JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

8 December 2021 (*)

(Non-contractual liability – Energy – Directive 2010/30/EU – Indication by labelling and standard product information of the consumption of energy – Delegated Regulation (EU) No 665/2013 – Energy labelling of vacuum cleaners – Energy efficiency – Measurement method – Annulment by the General Court – Sufficiently serious breach of a rule of law intended to confer rights on individuals)

In Case T-127/19,

Dyson Ltd, established in Malmesbury (United Kingdom), and the other applicants whose names are listed in the annex, (1) represented by E. Batchelor, T. Selwyn Sharpe and M. Healy, Solicitors,

applicants,

v

European Commission, represented by J.-F. Brakeland, Y. Marinova and K. Talabér-Ritz, acting as Agents,

defendant,

APPLICATION based on Article 268 TFEU for compensation for the loss allegedly suffered by the applicants as a result of the unlawfulness of Commission Delegated Regulation (EU) No 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners (OJ 2013 L 192, p. 1),

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos, President, V. Valančius and M. Sampol Pucurull (Rapporteur), Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 25 January 2021,

gives the following

Judgment

Background to the dispute

1 The first applicant, Dyson Ltd, and the other applicants, which are part of the same group and whose names appear in the annex, manufacture bagless cyclonic vacuum cleaners.

2 By judgment of 11 November 2015, *Dyson* v *Commission* (T-544/13, EU:T:2015:836), the General Court dismissed the action brought by the first applicant seeking annulment of Commission Delegated Regulation (EU) No 665/2013 of 3 May 2013 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of vacuum cleaners (OJ 2013 L 192, p. 1). That judgment was set aside by the Court of Justice by judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357). The Court of Justice referred the case back to the General Court for it to give

judgment on the first part of the first plea, alleging a lack of competence on the part of the European Commission, and the third plea, alleging infringement of the principle of equal treatment, put forward at first instance, and reserved the costs.

3 By judgment of 8 November 2018, *Dyson* v *Commission* (T-544/13 RENV, EU:T:2018:761), the General Court annulled Delegated Regulation No 665/2013 and ordered the Commission to pay the costs.

Procedure and forms of order sought

4 By application lodged at the Court Registry on 21 February 2019, the applicants brought the present action.

5 By document lodged at the Court Registry on 6 May 2019, the Commission applied for the adoption of a measure of organisation of procedure to the effect that the Court would first determine whether the conditions for the European Union to incur liability under Article 340 TFEU were satisfied, to the exclusion of any issue concerning the existence of any losses alleged by the applicants, therefore relieving the parties from having to address the quantum of the alleged losses until further order.

6 By document lodged at the Court Registry on 3 June 2019, the applicants opposed that request.

7 The Court rejected the Commission's request.

8 By decision of 18 October 2019, the President of the General Court, pursuant to Article 27(3) of the Rules of Procedure of the General Court, reallocated the case to a new Judge-Rapporteur assigned to the Seventh Chamber.

9 Acting upon a proposal of the Judge-Rapporteur, the General Court (Seventh Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, invited the parties to comment on certain questions at the hearing.

10 The applicants claim that the Court should:

– order the Commission to pay damages to compensate for the loss suffered by them as a result of the unlawfulness of Delegated Regulation No 665/2013, namely EUR 176 100 000, including compensatory interest, for the no-label counterfactual, starting from the entry into force of Delegated Regulation No 665/2013 until 19 January 2019, the date on which that regulation was annulled, at a compound rate of 2.05% (being EUR 8 000 000); or, in the alternative, EUR 127 100 000, including compensatory interest, for the dust-loaded counterfactual, starting from the entry into force of Delegated Regulation No 665/2013 of 3 May 2013 until 19 January 2019, the date on which that regulation was annulled, at a compound rate of 2.05% (being EUR 5 100 000);

– order the Commission to pay the costs.

11 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

12 The applicants seek compensation for the damage which they claim to have suffered as a result of the unlawfulness of Delegated Regulation No 665/2013. They claim, in essence, that the Commission committed several sufficiently serious breaches of a rule of law intended to confer rights on individuals,

such as to give rise to non-contractual liability on the part of the European Union. They claim that those breaches caused them damage and that there is a direct causal link between that damage and the unlawfulness of the delegated regulation.

The conditions for non-contractual liability of the European Union

13 Pursuant to the second paragraph of Article 340 TFEU, in the case of non-contractual liability, the European Union is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.

14 It is settled case-law that, in order for the European Union to incur non-contractual liability, three cumulative conditions must be satisfied: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious; actual damage must be shown to have occurred; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see, to that effect, judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraphs 39 to 42, and of 13 December 2018, *European Union* v *Kendrion*, C-150/17 P, EU:C:2018:1014, paragraph 117). The cumulative nature of these conditions implies that, if one of them is not met, the non-contractual liability of the European Union cannot be engaged (see, to that effect, judgments of 9 September 1999, *Lucaccioni* v *Commission*, C-257/98 P, EU:C:1999:402, paragraphs 63 and 64, and of 15 June 2000, *Dorsch Consult* v *Council and Commission*, C-237/98 P, EU:C:2000:321, paragraph 54).

15 The decisive test for finding that a breach of EU law is sufficiently serious is whether the EU institution or body concerned manifestly and gravely disregarded the limits on its discretion (judgments of 4 July 2000, *Bergaderm and Goupil* v *Commission*, C-352/98 P, EU:C:2000:361, paragraph 43, and of 4 April 2017, *Ombudsman* v *Staelen*, C-337/15 P, EU:C:2017:256, paragraph 31).

16 The requirement that there be a sufficiently serious breach of a rule of EU law stems from the need to strike a balance between, on the one hand, the protection of individuals against unlawful conduct of the institutions and, on the other, the leeway that must be accorded to the institutions in order not to paralyse action by them (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 34).

17 A sufficiently serious breach of a rule of law intended to confer rights on individuals is established where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, any difficulties in applying or interpreting the legislation, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU authorities and whether the error of law made was inexcusable or intentional (see, to that effect, judgments of 30 May 2017, *Safa Nicu Sepahan* v *Council*, C-45/15 P, EU:C:2017:402, paragraph 30, and of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 40 and the case-law cited).

18 In accordance with those criteria, account should be taken, more generally, of the area, conditions and context in which the infringed rule is binding on the EU institution or body concerned (see judgment of 4 April 2017, *Ombudsman* v *Staelen*, C-337/15 P, EU:C:2017:256, paragraph 40 and the case-law cited).

19 If the institution in question has only 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 judgment of 23 November 2011, *Sison* v *Council*, T-341/07, EU:T:2011:687, paragraph 35 and the case-law cited).

20 However, there is no automatic link between, on the one hand, the fact that the institution concerned has no discretion and, on the other, the classification of the infringement as a sufficiently serious breach (judgment of 3 March 2010, *Artegodan* v *Commission*, T-429/05, EU:T:2010:60, paragraph 59).

21 Thus, non-contractual liability of the European Union can arise only if an irregularity is found that would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraph 43).

22 It is, consequently, for the EU Courts, once they have first determined whether the Commission enjoyed any discretion, next to take into consideration the complexity of the situations to be regulated, any difficulties in applying or interpreting the legislation, the clarity and precision of the rule infringed, as well as the measure of discretion left by that rule to the EU institution and whether the error made was inexcusable or intentional.

The alleged unlawful acts

23 The applicants claim that the Commission manifestly and gravely infringed four rules of law intended to confer rights on individuals, namely Article 10(1) of Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJ 2010 L 153, p. 1), the principle of equal treatment, the principle of sound administration and duty to act diligently, and the right to pursue a trade or business.

24 It is necessary to ascertain, in the light of the criteria referred to in paragraphs 13 to 22 above, whether, as the applicants claim, the Commission committed infringements of EU law which were sufficiently serious as to give rise to non-contractual liability on the part of the European Union.

Infringement of Article 10(1) of Directive 2010/30

25 The applicants claim that the Court of Justice has definitively held that the Commission, by adopting a standardised empty-receptacle method of testing, infringed Article 10(1) of Directive 2010/30 (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraphs 60 and 68). They allege, in essence, a manifest and serious breach of a rule of law intended to confer rights on individuals capable of giving rise to non-contractual liability on the part of the European Union.

26 According to the applicants, by adopting an energy label on the basis of a standardised empty-receptacle testing method, the Commission manifestly exceeded the limits on its discretion. They submit that the General Court and the Court of Justice rejected the idea that the use of an empty-receptacle testing method reflects the normal usage conditions for a vacuum cleaner (judgments of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 52, and of 8 November 2018, *Dyson* v *Commission*, T-544/13 RENV, EU:T:2018:761, paragraphs 72 and 73). The applicants state that vacuum cleaners which are not based on cyclonic technology suffer a loss of performance as the receptacle fills due to the obstructive effect caused by the accumulation of dust in the vacuum cleaner. They claim that a performance test based on the use of a dust-loaded receptacle is more representative of normal conditions of use and provides a more reliable basis for comparison between all types of vacuum cleaners than a test based on the use of an empty receptacle, since the empty-receptacle test does not take into account the impact of the effect of obstruction on the performance of the appliance.

27 In that regard, it should be noted that, among the pleas in law relied on in support of the action for annulment of Delegated Regulation No 665/2013, the first applicant had claimed, inter alia, that the Commission lacked competence under the enabling criteria set out in Article 10 of Directive 2010/30 and that it infringed the principle of equal treatment.

28 As regards the plea that alleged a lack of competence on the part of the Commission, the Court of Justice held that the requirement that the information supplied to consumers must reflect energy consumption while the appliance is in use, as follows from Article 1 and the third subparagraph of Article 10(1) of Directive 2010/30, is an essential element of that directive (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 63).

29 According to the Court of Justice, the Commission was thus obliged to adopt a method of calculation which makes it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to actual conditions of use, requiring the vacuum cleaner's receptacle to be filled to a certain level (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 68).

30 The Court of Justice held that the General Court had relied on a distortion of the facts and infringed its obligation to state reasons in finding that no method of calculation based on tests with dust-loaded receptacles was reproducible. In those circumstances, since it could neither rely on such a finding in order to give a ruling by way of a substitution of grounds nor rule on the merits of the pleas raised at first instance alleging a lack of competence on the part of the Commission and unequal treatment, the Court of Justice referred the case back to the General Court for a decision on those pleas (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraphs 70, 77, 83 and paragraphs 1 and 2 of the operative part).

31 By judgment of 8 November 2018, *Dyson* v *Commission* (T-544/13 RENV, EU:T:2018:761), the General Court annulled Delegated Regulation No 665/2013 in its entirety, without ruling on the plea alleging unequal treatment. That judgment has acquired the force of *res judicata*.

32 The applicants' argument alleging infringement of the requirement that the information provided to consumers must reflect energy consumption while the appliance is in use, which is an essential element of Article 10(1) of Directive 2010/30, concerns, in essence, the Commission's lack of competence to adopt Delegated Regulation No 665/2013.

33 The Court of Justice held that the extent of the discretion conferred by the enabling act was a different point of law from the question of compliance with the limits of the power conferred by the enabling act, and that the review of compliance with those two requirements was subject to different standards (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 52).

34 In that regard, the Court of Justice noted that the possibility of delegating powers provided for in Article 290 TFEU aimed to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it found it appropriate to legislate, while entrusting the Commission with the task of 'supplementing' certain non-essential elements of the legislative act adopted or 'amending' such elements within the framework of the power delegated to it (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 58).

35 The Court of Justice nevertheless pointed out that the question whether Delegated Regulation No 665/2013 sought only to supplement and not to amend Directive 2010/30 was not relevant since neither of those two categories of delegated powers authorises the Commission to disregard an essential element of the enabling act (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 65).

36 It follows that the Commission did not have any discretion allowing it to exceed the powers conferred on it by the enabling act, bearing in mind in particular that such a delegated power must in any event comply with the essential elements of the enabling act and come within the regulatory framework as defined by the basic legislative act (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 53).

37 However, a lack of discretion is not sufficient to justify the conclusion that there has been a sufficiently serious breach of EU law (see, to that effect, judgment of 26 January 2006, *Medici Grimm* v *Council*, T-364/03, EU:T:2006:28, paragraph 87).

38 In order to determine whether the Commission committed a sufficiently serious breach of the obligation to comply with the essential element of the enabling act which the requirement laid down in Article 10(1) of Directive 2010/30 constitutes, it is still necessary to take into consideration the complexity of the situations

to be regulated, the difficulties in the application or interpretation of the legislation, the degree of clarity and precision of the rule breached and whether the error made was inexcusable or intentional.

39 As regards difficulties in the application or interpretation of the legislation and the degree of clarity and precision of the rule breached, the applicants argue that the obligation laid down in Article 10(1) of Directive 2010/30, which requires the Commission to adopt an energy label on the basis of a testing method which 'measure[s] the energy performance of vacuum cleaners in conditions as close as possible to actual conditions of use', is neither obscure, imprecise, nor ambiguous, which the Commission disputes.

40 The General Court considers that, in order to determine whether the Commission's compliance with the limits arising from the essential elements of the enabling act defined in Article 10(1) of Directive 2010/30 gave rise to complex questions and difficulties in the application or interpretation of the legislation in the light of, inter alia, the clarity and precision of the rule infringed, reference must be made to the judgment of 8 November 2018, *Dyson* v *Commission* (T-544/13 RENV, EU:T:2018:761), the full significance of which must be determined in the light of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357).

41 It is apparent from paragraph 68 of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357) that, although the Commission was obliged to adopt a method of calculation which makes it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to the actual conditions of use, requiring the vacuum cleaner's receptacle to be filled to a certain level, the Court of Justice nevertheless stated that that obligation had to be understood 'having regard nevertheless to the requirements concerning the scientific validity of the results obtained and to the accuracy of the information supplied to consumers, as mentioned in particular in recital 5 and Article 5(b) of [Directive 2010/30]'.

42 Referral of the case back to the General Court on the ground that the Court of Justice was not in possession of the facts enabling it to rule on the plea alleging a lack of competence on the part of the Commission under Article 10(1) of Directive 2010/30 cannot be regarded as irrelevant for the purposes of assessing difficulties in the application or interpretation of the legislation in the light of, inter alia, the clarity and precision of the rule infringed. Notwithstanding the grounds which led the General Court to uphold the plea alleging a lack of competence on the part of the Commission, it is apparent from paragraph 68 of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357), that the question of compliance by the Commission with that provision required the Court first to balance, on the one hand, the obligation to adopt a method of calculation which makes it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to the actual conditions of use, requiring the vacuum cleaner's receptacle to be filled to a certain level, and, on the other hand, the requirements concerning the scientific validity of the results obtained and the accuracy of the information supplied to consumers. If such a balancing exercise had not been necessary in the light of the duly established facts, the Court of Justice would have been able to rule on the application without referring the case to the General Court.

43 Despite the grounds of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357), by which the Court of Justice asked it to verify whether the standardised dust-loaded receptacle testing method could be regarded as reproducible, as the first applicant had argued, the General Court, following referral, did not find it necessary to rule on that question of fact. It interpreted the grounds set out in paragraph 68 of that judgment as meaning that, in order for the method adopted by the Commission to accord with the essential elements of Directive 2010/30, two cumulative conditions must be met. First, the vacuum cleaner's receptacle must be filled to a certain level. Second, the method adopted must satisfy certain requirements concerning the scientific validity of the results obtained and the accuracy of the information supplied to consumers (judgment of 8 November 2018, *Dyson* v *Commission*, T-544/13 RENV, EU:T:2018:761, paragraphs 69 to 71).

44 Since the Commission adopted a method for calculating the energy performance of vacuum cleaners based on an empty receptacle, the General Court found that the first of those conditions was not met. It

concluded that the Commission had disregarded an essential element of the enabling act (judgment of 8 November 2018, *Dyson* v *Commission*, T-544/13 RENV, EU:T:2018:761, paragraphs 72 and 73) and, consequently, annulled Delegated Regulation No 665/2013.

45 Those factors support the view that the application of Article 10(1) of Directive 2010/30 to the specific case of vacuum cleaners was such as to give rise to certain differences of assessment, indicating difficulties of interpretation in the light of the degree of clarity and precision of that provision and, more generally, of Directive 2010/30 as a whole.

46 As regards the complexity of the situation to be regulated and whether the error made was inexcusable or intentional, the applicants argue that the obligation to use a testing method which is as close as possible to the actual conditions of use and which requires the vacuum cleaner's receptacle to be filled to a certain level, did not give rise to any particular complexity. The applicants argue that the Commission already has experience in testing the electricity consumption of household appliances under load conditions reflecting their normal use, in particular as regards ovens and washing machines. At the date of adoption of Delegated Regulation No 665/2013, several testing methods based on the use of a dust-loaded receptacle existed, including, inter alia, the method set out in section 5.9 of harmonised standard EN 60312-1:2013 of the European Committee for Electrotechnical Standardisation (CENELEC) ('the CENELEC standard'). Those testing methods, which have long been known to manufacturers, have been used by consumer associations and national independent testing agencies. The applicants point out, in that regard, that the method used to measure dust pick-up performance is just as valid for a vacuum cleaner with an empty receptacle as for a vacuum cleaner with a dust-loaded receptacle, as is apparent from the purpose of the testing method referred to in point 5.9.1 of that standard. The Commission cannot therefore contend that it was too complex for it to rely on such a testing method.

47 The applicants claim that there was no evidence that the testing method set out in section 5.9 of the CENELEC standard did not meet the requirements of accuracy, reliability and reproducibility. The objectivity and comparability of the test results obtained using that standard are ensured through the use of three stopping points which reflect consumer conditions of use. The Commission, in the applicants' view, had at its disposal a scientifically valid testing method to measure the energy consumption of vacuum cleaners which use a dust-loaded receptacle.

48 The applicants claim that the Commission cannot escape liability by hiding behind the role of CENELEC and, more specifically, the mandate issued to CENELEC in 2004 for the preparation and adoption of standardised methods for measuring the consumption and energy performance of vacuum cleaners ('the M353 mandate'). In their view, that mandate was based on the energy labelling directive then in force, namely Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances (OJ 1992 L 297, p. 16). They consider, however, that that directive did not provide for 'during use' test conditions, unlike Directive 2010/30. They also point out that the tests carried out by CENELEC pursuant to that mandate failed and that the M353 mandate was never 'completed'.

49 The applicants submit that there was no evidence prior to the adoption of Delegated Regulation No 665/2013 which would undermine the reproducibility of the testing method referred to in section 5.9 of the CENELEC standard. The report of the company AEA Energy & Environment entitled 'Report to the Commission, Preparatory studies for Eco-Design Requirements of EUPs (II), Lot 17 Vacuum Cleaners' and dated February 2009 ('the AEA report') was prepared in the context of Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using products and amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC of the European Parliament and of the Council (OJ 2005 L 191, p. 29), and not in the context of Directive 2010/30. According to the applicants, AEA had reservations only in respect of certain unrelated parts of the standard. The applicants argue that although that testing method does not necessarily require the receptacle to be full, but only for it to be dust-loaded, that does not affect its reproducibility. They add that the Court of Justice held that the General Court 'could not regard it as established … that "there remain doubts as to whether [the test referred to in that section] is

reproducible"' (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 42).

50 The applicants point out that the Commission chose the testing method set out in section 5.9 of the CENELEC standard for the implementation of Commission Regulation (EU) No 666/2013 of 8 July 2013 implementing Directive 2009/125/EC of the European Parliament and of the Council with regard to ecodesign requirements for vacuum cleaners (OJ 2013 L 192, p. 4). To measure the energy consumption of a vacuum cleaner or the durability of its motor, it is necessary in both cases to take into account the effects of the obstruction caused by dust. The fact that the Commission used that testing method in the context of that regulation shows that there was no doubt as to the reliability or reproducibility of that method.

51 Lastly, the applicants submit that the Commission's unlawfulness was inexcusable, since the Commission was aware of power loss associated with the effect of obstruction, and, consequently, of the importance of dust-loaded receptacle tests and the misleading nature of empty receptacle tests. They consider that the use of the latter testing method was therefore unjustified and misleading for consumers. In their view, if the Commission considered that it could not comply with the 'during use' requirement, it should have attempted to amend the enabling provisions of Directive 2010/30 (judgment of 8 November 2018, *Dyson* v *Commission*, T-544/13 RENV, EU:T:2018:761, paragraph 76).

52 The Court considers it necessary to determine whether the Commission's failure to take account of the essential element from Article 10(1) of Directive 2010/30 to adopt a method of calculation which makes it possible to measure the energy performance of vacuum cleaners in conditions as close as possible to the actual conditions of use, requiring the vacuum cleaner's receptacle to be filled to a certain level, may be regarded as sufficiently serious to incur the non-contractual liability of the European Union. In order to rule on the applicants' arguments, it is necessary, for the reasons set out in paragraph 68 of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357), to determine whether the Commission was entitled to reject the use of the testing method set out in section 5.9 of the CENELEC standard in view of doubts surrounding the scientific validity of the results obtained and the accuracy of the information supplied to consumers. Only a manifest and serious breach of the limits on the Commission's discretion in that regard can give rise to liability on the part of the European Union.

53 In order to answer that question, it must be recalled that it is apparent from Article 1 of Directive 2010/30 that that directive established a framework for the harmonisation of national measures on end-user information, particularly by means of labelling on the consumption of energy during the use of energy-related products. Accordingly, the objective pursued was to allow end-users to choose more efficient products so as to influence their informed choice in favour of products which consume less energy during use, as also stated in recital 4 of that directive. To that end, Article 10 of that directive requires the Commission to adopt delegated acts concerning the labelling of energy-related products with a significant potential for saving energy and a wide disparity in performance levels for equivalent functionality, as is apparent from recital 1 of Delegated Regulation No 665/2013. The Commission had a five-year period for that purpose, starting on 19 June 2010, in accordance with Article 11(1) of that directive.

54 The energy efficiency class of a vacuum cleaner falling within the scope of Delegated Regulation No 665/2013 depended on its annual electricity consumption, which was determined by dust pick-up performance and energy consumption under normal conditions of use, in accordance with a formula defined in Annex VI to that delegated regulation.

55 The Commission was required to use harmonised standards and measurement methods in order to determine the detailed rules for calculating those indicators. It is apparent from Article 10(4)(b) of Directive 2010/30 that the Commission was under an obligation to indicate, in its delegated acts, the measurement standards and methods to be used in obtaining the energy information of the products covered by those delegated acts, recital 8 of that directive indicating that 'energy consumption of and other information concerning the products should be measured in accordance with harmonised standards and methods'.

56 In addition, recital 4 of Delegated Regulation No 665/2013 stated, with regard to vacuum cleaners falling within its scope, that energy efficiency information intended to be brought to the attention of end-users by means of labelling 'should be obtained through reliable, accurate and reproducible measurement procedures, which take into account the recognised state of the art measurement methods including, where available, harmonised standards'. Article 5 of that delegated regulation, entitled 'Measurement methods', therefore required the information to be provided to be 'obtained by reliable, accurate and reproducible measurement and calculations methods, which take into account the recognised state-of-the-art measurement and calculation methods, as set out in Annex VI'. Paragraph 1 of that Annex recalled that requirement and referred for that purpose to 'harmonised standards the reference numbers of which have been published for the purpose in the *Official Journal of the European Union*', stating that those standards '[had to] meet the technical definitions, conditions, equations and parameters set out [in] this Annex'.

57 The Commission published references to the CENELEC standard in a communication in the *Official Journal of the European Union* of 20 August 2014 (OJ 2014 C 272, p. 5). That communication states, first, that the CENELEC standard must be supplemented in order to specify the legal requirements which it is intended to cover and, second, that section 5.9 of that standard is not part of the present citation.

58 The practical consequence of that exclusion is that, for the purposes of applying Annex VI to Delegated Regulation No 665/2013, the harmonised standard for calculating the dust pick-up performance and annual energy consumption of vacuum cleaners was established by means of tests based on the use of an empty receptacle, in accordance with the relevant provisions of the CENELEC standard and sections 4.5 and 5.3 of that standard.

59 In that regard, it should be noted that the essential relevant points of the statement of reasons for Delegated Regulation No 665/2013 were found in Article 7 of that regulation, entitled 'Revision', under which:

'the Commission shall review this Regulation in light of technological progress no later than five years after its entry into force. The review shall in particular assess … whether it is feasible to use measurement methods for annual energy consumption, dust pick-up and dust re-emission that are based on a partly loaded rather than an empty receptacle'.

60 It follows from Article 7 of Delegated Regulation No 665/2013 that the Commission found, in the light of the state of technological knowledge, that the testing method referred to in section 5.9 of the CENELEC standard could not be adopted under Article 10(4)(b) of Directive 2010/30. Such an exclusion must be interpreted as meaning that the Commission, for the purposes of assessing the energy performance of vacuum cleaners, implicitly considered that that testing method did not constitute a reliable, accurate and reproducible measurement and calculations method, within the meaning of Article 5 of that delegated regulation. Thus, the Commission preferred to opt for an empty receptacle testing method which, although reflecting a narrower range of use than a dust-loaded receptacle method, met the criteria of reliability, accuracy and reproducibility.

61 As regards the applicants' argument that, at the time of the adoption of Delegated Regulation No 665/2013, there was no evidence to support the view that the testing method set out in section 5.9 of the CENELEC standard did not meet the criteria of accuracy, reliability and reproducibility, it should be noted that, according to the information provided by the applicants, that testing method is the result of harmonisation efforts that have been undertaken by the International Electrotechnical Commission (IEC) since 1971. In line with developments in the techniques and design of vacuum cleaners, the implementation of that testing method gave rise to discussions with a view to its adaptation.

62 On 25 June 2004, in the context of the work associated with Directive 92/75, the Commission issued the M353 mandate to CENELEC in view of the preparation of a standard comprising, inter alia, energy consumption measures, dust pick-up performance, dust re-emission and the usable size of the receptacle.

63 In accordance with the M353 mandate, measurement methods were required, as far as possible, to (i) be independent of the type of vacuum cleaner tested, (ii) reflect energy consumption during actual use of the appliance, (iii) cover all household vacuum cleaners that may be subject to information requirements on their energy consumption and performance, (iv) avoid unfairly favouring one product type relative to another and (v) ensure that vacuum cleaners cannot be programmed to recognise and react to test cycles.

64 Contrary to what the applicants claim, the M353 mandate is therefore relevant for the purposes of the present analysis, since it expressly sought to ensure that the testing methods covered by that mandate could reflect the normal conditions of use of vacuum cleaners.

65 The wording of the M353 mandate does not in any way indicate that the Commission intended to require CENELEC to adopt a particular testing method for the purposes of energy labelling, based on the use of an empty, dust-loaded or full receptacle. The M353 mandate is silent on that point. By contrast, it is clear from the wording of that mandate that the Commission included among the testing methods the requirements of accuracy, reliability and reproducibility of information relating to the vacuum cleaner's energy efficiency. Besides developing measurement methods for so-called 'dry' vacuum cleaners, the second priority set by the Commission was to define the error margins for the tests. In Part III of the M353 mandate, the Commission stated in that regard that it might be necessary to use 'round robin or other' testing. The purpose of 'round robin' tests is to verify the reproducibility of tests by repeating the same test in several laboratories using a single sample.

66 The grant agreement concluded on 22 December 2008 between the Commission, on behalf of the European Community, and CENELEC concerning the performance of that mandate (Annex E.2 to the Defence) stated that the main objective of that action was for CENELEC to 'perform the comparative testing necessary to check the reproducibility of the proposed test methods in a series of inter-laboratory tests' in order to complete the developed standard. Thus, Annex I.2 to that agreement provided that round robin tests should be carried out, pointing out that if those tests were not carried out, the experts of the competent working group 'would strongly hesitate in launching any draft standard to formal vote'.

67 It was on the basis of that information that work leading to the adoption of the CENELEC standard in May 2013 was undertaken.

68 It is apparent from the elements made available to the Court by the parties that, although a method of testing dust pick-up performance based on the use of a dust-loaded receptacle could be regarded as closer to the actual conditions of use of a vacuum cleaner than one which is based on the use of an empty receptacle, it would be difficult to develop such a method for the purpose of calculating energy performance.

69 The applicants maintain, however, on the basis of a written statement from one of their employees who participated in CENELEC's work under the M353 mandate, that the dust pick-up performance tests carried out were not round robin tests and that the Commission did not adopt CENELEC's final recommendations.

70 It is true that the CENELEC interim reports of 10 May 2010 and 1 July 2010 on the round robin tests referred to certain variations in the results of hard floor dust pick up performance tests. However, those interim reports stated that doubts as to the reproducibility of those tests had been dispelled. The CENELEC final report, dated May 2013, stated that the work of the experts had led to a revision of the existing standards so as to ensure that they are representative and reproducible.

71 The CENELEC final report notes that the Commission decided not to adopt, for the purposes of implementing Delegated Regulation No 665/2013, the procedure relating to dust pick-up performance on carpets and hard floors, but pointed out that that 'procedure is part of the standard EN 60312-1:2013'. It must be observed that that statement concerns paragraphs 6.Z1.2.3, 6.Z1.2.4., 6.Z1.2.5 and 6.Z2.3 of the CENELEC standard, which, in accordance with the Commission communication published in the Official Journal of 20 August 2014 (OJ 2014 C 272, p. 5), do not form part of the harmonised standards referred to in point 1 of Annex VI to that delegated regulation. It follows that the applicants' arguments relating to

those points are irrelevant for the purpose of determining whether the Commission was entitled to reject the use of the testing method set out in section 5.9 of that standard without manifestly and gravely disregarding the limits on its discretion.

72 As regards the Commission's decision not to use the testing method set out in section 5.9 of the CENELEC standard, one of the difficulties inherent in that testing method was the need to define in advance what constitutes a dust-loaded receptacle. That testing method consists of measuring dust pick up as the appliance sucks in test dust, until one of the following three conditions is met:

– an indicator on the vacuum cleaner signals that the dust receptacle should be emptied or replaced;

– the observed pressure inside the appliance has dropped by 40% compared with the pressure recorded at the start of the test;

– the amount of test dust injected into the appliance has reached 100 grams per litre of the 'maximum usable volume' of the dust receptacle, the method of calculation of which is described in section 5.7 of the CENELEC standard.

73 Accordingly, section 5.9 of the CENELEC standard contains three possible definitions of what may be understood by 'dust-loaded receptacle'.

74 The Commission states that that approach is not capable of ensuring uniformity and comparability of results, since it may involve different filling levels depending on the vacuum cleaner in question.

75 It must be noted that that assertion by the Commission is supported by the minutes of the work by the IEC. Within that body, the working group on vacuum cleaner standards referred to concerns, proposals and discussions connected with the method for determining maximum usable volume and the dust-loaded receptacle testing method, in particular at the meetings of 22 and 23 September 2008, 21 and 22 March 2012 and 1 and 2 October 2012, as regards, inter alia, uncertainties surrounding the results obtained, the reproducibility of tests between laboratories and the possibility that vacuum cleaners might, in the future, be able to manipulate electricity consumption during dust detection tests, thereby preventing that work from being finalised.

76 The difficulty in determining the level to which a vacuum cleaner receptacle should be filled and which can serve as a reference for measuring its performance is also supported by the note which precedes the description of the testing method set out in section 5.9 of the CENELEC standard and which, according to the declaration of one of the employees of the first applicant, was adopted by the IEC in 2010. That note is worded as follows:

'this method is used to determine the effects, if any, of dust loading during a single filling of the receptacle. It is not a long term sustained performance test, which is being developed separately for a future edition, and is not intended to represent a specific point of filling of the receptacle. It may be considered "full" if the stopping point reached is determined by the operation of the receptacle full indicator, otherwise the point reached should be considered to be somewhere between empty and full and performance tests undertaken at this point will give an indication as to how well the vacuum cleaner can perform as the receptacle fills and/or the filters fill with dust'.

77 It is clear from the note at issue that its function is to draw attention to the uncertainties that may arise from the absence of a single criterion enabling the determination of what constitutes a 'dust-loaded receptacle', as shown by the phrase to the effect that the tests carried out in accordance with that method 'will give an indication' of the vacuum cleaner's performance as it fills.

78 Read in the light of the considerations set out in paragraphs 54 to 76 above, the note at issue implies that the testing method set out in section 5.9 of the CENELEC standard is capable of measuring the performance of a given vacuum cleaner while its receptacle is loaded with dust at a level between 'empty'

and ‘full’. Accordingly, that method may be useful, for example, to estimate the decline in dust pick up performance of a vacuum cleaner by comparing the results obtained from a test carried out with an empty receptacle with those carried out with a dust-loaded receptacle. On the other hand, that note implies that, in the absence of a single definition of what constitutes a ‘dust-loaded’ receptacle, that testing method does not allow different vacuum cleaner models to be compared, since what constitutes a ‘dust-loaded’ receptacle is not identical for everyone.

79 That note also highlights that a method for long-term performance testing using a dust-loaded receptacle was still under development when CENELEC adopted the amendments made to the CENELEC standard in May 2013.

80 The applicants claim, however, that section 5.9 of the CENELEC standard is scientifically valid and meets the requirements of reliability, accuracy and reproducibility. They rely in that regard on the testimony of an employee who participated in the IEC’s work relating to that testing method. The applicant states, in essence, that it is incorrect to assume that the note relating to section 5.9 demonstrates that that method is not reliable or reproducible. The applicants also rely on the witness statement of an independent expert who also participated in the IEC’s work. That expert states that the method in question is scientifically valid, meets the criteria of reproducibility and makes it possible to simulate the effects of dust accumulation in the receptacle.

81 It is true that it follows from the nature of the standardisation process that the fact that a testing method has been incorporated into a harmonised standard, such as the CENELEC standard, means that that method can be presumed to be scientifically and technically valid. However, that does not mean that the Commission is, as a result, deprived of any discretion and is required to use that standard if it considers that it does not meet the applicable legislative criteria or that there is another harmonised standard more capable of meeting those criteria.

82 Contrary to what the applicants claim, the question whether the testing method set out in section 5.9 of the CENELEC standard is scientifically and technically correct is irrelevant in the present case, since the Commission did not dispute those elements when it adopted Delegated Regulation No 665/2013, but considered, in essence, that that testing method was inappropriate for the purposes of assessing the energy performance of vacuum cleaners in the light of the criteria of reliability, accuracy and reproducibility. The relevant issue is whether the Commission, by preferring the empty receptacle testing method over the dust-loaded receptacle testing method, committed a manifest and serious breach of the limits on its discretion. The above elements serve to demonstrate that, although the testing method referred to in section 5.9 makes it possible to assess the performance of those vacuum cleaners under conditions of use which are closer to normal conditions of use than those reflected by the use of an empty receptacle, it creates uncertainty as to the accuracy of the information intended to be supplied to consumers.

83 Other elements support that finding.

84 The AEA report sets out the relevant parameters for achieving good vacuum cleaner performance measures. It is apparent from that report that the parameters with the lowest correlation to dust pick-up performance are input power and suction power. Those with the greatest correlation are airflow and, above all, brushing. As regards receptacles and filtration systems, that report states that, generally, the more effectively the filtration system captures dust, the more it absorbs energy, which can reduce dust pick up performance.

85 With regard to section 5.9 of the CENELEC standard, the AEA report observes that, with regard to receptacles, the word ‘loaded’ does not represent any ‘specific point during filling but simply gives a guide to performance during filling’ and that ‘there is no acceptable definition for “full”’. Thus, that report confirms that, since the concept of a full receptacle cannot be defined in a satisfactory manner, the authors of the testing method referred to in section 5.9 focused on the concept of a dust-loaded receptacle, without, however, succeeding in providing a single definition.

86 Furthermore, while it is true that the existence of a sufficiently serious breach of a rule of EU law must necessarily be assessed in the light of the circumstances in which the institution acted on that specific date (judgment of 10 September 2019, *HTTS* v *Council*, C-123/18 P, EU:C:2019:694, paragraphs 44, 46 and 53), it should nevertheless be noted that several elements subsequent to the adoption of Delegated Regulation No 665/2013 reflect the persistence of the technical difficulties involved in developing a dust-loaded method to test the energy performance of vacuum cleaners. Although subsequent to the Commission's infringement of Article 10(1) of Directive 2010/30, those elements are relevant as evidence confirming the technical difficulties inherent in the use of a dust-loaded receptacle testing method to measure the energy efficiency of vacuum cleaners.

87 First of all, the minutes of the IEC Working Group's meeting of 17 and 18 October 2013 (Annex E.11 to the Defence) show that the work relating to section 5.7 of the CENELEC standard was to continue and that section 5.9 of that standard, although 'discussed *ad nauseum* in the past', should stay as it is since any change involved further studies.

88 Next, it is apparent from Commission Decision C(2015) 8753 final of 11 December 2015 (Annex E.12 to the Defence) that the Commission requested the establishment of a new harmonised standard with a view to revising the existing standards in order to include methods to measure energy consumption and dust pick-up performance based on the use of a partly loaded receptacle, with that method having to be repeatable and reproducible and have an accuracy fit for the purpose of ecodesign and energy labelling. That decision gave rise to another mandate to CENELEC for the finalisation of those new standards (the M540 mandate).

89 In the context of the performance of that mandate, CENELEC drew up a report dated 20 February 2019 (Annex G.2 to the rejoinder) on the results of round robin tests designed to study the impact of tests carried out using empty receptacles, half-loaded receptacles and 200 grams loaded receptacles on the result of airflow tests, given that airflow is the main design elements that affect the dust pick-up performance of vacuum cleaners. It is apparent from that report that the methods set out in sections 5.7 and 5.9 of the CENELEC standard give rise to reproducibility problems to the extent that the tests are carried out with an increasing quantity of dust, and it is therefore to be expected that the accuracy of the results of other performance tests will also decline with an increase in the quantity of dust used. The report also notes that energy consumption tends to decrease the more the amount of dust used for the purposes of the test increases.

90 Finally, the report commissioned by the Commission entitled 'Review study on Vacuum cleaners – Final report', dated June 2019 (Annex G.4 to the rejoinder), notes that, although the standardised testing method based on the use of an empty and completely clean receptacle does not reflect normal conditions of use, a test carried out using a dust-loaded receptacle is more complex, more costly and introduces a number of elements capable of affecting the reliability of the results (difficult to reproduce; the lack of a single definition of the concepts of full receptacle and half-full receptacle; methodological adjustments required for bagless vacuum cleaners with blocked filters). Moreover, that report refers to contrasting results as regards the impact of tests using dust-loaded receptacles, for which the decline in dust pick-up performance is partly offset by a fall in electricity consumption. According to that report, the choice between an empty receptacle testing method and a dust-loaded receptacle testing method depends above all on seeking a balance between the advantage consisting in adopting new testing methods which are intended to be close to 'reality' and the costs and uncertainties which such methods entail. According to the same report, those technical uncertainties are too great to be able to adopt a partly loaded receptacle testing method. In the light of those factors, the report in question designates energy labelling as the most advantageous option for consumers, provided that a testing method enabling the measurement or simulation of the effects of a partly loaded receptacle can be adopted.

91 These three elements, subsequent to the adoption of delegated Regulation No 665/2013, thus make it possible to confirm the difficulties inherent in developing a testing method which, by using a non-empty receptacle, is closer to normal conditions of use without compromising or reducing the scientific validity of the results obtained and the accuracy of the information provided to consumers.

92 Those difficulties, which relate specifically to the technology and use of vacuum cleaners, also allow the Court to reject the applicants' claim that the Commission was not faced with a complex situation since it had already had the chance to adopt, for the purposes of energy labelling, test standards reflecting the normal conditions of use of electrical appliances for domestic use such as ovens, washing machines, tumble dryers and water heaters.

93 As regards the fact that the Commission accepted the testing method set out in section 5.9 of the CENELEC standard in the context of Delegated Regulation No 666/2013, it must be held that that method is used to verify whether vacuum cleaners have a service life exceeding a predefined threshold. Unlike energy performance measures, that sustainability test does not require an examination of the relationship between dust pick-up performance and energy consumption. Consequently, the analogy which the applicants seek to draw between Delegated Regulation No 665/2013 and Regulation No 666/2013 is unfounded.

94 In the light of all the foregoing considerations, it must be concluded that, on the date of adoption of Delegated Regulation No 665/2013, there were legitimate doubts as to the scientific validity and accuracy of the results that the testing method set out in section 5.9 of the CENELEC standard could produce for the purposes of energy labelling. Although that testing method is more representative of the normal conditions of use of vacuum cleaners than the empty receptacle testing method, the Commission was entitled to take the view, without manifestly and gravely exceeding the limits on its discretion, that that testing method was not capable of guaranteeing the scientific validity and accuracy of the information supplied to consumers and opt instead for a testing method suitable for satisfying the criteria of validity and accuracy of the information.

95 It should be added that Article 11(1) of Directive 2010/30 limited the delegation of regulatory powers to the Commission to five years with renewal possible upon review by the European Parliament and the Council of the European Union. In those circumstances, the Commission could not postpone the adoption of energy labelling rules until CENELEC intended to adopt a standardised dust-loaded receptacle testing method capable of guaranteeing the scientific validity and accuracy of the information supplied to consumers.

96 Finally, it must be observed that the exercise by the Commission of its delegated regulatory powers could be revoked by the Parliament or the Council in accordance with Article 12 of Directive 2010/30, and those two institutions were able, moreover, to object to any delegated act under the conditions laid down in Article 13 of that directive. However, neither the Parliament nor the Council used those mechanisms to oppose the adoption of Delegated Regulation No 665/2013.

97 Those circumstances serve to confirm that the Commission's infringement of Article 10(1) of Directive 2010/30 is excusable. Due to those factors, as well as the technical complexity of the problems to be resolved and difficulties in the application and interpretation of the relevant texts, an administrative authority exercising ordinary care and diligence could take the view that it was at risk by deciding to use the dust-loaded receptacle testing method rather than the empty receptacle testing method. Accordingly, the Commission has demonstrated conduct that could be expected from an administrative authority exercising ordinary care and diligence. It follows that the Commission did not manifestly and gravely disregard the limits on its discretion.

98 Accordingly, there is no need to examine whether, in the present case, the infringement of Article 10(1) of Directive 2010/30 by the Commission could or could not be relied on in support of the present claim for damages, from the point of view of rights conferred on individuals or the addition or aggravation of obligations affecting the applicants' legal situation in their capacity as a manufacturer, since that question is not, in those circumstances, decisive for the outcome of the present dispute.

99 In the light of those factors, the first condition for establishing the non-contractual liability of the European Union, referred to in paragraph 14 above, is not met in respect of the unlawful act relied on by the applicants alleging an infringement of Article 10(1) of Directive 2010/30.

Infringement of the principle of equal treatment

100 The applicants claim that Delegated Regulation No 665/2013 resulted in discriminatory treatment between bagged vacuum cleaners and cyclonic vacuum cleaners in that it treated those two categories of vacuum cleaner in the same way, even though their characteristics are not comparable, without any objective justification.

101 The applicants state the Court of Justice accordingly held that the General Court infringed the principle of equal treatment and wrongly held that the testing method referred to in section 5.9 of the CENELEC standard was not sufficiently reliable, accurate and reproducible (judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 77).

102 The applicants claim that the infringement of the principle of equal treatment by the Commission is sufficiently serious for the European Union to incur liability. According to the applicants, Delegated Regulation No 665/2013 is inherently biased against cyclonic vacuum cleaners. They consider that the empty receptacle testing method prevented the actual performance of their vacuum cleaners from being measured, and prevented them, as a result, from promoting or distinguishing their technological innovations. By contrast, lower performing vacuum cleaners could, in their view, hide their deficiencies and exploit the system. They argue that the Commission cannot in fact rely on any justification based on the complexity of the situation to be regulated, difficulties in the application or interpretation of the legislation, the lack of clarity or precision of the rules infringed or the excusable nature of the error made.

103 The applicants state that they sent the Commission, as early as 2012, data which prove a significant decline in performance between the tests according to whether they are carried out using an empty receptacle or a dust-loaded receptacle. Cyclonic vacuum cleaners retain the same level of performance, whether their receptacle is empty or dust-loaded. Those data show that tests carried out using an empty receptacle were discriminatory. Those tests, according to the applicants, misled consumers, discouraged manufacturers from innovating and frustrated the objective pursued by the legislature, which was to reduce energy consumption.

104 The Commission disputes those arguments.

105 It must be stated at the outset that, contrary to what the applicants claim, the Court of Justice did not find that there was an infringement of the principle of equal treatment in paragraph 77 of the judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357). The Court of Justice merely concluded that the only justification relied on by the General Court was based on a finding of fact which had not been validly established. It is therefore for the applicants to prove, in the present case, the existence of the infringement which they allege.

106 In that connection, it should be recalled that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 95, and of 15 April 2010, *Gualtieri* v *Commission*, C-485/08 P, EU:C:2010:188, paragraph 70).

107 In the present case, the legislative and regulatory provisions in force at the time of the events relevant to the energy labelling are based on the uniform treatment of vacuum cleaners, irrespective of whether they use cyclonic technology or have bags. In order to enable consumers to make effective energy performance comparisons in their purchasing decisions and to receive reliable and uniform information, Directive 2010/30 seeks to harmonise national measures designed to inform consumers by means of energy labelling applicable to categories of equipment which are defined according to their function. Thus, it is apparent, inter alia, from Article 1 and Article 10(1) and (2) of that directive, that the directive seeks to make subject to an energy labelling obligation, by means of delegated acts, all products with a significant potential for saving energy, with those products being defined on the basis of their equivalent functions and their relevant levels of performance, which vary widely. In the present case, Article 2 of Delegated Regulation

No 665/2013 defined vacuum cleaners according to their function as 'an appliance that [removed] soil from the surface to be cleaned by an airflow created by underpressure developed within the unit'.

108 It is therefore clear that both Directive 2010/30 and Delegated Regulation No 665/2013 provided for uniform treatment of all vacuum cleaners falling within their respective scopes. That finding is also supported by Article 10(4)(b) of that directive, which required the Commission to indicate in delegated acts the measurement standards and methods to be used, and recital 8 of that directive which states that those standards and methods should be harmonised. It should also be noted that that neutrality with regard to the technology on which vacuum cleaners are based is reflected in the fact that the CENELEC standard makes no distinction between cyclonic vacuum cleaners and bagged vacuum cleaners.

109 However, the applicants do not claim that two types of testing methods should be used depending on whether a vacuum cleaner is cyclonic or not, but that the method which they consider most advantageous in terms of presenting the energy performance of the cyclonic appliance should be used. Their arguments consist, in essence, in criticising the Commission for not adopting the dust-loaded receptacle testing method set out in section 5.9 of the CENELEC standard. They state, without being contradicted by the Commission, that the energy performance of cyclonic vacuum cleaners remains the same, irrespective of whether the tests are conducted using an empty or dust-loaded receptacle. It follows that the applicants do not consider that they have been penalised by the testing method used by the Commission, in so far as the testing method led to an underestimation of the performance of cyclonic vacuum cleaners, but rather that it overestimated the non-cyclonic vacuum cleaners manufactured by their competitors.

110 However, it is apparent from what has been held above in the context of the examination of the first alleged unlawful act that, notwithstanding the Commission's infringement of Article 10(1) of Directive 2010/30, there were legitimate doubts as to the scientific validity and accuracy of the results to which the method set out in section 5.9 of the CENELEC standard could lead for the purposes of energy labelling.

111 Such a factual circumstance is sufficient for it to be held that, irrespective of any objective difference between cyclonic vacuum cleaners and other types of vacuum cleaner, the Commission, by using the empty receptacle testing method, did not manifestly and gravely disregard the limits on its discretion or commit a sufficiently serious breach of the principle of equal treatment.

112 In the light of those factors, the first condition for establishing the non-contractual liability of the European Union referred to in paragraph 14 above is not met in respect of the unlawful act relied on by the applicants alleging an infringement of the principle of equal treatment.

Breach of the principle of sound administration and of the duty to act diligently

113 The applicants claim that the Commission infringed the principle of sound administration by adopting a standardised empty receptacle testing method, in disregard of an essential element of Directive 2010/30, which would not have been done by any administrative authority exercising ordinary care and diligence. They consider that the misleading nature of that testing method was public knowledge and that all the other EU regulations on the energy labelling of consumer products (ovens, washing machines, tumble dryers, water heaters) require a form of dependent test. The method used by the Commission did not take into account the particular design of cyclonic vacuum cleaners. The Commission did not assess in an impartial and rational manner the testing methods based on the use of a dust-loaded receptacle which existed during the procedure leading to the adoption of Delegated Regulation No 665/2013, in particular section 5.9 of the CENELEC standard. Although that process lasted six years, the Commission at no point appears to have devised a standardised dust-loaded receptacle testing method, despite repeated requests from consumer associations and standards bodies. Since the Court considered that the 'during use' requirement is an essential element, the Commission was required to examine at least the possibility of developing a dust-loaded receptacle testing method in order to include it in the test. Alternatively, if it could not actually have developed such a method in accordance with Article 10(1) of Directive 2010/30, it should have returned to the legislative process to seek an amendment.

114 The applicants consider that that breach of the principle of sound administration was sufficiently serious, since the Commission had no discretion authorising it to adopt a standardised empty receptacle testing method and there were no circumstances justifying that breach.

115 The Commission disputes those arguments.

116 It should be noted that those arguments overlap to a large extent with those put forward by the applicants in the context of the first two alleged unlawful acts, which have been rejected.

117 Furthermore, it is apparent from the preparatory work leading to the adoption of Delegated Regulation No 665/2013, in particular the impact assessment, that the Commission carried out extensive consultations with experts and interested parties. The applicants' point of view was expressed during the preparatory work, as their statements show when they state, inter alia, that they provided a comparative study of the performance of 80 vacuum cleaners on 27 September 2012. Consequently, the Commission did not fail in its duty to act diligently. Furthermore, the applicants, who have adduced no evidence or indicia either of a breach of the obligation of impartiality or of an abuse of process, have failed to demonstrate the existence of an infringement by the Commission of the principle of sound administration.

118 It is therefore appropriate, for reasons analogous to those set out in the analysis of the first two alleged unlawful acts, to reiterate that, irrespective of any objective difference between cyclonic vacuum cleaners and other types of vacuum cleaner, the Commission, by using the empty receptacle testing method, did not manifestly and gravely disregard the limits on its discretion or commit a sufficiently serious breach of the principle of sound administration.

119 In the light of those factors, the first condition for establishing the non-contractual liability of the European Union referred to in paragraph 14 above is not met in respect of the unlawful act relied on by the applicants alleging an infringement of the principle of sound administration.

Infringement of the right to pursue a trade or business

120 The applicants claim that the Commission committed a sufficiently serious breach of their right to pursue a trade or business. They reiterate that the Commission's decision to adopt a standardised empty receptacle testing method meant that innovations linked to cyclonic technology could not be promoted or distinguished. That benefited competing manufacturers of bagged vacuum cleaners as they achieved unfairly flattering performance grades for their products. The applicants add that they could not use other means of communication to indicate to consumers that their products were more energy efficient, which placed them in a situation of unfair competition. They argue that the standardised empty receptacle testing method does not enable the environmental objectives of Delegated Regulation No 665/2013 to be achieved, even though there were alternative testing methods carried out using a dust-loaded receptacle that the Commission could have adopted.

121 The applicants consider that the breach of the right to pursue a trade or business was sufficiently serious, since the Commission had no discretion authorising it to adopt a standardised empty receptacle testing method and there were no circumstances justifying that breach.

122 The Commission disputes those arguments.

123 It should be recalled that Article 16 of the Charter of Fundamental Rights of the European Union ('the Charter') provides that 'the freedom to conduct a business in accordance with Union law and national laws and practices is recognised'. The protection afforded by that article of the Charter covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition, as is apparent from the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraph 42).

124 However, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function. The freedom to conduct a business may accordingly be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 45 and 46).

125 That circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented. In accordance with Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:28, paragraphs 47 and 48).

126 It is true that, by imposing energy labelling for vacuum cleaners, Delegated Regulation No 665/2013 introduced a form of interference with the freedom to conduct a business. However, energy labelling, in principle, follows from the provisions of Directive 2010/30, that is to say, from the law, within the meaning of Article 52(1) of the Charter, and does not affect the essence of the freedom to conduct a business. Neither that directive nor the delegated regulation prevents economic operators from manufacturing and marketing vacuum cleaners in accordance with the conditions laid down.

127 The applicants do not put forward any evidence capable of demonstrating that that form of interference exceeds the limits of what is appropriate and necessary in order to achieve the legitimate objectives pursued by Directive 2010/30.

128 In so far as, by their arguments, the applicants seek to demonstrate an infringement of the right to property, protected under Article 17 of the Charter, it should be noted that, in accordance with the second paragraph of that article, that right also relates to intellectual property.

129 Since the applicants have repeatedly mentioned an infringement of one of their trade marks, it is sufficient to note, first, that Directive 2010/30 and Delegated Regulation No 665/2013 in no way hinder the use of their intellectual property in connection with the marketing of their products, with the result that the essence of their property right essentially remains intact. Second, they have not produced or put forward any evidence to show that the interference resulting from energy labelling exceeds the limits of what is appropriate and necessary in order to achieve the legitimate objectives pursued by that directive. Their entire argument is based on the view that that delegated regulation used a testing method which is neutral with respect to cyclonic vacuum cleaners, but criticises the Commission for not having opted for a testing method which would have led to a more unfavourable energy classification for the non-cyclonic vacuum cleaners manufactured by their competitors.

130 The applicants' argument must therefore be rejected in so far as it alleges infringement of Articles 16 and 17 of the Charter.

131 As to the remainder, since the applicants' arguments alleging infringement of the right to pursue a trade or business are, in essence, identical to those developed in the context of the three other alleged unlawful acts, as regards the validity of the decision not to use the testing method referred to in section 5.9 of the CENELEC standard, those arguments must be rejected for the same reasons as those set out in paragraphs 25 to 119 above.

132 In the light of those factors, the first condition for establishing the non-contractual liability of the European Union referred to in paragraph 14 above is not met in respect of the unlawful act relied on by the applicants alleging an infringement of the right to pursue a trade or business.

133 The present action must therefore be dismissed in its entirety, without it being necessary to rule on the other conditions giving rise to non-contractual liability on the part of the European Union.

Costs

134 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. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission in accordance with the forms of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. Dismisses the action;

2. Dyson Ltd and the other applicants whose names appear in the annex shall bear their own costs and pay the costs incurred by the European Commission.

da Silva Passos Valančius Sampol Pucurull

Delivered in open court in Luxembourg on 8 December 2021.

E. Coulon M. van der Woude

Registrar President

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* Language of the case: English.

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1 The list of the other applicants is annexed only to the version notified to the parties.