Reports of Cases

ORDER OF THE GENERAL COURT (Fifth Chamber)

25 September 2019 *

(Action for failure to act, for damages and for annulment – Free movement of workers – Freedom to choose an occupation – Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Alleged infringement of that agreement by Swiss laws and regulations governing the exercise of the profession of medical practitioner – Request for the adoption of measures against Switzerland and request for compensation for harm suffered – Reply of the EEAS – Action in part manifestly inadmissible and in part manifestly lacking any foundation in law)

In Case T-99/19,

Nathaniel Magnan, residing in Aix-en-Provence (France), represented by J. Fayolle, lawyer,

applicant,

v

European Commission, represented by H. Støvlbæk, J. Hottiaux and M. Šimerdová, acting as Agents,

defendant,

APPLICATION (i) under Article 265 TFEU for a declaration that the Commission unlawfully failed to take measures against the Swiss Confederation following an alleged infringement of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6), signed in Luxembourg on 21 June 1999, (ii) under Article 263 TFEU for annulment of the decision of the Commission refusing to adopt measures against the Swiss Confederation, contained in the letter of the European External Action Service (EEAS) of 20 December 2018 and (iii) under Articles 268 and 340 TFEU seeking compensation for the harm that the applicant has allegedly suffered since 2013 due to an infringement of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, as well as a penalty payment,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias (Rapporteur), President, A. Dittrich and R. Frendo, Judges,

Registrar: E. Coulon,

* Language of the case: French.

makes the following

Order

Background to the dispute

1 The applicant, Mr Nathaniel Magnan, is a general medical practitioner of French nationality.

2 On 20 July 2013, the applicant applied to the cantonal authorities of Geneva (Switzerland) for authorisation to be able to pursue his profession in that canton.

3 By two decrees of 1 October 2013, the cantonal authorities of Geneva authorised the applicant to pursue his profession under his own responsibility but did not authorise him to pursue it under the compulsory sickness insurance scheme. The latter decision is based on Article 55a of the loi fédérale suisse du 18 mars 1994 sur l'assurance-maladie (Swiss Federal Law of 18 March 1994 on sickness insurance), known as the 'need clause' ('the need clause'), and on the ordonnance du Conseil fédéral suisse du 3 juillet 2013 sur la limitation de l'admission des fournisseurs de prestations à pratiquer à la charge de l'assurance-maladie obligatoire (Order of the Swiss Federal Council of 3 July 2013 on the limitation of the service providers allowed to practise under the compulsory sickness insurance scheme). The need clause provides that the Conseil fédéral suisse (Swiss Federal Council) may require that evidence be adduced of a need in order to allow, in particular, medical practitioners to practise under the compulsory sickness insurance scheme, with the exception of persons who have practised for at least three years at a recognised Swiss post-graduate training facility. By an order of 3 July 2013, the Swiss Federal Council exercised that option by providing that practitioners covered by the need clause were admitted to practise under the compulsory insurance scheme only if the maximum number of practitioners, taken as a whole, specified in the annex per canton and per speciality, was not reached.

4 On 15 November 2013, the applicant brought an action against the decision not to allow him to pursue the profession of general medical practitioner under the compulsory sickness insurance scheme before the Tribunal administratif fédéral suisse (Federal Administrative Court, Switzerland; 'the TAF'). By judgment of 19 March 2018, that court dismissed the action on the substance. It held, in particular, that, assuming that the need clause introduced indirect discrimination in relation to medical practitioners who are Member State nationals, it was justified on grounds of public health, in accordance with the case-law of the Courts of the European Union (paragraph 9.7 of the judgment). Furthermore, it stated that, since rulings in matters of sickness insurance given by it cannot be challenged before the Tribunal fédéral (Federal Supreme Court, Switzerland), its judgment was final (paragraph 12 of the judgment).

5 In May 2018, the applicant informed the European Commission of this situation. The competent administrator at the Commission (in Unit E5 'Professional Qualifications and Skills' of the 'Internal Market, Industry, Entrepreneurship and SMEs' Directorate-General (DG)) replied to the applicant by emails of 30 May and 7 June 2018. The administrator told the applicant that the Commission was aware of the situation in Switzerland and that it was in the process of working with the Swiss authorities to find a solution; for that reason he was unable to inform the applicant of the Commission's official position regarding the judgment of the TAF of 19 March 2018. In particular, according to the information available to the administrator, the Swiss authorities were considering amendments to certain sections of the Swiss Federal Law on sickness insurance.

6 On 23 August 2018, two Swiss insurance companies responsible for the compulsory sickness insurance scheme brought an application for conciliation before the Tribunal arbitral des assurances du canton de Genève (Insurance Arbitration Tribunal, Canton of Geneva, Switzerland) against the Geneva-based association SOS médecins, for payment of a sum corresponding to the reimbursement of the invoices of several medical practitioners who were members of that association and who had not been authorised to practise under the compulsory sickness insurance scheme. By email of 19 October 2018, the head medical practitioner of SOS médecins of Geneva announced that he was forced to suspend the activities of those medical practitioners, including the applicant. They were subsequently reinstated on 8 November 2018 following the hearing held in the context of the abovementioned conciliation proceedings. On 3 July 2019, the Tribunal arbitral des assurances du canton de Genève (Insurance Arbitration Tribunal, Canton of Geneva) delivered a judgment in which it ordered the association to pay a sum corresponding to the invoiced amounts that were reimbursed to the medical practitioners, members of the association, whom it regarded as not being authorised to practise under the compulsory sickness insurance scheme.

7 On 22 October 2018, the applicant sent a letter of formal notice to the Commission by which he asked the Commission, first, to 'take all legal measures permitted' by the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6; 'the AFMP') against the Swiss Confederation with a view to stopping immediately the discrimination against medical practitioners who were Member State nationals and, second, to compensate him for the economic harm which he had allegedly suffered since 2013, corresponding to an amount of 1 281 44 Swiss francs (CHF) (approximately EUR 1 121 650). In that letter, he claimed that, since 2013, he had been the victim of indirect discrimination because he was unable to set up as a general medical practitioner in the canton of Geneva and his activities within SOS médecins of Geneva had been suspended since 19 October 2018. He claimed that such discrimination was contrary to the case-law of the Courts of the European Union and that he had no possibility of appeal, at national or supranational level, against the judgment of the TAF. He argued that, faced with the infringement of the AFMP resulting from that discrimination applicable to all medical practitioners who were Member State nationals, the Commission, as the guarantor of the Treaties and of the application of EU law, pursuant to Article 17(1) TEU, had a duty to act and that it had not adopted any measures in that regard since 2013.

8 On 20 December 2018, the European External Action Service (EEAS) sent a letter to the applicant in reply to the applicant's letter, dated 22 October 2018, to the Commission. In its letter, the EEAS assured the applicant that that service and the Commission were making every effort to ensure the correct application of the AFMP and respect for the rights of Union citizens in Switzerland. It stated in the letter that the question of the restriction of access of medical practitioners to the Swiss labour market, in particular in the canton of Geneva, had been the subject of continuous discussions with the Swiss authorities since 2013, but that those authorities and the authorities of the European Union disagreed on the interpretation of the AFMP and the legal assessment of the need clause. It explained that, in the absence of a dispute settlement mechanism, the authorities of the European Union did not have the means to push for a solution in view of the lack of agreement between the parties, and that, being aware of that shortcoming, they had asked the Swiss authorities to negotiate an institutional framework agreement permitting the use of arbitration and referral to the Court of Justice of the European Union in matters relating to concepts of EU law, with a view to ensuring the uniform interpretation of the agreements concluded with the

Swiss Confederation and to guaranteeing identical rights and obligations. The EEAS added that the authorities of the European Union were closely monitoring the drawing up of a new law by the Swiss authorities intended to replace the need clause.

Procedure and forms of order sought

9 On 18 February 2019, the applicant brought the present action.

10 On 9 April 2019, the Court sent the application to the Commission, asking it to respond to a question in the defence.

11 On 20 June 2019, the Commission lodged an objection of inadmissibility and answered the question put by the Court.

12 On 6 August 2019, the applicant submitted observations on the objection of admissibility.

13 The applicant claims that the Court should:

– first, find, on the basis of Article 265 TFEU, that since 2013 the Commission has unlawfully failed to adopt all appropriate measures against the Swiss Confederation and order the Commission, on the basis of Articles 268 and 340 TFEU, to pay to him the sum of EUR 1 141 198.10 for the harm suffered since 2013 plus a penalty payment of EUR 500 per day until the Swiss authorities comply with the AFMP or one of the Contracting Parties withdraws from that agreement;

– second, annul, on the basis of Article 263 TFEU, the decision dated 20 December 2018 implicitly refusing to adopt, as a matter of urgency, legal and substantive measures against the Swiss Confederation on account of the infringement of the AFMP, and the decision implicitly refusing to pay compensation for the harm suffered as a result of that infringement.

14 The Commission contends that the Court should:

– dismiss the action as manifestly inadmissible;

– order the applicant to pay the costs.

Law

15 Under Article 126 of its Rules of Procedure, where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Court may, on a proposal from the Judge-Rapporteur, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

16 In the present case, the Court considers that the material in the file provides it with sufficient information and decides to give a decision without taking further steps in the proceedings.

17 As a preliminary point, it should be stated that the present action must be interpreted as containing, primarily, claims for a declaration of failure to act seeking a finding by the Court, on the basis of Article 265 TFEU, of a wrongful failure to act on the part of the Commission and

claims asking that the Court order the Commission, on the basis of Articles 268 and 340 TFEU, to compensate the applicant and pay a penalty payment to him in respect of the harm suffered. The claims for annulment of 'the decision dated 20 December 2018 implicitly refusing to adopt, as a matter of urgency, legal and substantive measures against [the Swiss Confederation] on account of the infringement of the AFMP' must be regarded as being put forward in the alternative, since they are based on the assumption that the Commission gave a decision on the applicant's requests and not, as in the case of the primary claims made, on the assumption that the Commission failed to do so. As for the claims for annulment of 'the decision implicitly refusing to pay compensation for the harm suffered by the applicant as a result of that infringement', which are likewise put forward in the alternative, they must be reclassified as claims for the European Union to be ordered to pay damages on the basis of Articles 268 and 340 TFEU.

The claims for a declaration of failure to act and the related claims for compensation

The claims for a declaration of failure to act

18 The applicant claims that the need clause introduces indirect discrimination between Swiss medical practitioners, who are mostly trained in Switzerland and are therefore not concerned by that clause, and medical practitioners who are nationals of a Member State, who are mostly trained in the European Union and are directly concerned by the prohibition on practising under the Swiss compulsory sickness insurance scheme. In addition, the need clause introduces discrimination between medical practitioners who have practised at a recognised Swiss post-graduate training facility for at least three years and other medical practitioners. The introduction of that clause constitutes an infringement of Articles 2, 7 and 13 of the AFMP and of Article 55 of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 2005 L 255, p. 22), as well as a failure to observe the case-law of the Court, which the Swiss Confederation committed to take into account pursuant to Article 16(2) of the AFMP. In addition, the Swiss authorities are failing to comply with the principle of reciprocity. The applicant asserts that the grounds of the judgment of the TAF of 19 March 2018 justifying the discrimination at issue in the light of public health objectives are vitiated by an error of law in the light of the case-law of the Court and are not valid in scientific terms. In any event, the need clause infringes the principle of proportionality. The applicant adds that the discrimination at issue is exacerbated in his regard by the fact that his experience at SOS médecins of Geneva cannot be taken into account by way of an exemption from the need clause, and by application, within the public authorities of the canton of Geneva, of a directive requiring that preference be given to employing local jobseekers over cross-border workers. Given the uncertainty as to his ability to continue practising within SOS médecins of Geneva, he has been placed in a situation of legal uncertainty.

19 With regard to the Commission's alleged failure to act, the applicant submits that the letter dated 20 December 2018 expresses an implicit refusal to act. In his opinion, the statement contained in that letter to the effect that there are no means of pushing for a solution in view of the lack of agreement between the parties is incorrect, since the European Union is able to terminate, at any time, one of the seven sectoral agreements concluded with the Swiss Confederation, which include the AFMP, or to suspend its effects and can also take action vis-à-vis the participation of the Swiss authorities in various European programmes. According to the applicant, in the light of its role as guarantor of the Treaties, and in accordance with the principles of legal certainty and of the protection of legitimate expectations, the Commission had a duty, in the present instance, to act in order to safeguard the EU acquis and to protect the rights of Union citizens. Its failure to act

may be inferred, in particular, from its knowledge since 2013 of the situation faced by medical practitioners who are Union citizens and its failure to respond to the continued presence of the recurrent barriers to the free movement of persons which follow from the Swiss legislation.

20 The Commission contends that the claims for a declaration of failure to act are inadmissible. First, the applicant is not entitled to bring an action for failure to act which does not seek a declaration that the Commission failed to adopt acts which have legal effects in his regard and may form the subject of an action for annulment. Second, the Commission argues that, in the present instance, it has a discretion, like the discretion to bring infringement proceedings, which precludes the right of individuals to require that it adopt a specific position. Furthermore, the Commission states that it has taken all legal measures permitted by the AFMP to stop the discrimination towards EU medical practitioners. It makes the point, in that regard, that at every annual meeting of the AFMP Joint Committee it has raised the issue of the compatibility of Swiss legislation with the provisions of that agreement, on the basis of Article 19 thereof, which confers on the Joint Committee the power to settle, in strictly political terms, disputes between the Contracting Parties. The Commission's initiatives have thus allowed progress to be made in several areas, in particular the revision of the horizontal directive of the Canton of Geneva. There is no alternative mechanism, and in particular no binding mechanism, for the settlement of disputes between the Contracting Parties to the AFMP. Lastly, the European Union cannot be required to terminate or suspend the AFMP, which forms part of the highly complex relations with the Swiss Confederation governed by agreement and which, in any event, is a mixed agreement, the termination or suspension of which requires the agreement of all Member States. The Commission concludes from the foregoing that the action for failure to act lacks any foundation.

21 In its observations on the objection of inadmissibility dated 6 August 2019, the applicant submits that the action for failure to act is admissible because the Commission is not the author of the letter dated 20 December 2018, that letter does not contain a defined position, he lodged the action within the prescribed time limit and the Commission had had the ability and the duty to act since 2013. He claims that the dismissal of his action as inadmissible by the Court, in the absence of any mechanism laid down in the AFMP enabling him to have access to a supranational court with jurisdiction in EU law, would enshrine the denial of justice to which he is subject and constitute an infringement of Article 47 of the Charter of Fundamental Rights of the European Union as well as a breach of the principles of effectiveness and equivalence.

22 Consideration should first be given to the admissibility of the claims for a declaration of failure to act.

– *The admissibility of the claims for a declaration of failure to act*

23 Under the second paragraph of Article 265 TFEU, an action for failure to act is admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency has not defined its position, the action may be brought within a further period of two months. However, the request for an institution to act must be sufficiently clear and precise to enable that institution to ascertain in specific terms the content of the decision that it is being asked to adopt and must also make it apparent that its purpose is to compel the institution to define its position (see judgment of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 54 and the case-law cited).

24 According to the case-law of the Court, Article 265 TFEU concerns a failure to take a decision or to define a position (see judgment of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 52 and the case-law cited).

25 In accordance with case-law, the third paragraph of Article 265 TFEU, which entitles natural and legal persons to bring an action for failure to act when an institution has failed to address to them any act other than a recommendation or an opinion, must be interpreted as allowing individuals to bring an action for failure to act against an institution which they claim has failed to adopt a measure producing binding legal effects that are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position. In addition, an action for failure to act may also be brought against the failure to adopt a preparatory act, if it is a necessary preliminary act in a procedure leading to an act that has binding legal effects (see, to that effect, judgments of 26 November 1996, *T. Port*, C-68/95, EU:C:1996:452, paragraph 59 and the case-law cited, and of 23 November 2017, *Bionorica and Diapharm* v *Commission*, C-596/15 P and C-597/15 P, EU:C:2017:886, paragraph 53 and the case-law cited).

26 It therefore follows from the principles recalled in paragraph 25 above that Article 265 TFEU does not entitle natural and legal persons to bring an action against any failure to define a position or to take a decision on the part of the institutions, further to a letter of formal notice sent to them. In accordance with those principles, that right exists only in three situations: where those persons would have been the addressees of the act which those institutions failed to address to them, where the omitted act would have had binding legal effects capable of affecting their interests by bringing about a distinct change in their legal position or, at the very least, where the act would have been a necessary preliminary act in a procedure capable of leading to an act that has binding legal effects in relation to them.

27 In the present case, leaving aside the question of whether the other conditions of admissibility of an action for failure to act laid down in paragraphs 23 and 24 above have been met, it must be stated, in any event, that the applicant's situation does not correspond to any of the three situations mentioned in paragraph 26 above.

28 In this regard, first, it should be observed that the applicant is not the addressee of the measures which it requested that the Commission adopt in his letter of 22 October 2018. In that letter, he asks that institution, in his own words, to 'take all legal measures permitted by the AFMP against [the Swiss Confederation]'.

29 Next, it should be pointed out that measures adopted by the Commission against the Swiss Confederation would not, in themselves, be capable of bringing about a distinct change in the applicant's legal position as regards his right to pursue the profession of medical practitioner in the Canton of Geneva.

30 Lastly, such measures cannot be regarded as a necessary preliminary act in a procedure capable of leading to an act that has binding legal effects in respect of the applicant.

31 First, it should be noted that the only dispute settlement procedure applicable to the interpretation or the application of the AFMP is that provided for in Article 19 of that agreement, under which the Contracting Parties may bring a matter under dispute of that kind to the Joint Committee, which may settle the dispute by considering every possible means to

maintain the good functioning of the agreement. Moreover, those provisions do not impose on the Joint Committee an obligation as to the result to be achieved as regards the settlement of disputes but merely an obligation to use its best endeavours.

32 There is, on the other hand, no dispute settlement procedure applicable in the present instance the preliminary act of which would be the adoption, by one of the Contracting Parties to the AFMP, of unilateral measures against the other Contracting Party. In this regard, it should be observed that the decision, cited by way of illustration by the applicant, not to renew the AFMP or to terminate it, on the basis of Article 25(2) or (3) of that agreement, cannot, by definition, be regarded as such a preliminary act, since adopting such a decision would terminate the agreement itself.

33 Furthermore, the adoption, outside any applicable procedure, of unilateral measures by one of the Contracting Parties to the AFMP against the other Contracting Party, on the ground of the latter's infringement of its obligations under that agreement, would not, by definition, offer any guarantee as regards the outcome of the dispute between them. In that situation, it would be for the party concerned by those unilateral measures to decide freely and at its absolute discretion whether or not it should abide by the interpretation of the AFMP advocated by the other Contracting Party (see, to that effect and by analogy, order of 3 July 2007, *Commune de Champagne and Others* v *Council and Commission*, T-212/02, EU:T:2007:194, paragraph 94).

34 Second, it is, admittedly, true that the exercise of the powers delegated to the EU institutions in international matters cannot escape judicial review (see, to that effect and by analogy, order of 3 July 2007, *Commune de Champagne and Others* v *Council and Commission*, T-212/02, EU:T:2007:194, paragraph 94 and the case-law cited). It is likewise true, as the applicant submits, that, under Article 17(1) TEU, the Commission, as the guardian of Treaties and of the agreements concluded thereunder, must ensure the correct implementation by a third country of the obligations it has assumed under an agreement concluded with the European Union or, as in the present case, with the European Union and its Member States (see, to that effect and by analogy, judgment of 25 July 2008, *C.A.S.* v *Commission*, C-204/07 P, EU:C:2008:446, paragraph 94).

35 However, in the present case, in the absence of provisions of international law or of EU law which involve, in some way or other, individuals in the decision-making process relating to the implementation of the AFMP, the applicant cannot derive from the infringement of that agreement by the Swiss Confederation, assuming that that were established, the right to require the Commission to adopt measures against the Swiss Confederation. If they were adopted, such measures would concern only the relations between the European Union and a third country and not the relations of the EU authorities with natural or legal persons. Accordingly, even if the existence of an obligation to adopt such measures is accepted, that obligation cannot confer any right on individuals (see, to that effect and by analogy, judgments of 13 June 2013, *Syndicat OP 84*, C-3/12, EU:C:2013:389, paragraphs 28 to 31, and of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 56).

36 Therefore, it follows from the foregoing that the claims for a declaration of failure to act put forward in the application are manifestly inadmissible.

37 The arguments raised by the applicant in the context of his observations on the objection of inadmissibility are clearly incapable of calling that conclusion into question.

38 In the first place, with regard to whether the Commission failed to define its position on the letter of formal notice which the applicant sent to it and whether the application was lodged within the time limit provided for in the second paragraph of Article 265 TFEU, it is sufficient to state that, for the reasons set out in paragraphs 28 to 35 above, the Court takes the view that the applicant's situation does not correspond to any of the situations in which natural and legal persons may bring an action for failure to act, regardless of whether the other conditions of admissibility of such an action are satisfied. Accordingly, even accepting that the Commission failed, in the present case, to define its position and that the applicant lodged his action within the prescribed time limit, those facts are irrelevant.

39 In the second place, it should be stated that the question of whether the Commission was able to adopt unilateral measures against the Swiss Confederation and whether it was under a duty to do so are not relevant when assessing the admissibility of the present action for failure to act, but only when examining its merits (see, to that effect and by analogy, judgment of 29 September 2011, *Ryanair* v *Commission*, T-442/07, not published, EU:T:2011:547, paragraph 27). The applicant's arguments in relation to those questions are therefore ineffective.

40 In the third place, it is to be recalled that the FEU Treaty has established, not only by Articles 263 and 277, on the one hand, and Article 267, on the other, but also by Article 265, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Courts of the European Union (see judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 92 and the case-law cited).

41 However, although the conditions of admissibility of direct actions brought before the Courts of the European Union must be interpreted in the light of Article 47 of the Charter of Fundamental Rights, which enshrines the fundamental right to effective judicial protection, it follows from settled case-law that that article is not intended to change the system of judicial review laid down by the Treaties, and particularly those conditions. Thus, that article does not require, inter alia, that an individual should be unconditionally entitled to bring an action against any failure to take a decision or to define a position on the part of the institutions (see, to that effect and by analogy, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 97, 98 and 105 and the case-law cited, and of 9 November 2017, *SolarWorld* v *Council*, C-205/16 P, EU:C:2017:840, paragraphs 67 and 68).

42 In the present case, although the provisions of Article 265 TFEU cannot, in the light of the principle of effective judicial protection, be interpreted strictly, the fact remains that, having regard to the conditions of admissibility of actions for failure to act brought by natural and legal persons recalled in paragraphs 25 and 26 above, the Commission's failure to define its position in relation to the applicant's request for the adoption of unilateral measures against the Swiss Confederation cannot, in any event, entitle him to bring such an action. Therefore, the Court cannot set aside those conditions of admissibility, which follow from the FEU Treaty, as interpreted by settled case-law, without going beyond the jurisdiction conferred on it (see, to that effect and by analogy, order of 24 November 2016, *Petraitis* v *Commission*, C-137/16 P, not published, EU:C:2016:904, paragraph 24 and the case-law cited).

43 In particular, with regard to the absence of any mechanism laid down in the AFMP enabling the applicant to bring the matter before a supranational court or a court 'with jurisdiction in [EU] law', it should be observed that the principle of effective judicial protection cannot justify the EU judicature going beyond the jurisdiction conferred on it with the sole aim of compensating for that absence.

44 Furthermore, contrary to what the applicant suggests, the principles of effectiveness and equivalence are not applicable in the present instance.

45 In that regard, it should be recalled that, in the absence of EU rules, the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law – rules which come under the domestic legal system of the Member States – must not be less favourable than those governing similar domestic actions (principle of equivalence) or render virtually impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 7 June 2007, *van der Weerd and Others*, C-222/05 to C-225/05, EU:C:2007:318, paragraph 28 and the case-law cited).

46 It is sufficient to state that, by definition, those principles can be implemented only by the national courts and tribunals and not by the Courts of the European Union, which apply the detailed procedural rules provided for in EU law itself. Furthermore, acting within the limits of the powers conferred on them in the Treaties, in accordance with the principle of institutional balance, the Courts of the European Union cannot set aside those detailed procedural rules (see, to that effect and by analogy, judgment of 25 October 2017, *Commission* v *Council (CMR-15)*, C-687/15, EU:C:2017:803, paragraph 40).

47 In any event, even if the claims for a declaration of failure to act could be regarded as admissible, they would have to be dismissed on the substance for the reasons set out below.

– ***The substance of the claims for a declaration of failure to act***

48 It is settled case-law that, in order to rule on the substance of a claim for a declaration that an institution has failed to act, it is necessary to determine whether, at the time when the institution in question was formally called upon to define its position within the meaning of Article 265 TFEU, it was under a duty to act (see judgment of 29 September 2011, *Ryanair* v *Commission*, T-442/07, not published, EU:T:2011:547, paragraph 28 and the case-law cited).

49 In the present case, it must be noted that, as the Commission rightly contends, there cannot be a duty on its part to adopt unilateral measures in respect of the Swiss Confederation here, regardless of that institution's position on the compliance of the need clause with the AFMP.

50 As has already been held in paragraphs 31 and 32 above, there is no provision applicable to any disputes between the Contracting Parties to the AFMP regarding its interpretation or its application which obliges, or even authorises, the Commission to adopt such measures. Under Article 19 of that agreement, it is merely allowed to bring such a dispute to the Joint Committee.

51 Furthermore, first, it must be pointed out that the AFMP was concluded with the Swiss Confederation not only by the European Union but also by all Member States. Accordingly, as the Commission observes in essence, any adoption of unilateral measures against the Swiss Confederation on account of an infringement of the AFMP requires, at the very least, the Member States' consent.

52 Second, it is true that the Commission enjoys a power of external representation of the European Union under Article 17(1) TEU and that that power authorises it to conduct, on behalf of the European Union, the necessary discussions with the Swiss authorities in order to implement that agreement and ensure that it is applied correctly by them. This does not mean, however, that it may decide, solely on the basis of that power, to adopt legally binding measures against the Swiss Confederation without having been expressly so authorised by the Council of the European Union (see, to that effect, judgment of 28 July 2016, *Council* v *Commission*, C-660/13, EU:C:2016:616, paragraph 36). In the absence of any procedure governing such measures, any adoption of them would necessitate, particularly in view of their potential consequences, reconciling the divergent interests arising in the relations between the European Union and the Swiss Confederation, which is a matter for the Council (see, to that effect, judgment of 28 July 2016, *Council* v *Commission*, C-660/13, EU:C:2016:616, paragraphs 33 and 39).

53 Moreover, such an obligation would risk undermining the implementation of the AFMP, which is one of the seven sectoral agreements concluded with the Swiss Confederation that are intended to strengthen economic ties between the European Union and that third country and which, more specifically, is intended to bring about between the Contracting Parties the free movement of persons on the basis of the rules applying in the European Union (see, to that effect, judgment of 27 February 2014, *United Kingdom* v *Council*, C-656/11, EU:C:2014:97, paragraphs 53 and 55).

54 For the purposes of the settlement of disputes regarding the interpretation of the AFMP and its application, it is essential that the institutions of the European Union and the Member States have a degree of latitude, if not a discretion, that is at least sufficiently broad in order to reconcile, as required, the divergent interests arising in the relations with the Swiss Confederation and to decide on the most appropriate strategy with regard to protecting the interests of the European Union and the interests of the European Union's citizens and operators (see, to that effect and by analogy, judgment of 6 December 2001, *Area Cova and Others* v *Council and Commission*, T-196/99, EU:T:2001:281, paragraphs 122 to 124 and the case-law cited).

55 In addition, it should be observed that the absence of any provision in the AFMP envisaging the adoption of unilateral measures by the Contracting Parties, other than the provisions on the non-renewal or termination of that agreement, and the content of the provisions of Article 19 thereof on the settlement of disputes by the Joint Committee, which pursuant to Article 14 of the AFMP reaches decisions by mutual agreement, show the intention of the Contracting Parties to give preference to negotiation and consensus to ensure that that agreement functions properly.

56 Consequently, in the circumstances of the present case, the Commission was under no duty to adopt against the Swiss Confederation the measures requested by the applicant. Accordingly, assuming that the Commission failed to define its position or take a decision on that request, that failure did not, in any event, constitute a failure to act.

57 Those conclusions cannot be called into question by the application of the principles of the protection of legitimate expectations and of legal certainty, upon which the applicant relies.

58 In accordance with settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person who has been caused by an EU institution to entertain expectations which are justified by precise assurances provided to him. As regards the principle of legal certainty, it requires that EU legislation must be certain and its application

foreseeable by those subject to it (see judgment of 17 February 2017, *Islamic Republic of Iran Shipping Lines and Others* v *Council*, T-14/14 and T-87/14, EU:T:2017:102, paragraphs 191 and 192 and the case-law cited).

59 First, with regard to the principle of the protection of legitimate expectations, it should be noted that the applicant did not receive any precise assurance as regards the adoption by the Commission of unilateral measures in respect of the Swiss Confederation in the light of infringements of the AFMP by that third country.

60 Thus, as has already been stated, there is no applicable provision which requires, or even authorises, the Commission to adopt such measures itself, measures which would, in any event, require the consent of the Member States and of the Council (see paragraphs 50 to 52 above).

61 Furthermore, in the emails of 30 May and 7 June 2018 from the Commission and the letter of 20 December 2018 from the EEAS, the authorities of the European Union provided only general assurances as regards the commitment to make every effort to guarantee the correct application of the AFMP and respect for the rights of Union citizens in Switzerland and as regards the commitment to monitor the legislative process for amending the need clause in that country, in conjunction with that country's authorities (see paragraphs 5 and 8 above).

62 Second, with regard to the principle of legal certainty, it follows clearly and unambiguously from the provisions of the AFMP that that agreement does not provide, at this stage, for a dispute settlement procedure other than that laid down in Article 19 thereof, which allows the Contracting Parties to bring a dispute of that nature to the Joint Committee, without there being any obligation on the latter to reach a settlement of that dispute. Accordingly, as the applicable law currently stands, the AFMP does not provide the Commission with any legal means to protect the rights which Union citizens derive from the AFMP on Swiss territory other than to bring to the Joint Committee any question relating to whether the provisions of Swiss law and of administrative measures adopted under that law comply with that agreement.

63 Furthermore, as has been stated in paragraph 33 above, the adoption, outside any applicable procedure, of unilateral measures by one of the Contracting Parties to the AFMP against the other Contracting Party, on the ground of the latter's infringement of its obligations under that agreement, does not, by definition, offer any guarantee as regards the outcome of the dispute between those contracting parties.

64 In his observations on the objection of inadmissibility, the applicant calls into question the legality of the provisions of the AFMP, on the ground that it does not provide for access to an independent tribunal to settle disputes related to the application of that agreement. However, those considerations cannot call into question the absence, in the present case, of a duty on the part of the Commission to adopt measures against the Swiss Confederation.

65 First, it should be observed that Article 11 of the AFMP provides for a right of appeal for the persons covered by that agreement to the competent authorities and, in particular, to the competent national judicial body. In the present case, it is clear from the material in the file that the applicant was able to bring an action before the TAF against the decision not to allow him to practise under the compulsory sickness insurance scheme. Although the applicant disputes that court's interpretation of the AFMP and of the applicable EU law, he fails to establish that the court did not give its ruling independently. In this regard, it should be recalled that, according to the case-law of the European Court of Human Rights, the method of appointing judges, a point

raised by the applicant in the present case, cannot on its own be sufficient to cast doubt on their independence (see, to that effect, ECtHR, 18 May 1999, *Ninn-Hansen v. Denmark*, CE:ECHR:1999:0518DEC002897295, and 26 August 2003, *Filippini v. Saint-Marin*, CE:ECHR:2003:0826DEC001052602). Furthermore, it is likewise clear from the documents before the Court that an appeal may be lodged against the judgment of the Tribunal arbitral des assurances du canton de Gèneve (Insurance Arbitration Tribunal, Canton of Geneva) of 3 July 2019 before the Tribunal fédéral Suisse (Federal Supreme Court, Switzerland). The applicant fails to establish therefore that, in the present instance, there is no access to an independent tribunal to settle disputes between him or his employers and the Swiss authorities regarding his right to pursue the profession of medical practitioner in the Canton of Geneva.

66 Second, and in any event, the fact that provision is not made in the AFMP for a mechanism allowing the EU judicature to rule on the Swiss authorities' application of that agreement and of EU law cannot, on its own, give rise to a duty on the part of the Commission to adopt unilateral measures in respect of the Swiss Confederation. In that connection, it is sufficient to recall that, as has been held in paragraphs 51 and 54 above, the adoption of such measures requires, at the very least, the consent of the Member States and the approval of the Council and, in addition, cannot be mandatory, in the light of the broad discretion required to make the necessary reconciliations and to decide on the most appropriate strategy.

67 Accordingly, even if the claims for a declaration of failure to act put forward in the application were admissible, they would have to be dismissed in any event as manifestly lacking any foundation in law.

The claims that the European Union has incurred non-contractual liability on account of the Commission's alleged wrongful failure to act

68 The applicant submits that, since 2013, he has suffered continuous harm because of his inability to practise medicine on an independent basis in the Canton of Geneva, and that that harm will continue until 2021 at least. In his view, that harm consists of the loss of income, including the loss of future income connected with the payment of a retirement pension, as well as non-material damage. In his observations on the objection of inadmissibility, the applicant submits that, if the Court were not to find that the Commission wrongfully failed to act, it would have to find that he is suffering abnormal, special, continuous and progressive harm and that the AFMP is manifestly unlawful, so that the Court should, at the very least, acknowledge the strict liability of the European Union and consequently compensate him for the harm that he has suffered.

69 The Commission contends that the action for damages is entirely unfounded.

70 Within the context of his claims for damages, the applicant puts forward, first, claims seeking compensation for the harm that he has already suffered since 2013 on the basis, primarily, of the Commission's wrongful failure to act and, in the alternative, of strict liability, and, second, claims for the imposition of a penalty payment, on account of the harm which he will continue to suffer until the Swiss Confederation complies with the AFMP or one of the Contracting Parties to that agreement withdraws from it. The claims for a penalty payment should be examined first.

– The claims seeking the imposition of a penalty payment

71 As a preliminary point, it should be recalled that an action for damages based on Article 268 TFEU and on the second paragraph of Article 340 TFEU is an independent form of action with a particular purpose to fulfil within the system of actions and is subject to conditions as to its use dictated by its specific nature. It differs from an application for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution (see judgment of 24 October 2000, *Fresh Marine* v *Commission*, T-178/98, EU:T:2000:240, paragraph 45 and the case-law cited).

72 That being so, in the context of an action for damages based on Article 268 TFEU and on the second paragraph of Article 340 TFEU, the EU judicature does not have jurisdiction to impose a penalty payment on the institution held liable for the alleged harm. The purpose of imposing a penalty payment cannot be to provide compensation for harm suffered, but merely to require the institution concerned to put an end to the infringement of EU law for which it is criticised either by adopting or by abolishing a particular measure (see, to that effect and by analogy, judgment of 17 November 2011, *Commission* v *Italy*, C-496/09, EU:C:2011:740, paragraphs 42 to 45).

73 Accordingly, the applicant's claims for a penalty payment have to be dismissed as manifestly inadmissible.

74 In any event, it should be recalled that, according to settled case-law, in order for the European Union to incur non-contractual liability under the second paragraph of Article 340 TFEU for unlawful conduct of its institutions, a number of conditions must be satisfied: the institution's conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (see order of 6 September 2011, *Mugraby* v *Council and Commission*, T-292/09, not published, EU:T:2011:418, paragraph 54 and the case-law cited). In particular, it should be recalled that the damage for which compensation is sought in an action to establish non-contractual liability on the part of the European Union, under the second paragraph of Article 340 TFEU, must be actual and certain, which it is for the applicant to prove. It is for the latter to adduce conclusive proof as to both the existence and the extent of the damage that he alleges (see judgment of 6 September 2018, *Klein* v *Commission*, C-346/17 P, EU:C:2018:679, paragraph 147 and the case-law cited).

75 Assuming that the penalty payment which the applicant asks the Court to impose on the Commission is intended to compensate for the future harm that he will continue to suffer as long as the application of the need clause is maintained in relation to him, such harm cannot, by definition, be regarded as being actual and certain within the meaning of that case-law. The claims for a penalty payment must therefore, in any event, be dismissed as manifestly lacking any foundation in law.

– The claims for the European Union to be ordered to pay compensation for the harm allegedly suffered by the applicant since 2013

76 It should be recalled that, so far as concerns the unlawfulness of the alleged conduct of the institutions, which is one of the three conditions that must be satisfied in order for non-contractual liability of the European Union to be incurred, the case-law requires that there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals. In relation to the requirement that the breach must be sufficiently serious, the decisive criterion for establishing that that requirement is satisfied is whether the institution concerned manifestly and

gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (see order of 6 September 2011, *Mugraby* v *Council and Commission*, T-292/09, not published, EU:T:2011:418, paragraph 55 and the case-law cited).

77 In the present case, first, it is sufficient to observe that, as has been held in paragraph 35 above, in the absence of provisions of international law or of EU law which involve, in some way or other, individuals in the decision-making process relating to the implementation of the AFMP, even if the Commission did fail to fulfil its obligations by not adopting measures against the Swiss Confederation, that supposed failure cannot be regarded as being a breach of a rule of law intended to confer rights on individuals.

78 Second, and in any event, it should be recalled that, as has been held in paragraphs 50 to 52 and 60 above, the Commission is not authorised to adopt such measures within the context of the implementation of the AFMP and could not do so, in any event, without the Member States and the Council having given their consent to their adoption. Furthermore, as the Court has stated in paragraph 54 above, for the purposes of settling disputes regarding the interpretation of the AFMP and its application, it is essential that the institutions of the European Union and the Member States have a degree of latitude, if not a discretion, that is at least sufficiently broad in order to reconcile, as required, the divergent interests arising in the relations with the Swiss Confederation and to decide on the most appropriate strategy with regard to protecting the interests of the European Union and the interests of the European Union's citizens and operators. Accordingly, the Commission's failure to adopt the measures requested by the applicant cannot in any way constitute a manifest and grave disregard by that institution of the limits imposed on its discretion and, therefore, a sufficiently serious breach within the meaning of the case-law recalled in paragraph 76 above.

79 For the same reasons as those set out in paragraphs 58 to 63 above, those considerations cannot be called into question by the principles of the protection of legitimate expectations and of legal certainty.

80 It follows from all the foregoing that the applicant's claims for damages put forward in respect of the Commission's alleged wrongful failure to act must be dismissed as manifestly lacking any foundation in law, without it being necessary to examine whether harm exists and whether there is a link between that harm and the failure to act for which the Commission is criticised.

81 As regards the line of argument put forward in the alternative in the applicant's observations on the objection of inadmissibility, by which he requests that the Court order the Commission to pay compensation for the alleged harm on the basis of strict liability, such a line of argument must be held to be manifestly lacking any foundation in law without it being necessary to rule on whether that line of argument is raised in support of independent claims or includes new pleas in law and whether, as the case may be, such claims or pleas in law would be admissible.

82 The Court has already held that, as it currently stands, EU law does not provide for a regime allowing the liability of the European Union to be put in issue in the absence of unlawful conduct by one of its institutions (see, to that effect, judgment of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraphs 167 and 179). That case-law may be applied in the present case since the provisions of the second paragraph of Article 340 TFEU are, in essence, analogous to the provisions of the second paragraph of the former Article 288 EC, on which that case-law is based.

83 The claims for the European Union to be ordered to pay compensation for the harm allegedly suffered by the applicant since 2013 must therefore be dismissed as manifestly lacking any foundation in law.

The claims for annulment of the Commission's alleged refusal to act and the related claims that the European Union has incurred non-contractual liability

The claims for annulment of the Commission's alleged refusal to act

84 The applicant argues that the letter from the EEAS of 20 December 2018 must be regarded as a refusal to act, since the Commission acknowledges the existence of an infringement of the AFMP by the Swiss Confederation and, contrary to the claim made in that letter, it is able to adopt unilateral measures against that third country.

85 The Commission contends that the application for annulment is inadmissible, first, because it is not the author of the letter of 20 December 2018, secondly, because the content of that letter is informative and, thirdly, because the letter has no binding legal effect.

86 In the present case, assuming that the letter from the EEAS of 20 December 2018 must be regarded as containing a clear refusal from the Commission to act upon the applicant's request for action, the claims for annulment in the action should still be dismissed as manifestly inadmissible.

87 In that regard, first, it should be recalled that, as is clear from the fourth paragraph of Article 263 TFEU, where an action for annulment is brought by a natural or legal person against an act which is not addressed to that person, that act must, inter alia, be of direct concern to the person. In accordance with settled case-law, the condition that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (see judgment of 28 February 2019, *Council* v *Marquis Energy*, C-466/16 P, EU:C:2019:156, paragraph 44 and the case-law cited).

88 In the present case, it is sufficient to note that the first of the cumulative conditions laid down by that case-law is not met. It has been held in paragraph 29 above that measures adopted by the Commission against the Swiss Confederation would not, in themselves, be capable of bringing about a distinct change in the applicant's legal position with regard to his right to pursue the profession of medical practitioner in the Canton of Geneva. Consequently, the refusal to adopt such measures likewise cannot directly affect the applicant's legal situation. Accordingly, without having to examine the other conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU, it is sufficient to state that the contested act is not of direct concern to the applicant.

89 Second, it has been stated in paragraph 35 above that, since the applicant is not entitled to require the Commission to adopt unilateral measures against the Swiss Confederation, as those measures concern merely the relations of the European Union and of the Member States with a third country, he could not be allowed to submit the failure to adopt those measures for review by the

EU judicature. For the same reasons, even assuming that, in the present case, the Commission not only failed to adopt those measures but refused to do so, the claims for annulment of that refusal would still remain manifestly inadmissible.

The claims that the European Union has incurred non-contractual liability

90 As has been stated in paragraph 22 above, the claims put forward in the application for '[the annulment] of the decision implicitly refusing to pay compensation for the harm suffered by the applicant as a result of that infringement' must be regarded as requesting, implicitly but necessarily, that the European Union be ordered to pay compensation for the harm suffered, on the basis of Articles 268 and 340 TFEU. The line of argument reproduced in paragraph 68 above is therefore raised in support of those claims.

91 The Commission contends that the applicant cannot reasonably ask the Court to compensate him for harm allegedly resulting from the Commission's refusal to act, since the Commission is not responsible for the infringements of the AFMP committed by the Swiss authorities.

92 For the same reasons as those set out in paragraphs 77 to 82 above, the applicant's claims for damages based on the Commission's alleged refusal to act upon his request to act must be dismissed, in any event, as manifestly lacking any foundation in law. Even assuming that the letter of 20 December 2018 from the EEAS contains such a refusal, it cannot be regarded either as a breach by the Commission of a rule of law intended to confer rights on individuals within the meaning of case-law or as manifest and grave disregard by that institution of the limits imposed on its discretion and, accordingly, as a sufficiently serious breach of such a rule of law. In addition, such a refusal cannot be regarded as constituting an infringement of the principle of the protection of legitimate expectations or of the principle of legal certainty. Lastly, there is no direct causal link between the Commission's alleged refusal and the damage pleaded by the applicant, since that refusal, as has been held in paragraph 88 above, is incapable of having direct legal effects on the applicant's situation.

93 In conclusion, it follows from all of the foregoing that the action must be dismissed in part as manifestly inadmissible and in part as manifestly lacking any foundation in law.

Costs

94 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

95 Since the applicant has been unsuccessful in the present case, he must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby orders:

1. The action is dismissed.

2. Mr Nathaniel Magnan shall pay the costs.

Luxembourg, 25 September 2019.

E. Coulon
Registrar

D. Gratsias
President