Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 13 March 2014[1]

Case C-562/12

MTÜ Liivimaa Lihaveis
v
Eesti-Läti programmi 2007-2013 Seirekomitee

(Request for a preliminary ruling from the Tartu Ringkonnakohus (Estonia))

(Regulation (EC) No 1083/2006 — Regulation (EC) No 1080/2006 — European Regional Development Fund — Powers of Monitoring Committee for an operational programme aiming at the promotion of European territorial cooperation — Joint programme of two Member States — Division of responsibilities between Monitoring Committee and Managing Authority of the programme — Prohibition of judicial review of Monitoring Committee decisions — Article 47 of the EU Charter of Fundamental Rights — Notion of implementing EU law — Acts of bodies, offices or agencies of the Union under Article 263 TFEU — Reviewable acts — National procedural autonomy — Principles of effectiveness and equivalence)

I – **Introduction**

1. The Estonia-Latvia Programme 2007-2013 is a cross-border cooperation programme carried out under the auspices of European territorial cooperation. The Tartu Ringkonnakohus (Tartu Regional Court, Estonia) is seeking guidance on whether an absolute ban on judicial review of a decision refusing funding for a project, that was made by the Monitoring Committee of the Programme ('the Monitoring Committee') complies with EU law. The Monitoring Committee Programme Manual (the 'Programme Manual') excludes any judicial remedy against its decisions. The programme is managed in conformity with an administrative agreement concluded between the two Member States of Estonia and Latvia, along with the Estonian Ministry of the Interior.

2. More particularly, the national court is concerned with the compliance of the ban with Article 63(2) of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999,[2] read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union (the 'Charter') which protects the right to an effective remedy and a fair trial.

1 — Original language: English.

2 — OJ 2006 L 210, p. 25. Regulation 1083/2000 was repealed by Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 OJ 2013, L 347 p. 320. Regulation 1083/2006 governs, however, the case to hand *ratione temporis*.

3. The national court would also like to know whether the General Court of the European Union, or a national court, has jurisdiction to hear and determine actions against Monitoring Committee decisions. This issue is intimately bound up with determining whether the decision of the Monitoring Committee can be considered to be an act of a body, office or agency of the European Union for the purposes of Article 263 TFEU.

4. The case to hand is complicated by the multi-stage nature of the award of aid under European territorial cooperation. It is not clear from the order for reference whether, as a matter of Estonian law, the decision of the Monitoring Committee rejecting MTÜ Liivimaa's Lihaveis' application is a legally binding decision amenable to judicial review, or whether a decision of this kind is made at a later point in the process by, for example, the managing authority of the programme. Further, although the Estonia-Latvia Programme 2007-2013 is an EU programme, there will inevitably be differences in the schemes of judicial review in each Member State that are applicable to its implementation.

5. Notwithstanding these complexities, it is a fundamental principle of EU law that, even though it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, EU law nevertheless requires that national legislation does not undermine the right to effective judicial protection.[3] The Member States are to establish a system of legal remedies and procedures which ensure respect for that right.[4] It is against the backdrop of this imperative that I will consider the questions referred by the Tartu Ringkonnakohus.

II – **Legal framework, main litigation and the questions referred**

A – *Estonia-Latvia Programme and the pertinent EU law and Estonian provisions*

1. Introduction

6. The Estonia-Latvia Programme 2007-2013 constitutes an 'operational programme' under Article 2(1) of Regulation No 1083/2006. Moreover, as a territorial cooperation project involving more than one Member State, it is also governed by Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999.[5]

2. Legal framework

7. The operational programme was approved by Commission decision C (2007) 6603 final of 21 December 2007,[6] and was drawn up with the objective of promoting European territorial cooperation. It receives Community aid from the European Regional Development Fund (the 'ERDF').

3 — Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 42 and case law cited.

4 — Ibid.

5 — OJ 2006 L 210, p. 1. It was pointed out by the European Commission at the hearing that this is a *lex specialis* for European territorial cooperation programmes. Regulation 1080/2006 was repealed with effect from 1 January 2014 by Article 15 of Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 laying down provisions on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 OJ 2013 L 347, p. 289. Regulation 1080/2006, however, is the pertinent regulation *ratione temporis*.

6 — According to the order for reference, on 24 October 2012, the Commission adopted Decision C(2012) 7497 amending Decision C(2007) 6603.

8. Basic management structure for European Regional Development fund programmes is provided for in Article 59(1) of Regulation No 1083/2006, which states that for each operational programme, the Member State shall designate a managing authority, a certifying authority, and an audit authority. However, Article 59(5) of Regulation No 1083/2006 provides that specific rules on management and control are laid down in Regulation No 1080/2006 for operational programmes falling within the European territorial cooperation objective.

9. Article 60 of Regulation No 1083/2006 sets out the functions of the managing authority which is to be responsible for managing and implementing the operational programme in accordance with the principle of sound financial management. Among other things, the managing authority is responsible for ensuring that operations are selected for funding in accordance with the criteria applicable to the operational programme and that they comply with applicable Community and national rules for the whole of their implementation period. The managing authority is to guide the work of the monitoring committee and provide it with the documents required to permit the quality of the implementation of the operational programme to be monitored in the light of its specific goals.

10. Article 63 of Regulation No 1083/2006, cited in the preliminary reference as the pertinent EU law provision, introduces the monitoring committee. Pursuant to it, each Member State is given a time limit to set up a monitoring committee for each operational programme, in agreement with the managing authority. A single monitoring committee may be set up for several operational programmes. Each monitoring committee is bound to draw up its rules of procedure within the institutional, legal and financial framework of the Member State concerned and adopt them in agreement with the managing authority in order to exercise its missions in accordance with the regulation.[7]

11. Under Article 70(1)(a) of Regulation No 1083/2006, the Member States shall be responsible for the management and control of operational programmes, and vested with specific tasks.

12. As to the special rules applicable to territorial cooperation programmes, Article 14 of Regulation No 1080/2006 states, inter alia, that Member States participating in an operational programme shall appoint a single managing authority, a single certifying authority and a single audit authority, the latter being situated in the Member State of the managing authority. The managing authority, after consultation with the Member States represented in the programme area, is to set up a joint technical secretariat. It is to assist the managing authority and the monitoring committee in carrying out their respective duties. Each Member State participating in the operational programme shall appoint representatives to sit in on the monitoring committee referred to in Article 63 of Regulation No 1083/2006.

13. Article 15(1) of Regulation No 1080/2006 states, inter alia, that the managing authority shall, subject to exceptions, perform the duties provided for in Article 60 of Regulation No 1083/2006.

14. Pursuant to Article 19(3) of Regulation No 1080/2006, in addition to the tasks referred to in Article 65 of Regulation No 1083/2006, the monitoring committee or a steering committee reporting to it shall be responsible for selecting operations.

15. In order to implement the Estonia-Latvia Programme 2007-2013 a separate management system was established in accordance with a common agreement struck between the two governments and the Ministry of the Interior of the Republic of Estonia. The management structure is mainly located in Estonia.

7 — Under Article 64(1) of Regulation No 1083/2006, the monitoring committee is to be chaired by a representative of the Member State or the managing authority. Its composition is to be decided by the Member State in agreement with the managing authority. Article 64(2) of Regulation No 1083/2006 provides, inter alia, that at its own initiative or at the request of the monitoring committee, a representative of the Commission is to participate in the work of the monitoring committee in an advisory capacity.

16. The Ministry of the Interior of the Republic of Estonia performs the task of the Managing Authority (see Chapter 7.2.1 of the Estonia-Latvia Programme 2007-2013), the Certifying Authority (see Chapter 7.3.1 of the Estonia-Latvia Programme 2007-2013) and the Audit Authority (see Chapter 7.4.1 of the Estonia-Latvia Programme 2007-2013). The Managing Authority set up a Joint Technical Secretariat (JTS) (Chapter 7.7 of the Estonia-Latvia Programme 2007-2013) which administers the operational programme.

17. In addition, a Monitoring Committee consisting of seven members from both Estonia and Latvia was also created. This occurred by virtue of the common agreement referred to in paragraph 15 above, Article 14(3) of Regulation No 1080/2006, Articles 63 and 64 of Regulation No 1083/2006, and Chapter 7.6.2 of the Estonia-Latvia Programme 2007-2013. It is a decision of this body that is challenged in the main litigation.

18. The Monitoring Committee adopted a Programme Manual containing guidelines on preparing aid applications as well as on implementing and monitoring the project, reporting on it and completing it. Chapter 7.6.3 of the Estonia-Latvia Programme 2007-2013 provides that the 'Monitoring Committee shall draw up its Rules of Procedure and adopt them in agreement with the Managing Authority in order to exercise its missions in accordance with the General Regulation and the ERDF Regulation'. [8]

19. Chapter 6.6 of the Programme Manual provides: 'The decisions of the MC [Monitoring Committee] are not appealable'.

20. Paragraph 1(3) of the 2007 to 2013 Estonian Structural Assistance Act (Perioodi 2007-2013 struktuuritoetuse seadus, StS 2007-2013) states that various sections of the Act apply to the grant and use of structural assistance based on the operational programmes of European territorial cooperation objective specified in Article 3(2)(c) of Regulation No 1083/2006. Pursuant to Paragraph 1(5) of the Estonian Structural Assistance Act, the provisions of the Law on administrative procedure (haldusmenetluse seaduse) apply to the proceedings prescribed in this Act, taking account of the specifications arising therefrom. [9]

B – *Main litigation and questions referred*

21. In February 2010, MTÜ Liivimaa Lihaveis, which is an Estonian association of cattle breeders, submitted an application under the Estonia-Latvia Programme 2007-2013 for financing of a project '(t)o create a new product and brand which is produced from quality beef animals raised on the most diversified grasslands of Estonia and Latvia' (the 'project').

22. The project submitted by the MTÜ Liivimaa Lihaveis passed the first stage of the selection procedure by being classified as technically eligible for aid. Afterwards it was referred for a quality assessment carried out by the JTS, which in turn submitted a ranking to the Monitoring Committee. On 19 April 2010 the JTS sent a letter to MTÜ Liivimaa Lihaveis informing it that its application had

8 — However, according to observations made by the Commission at the hearing, the Programme Manual was adopted on the basis of Article 5(1) of Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund (OJ 2006 L 371 p. 1). See also Corrigendum to Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund OJ 2007 L 45, p. 3.

9 — The order for reference states that the Tartu Halduskohus was of the view that these provisions preclude the application of the Law on administrative procedure to projects under the Estonia Latvia Programme. See further paragraph 25 below.

passed the first stage of the selection process and that it had been declared technically eligible for aid. MTÜ Liivimaa Lihaveis was further informed that the JTS would proceed to the qualitative assessment of the application, but that the 'final decision' would be taken by the Monitoring Committee on 29 June 2010.

23. At the meeting held on 28 and 29 June 2010, the Monitoring Committee rejected MTÜ Liivimaa Lihaveis' application for aid. On 7 July 2010 MTÜ Liivimaa Lihaveis was informed of this decision, of the Monitoring Committee, in a letter from the JTS.

24. MTÜ Liivimaa Lihaveis initiated legal proceedings before the Tartu Halduskohus (Administrative Court, Tartu) on 1 November 2010 seeking the annulment of the Monitoring Committee's decision rejecting its application and an order requiring the Monitoring Committee to re-examine the application and to adopt an administrative decision consistent with the law.

25. By order of 21 September 2011, the Tartu Halduskohus dismissed the action for annulment of the contested decision on the ground that the decision did not constitute an administrative act which could be challenged before an administrative court. Paragraph 1(3) in conjunction with (5) of the 2007 to 2013 Estonian Structural Assistance Act precluded the application of the provisions of the Estonian Law on administrative procedure to projects under the Estonia-Latvia Programme. According to the Halduskohus, in view of the specific provisions on the decision-making procedure laid down in the programme document, it could be concluded that the legislator had intended to make the national provision on administrative procedure inapplicable to the Monitoring Committee, which is not an administrative organ but an international committee.

26. Moreover, the Halduskohus took the view that, even if the decision of the Monitoring Committee were classified as an administrative act, it was an internal administrative act and the applicant had no right of action against it because the contested decision did not create, terminate or alter any rights or obligations for persons outside of the administration.

27. In October 2011, the applicant appealed against the order of the Tartu Halduskohus to the Tartu Ringkonnakohus. It decided to stay the proceedings and to refer the following question to the Court of Justice of the European Union for a preliminary ruling:

'(a) Are the rules of procedure of a monitoring committee jointly set up by two Member States (and the Programme Manual adopted by the Monitoring Committee for the Estonia-Latvia Programme 2007-2013), which provide that "The decisions of the Monitoring Committee are not appealable [at any place of jurisdiction]"[10] (Chapter [6.6.4] of the Programme Manual) compatible with Article 63(2) of Council Regulation No 1083/2006 […] in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union?

(b) If Question (a) is to be answered in the negative, must point (b) of the first paragraph of Article 267 of the Treaty on the Functioning of the European Union be interpreted as meaning that Chapter [6.6.4] of the Programme Manual adopted by the Monitoring Committee for the Estonia-Latvia Programme 2007-2013 is an act of an institution, body, office or agency of the Union which must be declared invalid?

(c) If Question (a) is to be answered in the negative, must the second sentence of the first paragraph of Article 263 in conjunction with Article 256(1) and Article 274 of the Treaty on the Functioning of the European Union be interpreted as meaning that the General Court of the

10 — According to the correction of the European Commission of 15 November 2013 to its written observations the words in square brackets did not appear in the version of the Programme Manual that is applicable *ratione temporis* in the case to hand. This version states in its paragraph 6.6 that the 'decisions of the Monitoring Committee are not appealable.'

European Union or the competent court under national law has jurisdiction to hear and determine actions against decisions of the Monitoring Committee for the Estonia-Latvia Programme 2007-2013?'

III – **Analysis**

A – *Preliminary observations*

28. In my opinion the national court needs an interpretation of EU law in two key respects. They are (i) which courts are competent to resolve the dispute, those of a Member State or the General Court of the European Union; and (ii) whether the exclusion from judicial review of funding refusals is, on the basis of the facts arising in this case, compatible with EU law.

29. At the outset it is useful to note that if question (b), as referred by the national court, were to be answered in the affirmative, and the Monitoring Committee for the Estonia-Latvia Programme 2007-2013 were an act of an institution, body, office or agency of the Union for the purposes of Article 263 TFEU, the General Court of the European Union would indeed be competent to hear the action brought by MTÜ Liivimaa Lihaveis,' rather than the Estonian courts. This latter issue was raised by the national referring court in question (c). Therefore, I shall address the legal issues raised in questions (b) and (c) before proceeding to answer question (a) concerning the compatibility of Chapter 6.6 of the Programme Manual with EU law.

B – *The answer to questions (b) and (c)*

30. As I have already mentioned, the Monitoring Committee, the existence of which is required by Regulations Nos 1080/2006 and 1083/2006, is established under the terms of an agreement that was made between Latvia and Estonia. Regulation 1080/2006 is a *lex specialis* applicable to territorial cooperation programmes.[11] Article 19(3) of Regulation No 1080/2006 also states that the Monitoring Committee, or steering committee reporting to it 'shall be responsible for selecting operations.' It is this provision that is pivotal to the resolution of the dispute, given that the programme in issue falls within European territorial cooperation, rather than Article 63(2) of Regulation No 1083/2006, although the latter is referred to in question (a) in the order for reference.

31. It was clarified at the hearing that the agreement has not been concluded pursuant to the provisions relating to conclusion and ratification of international agreements. What we are dealing with seems to be an instrument that has been described as an international administrative agreement.[12] It is not uncommon for authorities of adjacent or neighbouring States to agree between themselves on performance of certain practical tasks, or implementation of technical or administrative cooperation without having recourse to formal treaty making procedures. The legal nature of such arrangements, which often involve the establishment of joint or mixed working groups or committees or other similar bodies, is murky under public international law.[13]

32. In any event, independently of how the legal nature of the Monitoring Committee is classified under international or national law, in my opinion it is beyond doubt that the Monitoring Committee is not an institution agency, body or office of the Union for the purposes of Article 263 TFEU, which equally excludes it from the jurisdiction of the General Court of the European Union.

11 — See recital 14 of Regulation No 1080/2006 and recital 48 of Regulation No 1083/2006.

12 — Klabbers, J., *The Concept of Treaty in International Law* (Kluwer, 1996) pp. 21 to 25, and Möllers, C., 'Transnationale Behördenkooperation Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung', ZaörV 65 (2005) 351.

13 — Klabbers, ibid pp. 97 to 94.

33. With regard to the first of these categories, the Monitoring Committee is plainly not an 'institution' of the European Union. These are designated in Article 13 TEU as comprising the Europe Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors.

34. However, the second sentence of the first paragraph of Article 263 TFEU, as introduced by the Lisbon Treaty, lays down a new provision of primary EU law under which the EU courts also review the legality the acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. [14] As the General Court has observed, it cannot be inferred from the wording of Article 263(1) TFEU that any entity or structure coming under or working within the European Union's organisational framework may automatically be regarded as an agency or office of the Union. [15]

35. Thus, for an entity to fall within this element of Article 263 TFEU, certain conditions must be met. The entity must be established by an EU act vesting it with legal personality and it must be included in the institutional and administrative structure of the European Union as reflected in the EU budget. [16]

36. There are some clear cut examples that fall within these parameters. Here I have in mind the bodies which have been established as EU agencies with legal personality, such as the Office for Harmonisation of the Internal Market, [17] the Community Plant Variety Office, [18] the European Aviation Safety Agency, [19] and the European Chemicals Agency. [20] Indeed, these were precisely the types of bodies that Article 263 TFEU, the wording of which differs from Article 230 EC, was designed to capture. [21] However, there are some cases that are not clear cut, such as, for example, the legal system of the European Schools, which is a *sui generis* system distinct from that of the European Union and the Member States. [22]

37. However, that is not the case with an entity such as the Monitoring Committee, which was jointly established by Estonia and Latvia, and not by the European Union through an EU legal instrument. Nor is the Monitoring Committee endowed with legal personality by an EU measure. From an organic point of view it has no budget line in the general budget of the European Union, or a separate budget established in an EU legal instrument. Rather, it is financed by the funds allocated by the European

14 — The General Court had, of course, jurisdiction to hear cases against agencies of the European Union before Article 263 TFEU made express reference to them. See Case T-411/06 *Sogelma* v *EAR* [2008] ECR II-2771, paragraphs 33 to 57.

15 — Case T-395/11 *Elti* v *Delegation of the European Union to Montenegro* [2012] ECR, paragraph 27.

16 — See Articles 55, 171 and 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities OJ 2006 L 390, p.1.See also Draft General Budget of the European Commission for the financial year 2013. Working Document Part III. Bodies set up by the European Union and having legal personality. COM(2012) 300 — May 2012. Regulation 1605/2002 was partially repealed, with effect form 1 January 2013, by Article 212 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.

17 — Established by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). Regulation 40/94 was repealed pursuant to Article 166 of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark (codified version) OJ 2009 L 78, p.1.

18 — Established by Council Regulation (EC) No 2100/94 on Community plant variety rights (OJ 1994 L 227, p. 1).

19 — Established by Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ 2002 L 240, p. 1).

20 — Established by 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).

21 — See my Opinion in Case C-270/12 *United Kingdom* v *Parliament and Council* [2014] ECR, points 23, 73 and 74.

22 — See e.g. Case C-196/09 *Miles and Others* [2011] ECR I-5105, paragraph 39, Case 44/84 *Hurd and Jones* [1986] ECR 29, paragraphs 3 to 6, 20 and 21; Case C-132/09 *Commission* v *Belgium* [2010] ECR I-8695.

Union and the two Member States to the operational programme in accordance with the EU law provisions governing the structural funds. The contested decision cannot be imputed to the Commission, so there can be no question of the Commission being the proper defendant before the General Court. [23]

38. As was acknowledged by the Commission at the hearing, Article 14(1) of Regulation No 1080/2006 states, inter alia, that Member States participating in an operational programme shall appoint a single managing authority, a single certifying authority, and a single auditing authority. It is obvious that this rule aims at preventing any lacunae concerning responsibility over the use of EU funding in the implementation of regional funds programmes involving more than one Member State.

39. In terms of judicial control, this inevitably means that the courts of the Member State where the single managing authority is situated are in principle competent to review its decisions. In my opinion the same rule must also apply to the decisions of the joint programme bodies such as the Monitoring Committee and the JTS, inasmuch as their decisions are independently capable of producing legal effects.

40. In other words, given this interpretation of EU law, it is difficult to envisage how the Monitoring Committee, at national level, could be considered to be a foreign authority or an international organisation that escapes any judicial control. This is significant because paragraph 8 (1) of the Law on administrative procedure seems to exclude bodies of this kind from the jurisdiction of Estonian administrative courts. [24]

41. This interpretation also prevents the emergence of problems appertaining to jurisdiction. In my opinion, the mixed nationality of the members of the Monitoring Committee is no impediment to judicial review of its decisions, since the object of such review would be *a decision of that body* as defined in the applicable EU law acts and programme documents. This is unaffected by the fact that the decisions of the Monitoring Committee are made by consensus among the delegates of the Committee from Estonia and Latvia.

42. Thus, I propose to dismiss arguments made by the Government of Latvia to the effect that, if the Court were to find that the decisions of the Monitoring Committee were judicially reviewable, then this might potentially result in a collision of some kind between the administrative jurisdictions of the Latvian and Estonian courts, given that the Monitoring Committee is comprised of members of both countries. As was pointed out by the Commission at the hearing, the operational programme parties agreed on Estonian jurisdiction, both with respect to the financial framework and the location of the above described programme bodies. These details are reflected in the Estonia-Latvia Programme 2007-2013.

43. Therefore, preliminary questions (b) and (c) should be answered jointly in the sense that decisions of the Monitoring Committee are not acts of an institution, body, office or agency of the Union, within the meaning of Article 263 TFEU, and it is the courts of Estonia and not the General Court of the European Union which have jurisdiction to hear and determine actions against the Monitoring Committee.

23 — E.g. *Elti* v *Delegation of the European Union to Montenegro*.

24 — This is the interpretation of the Law on administrative procedure that was made by the Tartu Halduskohus and which appears in the order for reference.

44. From a policy perspective this solution may put Latvian applicants for funding in a difficult situation due to inevitable linguistic problems, and their likely unfamiliarity with the Estonian legal system. It is regrettable that the Member States concerned did not consider establishing a cross-border body to review the legality of the funding decisions of the Monitoring Committee similar to the Benelux Court. Moreover, in my opinion nothing would have prevented the Member States from agreeing that Latvian courts are competent to review the decisions of the Monitoring Committee which are exclusively addressed to Latvian undertakings and residents.

C – *The answer to question (a)*

1. Preliminary remarks

45. Firstly, it is important to specify the arm of Article 47 of the Charter that is at issue in these proceedings. Like Article 6(1) of European Convention on Human Rights (the 'ECHR'), Article 47 of the Charter refers to a number of different rights that are essential to the administration of justice. These include the right to a fair and impartial hearing, which is to take place within a reasonable time, and the availability of effective remedies, to name only a few of its elements. The case file shows that the dispute to hand concerns an alleged infringement of the right of access to a court, since the Programme Manual imposes a blanket ban on the adjudication of the decision in issue. [25]

46. By its first question, the Tartu Ringkonnakohus asks in essence whether the Monitoring Committee, in adopting its rules of procedure under Article 63(2) of Regulation No 1083/2006, and by excluding judicial review of its own decisions, has complied with Article 47 of the Charter. However, as noted above, the pertinent provision in disputes, like the case to hand, involving European territorial cooperation, is Article 19(3) of Regulation No 1080/2006 and not Article 63(2) of Regulation No 1083/2006.

47. As I have already mentioned, in essence this case turns on whether the ban imposed by Chapter 6.6 of the Programme Manual, and indeed Estonian law if the findings of the Tartu Halduskohus are correct, breach the right of access to a court. However, as will be explained below, this arm of Article 47 of the Charter equally binds Member State courts to respect the principles of effectiveness and equivalence, which are also pertinent. Under the former principle Member States are bound to ensure that the remedies and procedural rules available to enforce rights arising from EU law do not render them impossible in practice or excessively difficult to enforce. Under the latter, Member State remedies and procedural rules must not be less favourable than those attaching to analogous claims of a purely domestic nature. [26] In my opinion, the principles of effectiveness and equivalence need to be brought under the umbrella of Article 47 of the Charter. [27]

48. The European Union is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the question of whether the measures adopted by them are in conformity with the basic constitutional charter, [28] namely the EU the FEU Treaties and the Charter. In my opinion, and contrary to the concerns expressed by the representative of Latvia at the hearing on the consequences of allowing judicial review of cross-border measures, it would be inconceivable for implementation of an EU programme to escape all judicial control merely through involvement of more than one Member State.

25 — This is a relatively unusual scenario, but one which has been considered by the Court. See classically Case 222/84 *Johnston* [1986] ECR 1651.

26 — Case C-93/12 *Agrokonsulting-04* [2013] ECR, paragraph 36 and case law cited.

27 — See the Opinion of Advocate General Bot of 14 March 2013 in *Agrokonsulting-04*.

28 — Case C-15/00 *Commission* v *EIB* [2003] ECR I-7281, paragraph 75 and case law cited. This principal was applied to the European Economic and Social Committee in Case T-117/08 *Italy* v *EESC* [2011] ECR II-1463, paragraph 32.

49. That said, subject to the guidance suggested below, it is for the national referring court to decide whether the judicial review arrangements in issue comply with the right of access to a court, as protected by Article 47 of the Charter. As a matter of EU law, it is free to apply its own remedies and procedural rules, subject to the principles of effectiveness and equivalence. Given that the dispute entails implementation of EU law, the substantive grounds of review which the Member State court is bound to apply include general principles of law and fundamental rights, along with the grounds of review available under Member State administrative law. [29]

50. Further, in my opinion EU law does not preclude the Member States from laying down more generous conditions for access to courts and judicial review than EU law, provided that it does not endanger the effective implementation of EU law. This applies both to the conditions for the grant of *locus standi* and the criteria for determining reviewable acts. [30]

51. For a correct understanding of the role of the general principles of EU law and Article 47 of the Charter for the case to hand, it is important to distinguish between two issues; namely (i) whether there has been a legally binding rejection of the application by MTÜ Liivimaa Lihaveis for funding under the Estonia-Latvia Programme and (ii) at which stage of the administrative procedure this took place. In other words, what was the decisive step in this respect? It is the first issue where Article 47 of the Charter is directly relevant, whereas the second issue is a matter for national procedural autonomy as limited by the general EU law principles of effectiveness and equivalence, the latter being an expression of the more general principle of non-discrimination.

2. Article 47 of the Charter and the right of access to a court

52. It is important to bear in mind that, due to Article 6(1) TEU, the Charter forms part of the primary law of the European Union. That being so, all EU legislation, including Article 19(3) of Regulation No 1080/2006, must be interpreted in conformity with Charter rights. [31]

53. The Court has noted that the European Court of Human Rights considers, in determining whether there has been a breach of the right of access to a Court, 'whether the limitations … had undermined the very core of that right, whether those limitations pursued a legitimate aim and whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved'. [32] Given the absolute nature of the alleged restriction on the right of access to a Court that is in issue in this case, weighty reasons indeed would be required before it could be justified.

54. It is beyond doubt that Estonia and Latvia are bound to comply with the right of access to a Court, as protected by Article 47 of the Charter, when they apply and implement the programme. Further, the Monitoring Committee itself is bound by this fundamental right. I recall that it is the Monitoring Committee that adopted the Programme Manual containing the impediment to access to a court.

29 — See for example Case C-241/07 *JK Otsa Talu* [2009] ECR I-4323. In Case C-336/00 *Huber* [2002] ECR I-7699, it was held at paragraph 40 that 'Commission approval of a national aid programme does not in any way have the effect of conferring on that programme the nature of an act of Community law'. As the Court went on to note in the same paragraph, this meant that where an *aid contract* was incompatible with a programme approved by the Commission, it was for the national court to draw the appropriate inferences from this in regard to *national law*, by taking into account the relevant Community law in applying national law (my emphasis). See also the analysis by Advocate General Alber at point 53 of his opinion in *Huber*. Thus, *Huber* did not displace the rule that, in public law judicial review proceedings, refusals to grant aid are to be tested against general principles of EU law and fundamental rights, alongside national grounds of judicial review.

30 — See generally Case C-362/06 P *Sahlstedt and Others* v *Commission* [2009] ECR I-2903, paragraph 43.

31 — Case C-400/10 PPU *McB* [2010] ECR I-8965.

32 — Case C-279/09 *DEB* [2010] ECR I-13849, paragraph 47. See also Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 63. E.g. before the European Court of Human Rights *Levages Prestations Services v. France*, 23 October 1996, § 40, *Reports of Judgments and Decisions* 1996-V and *Assunção Chaves v. Portugal*, no. 61226/08, § 71, 31 January 2012.

55. I am deeply convinced that a clearly non-legislative body like the Monitoring Committee cannot have competence to exclude judicial review of its own decisions with an effect that binds the relevant national courts. It would not fulfil the criteria 'provided for by law' which is required of any limitation on exercise of the rights recognised by the Charter.[33] Therefore, if any exclusion of access to justice regarding the decisions of the Monitoring Committee can lawfully be provided in this case, it must be a consequence of a clearly prescribed Estonian law, not of the Programme Manual.

56. In consequence, Article 47 of the Charter underscores the principles of the established case law to the effect that decisions refusing EU funding made by national authorities exercising implementing powers are to be open to judicial review.[34]

3. Article 47 of the Charter and the principles of effectiveness and equivalence

57. As I have already mentioned, the procedural and remedial autonomy of the national referring court is circumscribed by the principles of effectiveness and equivalence. As stated in paragraph 47, in my opinion these rules now fall under the umbrella of Article 47 of the Charter.

58. This is the background against which an assessment is to be made of whether the decision of the Monitoring Committee is a reviewable act in its own right, or only an internal procedural step before the final decision is taken by the Managing Authority. In the case of the latter alternative, account must also be taken of the fact that according to the Programme Manual (paragraph 6.7) the final step in the award of ERDF funding consists of the conclusion of a Subsidy Contract between the Managing Authority and the Lead Partner of the approved project. In other words, it is possible that the decision-making process does not lead to any administrative decision in the classical sense but to a private law or administrative law contract between the Managing Authority and the Lead Partner.

59. It may helpful to recall that at the EU level, in order to determine whether an administrative order brings about a distinct change in the applicant's legal position, it is necessary to look at the actual substance of the act challenged,[35] rather than form,[36] and the relevant background legal relations.[37]

60. Thus, acts which, although adopted in the course of a preparatory procedure, mark the culmination of a distinct stage in the main procedure and produce legal effects[38] attract the right to judicial review. It is useful to point out that the Court has ruled specifically on the legal effects of decisions taken by EU bodies precluding certain applicants from EU funding in the early stages of a multi-stage process. The Court has held that the drawing-up of lists can entail legal effects, in so far as it may result in the omission of certain undertakings from those lists and thus deprive them of participating in contracts.[39]

61. Here I would add that, in modern administrative multistage decision-making, the outcome may not be an administrative decision but an administrative law or a private law contract between the authority and a private party. Such a contract may remain uncommunicated or even inaccessible to the failed applicants.[40] In other words, in such circumstances the decision that has objectively rejected the

33 — See Article 52(1) of the Charter.

34 — *JK Otsa Talu.*

35 — Order of 31 March 2011 in Case C-433/10 P *Mauerhofer* v *Commission*, paragraph 58.

36 — Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 55 and case law cited.

37 — *Mauerhofer* v *Commission*, paragraph 61, and *Internationaler Hilfsfonds* v *Commission*.

38 — The Opinion of Advocate General Bot of 5 July 2012 in Case C-402/11 P *Jager & Polacek* v *OHIM* [2012] ECR, point 42, citing Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

39 — Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, paragraph 13.

40 — According to Liivimaa Lihaveis' answer to the written questions of the Court there was e-mail exchange between the Managing Authority of the programme and the Ministry of the Interior of Estonia in July 2010 where the former had explained that in the framework of the Estonia-Latvia Programme no administrative decision are taken concerning approval or rejection of projects. Unsuccessful candidates will only receive a letter explaining the reasons for refusal.

funding application may have been taken earlier than the conclusion of the contract. In my opinion, in such circumstances the applicant must be able to challenge that rejection before the courts unless a form of legal action is available against the negative funding decision other than administrative appeal. [41]

62. The order for reference does not contain an exposé of the relevant national provisions relating to administrative procedure and administrative courts procedure. Therefore it is not possible to ascertain which remedies and forms of action are available in corresponding purely national settings. However, as I have already stated, there must be a remedy available in the case of rejection of an application for funding, and this remedy must fulfil the conditions following from the principles of effectiveness and equivalence. Ultimately, the national legal order of the Member State is bound to provide 'a free-standing action' for an examination of whether national provisions are compatible with EU law, if all other legal remedies available under national law fail to guarantee effective judicial protection. [42]

63. With regard to the principle of effectiveness, the Court has consistently held that, in order to determine whether a Member State rule renders EU law impossible in practice or excessively difficult to enforce, factors to be taken into account include the role of the provision in the procedure, its progress and its special features viewed as a whole and 'the principles which lie at the basis of the national legal system concerned, such as the protection of the rights of the defence, the principal of legal certainty and the proper conduct of the proceedings'. [43] It follows that, in the appreciation of whether the decision of the Monitoring Committee is a reviewable act, the national court must consider if there are alternative remedies providing for effective legal protection, other than an administrative appeal.

64. With regard to the principle of equivalence, I am concerned by the fact that only funding under European territorial cooperation programmes seems to be excluded from judicial review in Estonia. This would appear to amount to a special and restrictive remedial regime that does not apply to analogous claims of a purely domestic (and in this case Estonian) nature. It is for the national court to decide, however, whether the principal of equivalence has been breached. [44]

4. The scope of judicial review required under general principles of EU law

65. Finally, I close by making reference to the scope of judicial review available to candidates whose applications have been declined by the Monitoring Committee.

66. In my opinion, the funding decision contested by MTÜ Liivimaa Lihaveis is ultimately discretionary in nature in the sense that even those applicants who fulfil the legal criteria and conditions for funding do not have a subjective right to receive it. This is because there may be more applications fulfilling the criteria than funds available. Alternatively, none of the competing projects may necessarily be deemed to be worth funding, even if they meet the formal and technical eligibility criteria.

41 — There was a detailed discussion at the hearing on whether or not the Managing Authority is bound by the decisions of the Monitoring Committee, and whether or not the former has powers to override rejection of aid applications made by the latter. In my opinion, this is hardly relevant, given that the only notification sent to the applicant was the contested letter. Moreover, Rule 5, point 8, of the Rules of Procedure of the Monitoring Committee states that in 'case the Managing Authority has profound objections concerning the compliance of a decision taken by the Monitoring Committee with the legal basis of the Programme, the decision shall not be taken until the Managing Authority by communicating with the relevant authorities and organisations will have clarified the matter. … A new decision by the Monitoring Committee must take the report into consideration'.

42 — *Unibet*, paragraph 65.

43 — *Agrokonsulting-04*, paragraph 48; See also Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14 and Case C-63/08 *Pontin* [2009] ECR I-10467, paragraph 47.

44 — *Agrokonsulting*, paragraph 39.

67. This means that even if the project of MTÜ Liivimaa Lihaveis fulfilled all of the criteria established pursuant to European territorial cooperation, funding may still be refused.

68. Further, in my opinion the Member State court must take into account the reality that the Monitoring Committee is bound by the same criteria as are applicable to EU institutions when they exercise a power of appraisal. In this context it has been held that, 'respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.[45] These elements are, in my opinion, part of the duty of good administration, which is now reflected in Article 41 of the Charter.

69. However, this is the limit of the scope of judicial review that the Member State court is required by EU law to undertake.[46]

70. I therefore propose that question (a) is answered to the effect that irrespective of the rules of a monitoring committee jointly set up by two Member States in the context of the European Regional Development Fund, such as the Programme Manual adopted by the Monitoring Committee for the Estonia-Latvia Programme 2007-2013, and according to which decisions of the committee are not appealable, the principle of effective judicial protection and Article 47 of the Charter require that an applicant whose application for funding in accordance with Regulations Nos 1080/2006 and 1083/2006 has been rejected must be able to challenge that rejection before a competent court or tribunal of the Member State responsible for the management of the programme. It is for the national court to decide which procedural provisions and principles of national law govern access to a court in this context, subject to the requirements stemming from the principles of equivalence and effective judicial protection.

D – *Temporal effects*

71. I see no reason to accept the observations of the Government of Latvia to the effect that the temporal effects of the judgment should be limited *ex nunc* (with the exception of cases already before the courts concerning the Monitoring Committee) due to the fact that a supplementary charge would be incurred to national budgets if the judgment were rendered with *ex tunc* effect. The Government of Latvia has further argued that a wave of applications would arise with respect to Monitory Committee decisions that had already been executed, if the temporal effects of the judgment were not suspended.

72. Before the Court will take the exceptional step of limiting the temporal effects of a judgment two conditions need to be fulfilled; namely, those concerned must have acted in good faith and there must be a risk of serious difficulties if the temporal effects of the judgment are not limited.[47]

73. As regards the condition that those concerned should have acted in good faith, the Estonian and Latvian Governments in general, and the Monitoring Committee in particular, should have been aware of the requirements of effective judicial protection under EU law when they elaborated the relevant rules applicable to decision-making in the framework of European territorial cooperation.

45 — Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14.

46 — See e.g. *JK Otsa Talu*.

47 — Case C-262/12 *Vent de Colère and Others* [2013] ECR, paragraph 40 and case law cited.

74. As regards the requirement that there should be a risk of serious difficulties, the Court has made it clear that the financial consequences which might result for a Member State from a preliminary ruling have never, in and of themselves, justified limiting the temporal effect of such a ruling.[48] Moreover, as there cannot be a subjective right to the grant of aid in the context of the European Regional Development Fund, it does not follow that any financial consequences for the Member States concerned would necessarily result from the interpretation to be adopted by the Court.

75. In those circumstances, there is nothing in the present case to warrant derogation from the principle that a ruling on the interpretation of EU law takes effect from the date on which the rule interpreted came into force.

IV – **Conclusion**

76. On the basis of the preceding reasoning, I propose the following answer to the questions referred by the Tartu Ringkonnakohus:

Question (a)

The principle of effective judicial protection and Article 47 of the Charter of Fundamental Rights of the European Union require that an applicant whose application for funding in accordance with Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999 and Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 has been rejected, must be able to challenge that rejection before a competent court or tribunal of the Member State responsible for the management of the programme. It is for the national court to decide at which point in the decision-making process a reviewable act has been adopted, and which procedural provisions and principles of national law govern access to a court in this context, provided that they fulfil the requirements stemming from the principles of equivalence and effective judicial protection.

Questions (b) and (c)

Decisions of a monitoring committee jointly set up by two Member States in the context of the European Regional Development Fund, such as the Monitoring Committee for the Estonia-Latvia Programme 2007-2013, are not acts of an institution, body, office or agency of the Union, within the meaning of Article 263 TFEU, and it is the Member State courts, and not the General Court of the European Union, which have jurisdiction to hear and determine actions against the decisions of such monitoring committees.

48 — See to that effect, inter alia, Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 37 and case law cited.