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EU Case Law

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European Union Litigation

Abstract: This section provides an overview of cases in front of the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of September 2013 and the end of December 2013.

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General Law of Contracts and Obligations

– Trade mark owner withdrawing consent to use trade mark: Judgment in Case 661/11 *Martin Y Paz Diffusion* 19.09.2013 (CJEU): In the case at hand, both parties are active in the industry of leather fashion items and have used the same trade mark, but each with respect to different goods. The parties initially cooperated and changed the trade mark they used over time. Despite the fact that one of the parties registered some of those trade marks, they continued their relationship as before. Later, the relationship of the parties deteriorated, resulting in several legal proceedings. The question arose whether the owner of a trade mark can be permanently prevented from exercising its exclusive rights and from using the trade mark for certain goods because a third party has used the mark for these goods with the consent of the owner over an extended period of time. The CJEU held that Article 5 of Directive 89/104/EEC[1] precludes a proprietor of trade marks which, in a situation where there has been use shared with a third party, but no longer consents to that use, from being deprived of any possibility of asserting the

1 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, *OJ* 1989 L40/1.

exclusive right conferred upon it by those marks against that third party and of itself exercising that exclusive right in respect of goods which are identical to those of that third party.

- Derogation of the obligation to install recording equipment in respect of the non-commercial carriage of goods: Judgment in case 317/12 *Lundberg* 03.10.2013(CJEU): The CJEU held that the concept of 'non-commercial carriage of goods' in Article 3(h) of Regulation No 561/2006[2] must be interpreted as covering the carriage of goods by a private individual for his own purposes purely as part of his hobby where that hobby is in part financed by financial contributions from external persons or undertakings and where no payment is made for that carriage per se. In the case at hand, Mr Lundberg, a Swedish national and amateur rally driver, was taking his rally car to a fair by using an extra lorry attached to his normal car when the police stopped him and issued a fine for not having a tachograp. The purpose of the derogation in Article 3(h) is to exclude from the scope of the regulation the carriage of goods by private individuals outside any professional or commercial activity. Since the type of carriage of goods at issue appears to be relatively infrequent, an interpretation of the derogation at issue to the effect that it covers the carriage of goods carried out by a private individual as part of his hobby ought not to have significant negative effects on road safety.
- Remuneration to authors for the communication of their works by means of television or radio receivers to patients in bedrooms in a spa establishment: Opinion in case 351/12 *OSA* 14.11.2013 (CJEU): According to Advocate-General Sharpston, the national law exception disallowing remuneration to authors for the communication of their works by means of television or radio receivers to patients in rooms in a spa establishment which is a business is contrary to Directive 2001/29/EC.[3] The Advocate-General distinguished the situation at hand from *SCF*,[4] where the CJEU held that the criteria for ascertaining whether there is 'communication to the public' were not met where background music was broadcast in the presence of patients at a private dental clinic. However, none of those considerations apply in case of spa establish-

2 Regulation (EC) No 561/2006 of the European Parliament and of the Council of 15 March 2006 on the harmonisation of certain social legislation relating to road transport and amending Council Regulations (EEC) No 3821/85 and (EC) No 2135/98 and repealing Council Regulation (EEC) No 3820/85, *OJ* 2006 L102/1.

3 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2001 L167/10.

4 Case 135/10 *Società Consortile Fonografici (SCF)* v *Marco Del Corso* 15.3.2012 (CJEU).

ments, which typically have a broader and less determinate clientele than dentists. The availability of access to television and radio broadcasts in bedrooms may well influence a patient's choice of establishment. Moreover, the television and radio sets are in residents' bedrooms and are used in the context of enjoyment of the accommodation facilities offered by the spa, not of its health care treatment. Such a situation would be analogous to that of the hotel guests in *SGAE*.[5]

- Responsibilities of digital service providers towards copyright holders: Opinion in case 314/12 *UPC Telekabel Wien* 26.11.2013 (CJEU): The case at hand concerns the access to a website on which more than 130,000 movies were made available for streaming and downloading without permission of the copyright holders. The question is whether the internet provider, who had no (contractual) relation to the makers of the website, was under a legal duty to prohibit users from accessing the website. Advocate General Cruz Villalón held that to impose a general prohibition on an internet provider to allow its users to view a website that violates copyright law, without giving any specific guidance as to concrete measures that should be taken so as to prevent access to the site, is incompatible with Article 8(3) of Directive 2001/29/EC.[6] This is not different in case where a provider may avoid sanctions by demonstrating to have taken all reasonable measures to uphold the prohibition. However, a national measure specifically requiring a certain provider to block access to a designated website is not as a matter of principle disproportionate for the sole fact that it requires the service provider to incur considerable costs, while users may easily circumvent the technical measures taken by the service provider.
- Mandatory information requirements for a prospectus when securities are offered to the public: Opinion in case 359/12 *Timmel* 26.11.2013 (CJEU): In the case at hand, Mr Timmel subscribed for Dragon FX Grant securities, for which certain required information was omitted from the base prospectus and from a supplement to it. The relevant documents could only be found and retrieved for a while on the homepage of the Luxembourg Stock Exchange, following a lengthy and complicated registration process, upon which only two documents per month could be consulted free of charge. Therefore Mr Timmel launched legal proceedings, arguing that the prospectus had not been validly

5 Case 306/05 *Sociedad General de Autores y Editores de España (SGAE)* v *Rafael Hoteles SA* [2006] ECR I-11519 (CJEU).

6 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2001 L167/10.

published and that he was therefore entitled to withdraw from the contract to purchase the securities in question. The referring court seeks guidance on the interpretation of Regulation No 809/2004,[7] particularly it is questionable when an issuer of securities offered to the public must publish a supplement to a base prospectus, and what constitutes valid publication of a base prospectus in electronic form. Advocate-General Sharpston considers that according to Article 22 of the Regulation, the supplement to the prospectus is having a function of correcting any material mistakes or inaccuracies as well as revealing significant new factors. If the required information became known to the issuer after the prospectus has been published but would not materially influence the assessment of securities, it does not have to be revealed in the supplement but may be added to the final terms instead. However, Article 29 of the Regulation requires that the base prospectus should be easily accessible to an investor when entering the website, and additionally, must be made available at the registered office of the issuer and at the offices of the financial intermediaries.

– Conditions for the outsourcing of responsibilities of producer organisations under Regulation No 2200/96:[8] Judgment in case 500/11 *Fruition Po* 19.12.2013 (CJEU): The dispute at hand concerns the decision of the UK Minister for Sustainable Farming and Food and Animal Health to withdraw the recognition of Fruition's status as producer organisation granted to it on the basis of Regulation No 2200/96 on the grounds that the functions which ought to have been its responsibility had been almost entirely outsourced and, further, that Fruition had not supplied sufficient evidence that it exercised control over these outsourced functions. The CJEU held that a producer organization, which has entrusted to a third party the carrying out of the activities which are essential to its recognition under Article 11 of Regulation No 2200/96, can meet the conditions for recognition laid down therein, if it enters into a contractual agreement enabling it to continue to be responsible for the carrying out of those activities and for control of their overall management, in such a way that that organisation retains, ultimately, the power of control and, when necessary, the power to take timely action as regards those activities being carried out for the entire duration of the agreement. It is for

7 Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, *OJ* 2004 L149/1.

8 Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organization of the market in fruit and vegetables, *OJ* 1996 L297/1.

the national court to determine in each case whether the degree of control retained by a producer organisation fulfils this requirement.

– Liability of a public limited liability company in case of inaccurate information in the share prospectus: Judgment in case 174/12 *Hirmann* 19.12.2013 (CJEU): In the case at hand, an investor purchased shares in a public limited liability company on the secondary market through a broker and subsequently contended that the information in the securities prospectus on which he relied in making the purchase was neither complete nor truthful. The investor claimed that the national court should cancel the contract for the purchase of the shares and award damages. According to Austrian law, a public liability company, which breaches its information obligations stemming from the Prospectus Directive,[9] Transparency Directive[10] and Market Abuse Directive,[11] is required to re-acquire its shares and refund the purchase price to the investor. The CJEU held that the national legislation does not run counter to the objectives of the Second Company Law Directive[12] to ensure that the share capital of public limited liability companies is maintained and that the shareholders are treated equally. In this regard, the Second Company Law Directive regulates the legal relationships established between the company and its shareholders, which derive exclusively from the memorandum and articles of association and are directed solely to the internal relations within the company concerned. On the other hand, the source of liability at issue is the share purchase contract. The legal obligation of the company to compensate the investor who has suffered loss is wholly unrelated to the provisions of the Second Company Directive for the maintenance of capital. Moreover, shareholders who have suffered loss as a result of a company's wrongful conduct occurring prior or at the time of the purchase of the shares

9 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *OJ* 2003 L345/64.

10 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *OJ* 2004 L390/38.

11 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ* 2003 L96/16.

12 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent, *OJ* 1977 L026/1.

are not in a situation which is identical to that of shareholders in the same company whose legal situation has not been affected by that wrongful conduct. The CJEU stressed that while the establishment of such a civil liability regime falls within the discretion of the Member States, it constitutes an appropriate remedy for the harm suffered by the investor and for the failure of the issuing company to comply with the information requirements under the Prospectus Directive, Transparency Directive and Market Abuse Directive. Accordingly, the Member States are also free to decide whether to base the calculation of the sum to be refunded on the value of the shares when the claim was brought or on the original purchase price. The CJEU clarified that the national liability regime is wholly unrelated to company nullity procedures as provided for in Articles 12 and 13 of Directive 2009/101.[13] Additionally, where the harm to the purchaser is caused solely by the irregular conduct of the issuing company, there is no justification for having recourse to the test of a satisfactory balance and a fair division of the risks among the various interested parties, as referred to in the judgment *E. Friz*.[14]

Consumer Protection

Advertising

– Criteria to determine a misleading commercial practice: Judgment in case 435/11 *CHS Tour Services* 19.09.2013 (CJEU): The CJEU clarified that if a commercial practice satisfies all the criteria specified in Article 6(1) of the Unfair Commercial Practices Directive[15] for being categorised as a misleading practice, it is not necessary to determine whether such a practice is also contrary to the requirements of professional diligence in Article 5(2)(a) in order for it to be regarded as unfair and, therefore, prohibited in accordance with Ar-

13 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent, *OJ* 2009 L258/11.

14 Case 215/08 *E. Friz GmbH* v *Carsten von der Heyden* [2010] ECR I-02947 (CJEU).

15 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, *OJ* 2005 L149/22.

ticle 5(1). CHS and Team4 Travel are two Austrian companies that operate travel agencies organising skiing courses and winter holidays in Austria for groups of schoolchildren from the UK. CHS was of the opinion that the exclusivity statement contained in the sales brochure for the 2012 winter season of Team4 Travel infringes the prohibition of unfair commercial practices. It consequently asked the Austrian courts to prohibit Team4 Travel from stating that, on specific dates, certain hotels can be booked only through Team4 Travel, because those hotels can also be booked through CHS. Team4 Travel argued that it acted with the professional diligence required in the light of the pre-booking contracts concluded with the hotels and that it had not been aware of the contracts concluded between CHS and those hotels. According to the general scheme of the Directive, Article 5(4) categorises commercial practices as unfair where it is established that they are misleading as set out in Articles 6 and 7 or aggressive as set out in Articles 8 and 9, showing that the determination of whether the practice concerned is misleading or aggressive depends only on the assessment of the practice in the light of the criteria set out in those latter articles alone. As a consequence and in line with a high level of consumer protection, for the purpose of applying Article 6(1), the national court is not required to determine whether the commercial practice is contrary to the requirements of professional diligence under Article 5(2)(a). This interpretation was shared by the opinion of Advocate-General Wahl, delivered on 13 June 2013.

– Misleading statements made by a sickness insurance fund, being a public body: Judgment in case 59/12 *BKK Mobil Oil* 03.10.2013 (CJEU): The CJEU followed the conclusion reached by Advocate-General Bot (delivered on 4 July 2013) and held that a public law body charged with a task of public interest falls within the persons covered by the Unfair Commercial Practices Directive. The dispute at hand arose between BKK Mobil Oil, a public law body providing statutory health insurance, and the German Office for the Prevention of Unfair Competition regarding misleading advertising circulated by BKK to its members. The CJEU pointed out that the meaning and scope of the concept of 'trader' which is used in the directive must be determined in relation to the related but diametrically opposed concept of 'consumer', which refers to any individual not engaged in commercial or trade activities. BKK's members, who must manifestly be regarded as consumers within the meaning of the directive, could be deceived by the misleading information circulated by that body, thus preventing them from making an informed choice and leading them to take a decision they would not have taken in the absence of such information. In order to give full effect to the Unfair Commercial Practices Directive and in accordance with a high level of consumer

protection, it is irrelevant in those circumstances, whether the body or the specific tasks pursued are of a public or private nature.

– Publication of misleading advertorials: Judgment in case 391/12 *RLvS* 17.10.2013 (CJEU): The case concerned the Law governing the Press of the *Land* of Baden-Württemberg (Germany) according to which any publication for remuneration is prohibited, irrespective of the purpose thereby pursued, if that publication is not identified by the use of the term 'advertisement', unless it is already evident from the arrangement and layout of the publication that it is an advertisement. The national provision seeks to prevent newspaper readers from being misled by advertising which is disguised as editorial content and to maintain the objectivity and neutrality of the press. The CJEU held that the Unfair Commercial Practices Directive, particularly point 11 of Annex I thereto, is not intended to protect a competitor of a newspaper publisher on the ground that the latter proceeded with publications which are liable to promote the products or services of advertisers sponsoring those publications, without the identification as 'advertising'. The practices covered by the Unfair Commercial Practices Directive must be commercial in nature, i.e. that they must originate from traders and must be directly connected with the promotion, sale or supply of their products to consumers. However, the publications in dispute, namely two articles with informative and descriptive editorial content, are not such as to promote the newspaper publisher's product, in this case a free newspaper, but rather the products and services of undertakings which are not parties to the dispute. The situation would be different if the newspaper publisher would act in the name of or on behalf of those undertakings sponsoring the publications within the meaning of Article 2(b) of the Unfair Commercial Practices Directive. Moreover, while the EU legislator has imposed through the Directives 89/552[16] and 2010/13/EU[17] obligations in the audiovisual field on media providers when their audiovisual services or programmes are sponsored by third-party undertakings, this is not the case for the written press. Consequently, the Member States retain the power to impose obligations on newspaper publishers to indicate when editorial content has been sponsored. The CJEU did not follow the opinion of Advocate-General Wathelet, delivered on

16 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ* 1989 L298/23.

17 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, *OJ* 2010 L95/1.

11 July 2013, that the Unfair Commercial Practices Directive precludes more restrictive national provisions regulating the publisher's activity.

– *Ratione temporis* of Article 10 of Regulation No 1924/2006:[18] Opinion in case 609/12 *Ehrmann* 14.11.2013 (CJEU): Ehrmann produces milk products and among others, a fruit quark, which was labelled with the slogan 'As important as the daily glass of milk'. The German Association for the Combatting of Unfair Competition took legal action against Ehrmann as it considered the slogan to be in breach with Articles 9 and 10 of Regulation No 1924/2006. The referring court notes that according to the judgment of the CJEU in *Deutsches Weintor*,[19] the slogan constitutes a health claim under Article 2(2)(5) of Regulation 1924/2006. Moreover, in the relevant time-period of the dispute, ie in the year 2010, the labelling of the product did not comply with the information requirements in Article 10(2). However, the national court was unsure whether it was necessary to comply with Article 10(2) in 2010. Following the Opinion of Advocate-General Wathelet, according to Article 28(5) of Regulation No 1924/2006, it was necessary to comply with the duty to provide information under Article 10(2) since 1 July 2007. According to Article 28(5), health claims falling under Article 13(1)(a) of the Regulation could be used from the entering into force of the Regulation until the adoption of the list of permitted claims under Article 13(3), provided they comply with the requirements of the Regulation, including Article 10(2). It remains to be seen whether the CJEU will broaden the preliminary reference of the national court in order to question whether the slogan constitutes a 'health claim' in terms of the Regulation. In line with the view of the referring court, Advocate-General Wathelet affirmed this question. It remains also open whether the CJEU will address the question submitted by the Commission as to whether Article 10(3) instead of Article 10(2) is applicable to the slogan.
– Application of Article 3(5) of the Unfair Commercial Practices Directive: Opinion in case 421/12 *Commission* v *Belgium* 26.11.2013 (CJEU): The Commission brought infringement proceedings against Belgium for the incorrect implementation of the Unfair Commercial Practices Directive. According to Advocate-General Cruz Villalón, Belgium failed to comply with its obligation on three grounds. Firstly, by excluding from the scope of the Belgian transposition members of a profession and dentists and physiotherapists, Belgium has failed to fulfil its obligations under Article 3, combined with Article 2(b)

18 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, *OJ* 2006 L404/9.

19 Case 544/10 *Deutsches Weintor eG* v *Land Rheinland-Pfalz* 6.9.2012 (CJEU).

and (d) of the Unfair Commercial Practices Directive. Secondly, by maintaining in force stricter rules for the announcement of price reductions than foreseen by the Directive, Belgium breached its obligation in Article 4, which lays down the maximum harmonization nature of the Unfair Commercial Practices Directive. As the Belgian provisions do not fall within the scope of Price Indication Directive 98/6/EC,[20] Belgium is precluded to rely on Article 3(5) of the Unfair Commercial Practices Directive, which allows the Member States to apply national provisions which are more restrictive and which implement directives containing minimum harmonisation clauses. Finally, Belgian failed to comply with Article 4 by adopting stricter provisions for itinerant sales of certain products. While itinerate sales constitute commercial practices under Article 2(d) of the Unfair Commercial Practices Directive, the Belgian provisions could also fall within the scope of the Doorstep Selling Directive 85/577,[21] which allows the Member States in Article 8 to adopt more favourable provisions to protect consumers. However, as Belgium did not notify the Commission about those national provisions in accordance with Article 3(6), it cannot rely on Article 3(5) of the Unfair Commercial Practices Directive.

– Criteria to determine a misleading commercial practice: Judgment in case 281/12 *Trento Sviluppo and Centrale Adriatica* 19.12.2013 (CJEU): The CJEU held that a commercial practice cannot be classified as 'misleading' for the purposes of Article 6(1) of the Unfair Commercial Practices Directive on the sole ground that that practice contains false information, or is likely to deceive the average consumer, but must also cause the consumer to take a transactional decision that he would not have taken otherwise. In the dispute at hand, upon complaint by a consumer, the Italian authority responsible for compliance with competition and the rules of the market took legal action against Trento Sviluppo and Centrale Adriatica. The consumer claimed that the commercial announcement of the defendants was inaccurate because, when he went to the supermarket during the validity period of the promotion, the IT product, which was advertised at an attractive price, was not available. The CJEU clarified that since the misleading commercial practices referred to in Article 6(1) constitute a specific category of unfair commercial practices, they must necessarily combine all the constituent elements of such unfairness,

20 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *OJ* 1998 L80/27.

21 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, *OJ* 1985 L372/31.

including the element relating to the ability of the practice to materially distort the economic behavior of the consumer by causing him to take a transactional decision that he would not have taken otherwise. The scope of the concept of 'transactional decision' is broadly defined under Article 2(k), covering therefore not only the decision whether or not to purchase a product, but also the decisions directly related to that decision, like acts preparatory to the purchase of a product, such as the consumer's trip to the shop or the act of entering the shop.

– The concept of 'consideration' in pyramid schemes: Opinion in case 515/12 *4finance* 19.12.2013 (CJEU): The preliminary reference by the Supreme Administrative Court of Lithuania will give the CJEU the opportunity to address the question what constitutes a pyramid scheme under the Unfair Commercial Practices Directive. 4finance ran an advertising campaign indicating that anyone registering on its website for a nominal registration fee would receive a credit to his or her bank account for each 'friend' introduced by them (by indicating on the on-line registration form that person's mobile phone number or email address) who then registered on 4finance's website. Providing the contact information of the 'friends' enabled 4finance to market its small loans to those persons who would subsequently be invited to register. According to Advocate-General Sharpston, a pyramid scheme exists only where consumers give consideration in order to enter such scheme. The Directive is concerned with those practices that require consumers to give consideration (ie to pay a fee) rather than situations where there is no such economic commitment. In the absence of consideration, identifying the economic behaviour of the consumer that requires protection under the Directive would be uncertain. However, it is not required that the consumer pays a certain minimum amount. In order to demonstrate that the operation at issue constitutes a pyramid structure, there must be multiple levels with the operator at the apex and a cumulative recruitment of new members increasing exponentially. The compensation paid to existing scheme members must be derived primarily from the consideration given by new recruits.

Insurance

– Limitation of the right to compensation for non-material damage in the event of road traffic accidents: Opinion in case 371/12 *Petillo* 09.10.2013 (CJEU): As regards non-material damage in the event of car accidents leading to minor physical injuries, Italian legislation provides for a compulsory method for quantifying the compensation for damage to health payable by the civil

liability insurer. On the basis of this legislation, Mr Petillo, who was the victim of a road traffic accident, received from Unipol EUR 2,700 instead of the requested EUR 14,155 for the non-material damage that he suffered. The Italian court has doubts about the compatibility of the Italian legislation with the obligation to compensate any loss or injury as provided for by Directive 72/166/EEC,[22] Directive 84/5/EEC[23] and Directive 90/232/EEC.[24] According to the case-law of the CJEU, while EU legislation guarantees the obligation to provide insurance coverage against civil liability for damage caused by motor vehicles, the extent of compensation to be afforded to the victims is a matter essentially governed by national law.[25] Advocate-General Wahl took the view that the Italian legislation is not incompatible with Article 3(1) of Directive 72/166/EEC for two reasons. Firstly, it does not exclude in total compensation for non-material damage caused by car accidents. Secondly, the insurance cover mirrors the relevant civil liability obligations with the result that the injured party cannot seek additional compensation directly from the policy-holder (the driver or car-owner) on the basis of other national provisions. Moreover, the Italian legislation does not deprive the Directives 72/166/EEC, 84/5/EEC and 90/232/EEC of their effectiveness by limiting the right of the victim to be compensated in a disproportionate manner, ie that the compensation for non-material damage would be inadequate.

– Authority of the claims representative to accept service of judicial documents: Judgment in case 306/12 *Spedition Welter* 10.10.2013 (CJEU): In order to obtain compensation for the damage caused in a motor vehicle accident in France, Spedition Welter GmbH initiated legal proceedings against the driver of the other vehicle, insured by Avanssur SA, before the German courts. Notice of those proceedings was not served on Avanssur, but on its designated repre-

22 Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, *OJ* 1972 L103/1.

23 Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, *OJ* 1984 L008/17.

24 Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, *OJ* 1990 L129/33.

25 Case 300/10 *Vítor Hugo Marques Almeida* v *Companhia de Seguros Fidelidade-Mundial SA and Others* 23.10.2012 (CJEU), paragraph 28; case 484/09, Manuel Carvalho Ferreira Santos v Companhia Europeia de Seguiossa [2011] I-1821 (CJEU) paragraph 31; case 409/09 *José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio* v *Companhia de Seguros Fidelidade-Mundial SA* [2011] ECR I-04955, paragraph 25.

sentative in Germany. The admissibility of the legal action against Avanssur depends on whether the claims representative was authorised to accept service of judicial documents on behalf of the defendant. The CJEU clarified that the purpose of Directive 2009/103/EC[26] is to guarantee victims of motor vehicle accidents comparable treatment irrespective of where in the Community the accidents occur. As noted by Advocate-General Cruz Villalón in his opinion of 30 May 2013, the specific purpose of the claims representative is to make the steps to be taken by the victims easier, in particular by allowing them to make a claim in their own language. Consequently, the CJEU held that under Article 21(5) of Directive 2009/103/EC, the powers of the claims representative must include the authority validly to accept service of legal documents necessary for proceedings for settlement of a claim to be brought before the court having jurisdiction. Considering that the German legislation reproduces Article 21(5) of Directive 2009/103 word for word, the national court is not required to disapply the national provision, but to interpret the national law in a way to ensure that the claims representative is authorised to accept service of judicial documents.

– Compensation for non-material damage suffered by the next of kin of the deceased victim of a road traffic accident: Judgment in case 22/12 *Haasová* 24.10.2013 (CJEU): The case concerned the claim for compensation by Mrs Haasová, acting in her own name and on behalf of her daughter, for the non-material damage resulting from the death of her husband and father of her child in a road traffic accident. The CJEU held that according to Article 3(1) of Directive 72/166/EEC, Article 1(1) and (2) of Directive 84/5/EEC and Article 1(1) of Directive 90/232/EEC, compulsory insurance must cover compensation for non-material damage by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law. In order to reach that conclusion, the CJEU adopted a broad interpretation of the notion of 'personal injuries' as covering any type of damage resulting from an injury to physical integrity, which includes both physical and psychological suffering.[27] Therefore, in line with the aim to strengthen the protection afforded to victims, non-material damage features among the types of damage in respect of which compensation must be provided. Moreover, it cannot be concluded

26 Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability, *OJ* 2009 L263/11.

27 The CJEU relied in that regard on the judgment of the EFTA Court of 20 June 2008 in case E-8/07 *Celina Nguyen* v *The Norwegian State* (EFTA Court report, 224, paragraphs 26 and 27).

from any of the three directives that the European legislature intended to limit their protection exclusively to persons directly involved in the road traffic accident. The fact that, in the case at hand, the wife and the child of the victim are entitled to compensation for non-material damage under the sections of the national civil code governing injury to the rights of the person but not under the section governing actual civil liability is irrelevant. It is sufficient that the liability of the insured person originated in a road traffic accident and is civil in nature to fall under the substantive national civil liability law to which the directives refer.

- Limit to the amount of compensation for non-material damage covered by compulsory insurance: Judgment in case 277/12 *Drozdovs* 24.10.2013 (CJEU): The case concerned the claim of the guardian of a child for compensation on the basis of the psychological suffering the child endured following the loss of his parents in a road traffic accident. The amount claimed by the applicant exceeded the maximum amount for non-material damage covered, under Latvian law, by compulsory insurance. The CJEU held that Article 3(1) of Directive 72/166/EEC and Article 1(1) and (2) of Directive 84/5/EEC preclude national provisions, which limit compensation for non-material damage resulting from the death of a person's next of kin in a road traffic accident covered by the compulsory insurance to a maximum amount which is lower than the minimum amounts laid down in Article 1(2) of Directive 84/5. In contrast to the case *Marques Almeida*,[28] the national legislation at hand did not seek to determine the extent of the right of the victim to compensation arising from the civil liability of the insured person, but limited the compulsory insurance cover of the insured person against civil liability.
- Freedom of the insured to choose a lawyer under a legal expenses insurance contract: Judgment in case 442/12 *Sneller* 07.11.2013 (CJEU): The case concerns a legal expenses insurance contract, which provides that legal assistance will in principle be provided by the insurer's own employees and that the insured person has the right to instruct a lawyer or legal representative of his own choosing only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer. However, in legal proceedings against his former employer, Mr Sneller wanted to be assisted by a lawyer of his choosing and to have the costs of legal assistance covered by his legal expenses insurer. Following the insurer's refusal to cover those costs of legal assistance, Mr Sneller took legal action to order the insurer to bear them.

28 Case 300/10 *Vítor Hugo Marques Almeida* v *Companhia de Seguros Fidelidade-Mundial SA and Others* 23.10.2012 (CJEU).

By relying on its ruling in *Eschig*[29] and *Stark*,[30] the CJEU held that according to Article 4(1)(a) of Directive 87/344/EEC,[31] the insured person's right to choose his lawyer cannot be restricted to situations in which the insurer decides that recourse should be had to an external lawyer. This outcome does not differ depending on whether or not legal assistance is compulsory under national law in the type of legal proceedings concerned. However, the insured person's right to choose his representative does not rule out the possibility that, in certain cases, limitations may be imposed on the costs to be borne by the insurer, on condition that the freedom of choice is not rendered meaningless.

– Cancellation period of a life assurance contract: Judgment in case 209/12 *Endress* 19.12.2013 (CJEU): Upon termination of his life assurance contract, Mr Endress received from his insurer the repayment value which was less than the sums of the paid premiums with interest. Before court, Mr Endress claimed that the contract was not validly concluded as he was not informed of his right of cancellation and asked the insurer to repay all the premiums plus interest. However, according to the national provisions at that time, the right of the policy-holder to cancel the contract lapses one year after the payment of the first premium. The CJEU concluded that in order to enable the consumer to profit fully from the diversity and increased competition in a single assurance market, Article 15(1) of Directive 90/619/EEC[32] read in conjunction with Article 31 of Directive 92/96/EEC[33] precludes a national provision, under which a right of cancellation lapses one year after payment of the first premium, where the policy-holder has not been informed about the right of cancellation. By applying its reasoning in *Heininger*[34] to the dispute at hand, the CJEU clarified that the insurer may not validly rely on reasons of legal certainty in order to redress a situation caused by its own

29 Case 199/08 *Erhard Eschig* v *UNIQA Sachversicherung AG* [2009] ECR I-08295 (CJEU).

30 Case 293/10 *Gebhard Stark* v *D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG* [2011] ECR I-04711 (CJEU).

31 Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, *OJ* 1987 L185/77.

32 Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, *OJ* 1990 L330/50.

33 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC, *OJ* 1992 L360/1.

34 Case 481/99 *Georg Heininger and Helga Heininger* v *Bayerische Hypo- und Vereinsbank AG* [2001] ECR I-09945 (CJEU), paragraphs 45 and 47.

failure to comply with the requirement, under European Union law, to communicate a defined list of information, including information relating to the right of the policy-holder to cancel the contract. The CJEU refused to limit the temporal effects of the judgment as the insurer failed to prove that there is a risk of serious economic repercussions, nor has there been 'objective, significant uncertainty' regarding the implications of the EU provisions.

Passenger rights and package holidays

– Compensation for rail passengers in the event of delays caused by force majeure: Judgment in case 509/11 *ÖBB-Personenverkehr* 26.09.2013 (CJEU): The Austrian Rail Network Control Commission regarded the terms of ticket price compensation which ÖBB-Personenverkehr applied to passenger transport contracts as not complying with Article 17 of Regulation No 1371/2007[35] and, consequently, ordered that undertaking to amend them. ÖBB-Personenverkehr claimed before court that it is excused from compensating the ticket price when a delay is caused by force majeure. Particularly, on the basis of Article 15 of the regulation, ÖBB-Personenverkehr submitted that the exemptions from liability laid down in Article 32(2) of the CIV Uniform Rules[36] are applicable in the context of the regulation. In line with the opinion of Advocate-General Jääskinen delivered on 14 March 2013, the CJEU held that a railway undertaking may not exclude its obligation to pay compensation of the ticket price in the event of a delay caused by force majeure or by one of the reasons set out at Article 32(2) of the CIV Uniform Rules. Regulation No 1371/2007 makes no reference to force majeure or any circumstances that are equivalent to it. Moreover, the compensation system provided for by the EU legislature in Article 17 of Regulation No 1371/2007 cannot be treated in the same way as the railway carrier's liability system under Article 32 of the CIV Uniform Rules. The purpose of the Regulation No 1371/2007 is to compensate the passenger for the consideration provided for a service which was not ultimately supplied in accordance with the transport contract. The compensation is calculated on the basis of a fixed rate of the ticket-price, which

35 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, *OJ* 2007 L315/14.

36 Appendix A – Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (1999 Protocol).

depends on the length of the delay. On the other hand, Article 32(1) of the CIV Uniform Rules provides for compensation on the basis of an individual assessment of the damage suffered, which can be claimed in addition to the compensation under Regulation No 1371/2007. However, even though the Austrian Rail Network Control Commission has only limited enforcement powers under national law, Article 30(1) of Regulation No 1371/2007 cannot be interpreted as constituting a legal basis authorising national bodies to impose on railway undertakings the specific content of their contractual terms relating to the circumstances in which they have to pay compensation.

Unfair contract terms

- Out-of-court settlement procedure of a secured claim by recourse to the public auction of immovable property: Opinion in case 482/12 *Macinský und Macinská* 21.11.2013 (CJEU): The case concerned the Slovak rules, which enable a creditor to enforce a secured claim based on an unfair term in a consumer contract through the sale of immovable property by means of an out-of-court procedure. Advocate-General Wahl concluded that the Slovak procedural and remedial system complies with Directive 93/13/EEC:[37] The consumer has the possibility to challenge the sale by public auction *ex ante* and *ex post* before the national courts, triggering the case-law of the CJEU on the responsibilities of the national court to assess of its own motion whether a term is unfair and to ensure that the consumer is not bound by an unfair term. He did not consider it to be an excessive impediment to the effective legal protection of consumers to require the consumers to become themselves active by initiating legal proceedings against the trader. Considering that Advocate-General Wahl denied the admissibility of the preliminary question, it remains to be seen whether the CJEU will engage into the substantive assessment of the question referred by the Slovak court.
- Territorial jurisdiction in case of an action for an injunction: Judgment in case 413/12 *Asociación de Consumidores Independientes de Castilla y León* 05.12.2013 (CJEU): The case concerned the question whether EU law precludes national procedural rules under which an action for an injunction initiated by a consumer protection association must be brought before the courts where the defendant is established or has its address. The CJEU held that this

37 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993 L95/29.

question is governed by the principle of procedural autonomy, subject to the principles of equivalence and effectiveness. In line with the opinion of Advocate-General Mengozzi, delivered on 5 September 2013, the CJEU did not find any evidence for a breach of the principles of equivalence and effectiveness by the Spanish rules, which confer territorial jurisdiction to the courts where the defendant is established. The limited territorial remit and the restricted financial situation of the consumer protection association in the dispute at hand cannot prevail over the general interest in the sound administration of justice and foreseeability. On the basis of the different nature of an action for an injunction and an individual action, the preferential procedural treatment granted to individual consumers cannot be extended to consumer protection associations.

– Right of consumer protection associations to intervene in enforcement proceedings: Opinion in case 470/12 *Photovost'* 12.12.2013 (CJEU): The Slovak court raised the question whether Directive 93/13 and Articles 47 and 38 of the Charter of Fundamental Rights of the European Union require or preclude granting consumer protection associations leave to intervene in enforcement proceedings. Advocate-General Wahl confirmed the admissibility of the preliminary reference and concluded that the procedural rules of the Member States are not required to grant consumer protection associations leave to intervene into legal proceedings between an individual consumer and a seller or supplier. However, in line with the minimum harmonization nature of Directive 93/13, they are not precluded to grant this right to consumer protection associations.

Miscellaneous

– Purchase price reduction of a defective product where rescission of the contract is excluded: Judgment in case 32/12 *Duarte Hueros* 03.10.2013 (CJEU): The CJEU held that where a consumer is entitled to a reduction of the purchase price but claims only the rescission of the contract, which is, however, excluded by the minor nature of the defect, and the consumer is not entitled to refine his initial application or to initiate new legal proceedings to that end, Directive 1999/44/EC[38] precludes national legislation which does not allow the national court to grant of its own motion an appropriate

38 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ* 1999 L171/12.

reduction of the purchase price. In the case at hand, the Spanish court refused to rescind the contract of sale of a convertible car as it considered the defect of a non-waterproof roof to be of minor nature. Spanish procedural law precluded the award of a price reduction as the consumer did not, at least in the alternative, request a price reduction in its application, and as the claim could not be deferred to later proceedings under the principle of *res judicata*. In line with the opinion of Advocate-General Kokott, delivered on 28 February 2013, the CJEU concluded that the Spanish procedural rules are in breach with the principle of effectiveness as they deprive the consumer of the possibility of benefitting from the right to seek an appropriate price reduction pursuant to Article 3(5) of Directive 1999/44.

– Surcharging clause in contract between a mobile phone operator and its customers: Opinion in case 616/11 *T-Mobile Austria* 24.10.2013 (CJEU): In the case at hand, the Austrian Consumers' Association initiated an action for an injunction against the mobile phone operator, T-Mobile Austria. According to the general terms and conditions of T-Mobile Austria, the customer has to pay a surcharge if he decides to not pay by direct debit or credit card but instead by a signed cash payment form or through online banking (telebanking). The question arose whether Article 52(3) of Directive 2007/64/EC[39] is applicable in this context. Advocate General Wathelet affirmed that the provision is applicable to the contractual relationship between a mobile phone operator, as payee, and that operator's private customer (consumer), as payer. Moreover, the notion of 'payment instruments' includes the credit transfer by a signed cash payment form or through online banking. Finally, Advocate General Wathelet concluded that the Austrian legislation, which prohibits a payee from levying charges in general and from levying different charges for different payment instruments in particular, is not precluded by Article 52(3) of Directive 2007/64/EC.

39 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, *OJ* 2007 L319/1.

Competition Law, Public procurement and State Regulation

- Concepts of 'body governed by public law' under Article 1(9), second subparagraph, point (c) of Directive 2004/18/EC:[40] Judgment in case 526/11 *IVD* 12.09.2013 (CJEU): The doctors' association in Westphalia-Lippe initiated a procedure for the award of a public contract for the printing and distribution of its newsletter and the placement of advertising and the sale of subscriptions. One of the candidates challenged the final award, claiming that the successful tenderer had not submitted some of the references required by the contracting authority. The national court decided of its own motion to make a reference to the CJEU on the issue of the doctors' association's status as a contracting authority, an issue on which the admissibility of the application for review brought by the candidate depends. Although the doctors' association is mentioned in Annex III to Directive 2004/18, the CJEU clarified that the inclusion of a body in that Annex is only the application of the substantive rule laid down in Article 1(9), second subparagraph of Directive 2004/18, which does not give rise to an irrebuttable presumption that that body is a 'body governed by public law' within the meaning of that provision. The CJEU held that although the national law determines the tasks of the doctors' association and the manner in which the greater part of its financing must be organised, and provides that the decision by which it fixes the amount of the contributions payable by its members must be approved by a supervisory authority, that body has in fact organisational and budgetary independence. Therefore, it cannot be considered to be closely dependent on the public authorities.
- Right of the contracting authority to ask candidates applying to take part in a tendering procedure to provide copies of balance sheets: Judgment in case 336/12 *Manova* 10.10.2013 (CJEU): The Danish Education Ministry launched a call for tenders in respect of services required for the operation of seven occupational guidance and advice centres. During the preliminary screening stage, the Ministry asked two candidates to forward a copy of their balance sheets, as it was required in the contract notice. Upon complaint by one of the candidates, the Complaints Board found a breach of the principle of equal

40 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ* 2004 L134/114.

treatment, since the Ministry did not reject the applications of the two candidates, which failed to provide copies of their most recent balance sheets at the same time as their applications for admission to the screening stage. On the basis of its judgment in *SAG ELV Slovensko and Others*,[41] the CJEU held that the principle of equal treatment does not preclude a contracting authority from asking a candidate, after the deadline for applying to take part in a tendering procedure, to provide documents describing that candidate's situation – such as a copy of its published balance sheet – which can be objectively shown to pre-date that deadline, so long as it was not expressly laid down in the contract documents that, unless such documents were provided, the application would be rejected. That request must not unduly favour or disadvantage the candidate or candidates to which it is addressed.

– Reliance on the capacities of more than one auxiliary undertaking to meet tender requirements: Judgment in case 94/12 *Swm Costruzioni 2 and Mannocchi Luigino* 10.10.2013 (CJEU): The Provincia di Fermo initiated a tendering procedure for a works contract for the modernisation and extension of a road. Under that procedure, tenderers were required to demonstrate their technical and professional ability by presenting an SOA certificate corresponding to the nature and value of the works covered by the contract. One of the candidates was excluded from the tendering procedure, as it relied on the SOA certificates of two auxiliary undertakings. The CJEU held that Articles 47(2) and 48(3) of Directive 2004/18/EC read in conjunction with Article 44(2) of that directive preclude a national provision which prohibits, as a general rule, economic operators participating in a tendering procedure for a public works contract from relying on the capacities of more than one undertaking for the same qualification category. Directive 2004/18 permits the combining of the capacities of more than one economic operator for the purpose of satisfying the minimum capacity requirements set by the contracting authority, provided that the candidate or tenderer relying on the capacities of one or more other entities proves to that authority that it will actually have at its disposal the resources necessary for the execution of the contract. If the special requirements of a work necessitate a certain capacity which cannot be obtained by combining the capacities of more than one operator, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators. However,

41 Case 599/10 *SAG ELV Slovensko a.s. and Others* v *Úrad pre verejné obstarávanie* 29.3.2012 (CJEU).

since those circumstances constitute an exception, Directive 2004/18 precludes that requirement from being made a general rule under national law.

– Sale by a municipality of its cable network to a private undertaking; Contract clause limiting the tariff for the basic service: Judgment in case 518/11 *UPC Nederland* 07.11.2013 (CJEU): In this case, the municipality of Hilversum sold its cable television network and the municipal undertaking which operated it to UPC. Under their agreement, Hilversum undertook to assist the purchaser in obtaining authorisation to install, maintain and operate a cable broadcasting facility in the territory of the municipality. UPC undertook to make the investments necessary for the provision of a cable network capable of offering an improved service to average subscribers, and to offer, in addition to radio and television channels, an attractive package of telecommunications services to private individuals and businesses. Additionally, the agreement contained a clause that fixed the monthly tariff for the basic cable package and allowed UPC to adjust that tariff only in line with the consumer price index and 'external cost increases'. In this context, UPC brought a legal action seeking the annulment of the tariff limitation clause and an injunction requiring the municipality to authorise the tariff increases. The CJEU determined on the basis of the different relevant directives, particularly the Framework Directive,[42] the Competition Directive[43] and the Audiovisual Media Services Directive,[44] that a clear distinction has to be drawn between the production of content, which involves editorial responsibility, and the transmission of content, which does not entail any editorial responsibility. Both content and transmission are covered by different measures which pursue their own specific objectives. As UPC's principal business is the transmission of radio and television programmes via cable to its subscriber customers, its service falls within the definition of an 'electronic communications service' in Article 2(c) of the Framework Directive and, therefore, the substantive scope of the NRF.[45] Although UPC's customers take out a subscription in order to

42 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* 2002 L108/33.

43 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, *OJ* 2002 L249/21.

44 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ* 2010 L95/1.

45 'The new regulatory framework for electronic communications networks' refers to the following measures: Directive 2002/21/EC of the European Parliament and of the Council of 7 March

gain access to the basic cable package offered by that company, UPC's business consists in broadcasting programmes produced by the content editors by transmitting those programmes to the connection point of its cable network in its subscribers' homes. The fact that the transmission costs charged to subscribers incorporate the payments made to broadcasting channels and the royalties paid to copyright collecting societies in connection with the transmission of programme content cannot preclude this conclusion. According to the NRF, it is the NRAs (national regulatory authorities) which have power to define the relevant market for the purposes of the application of the rules and instruments of regulatory intervention provided for by the NRF. To that end, the NRAs are responsible for carrying out market analysis and, in particular, where they find that undertakings have significant power on that market, they may impose on them certain obligations, including tariff obligations. However, Hilversum is not an NRA and therefore does not have power to intervene directly in the retail tariffs in respect of services falling within the NRF but can only request the NRA to adopt adequate measures. Hilversum may also not rely on a clause stipulated in an agreement concluded prior to the adoption of the new regulatory framework applicable to electronic communications services which restricts that supplier's freedom to set tariffs.

– Transfer by public entities of their television provision activities and the exclusive right to use their cable networks to an undertaking in the same Member State: Judgment in case 221/12 *Belgacom* 14.11.2013 (CJEU): The dispute at hand arose between Belgacom and four inter-municipal associations, concerning various decisions by which they approved, without organising a call for tenders, the conclusion of agreements providing for the transfer to Telenet of its television broadcasting service activities and television subscription contracts signed by their clients and, for a fixed period, ancillary rights on their cable networks and the grant of long-term leasehold rights on

2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* 2002 L108/33, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, *OJ* 1998 L24/1, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), *OJ* 2002 L108/7, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), *OJ* 2002 L108/21, and Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), *OJ* 2002 L108/51.

those networks. The CJEU held that an agreement transferring to Telenet the inter-municipal associations' provision of television services and conferring on it the exclusive right to operate their cable networks, constituted a service concession within the meaning of Article 1(4) of Directive 2004/18. Even though service concessions do not come within the scope of Directive 2004/18 by virtue of Article 17, the public authorities which grant such a concession are required to comply with the fundamental rules of the TFEU, since that concession is of certain cross-border interest. Consequently, according to Articles 49 TFEU and 56 TFEU, an economic operator in a Member State may, before the courts of that Member State, allege an infringement of the obligation of transparency occurring at the time of conclusion of an agreement whereby one or more public entities of that Member State have either granted to an economic operator of that same Member State a licence for services of certain cross-border interest or granted an economic operator the exclusive right to engage in an economic activity of cross-border interest. In case of a lack of transparency, the cross-border interest is given, as economic operators established in other Member States do not have a genuine opportunity to manifest their interest in obtaining that concession. This amounts to a difference in treatment to the detriment of undertakings which might be interested in that concession but which are located in other Member States. This indirectly discriminatory treatment cannot be justified by the wish not to disregard certain rights which the public entities have granted to the economic operator under a pre-existing agreement concerning the use of cable networks belonging to them, including when it is for the purpose of putting an end to a dispute which has arisen as to the scope of that agreement. Grounds of an economic nature, such as the wish to avoid the depreciation of an economic activity, cannot be considered to be overriding reasons in the public interest.

– Negotiations on tenders which do not comply with the mandatory requirements of the technical specifications relating to the contract: Judgment in case 561/12 *Nordecon and Ramboll Eesti* 05.12.2013 (CJEU): The Estonian Highways Office launched a negotiated procedure with the publication of a contract notice for the planning and construction of a road section. The Estonian Highway Office declared that the four tenders submitted were admissible, even though the tender from one of the consortiums proposed a different width of the central reservation than provided for in the contract notice. During the negotiations which followed the submission of those tenders, the Estonian Highways Office invited the other tenderers to alter the width of the central reservation in their original tenders accordingly. The CJEU held that Article 30(2) of Directive 2004/18 does not allow the contracting authority to negotiate with tenderers that do not comply with the manda-

tory requirements laid down in the technical specifications of the contract. Even though the contracting authority has the power to negotiate in the context of a negotiated procedure, it is still bound to see that the mandatory requirements of the contract are complied with. This is necessary to ensure compliance with the obligation of transparency, which is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. Moreover, allowing a tender that does not comply with the mandatory requirements to be admissible would deprive the fixing of mandatory conditions in the call for tenders of any useful effect and would not allow the contracting authority to negotiate with the tenderers on a common basis, enabling it to treat them equally.

– Possibility for a State authority to rely on certain provisions of Directive 93/38/EEC[46] against a body which is a public service concession in the case where that directive has not been transposed into national law: Judgment in case 425/12 *Portgás* 12.12.2013 (CJEU): Portgás is a limited liability company governed by Portuguese law which is active in the natural gas production and distribution sector. The dispute between Portgás and the Portuguese Ministry concerns a decision ordering the recovery of financial assistance which had been granted to that company in the context of the European Regional Development Fund, on the ground that, at the time when it acquired gas meters from another company, Portgás had not complied with a number of rules of EU law applicable with respect to public contracts. Portgás claimed that the Portuguese State could not require it, as a private undertaking, to comply with the provisions of Directive 93/38, since that directive had not yet been transposed into Portuguese law at the material time. The CJEU held that Articles 4(1), 14(1)(c)(i) and 15 of Directive 93/38 cannot be relied on against a private undertaking solely on the ground that, in its capacity as the exclusive holder of a public-interest service concession, that undertaking comes within the group of persons covered by Directive 93/38, in circumstances where that directive has not yet been transposed into the domestic system of the Member State concerned. However, the situation would be different if that undertaking has been given responsibility, pursuant to a measure adopted by the State, for providing, under the control of the State, a public-interest service and has, for that purpose, special powers going beyond those which result

46 Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *OJ* 1993 L199/84.

from the normal rules applicable in relations between individuals.[47] Whether this is the case in the dispute at hand has to be determined by the national court. Assuming that Portgás can be regarded as an 'emanation of the State', those provisions of Directive 93/38 could also be relied on against Portgás by the Portuguese authorities.

– Certification body tasked with checking and certifying compliance by undertakings carrying out public works: Judgment in case 327/12 *Soa Nazionale Costruttori* 12.12.2013 (CJEU): The Italian legislature introduced, in accordance with Article 52(1) of Directive 2004/18, a certification scheme to be carried out by private bodies (SOAs). They are commercial undertakings entrusted with supplying certification services, the receipt of an appropriate certificate being a necessary condition in order for interested persons to participate in public works contracts. The activities pursued by SOAs have an economic character since the certificates are issued in return for remuneration and exclusively on the basis of actual market demand. SOAs operate under conditions of competition. In this context, the CJEU ruled that Articles 101 TFEU, 102 TFEU and 106 TFEU do not preclude national legislation that imposes on SOAs a scheme of compulsory minimum tariffs for certification services. However, the Italian legislation is liable to make it less attractive for undertakings established in Member States other than Italy to exercise the freedom of establishment on the market for those services within the meaning of Article 49 TFEU. This restriction can be justified in the sense that the setting of minimum tariffs for the supply of such services is intended, in principle, to ensure the quality of those services and it is suitable for attaining the objective of protecting the recipients of those services by ensuring the independence of SOAs.

Employment law and Discrimination

– Inclusion in the minimum wage of elements of remuneration such as a lump sum payment and a capital formation contribution: Judgment in case 522/12

47 See also: case 188/89 *A. Foster and others* v *British Gas plc* [1990] ECR I-3313 (CJEU), paragraph 20; case 343/98 *Renato Collino and Luisella Chiappero* v *Telecom Italia SpA* [2000] ECR I-6659 (CJEU), paragraph 23; case 157/02 *Rieser Internationale Transporte GmbH* v *Autobahnen- und Schnellstraßen-Finanzierungs-AG (Asfinag)* [2004] ECR I-1477 (CJEU), paragraph 24; case 356/05 *Elaine Farrell* v *Alan Whitty, Minister for the Environment, Ireland, Attorney General and Motor Insurers Bureau of Ireland (MIBI)* [2007] ECR I-3067 (CJEU), paragraph 40; case 282/10 *Maribel Dominguez* v *Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* 24.01.2012 (CJEU), paragraph 39.

Isbir 07.11.2013 (CJEU): Mr Isbir, employed in the industrial cleaning sector, works in Germany for DB Services. He applied for the more favorable provisions establishing the hourly wages of the building cleaning sector under different collective wage agreements, which were made applicable to all employees and employers of that sector, including those of DB Services. Although DB Services did not dispute that it was subject to the collective wage agreements, it considered that Mr Isbir had in fact already received much more than the minimum hourly wage that he claimed, since he had received, for the period in question and under the collective agreements binding the Deutsche Bahn AG group, amounts which, according to it, should be included in that minimum wage, namely two lump sum payments and the contribution to the capital formation. The CJEU clarified that according to Article 3(1) of Directive 96/71,[48] the Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, inter alia the minimum rates of pay. To determine the minimum rates of pay referred to in the first subparagraph of Article 3(1), the second subparagraph of Article 3(1) of Directive 96/71 expressly refers to the national law or practice of the Member State to whose territory the worker is posted. In the absence of any substantive definition of the minimum wage, the task of defining what the constituent elements of the minimum wage are therefore comes within the scope of the law of the Member State concerned, in so far as that definition does not have the effect of impeding the free movement of services between Member States. According to the ruling of the CJEU in *Commission* v *Germany*,[49] only the elements of remuneration which do not alter the relationship between the service provided by the worker, on the one hand, and the consideration that he receives in return, on the other, can be taken into account in determining the minimum wage within the meaning of Directive 96/71. While it is for the national court to verify whether that is the case as regards the elements of remuneration at hand, the CJEU held that the lump sum payments appear to be consideration for the usual work of the workers, as provided for in a collective agreement of universal application. On the other hand, since the aim of the capital formation contribution appears to be an objective of social policy

48 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* 1997 L18/1.

49 Case 341/02 *Commission* v *Germany* [2005] ECR I-2733 (CJEU).

supported by a financial contribution from the public authorities, it cannot be regarded as forming part of the usual relationship between the work done and the financial consideration for that work from the employer.

– Advancement of an employee of a local or regional authority to the next pay step in his grade: Judgment in case 514/12 *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH* 05.12.2013 (CJEU): SALK is a holding company for three hospitals and further establishments situated in the Province of Salzburg. The defendant, Land Salzburg, is the sole shareholder in SALK. Under Austrian law, SALK employees are regarded as officials or contractual agents of Land Salzburg. The Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH sought a declaration before court, that SALK employees have the right to have all periods of relevant professional service completed in the European Union or the European Economic Area with employers other than Land Salzburg taken into account in determining the reference date for the purposes of advancement to the next pay step in their grade. As clarified by the referring court, if the employee has only ever worked for Land Salzburg, full account is to be taken of the entire period of service, but, if not, account is to be taken of only 60% of the periods of service completed before recruitment by Land Salzburg. Consequently, an employee who has worked for Land Salzburg from the very beginning of his career will be placed on a higher pay step than an employee who has accumulated comparable professional experience of equal length with other employers. The CJEU held that Article 45 TFEU and Article 7(1) of Regulation No 492/2011[50] preclude national legislation under which, in determining the reference date for the purposes of the advancement of an employee of a local or regional authority to the next pay step in his grade, account is to be taken of all uninterrupted periods of service completed with that authority, but of only a proportion of any other periods of service.
– Compensation for the unlawful insertion of a fixed-term clause in an employment contract: Judgment in case 361/12 *Carratù* 12.12.2013 (CJEU): In this case, Ms Carratù brought legal proceedings against Poste Italiane as she considered that there were no lawful reasons for placing a time limit on her employment contract. The national court found the fixed-term clause to be unlawful and held that an employment relationship of indefinite duration had commenced. The outstanding issue is the amount of compensation owed to Ms Carratù. According to the Italian rules, the compensation payable for the

50 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance, *OJ* 2011 L141/1.

unlawful insertion of a fixed-term clause in a contract of employment is limited to a bracket ranging from 2.5 to 12 months' pay. If, instead, Ms Carratù had been unlawfully dismissed under a contract of indefinite duration, she would have had a right to a higher amount of compensation. The CJEU clarified firstly that clause 4(1) of the framework agreement on fixed-term work[51] must be interpreted as meaning that it may be relied on directly against a State body such as Poste Italiane. Secondly, the concept of 'employment conditions' in that clause covers the compensation that the employer must pay to an employee on account of the unlawful insertion of a fixed-term clause into his employment contract. Thirdly, the CJEU held that the equal treatment between workers with a fixed-term contract and comparable permanent workers, as laid down by clause 4(1) of the framework agreement, does not apply to the dispute at hand. For the compensation paid in respect of the unlawful insertion of a fixed-term clause into an employment relationship to be determined in the same way as that paid in respect of the unlawful termination of a permanent employment relationship, the persons concerned must be regarded as being in a comparable situation. However, the situation in which one of those types of compensation is paid is significantly different from that in which the other is paid. The first type of compensation relates to workers whose employment contract was concluded unlawfully, whereas the second relates to employees who have been dismissed. Nevertheless, it is apparent from a reading of clause 4(1) in conjunction with clause 8(1) that they enable Member States that so wish to introduce more favourable provisions for fixed-term workers and, therefore, to treat the economic consequences of the unlawful insertion of a fixed-term clause into an employment contract in the same way as those of the unlawful termination of an employment contract of indefinite duration.

Leave

– Right to receive maternity leave in case of surrogacy: Opinion in case 167/12 *CD* 26.09.2013 (CJEU): The situation at hand deals with the right to paid maternity leave of an intended mother, who received her child with the assistance of a surrogate mother and began mothering and breastfeeding the

51 Framework agreement on fixed-term work of 18 March 1999 ('the framework agreement'), which can be found in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ* 1999 L175/43.

child within an hour of the birth. Advocate-General Kokott clarifies that Directive 92/85/EEC[52] takes biological motherhood as the norm, since the practice of surrogacy was not as widespread in the early 1990s as it is today. However, in view of the possibilities created by medical advances, the objectives pursued by Directive 92/85 must be understood in functional rather than monistic biological terms. Maternity leave is intended to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, a position which is also consistent with Articles 24(3) and 7 of the Charter of Fundamental Rights of the European Union. In the initial stage this relationship should not suffer from the mother simultaneously pursuing employment. Consequently, according to Advocate-General Kokott, an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave under Articles 2 and 8 of Directive 92/85 where she takes the child into her care following birth. In this regard, it is irrelevant whether the intended mother is breastfeeding the child following birth. However, the right to maternity leave depends on the Member State, in which rights under Directive 92/85 are being asserted, recognizing the legal relationship of the intended mother and the child in the specific case. The leave must amount to at least two weeks and any other maternity leave taken by the surrogate mother must be deducted. Advocate-General Kokott found no breach of Article 14 of Directive 2006/54/EC.[53]

– Right to receive paid leave of absence from employment equivalent to maternity leave or adoption leave in case of surrogacy: Opinion in case 363/12 *Z* 26.09.2013 (CJEU): The case deals with the right to receive paid leave of absence from employment equivalent to maternity leave or adoption leave of an intended mother, who received her child through a surrogacy arrangement, as she has no uterus and therefore cannot support a pregnancy. Contrary to Advocate-General Kokott in *CD*, Advocate-General Wahl concluded that a woman undertaking surrogacy cannot be compared to a woman who, after being pregnant and having endured the physical and mental constraints of pregnancy, gives birth to a child. Because of the clearly enunciated objective of protecting the health and safety of workers in a vulnerable condition, Directive 92/85 cannot be read as protecting a right to paid leave

52 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *OJ* 1992 L348/1.

53 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *OJ* 2006 L204/23.

of absence equivalent to maternity leave in the case of a mother who has had her genetic child through a surrogacy arrangement. Moreover, because the different treatment of which the intended mother complains does not constitute discrimination on grounds of sex, Directive 2006/54 cannot be construed as precluding national legislation which does not provide for paid leave of absence from employment, equivalent to maternity or adoption leave, for a woman who is the genetic mother of a child born through a surrogacy arrangement. A more appropriate point of comparison for a woman, who becomes a mother through a surrogacy arrangement, would be an adoptive mother. However, no provision is made under EU law which would entail an obligation for Member States to grant paid leave of absence for adoptive parents. Finally, Advocate-General Bot concluded that Directive 2000/78/EC[54] does not apply in circumstances in which a woman who suffers from a condition that makes her unable to support a pregnancy and whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave. The concept of 'disability' is to be understood in relation to the possibilities for that person to work, and to exercise a professional activity. The interrelationship between the limitation to support pregnancy and the capacity to work appears to be missing in the circumstances at hand.

– Entitlement to payment of commission during annual leave: Opinion in case 539/12 *Lock* 05.12.2013 (CJEU): In the situation at hand, the worker's annual pay comprises of basic pay and commission payments made under a contractual right to commission. The commission is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's work. The worker receives the commission in arrears and the amount in a given reference period fluctuates according to the value of sales achieved and contracts entered into and the time of such sales. During the period of annual leave, the worker is entitled to basic pay and continues to receive commission payments based on commission earned earlier. However, during the annual leave, the worker does not undertake any work that would entitle him to commission payments and accordingly the average commission earnings over the course of the year will be lower than they would be if the worker had not taken leave. According to the opinion of Advocate-General Bot, Article 7 of Directive 2003/88/EC[55] requires such commission to be

54 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* 2000 L303/16.

55 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* 2003 L299/9.

included in the basis for calculating the remuneration that is payable to that worker in respect of his period of paid annual leave. Failure to take commission into account in the remuneration that is payable to a worker in respect of his paid annual leave is capable of deterring him from exercising his right to such leave. Advocate-General Bot left it to the national tribunal to determine the method and rules enabling commission to be included in the basis for calculating the remuneration that an employee must receive during his paid annual leave. Taking into account the average amount of commission received by the worker over a representative period, 12 months for example, appears to be an appropriate solution to Advocate-General Bot.

Discrimination

- Sex discrimination by different retirement age for men and women: Judgment in case 614/11 *Kuso* 12.09.2013 (CJEU): Ms Kuso, who was born in 1948, worked for her employer since 1967 under a permanent employment contract. In 1980 she obtained status of 'employee who cannot be dismissed' and agreed to be placed under a fixed-term employment contract governed by the rules on employment and remuneration laid down in the Niederösterreichische Landes-Landwirtschaftskammer (Dienst- und Besoldungsordnung der Niederösterreichischen Landes-Landwirtschaftskammer). The termination of employment depends on the age of the employee and varies according to whether the employee is a man (65 years) or a woman (60 years). In 2008, the request of Ms Kuso for an extension of her contract beyond age 60 was denied. The CJEU held that the national legislation under which the employment relationship is to come to an end upon attainment of the fixed retirement age, which differs depending on whether the employee is a man or a woman, constitutes direct discrimination prohibited by Article 3(1)(c) of Directive 76/207/EEC.[56] The applicability of the Directive to the termination of the employment contract could not be ruled out by the fact that the contract was concluded before the accession of Austria to the European Union.
- Right of the father to take part in the maternity leave: Judgment in case 5/12 *Betriu Montull* 19.09.2013 (CJEU): The preliminary reference concerns the Spanish employment legislation according to which the first 6 weeks of

56 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *OJ* 1976 L39/40.

maternity leave following the birth must be taken by the child's mother and the mother may then elect for the father to take all or part of the remainder of the maternity leave. Mr Betriu Montull applied for maternity benefit for the period following the six weeks of compulsory leave which the mother must take immediately following the birth. That application was rejected by the Spanish National Social Security Agency on the grounds that the mother was not a member of a State social security scheme and, therefore, had no primary right to the leave and the social security cover. Moreover, it was submitted that the father does not have his own individual, autonomous and independent right to leave, but only a right derived from that of the mother. The CJEU firstly clarified that while the Spanish legislation is in compliance with Directive 92/85/EEC, the directive is not applicable to the situation at hand, in which the mother is not an employed but self-employed person, who has chosen not to be covered by a State social security scheme which guarantees her such leave. With regard to Directive 76/207, the Spanish legislation establishes a difference on grounds of sex as the right to maternity leave is reserved to employed mothers, while the employed father is entitled to that leave only on the condition that the mother confers on him all or part of the available leave. However, the Spanish legislation intended to protect a woman's biological condition during and after pregnancy is justified by Article 2 (3) of Directive 76/207. In contrast, Advocate-General Wathelet concluded in her opinion of 11 April 2013, on the basis of the judgments of the CJEU in *Roca Álvarez*[57] and *Hofmann*,[58] that the 10 weeks' leave in the present case is accorded to workers solely in their capacity as parents of the child and is not linked to the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child.

– Increase of the contribution to the occupational pension scheme on the basis of age: Judgment in case 476/11 *HK Danmark* 26.09.2013 (CJEU): The CJEU held that an occupational pension scheme under which an employer pays, as part of pay, pension contributions which increase with age complies with the principle of non-discrimination on grounds of age,[59] provided that the difference in treatment is appropriate and necessary to achieve a legitimate aim. This outcome corresponds with the opinion of Advcoate-General Kokott,

57 Case 104/09*Pedro Manuel Roca Álvarez* v *Sesa Start España ETT SA* [2010] ECR I-08661 (CJEU).
58 Case 184/83 *Ulrich Hofmann* v *Barmer Ersatzkasse* [1984] ECR 03047 (CJEU).
59 As enshrined in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression by Council Directive 2000/78/EC, and, in particular, Articles 2 and 6(1) of that directive.

delivered on 7 February 2013. The dispute at hand arose between two private parties, Ms Kristensen and Experian, concerning alleged discrimination on grounds of age. Experian has a mandatory occupational pension scheme, which is not based on statute or a collective agreement, but on the employment contract entered into between Experian and its employee. The scheme provides for Experian to pay two thirds of the contributions and the employee to pay the remaining third. The amount of the contributions is determined by a percentage of the basic salary and is graduated according to the age of the employee. After clarifying that the contributions paid under the scheme fall within the scope of Directive 2007/78/EC as they constitute an immediate cash benefit within the meaning of 'pay' in Article 157(2) TFEU, the CJEU found that the occupational pension scheme establishes a difference in treatment based directly on the criterion of age. Even if the basic salary is equal, the overall monthly pay, made up of the basic salary plus the employer's contributions, varies with the age of the employee. The difference in treatment cannot be justified on the basis of Article 6(2) of Directive 2000/78, because the disputed occupational pension scheme does not set any age for admission to retirement benefits, given that Experian's employees automatically join the scheme after nine months' service in the undertaking. However, the difference in treatment on grounds of age is capable of being justified under Article 6(1) of that directive. The occupational scheme reflects a legitimate aim as it enables all of Experian's employees to build up reasonable retirement savings, which they will have at their disposal when they retire and cover the risks of death, incapacity and serious illness. The age-related increases in contributions appear to be appropriate to the pursuit of those aims. As a result of the application of higher pension contribution rates to older workers, it is possible for those workers to build up a reasonable retirement capital, even where their affiliation to the scheme is relatively recent. Those increases also make it possible for younger workers to join that scheme, while imposing on those persons a lighter financial burden. Additionally, the risks of death, incapacity and serious illness are statistically more likely for older workers. However, it is for the national court to determine whether the age-related increases in contributions attain their aim in a consistent and systematic manner, while ensuring that they do not go beyond that which is necessary for achieving the aims pursued.

– Availability pay for civil servants, who have reached the age of retirement: Judgment in case 546/11 *Dansk Jurist- og Økonomforbund* 26.09.2013 (CJEU): The CJEU held that Articles 2 and 6(1) of Directive 2000/78 preclude a national provision under which a civil servant who has reached the age at which he is able to receive a retirement pension is denied, solely for that

reason, entitlement to availability pay intended for civil servants dismissed on grounds of redundancy. In Denmark, civil servants who have been dismissed on grounds of redundancy continue to receive their original salary for three years. However, civil servants who have reached the age of 65 – and are therefore able, but are not obliged, to retire – have no entitlement to that availability pay. The CJEU determined first whether the alleged discriminatory national legislation falls within the scope of Directive 2000/78. The scope of the directive excludes social security or social protection schemes, the benefits of which are not equivalent to 'pay' within the meaning of Article 157(2) TFEU. The availability pay is paid monthly for three years by the State, acting in its capacity as a public employer, to a civil servant dismissed on the ground that his post has ceased to exist. In return for the entitlement to availability pay, the civil servant is obliged to remain available to his employer during the period in which he receives that pay and is obliged to take a suitable post offered by his employer. Consequently, it represents immediate consideration in cash, paid by the employer to the civil servant in respect of his employment, and thus constitutes pay within the meaning of Article 157(2) TFEU. Given that the national legislation at stake has the effect of depriving civil servants who have reached the age of 65 of entitlement to availability pay, that provision establishes a difference of treatment directly based on age within the meaning of Article 2(2) of Directive 2000/78. Article 6(2) of Directive 2000/78 does not justify the national legislation as it does not constitute an occupational social security schemes covering the risks of old age and invalidity. While the aim of the national legislation falls within the category of legitimate employment policy and labour market objectives provided for in Article 6(1) of Directive 2000/78, it goes beyond what is necessary. The measure deprives civil servants who wish to remain in the labour market of the entitlement to that pay merely because they could, because of their age, draw a retirement pension, which could be lower than the pension to which they would be entitled if they were to remain in employment for more years. In order to avoid abuse by civil servants, it would be more proportionate to examine individually whether the civil servants are actually available to take up an alternative post. The result reached by the CJEU is in line with the opinion of Advocate-General Kokott, delivered on 7 February 2013.

– Direct discrimination based on sexual orientation by a collective agreement which restricts benefits to employees who marry: Judgment in case 267/12 *Hay* 12.12.2013 (CJEU): The CJEU held that Article 2(2)(a) of Directive 2000/78/EC precludes a provision in a collective agreement under which an employee who concludes a civil solidarity pact (PACS) with a person of the same sex is

not allowed to obtain the same benefits as those granted to employees on the occasion of their marriage, where the national rules of the Member State do not allow persons of the same sex to marry. In the dispute at hand, Mr Hay, an employee of Crédit agricole, concluded a PACS with a person of the same sex. On that occasion, Mr Hay applied for the days of special leave and the marriage bonus granted to employees who marry, in accordance with Crédit agricole's national collective agreement. Crédit agricole refused him those benefits on the ground that, under that collective agreement, they were granted only upon marriage. The CJEU clarified that direct discrimination occurs when a person is treated in a less favourable manner than another person in a comparable situation. As regards benefits in terms of pay or working conditions, such as days of special leave and a bonus granted at the time of an employee's marriage, persons of the same sex who cannot enter into marriage and therefore conclude a PACS are in a situation which is comparable to that of couples who marry. By relying on its case-law in *Römer*[60] and *Maruko*,[61] the CJEU concluded that the restriction of benefits in terms of conditions of pay or working conditions to married employees, whereas marriage is legally possible in that Member State only between persons of different sexes, give rise to direct discrimination based on sexual orientation against homosexual employees in a PACS arrangement. A direct discrimination can be only upheld on the grounds referred to in Article 2(5), namely public security, the maintenance of public order and the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others, which have not been relied on in the dispute at hand.

Private International and International Procedural Law

– Scope of the concept of 'civil and commercial matter' in Article 1(1) of Regulation No 44/2001:[62] Judgment in case 49/12 *Sunico* 12.09.2013 (CJEU): The CJEU held that the concept of 'civil and commercial matter' covers an action whereby a public authority of one Member State claims, as against natural and legal

60 Case 147/08 *Jürgen Römer* v *Freie und Hansestadt Hamburg* [2011] ECR I-03591 (CJEU).

61 Case 267/06 *Tadao Maruko* v *Versorgungsanstalt der deutschen Bühnen* [2008] ECR I-01757 (CJEU).

62 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001 L012/1.

persons resident in another Member State, damages for loss caused by a tortious conspiracy to commit value added tax fraud in the first Member State. In the dispute at hand, the UK tax authority brought court proceedings in the UK against a number of natural and legal persons established in Denmark by reason of the fact that the defendants allegedly took part in a tortious conspiracy to defraud. More specifically, it was maintained that those non-residents were guilty, on the territory of the UK, of a VAT 'carousel' type fraud. The CJEU clarified that although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001, it is otherwise where the public authority is acting in the exercise of its public powers. In the case at hand, the CJEU determined that the legal relationship between the UK tax authority and the defendants is not based on public law, involving the exercise of powers of a public authority. This is due to the fact that the authority's claim for damages is not based on UK VAT law, but comes under the law of tort, and that the UK tax authority does not exercise any exceptional powers in comparison with the rules applicable to relationships between persons governed by private law. This outcome is in line with the opinion of Advocate-General Kokott, delivered on 11 April 2013.

– Irreconcilable judgments given by courts of the same Member State: Judgment in case 157/12 *Salzgitter Mannesmann Handel* 26.09.2013 (CJEU): In the dispute at hand, Laminorul SA, a company established in Romania, brought an action seeking payment for a delivery of steel products against Salzgitter Mannesmann Handel GmbH before the Romanian courts. By its first judgment, the Romanian court dismissed the action on the grounds that it was not directed against the other party to the relevant contract. Laminorul initiated new proceedings against Salzgitter before the same court, involving the same cause of action. The application was served on Salzgitter's former Romanian legal representative, whose authority to act for that company had been limited, according to Salzgitter, to the first proceedings. For this reason, no one appeared on Salzgitter's behalf at the hearing arranged by the Romanian court, which proceeded to hand down a judgment by default against Salzgitter, requiring Salzgitter to pay EUR 188,330. Salzgitter exhausted all legal remedies available in Romania against this judgment. In the context of the proceedings initiated in Germany for a declaration of enforceability of the second judgment, the referring court notes that the first judgment, which dismissed Laminorul's action for payment, and the second judgment, which upheld that action, are irreconcilable. Consequently, the question arose whether a national court must decline to enforce a judgment given in another Member State if it conflicts with a judicial decision from the latter Member

State. In line with the principle of mutual trust, the CJEU concluded that 34(4) of Regulation 44/2001 must be interpreted as not covering irreconcilable judgments given by courts of the same Member State but only those given in two different Member States. Otherwise, such a possibility of review as to the substance would de facto constitute an additional means of redress against a judgment which has become final in the Member Sate of origin. It is for the party to the proceedings to avail himself of the legal remedies provided for by the legal system in the Member State in which the proceedings take place. The judgment is in accordance with the opinion of Advocate-General Wahl, delivered on 16 May 2013.

- Applicable law in the absence of a choice made by the parties to an employment contract: Judgment in case 64/12 *Schlecker* 12.09.2013 (CJEU): In the case at hand, Mrs Boedeker, a German national and resident, who pursued her professional activity without interruption and exclusively in the Netherlands for more than 11 years, brought an action against her employer, Schlecker, which is established in Germany, on the ground that the latter unilaterally decided to change her place of work. In line with the opinion of Advocate General Wahl (delivered on 16 April 2013), the CJEU held that according to Article 6(2) of the Rome Convention,[63] the national court may disregard the law of the country where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption, if it appears from the circumstances as a whole that the contract is more closely connected with another country. The national court must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant. In this regard, account should be taken in particular of the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes. In addition, the national court must also take account of all the circumstances of the case, such as the parameters relating to salary determination and other working conditions.
- Application by a person who has been placed under guardianship for authorisation to dispose of his immovable property: Judgment in case 386/12 *Schneider* 03.10.2013 (CJEU): The case deals with non-contentious proceedings brought by Mr Schneider, a Hungarian national who has been placed under guardianship, for authorisation to sell his share of a property situated in

63 Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, *OJ* 1980 L266/1.

Bulgaria. Mr Scheider appealed the decision of the Bulgarian court, which refused that application on the ground that disposal of the property in question was not in the interests of a person declared to be lacking full legal capacity. The CJEU concluded that the Regulation No 44/2001, particularly Article 22(1), does not apply to non-contentious proceedings by which a national of a Member State who has been declared to be lacking full legal capacity and placed under guardianship in accordance with the law of that State applies to a court in another Member State for authorisation to sell his share of a property situated in that other Member State. The Court reached this result due to the fact that the proceedings are concerned with the 'legal capacity of natural persons' in Article 1(2)(a) of Regulation No 44/2001, which falls outside the material scope of that regulation.

- Requirement of a 'causal link' under Article 15(1)(c) of Regulation No 44/2001: Judgment in case 218/12 *Emrek* 17.10.2013 (CJEU): In the dispute at hand, the consumer domiciled in Germany travelled to the business premises of the seller in France in order to buy a second-hand car. By an action brought before the German courts, he made claims against the seller under the warranty. The German court referred to the CJEU the question, whether Article 15(1)(c) of Regulation No 44/2001 requires the existence of a causal link between the means used to direct the commercial or professional activity to the Member State in which the consumer is domiciled, namely an Internet site, and the conclusion of the contract with that consumer. The CJEU negated the question but pointed out that a causal link must be regarded as constituting evidence of 'directed activity'. In order to determine the existence of a 'directed activity' towards the Member State where the consumer is domiciled, the national court has to make an overall assessment of the circumstances in which the consumer contract was concluded, taking also the non-exhaustive list of criteria as established in *Pammer and Hotel Alpenhof*[64] and *Mühlleitner*[65] into account. Advocate-General Cruz Villalón reached the same conclusion in his opinion, delivered on 18 July 2013.
- Concept of 'matters relating to a contract' under Regulation No 44/2001: Judgment in case 519/12 *OTP Bank* 17.10.2013 (CJEU): In the case at hand, OTP Bank, established in Hungary, has concluded with the debtor company, also established in Hungary, contracts granting credit to the latter. Four years later, over 75% of the capital of the debtor company was acquired by Hoch-

64 Joined cases 585/08 and 144/09 *Peter Pammer* v *Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH* v *Oliver Heller* [2010] ECR I-12527 (CJEU), paragraphs 89–91.

65 Case 190/11 *Daniela Mühlleitner* v *Ahmad Yusufi and Wadat Yusufi* 6.9.2012 (CJEU), paragraph 44.

tief, established in Germany. Hochtief informed OTP Bank, but did comply with the further reporting requirements under Hungarian company law. The debtor company was subsequently subject to insolvency proceedings in which it was not able to repay the debts owed to OTP Bank. The latter initiated legal proceedings before the Hungarian courts to order Hochtief to repay the debt of the debtor company. The CJEU held that an action based on national legislation, which renders a person liable for the debts of a company which he controls, where that person did not comply with the reporting obligations following the acquisition of that company, cannot be regarded as concerning 'matters relating to a contract' for the purposes of Article 5(1)(a) of Regulation No 44/2001.

- Applicable law to a commercial agency contract: Judgment in case 184/12 *Unamar* 17.10.2013 (CJEU): The legal proceedings between Unamar, a company incorporated in Belgium, and NMB, a company incorporated in Bulgaria, concern the payment of various forms of compensation owed as a consequence of the termination, by NMB, of the commercial agency contract which until then had bound the two companies. The question was raised whether the Belgian court could apply to the contract the law of the forum on the ground of the mandatory nature of the rules governing the position of self-employed commercial agents in the legal order of that Member State, despite the contract expressly providing for the application of Bulgarian law, which meets the minimum protection requirements laid down by Directive 86/653.[66] On the basis of Articles 3 and 7(2) of the Rome Convention, the CJEU confirmed this question, provided that the court seized finds, on the basis of a detailed assessment, that, in the course of the transposition of Directive 86/653, the legislature of the State of the forum held it to be crucial to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions.
- Concept of 'other party to the contract' in Article 16(1) of Regulation 44/2001: Judgment in case 478/12 *Maletic* 14.11.2013 (CJEU): In the dispute at hand, the consumers domiciled in Bludesch (Austria) booked a package holiday on the website of a travel agent established in Munich (Germany), while the trip was to be operated by an Austrian company having its registered office in Vienna (Austria). Because of a booking mistake, the consumers had to pay a surcharge upon arrival at the hotel. In order to recover the surcharge paid and to

66 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, *OJ* 1986 L382/17.

be compensated for the inconvenience, they initiated an action before the Bezirksgericht Bludenz seeking payment from the travel agent and the operator. The national court dismissed the action in as far as it was brought against the operator on the ground that it lacked local jurisdiction. It held that Regulation No 44/2001 was not applicable and that according to domestic law, the courts in Vienna have jurisdiction. The CJEU held that the concept of 'other party to the contract' laid down in Article 16(1) of Regulation No 44/2001 covers the contracting partner of the operator with which the consumer concluded that contract and which has its registered office in the Member State in which the consumer is domiciled. In line with the objectives of Regulation 44/2001 to protect the consumer and to avoid concurrent proceedings, the second contractual relationship cannot be classified as 'purely' domestic since it was inseparably linked to the first contractual relationship which was made through the travel agency situated in another Member State.

- European Enforcement Order in a dispute between two persons not engaged in commercial or professional activities: Judgment in Case 508/12 *Vapenik* 05.12.2013 (CJEU): The CJEU held that according to Article 6(1)(d) of Regulation No 805/2004,[67] the Regulation does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities. The dispute at hand concerned the repayment of a loan based on an agreement concluded between two parties none of whom was acting in a professional capacity. The creditor obtained a judgment in his favor from the Austrian courts and subsequently applied for a European Enforcement order in order to facilitate its enforcement in Belgium, where the debtor lives. The Austrian court refused, holding that one of the requirements for issuing such an order against a 'consumer' is that the judgment has been given in the state where he has his domicile. The CJEU clarified that there is no imbalance in a contractual relationship between two persons not engaged in commercial or professional activities. Therefore, that relationship cannot be subject to the system of special protection applicable to consumers contracting with persons engaged in commercial or professional activities.
- Jurisdiction to hear an action based on an exclusive distribution agreement: Judgment in case 9/12 *Corman-Collins* 19.12.2013 (CJEU): In line with the opinion of Advocate-General Jääskinen, delivered on 25 April 2013, the CJEU held that a distribution agreement must be classified as a contract for the supply of services for the purpose of applying the rule of jurisdiction in the

67 Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, *OJ* 2004 L143/15.

second indent of Article 5(1)(b) of Regulation No 44/2001. The characteristic obligation of an exclusive distribution agreement would not correspond to that of a 'sale of goods'. Its general scheme is characterised by a framework agreement, the aim of which is an undertaking for supply and provision concluded for the future by two economic operators, including specific contractual provisions regarding the distribution by the distributor of goods sold by the grantor. An exclusive distribution agreement thereby fulfills the two conditions of the concept of 'service', which is defined by the CJEU as requiring that the party who provides the service carries out a particular activity in return for remuneration. The first criterion of an 'activity' corresponds to the service provided by the distributor, who, as a result of the supply guarantee, is able to offer clients services and benefits that a mere reseller cannot and thereby acquires, for the benefit of the grantor's products, a larger share of the local market. The second criterion of a 'remuneration' is constituted by all the advantages that arise from the selection of the distributor by the grantor, as the right to sell the grantor's products in a particular territory and oftentimes assistance regarding access to advertising, communicating know-how by means of training or yet even payment facilities.

– Relationship between Regulation No 44/2001 and the CMR: Judgment in case 452/12 *NIPPONKOA Insurance Co. (Europe)* 19.12.2013 (CJEU): In the case at hand, Canon contracted with the Netherlands companies Nippon Nederland and Nippon Euro to transport by road several of its products between the Netherlands and Germany. Nippon Euro contracted Inter-Zuid Transport to carry out that transportation. Due to the fact that some of the consignment was stolen, Canon received compensation from Nippon Euro by way of court settlement. Subsequently, Nipponkoa Insurance brought an action for indemnity before the Second Commercial Chamber of the Landgericht Krefeld against Inter-Zuid Transport. However, one year and a half prior to the indemnity action, Inter-Zuid Transport had already obtained a final negative declaratory judgment against Nippon Nederland and Nippon Euro in the Netherlands in respect of the same facts, according to which Inter-Zuid Transport was responsible for the damage suffered only up to the maximum amount provided for in Article 23 of the CMR.[68] Nipponkoa Insurance takes the view that despite the existence of the negative declaratory judgment, the Landgericht Krefeld has jurisdiction under Article 31(1) of the CMR to adjudicate on the indemnity action as that article must be interpreted autonomously

68 Convention on the Contract for the International Carriage of Goods by Road ('CMR'), signed in Geneva on 19 May 1956, as amended by the Protocol signed in Geneva on 5 July 1978.

and prevails over Article 27 of Regulation No 44/2001, by virtue of Article 71 thereof. Inter-Zuid Transport claims that, under Article 27 of the regulation and Article 31(2) of the CMR, the proceedings cannot be pursued before the Landgericht Krefeld on account of the negative declaratory judgment given previously in the Netherlands. By relying on its judgment in *TNT Express Nederland*,[69] the CJEU clarified firstly that according to Article 71 of Regulation No 44/2001, an international convention may not be interpreted in a manner which fails to ensure, under conditions at least as favourable as those provided for by that regulation, that the underlying objectives and principles of that regulation are observed. An interpretation of Article 31(2) of the CMR, as meaning that that action for indemnity and the negative declaratory judgment do not have the same cause of action, would not guarantee observance of the aim of minimising the risk of concurrent proceedings which is one of the objectives and principles which underlie judicial cooperation in civil and commercial matters in the European Union.

69 Case 533/08 *TNT Express Nederland BV* v *AXA Versicherung AG* [2010] ECR I-4107 (CJEU).