Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 20 November 2025 [1]

Case C-882/24 P

AL

v

European Commission

(Appeal – Civil service – Remuneration – Family allowances – Dependent child allowance – Article 2 of Annex VII to the Staff Regulations – Withdrawal of the allowance – Recovery of sums unduly paid under Article 85 of the Staff Regulations – Review of legality – Effects of a final and retroactive national decision – Effective judicial protection)

1. By this appeal, a (former) [2] official of the General Secretariat of the Council of the European Union seeks to have set aside the judgment of the General Court of 10 April 2024, *AL* v *Commission*. [3]

2. The judgment under appeal confirmed a decision of the European Commission [4] ordering the recovery of certain payments made to the appellant in the form of family allowances.

3. It is settled case-law of the Court of Justice that the legality of an act adversely affecting a person, challenged by way of an action for annulment, must in principle be assessed in the light of the matters of fact and law *existing* at the time when that act was adopted.

4. It falls to be determined now whether the General Court distorted the facts in failing to take into account the retroactive effects of a final national judgment duly entered in the case file and delivered *after* the adoption of the act adversely affecting AL but *prior to* the end of the written part of the action for annulment.

1 Original language: Spanish.

2 On 27 September 2021, at the end of disciplinary proceedings, the appointing authority ('the AA' or 'the administration') of the Council decided to remove the appellant from his post. AL brought an action against that decision before the General Court, which confirmed the decision by judgment of 10 April 2024, *AL* v *Council* (T-22/22, EU:T:2024:219), against which AL has brought an appeal that is still pending before the Court of Justice (Case C-893/24 P, *AL* v *Council*).

3 T-50/22, EU:T:2024:220; 'the judgment under appeal'. As directed by the Court of Justice, I shall address only the second ground of appeal in this Opinion.

4 The action for annulment before the General Court was directed against the decision of the AA of 22 October 2021 (Ares(2021)6909466), which ruled on the complaint lodged by AL against a previous decision of 22 March 2021 (Ares(2021)2023374) ordering the recovery of certain family allowances paid to him. In paragraphs 17 and 21 of the judgment under appeal, the General Court held that the action for annulment, although formally directed against the rejection of the complaint, had the effect of bringing before the EU judicature the original act adversely affecting him. Therefore, I shall hereinafter use the expression 'the contested decision' to refer, in general terms, to both decisions, taken together. However, where it is necessary to distinguish between them, I shall use the expressions 'the decision of 22 March 2021' and 'the decision of 22 October 2021'.

I. Legal framework – Staff Regulations [5]

5. In accordance with Article 85:

'Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.

The request for recovery must be made no later than five years from the date on which the sum was paid. Where the Appointing Authority is able to establish that the recipient deliberately misled the administration with a view to obtaining the sum concerned, the request for recovery shall not be invalidated even if this period has elapsed.'

II. Background to the dispute

6. The background to the dispute is set out in detail in paragraphs 2 to 13 of the judgment under appeal. I shall mention only those factual elements of it that are relevant to this Opinion.

7. AL was appointed as an official on 1 December 2007 and was assigned to the General Secretariat of the Council in Belgium.

8. On 28 July 2010, the competent Romanian authority placed two minors in foster care with AL. [6] Authorisation was given for them to be transferred to Belgium to live with AL and his wife.

9. Under Article 2 of Annex VII to the Staff Regulations, AL applied for dependent child allowance, which was granted to him and paid from 1 August 2010 to 31 July 2013. [7] In support of his application, AL submitted a number of consular documents equivalent to parental authorisation.

10. On 30 January 2013, following a joint request to that effect by AL and the minors' parents, filed on 16 October 2012, the Child Protection Commission adopted two decisions terminating the foster care placement. [8]

11. It is apparent from the documents in the case that those two national decisions of 30 January 2013, which were adopted without the applicants' being present, were never notified to AL. [9]

[5] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (OJ, English Special Edition, Series I Volume 1959-1962, p. 135), as amended by Council Regulation (EC, Euratom) No 723/2004 of 22 March 2004 (OJ 2004 L 124, p. 1); 'the Staff Regulations'.

[6] Decisions Nos 107 and 108 of 28 July 2010 of the Comisia pentru protecția copilului – Sectorului 5 București (Child Protection Commission – Sector 5, Bucharest, Romania) ('the decision of 28 July 2010').

[7] The allowance was initially awarded for the period from 1 August 2010 to 31 July 2011. It was subsequently renewed twice, for the periods from 1 August 2011 to 31 July 2012 and from 1 August 2012 to 31 July 2013.

[8] 'The national decisions of 30 January 2013'.

[9] See footnote 14 to this Opinion.

12. On 22 March 2021, acting on the basis of the findings of an investigation by the European Anti-Fraud Office (OLAF) initiated in 2016 and pursuant to Decision (EU) 2019/792,[10] the Commission ordered the recovery of (among other benefits) the allowances unduly paid to AL for the two minors during the period from 1 August 2010 to 31 July 2013, in accordance with Article 85 of the Staff Regulations.[11]

13. AL responded by means of two recourse mechanisms:

– On 16 March 2021, AL himself and the minors' parents brought an action for annulment of the national decisions of 30 January 2013 before the Tribunalul București (Regional Court, Bucharest, Romania).[12] They claimed that those decisions were contrary to the best interests of the minors, had not been notified and were vitiated by other procedural defects.

– He submitted a complaint against the decision of 22 March 2021, in accordance with Article 90(2) of the Staff Regulations.

14. The outcome of those two recourse mechanisms was as follows:

– As regards the challenge brought against the national decisions of 30 January 2013, the Tribunalul București (Regional Court, Bucharest), by judgment of 16 May 2022,[13] declared those decisions to be absolutely and retroactively null and void. That judgment became final on 16 August 2022.[14]

– So far as concerns the complaint to the Commission, on 22 October 2021 the AA upheld the complaint in part, with the result that: (a) it reinstated the allowance for the period from 1 August 2010 to 29 January 2013; and (b) it ordered the recovery of the allowances unduly paid following the adoption of the national decisions of 30 January 2013 in respect of a period of six months in the case of one of the minors and two months in the case of the other.[15] Even though it had been duly informed of the existence of the proceedings pending before the Tribunalul București (Regional Court, Bucharest), the AA of the Commission took the view that those proceedings were not relevant to the decision on the complaint.[16]

[10] Council Decision of 13 May 2019 entrusting to the European Commission – the Office for the Administration and Payment of Individual Entitlements (PMO) – the exercise of certain powers conferred on the appointing authority and the authority empowered to conclude contracts of employment (OJ 2019 L 129, p. 3).

[11] According to the Commission, by failing to inform it immediately of the significant change in his family situation which had taken place as a result of the national decisions of 30 January 2013, AL deliberately misled the administration with a view to obtaining payment of the allowance, within the meaning of the second sentence of the second paragraph of Article 85 of the Staff Regulations.

[12] That action, brought eight years after the adoption of the contested decisions, does not appear so out of time when viewed in a broader factual context. It is apparent from the final report of the OLAF investigation in Case OF/2016/0928/A1 that, although the investigation was launched on 8 November 2016, AL was informed of its initiation on 22 July 2020 and was notified of the final report in December 2020. It is therefore plausible, given the failure to notify the national decisions of 30 January 2013, that their existence came to light in the course of the OLAF investigation and that AL did not become fully aware of them until some point between July and December 2020.

[13] Civil judgment No 844 of 16 May 2022, ECLI:RO:TBBUC:2022:013:000844 ('the judgment of 16 May 2022').

[14] The judgment of 16 May 2022 confirmed the absence of any proof of proper notification of the national decisions of 30 January 2013, but linked their absolute nullity mainly to the infringement of mandatory rules intended to protect the best interests of the minor. In particular, neither the biological parents nor the foster parents were duly summoned to a hearing prior to the adoption of those decisions. Furthermore, the minors were not afforded an opportunity to make their views known before the decisions were adopted.

[15] That difference is due to the fact that, in April 2013, AL had filed an application to adopt one of the minors and was granted an allowance for that reason, in accordance with the second subparagraph of Article 2(2) of Annex VII to the Staff Regulations. In the case of the other minor, the recovery order covers the period from 1 February to 31 July 2013.

[16] Page 27 of the English version of the decision of 22 October 2021.

III. Proceedings before the General Court and judgment under appeal

15. On 21 January 2022, AL brought an action for annulment of the decision of 22 October 2021 before the General Court.

16. In support of his action, he put forward five pleas for annulment. The fourth plea alleged an infringement of Article 85 of the Staff Regulations and an error of assessment in relation to the allowance paid for the two minors covering the period subsequent to the national decisions of 30 January 2013 and up until the end of the period for which the allowance had been granted (from 1 February to 31 July 2013).

17. Under that plea for annulment, AL:

– reiterated that he had been unaware of the national decisions of 30 January 2013 and, therefore, had not had any intention of deliberately misleading the administration about the date on which the period of foster care came to an end; [17]

– drew attention to the existence of the annulment proceedings pending before the Tribunalul București (Regional Court, Bucharest); [18]

– maintained that the national decisions of 30 January 2013 did not affect the validity of the consular documents which, in his view, supported the grant of the dependent child allowance.

18. In a later document (the reply), lodged on 30 August 2022, AL informed the General Court of the outcome of the proceedings before the Tribunalul București (Regional Court, Bucharest) and sent it a copy of the judgment of 16 May 2022.

19. In its rejoinder, the Commission contended that the judgment of 16 May 2022 was incapable of affecting the legality of the contested decision, since that decision had to be assessed exclusively in the light of the matters existing at the time of its adoption. [19]

20. In the judgment under appeal, the General Court:

– found, in response to the fourth plea for annulment, that the administration was entitled to form the view, rightly, that AL had deliberately misled it by failing to disclose the termination of the foster care placement as from 1 February 2013; [20]

– held that, 'in the light of the application of Article 85 of the Staff Regulations, the fact that an action *[was] pending* before the Romanian courts against the decision terminating the foster family placement [was] … irrelevant, since that decision [*did*] *in fact [produce] legal effects* as from January 2013'; [21]

[17] Application to the General Court, paragraphs 110 to 119.

[18] Application to the General Court, paragraph 121.

[19] Commission's rejoinder to the General Court, paragraphs 30 to 32. As regards the failure to notify the national decisions of 30 January 2013, the administration '[found] it implausible' that AL would not have been aware of the existence of a decision adopted in proceedings which he had himself initiated.

[20] In paragraphs 94 to 98 of the judgment under appeal, the General Court concurred with the position taken by the administration, as set out in the preceding footnote. Notwithstanding the failure to notify the national decisions of 30 January 2013, it was for AL to request information directly from the Romanian authorities if he had any doubts concerning the outcome of his request (paragraphs 96 to 98 of the judgment under appeal).

[21] Paragraph 100 of the judgment under appeal. Emphasis added.

– found that the AA had not made an error of assessment by basing its request for recovery of the allowances paid on the adoption of the national decisions of 30 January 2013. Although granted and maintained on the basis of consular documents showing that the minors were going to reside with the appellant, it was the maintenance costs connected with the minors that justified the grant of those allowances. [22]

21. Consequently, the General Court dismissed the fourth plea of the application for annulment as unfounded.

IV. Procedure before the Court of Justice

22. In his appeal, lodged on 19 December 2024, AL claims that the Court should:

– set aside the judgment under appeal;

– annul the decision of 22 October 2021 in so far as it dismisses the complaint lodged against the decision of 22 March 2021;

– allow him to raise new related grounds of appeal if new matters of law or fact come to light;

– assess of its own motion any other ground of appeal in the public interest which it considers appropriate;

– order the Commission to bear its own costs and to pay those incurred by the appellant.

23. The Commission contends that the Court should:

– dismiss the appeal;

– order the appellant to pay the costs.

V. Second ground of appeal

24. In its appeal, AL puts forward three grounds in support of his claim that the judgment under appeal should be set aside. As I have already stated, I shall address only the second of those grounds of appeal, which is divided into three parts.

A. Arguments of AL and the Commission

25. By the first part of his second ground of appeal, AL claims that the General Court distorted the facts in stating (paragraph 100 of the judgment under appeal) that 'an action [was] pending' before the Romanian courts against the national decisions of 30 January 2013, when, in actual fact, that action had been brought to an end by judgment of 16 May 2022, which was incorporated into the proceedings in the reply.

[22] Paragraph 101 of the judgment under appeal.

26. In the second part of the second ground of appeal, AL submits that, as a result of the judgment of 16 May 2022, the General Court made an error of law in stating (paragraph 100 of the judgment under appeal) that the national decisions of 30 January 2013 had produced legal effects as from January 2013.

27. In the third part of the second ground of appeal, AL maintains that the General Court failed to comply with the rule on the symmetry of forms in stating (paragraph 101 of the judgment under appeal) that the AA had not made an error of assessment by basing its order for recovery of the allowances paid on the national decisions of 30 January 2013.

28. The Commission objects to this ground of appeal, reiterating that, in order to assess the legality of an act adversely affecting a person, the General Court must take as its point of reference the situation existing at the time when the AA adopted the contested act, that is to say 22 October 2021. On that date, the proceedings before the Tribunalul București (Regional Court, Bucharest) were still pending.

29. In the same vein, the Commission states that, on 22 October 2021, the annulment *ex tunc* of the national decisions of 30 January 2013 had not yet been ordered.

30. Finally, the Commission rejects the third part of the second ground of appeal as being unclear and unfounded.

B. Assessment

1. Preliminary observations

31. The first and second parts of the second ground of appeal are closely related. They share the criticism, albeit levelled from different points of view, that the General Court failed to take into account: (a) the conclusion of the annulment proceedings brought before the Tribunalul București (Regional Court, Bucharest); and (b) the consequences of the judgment of 16 May 2022 for the legal effects of the national decisions of 30 January 2013.

32. As a preliminary point, I would recall that the (final) judgment of 16 May 2022 declared the national decisions of 30 January 2013 to be null and void *ab origine*. Consequently, those decisions *never produced* any legal effects. In particular, they did not put an end, legally, to the foster care measure in place in 2013.

33. AL was paid the dependent child allowance until 31 July 2013. Accordingly, during the period in which he received that benefit, the foster care measure ordered by decision of 28 July 2010 had to be regarded as valid and effective: the minors could be treated as dependent children in accordance with Article 2(2) of Annex VII to the Staff Regulations.

34. For the purposes of the application of Article 85 of the Staff Regulations, there were thus no sums unduly paid in the form of dependent child allowance,[23] or any manifest intention to 'deliberately mis[lead] the administration' as to the date on which the foster care measure came to an end.

35. In that context, the criticism which AL levels at paragraph 100 of the judgment under appeal is twofold:

– with regard to the finding that the action for annulment of the national decisions of 30 January 2013 was still pending, AL expressly claims a 'significant misrepresentation … of the facts';[24]

– with regard to the effects of the national decisions of 30 January 2013 once they had become final, AL criticises the General Court's interpretation of the judgment which annulled them.

2. First part of the second ground of appeal

36. As I have already indicated, AL claims that the General Court distorted the facts in stating that the action for annulment of the national decisions of 30 January 2013, which had been brought before the Romanian court, was still pending when it had, in fact, already been concluded. He also criticises the General Court for having failed to take into account the (final) judgment of 16 May 2022 which brought that action for annulment to an end.

37. As a ground of appeal of an 'exceptional nature',[25] distortion of the facts must be interpreted strictly. In order for such a distortion to be present, the following conditions must be met:

– the appellant must 'indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to that distortion';[26]

– the error committed by the General Court must take the form of a material inaccuracy in its observations that is obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts;[27]

– the distortion of the facts, if established, must be such as to affect the soundness of the judgment under appeal.[28]

[23] It is true that, in the light of the statement of facts, the dependent child allowance was granted until 31 July 2013, even though the decision of 28 July 2010 had set the end date of the foster care placement as being 27 July 2013. Nonetheless, even if there had been an overpayment of the allowance in respect of the four additional days, the administration's claim would now be time-barred pursuant to the second paragraph of Article 85 of the Staff Regulations, since the specific intent required to render the time limit unenforceable against the AA was not present.

[24] Paragraph 15 of his appeal.

[25] Judgment of 20 October 2011, *PepsiCo* v *Grupo Promer Mon Graphic* (C-281/10 P, EU:C:2011:679, paragraph 78).

[26] *Loc. ult. cit.*

[27] Judgment of 1 August 2025, *France and Commission* v *CWS Powder Coatings and Others* (C-71/23 P and C-82/23 P, EU:C:2025:601, paragraph 67).

[28] If that condition is not met, the ground of appeal must be rejected as ineffective (judgments of 1 February 2007, *Sisón* v *Council*, C-266/05 P, EU:C:2007:75, paragraphs 71 and 72, and of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 109).

38. As regards the first condition, in my opinion, AL discharged his duty to substantiate and prove his claim: he identified precisely the allegedly distorted fact and the error of appraisal arising from its distortion. [29]

39. As regards the third condition, there is in my opinion no denying the impact of the judgment of 16 May 2022, which declared the national decisions of 30 January 2013 null and void *ab origine*. Those decisions, as I have already stated, *never produced* any legal effects, in the opinion of the Romanian court, which has a direct impact on the 'soundness' of the judgment under appeal.

40. The assessment of the second condition, on the other hand, presents more difficulties, on account of *when* the judgment of 16 May 2022 was delivered. That judgment was given *after* the adoption of the contested decision but *prior to* the conclusion of the written part of the action for annulment pending before the General Court.

41. In that regard, I would like to draw attention to two relevant points.

42. First of all, it is common ground that AL submitted the judgment of 16 May 2022 to the General Court, attaching it to the reply along with a translation of the judgment into the language of the proceedings.

43. It is also common ground that the General Court did not assess the existence of the judgment of 16 May 2022 and its legal effects on the national decisions of 30 January 2013.

44. I share the view expressed by Advocate General Mengozzi: a distortion of the facts may present itself in the form of 'a manifestly inaccurate finding of the content of the evidence taken into account, or … the omission or selection of evidence giving rise to a manifestly misleading and incorrect impression of the truth'. [30]

45. There will therefore be a distortion of the facts where there is an *unjustified or arbitrary* omission or selection of evidence.

46. The Commission argues that, in the present case, the omission was not only *justified* but also *required* by the case-law of the Court of Justice on the point in time at which the legality of the contested measure is to be assessed, having regard to the matters of fact and law *existing* at the time when the measure was adopted. [31]

47. For the reasons which I shall set out below, it is my view that that argument cannot succeed in the present case.

[29] Paragraphs 15 to 19 of his appeal.

[30] Opinion in the Joined Cases *ArcelorMittal Tubular Products Ostrava and Others* v *Council* and *Council* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2015:767, paragraph 72).

[31] Judgment of 7 February 1979, *France* v *Commission* (15/76 and 16/76, EU:C:1979:29, paragraph 7). That principle is applied consistently and across the board: see judgments of 17 May 2001, *IECC* v *Commission* (C-449/98 P, EU:C:2001:275, paragraph 87) (competition); of 22 December 2008, *Centeno Mediavilla and Others* v *Commission* (C-443/07 P, EU:C:2008:767, paragraph 110) (civil service); of 3 September 2015, *Inuit Tapiriit Kanatami and Others* v *Commission* (C-398/13 P, EU:C:2015:535, paragraph 22) (action for the annulment of a legislative measure); of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraphs 37 and 38) (restrictive measures); and of 4 October 2024, *García Fernández and Others* v *Commission and SRB* (C-541/22 P, EU:C:2024:820, paragraph 327) (economic and monetary policy). I shall henceforth refer to this case-law as the case-law 'on the review of legality'.

(a) Matters 'existing' at the time when the contested decision was adopted

48. Should the General Court have based its assessment solely on the matters *existing* at the time when the administration adopted the contested decision, on 22 October 2021? [32]

49. To my mind, both the Commission (in its response) and the General Court (in the judgment under appeal) were misguided in their approach to determining which matters of fact and law '*existed*' on that date. They both rely on a purely *material* view of the relevant factors, as a result of which:

– on 22 October 2021, the national decisions of 30 January 2013, the (apparent) legal effects of which were to bring the foster care measure to an end, 'existed' in fact (in the sense that they had been adopted);

– on 22 October 2021, the judgment of 16 May 2022, on the other hand, did not yet 'exist'. It would therefore be correct to say that the action for annulment was pending before the Tribunalul București (Regional Court, Bucharest).

50. However, that approach is liable to sidestep the fundamental issue raised in the present case, which is the consideration of the *retroactive* and *purely declaratory* effect of the judgment of 16 May 2022, together with its status as *res judicata*.

51. The judgment of 16 May 2022 prevented the General Court from giving effect to the national decisions of 30 January 2013, invalid by operation of law, in its definition of the factual and legislative context.

52. By not taking account of that matter (that is to say, by failing to recognise that, on 22 October 2021, the national decisions of 30 January 2013 could not be accepted as valid), the General Court disregarded the retroactive effect of the judgment of 16 May 2022. [33] It thus distorted the key fact in this dispute, which is the situation of the minors in relation to AL, and the understanding of the Romanian law applicable *ratione temporis* to the facts.

53. For the purposes of establishing a distortion of the facts, it is immaterial that the nullity of the national decisions of 30 January 2013 followed from a final judgment delivered *after* the adoption of the contested decision, if – as is the case here – the wording of that judgment shows that its legal effects *are retroactive* to an earlier date.

54. As I have already said, the judgment of 16 May 2022 *altered the situation* 'existing' in January 2013 by unequivocally declaring the national decisions of 30 January 2013 to be absolutely and retroactively null and void. Those decisions had been removed *root and branch* (*ex tunc*) from the Romanian legal order.

[32] That is the date of the decision on the complaint. As the General Court recalls in paragraphs 17 to 22 of the judgment under appeal, the evolving nature of the administrative complaint means that the further particulars with respect to the grounds for confirming the earlier measure that are contained in an express decision rejecting the complaint will be taken into consideration in the assessment of the legality of the contested measure.

[33] The General Court did not take adequate account of the fact that, from a legal point of view, the 'time' factor does not operate in a linear and irreversible fashion: something which has not happened at a given point in time may be deemed to have been legally in existence at that time if a subsequent measure applies retroactively. And vice versa.

55. Furthermore, the judgment of 16 May 2022 did not have an independent constitutive effect: it simply 'acknowledges' the defect vitiating the national decisions of 30 January 2013 *from their inception*.[34] In annulling those national decisions, the Romanian court restored the legal situation to that which had existed prior to their delivery (as defined by the decision of 28 July 2010).[35]

56. In short, the judgment of 16 May 2022 was the definitive (and final) response by a Romanian court to the action challenging the validity of a national measure over which the General Court has no jurisdiction. The latter had a duty to accept the assessments of the Romanian court and to recognise the authority of *res judicata* attaching to that judgment.[36]

57. In the light of the content of the judgment of 16 May 2022, the situation *existing* on 22 October 2021 should, as I have said, have been assessed on the basis that the foster care arrangement in place on 22 October 2021 had not been changed, by operation of law, by the national decisions of 30 January 2013.

58. In order to meet the threshold for a distortion of the facts, the General Court must have 'manifestly exceeded the limits of a reasonable assessment' of the evidence entered in the case file.[37] The interpretation proposed by the party claiming the distortion must be the *only way* in which the documents before the Court could be construed. The divergent assessment of those documents by the General Court must show that it distorted their content 'in a manner manifestly at odds with their wording'.[38]

59. I consider that to be the case here.

[34] The reasons for the declaration of absolute nullity are set out in footnote 14.

[35] Notwithstanding that the judgment of 16 May 2022 mentions the 'new' dates for the end of the foster care measure, these were not 'established' by it. On the contrary, these derive from external circumstances to do principally with the restoration of the legal effects produced by the decision of 28 July 2010, and with other successive events known to the administration (such as the emancipation of one of the minors and the adoption of that minor by AL). See, in that regard, the text of the judgment reproduced in footnote 39.

[36] The principle of the authority of *res judicata* is of fundamental importance both in EU law and in national legal systems. So much so that a national court is not required to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (see, to that effect, the judgment of 7 April 2022, *Avio Lucos*, C-116/20, EU:C:2022:273, paragraphs 92 and 93 and the case-law cited). Although that principle is not such as to preclude the exercise of an exclusive competence of an EU institution (judgment of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434), the requirement not to apply it remains exceptional and should not be extended beyond that scenario. In the present case, the General Court was under an obligation to respect the authority of *res judicata* attaching to the judgment of 16 May 2022 and to abide by the findings of the Romanian court, particularly given that such respect would have facilitated, rather than undermined, the correct application of Article 85 of the Staff Regulations.

[37] In particular, 'it … does not suffice, in order to show such a distortion, to suggest a reading of that evidence different from that adopted by the General Court' (judgment of 29 October 2015, *Commission* v *ANKO*, C-78/14 P, EU:C:2015:732, paragraph 55).

[38] See, inter alia, the judgment of 10 February 2011, *Activision Blizzard Germany* v *Commission* (C-260/09 P, EU:C:2011:62, paragraphs 54 to 57).

60. The wording of the judgment of 16 May 2022 does not allow for any interpretation other than that based on the nullity *ab origine* and *ex tunc* of the national decisions of 30 January 2013. [39] A reading of that judgment does not support the *reconstruction* of the facts carried out in paragraph 100 of the judgment under appeal.

61. The foregoing is sufficient to support the conclusion that the General Court distorted the facts with respect to the status of the action brought before the Tribunalul București (Regional Court, Bucharest) and the relevance of the judgment of 16 May 2022 as a key factor in the application of Article 85 of the Staff Regulations.

62. It stands to reason that, when it adopted the contested decision (on 22 October 2021), the administration was unaware of the existence of the judgment of 16 May 2022 and of the absolute nullity of the national decisions of 30 January 2013. That lack of awareness, however, has no bearing on what I have just said, as I shall explain below.

(b) Requirement of prior knowledge by the administration of the matters 'existing' on the date when the contested decision was adopted

63. In the abstract, it could be argued that the circumstances informing the assessment of the legality of a contested decision must not only 'exist' at the time when that decision was adopted but must also be 'known' to the administration which issued it. [40]

64. In my view, however, prior knowledge by the administration is not an absolute condition. The case-law on the review of legality (which recognises the administration's decision-making autonomy vis-à-vis the General Court) [41] allows the need for prior knowledge to be dispensed with in certain situations.

[39] Page 11 of the English translation of the judgment of 16 May 2022 reads: 'Finding the reason for nullity based on the violation of the provisions of [Article] 58(4) and … [Article] 29(1) of [Legea nr. 272/2004 privind protecția si promovarea drepturilor copilului (Law No 272/2004 on the protection and promotion of the rights of minors); 'Law No 272/2004'], in the form in force on the date of issuing the contested decisions, the [court] shall [declare] the absolute nullity of [Decision No] 14/30.01.2013 and of [Decision No] 15/30.01.2013 issued by the Child Protection Commission of the [local council of the municipality of Bucharest (Romania)] 5 …, [decisions] which had terminated the [child] protection measure of placement in [foster care] of the [then] minors [A] and [B]; … Resulting from the above [findings and declaration of absolute nullity], *the [child protection] measure of placement [in foster care] of the minors did not end as a result of the [hereby annulled] [Decision No] 14/30.01.2013 and of [Decision No] 15/30.01.2013* …, [but instead the court finds that] this measure … continued to produce effects until the child [A] became legally major, on [13 May 2014], date set by the closing judgment … pronounced by the [Tribunalul Alba (Regional Court, Alba, Romania)] … in which full legal capacity [emancipation] was recognised upon reaching the age of 16 … Pertaining to the child [B], starting [the legal reasoning] from the provisions of [Article] 58(1) of [Law No] 272/2004, according to which the measure of placement [in foster care] is a temporary one, as the placement decision was issued on [28 July 2010], this measure has ceased on [28 July 2013]' (emphasis added).

[40] In the interests of brevity, I shall henceforth use the term 'prior knowledge' when referring to this requirement.

[41] Limiting the review of legality to the matters existing at the time when the contested decision was adopted serves to ensure that the General Court, when considering matters which have arisen since and were unknown to the administration, does not substitute its own reasoning for that of the administration (judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38; 'the judgment in *Galp Energía España*', paragraph 73).

65. The requirement that the administration must have had an opportunity to acquaint itself with and assess autonomously beforehand the matters of fact and law on which the review as to the legality of the act adversely affecting a person is based is, depending on the case in question, either *dispensable* [42] or, conversely, *indispensable* [43] in the context of that review.

66. The variations in the treatment afforded to the requirement of prior knowledge (by the administration) depend on: (a) the structure of, and aims pursued by, the administrative procedure in the various areas of EU law; and (b) the different points of balance between those aims and the (opposing) interests of the person adversely affected by an act as someone entitled to effective judicial protection. [44]

67. Identifying the point of equilibrium *inherent in matters relating to the civil service* calls for a reasoned balance to be struck between two different factors:

– on the one hand, the objectives pursued by a complaint as provided for in matters relating to the civil service, in particular in cases concerning the application of Article 85 of the Staff Regulations;

– on the other hand, the consequences of a restrictive interpretation which might operate to the detriment of the applicant's right to effective judicial protection (in particular, his or her rights of defence).

68. With regard to the first factor, the Court of Justice has drawn attention to 'the principle consistently upheld by the Court according to which Article 91 of the Staff Regulations is designed to permit and encourage the amicable settlement of differences which have arisen between officials and the administration. In order to comply with that requirement it is essential that the administration should be in a position to know with sufficient certainty the complaints or wishes of the person concerned' as early as the complaint stage. [45]

69. With regard, more specifically, to Article 85 of the Staff Regulations, its purpose is to protect the financial interests of the European Union: [46] once it has been established that the conditions governing its application are met, the administration has an obligation to recover in full the sums unduly paid.

[42] As regards the protection of competition, the Court of Justice has confirmed that the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 TFEU and 102 TFEU, whether they 'pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the [contested] decision' (judgment in *Galp Energía España*, paragraph 72).

[43] In the context of State aid, 'the lawfulness of a decision taken at the end of the preliminary examination stage is examined only *on the basis of the information which the Commission had at its disposal* at the time when it made the decision.' Emphasis added. Judgments of 17 July 2008, *Athinaïki Techniki* v *Commission* (C-521/06 P, EU:C:2008:422, paragraph 56 and the case-law cited); of 2 September 2010, *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 91); and of 20 December 2017, *Spain* v *Commission* (C-81/16 P, EU:C:2017:1003, paragraph 52).

[44] According to the judgment of 15 April 2008, *Nuova Agricast* (C-390/06, EU:C:2008:224, paragraphs 57 to 60), the limitation imposed by the case-law mentioned in the previous footnote is warranted by the objective of preserving the 'division of the review of State aid into two distinct stages, the second of which is not always required …'. In the field of the protection of competition, on the other hand, the Court of Justice justifies the relaxation of the parameters of the review of legality by reference to the general legal framework in the field concerned, noting that, 'as regards the application of Articles 81 EC and 82 EC, there is no requirement under the law of the European Union that the addressee of the statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings. … In the absence of a specific legal basis, such a restriction [of the right to bring proceedings] is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence' (judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraphs 89 to 91).

[45] Judgment of 7 May 1986, *Rihoux and Others* v *Commission* (52/85, EU:C:1986:199, paragraph 12 and the case-law cited).

[46] As recalled by the judgment under appeal in paragraph 64 thereof.

70. That said, in the context of Article 85 of the Staff Regulations, a complaint is aimed not so much at achieving a genuine amicable settlement based on reciprocal concessions between the parties as, rather, at avoiding any unnecessary recourse to litigation.

71. From that point of view, the complaining official's intervention will enable the administration to obtain some clarity on whether the objective and subjective preconditions for the application of Article 85 of the Staff Regulations are met and, if necessary, to rectify a previous decision in the light of the new information obtained.

72. Requiring that an assessment of the legality of the administration's actions be confined to the matters actually *known* at the time when the contested decision was adopted could, in certain circumstances, restrict the applicant's rights of defence.

73. Specifically, those rights would be unduly restricted if the applicant could not submit to the EU judicature *any such matters*, even if discovered subsequently, as are relevant to his or her defence, in so far as they have a bearing on the legality of the act adversely affecting him or her.

74. Generally speaking, in the case of administrative decisions which have *already become final*, because the time limits for bringing a complaint and taking legal action have expired, the Court of Justice [47] strikes a balance between that objective and the rights of defence of the applicant by allowing the latter to ask the administration, within a reasonable period, [48] to re-examine his or her situation in the light of the subsequent emergence of a 'material' new fact. [49] The applicant may challenge before the General Court the legality of the decision adopted following that subsequent examination.

75. That approach preserves both the decision-making autonomy of the administration and the rights of defence of the applicant, who thus circumvents the final nature of a previous decision.

76. Unless I am mistaken, the Court of Justice has not yet had occasion to rule on a situation such as that at issue here, in which the material new [50] fact emerges at a time when the contested decision *has not yet become final* because the action brought against it before the General Court *is still pending* (Article 270 TFEU).

77. In such a situation, a restrictive interpretation of the case-law linking the legality of an act adversely affecting a person to matters not only in existence but also known to the administration:

– would prevent the General Court from taking into account facts occurring after the adoption of the contested decision, notwithstanding their timely inclusion in the case file and their potentially retroactive effects;

[47] Judgment of 18 June 1981, *Blasig* v *Commission* (173/80, EU:C:1981:145, paragraph 8); order of 18 November 1999, *Progoulis* v *Commission* (C-431/98 P, EU:C:1999:569, paragraph 36); and judgment of 20 May 2021, *Dickmanns* v *EUIPO* (C-63/20 P, EU:C:2021:406, paragraph 38).

[48] Order of 11 June 2009, *Ketselidou* v *Commission* (F-81/08, EU:F:2009:59, paragraph 36).

[49] Judgment of 26 October 2017, *Global Steel Wire and Others* v *Commission* (C-454/16 P to C-456/16 P and C-458/16 P, EU:C:2017:818, paragraph 31). The Court of Justice accepts that a judgment annulling an administrative measure which was delivered after the adoption of the (now final) contested decision may constitute a 'material new fact' as regards the persons directly affected by the measure annulled (judgment of 8 March 1988, *Brown* v *Court of Justice*, 125/87, EU:C:1988:136, paragraph 13 and the case-law cited).

[50] I am using the term 'new' here in the sense given to it by the case-law cited in footnote 47, that is to say as a fact previously unknown both to the official and to the administration. In that context, classifying the judgment of 16 May 2022 as a 'new fact' is not incompatible with the approach proposed in points 49 to 57 of this Opinion, to the effect that the absolute nullity of the national decisions of 30 January 2013 is retroactive to the time when the contested decision was adopted. That apparent contradiction is due to the fact that an (unknown) new fact may produce retroactive effects on previous legal situations.

– would compel the applicant, as a precondition of entitlement to rely on all the existing exculpatory evidence, to approach the administration once again in order to adduce material new facts in connection with decisions which are already final.

78. In the circumstances of the present case, it would be neither reasonable nor proportionate to require AL to lodge a new complaint with the administration.

79. Requiring AL to request a re-examination by the administration (for the sole purpose of enabling the latter, if necessary, to *avoid recourse to litigation* in connection with that material new fact) is not justified where *judicial proceedings* relating to the effect of that same fact on the legality of the contested decision *are already under way*. [51]

80. Such a requirement would go beyond what is necessary to attain the objective pursued and preserve the sound administration of justice. It would, moreover, constitute an obstacle to the prompt resolution of the substance of the dispute by the EU judicature.

81. In my opinion, if it had classified that judgment as a 'material new' fact, the General Court would have been in a position to assess it directly and autonomously once it had been *duly entered in the case file and subjected to an exchange of arguments between the parties*. It would thus have been able to draw its own conclusions on the effect of that fact on the legality of the action taken by the administration on the date in question.

82. What is more, the approach I am proposing seems to me to be of a piece with the case-law of the Court of Justice on consistency between the complaint and the corresponding legal action.

83. In principle, the consistency rule, like that relating to the review of legality, restricts the possibility of submitting directly to the court, during the litigation stage of the case, matters and pleas not relied on and discussed in the prior administrative complaint.

84. The Court of Justice has stated that an administrative complaint, although compulsory, does not have as its purpose 'to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the legal basis nor the [subject matter] of the complaint'. [52] 'The general plan both of the administrative procedure and of the court procedure militates against an interpretation of Article 91(2) which, if taken literally, would merely result in a futile prolongation of the procedure'. [53]

85. Those considerations can be extrapolated to the limitation established by the case-law on the review of legality. Reducing the discretion available to the General Court should not go so far as to restrict the possibility of taking into account particulars adduced by the applicant which, *without altering the subject matter or the scope of the dispute*, are linked to pleas already relied on and serve the purpose of substantiating the particulars *actually in existence* on the date in question.

[51] During the written part of the proceedings before the General Court, the Commission had the opportunity to state its views on the effect of the judgment of 16 May 2022 on the legality of the contested decision. The Commission simply dismissed the relevance of that judgment, without making any submissions, in the alternative, on the substance of the matter (see paragraphs 31 and 32 of the rejoinder lodged with the General Court).

[52] Judgment of 7 May 1986, *Rihoux and Others* v *Commission* (52/85, EU:C:1986:199, paragraph 12 and the case-law cited).

[53] Judgment of 16 March 1978, *Ritter von Wüllerstorff und Urbair* v *Commission* (7/77, EU:C:1978:68, paragraph 8).

86. In the context of Article 85 of the Staff Regulations, the administration does not in fact have any discretion. Its function is confined to verifying the presence of the objective conditions (existence of an undue payment) and subjective conditions (knowledge or obviousness of the irregularity of the payment) warranting the application of that provision.

87. There is, therefore, no risk that the General Court will substitute its own reasoning (which the case-law on the review of legality seeks to avoid) [54] if it finds that the objective or subjective conditions recalled above are not met.

88. In the light of the above considerations, I can confirm that the administration's lack of prior knowledge of the nullity of the national decisions of 30 January 2013 did not prevent the General Court from reviewing the legality of the contested decision.

89. The General Court was under an obligation to respect the retroactive effect of the judgment of 16 May 2022 in determining the matters 'existing', from a legal point of view, when the contested decision was adopted. By failing to do so, it distorted the facts.

90. The approach I am proposing is appropriate to the specific circumstances of the present case. In my view, this appeal is not the most opportune moment to settle the *apparent* contradiction between the judgments of the Court of Justice relating to the limits on the review of legality. [55] If one line of case-law had to be favoured over others, that set out in the judgment in *Galp Energía España* should, in my opinion, be applied generally.

91. It is therefore appropriate to uphold the first part of the second ground of appeal. If the Court of Justice were to find likewise, there would be no need to analyse the remainder of the second ground of appeal. I shall do so in any event, in the alternative.

3. Second part of the second ground of appeal

92. AL takes issue with the General Court for having stated that the national decisions of 30 January 2013 produced legal effects as from January 2013. In his view, it was already clear when the judgment under appeal was delivered that those decisions were vitiated by absolute nullity and had therefore never produced any legal effects at all.

93. AL criticises the General Court's interpretation of the applicable Romanian law, not only as regards the validity of the national decisions of 30 January 2013 but also, indirectly, as regards the temporal effect of the foster care measure. [56]

94. Although AL does not claim, or at least not expressly, that there has been a *distortion* of Romanian law in this part of the second ground of appeal, it is my view that such a criticism is implicit and follows logically from the first part of his ground of appeal.

[54] See footnote 41. The General Court would therefore confine itself to examining whether, in the light of the material new fact, the request for recovery of the sums unduly paid remains lawful, which is in keeping with the very essence of the review of legality.

[55] See footnotes 31, 42, 43 and 44 to this Opinion.

[56] The final paragraph of Article 2(2) of Annex VII to the Staff Regulations links eligibility for the dependent child allowance to the existence of a '*responsibility to maintain under a judicial decision based on Member States' legislation on the protection of minors*' (emphasis added). In the present case, the foster care measure is governed by Romanian law and the dispute concerns the *temporal effect* of that measure, which has an impact on eligibility for the dependent child allowance.

95. There is a close link between the 'fact' which AL claims to have been distorted (the existence of the judgment of 16 May 2022) and the applicable 'law' (the legal consequences of that judgment for the national decisions of 30 January 2013). [57]

96. It would be excessively formalistic to dismiss the admissibility of the second part of the second ground of appeal solely because AL did not use the term 'distortion' when formulating it. In order to assess whether any such distortion has taken place with respect to Romanian law, it is sufficient to verify whether the conditions already described in the foregoing points of this Opinion are met. [58]

97. According to the Court of Justice, a distortion of the law occurs if 'the General Court arrived at findings that were manifestly at odds with the content of the provisions of that legislation or … attached to them a significance they manifestly did not have'. [59]

98. In particular, in the context of an appeal, 'the Court of Justice has jurisdiction to determine, first of all, whether the General Court, on the basis of the documents and other evidence submitted to it, distorted the wording of the national provisions at issue or of the national case-law relating to them, or of the academic writings concerning them; second, whether the General Court, as regards those particulars, made findings that were manifestly inconsistent with their content; and, lastly, whether the General Court, in examining all the particulars, attributed to one of them, in order to establish the content of the national law at issue, a significance which is not appropriate in the light of the other particulars, where that is manifestly apparent from the documentation in the case file'. [60]

99. The General Court is therefore under an obligation to 'examin[e] all the particulars', properly entered in the case file, with a view to attributing to each one of them the significance appropriate to it 'in the light of the other particulars'.

100. In the present case, the General Court had a duty to determine, 'on the basis of the documents and other evidence submitted to it', the exact *temporal* scope of the foster care measure. In order to do so correctly, it was necessary to assess *all of the Romanian decisions delivered in that regard*, including the judgment of 16 May 2022, and the relationship between them.

101. For the reasons which I have already set out, in accepting that the national decisions of 30 January 2013 had produced legal effects as from January 2013, the General Court conferred on them a scope which was not appropriate to them under the legal system from which they originated.

102. That led, in consequence, to a manifestly erroneous assessment, from the point of view of Romanian law, of the temporal scope of the foster care measure. That assessment had a direct and erroneous effect on the application of Article 85 of the Staff Regulations. [61]

103. In my view, therefore, the second part of the second ground of appeal should also be upheld.

[57] See, in that regard, the first sentence of paragraph 19 of the appeal.

[58] Point 37 of this Opinion.

[59] Judgment of 9 November 2017, *TV2/Danmark* v *Commission* (C-649/15 P, EU:C:2017:835, paragraph 52).

[60] Judgment of 12 September 2024, *Anglo Austrian AAB* v *BCE and Far-East* (C-579/22 P, EU:C:2024:731, paragraph 86).

[61] See footnote 55 to this Opinion.

4. Third part of the second ground of appeal

104. In the light of my proposed approach to the first and second parts of the second ground of appeal, there would be no need to take a view on the third part. I shall do so, however, in the event that the Court takes a different view.

105. In this part of the second ground of appeal, AL reproduces almost word for word the pleas relied on before the General Court,[62] without including any line of argument aimed specifically at identifying the error of law in the judgment under appeal.

106. In such circumstances, since the third part of the second ground of appeal does not satisfy the requirements of the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union or those of Article 168(1)(d) and Article 169 of the Rules of Procedure of the Court of Justice, it must be deemed inadmissible.

107. In short, I propose that the Court of Justice uphold the first and second parts of the second ground of appeal and set aside the corresponding paragraphs of the judgment of the General Court.

VI. The action before the General Court

108. The first paragraph of Article 61 of the Statute of the Court of Justice of the European Union provides that, if the judgment of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

109. Given the limited nature of my analysis of the appeal, which is confined to the second ground thereof, I am not in a position to suggest that the Court of Justice give final judgment in the dispute.

110. I could do so, however, if this were the only ground of appeal concerned, rather than suggesting that the case be referred back to the General Court for judgment, given that the foregoing considerations leave no other conclusion than that the contested decision should be annulled.

VII. Costs

111. For the same reasons, it is not appropriate for me to take a view on the award of costs.

VIII. Conclusion

112. In the light of all of the foregoing, I propose that the Court of Justice uphold the second ground of the appeal lodged against the judgment of the General Court of 10 April 2024, *AL* v *Commission* (T-50/22, EU:T:2024:220), and set aside the part of that judgment to which the second ground of appeal relates.

[62] Paragraphs 21 and 22 of the appeal are identical to paragraphs 46 and 47 of the reply lodged with the General Court. In paragraph 20 of his appeal, AL simply claims that the General Court breached the rule of the symmetry of forms, without putting forward any other argument specifically to criticise the reasoning set out by the General Court in the judgment under appeal.