliminal message emerges from the judgments: power, responsibility and accountability are inextricably linked and the abstract allegation of legitimate objectives, 'however laudable', will not suffice.

For the future, it remains to be seen whether some of the Court's findings in relation to competition law are limited to sports or have a wider scope. As always, Cruz Vilaça Advogados will closely follow these developments.

This foreword is inspired by the article of the same title published in *EU Law Live's Competition Corner* (see the full article here).

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DECREE LAW NO. 114-A/2023, IMPLEMENTING DIRECTIVE (EU) 2020/1828 ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS

Decree Law No. 114-A/2023, of 5 December ("DL 114-A/2023"), transposes into Portuguese law Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers. It establishes a new specific national collective action regime for the protection of consumer rights and interests, establishing new procedural requirements and transparency obligations. Companies must now monitor and adapt to the new class action regime, considering the increased risks of litigation, including initiated by foreign entities and the possible reputational damage resulting from mandatory disclosure obligations under this new regime.

MAXIMIZING COMPUTER FORENSICS TOOLS IS PRIORITY FOR THE PORTUGUESE COMPETITION AUTHORITY IN 2024

On the 28 December 2023, the Portuguese Competition Authority (Autoridade da Concorrência) published its Competition Policy Priorities for 2024, with a notable emphasis on maximizing computer forensics tools. Recognising that the ongoing digitalization significantly influences competition authorities' operations, Autoridade da Concorrência has prioritised equipping itself with the necessary tools and data to implement new, more effective methods. These methods aim to provide robust responses in investigating anti-competitive practices.

EUROPEAN COMMISSION ADOPTS TWO REGULATIONS AMENDING THE *DE MINIMIS* REGULATION AND THE *SGEI DE MINIMIS* REGULATION

The European Commission has adopted two regulations amending the general rules for small amounts of aid (*de minimis* Regulation) and for small amounts of aid for Services of General Economic interest, such as public transport and healthcare (SGEI *de minimis* Regulation). The revised regulations, which exempt small aid amounts from EU State aid control since they are deemed to have no impact on competition and trade in the Single Market, will enter into force on 1 January 2024 and will apply until 31 December 2030.

Source: website of the European Commission

DATA ACT

On 27 November 2023, the Council of the EU adopted a new Regulation, by which it harmonises rules on fair access to and use of data – Data Act. The Data Act puts obligations on manufacturers and service providers to let their users, be they companies or individuals, access and reuse the data generated by the use of their products or services, from coffee machines to wind turbines. It also allows users to share that data with third parties. The new piece of legislation ensures an adequate level of protection of trade secrets and intellectual property rights, accompanied by relevant safeguards against possible abusive behaviour. The Regulation will enter into force on the twentieth day after its publication in the EU's official journal. It shall apply for 20 months from the date of its entry into force.

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REFORM OF THE STATUTE OF THE COURT OF JUSTICE OF THE EU

On 7 December 2023, the Council presidency and the European Parliament representatives, together with representatives of the European Commission and the Court of Justice of the EU, reached a provisional agreement on a reform of the Statute of the Court that will permit the transfer of jurisdiction over preliminary rulings to the General Court in specific areas. On the procedural aspects, the reform provides for a "one-stop-shop" mechanism, under which national judges will continue to address requests for preliminary rulings to the Court of Justice. The designation of judges of the General Court to act as Advocates-General and the creation of a chamber of intermediate size at the General Court to deal with certain requests for preliminary ruling are the other procedural aspects established in the proposal.

ARTIFICIAL INTELLIGENCE ACT

On 9 December 2023, the Council presidency and the European Parliament's negotiators have reached a provisional agreement on the proposal on harmonised rules on artificial intelligence ("AI"), the so-called Artificial Intelligence Act. The draft regulation aims to ensure that AI systems placed on the European market and used in the EU are safe and respect fundamental rights and EU values. This landmark proposal also aims to stimulate investment and innovation on AI in Europe.

Source: website of the European Parliament

ENLARGEMENT FOR THE SIX WESTERN BALKANS PARTNERS, TÜRKIYE, UKRAINE, MOLDOVA, AND GEORGIA APPROVED BY THE COUNCIL

On 12 December 2023, the Council of the European Union approved conclusions on Enlargement for the six Western Balkans partners, Türkiye and – for the first time - Ukraine, Moldova, and Georgia, following the Communication from the Commission, dated 8th November 2023, outlining the EU Enlargement Policy. The conclusions assess the situation in each of the EU candidates and partners, set out guidelines on reform priorities, and reaffirm the Council's commitment to the EU's enlargement policy.

COUNCIL DECISION ON THE APPLICATION OF THE SCHENGEN ACQUIS IN BULGARIA AND ROMANIA

Council Decision (EU) 2024/210 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania was published in the Official Journal of the EU on 4 January 2024. According to this Council Decision, "*From 31 March 2024, checks on persons at internal air and sea borders with and between Bulgaria and Romania shall be lifted and the provisions of the Schengen acquis referred to in the Annex shall apply to Bulgaria and Romania between themselves and in their relations with the*" EU Member States and EEA States. In addition, the Council, acting by unanimity, "*shall endeavour to take a decision lifting checks on persons at internal land borders (…) in accordance with Article 4(2) of the 2005 Act of Accession of the Republic of Bulgaria and Romania*" (see here).

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JUDGMENT IN CASE *ALTICE GROUP LUX V COMMISSION*

In Altice Group Lux v Commission (C-746/21 P), the Court of Justice of the EU upholds the Commission's 2018 decision, while slightly reducing the amount of the fine for the breach of the notification requirement under the EU merger rules (usually called gun-jumping). In its decision, the Commission found that Altice breached both the notification requirement and the standstill obligation laid down in the EU Merger Regulation by implementing its acquisition of the Portuguese telecommunications operator PT Portugal prior to notification and approval by the Commission. In its judgment, the Court fully upheld the Commission's finding that certain provisions of the purchase agreement resulted in Altice acquiring the legal right to exercise decisive influence over PT Portugal and that the company actually exercised such influence in several instances, in breach of the EU Merger Regulation.

JUDGMENT IN CASES *LUXEMBOURG V COMMISSION* AND *ENGIE GLOBAL LNG HOLDING AND OTHERS V COMMISSION*

On 5 December 2023, the Grand Chamber of the Court of Justice delivered its judgments in two cases concerning actions by which the appellants sought the annulment of the respective judgments of the General Court confirming two sets of tax rulings as "selective" advantage, in light of a Commission's State aid decision: Luxembourg v Commission and Engie Global LNG Holding and Others v Commission (joined cases C-451/21 P and C-454/21 P). First, the Court held that to determine whether a national measure constitutes State aid, the Commission must demonstrate that the measure confers a selective advantage on the beneficiary, which will be the case if the measure at issue derogates from the 'normal' tax system because it differentiates between undertakings in a comparable situation. Second, the Court considered that the Commission is required to accept the interpretation of provisions of national law given by the Member State during an exchange of arguments, provided that that interpretation is compatible with the wording of those provisions. Third, the Court of Justice held that the General Court erred in holding that the Commission was not required to take into account the administrative practice of the Luxembourg tax authorities relating to a national provision on abuse of law. The Court concluded that the Commission made errors in its various analyses of the reference frameworks defining the normal tax system, and decided to annul the Commission's decision.

JUDGMENT IN *COMMISSION V AMAZON.COM AND OTHERS*

On 14 December 2023, the Court of Justice delivered its judgment in *Commission v Amazon.com and Others* (C-457/21 P), confirming the 2021 judgment of the General Court (Cases T-816/17 and T-318/18, *Luxembourg and Amazon v Commission*) which annulled the Commission's 2017 decision (SA.38944). The Court of Justice considered that, contrary to the General Court's finding, the arm's length principle has no autonomous existence in EU law and that the Commission may rely on it only if it is incorporated into the national tax law of the concerned Member States. In addition, it concluded that the Commission had wrongly determined the 'reference system', which is the first step in analysing a national measure in order to be able to categorize it as State aid. The Court of Justice nevertheless upheld the judgment under appeal since the Commission decision had to be annulled in any event because of the incorrect definition of the reference system, rather than for the reasons given by the General Court.

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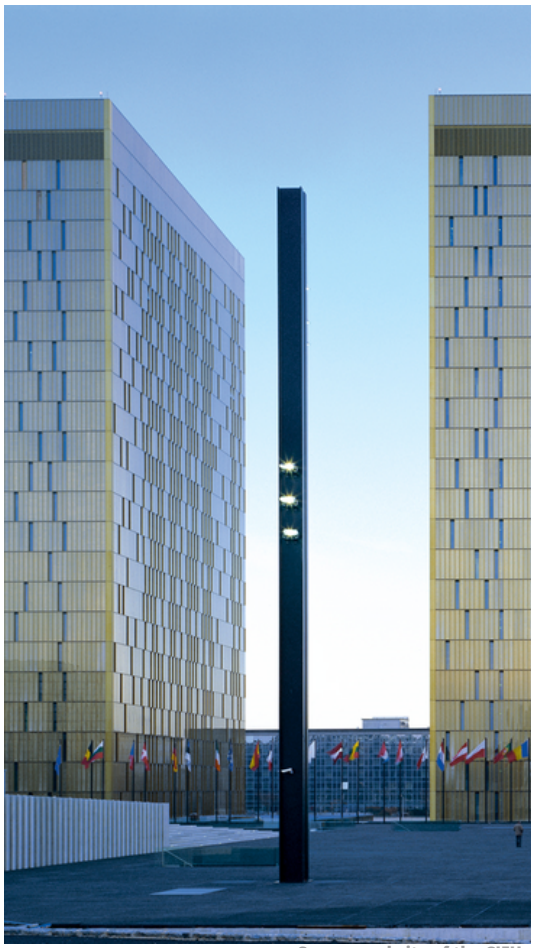
INTERVYUIRASHT ORGAN NA DAB PRI MS (WOMEN VICTIMS OF DOMESTIC VIOLENCE)

The Court of Justice of the European Union delivered, on 16 January 2024, its judgment in Intervyuirasht organ na DAB pri MS (Women victims of domestic violence) (C-621/21), a case concerning the conditions for granting international protection under Directive 2011/95/EU on international protection in the case of domestic violence against women. In this case, a Turkish national, who is of Kurdish origin, a Muslim and divorced and who claims that she was forced to marry by her family and was beaten and threatened by her husband, feared for her life if she had to return to Türkiye and lodged an application for international protection in Bulgaria. The Court of Justice held that the Directive must be interpreted consistently with the Istanbul Convention (approved on behalf of the European Union by Council Decision (EU) 2023/1076 of 1 June 2023), which is binding on the European Union and recognises gender-based violence against women as a form of persecution. Furthermore, the Court states that women, as a whole, may be regarded as belonging to a social group within the meaning of Directive 2011/95. Consequently, they may qualify for refugee status where, in their country of origin, they are exposed, on account of their gender, to physical or mental violence, including sexual violence and domestic violence.



Source: website of the CJEU

CASE OF *WAŁĘSA V. POLAND*

On 23 November 2023, the European Court of Human Rights handed out its decision in Case *Wałęsa v. Poland* (application no. 50849/21). The Court decided that there has been a violation of Mr. Wałęsa's rights (Poland's former president and Nobel Peace Prize winner), namely the right to a fair hearing (Article 6(1)) and the right to respect for private and family life (Article 8). The case dates back to a civil suit Mr. Wałęsa filed in his homeland over a decade ago against a former associate, Krzysztof Wyszkowski, who had publicly accused him of collaborating with the communist security services. The 2011 decision was overturned nine years later thanks to a new process, known as extraordinary appeal, created by the Law and Justice government in 2017. The Court said that the CERPA is not an "independent and impartial tribunal established by law", meaning that Mr. Wałęsa's right to an independent and impartial tribunal established by law, a key requirement of the right to a fair hearing, has been violated. It also found a violation of the principle of legal certainty. Finally, the ECtHR, resorting to the pilot-judgment procedure under Rule 61 of the Rules of Court, requested that Poland to 'put an end to the systemic violations of Article 6 § 1 of the Convention identified in the present case' by taking 'appropriate legislative and other measures' to bring its domestic legal order in line with the requirements of an 'independent and impartial tribunal established by law'.

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CASE OF *PRZYBYSZEWSKA AND OTHERS V. POLAND*

On 12 December 2023, the European Court of Human Rights delivered its judgment in the case of *Przybyszewska and Others v. Poland* (applications nos. 11454/17 and 9 others), finding a breach of Article 8 (right to respect for private and family life) of the European Convention on Human Rights. The applicants, five same-sex couples who complained of a lack of any form of legal recognition for their respective relationships, challenged the decisions of the local Civil Status Office, which refused to accept their declarations, relying on the domestic law, which defined marriage only as a union between a man and a woman. The European Court of Human Rights concluded that Poland overstepped its margin of appreciation and failed in its duty to provide a legal framework for the recognition and protection of same-sex unions. Poland's argument, rooted in the traditional concept of marriage as a union between a man and a woman, was dismissed by the ECtHR clarifying that the case did not concern same-sex marriage.

CASE OF *VEIGA CARDOSO V PORTUGAL*

The European Court of Human Rights has ordered Portugal to pay more than €18,000 to a Portuguese citizen for violating his right to freedom of expression (by confusing it with 'defamation') in Case of Veiga Cardoso v Portugal (application no. 48979/19). The European Court ruled that the Portuguese courts violated Victor Veiga Cardoso's freedom to say what he felt by penalising a comment made about the prosecutor responsible for his daughter's parental regulation case. It considered the penalty imposed by the Portuguese court "manifestly disproportionate" and that "the comments constituted a form of venting".

EUROPEAN COURT OF HUMAN RIGHTS FINES PORTUGAL IN MORE THAN €36,000

The European Court of Human Rights fined Portugal in more than €36,000 for inadequate conditions of detention, lack of appeals and excessive length of criminal proceedings in the Portuguese judicial system. In Case of Ferreira Capitão and Gil Cardoso v. Portugal (applications nos 31519/22 and 41866/22), the applicants complained about the poor conditions of the Lisbon Central Prison, such as inadequate temperature, lack of fresh air, poor quality of food, lack of privacy in the showers and lack of requisite medical assistance, and the Court decided that there was a breach of Article 3 of the Convention concerning the inadequate conditions of detention and of Article 13 of the Convention as regards the lack of an effective remedy to complain about inadequate conditions of detention. In Case of Agostinho Ribeiro and Pessoa Leal v. Portugal (applications nos. 74693/17 and 17194/19), the European Court found a breach of Article 6 § 1 of the Convention concerning the excessive length of the criminal proceedings, stating that Portugal failed to meet the "reasonable time" requirement.

Source: website of the ECtHR

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LATEST NEWS ON OUR WEBSITE

APDEN IBERIAN CONFERENCE

The 1st Iberian Conference of APDEN (Portuguese Energy Law Association) entitled "Contributions to the Reform of the European Energy Market" took place on 9 November 2023 at the Campolide Campus of NOVA School of Law. The conference was organised jointly by APDEN, APE (Portuguese Energy Association) and NOVA School of Law through the NOVA Green Lab, in partnership with AEDEN (Spanish Energy Law Association), EFELA (European Federation of Energy Law Associations) and the Spanish Energy Club. José Luís da Cruz Vilaça, managing partner of CVA and President of APDEN, moderated the debate on Panel I, on the challenges of building the Iberian Energy Market (MIBEL) and the impact of European energy policy reforms.

EUROPEAN LAW IN THE ERA OF ARTIFICIAL INTELLIGENCE

José Luís da Cruz Vilaça, Lawyer and Founding Partner of Cruz Vilaça Advogados, and Paulo Sande, Lawyer and Partner of the same law firm, shared their views on the recent European legislation that seeks to regulate Artificial Intelligence (AI). In their testimony published in Pontos de Vista magazine, the two lawyers address issues such as the new European Union regulation on Artificial Intelligence, which not only positions Europe in a leading role worldwide, as it becomes the basis for managing the risks associated with AI. Read the full article here.

UNWRAPPING EU LAW: EUROPEAN SUPERLEAGUE COMPANY

Cruz Vilaça Advogados has just launched the first episode of its new podcast, entitled "Unwrapping EU Law". In this first episode, José Luís da Cruz Vilaça, managing partner of CVA, and Mariana Martins Pereira, principal associate, talk about the recent judgement of the Court of Justice of the European Union in the European Superleague Company case, where they discuss the consequences for the future of football scene and the competition issues that arise from the Court's judgment. Read the transcript here.

CRUZ VILAÇA ADVOGADOS HAS A STRENGTHENED TEAM

From January 1st 2024, CVA has a strengthened team, notably through the transition to partner of its senior counsel Mariana Tavares, in the context of a sustained growth strategy that has made our firm a benchmark in the legal world in Portugal and Europe, particularly in the areas of European Union and Competition, Digital and Energy Law and Fundamental Rights.

JOSÉ LUÍS DA CRUZ VILAÇA WAS A GUEST AT "CICLO GRANDES ADVOGADOS", ORGANISED BY RFF LAWYERS

José Luís da Cruz Vilaça, managing partner of CVA, was invited to take part in "Ciclo Grandes Advogados", organised by RFF Lawyers. This initiative of in-house training sessions with the Great Lawyers and Managing Partners of the Portuguese legal profession aims to promote the sharing of knowledge between generations, debating the challenges, changes and new opportunities in the world of law.

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LATEST NEWS ON OUR WEBSITE

REFORM OF THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

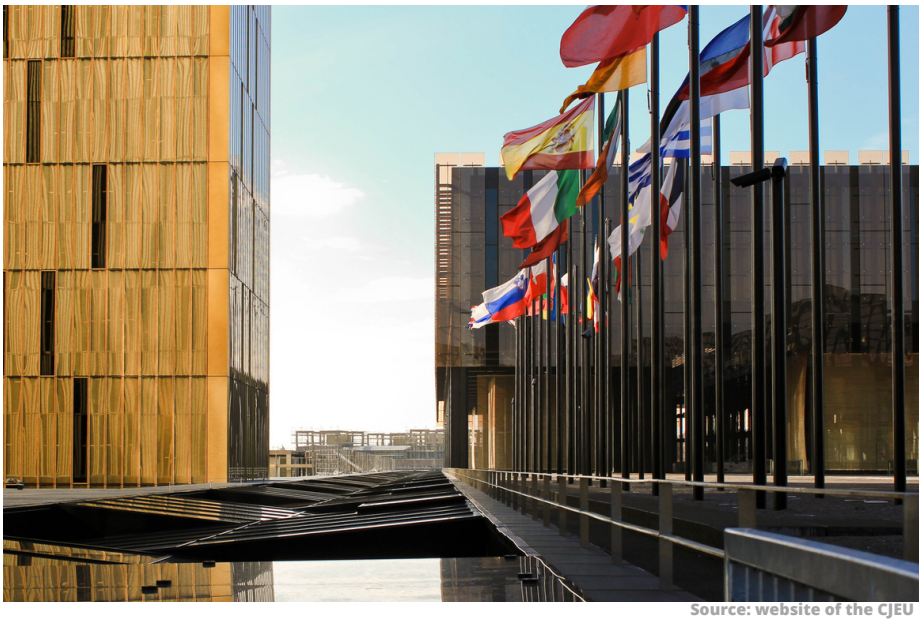
In this Newsletter, Cruz Vilaça Advogados analyses the request submitted by the President of the Court of Justice of the European Union to the European Parliament and to the Council of the European Union with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union. Based on the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, the Court of Justice's request is 'made against a background of sustained high levels of judicial activity marked by both the volume and complexity of cases brought before the Court of Justice' and has been designed along two main lines. First, the Court's request concerns the specific areas in which, according to Article 256(3) TFEU and the Statute, the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling by the national courts under Article 267 TFEU. Secondly, it concerns the mechanism by which the Court of Justice determines whether an appeal brought against decisions of the General Court handed down in respect of decisions of boards of appeals is allowed to proceed.

Read the Newsletter here.

MATCHING STATE AID

Cruz Vilaça Advogados launched its new initiative, "Legal Flash CVA". In this first brief informative note, we explore the Temporary Crisis and Transition Framework adopted by the European Commission on March 2023, which led to the approval of two state aid measures on 8 January 2024. This framework, known as "matching aid", allows Member States to grant higher amounts of aid to companies where there is a risk of investment being diverted from Europe.

Read the Legal Flash here.



Source: website of the CJEU

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