



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 18 March 2021¹

Case C-546/18

FN,

GM,

Adler Real Estate AG,

HL,

Petrus Advisers LLP

joined parties:

Übernahmekommission

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Austria))

(Reference for a preliminary ruling – Article 47 of the Charter of Fundamental Rights of the European Union – Finality of decisions taken at the close of administrative procedures – Directive 2004/25/EC – Interpretation in conformity with EU law)

I. Introduction

1. The context of the present case is shaped by two separate proceedings initiated by the Übernahmekommission (Takeover Commission, Austria). The first (preliminary) proceeding established the (objective) facts of an infringement of the rules on mandatory takeover bids. Under the Austrian procedural rules, once the findings from the preliminary proceedings become definitive, the second (administrative penalty) proceeding is bound by those objective determinations when assessing whether the (subjective) criteria for the alleged infringement are also satisfied and when imposing sanctions on the individuals concerned.

2. It is in this context that the Bundesverwaltungsgericht (Federal Administrative Court, Austria), invoking Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Directive 2004/25/EC² ('the Takeover Bids Directive'), essentially enquires about the procedural rights that EU law provides for persons who were not parties to the 'first round' of preliminary proceedings, but who may face, due to their respective positions within the corporate structures of the companies that were the parties in the first proceedings, sanctions imposed on them in the 'second round' of administrative proceedings.

¹ Original language: English.

² Directive of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ 2004 L 142, p. 12).

II. Legal framework

A. EU law

3. Under Article 4(1) of the Takeover Bids Directive, the Member States shall designate one or more authorities to supervise bids for the purposes of the rules which they make or introduce pursuant to that directive. Pursuant to its Article 4(5):

‘The supervisory authorities shall be vested with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive.’

4. Article 5(1) of that directive contains the obligation to make a takeover bid. That obligation arises whenever ‘a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company ...’.

5. By virtue of Article 17 of the Takeover Bids Directive, entitled ‘sanctions’:

‘Member States shall determine the sanctions to be imposed for infringement of the national measures adopted pursuant to this Directive and shall take all necessary steps to ensure that they are put into effect. The sanctions thus provided for shall be effective, proportionate and dissuasive. Member States shall notify the Commission of those measures no later than the date laid down in Article 21(1) and of any subsequent change thereto at the earliest opportunity.’

B. Austrian law

6. The Allgemeines Verwaltungsverfahrensgesetz 1991 (1991 General Law on administrative proceedings) (‘the AVG’) regulates the proceedings of administrative authorities in Austria. Paragraph 24 of the Verwaltungsstrafgesetz 1991 (1991 Law on administrative penalties) states that, unless otherwise provided, the AVG shall also apply in administrative penalty proceedings.

7. The Bundesgesetz betreffend Übernahmeangebote (Federal Law on takeover bids), BGBl. [Federal Law Gazette] I No 127/1998 (‘the ÜbG’) regulates substantive and procedural aspects for public takeovers of shares and other securities of listed companies.

8. Paragraph 1(6) of the ÜbG defines the term ‘acting in concert’. Pursuant to Paragraph 23(1), where parties are found to ‘act in concert’, the mutually held shares or securities in an offeree company are aggregated when applying Paragraphs 22 to 22b of the ÜbG.

9. Paragraph 22 of the ÜbG concerns the obligation to make a takeover bid. That obligation is incumbent on ‘anyone who directly or indirectly obtains a controlling interest in an offeree company’ within 20 stock-market working days’. Paragraph 22a thereof extends that takeover bid obligation also to parties acting in concert when acquiring a ‘controlling interest’.

10. Paragraph 30(2) of the ÜbG states that the AVG applies to proceedings initiated by the Takeover Commission.

III. Facts, national proceedings and the questions referred

11. On 22 November 2016, the Takeover Commission issued a decision ('the Preliminary Decision') against Adler Real Estate AG ('Adler'), Mountain Peak Trading LLP ('Mountain Peak'), Westgrund AG ('Westgrund'), Petrus Advisers LLP ('Petrus') and GM (a natural person). That decision was handed down in the context of proceeding concerning the acquisition of a 'major holding' of shares with voting rights of 31.36% in Conwert Immobilien SE ('Conwert'), and the related failure to satisfy the obligation to submit a mandatory public takeover bid.

12. In the preliminary proceedings, the Takeover Commission found that, upon the reciprocal attribution of voting rights pursuant to Paragraph 23(1) of the ÜbG, a controlling interest within the meaning of Paragraph 22 of the ÜbG was acquired. The Takeover Commission had reached that threshold finding on the basis of the aggregation criteria for 'legal entities acting in concert' laid down in Paragraph 1(6) of the ÜbG. Pursuant to Paragraph 23(1) of the ÜbG, those voting rights in Conwert should therefore have been reciprocally attributable to Adler, Mountain Peak, Westgrund, Petrus, and GM for the first time on 29 September 2015. In principle, pursuant to Point 1 of Paragraph 22a of the ÜbG, that acquisition of a 'major holding' by 'persons acting in concert' should have led to a mandatory takeover bid for Conwert within a period of 20 stock-market working days.

13. By decision of 1 March 2017, the Oberster Gerichtshof (Supreme Court, Austria) dismissed a challenge against the Preliminary Decision. The Preliminary Decision became definitive.

14. Subsequently, the Takeover Commission initiated administrative penalty proceedings against, inter alia, GM, HL and FN (all natural persons). The liability of HL and FN arose from their functions as board member of Adler and director of Petrus, respectively, at the time of the alleged offense.

15. On 29 January 2018, the Takeover Commission issued its decision against GM (as a natural person), HL (in the capacity of board member of Adler) and FN (in the capacity of director of Petrus) ('Administrative Penalty Decision'). The Takeover Commission imposed administrative penalties on GM, HL and FN and held that the respective companies represented by HL and FN were accessorially liable.

16. In reaching that decision, the Takeover Commission based its factual findings on the Preliminary Decision, in particular with regard to the key finding that, on the basis of an agreement made on 29 September 2015, the parties concerned 'acted in concert' within the meaning of Paragraph 22a of the ÜbG. By failing to provide the Takeover Commission with a mandatory takeover bid within the statutory period of 20 stock-market working days, GM, HL and FN would be guilty of having breached Paragraph 22a(1) of the ÜbG, in conjunction with Paragraph 22(1) thereof. On that basis, the Takeover Commission imposed fines on GM, HL and FN and made Adler and Petrus accessorially liable for the fines imposed on HL and FN.

17. Appeals were brought against the Administrative Penalty Decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), the referring court. That court observes that, under Austrian law relating to administrative proceedings, a final preliminary decision of an administrative authority binds (the same, as well as other) administrative authorities and courts that must decide on the same factual and legal situation as

that which was decided on by the previous preliminary decision. The prerequisite for such binding effects is the existence of party identity. The same binding effects must also be observed by the administrative courts, subject again to party identity in the two proceedings.

18. As regards GM, the referring court considers that there is identity of parties for the purposes of the proceedings underlying the Preliminary and the Administrative Penalty Decisions. In respect of GM, it also considers all the other requirements for the binding effects of the Preliminary Decision to be satisfied under national law.

19. In so far as HL and FN are concerned, the referring court doubts whether identity of parties between the preliminary and administrative penalty proceedings was present. It observes that HL and FN were not present as ‘parties’ during the preliminary proceedings but merely acted as representatives of the companies Adler (for which HL acted as board member) and Petrus (for which FN acted as director). Such ‘party’ status for HL and FN (as natural persons) was only present during the administrative penalty proceeding. Nevertheless, during the administrative penalty proceeding, the Takeover Commission found the existence of ‘extended binding effects’ (*‘erweiterte Bindungswirkung’*) arising from the Preliminary Decision also for HL and FN (as natural persons).

20. It is within this factual and legal context that the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Do Articles 4 and 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids – read in the light of the principle of effectiveness under EU law – preclude an interpretation according to which a decision having the force of *res judicata* taken by the supervisory authority pursuant to Article 4 of Directive 2004/25/EC by means of which a natural person’s breach of national provisions adopted in implementation of Directive 2004/25/EC was established is not given binding effect in the context of administrative-penalty proceedings subsequently conducted by that supervisory authority against that same person, as a consequence of which that person once again has all the factual and legal pleas and evidence available to him to challenge the breach of law established in the decision that already has the force of *res judicata*?
- (2) Do Articles 4 and 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids – read in the light of the principle of effectiveness under EU law – preclude an interpretation according to which a decision having the force of *res judicata* taken by the supervisory authority pursuant to Article 4 of Directive 2004/25/EC by means of which a legal person’s breach of national provisions adopted in implementation of Directive 2004/25/EC was established is not given binding effect in the context of administrative-penalty proceedings subsequently conducted by that supervisory authority against the body authorised to represent that legal person, as a consequence of which that legal person (the body) once again has all the factual and legal pleas and evidence available to it to challenge the breach of law established in the decision that already has the force of *res judicata*?
- (3) (If Question [1] is answered in the negative) Does Article 47 of the Charter of Fundamental Rights of the European Union preclude a national practice according to which a decision having the force of *res judicata* taken by the supervisory authority pursuant to Article 4 of Directive 2004/25/EC by means of which a natural person’s breach of national provisions

adopted in implementation of Directive 2004/25/EC was established is given binding effect in the context of administrative-penalty proceedings subsequently conducted by that supervisory authority against that same person, with the result that that person is prevented from challenging, in law and fact, the breach of law already established with the force of *res judicata*?

- (4) (If Question [2] is answered in the negative) Does Article 47 of the Charter of Fundamental Rights of the European Union preclude a national practice according to which a decision having the force of *res judicata* taken by the supervisory authority pursuant to Article 4 of Directive 2004/25/EC by means of which a legal person's breach of national provisions adopted in implementation of Directive 2004/25/EC was established is given binding effect in the context of administrative-penalty proceedings subsequently conducted by that supervisory authority against the body authorised to represent that legal person, with the result that that person (the body) is prevented from challenging, in law and fact, the breach of law already established with the force of *res judicata*?

21. Written observations were submitted by Alder, HL, GM, the Takeover Commission, as well as the European Commission. With the exception of the Commission, those parties also replied to the questions put to them by the Court.

IV. Analysis

22. This Opinion is structured as follows. I shall start by setting out my understanding of the national law and, on that basis, suggest a simplification of the questions raised by the referring court (A). I will then set out the applicable yardstick under EU law (B), before turning to the present case (C).

A. The (national legislative) background and the questions raised

23. At first sight, the four questions formulated by the referring court, viewed in the context of the complex web of national rules and procedures, appear rather complicated indeed. Moreover, those questions seem to be quite far-reaching, touching in general on: the effectiveness of EU law; the status or binding effect of final administrative decisions, potentially coupled with the duty to revisit those final decisions; and fundamental rights in proceedings imposing criminal penalties.

24. In my view, this case can be approached in a much more circumscribed manner. Useful guidance can perhaps be provided to the referring court without engaging in all the intricacies of the national law, set out in quite some detail by the referring court, as well as the elements of conflicting national case-law. Intriguing as such discussions might be, I am not sure that they are in fact necessary in the context of the present case. Instead, I prefer to focus on the practical problem emerging, in particular from the point of view of the rights of the defence and access to a court, for the individuals being subject to such proceedings.

25. In order to be able to do so, there are three elements that must be discussed at the outset. First, what exactly is the issue under national law? Second, how does the Charter and its Article 47 interact with the Takeover Bids Directive and fit into the picture of the present case? Third, both of these points compel me to reformulate and simplify the questions raised by the referring court, hopefully without losing sight of the problem.

26. First, for the purposes of the present case, it is crucial to understand two elements of national administrative law: on the one hand, the procedural rules on how the Takeover Commission conducts its administrative proceedings for alleged infringements of the rules on mandatory takeover bids; and, on the other hand, the national procedural rules which bestow binding effect on administrative decisions that have become definitive.

27. The Takeover Commission has the power to initiate an investigation *inter alia* into whether a holder of securities failed to make a mandatory takeover bid, within the meaning of Paragraph 22(1) of the ÜbG, upon the acquisition of ‘major holdings’ in an offeree company. It can also do so where a group of parties is ‘acting in concert’ to acquire such holdings.³

28. However, the procedure is split into determinations of the *objective* and *subjective* elements of the failure to make a mandatory takeover bid.⁴ As the parties explain, those two determinations are made separately, with the *objective* determination of whether a party failed to submit a mandatory takeover bid being considered in a preliminary proceeding and decided by way of a preliminary decision. Nevertheless, the preliminary proceeding does not settle the question of criminal liability. That liability is dealt with by a subsequent determination to establish the *subjective* elements for the existence of administrative liability, which appears to amount to a sanction of a criminal nature.

29. The potential *judicial review* of each of those determinations follows a different path. The Takeover Commission explains that the preliminary and administrative penalty proceedings are subject to different instances of appeal. The *preliminary* proceeding can be appealed to the Oberster Gerichtshof (Supreme Court, Austria). However, it has been stated that the Supreme Court’s review in such cases is limited to matters of law only. Matters of fact cannot be reviewed by it. By contrast, the administrative penalty proceeding can be challenged before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), and in certain cases can also be challenged before the Verwaltungsgerichtshof (Higher Administrative Court, Austria). The Federal Administrative Court holds ‘full jurisdiction’ to review the decision resulting from the administrative penalty proceeding in law and in fact. However, that jurisdiction appears to be subject to the binding nature of a prior decision taken by the Takeover Commission or another authority or court, which has become definitive.

30. The Takeover Commission maintains that, as regards both instances of appeal, it acts as a ‘court of first instance’. Accordingly, for both the preliminary and administrative penalty proceedings, there are at least two instances of appeal.

31. The referring court explains that once an administrative decision taken by the Takeover Commission becomes final, the Takeover Commission itself, as well as other administrative authorities, are bound by that previous decision. Moreover, the same effects are then created for the Federal Administrative Court as well, if that court were called upon to decide on the same factual and legal situation as that which was before the Takeover Commission. Thus, the ‘two-rounds’ structure of proceedings before the Takeover Commission means that, in practice, the subsequent administrative penalty proceeding on the (subjective) elements of the failure to submit a mandatory takeover bid is bound by the binding force of the prior (objective) determinations of the preliminary proceeding, once a decision on that proceeding has become definitive.

³ Point 1 of Paragraph 22a of the ÜbG.

⁴ Pursuant to Paragraphs 33 and 35 of the ÜbG.

32. In short, this is where I understand the practical problem to lie. That which has been decided in the ‘first’ preliminary procedure binds all the subsequent procedures, both administrative and judicial. Moreover, or rather above all, that ‘binding effect’ is not only produced across procedures with regard to the same parties (identity of the parties across proceedings).⁵ It is also, rather crucially, produced with regard to situations where such ‘identity’ appears debatable, to say the least (for instance, when individuals are being sanctioned in the ‘second’ round in their personal capacity whereas, in the ‘first’ round, it was only their company that formally participated in the preliminary procedure).

33. Second, against the background of such a system, the referring court raises four questions. The *first* and *second* questions approach the compatibility of the Austrian national procedural rules on the finality of administrative decisions from the perspective of preserving the substantive effects of Articles 4 and 17 of the Takeover Bids Directive. The two questions differ on the issue of the identity of the parties, or the lack thereof, across the proceedings.

34. Articles 4 and 17 of the Takeover Bids Directive deal with the appointment and powers of a supervisory authority and the issuing of sanctions for infringement of the national measures adopted pursuant to that directive. However, it is not obvious, and the referring court does not explain, how those provisions are able to provide any guidance on the specific issues raised in the present proceedings.

35. The *third* and *fourth* questions approach the same issue from the perspective of the Charter. In essence, they ask whether Article 47 of the Charter would preclude national procedural rules which consider a decision of an administrative authority concerning breaches of the national rules on takeover bids, which has become final, to bind the same administrative authority in a later (administrative) criminal proceeding. The third question seeks guidance on that compatibility from the perspective that party identity between the two proceedings conducted by said administrative authority exists. The fourth question poses the same question from the perspective that there is a lack of party identity.

36. Read together, the four questions raised by the referring court thus appear to juxtapose giving ‘full effectiveness’ to the Takeover Bids Directive with the adherence of the procedural rights protected by, inter alia, the Charter. The referring court seems to suggest that a certain tension exists between those two aims. Indeed, the silent assumption appears to be that there can either be effectiveness of the sanctions, or protection of fundamental rights, but not both. There may even be a further silent assumption, namely that if a sanction is to be ‘effective’, it ought not to be disturbed too much by the rights of the parties.

37. I do not think that this is a good starting assumption.

38. Instead, it is uncontested that Austria’s rules on the supervision of takeover bids, as inter alia contained in the ÜbG, constitute implementation of the Takeover Bids Directive, and thus EU law, for the purposes of Article 51(1) of the Charter. Any national proceeding conducted pursuant to the framework of the Takeover Bids Directive must thus be compatible with Article 47 of the Charter and any rights guaranteed by EU law.

⁵ As the referring court noted would normally be the condition under national law – see above, point 17 of this Opinion.

39. Thus, the real issue, in my view, is not that one must choose between ‘full effectiveness’ and ‘fundamental rights’. Rather, the genuine issue is whether the Austrian procedural rules, as applied and evidenced by the present case, are compatible with Articles 4 and 17 of the Takeover Bids Directive, read in conjunction with Article 47 of the Charter and the rights guaranteed by EU law.

40. Third, seen in this light, the four questions raised by the referring court become two, or rather one, with two sub-questions. Therefore, the questions referred can essentially be rephrased to enquire whether the application of the national procedural rules, as evidenced by the present case, is compatible with Articles 4 and 17 of the Takeover Bids Directive, if read in the light of the principle of respect for the rights of the defence and/or Article 47 of the Charter. That overarching question has two further sub-questions: a scenario where party identity across the procedures is present (Questions 1 and 3) and where such identity is missing (Questions 2 and 4).

41. Those questions are posed with a particular focus on the administrative penalty proceeding. However, as becomes clear, that proceeding is not the origin of the problem. That problem begins ‘upstream’ with the protection of such rights during the preliminary proceeding by the Takeover Commission and the limited review of the resulting findings before the Supreme Court, with those issues then being carried ‘downstream’ into the subsequent (administrative) criminal (and potentially further) proceedings.

42. Given the importance of the preliminary proceeding, I shall thus begin with Questions 2 and 4 and the protection of fundamental rights of those parties that did not participate in the preliminary proceeding and (therefore) were unable to challenge the findings made in the Preliminary Decision (C.1). Only thereafter shall I turn to Questions 1 and 3 and the situation of party identity between proceedings, albeit only briefly (C.2). Before doing so, however, I shall outline the fundamental rights standard applicable to both sets of questions (B).

B. The EU law requirements

1. Administrative proceedings and the rights of the defence

43. Respect for the rights of the defence is a general principle of EU law, which applies where an authority is minded to adopt a measure which will adversely affect an individual.⁶ In those circumstances, the addressee of that decision must be put in a position to be heard and to submit his or her observations *before* that decision is taken.⁷ Those rights are indispensable in *all* proceedings leading to an adverse decision for the party concerned, be they of a civil, criminal, administrative, or other nature.⁸

⁶ See judgments of 22 October 2013, *Sabou* (C-276/12, EU:C:2013:678, paragraph 38 and the case-law cited); of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 84); and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 39 and the case-law cited).

⁷ Judgments of 19 February 2009, *Kamino International Logistics* (C-376/07, EU:C:2009:105, paragraphs 42 to 43); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 47); and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 41).

⁸ Judgments of 14 September 2010, *Akzo Nobel Chemicals and Akros Chemicals v Commission* (C-550/07 P, EU:C:2010:512, paragraph 92 and the case-law cited); of 5 March 2015, *Commission and Others v Versalis and Others* (C-93/13 and C-123/13 P, EU:C:2015:150, paragraph 94 and the case-law cited); and of 6 October 2020, *Bank Refah Kargaran v Council* (C-134/19 P, EU:C:2020:793, paragraph 56).

44. Crucially, the respect for a party's subjective rights of the defence must be safeguarded *by administrative authorities* when carrying out their proceedings.⁹ Those rights must be available at the point in time in which they become implicated.¹⁰ Only in this manner can it be ensured that the authority concerned takes all the relevant information into account, and that the person affected is permitted to correct any errors and argue in favour of the non-adoption of an adverse decision.¹¹

2. Judicial proceedings and Article 47 of the Charter

45. The first paragraph of Article 47 of the Charter provides for the right to an effective remedy before a tribunal. Key components of that right are the principle of equality of arms, including the principle of *audi alteram partem*,¹² and the principle of procedural equality.¹³ By imposing the obligation to provide each party with a reasonable opportunity to present their case in conditions that do not place one of the parties in a clearly less advantageous position than the other,¹⁴ Article 47 of the Charter also concerns itself with the protection of the rights of the defence.¹⁵

46. It is true that the full range of guarantees flowing from Article 6(2) and (3) of the European Convention on Human Rights ('ECHR'), to which Articles 47 and 48 of the Charter correspond, only arises in proceedings liable to lead to a penalty that is 'criminal' in nature.¹⁶ However, it is also clear from the wording of Article 47 of the Charter that that provision is not limited to proceedings which lead to the imposition of 'criminal' penalties alone. Indeed, that provision establishes a nucleus of rights which must be protected in all judicial proceedings.¹⁷

⁹ See judgments of 26 September 2013, *Texdata Software* (C-418/11, EU:C:2013:588, paragraph 83 and the case-law cited), and of 17 March 2016, *Bensada Benallal* (C-161/15, EU:C:2016:175, paragraph 33 and the case-law cited).

¹⁰ See, to that effect, judgments of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraph 90); of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraphs 47 to 49); and of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraphs 42 and 44 and the case-law cited).

¹¹ Judgments of 21 December 2011, *France v People's Mojahedin Organization of Iran* (C-27/09 P, EU:C:2011:853, paragraph 65 and the case-law cited); of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 47); and of 16 October 2019, *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:861, paragraph 41).

¹² Judgment of 21 September 2010, *Sweden and Others v API and Commission* (C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 88 and the case-law cited).

¹³ Judgment of 30 June 2016, *Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (C-205/15, EU:C:2016:499, paragraph 36 and the case-law cited).

¹⁴ Judgment of 17 July 2014, *Sánchez Morcillo and Abril García* (C-169/14, EU:C:2014:2099, paragraph 49).

¹⁵ Judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67), and of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 77 and the case-law cited).

¹⁶ See, to that effect, judgment of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraphs 42 and 43). See also ECtHR 10 December 2020, *Edizioni del Roma Società Cooperativa A.R.L. et Edizioni del Roma S.R.L. v. Italy* (ECLI:CE:ECHR:2020:1210JUD006895413, § 40 and the case-law cited).

¹⁷ See, to that effect, judgments of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 56 and the case-law cited), and of 2 February 2021, *Consob* (C-481/19, EU:C:2021:84, paragraph 37 and the case-law cited).

47. A review into whether said nucleus of rights has been observed must be available, both in law and in fact, by a ‘tribunal’ within the meaning of Article 47 of the Charter.¹⁸ For the purposes of the case-law, such a body must be established by law; be permanent; have compulsory jurisdiction; feature a proceeding that is *inter partes*; apply rules of law; and be independent (internally and externally).¹⁹

48. By default, in order for judicial review under the first paragraph of Article 47 of the Charter to be effective, that review requires *full jurisdiction* at least in *one instance*.²⁰ The scope of the review by such a ‘tribunal’ may be limited, for example, to questions of law only.²¹ However, in that case, the administrative authority competent to render the decision at issue must *itself* satisfy all the criteria of a ‘tribunal’ for the purposes of Article 47 of the Charter.²² Thus, in one way or another, there must be at least one fully independent instance, which will qualify as ‘tribunal’ for the purposes of the first paragraph of Article 47 of the Charter, and which is entitled to assess the case in full jurisdiction, that is to say involving elements of law as well as those elements of fact.

C. The present case

1. Different parties in subsequent administrative proceedings

49. The referring court explains that, during the preliminary proceeding, the Takeover Commission carried out an examination into whether the conduct of the parties to the proceedings could (objectively) be regarded as ‘acting in concert’ to acquire ‘major holdings’ in Conwert and whether that should have triggered the obligation to make a mandatory takeover bid. In the subsequent (administrative criminal) proceeding, the Takeover Commission then deemed itself bound by those (objective) findings for determining the subjective elements of the failure to make a mandatory takeover bid. It considered those binding effects to arise despite the fact that the preliminary and administrative criminal proceedings did not concern the same participants.

50. In my view, this clearly raises issues under EU law, in both of the dimensions just outlined: from the perspective of the exercise of the rights of the defence of the parties concerned (a) and the lack of a possibility for review by a court with ‘full jurisdiction’ (b).

¹⁸ See, to that effect, judgment of 11 September 2014, *CB v Commission* (C-67/13 P, EU:C:2014:2204, paragraphs 43 to 46). See also ECtHR 10 December 2020, *Edizioni del Roma Societa Cooperativa A.R.L. et Edizioni del Roma S.R.L. v. Italy* (ECLI:CE:ECHR:2020:1210JUD006895413, § 90 and the case-law cited).

¹⁹ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16, EU:C:2018:117, paragraph 38 and the case-law cited). See also, as regards the ‘internal’ aspect of independence, judgment 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 122).

²⁰ Judgments of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 49), and of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraphs 54 to 56 and the case-law cited).

²¹ See, to that effect, judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraphs 61). See also ECtHR 18 January 2000, *Pesti et Frodl v. Autriche* (ECLI:CE:ECHR:2000:0118DEC002761895, § 4 and the case-law cited), and of 22 November 1985, *Bryan v. the United Kingdom* (ECLI:CE:ECHR:1995:1122JUD001917891, § 47).

²² See, to that effect, judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraphs 61 and 62). See also, ECtHR 27 October 2009, *Crompton v. the United Kingdom* (ECLI:CE:ECHR:2009:1027JUD004250905, §§ 70 to 73).

(a) The exercise of the rights of the defence

51. HL explains that, during the preliminary proceeding, he was unable to exercise his rights of the defence because he was not designated as a ‘party’ to the proceeding (*Parteistellung*). Instead, HL was merely deemed a ‘participant’ (*Beteiligter*) for the purposes of the preliminary proceeding. Under Austrian law, those statuses apparently carry different procedural rights and guarantees. For instance, HL explains that he was not informed of the preliminary proceeding; he was not able to inspect the file; or exercise his right to remain silent; or appeal the Preliminary Decision. Only once the administrative penalty proceedings were initiated was HL allegedly able to exercise those rights, but only within that second set of proceedings. At that point in time, however, the Preliminary Decision, which by then had become definitive, already bound the Takeover Commission as regards the objective determination of the parties having ‘acted in concert’. Therefore, HL was, from the beginning, objectively attributed the actions of Adler due to his position as board member of that company, without him being able to exercise his (own and personal) rights of the defence.

52. In its reply to a question posed by the Court, the Takeover Commission argues that HL was able to participate in the preliminary proceeding; had the right to remain silent under Paragraph 51 of the AVG; and had the right to defend himself during those proceedings. The Takeover Commission also notes that HL was, indeed, ‘personally’ invited to the oral hearing of the preliminary proceeding, was present, and participated therein. That would imply that HL was able to exercise some of his subjective procedural rights.

53. It remains for the referring court to determine the factual circumstances of the present case, as well as the existing interpretation of national law, which appears somewhat disputed.

54. From the case file, I understand that, during the preliminary proceeding, HL participated in his capacity as *board member* for Adler, acting for and on behalf of that company, but not in his personal capacity. In fact, there appears to be no indication that his personal liability was objectively investigated by the Takeover Commission in the preliminary proceeding. It was the company’s involvement that had been investigated. HL’s *personal* involvement appears only to arise during the administrative penalty proceeding.

55. The Takeover Commission, however, appears to argue that, despite the party mismatch between the two proceedings, HL could have exercised his *personal* rights of the defence during the preliminary proceeding vicariously through Adler, when representing the latter legal entity in his capacity as board member since both parties shared the same interests (*Interessengleichlauf*).

56. I disagree with that logic for (at least) two reasons.

57. First, one cannot overlook the rather striking potential that a *conflict of interests* and/or a breach of fiduciary duties may arise for directors of companies who are placed in the position described by the Takeover Commission. Certainly, it is largely correct to assume that, as far as the bigger picture is concerned, both the company and its director(s) or other members of its governing bodies are likely to share the same interest in their company not being found guilty of infringing the rules on takeover bids. However, with regard to other issues potentially arising along the way, can it really be excluded that a company director or a board member will not find themselves in a position where he or she must choose between the best interests of the company

and his or her own best interest, particularly in the context of what appears to be a subsequent administrative personal liability for company directors with sanctions of a criminal nature being imposed?

58. Second, the rights of the defence are of a *subjective* nature. Pursuant to settled case-law, those rights may not be transferred to another person, natural or legal, and they may certainly not be exercised on behalf of another person.²³ It is the concerned parties themselves that must be able to effectively exercise their rights conferred on them by EU law, irrespective of the nature of the proceedings to which they are subject.

59. Thus, without wishing to sound too formalistic, I cannot embrace the premiss that a physical person acting for and on behalf of a company (and thus normally understood as acting *as the company*, a statutory representative of a legal person), is effectively the same as that person acting in his or her personal interest and for his or her own account. This is a fortiori true in circumstances where, in the course of those procedures, the interests of both persons may diverge, if not outright conflict.

60. In the present case, it appears that HL, in his personal capacity, was only able to exercise *his* rights of the defence during the administrative penalty proceeding. However, at that point in time, the Preliminary Decision had already become definitive. It therefore bound the administrative penalty proceeding as to the ‘objective’ elements of the Takeover Commission’s investigation into a possible breach of the obligation to make a mandatory takeover bid. That had the effect of prejudging HL’s conduct, without him being able to make known his views *before* the adoption of that decision.²⁴

(b) Lack of access to a court with ‘full jurisdiction’

61. GM, HL and Adler take the view that, in the present circumstances, Article 47 of the Charter precludes the recognition of the binding effect of the Preliminary Decision for the purposes of the administrative penalty proceeding. As regards the first paragraph of Article 47 of the Charter, those parties submit that, in the light of the limited judicial review available to the Supreme Court, recognising the binding effect of the Preliminary Decision, once it became definitive, in the context of the subsequent administrative penalty proceeding and for court proceedings before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), undermines their right to effective judicial protection arising from the Charter.

62. The Takeover Commission opposes those views. It argues that the procedural guarantees underlying both the preliminary and administrative penalty proceedings are such that the resulting decisions are taken by an independent and impartial ‘tribunal’ within the meaning of Article 47 of the Charter. Given that the Takeover Commission thus, in both cases, acts as the ‘court of first instance’, limiting the standard of review of the Supreme Court to questions of law only, is compatible with Article 47 of the Charter.

²³ See, for instance, judgments of 9 June 2011, *Evropaïki Dynamiki v ECB* (C-401/09 P, EU:C:2011:370, paragraph 49), and of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraph 73). See also, more recently, judgment of 19 September 2019, *Zhejiang India Pipeline Industry v Commission* (T-228/17, EU:T:2019:619, paragraph 36).

²⁴ Judgment of 5 November 2014, *Mukarubega* (C-166/13, EU:C:2014:2336, paragraphs 46 and 47 and the case-law cited).

63. The logic of the requirements of the first paragraph of Article 47 of the Charter requires a two-part assessment.²⁵ First, whether the Takeover Commission does in fact, like it claims, qualify as a ‘tribunal’ within the meaning of Article 47 of the Charter (1). Second, where that is not the case, whether its decisions are subject to review by a court with ‘full jurisdiction’ (2).

(1) Is the Takeover Commission a ‘tribunal’ within the meaning of Article 47 of the Charter?

64. One of the cumulative conditions required for there to be a ‘tribunal’, within the meaning of Article 47 of the Charter, is whether the authority concerned is ‘independent’.²⁶ It ensures a level playing field for the parties to the proceedings and their respective interests in relation to the subject matter of those proceedings.²⁷ In other words, the body concerned may not act as a party in its own cause in breach of the principle of ‘*nemo iudex in sua causa*’.²⁸

65. Without it being necessary to run through all that is required in order to satisfy the criteria of a ‘tribunal’, as required for Article 47 of the Charter, it appears that the Takeover Commission does not satisfy the criterion linked to ‘independence’.

66. In reply to a question posed by the Court, GM notes that, pursuant to Paragraph 29(1) of the ÜbG, the Takeover Commission is responsible for the implementation of the ÜbG, and has therefore been conferred extensive *ex officio* powers, including the power to initiate preliminary and administrative penalty proceedings. In such proceedings, the Takeover Commission itself decides on the scope and subject matter of the proceeding, and itself carries out the investigation for that proceeding. Subject to confirmation by the referring court, it appears from Paragraph 33(4) of the ÜbG that, in proceedings commenced pursuant to a reasoned request, the Takeover Commission holds the sole competence to decide on whether to continue a proceeding, even where said request is later withdrawn.

67. Thus, in a nutshell, the Takeover Commission appears to have a number of ‘hats’ under national law: the investigator, the prosecutor, as well as the ‘judge’. There is no indication that the Takeover Commission internally operates on the basis of a firm functional separation between, on the one hand, the departments of that authority responsible for investigation and decision-making in the context of the implementation of the Takeover Bids Directive, and, on the other hand, a body ruling on complaints lodged against decisions taken by those departments.²⁹

68. Indeed, it appears that, in subsequent judicial proceedings relating to challenges to the Takeover Commission’s preliminary or administrative penalty proceedings, the Takeover Commission acts as the defendant in its own cause to defend its decisions before the competent Austrian court.³⁰ It thus does not act as an impartial third party between the alleged offender, on the one hand, and the administrative authority responsible for monitoring the compliance with takeover bids, on the other hand.

²⁵ Set out above in point 48 of this Opinion.

²⁶ See above, point 47 of this Opinion.

²⁷ See, for instance, judgment of 22 December 2010, *RTL Belgium* (C-517/09, EU:C:2010:821, paragraphs 38 to 40 and the case-law cited).

²⁸ See, to that effect, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraph 62 and the case-law cited). See also ECtHR 10 December 2020, *Edizioni del Roma Società Cooperativa A.R.L. et Edizioni del Roma S.R.L. v. Italy* (ECLI:CE:ECHR:2020:1210JUD006895413, § 64).

²⁹ See judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 72 to 77).

³⁰ *Ibid.*, paragraph 42.

69. Naturally, all those elements are for the referring court to decide on. However, in view of the answers provided to this Court, and for the reasons laid down in the preceding points of this Opinion, I am not convinced that the Takeover Commission satisfies the criteria of a ‘tribunal’ within the meaning of Article 47 of the Charter. I wish to stress that such a tentative conclusion, again solely for the referring court to verify, in no way questions the fact that certain national administrative authorities will be endowed with an advanced level of independence, and possess the highest level of expertise in their respective fields of activity.

70. However, that is not what defines an ‘independent’ tribunal. An independent tribunal under the first paragraph of Article 47 of the Charter is characterised by its complete independence, both ‘internal’ as well as ‘external’. It is an independent *third* with regard to both parties concerned. Within that logic, decision-making chambers that are part of an administrative authority, or even functionally very independent appellate chambers that are part of an administrative authority, still tend to fall on the side of public administration and not be part of the judiciary.³¹

71. Since it would appear that the Takeover Commission is not a ‘tribunal’ within the meaning of the first paragraph of Article 47 of the Charter, the question thus becomes whether, in the present case, the competent national courts maintain ‘full jurisdiction’ to review the decisions of the Takeover Commission.

(2) Does a review by a court with ‘full jurisdiction’ take place?

72. The judicial review of decisions of the Takeover Commission appears to differ depending on the proceeding at issue. On the one hand, the findings resulting from the *preliminary* proceeding may be appealed to the Supreme Court. That court’s review is limited to questions of law only.³² It thus does not appear to have ‘full jurisdiction’ to review questions of fact.³³ On the other hand, the findings resulting from the *administrative penalty* proceeding may be appealed for review to the Federal Administrative Court (which, in the present case, is the referring court itself).³⁴ That court appears to hold ‘full jurisdiction’ to review findings of the Takeover Commission in law and in fact.

73. However, the referring court explains that it is, in practice, not exercising ‘full jurisdiction’ because it cannot review the Preliminary Decision of the Takeover Commission. It notes that – by reason of the broad binding effects which the Austrian procedural rules attach to final administrative decisions – the referring court is bound by the (now definitive) findings of the Takeover Commission in the Preliminary Decision, and cannot review those findings.

74. In summary, national law puts in place a system, whereby the Takeover Commission, which (i) does not satisfy the qualities of a ‘tribunal’, renders a decision, which (ii) cannot be reviewed in full by the Supreme Court, and that, (iii) upon becoming definitive, (iv) binds not only the

³¹ See, by analogy, from the case-law concerning admissibility of requests for preliminary rulings issued by various (review or quasi-judicial) chambers of bodies within the public administration, for instance judgment of 31 May 2005, *Syfait and Others* (C-53/03, EU:C:2005:333, paragraphs 31 to 37), or of 30 May 2002, *Schmid* (C-516/99, EU:C:2002:313, paragraphs 34 to 38).

³² See, in more detail, point 29 of this Opinion.

³³ See, in this regard, Paragraph 30a(1) and (2) of the ÜbG. By contrast, see for example the review proceeding available under German law against a decision of the Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority, Germany), which allows for a review of law and fact. See Paragraph 48 of the Wertpapiererwerbs- und Übernahmegesetz (German Securities Acquisition and Takeover Act).

³⁴ Paragraph 35(3) of the ÜbG.

Takeover Commission itself in future proceedings featuring identity of parties (interpreted rather broadly by that body), cause and object, but also (v) any court ordinarily tasked with reviewing those related proceedings.

75. If that is indeed the case, such a situation is, in my view, at odds with Article 47 of the Charter and the requirement for effective judicial protection.

76. I would emphasise that that incompatibility arises *for every participant* in the ‘first’, preliminary procedure, because there appears to be no ‘tribunal’ with full jurisdiction, as required under the first paragraph of Article 47 of the Charter. To that initial problem, an *additional* one arises with regard to the specific situation of the parties that were not even participating in the first preliminary proceedings.

2. *The same parties in the subsequent proceedings*

77. GM argues that, while he did participate as a ‘party’ in the preliminary proceeding, he was not informed of the fact that that proceeding could lead to the imposition of a ‘criminal’ penalty by virtue of the administrative penalty proceeding. He also notes that, during the preliminary proceeding, he was not given the right to remain silent.

78. The Takeover Commission takes the position that all of GM’s fundamental rights were respected during the preliminary and administrative penalty proceedings.

79. While it falls to the referring court to verify those circumstances, the bottom line for the purposes of protecting the fundamental rights of GM is the same as that evoked for the specific circumstances of HL and Adler. In a way, the problem arising in the first round is *the same for all the parties*. It is only that, in the specific context of where the parties are the same across the proceedings, the additional issue of the absence of the rights of the defence may not arise (that is, of course, subject to the proviso that those rights, which arose during the ‘first round’, could have been exercised when they became implicated).

80. Beyond that, I see no reason why, in principle, objective determinations of a previous administrative proceeding could not be relied upon in a parallel, or later, administrative proceeding arising from the same facts.³⁵ It is common practice that later administrative decisions take as their basis the findings, information, or even elements of evidence established in their previous decisions or even decisions of other administrative authorities.

81. However, the bottom line for all such ‘across-the-files-transfers’ is that the party concerned must remain able to fully exercise his or her rights of the defence when such rights became or would have become implicated.³⁶ It cannot be that such a party is suddenly faced with a ‘fait accompli’, in essence prejudging significantly his or her position without that party ever having the opportunity to state their case.

³⁵ See my Opinion in *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:462, paragraph 39).

³⁶ See above, point 44 of this Opinion.

82. In so far as it appears that GM was the party in both proceedings, acting in both his own and personal capacity, the structural issues arising from the lack of identity of parties across the various proceedings do not arise.³⁷ Whether or not his rights of the defence were respected in the specific case in either of the two sets of proceedings is an issue for the referring court.

3. A Closing Remark

83. I find it necessary to point out that this Opinion does not question in any way the possibility for national law to extend the binding effect of administrative decisions, which have become final, across proceedings. It is, again, rather common that one decision may form the basis for another decision, or is taken into account in a different proceeding.³⁸ More often than not, administrative efficiency, together with equality and foreseeability of administrative action, indeed speaks to extending certain findings across proceedings.³⁹

84. Whether, and how, the national legal order wishes to create binding effects of final decisions by administrative authorities is left to the procedural autonomy of the Member States. The fundamental rights protection of EU law limits that autonomy only to the extent that it is necessary to establish effective protection of those rights.⁴⁰

85. It is also clear that the Member States are not required to establish a system of administrative decisions, in which the administrative authority itself satisfies the criteria of a ‘tribunal’ within the meaning of Article 47 of the Charter. However, as a matter of EU law, when rights derived from EU law are concerned, the (judicial) control of that administration’s decisions then shifts one step ‘upstream’ to the competent national courts.

86. Viewed in that context, all that has been suggested in this Opinion is that the specific combination of institutional and procedural choices made by the national legislature is problematic for two reasons. First, within the preliminary proceedings, there must be, at some stage, the possibility to challenge the preliminary decision before a court with ‘full jurisdiction’, should the parties wish to do so. Second, the protection of (by their nature) subjective rights does not allow for an ‘imputation by proxy’ across administrative proceedings, in which individuals find themselves in a position where their case is being partially pre-judged by findings concerning their behaviour, established in a previous proceedings to which they were not a party.

V. Conclusion

87. I propose that the Court answer the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Austria) as follows:

Articles 4 and 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union and the rights of the defence, must be interpreted as

³⁷ See above, points 54 to 60 of this Opinion.

³⁸ In relation to VAT, see, for instance, judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraphs 68 and 90). See also my Opinion in *Glencore Agriculture Hungary* (C-189/18, EU:C:2019:462, point 39 and the case-law cited).

³⁹ Although reasons of administrative efficiency cannot act as a ‘silver bullet’ to restrict the protection of fundamental rights. See, to that effect, judgment of 30 June 2011, *Zeturf* (C-212/08, EU:C:2011:437, paragraph 48).

⁴⁰ See, to that effect, judgment of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraph 40 and the case-law cited).

precluding the application of national procedural rules that have as their effect the prevention of the parties concerned from fully exercising their rights of the defence in the course of a subsequent administrative penalty proceeding establishing the subjective responsibility for an infringement arising from Directive 2004/25 or which fail to provide the parties access to an effective remedy before a tribunal under the first paragraph of Article 47 of the Charter.