Litigation

Philipp Hacker* and Marie-Sophie Schäfer

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Abstract: This article provides an overview of cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between July 2017 and the beginning of January 2018.

General Law of Contract and Obligations

Contracts of Sale vs. Contracts for Work under Directive 1999/44: Judgment in Case C-247/16 *Schottelius*

The present case deals with the notion of 'contract of sale' under Directive 1999/44 on the sale of consumer goods. Although the holding merely states that the CJEU lacks jurisdiction to decide the case, the reasoning provides important insights into the Court's understanding of the distinction between contracts of sale and contracts for work under Directive 1999/44. The relevant facts of the case are as follows:

The husband of Mrs Schottelius retained Mr Seifert, a contractor, to renovate the swimming pool in the couple's garden. The pool itself belongs to Mrs Schottelius as she also owns the land on which it was built. As part of the contract, the contractor sold a number of items to the couple, such as a filtration system including a pump, and completed the repair works. Along with the contract, he issued a warranty in favour of the husband. After the termination and handover of the work, the husband assigned all of his rights under the warranty to Mrs Schottelius on 3–4 November 2011. Once the pool was put to use, a number of defects (affecting the newly installed cleaning system and the pump) surfaced. The couple requested that the contractor repair the defects; on 16 November 2011,

***Corresponding author: Dr. Philipp Hacker,** LL.M. (Yale), is an A.SK Fellow at WZB Berlin Social Science Center, and a Research Fellow at the Centre for Law, Economics and Society as well as the Centre for Blockchain Technologies, both at UCL, E-Mail: philipp.hacker@rewi.hu-berlin.de
Marie-Sophie Schäfer, Maîtrise en droit (Paris 2), is a postgraduate student at King's College London and a research assistant at Humboldt University of Berlin,
E-Mail: mariesophie.schaefer@gmail.com

the husband set a deadline for the repair works. As the contractor did not react, the husband repaired the defects with the help of a friend and sued the contractor for reimbursement of the expenses.

The referring court noted that, under current German law, reimbursement of expenses is only possible, independent of the classification of the contract as a contract of sale or for work, if they were incurred after a validly set deadline had passed. However, the deadline set by the husband was invalid as it was set after the assignment of his rights to his wife. Therefore, the referring court reasoned, the claim could only succeed under two conditions. First, Directive 1999/44 needed to be applicable to the facts of the case, or at least contain a principle of EU consumer law that applies to the facts of the case. Second, the second indent of Article 3(5) of the Directive, which holds that the consumer may require an appropriate reduction of the price if the seller has not completed the primary remedy 'within a reasonable time', must be taken to mean that secondary rights under a warranty, such as reimbursement of expenses, may be owed even if the consumer has not set a deadline for the rectification of the defects. This is a particularly debated question under German law as the German transposition of the Directive (§§ 281(1), 323(1) German Civil Code, BGB) does require the setting of a deadline (see more in detail below, last paragraph of this case report).

Against this factual background, the CJEU followed the pleas of the German government and the European Commission in denying its jurisdiction over the case. The Court started by noting that, according to settled case law, it only has jurisdiction to interpret those provisions of EU law that are actually applicable in the main proceedings (see, eg, judgment of 7 July 2011, *Agafiței and Others*, C-310/10, EU:C:2011:467, para 28).

The factual pattern underlying the case at issue, however, falls outside the scope of Directive 1999/44, according to the Court. The contract for the renovation of the pool did not constitute a contract of sale. The Court rightly noted that, while undefined in the Directive, the 'contract of sale' constitutes an autonomous concept of EU law whose key characteristic is the obligation to deliver an asset. However, this obligation did not assume sufficient weight in the overall contractual scheme. While the contractor did sell items to the couple, his main obligation consisted in the performance of the activities necessary for renovation. The principal contractual promise hence amounts to a contract for work, not a contract of sale.

In a second step, the Court went on to consider those two types of contracts in which obligations to perform work or services are covered by Directive 1999/44. According to its Article 2(5), the installation of consumer goods falls within the ambit of the Directive if the installation forms part of the contract of sale. Furthermore, according to Article 1(4), '[c]ontracts for the supply of consumer

goods to be manufactured or produced' are equated with contracts of sale. However, in both cases, the obligation to perform work or services needs to be *ancillary* to the sales obligation, according to the Court (para 38). The Court justified the restriction of the scope of the Directive by reference to the preparatory documents relating to the current Directive and to the UN Convention on Contracts for the International Sale of Goods of 1980, on which the Directive was (partially) based. In the present case, however, the focus of the contract was the renovation of the pool, and hence the performance of activities, not the delivery of assets. Therefore, even though the filter and the pump were installed by the contractor, the more pervasive repair purpose of the contract disqualified it as a sales contract with an ancillary installation clause; rather, the Court reiterated, it must primarily be considered a contract for work. As the sold products were not produced or manufactured for the sale, but rather concerned standard items, the contract did not fall under Article 1(4) of the Directive, either.

In distinguishing contracts with a work or service component that fall under the Directive from those that do not, Member State courts will therefore have to identify and classify the principal obligation under the contract. It seems to be ruled out to split the contract into one part covered by the Directive, and another part not covered by it. While this focus on the principal obligation constitutes a satisfying test in theory, it may lead to significant legal uncertainty in more complex contractual arrangements in which principal and ancillary contractual duties may be difficult to tease apart.

In the present case, the Court flatly denied its jurisdiction over the facts of the case. Hence, it did not provide an answer to the intriguing material question the referring court had asked on the necessity to set a deadline for the invocation of secondary rights under the Directive. This has been discussed at length in the German literature, with most commentators concluding that a necessity to set a deadline violates EU law.[1] However, at least for German law, the practical relevance of this question is greatly diminished by a recent judgment of the Bundesgerichtshof (Federal Private Law Supreme Court, BGH). The BGH, continuing an earlier line of judgments, ruled that a deadline is implicitly set if the consumer, even without mentioning a fixed date, requires repair or replacement from the seller in a way that clearly conveys to the seller that he must perform within a limited, definite period of time.[2] Under this interpretation, it is sufficient for the consumer, for example, to press for 'speedy repair' to implicitly set the deadline

1 See, eg, W. Ernst, in *Münchener Kommentar zum BGB* (7th ed, Munich: C H Beck, 2016) § 323 para 51.

2 BGH, Judgment of 13 July 2016, VIII ZR 49/15, *Neue Juristische Wochenschrift* 2016, 3654 (para 27).

required by German law. Therefore, in cases in which the seller has not completed the remedy within reasonable time (second indent of Article 3(5) of Directive 1999/44), an implicitly set deadline satisfying the German transposition of the Directive will often have expired. It remains true, however, that the necessity to set a deadline, even implicitly, does not follow from the Directive which, after all, does establish minimum requirements with respect to consumer protection (Article 8(2)). It will likely take another decision of the Court to definitely settle this debate.

Uber as a Transportation, not an Information Society Service: Judgment in Case C-434/15 *Asociación Profesional Elite Taxi*

See the Case Note on the judgment in this issue, on page 80.

Consumer Protection

Advertising

Advertising for Plastic Surgery: Judgment in Case C-356/16 *Wamo*

This is yet another case dealing with the limitations European law imposes on national restrictions of the advertising activities in regulated professions, in this case plastic surgery. Wamo is a company operating in Belgium that disseminated advertising for plastic surgery, contrary to Belgian law. As in the recent *Vanderborght* case concerning the Belgian prohibition on advertising for dentists,[3] criminal proceedings were brought against Wamo. The referring court asked whether the Unfair Commercial Practices Directive 2005/29 (UCPD) precludes the Belgian ban on advertisements for plastic surgery or non-surgical plastic medicine.

The CJEU answered this question pursuant to Article 99 of its Rules of Procedure, according to which the Court may give a decision by reasoned order on a proposal from the Judge-Rapporteur, and after hearing the Advocate General, if the answer to the question of the referring court may clearly be deduced from existing case law. Therefore, the Court quickly turned to is recent *Vanderborght* judgment

3 See F. Esposito and Ph. Hacker, 'European Union Litigation' (2017) 13 *European Review of Contract Law* 310, 314–317.

(judgment of 4 May 2017, *Vanderborght*, C-339/15, EU:C:2017:335) to point out two things. First, advertisements relating to plastic surgery constitute 'commercial practices' in the sense of Article 2(d) UCPD. However, second, the UCPD explicitly exempts national rules relating to the health and safety aspect of products and national rules governing regulated professions from its scope, Articles 3(3) and 3(8), respectively. Therefore, the UCPD does not preclude national legislation banning advertisements on plastic surgery or non-surgical plastic medicine.

The Court, however, felt apparently limited by the narrow scope of the question asked by the referring court (cf Article 267(2) TFEU: 'ruling thereon'). This is surprising as the CJEU has held repeatedly that is not bound by the scope of the questions to give the referring court any guidance on EU law it deems necessary (see, eg, judgment of 29 January 2008, *Promusicae*, C-275/06, EU:C:2008:54, para 42). The questions posed in the *Vanderborght* case also referred to the compatibility of the advertisement ban (concerning dentists) with the freedom to provide services, enshrined in the Article 8(1) E-Commerce Directive 2000/31 for information society services provided by members of the regulated profession, and more generally in Article 56 TFEU. In *Vanderborght*, the Court reached the conclusion that a general and total ban *did* violate both provisions of EU law: Article 8(1) of the E-Commerce Directive protects online, and Article 56 TFEU all other types of advertisements. Had the Court dealt with these issues again, it would likely have come to a similar conclusion for the ban on advertisements for plastic surgery.

Consumer Credit and Unfair Commercial Practices

Relationship between Debt Collection Agency and Debtor Falling under the UCPD: Judgment in Case C-357/16 *Gelvora*

Gelvora is a private debt collection agency. By way of assignment, it acquired claims derived from consumer credit agreements from banks. The agency then brought actions for recovery against the debtors, sometimes in parallel with enforced recovery proceedings carried out by bailiffs on the basis of final judgments. Some consumers lodged complaints about the recovery practices with the Lithuanian Consumer Protection Authority. The authority fined Gelvora for breach of the Lithuanian transposition of the Unfair Commercial Practices Directive 2005/29 (UCPD). Gelvora filed a claim against the fine.

The Court was called upon to determine whether the relationship between the debtors and Gelvora falls within the scope of the UCPD. To this effect, the Court turned to Article 2(d) UCPD, which defines 'commercial practices' as 'any act,

omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers'. According to Article 3(1) UCPD, commercial practices may occur before, during and after the conclusion of the contract, or even, in the light of Recital 13 UCPD, outside of a contractual relationship. Therefore, measures to obtain payment for a product also qualify as 'acts [...] directly connected with the [...] sale [...] of a product'. In the case of Gelvora, the credit agreements constituted the requisite 'product'.

According to the Court, this also holds if the debt collection agency has acquired the claims by way of assignment, for two reasons. First, the measures of the debt collection agency may influence the consumer's decision regarding the payment of the product, or even the purchase of the product in the first place. It is precisely this influence of consumer decision making that the UCPD is designed to protect. Second, creditors would otherwise have incentives to separate the debt collection phase in order to circumvent the protective regime of the UCPD. This is also the reason for which the confirmation of the debt in a court proceeding, and the initiation of enforcement proceedings with the help of bailiffs, does not change the relationship with respect to the applicability of the UCPD. Again, this would set incentives to use court proceedings as a circumvention measure.

General Prohibition of Selling at a Loss: Judgment in Case C-295/16 *Europamur Alimentación*

Europamur is a wholesale company selling household and food products to supermarkets and local shops. It specializes in serving smaller shops and supermarkets that stand in direct competition to large supermarket chains. Europamur forms part of a collective purchasing mechanism and is therefore able to offer its customers prices that enable them to compete with large supermarket chains. In February 2015, Europamur was fined by a local Spanish Directorate General for Commerce and Consumer Protection for selling products at a loss. The agency claimed that Europamur infringed a Spanish law generally prohibiting to sell or to offer to sell to the public at a loss; the provision contains exceptions only for two cases: if the objective of the seller is to match the prices of competitors, or if the sale involves perishable goods about to perish. Europamur argued that the Spanish provision on selling at a loss stands in contradiction to the UCPD.

The Court started by affirming its previous judgment in *Euronics Belgium*, in which it had held that the UCPD precludes national legislation generally prohibit-

ing to offer to sell or to sell goods at a loss if that legislation does not include a necessary determination whether the transaction in question is 'unfair' in the sense of Articles 5–9 UCPD (judgment of 7 March 2013, *Euronics Belgium*, C-343/12, EU:C:2013:154, para 30 and 31). This holding only covers national legislation aiming to protect consumers. The Court then set out to qualify the Spanish prohibition on selling at a loss in view of this jurisprudence.

The preamble of the Spanish legislation in question clearly states that it aims to protect consumers. The referring court explained that this objective was relevant even in B2B constellations, such as the present proceedings, as these upstream transactions eventually affect consumers.

Furthermore, the Spanish prohibition applies generally and rules out selling at a loss irrespective of the unfairness criteria of the UCPD; selling at a loss, however, does not form part of the 'black list' of Annex I UCPD. The exceptions of the Spanish law contain criteria that do not relate to the provisions of the UCPD. Finally, the legislation includes a reversal of the burden of proof that is also not foreseen in the UCPD for cases of selling at a loss. The UCPD fully harmonizes the area of unfair commercial practices (Article 4) and therefore prevents Member States from adopting stricter legislation, even for the sake of consumer protection. Therefore, the UCPD precludes the Spanish legislation, both because it generally prohibits selling a loss and because it reverts the burden of proof without relation to the unfairness criteria of the UCPD.

Passenger Rights and Package Holiday

Distance in Flights Consisting of Several Legs: Judgment in Case C-559/16 *Bossen*

Mrs Bossen and other applicants booked flights from Rome via Brussels to Hamburg. The leg from Rome to Brussels was slightly delayed so that they missed their connection flight in Brussels. Therefore, they arrived in Hamburg with a delay of 3 hours and 50 minutes, and sought compensation from the airline. The amount of the compensation owed usually depends on the distance of the flights, according to Article 7(1) of the Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. It amounts to €250 for flights of 1500 km or less, and to €400 for all intra-EU flights of more than 1500 km. The distance between Rome and Hamburg is less than 1500 km; however, the sum of the distances between (i) Rome and Brussels and (ii) Brussels and Hamburg is greater than 1500 km. Therefore, the question arose how the distance should be calcu-

lated. There had been considerable debate, and diverging judgments by Member State courts, about this question in the previous years.[4]

The Court started by reiterating that compensation is expressly only foreseen in cases of cancellation of flights, or of re-routing that lead to a flight duration that exceeds the duration of the original connection by more than three hours, Article 5(1)(c) and Article 7(1) of the Regulation. However, as the Court has established in previous judgments, the principle of equal treatment demands that compensation is also owed to passengers in the case of their flight not being cancelled, but delayed (without re-routing) by three hours or more (judgment of 23 October 2012, *Nelson and Others*, C-581/10 and C-629/10, EU:C:2012:657, para 40). As the Court pointed out in this judgment, the two groups of passengers (re-routed and delayed flight; simply delayed flight) are comparable and must be treated equally.

Therefore, the CJEU now held that the staggered compensation amounts in Article 7(1) of the Regulation equally apply to passengers on simply delayed flights. To answer the question of whether the distances referred to in this article should be calculated from the first point of departure to the final destination, or by summing up the individual legs, the Court turned to the purpose of the compensation. As it had suggested in *Nelson and Others*, the reason for compensation in the case of re-routing and delay is to make up for the impossibility of reorganizing travel arrangements freely at the very last moment (para 35 there). Passengers are de facto forced to accept the re-routing and the delay, even if they absolutely have to reach the final destination at a certain time. The same reason triggers compensation, according to the Court, in the present case. If, however, compensation is offered for the inconvenience of not being able to reorganize travel arrangements, it does not matter if the delay was incurred on a direct or on a multi-leg flight. Therefore, according to the Court, the distance must be calculated not by summing up the individual legs, but by measuring the distance from the first point of departure to the final destination.

This reasoning, however, is not convincing. After all, Article 7(1) itself differentiates on the basis of the distance travelled; therefore, it clearly uses the distance of a flight as a proxy for the inconvenience suffered. If the inconvenience *only* stemmed from the impossibility to reorganize travel arrangements, it would have to be the same for all flights regardless of the distance travelled. Therefore, in the cases of re-routing and simple delay, compensation is better understood to make up for an inconvenience partly driven by the impossibility to reorganize

4 See, eg, J. Maruhn, *BeckOK Fluggastrechte-Verordnung* (4th ed, Munich: C H Beck, 2017) art 7 para 9–13d.

travel arrangements, and partly by the distance travelled. If this is the case, the real distance travelled arguably provides a more accurate proxy of the inconvenience suffered than the simple distance between the first point of departure and the final destination.

Unfair Contract Terms

Loans Denominated in a Foreign Currency: Judgment in Case C-186/16 *Andriciuc and Others*

In 2007 and 2008, Ms Andriciuc and others took up consumer loans from Banca Românească SA ('the Bank'). These loans were denominated in a foreign currency (Swiss francs), even though the applicants received their income in Romanian lei. The contracts they signed included standardized contract terms, obliging the borrowers to pay back their monthly repayments in Swiss francs and thus imposing them the risk related to possible fluctuations in the exchange rate between the two currencies. Subsequently to the conclusion of the contract, the exchange rate of the Romanian lei against the Swiss franc fell, thus increasing the monthly repayments.

The applicants initiated legal proceedings in Romania due to these allegedly unfair terms, arguing that the Bank violated its obligations to inform, warn and advise as well as its duty to draft contractual terms in plain and intelligible language. They held that the Bank had emphasized the advantages of denominating a loan with a foreign currency instead of warning the applicants of the loan agreement's (very probable) negative consequences. As the District Court dismissed the action, the applicants appealed against this decision, reasoning that Article 3(1) of the Unfair Contract Terms Directive ('UCTD') had been violated due to a 'significant imbalance' between the parties. The referring court called upon the CJEU to reveal whether the 'significant imbalance' (Article 3(1) UCTD) needs to already have existed at the time of the conclusion of the contract. Furthermore, it asked the Court to clarify the exception under which the unfairness of a term may not be examined under Article 4(2) UCTD (when the term is written in 'plain intelligible language').

Concerning Article 3(1) UCTD, the Court reiterated that national courts need to take into account the circumstances at the time of conclusion of the contract (judgment of 9 July 2015, *Bucura*, C-348/14, EU:C:2015:447, para 48). This means that an assessment of the unfairness of a contractual term must be made by reference to the time of conclusion of the contract at issue, taking into account all of the circumstances which could have been known to the seller or supplier at

that time, and which were such as to affect the future performance of that contract. In the present case, the referring court needed to examine whether the Bank had knowledge and expertise of the possible fluctuation of the exchange rate as well as the risks inherent in taking out a loan in a foreign currency.

Regarding Article 4(2) UCTD, the Court reminded that 'plain intelligible language' is used as soon as the consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences from it (judgment of 23 April 2015, *Van Hove*, C-96/14, EU:C:2015:262, para 50). This question must be examined in the light of all the relevant facts, including the promotional material and information provided by the Bank in the negotiation of the agreement (judgment of 26 February 2015, *Matei*, C-143/13, EU:C:2015:127, para 75). The Court concluded that, in the case of a term under which the loan must be repaid in the same foreign currency as that in which it was contracted, an average consumer must be able to understand the term both at a formal and grammatical level, and also in terms of its actual effects.

Employment Law and Discrimination

Carry-over of Unexercised Rights to Paid Leave: Judgment in Case C-214/16 *King*

From 1999 until 2012, Mr King worked for The Sash Window Workshop Ltd on the basis of a contract paying him on a commission-only basis and granting only unpaid annual leave. After termination of his contract, Mr King unsuccessfully demanded payment for his annual leave – taken and not paid as well as not taken for the entire period of his employment. He therefore instituted legal proceedings before the competent UK Employment Tribunal. The latter found that he was a 'worker' under the respective UK legislation transposing the Working Time Directive ('WTD') and thus decided in his favour. The Court of Appeal then sought the CJEU for a preliminary ruling regarding the interpretation of the WTD, especially asking whether it is compatible with Article 7 WTD and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the EU ('the Charter') if the worker has to take leave first before being able to establish whether he is entitled to be paid.

The Court held that that the very clear wording of Article 7(1) WTD entitles every worker paid annual leave of at least four weeks without derogation. This right furthermore is a particularly important principle of EU social law set out in Article 31(2) of the Charter. As explained in the Court's ruling in *Schultz-Hoff and Others* (judgment of 20 January 2009, C-350/06 and C-520/06, EU:C:2009:18,

para 28), Member States may not subject this right to any preconditions whatsoever. With regard to the Court's judgment in *Lock*, the CJEU reiterated that the right to annual leave and to a payment on that account are aspects of a single right (judgment of 22 May 2014, C-539/12, EU:C:2014:351, para 17), seeking to grant the worker a period of relaxation and leisure (*Schultz-Hoff and Others*, para 25). The Court concluded that EU law consequently precludes a situation in which a worker has to take leave first before being able to establish whether he is entitled to pay.

The referring court furthermore asked whether Article 7 WTD must be interpreted as precluding national legislation preventing a worker from carrying over and, where appropriate, accumulating, until termination of his position, paid annual leave rights not exercised (for several consecutive reference periods) because his employer refused to remunerate the leave. First of all, the Court reiterated *Schultz-Hoff and Others*, where the worker was unable to exercise his right to paid annual leave due to illness – a reason beyond the worker's control. In this case, Mr King was unable to exercise his right due to a reason beyond his control as well, as his employer refused to remunerate his leave. In this regard, Member States are prohibited to prevent workers from exercising their right to carry-over at the end of a reference period, especially as workers are entitled to an allowance in lieu under Article 7(2) WTD. With respect to previous cases concerning absence from work due to sickness, the Court reiterated that the right to paid annual leave may be limited as the employers need to be protected as well (judgment of 22 November 2011, *KHS*, C-214/10, EU:C:2011:761, paras 38, 39 and 44). In the case of Mr King, his employer was not faced with periods of his absence, which would have led to difficulties in the organization of work. Quite contrarily, his employer benefited from the fact that Mr King refrained from interrupting his job in order to take annual leave. Therefore, Article 7 WTD precludes national legislation preventing a worker from carrying over and accumulating paid annual leave rights because his employer refused to remunerate the leave.

Discrimination

Appropriate Risk Assessment at Workplace for Breastfeeding Workers: Judgment in Case C-531/15 *Otero Ramos*

Ms Otero Ramos is employed as a nurse at a public hospital. In 2011, she gave birth to a child. A few months later, she informed her employer that she was breastfeeding and requested – according to the Spanish law transposing Article 4(1) of Directive 92/85 (on measures to improve the safety and health at work of workers that are pregnant, have recently given birth or are breastfeeding) – that her work-

ing conditions be adjusted to her breastfeeding as her current conditions exposed her to health and safety risks. Her employer then issued a report stating that her work did not pose a risk for her breastfeeding. Ms Otero Ramos therefore demanded a medical certificate from the Instituto Nacional de la Seguridad Social stating that there was a risk. This, however, remained unsuccessful so that she sought legal proceedings before Spanish courts. The court dismissed her action and Ms Otero Ramos appealed.

The referring court asked the CJEU whether and how the rules on the burden of proof laid down in Article 19 of Directive 2006/54 (on the principle of equal treatment of men and women in matters of employment) may be applied in order to prove that there is a situation of risk during breastfeeding by definition of the Spanish law.

In a first step (regarding whether Article 19 of Directive 2006/54 should be applied), the Court stated that Article 4(1) Directive 92/85 requires the assessment of risks to the safety or health and any possible effect on a pregnancy or breastfeeding of a worker so that the employer can decide which measures to take. Such a risk assessment requires the employer to take into account the individual situation of the worker in question in order to ascertain a risk for her or her child. Furthermore, the Court referred to Article 19(1) of Directive 2006/54, which regulates that the defendant has to prove that there has not been a breach of the principle of equal treatment when a conflict arises in this regard, as well as Article 19(4)(a) of Directive 2006/54, which extends this rule reversing the burden of proof to sex discrimination situations covered by Directive 92/85. Therefore, the Court examined whether Ms Otero Ramos was discriminated on grounds of sex in the Spanish proceedings. Discrimination under directive 92/85 is any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of the Directive. The Court reiterated its judgment *Danosa* and proclaimed that the aim, in such a context, is to protect women before and after birth (judgment of 11 November 2010, C-232/09, EU:C:2010:674, para 68). The Court then explained that breastfeeding women must be just as much protected as women that are pregnant or have recently given birth. It thus concluded that a treatment must be regarded as less favourable when an employer fails to assess a breastfeeding worker's risk and that Article 19(1) of Directive 2006/54 needs to be interpreted as applying in a situation in which a breastfeeding worker claims that the assessment was not concluded in accordance with Article 4(1) of the Directive 92/85.

In a second step (regarding how Article 19 of Directive 2006/54 should be applied), the Court reiterated that the rules of evidence apply as soon as the risk assessment is challenged before a court or other authority, but not when demanding the assessment in the first place. According to the Court's jurisprudence, it

holds that the worker in question needs to present evidence capable of showing that the risk assessment was not conducted in accordance with Article 4(1) of Directive 92/85 and that she was therefore discriminated; it is only then that the burden of proof is shifts back onto the employer (judgment of 21 July 2011, *Kelly*, C-104/10, EU:C:2011:506, paras 29 and 30). In the present case, Ms Otero Ramos could provide evidence showing the failure to assess the risks appropriately, thus shifting the burden of proof upon her employer.

Age Limit of 65 Years for Pilots of Commercial Aircraft in EU Law: Judgment in Case C-190/16 *Fries*

Mr Fries was employed as a captain by Lufthansa until October 2013, when he reached the age of 65 years – the age limit under point FCL 065(b) in Annex I to Regulation 1178/2011 related to civil aviation aircrew ('the EU law'). As his contract did not expire till the end of 2013, he requested his salary from Lufthansa for November and December 2013. As Lufthansa refused to pay, Mr Fries sought legal proceedings claiming that he was discriminated on grounds of age contrary to Article 21(1) of the Charter of Fundamental Rights of the EU ('the Charter') and the right to engage in work and to pursue a freely chosen or accepted occupation under Article 15(1) of the Charter. The case was brought before the German Federal Labour Court, which asked the CJEU for its interpretation regarding Articles 15(1) and 21(1) of the Charter.

Regarding Article 21(1) of the Charter, the Court started by reiterating that the principle of equal treatment is a general principle of EU law that found a particular expression with the principle of non-discrimination in Article 21(1) of the Charter. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (judgment of 1 March 2011, *Association Belge des Consommateurs Test-Achats and Others*, C-236/09, EU:C:2011:100, para 28).

Therefore, the Court first examined whether there was a difference in treatment based on age and second whether such a difference was justified. The relevant EU law prohibits holders of a pilot's license to act as pilots of an aircraft engaged in commercial air transport upon reaching the age of 65. Therefore, from the age of 65 on, pilots are treated less favorably than those under the age of 65. This difference in treatment could, however, satisfy the criteria of Article 52(1) of the Charter, providing that any limitation on the exercise of the rights in the Charter must be provided for by law, must respect the essence of the latter rights and the principle of proportionality. The respective EU law aims to ensure a high uniform level of civil aviation safety in Europe, which constitutes a general

interest (this was decided with regards to Directive 2000/78/EC in judgment of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paras 58 and 69). Furthermore, it must be a measure appropriate for attaining the objective pursued and may not go beyond what is necessary in order to attain it. First of all, the Court considered that the necessary physical capabilities of a pilot diminish with age (*Prigge and Others*, para 67). As the respective EU law reduces accidents caused by a reduction of physical capabilities, it considers it to be an appropriate measure. Furthermore, the CJEU stated that it needs to pursue the aim in a consistent and systematic manner (judgment of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508, paras 85 and 86). Mr Fries held that the respective EU law was inconsistent, as it does not concern non-commercial air transport. The Court considered that commercial air transport is very different from non-commercial transport – the airplanes are technically more complex and the number of persons concerned is higher. Therefore, the Court deemed it necessary that it is guaranteed that the crew in general is qualified, conscientious and competent – especially pilots as essential elements in the chain of actors in air navigation. Furthermore, the Court reminded that EU legislature enjoys broad discretion as to complex medical questions (judgment of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350, paras 64 and 65) and cannot be required to provide individual examination of every holder of a pilot's license. Furthermore, Mr Fries was not prohibited from working as a pilot on ferry flights (without passengers, cargo or mail), or from working as an instructor. In conclusion, the Court held that the measure did not go beyond what is necessary to achieve the aim.

As the Court had already examined the justification under Article 52(1) of the Charter, there was no violation in light of Article 15(1) of the Charter, either. Therefore, the Court considered the respective EU law to be valid after all.

Alternative Dispute Resolution Procedures and Private International Law

Jurisdiction of a Recourse Claim Involving Joint Debtors: Judgment in Case C-249/16 *Kareda*

The present case deals with Regulation 1215/2012, also known as the Recast Brussels Regulation. The facts were as follows: In 2007, the Austrian citizen Mr Benkö and the Estonian citizen Ms Kareda, who were partners at the time, took out several loans together as joint debtors in order to buy a house in Austria. In 2011, Ms Kareda ended her cohabitation and moved back to Estonia. Her resi-

dence was unknown to Mr Benkö. As she stopped her monthly repayments in 2012, he alone had to meet them from 2012 to 2014. Mr Benkö therefore sought reimbursement from Ms Kareda before Austrian courts. Ms Kareda's representative first claimed that her domicile was in Estonia so that the proceedings did not come within the scope of Section 2 to 7 of Chapter II of Regulation 1215/2012, thus lacking international jurisdiction. Second, the representative challenged territorial jurisdiction, as Mr Benkö falsely had not addressed the Austrian court at the place where the bank granting the loans had its registered office. Thereupon, the Austrian court declared a lack of international jurisdiction. Mr Benkö then sought the court of appeal, which held that there had been both international and territorial jurisdiction. Ms Kareda's representative then brought an appeal against that decision to the Austrian Supreme Court, establishing that Austrian courts had no jurisdiction.

In a preliminary ruling, the referring court first asked the CJEU whether Article 7(1) of Regulation 1215/2012 must be interpreted as meaning that a recourse claim between jointly and severally liable debtors under a credit agreement constitutes a 'matter relating to a contract', as referred to in that provision. The Court first drew a parallel to the equivalent Article 5(1) of Regulation 44/2001 and reiterated that 'matters relating to a contract' needed to be interpreted autonomously and applied uniformly throughout all Member States (judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, paras 37 and 39). The Court then proclaimed that all obligations arising under a contract that has not been performed must be considered to come within the concept of matters relating to a contract (judgment of 8 March 1988, *Arcado*, 9/87, EU:C:1988:127, para 13). Therefore, the Court explained that it would be artificial to separate the different legal relationships from the contract, which gave rise to them and on which they are based. Therefore, the recourse in the present case constitutes a 'matter relating to a contract' under Article 7(1) of Regulation 1215/2012.

The referring court secondly asked whether the contract in question is a 'contract for the provision of services' under the second indent of Article 7(1)(b) of Regulation 1215/2012. The Court quickly affirmed this, stating that the party who provided the service carried out a particular activity in return for remuneration (judgment of 14 July 2016, *Granarolo*, C-196/15, EU:C:2016:559, para 37).

Thirdly, the referring court asked whether the 'place in a Member State where, under the contract, the services were provided or should have been provided' under the second indent of Article 7(1)(b) of Regulation 1215/2012 is the place where that institution has its registered office, and whether this also applies when determining territorial jurisdiction in a recourse between debtors. The Court affirmed this, arguing that the characteristic obligation is the actual granting of the sum loaned, while the borrower's obligation to repay that sum is merely a

consequence of the performance of the service by the lender (judgment of 14 July 2016, *Granarolo*, C-196/15, EU:C:2016:559, para 33).

Note: The primary responsibility for the areas of General Law of Contract and Obligations, Advertising, Unfair Commercial Practices as well as Passenger Rights and Package Holiday lies with Philipp Hacker; for the areas of Unfair Contract Terms, Employment Law, Discrimination, Alternative Dispute Resolution Procedures and Private International Law with Marie-Sophie Schäfer.