EU Case Law

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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 the beginning of July 2019 and the end of December 2019.

General Law of Contract and Obligations

Formation of a transport contract with passengers traveling without tickets: Judgment in Joint Cases C-349/18 to C-351/18 *NMBS*

The question is a classic of national contract law classes: is a transport contract formed when the passenger boards a means of transport without buying a ticket? In a case of considerable importance for European contract law, the CJEU has answered this question at the European level. The relevance of the case arises not only from the substantive answer, but perhaps even more from the methodological assumption of the CJEU that the question of contract formation could and needed to be answered by European, not Member State law. In other contexts, rules of contract formation are generally considered the prerogative of national contract law. For example, the new Directive 770/2019 on Digital Contents and Digital Services, in its Article 3(10), explicitly relegates this issue to Member State law. However, concerning rail transport contracts, Annex I of Regulation 1371/2007 on Rail Passengers' Rights and Obligations (the Regulation) explicitly contains rules on the conclusion and performance of such contracts. Therefore, the case offered the CJEU an opportunity to formulate substantive criteria of contract formation whose importance for European contract law, arguably, goes beyond the area of rail transport contracts.

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The facts of the case are as follows: the Belgian railway company NMBS found three different passengers to be traveling without tickets on NMBS trains. According to NMBS' terms and conditions, it offered them the opportunity to pay the price of the journey immediately, in addition to an 'on board' surcharge. In the alternative, they could pay the original price plus a surcharge of EUR 75 (or EUR 60 for infringements prior to 2015) within 14 days of the date of travel. If travellers did not make use of any of those two alternatives, the surcharge rose to EUR 225 (or EUR 200 for infringements prior to 2015). The three travellers did not make any payment and NMBS therefore sued them for the payment of the original transportation price plus the highest surcharge. The CJEU therefore had to answer two questions: first, was a transportation contract concluded at all; second, if the surcharges do not hold up to the control of unfair contract terms, can the contract be somehow modified by the referring court to include more lenient surcharges?

The first question concerns the delimitation of (European) contract law on the one hand and regulatory law on the other hand. NMBS had argued, before the referring court, that the relationship between itself and the passengers was entirely regulatory, as they failed to purchase a ticket in the first place. The CJEU, in turn, started its analysis by looking at Article 3(8) of the Regulation, which defines the concept of 'transport contract' as 'a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services'. In a brief, but textbook-like analysis, the Court set out by defining a 'contract' as an agreement by consensus intended to produce legal effects. In the case of a rail transport contract, said legal effect consists in the obligation, on the one hand, of the carrier to provide one or more transport services and, on the other hand, of the passenger to pay the required price of transport. The CJEU concluded that both parties demonstrated their agreement to enter into a contractual relationship by, on the one hand, allowing free access to the trains and, on the other hand, by boarding the train with an intention to travel. Hence, generally speaking, the transport contract is formed implicitly by the performance of clear, affirmative actions from which the intention to enter into a contractual agreement can be safely deduced.

In a second step, however, the CJEU analysed whether the formation of the transport contract could be frustrated by the fact that the passengers did not possess a ticket when boarding the train. In other words, the question to be answered was whether the position of a valid ticket is, in the context of the rail transport contract, a necessary condition for the conclusion of the contract. Since the wording of Article 3(8) of the Regulation does not address that question, the Court undertook a systematic and teleological analysis of the Regulation to answer the question in the negative. First, it turned to the rules on the conclusion of the transport contract contained in Annex I of the Regulation which, in turn, repro-

duces the rules contained in Title II of Appendix A of the international Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980. Article 6(2) of that Appendix states that the transport contract must be confirmed by one or more tickets issued to the passenger. However, it goes on to clarify that the 'absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract which shall remain subject to' the rules of COTIF annexed to the Regulation. Arguably, it is precisely this part of the Regulation which gave the CJEU authority to rule on the question of contract formation in the first place – a methodological question not addressed explicitly by the CJEU at all.

The Court did, however, find that, in substantive terms, the system of the rules of the Regulation do not establish the possession of a ticket as a necessary condition for a transport contract. While the quoted Article 6(2) of the Appendix seems to be quite explicit on the matter, it applies only 'subject to Article 9' of the Appendix. This necessitates a brief interpretative detour, for Article 9 starts by declaring that the passenger must 'from the start of his journey' possess a valid ticket. Nevertheless, said Article continues by stating that the General Conditions of Carriage may provide, inter alia, for a surcharge for passengers who cannot produce a valid ticket upon inspection. The concept of 'General Conditions of Carriage', in turn, is defined in Article 3(16) of the Regulation as 'the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it'. The CJEU therefore rightly concluded that the applicability of the General Conditions of Carriage presupposes the existence of a contract and that, therefore, Article 9 of the Appendix cannot be read such as to require the existence of the ticket for the conclusion of the contract. If this was the case, the General Conditions of Carriage could not validly define a surcharge for passengers without tickets. Moreover, the CJEU deduced from this systematic analysis that the transport contract is formed as soon as the passenger boards the train. The ticket, hence, is only an instrument embodying the transport contract, according to the Court, but not a necessary condition for its existence.

The CJEU buttressed this systematic argument with a teleological reading of the Regulation. Recitals 1 to 3 of the Regulation stress the necessity to safeguard passenger rights in the case of transport contracts because the passenger is perceived as the weaker party. However, in the absence of a contract, the passenger would be deprived of the protective provisions of the Regulation and other parts of European contract law. This would violate the spirit of said Recitals.

In closing, the Court did, however, make a conciliatory gesture toward national contract law. It noted that its interpretation is without prejudice to the validity of the contract and the consequences resulting from non-performance which, in the absence of provisions in the Regulation, are governed by national

contract law. However, the Court failed to offer guidance on the crucial methodological question of how to determine whether a certain issue is covered by the Regulation or not. The Court, however, implicitly decided that the rules of implicit contract formation are covered by the Regulation without, unfortunately, giving any reason for its choice. In the long run, this methodological point may prove to be the most contentious part of the judgment.

The Court then turned to the second question, the consequences of the invalidity of the surcharges under the Unfair Contract Terms Directive 93/13 (UCTD). The referring court seems to be of the opinion that the amount of the surcharges was, at least partially, unfair and therefore asked the CJEU whether Article 6(1) UCTD precludes a national court from moderating the surcharge or replacing it with a default rule from national law. The referring court did note that the CJEU had already ruled on precisely these questions of the consequences of invalid terms in its recent jurisprudence and had, generally, denied the possibility to moderate penalties or replace them with more lenient national default rules.[1] However, the referring court also reported that, in the Belgian literature, there is strong opposition to these rulings of the CJEU. It therefore asked if there were any circumstances the CJEU could imagine, and describe abstractly, under which a moderation, or replacement of the penalties by a default rule, could be permissible. In essence, therefore, the question amounted to a challenge of existing CJEU jurisprudence by the referring court, supported by parts of the legal literature.

The CJEU took up the challenge, but refused to budge. It started by noting that Article 1(2) UCTD exempts from its scope contractual terms reflecting mandatory statutory or regulatory provisions. The Court left to the referring court to determine whether this exemption applies to the general conditions of carriage under scrutiny in the present case. It did reiterate, however, that the exemption extends both to mandatory and to default rules of national law and is justified by the general balancing of interests (presumably) inherent in every proceeding of parliamentary or executive law-making.

The CJEU then turned to the substantive question the challenge of the referring court had opened. The legal basis of the analysis can be found in Article 6(1) UCTD, which holds that unfair terms shall 'not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms'. The Court reiterated and unabashedly confirmed its case-law which stipulates that, in general, the na-

1 See, eg, P. Hacker and B. Kas, 'European Union Litigation' (2019) 15(3) *European Review of Contract Law* 340 (355 *et seq*) on *Abanca Corporación Bancaria*, judgment of 26 March 2019, Joined Cases C-70/17 and C-179/17, ECLI:EU:C:2019:250.

tional court may not modify the contract by revising the content of the unfair term, and may in particular not moderate the amount of the penalty. The reason for this rule is to maximally deter traders from using unfair terms in the first place (Article 7 UCTD). The Court also explicitly confirmed that the only exception to the straightforward non-application of the unfair term is the case in which the invalidity of the term would require an annulation of the entire contract that would expose the consumer to particularly unfavourable consequences and, in effect, penalize the consumer. While the concrete application of this standard to the case at hand was left to the referring court, the CJEU did say that it 'does not appear' that this exception applies.

Again, in closing, the CJEU offered an olive branch petition to national contract law regimes by deciding that the referring court may apply rules of national law governing non-contractual liability as they are entirely independent from the rules of the UCTD. However, concerning the main focus of the referring court's challenge of the CJEU's established case-law, the Court refused to reconsider its jurisprudence by any standard. Therefore, it can safely be concluded that the case-law on the general non-application of the unfair term and the prohibition to modify or replace it is here to stay.

Facebook's liability under the E-Commerce Directive: Judgment in Case C-18/18 *Glawischnig-Piesczek*

The liability of online intermediaries is a never-ending story in EU law. The CJEU added an important chapter to it with the present case concerning the liability of Facebook for hate post harming the reputation of Ms Glawischnig-Piesczek, an Austrian politician. In April 2016, a Facebook user shared, on his personal Facebook page, an article on Ms Glawischnig-Piesczek and added comments which, according to the referring court, harmed the politician's reputation in legally relevant ways by insulting and defaming her. Ms Glawischnig-Piesczek asked Facebook Ireland, the operator of Facebook services in the EU, to delete the comment. Facebook declined, and the present litigation ensued. The questions referred to the CJEU focus on the perhaps most controversial aspect of host provider liability: the obligation to remove not only the original illegal post, but also similar content.

In total, the CJEU had to answer three separate, but interlinked questions which have for a long time been hotly debated in national and European law. First, it had to determine whether Facebook had to remove, or block access to, information with content identical to the one already found illegal, irrespective of who re-posted that information. Second, the same question needed to be an-

swered for content which is not identical, but *equivalent in meaning* to the original post. Third, the Court had to rule if a national court could give is injunction *worldwide* effect. In all of these questions, the CJEU considered whether the rules of the E-Commerce Directive 2000/31 precluded such an understanding of the liability of the host provider.

The Court first recalled that the E-Commerce Directive contains liability exemptions for providers merely hosting information for third parties in its Articles 14 and 15, and that Facebook qualifies as a host provider. However, the rules of the E-Commerce Directive do not unequivocally exonerate host providers. Rather, they exhibit an inherent tension between exemptions from liability in some cases and rights of victims to obtain injunctions in others. More specifically, according to Article 14(1), host providers are not liable for stored content if they either do not have knowledge of the illegal information or act expeditiously to remove, or block access to, the information as soon as they become aware of it. Article 15(1) adds that host providers must not be placed under a general obligation to monitor stored information or to seek facts or circumstances indicating illegal activity. These two norms, read in isolation, seem to provide a wide-reaching liability shield for host providers. However, two other norms point into the very opposite direction. Article 14(3) holds that Member State courts or administrative authorities may require the host provider to terminate or prevent an infringement, and to remove or block access to illegal information. In a similar vein, Article 18(1) specifies that court actions must be available for the rapid adoption of measures to terminate any alleged infringement and to prevent any further impairment of the involved interests.

In a general comment, the CJEU, before addressing any of the three questions in detail, chose to specifically affirm that a host provider may be the addressee of specific injunctions, even if it is not liable according to Article 14(1) because it fulfils either one of the alternative conditions (lack of knowledge or expeditious removal/blocking). The liability shield of Article 14(1), therefore, does not extend to injunctions. On this basis, the three questions concerning the scope of potential injunctions needed to be answered, necessitating again an interpretation of the conflicting provisions of the E-Commerce Directive.

The CJEU started with the first question, the conformity of injunctions covering identical pieces of information with the prohibition of a general monitoring obligation under Article 15(1) E-Commerce Directive. The Court referred to Recital 47 to specify that the prohibition of the general monitoring obligation only refers to an abstract monitoring obligation, not to an obligation 'in a specific case'. In Member State law, it had long been hotly debated what precisely constitutes a 'specific case' in which monitoring and fact-seeking obligations may be permissible. The CJEU interpreted the term as covering a particular piece of information

stored by a social network and declared to be illegal by a Member State court. The Court's argument relied on the specific risks inherent in social networks: since these institutions facilitate the rapid propagation of information, the Court reasoned, a genuine risk arises that posts declared to be illegal are simply copied and shared by other network users. The Court convincingly argued that this specific risk justifies to extend an injunction to the removal or blocking of identical content. It noted that since the injunction is granted for that particular purpose, and arises from a particular case, it does not impose a general monitoring or fact-seeking obligation on the service provider and, hence, conforms with Article 15(1) E-Commerce Directive.

The Court's legal analysis is less straightforward when it comes to the second question, the removal or blocking of information not of identical, but merely of equivalent content. At the outset, the CJEU defines information with an equivalent meaning as a piece of information conveying a message of essentially unchanged content which, therefore, diverges very little from the original content. The Court, however, concedes that there are countervailing interests at stake when it comes to the treatment of such equivalent messages, and that the EU legislator intended to strike a balance between them according to Recital 41 of the E-Commerce Directive. On the one hand, the interest of a person to effectively protect its reputation and honour must be preserved. This implies that injunctions must cover some information that is highly similar but not identical to the original illegal information. Otherwise, it would suffice to change one word to prevent the triggering of a removal/blocking obligation, which could render enforcement ineffective in social networks. On the other hand, Article 15(1) E-Commerce Directive clearly prohibits any general obligations of monitoring or fact-seeking. The CJEU resolved this tension by delimiting the scope of an injunction referring to information of equivalent meaning. The equivalent information, to trigger a removal/blocking obligation, must contain specific elements properly identified in the injunction. The Court named three exemplary elements: the name of the person harmed by the original information, the circumstances of the original infringement and content equivalent to the original information. Concerning the determination of equivalence, the differences between the new and the original information must not be such as to require the host provider to carry out an independent assessment of that content. In other words, it must be evident for the host provider that the new information confers essentially the same harm upon the victim as the original message.

The CJEU, in explaining its reasoning, went even further in addressing the concerns of host providers. It states that the solution offered in the previous paragraph not only provides for an effective protection of the victims' interests, but that it can be operationalized by host providers without excessive burden. The

reason for the latter finding is that host providers need only search for the specific elements contained in the injunction and may rely on automated search tools to detect and remove, or block access to, the incriminated content precisely because an independent assessment of the host provider is not necessary. This seems to suggest that an adequate balance between the involved interests is struck if, and only if, the search and removal process can indeed be automated. If this reading of the judgment is correct, expert opinions on the feasibility of such search and removal algorithms may become a staple of intermediary liability cases.

Finally, the CJEU addressed the territorial reach of the injunctions concerning identical or equivalent information. The CJEU observed that the E-Commerce Directive as such does not preclude a global reach of the injunctions. Article 18(1), in calling for court actions, does not contain any territorial limitation. However, Recitals 58 and 60 of the E-Commerce Directive show that the EU legislator sought consistency of EU rules with international rules on intermediary liability. Hence, the CJEU noted that it 'is up to Member States to ensure that the measures which they adopt and which produce effects worldwide take due account of those rules.' In the end, however, this seems to be more of a policy recommendation than a hard legal constraint on Member State law.

In sum, the CJEU therefore significantly extended the possible scope of online intermediary liability, in the present case of hosts providers such as Facebook, both in substantive and territorial terms. The exact delimitation of injunctions on equivalent meaning, however, will without doubt generate a steady stream of future jurisprudence and legal scholarship.

Consumer Protection

Consumer Rights Directive

No right to contact Amazon via phone: Judgment in Case C-649/17 *Amazon EU*

The Consumer Rights Directive 2011/83 (CRD) broadly installed an information and disclosure regime in consumer contracts. Hence, it does not come as a surprise that a number of cases have since dealt with the specific type of information that must be provided by sellers.[2] The present case was decided in this tradition

2 See, eg, F. Esposito and P. Hacker, 'European Union Litigation' (2019) 15(1) *European Review of Contract Law* 66 (68 *et seq*) on *Walbusch*, judgment of 23 January 2019, Case C-430/17, ECLI:EU:C:2019:47.

and concerns the communication channels an online retailer, in this case Amazon, must provide to be contacted by consumers. Article 6(1)(c) CRD holds that information before the conclusion of a distance or off-premises contract must include 'the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently'. The German transposition of that provision, however, stipulates that the trader must always provide a telephone number and, where available, his fax number and email address.

Amazon, in turn, gave a choice of three options to consumers in 2014. It could be contacted by email, by chat or via telephone. It did not provide a fax number and the main telephone option Amazon provided was a callback option under which the consumer had to provide his or her telephone number and would be called back by the trader. The contact page did provide a link to a general helpline, which led to a page containing Amazon's telephone number and a warning that callers would have to answer a series of questions to confirm their identity. A German consumer association, qualified under German law to bring suits for injunctions in consumer law cases, sued Amazon because of an alleged violation of the German transposition of Article 6(1)(c) CRD.

The CJEU therefore essentially has answered two questions: first, does the trader need to provide a telephone, fax number or email address under all circumstances; and, second, is the list of means of communication included in Article 6 (1)(c) CRD exhaustive?

Concerning the first question, the Court noted that Article 6(1)(c) CRD allows for two different interpretations. On the one hand, it could be read as an obligation of the trader to disclose a telephone and a fax number if those numbers are available to traders. On the other hand, this obligation could be limited to cases in which the trader actually uses the telephone or fax in its contacts with consumers. The wording of Article 6(1)(c) CRD does not resolve the issue, particularly because of slight differences between the different language versions. Hence, a systematic and teleological analysis of the provision was undertaken by the Court.

The objective of the CRD consists, inter alia, in ensuring a high level of consumer protection via disclosures facilitating informed decisions, as evidenced by Recitals 4, 5 and 7 of the CRD. Contact information, according to the CJEU, is particularly important for the effective implementation of consumer rights, especially the right of withdrawal. However, the interests of the consumers to be provided with multiple means of communication need to be balanced against the competitiveness of undertakings, acknowledged in Recital 4 of the CRD and in Article 16 of the Charter of Fundamental Rights.

This implies that, while Article 6(1)(c) CRD does not impose a specific means of communication, it obliges the trader to put at the disposal of the consumer

some information and means enabling quick contacting and efficient communication. The CJEU relegated the task of applying this standard to the case at hand to the referring court. However, it did note that the presentation and functionality of the website are crucial parameters for evaluating whether the threshold of quick contacting and efficient communication was reached.

Concerning the broader question of the interpretation of Article 6(1)(c) CRD, the court ruled in favour of the second interpretation. Hence, an obligation to provide consumers under all circumstances with a telephone number, fax number or an email address was considered disproportionate by the Court, for three reasons. First, small companies might legitimately seek to reduce operating costs without making all or any of these more traditional forms of communication available. Furthermore, second, from a systematic perspective, the Court highlighted the difference with Article 5(1)(b) CRD, which does contain an unconditional obligation to provide a telephone number in cases of contracts that are not distance or off-premises contracts. Finally, Article 21 CRD, which limits calling fees for a consumer service hotline to the basic calling fees, also leaves it up to the trader to open, or not, a telephone line by which consumers may contact him. Therefore, in sum, traders need only publish a telephone or fax number if they choose to use any of these means of communication for consumer contacts, and they do not need to create a new email address to allow consumers to contact them.

Concerning the second question, the Court briefly noted that the means listed in Article 6(1)(c) CRD (telephone, fax and email) are not exhaustive. Therefore, the trader may choose to provide other means of quick and efficient contacting and communication, such as chat formats, electronic inquiry templates, or callback services. With a view to the present case, the CJEU specified that traders can even encourage the use of alternative forms of communication. Even if they are required to publish a telephone number, because they do use the telephone number for customer services generally, this number may be disclosed in a way that requires a few clicks by the user. However, the items mentioned in Article 6(1)(c) CRD must be accessible in a clear and comprehensible manner, which must be verified by the referring court. All in all, it therefore seems highly likely that the information policy chosen by Amazon did comply with EU law. It remains to be seen if the German Supreme Court for Private Law (BGH) will be able to interpret the incorrect German transposition in this sense, too.

Unfair Contract Terms

Impossibility for general terms of civil law to remedy unfair terms: Judgment in Case C-260/18 *Dziubak*

One of the key features of the Unfair Contract Terms Directive 93/13/ECC (UCTD) is that, pursuant to Article 6(1), an unfair term is inapplicable in the relationship between the consumer and the trader. As it is well-known, this harsh consequence is meant to dissuade traders from adopting unfair terms in the first place. The inapplicability is subject to an exception when the contract could not continue without the unfair term carved out by *Kásler and Káslerné Rábai* (judgment of 30 April 2014, C-26/13, EU:C:2014:282). With the current decision, the Court is asked to develop the content of this exception further.

Two Polish consumers, Mr Kamil Dziubak and Ms Justyna Dziubak, entered into a loan agreement indexed to Swiss franc with Raiffeisen Bank International AG Oddział w Polsce. Subsequently, the borrowers filed a lawsuit against the bank lamenting the unfairness of the index mechanism. The Polish court is convinced of the unfairness of the term but is unsure about the consequences of the finding.

The referring court takes the view that the contract cannot continue without a term establishing the interest rate and envisages several options to fill this gap. Against this background, the Polish court, in essence, asks the CJEU to rule on the compatibility with the UCTD of the following options. First, one could rely on 'national provisions not of supplementary law but of a general nature, which refer to rules of social conduct and established customs' or 'the market exchange rate or the rate set by the central bank' (para 24). If that is not possible, the court wonders if it could hold the unfair term applicable if it takes the view that nullifying the entire contract would make the consumer worse off, eventually even against the consumer's wish.

In relation to the last point, the CJEU restates that the protection granted to consumers does not go as far as ignoring their wishes. The answer to the question relating to the legal materials that can be used to fill a gap that represents the most significant contribution of this decision.

The Court agrees with the Advocate General that the UCTD forbids the use of provisions of a general nature because they have not been 'subject to a specific assessment by the legislature' (para 61) with regard to their fairness. This is essential for the Court. In its view, Recital 13 UCTD explains that Article 7 UCTD shields supplementary provisions of national law from the unfairness test because the 'legislator' has considered those default terms fair (para 60). As the same cannot be said for provisions of a general nature, these do not benefit from the said fair-

ness presumption and therefore the national court cannot apply them. In addition, the Court agrees with the Advocate General when the latter reasons that 'such general provisions would constitute "creative" intervention capable of altering the balance of interests sought by the parties and excessively encroaching on contractual autonomy' (AG Opinion, para 74).

The reasoning of the Court and of the Advocate General leave consumers, especially in the financial sector, between a rock and a hard place: either to nullify the contract in its entirety (and reimburse the loan immediately or lose the collateral) or continue with the contract as it is, unfair terms included. This dissatisfactory outcome in terms of effective consumer protection is even more puzzling once one notes the careless reading of Recital 13 on which the decision rests. Recital 13 refers to 'Member States' and not to 'legislators' as in the Court's reasoning. This implies that the scheme of the directive is such that national legislators may consider vague default terms fair once interpreted by national courts. By referring to legislators only, the Court has arguably interfered with the procedural autonomy of Member States. Indeed, nothing in the recital suggests that only precise 'statutory or regulatory provisions' may be used as gap fillers. This view is additionally supported by the fact that the same recital extends the same presumption to 'principles or provisions of international conventions' – which may well not be very precise.

Passenger Rights and Package Holiday

Liability for the delay of a non-EU flight in case of code-sharing: Judgment in Case C-502/18 *České Aerolinie*

As a consequence of the formation of larger networks of airlines cooperating to provide transportation services, a single flight, operated by one specific airline, will often be simultaneously registered, and marketed, as provided by partner airlines (code-sharing). Generally, however, the EU law framework for liability in cases of cancelled or delayed flights applies only to flights with a connection to the EU. Therefore, if a passenger departs from the EU and continues on a second code-shared flight outside of the EU, liability questions arise if only the second flight happens to be delayed or cancelled. The CJEU handed down a judgment on precisely this situation, which is of major importance for the globalized provision of air transportation services.

The passengers concerned each made a booking with České aerolinie for flights from Prague to Bangkok via Abu Dhabi. The first leg, operated by České aerolinie, arrived on time. The connecting flight, however, was operated by Eti-

had Airways under a code-share agreement and arrived more than eight hours late. Therefore, the CJEU had to decide whether the passengers could claim compensation, provided for in Article 7(1)(c) of Regulation 261/2004 (the Regulation), from České aerolinie.

The Court started its analysis by recalling that a multi-leg flight constitutes a whole for the purposes of the Regulation if, as in the present case, it is the subject of one single reservation. Hence, the entire multi-leg flight, from Prague via Abu Dhabi to Bangkok, qualifies as a flight departing from an airport located in the EU. This implies that the Regulation applies, according to its Article 3(1)(a), even though Etihad Airways is not a community carrier within the meaning of the Regulation and Abu Dhabi is not located in the EU. Furthermore, as is well-known, the CJEU had held in *Sturgeon* that passengers are entitled to compensation according to Article 7(1) of the Regulation not only in cases of cancellation, but also of a delay of flights of at least three hours (judgment of 19 November 2009, *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716, paragraph 61).

This means that the passengers were generally entitled to receive compensation. However, it does not settle the question of which of the air carriers should be held liable: České aerolinie or Etihad Airways. To determine this, the CJEU inferred from Article 5(1)(c) and Article 5(3) that only the operating air carrier can be liable. This term, in turn, is defined in Article 2(b) of the Regulation as 'an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger'. The Court broke down this definition into two cumulative conditions: the performance of the flight and the existence of a contract with a passenger.

Very succinctly, the CJEU concluded that both conditions were met by České aerolinie. Indisputably, it had a contract with the passengers and it also performed (the first leg of) the flight. The fact that the delay arose only in the second leg of the flight did not shield České aerolinie from liability, the Court ruled. First, since multi-leg flights are regarded as a single unit, the carrier performing the first flight counts as a carrier performing the entire flight. Logically, this entails that multi-leg flights may have more than one performing carrier. Perhaps more importantly, second, Article 3(5) of the Regulation stipulates that where 'an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger'. From this, the CJEU deduced that if the second leg of a multi-leg flight with a single reservation is performed under a code-share agreement by a different operating air carrier than the first leg, the carrier with a contractual connection to the passengers (first leg) remains subject to the contractual obligations vis-à-vis the passengers even in relation to the performance of the

second leg. Hence, Article 3(5) of the Regulation functions like a norm of attribution known in civil codes in general.

The CJEU buttressed this finding by reference to the high level of protection of passengers, stated in Recital 1 of the Regulation, as the passengers under the Court's solution do not have to deal with the arrangements between the different carriers, of which they were not part. Finally, the Court noted that the possibility of the carrier of the first leg to seek compensation from the carrier of the second leg moderates the burden on the former. Article 13 of the Regulation specifically holds that such a right to redress is not precluded by any provision of the Regulation.

Hence, in sum, in the case of code-sharing, the carrier with whom the passenger has entered into a contract remains liable for delays of code-shared legs of flights not physically performed by that carrier itself; however, the carrier may turn around and seek redress from the carrier actually performing the delayed flight leg.

Consumer Credit

Cost reduction in case of early credit repayment: Judgment in Case C-383/18 *Lexitor*

Credit agreements usually stretch repayment obligations over several years. Sometimes, however, a debtor is able to repay the loan earlier than expected. In these cases, questions concerning the distribution of the costs of early repayment, including profits foregone by the lender, generally arise. The CJEU in the present case was asked to interpret the provisions in the Consumer Credit Directive 2008/48 (CCD) on early repayment. Consumers in three largely identical cases had taken out loans from three different Polish banks. Each of the credit agreements included a commission fee whose amount varied between EUR 380 and EUR 1150. The consumers repaid their credits early and assigned their claims against the respective banks to Lexitor, a Polish company offering legal services to consumers. The assignee requested the banks to reimburse part of the commissions paid by the consumers and ultimately sued the banks in this matter.

The CJEU therefore had to interpret the CCD to answer the question whether the cost of the credit, which must be reduced in case of early repayment, also includes costs which are independent of the duration of the contract, such as the commission fee. It started by focusing on Article 16(1) CCD, which provides that consumers may at any time repay their credit early and, as a consequence, are entitled to a 'reduction in the total cost of the credit, such reduction consisting of

the interest and the costs for the remaining duration of the contract'. The total cost of the credit, in turn, is defined in Article 3(g) CCD as 'all the costs, including interest, commissions, taxes and any other kind of fees which the consumer is required to pay in connection with the credit agreement and which are known to the creditor, except for notarial costs'. Therefore, it is apparent that the reference to the remaining duration of the contract is present only in Article 16(1), not in Article 3(g) CRD. Hence, the CJEU notes, the former provision may be interpreted in two ways. First, it could be read to mean that the costs which shall be reduced are limited to those which depend on the duration of the contract. Second, the reference to the duration of the contract could designate a mere calculation method, by which all the costs of the credit (as per Article 3(g) CCD) must be reduced in proportion to the outstanding duration of the contract.

The wording of Article 16(1) CCD is inconclusive, particularly when seen in the different language versions. Hence, as always (see the judgment *Bundesverband der Verbraucherzentralen und Verbraucherverbände* above), the provision must be interpreted in a systematic and teleological fashion. The Court, in this interpretative exercise, opted for the second reading of Article 16(1) CCD, for a number of reasons. First, the Court again highlighted that the objective of the directive is to guarantee a high level of consumer protection. Second, Article 22 (3) CCD specifies that the provisions of the directive may not be 'circumvented as a result of the way in which agreements are formulated'. However, restricting reduction to costs dependent on the duration of the contract would incentivize banks to move costs to the beginning of the contract as a way to secure these fees in case of early repayment. Third, the amount and labeling of the fees are usually unilaterally determined by the credit providers and it would be almost impossible to objectively determine which costs really do depend on the duration of the contract and which do not. Finally, according to the Court, reducing costs not linked to the duration of the contract does not disproportionately burden the creditor. On the one hand, the creditor has a right to objective compensation, in cases of early repayment, provided for in Article 16(2) CCD. On the other hand, Article 16(4) CCD provides Member States with additional leeway to enact compensation mechanisms tailored to the conditions of the credit contracts and the market to protect creditors interests. Furthermore, the creditor may put the credit repaid early to immediate profitable re-use. Therefore, the CJEU held, the reduction provided for in Article 16(1) CCD comprises all the costs imposed on the consumer, including commission fees.

Service and Employment Law

Information Society Services

Airbnb provides an information society service: Judgment in Case C-390/18 *Airbnb Ireland*

The Grand Chamber of the CJEU has delivered an important decision on the interpretation of Information Society Services Directive 2000/31/EC (E-Commerce Directive). On the one hand, this decision draws the contours of the concept of information society service under Article 2(a) E-Commerce Directive once read in conjunction with the Uber judgments (judgments of 20 December 2017, *Asociación Profesional Elite Taxi*, C-434/15, EU:C:2017:981 and of 10 April 2018, *Uber France*, C-320/16, EU:C:2018:221). On the other hand, the Court deals with a delicate aspect of the governance of service markets under the E-Commerce Directive, namely the prior notification obligation established by Article3(4)(b) E-Commerce Directive.

The request for a preliminary ruling was made in a criminal proceedings for the violation of the 1970 Hoguet Law, a French law making intermediation activities in the real estate market conditional upon receiving an authorization. Airbnb contends that the Hoguet Law is inapplicable in the main proceedings for being incompatible with the E-Commerce Directive.

To decide whether Airbnb offers an information society service, the Court had to choose between two classificatory alternatives. According to the first, the service offered by Airbnb is part of 'an overall service, whose main component is the provision of an accommodation service' (para 51). Thus, the economic activity of Airbnb would be akin to that of Uber. The CJEU opted for the second option instead, according to which Airbnb offers a mere information society service because 'the nature of the links' between the intermediation provided by Airbnb and the accommodation service provided by the hosts are such that the former is 'not merely ancillary' to the latter (paras 52 and 54). After listing the multidimensional intermediation service provided by Airbnb, the Court emphasises two features of its business model. First, Airbnb's service is 'in no way indispensable to the provision of accommodation services' (para 55). Second, Airbnb does not set or cap the prices charged to guests. It is arguably the second feature that constitutes the most important criterion in the decision of the Court, especially because it sharply distinguishes Airbnb's and Uber's business models. The indispensability criterion, instead, hardly applies either in the case of Airbnb or in the case of Uber. Indeed, the CJEU makes an explicit parallel between the two, stressing the difference in the 'level of control' (para 66). Contrary to Uber, Airbnb does not exercise

'a decisive influence over the conditions for the provision of the accommodations services' (para 68). Arguably then, as long as a platform does not set or cap the prices, it has a good chance of being qualified as an information society service. In this regard, it is noteworthy that Airbnb supports hosts in estimating the appropriate rental price for their accommodations.

Having established that Airbnb provides an information society service, the Court sets to decide over the alleged inapplicability of the Hoguet Law for its incompatibility with the E-Commerce Directive. Under Article 3 of the directive, Member States have to notify to the Commission and the Member State of establishment of the service provider of the intention to adopt a measure restricting the freedom to provide services.

The matter is particularly complicated because the referring court has to decide on the application of a legal text that predates of many years the entry into force of the E-Commerce Directive. The Court swiftly but emphatically holds that the obligation to notify stands also in case of predating legislation. In so doing, the Court goes beyond the letter of Article 3(4), which speaks of an obligation to notify 'before' adopting the measure.

Moving from this brittle premise, the Court develops a familiar argument leading to the inapplicability of the Hoguet Law in the main proceedings. The provisions of the E-Commerce Directive under consideration are 'sufficiently clear, precise and unconditional' to have direct effect (para 90). Consequently, the Hoguet Law is inapplicable both in criminal proceedings and in civil proceedings.

The decision shows the difficulty in ensuring the smooth application of the E-Commerce Directive to measures predating its entry into force. This is a crucial question. The paramount goal of ensuring a level playing field in the internal market requires effective coordination between national legal orders, capable of avoiding regulatory races to the bottom.

Self-Employment

Disproportionality of a right of pre-emption granted to employees of the pharmacy being sold: Judgment in Case C-465/18 *Comune of Bernareggio*

In the Italian legal system, Article 12(2) of Law 362/1991 grants a pre-emption right to the pharmacists employed by the municipal undertaking operating pharmacies within the municipality. Pursuant to Article 12(2), CT was awarded a contract without having participated to the call for tenders. The *Consiglio di stato* (the highest Italian administrative court) asks to the CJEU to shed light on the compatibility

of Article 12(2) with a wide range of EU law provisions, including Articles 49 and 106 TFEU.

The Court, preliminarily, narrows its review to the compatibility with Article 49 TFEU, granting the freedom of establishment, because the *Consiglio di stato* has failed to show that Article 106 TFEU is applicable to pharmacies in the Italian legal system. Interestingly, neither the *Consiglio di stato* nor the CJEU mention EU public procurement law as even potentially relevant in the current case, where a public entity has awarded with a competitive procedure the contract for the management of an economic activity.

On the merits, the CJEU essentially shares the concerns expressed by the *Consiglio di stato* and rules for the inapplicability of Article 12(2) of Law 362/1991. The two courts fear that this right of pre-emption is a barrier to practice the profession of pharmacist in Italy. The reason is that knowing that local pharmacists can be awarded the contract without having to participate to the call for tenders, foreign pharmacists would be deterred from participating in the first place. Accordingly, Article 12(2) of Law 362/1991 restricts the freedom of establishment of pharmacists from other Member States.

Next, the Court evaluates if the said restriction can be justified. The order for reference makes apparent that 'the right of pre-emption … to the pharmacists employed by that pharmacy, is aimed at ensuring that pharmacies are run more effectively, first, by ensuring continuity in the employment relationship of pharmacists employed by that pharmacy, and secondly, by capitalising on the experience gained by those pharmacists in running the pharmacy' (para 45).

At this point, the Court recalls its case-law holding that a restriction of the freedom of establishment can be justified only if appropriate and necessary to attain its objective. The Court finds that a right of pre-emption is an inappropriate means to ensure the effective (or efficient) run of pharmacies. This right creates a 'non-rebuttable presumption' in favour of the right-holder, which 'is not based on any real assessment' of the quality of the service provided (para 50).

More radically, and perhaps convincingly, the Court notes that a less intrusive way to take into account the professional experience (and one may add, connection to the local community) of local pharmacists would be granting 'additional points under the tender procedure to tenderers who provide proof of experience in managing a pharmacy' (para 51).

In conclusion, Italian pharmacists will have to participate in the call for tenders in the future and, if properly designed, these tenders will be able to give due (and perhaps undue) consideration to their professional experience and connection to the local community. It remains to be seen if foreign pharmacists will increase their participation in similar calls for tenders thanks to this decision.

Private International Law

Jurisdiction

Jurisdiction on the damage caused by a cartel in the absence of a direct contractual relationship: Judgment in Case C-451/18 *Tibor-Trans*

This decision answers a highly technical question in relation to the private enforcement of competition law. In so doing, the case also illustrates clearly how occasionally contract law practice goes well beyond the dogmatic criterion of involving contractual parties.[3] The case involves a Hungarian transportation company (the plaintiff) and a Dutch truck producer (the defendant).

The plaintiff in the main proceedings sued the defendant for the damage suffered because of a cartel to which the defendant was found to be part of by a decision of the Commission. However, the plaintiff and the defendant were not in a contractual relationship. The plaintiff filed its lawsuit in Hungary and the defendant complains that 'it could not reasonably expect to be sued' there (para 17) – a significant complaint in jurisdictional issues as Recital 15 of Brussels II Regulation 1215/2012 holds that 'the rules of jurisdiction should be highly predictable'. Against this background, the CJEU is asked to interpret the Brussels II Regulation, thereby helping the referring judge in evaluating where it has jurisdiction over the claim for damages made by the plaintiff. More precisely, the referring court asks whether its has jurisdiction pursuant to Article 7(2) establishing the special jurisdiction in the place where the harmful event occurred in case of tort, delict, or quasi-delict.

The Court begins by noting that the provisions of the Brussels II Regulation have to be interpreted in continuity with the 'equivalent' provisions of its predecessors – the Regulation 44/2001 and the Convention of 27 September 1968. Secondly, the CJEU observes briefly that the Brussels II Regulation is applicable in the main proceedings because the claim of the plaintiff is surely within the scope of application of the regulation.

On these grounds, the Court focuses on the controversial point, namely the interpretation of the criterion of 'the place where the harmful event occurred'. This criterion is two-fold and covers 'both the place where the damage occurred and the place of the event giving rise to it' (para 25). In the main proceedings, it is uncontroversial that the cartel meetings did not take place in Hungary, so that the

3 On this point, see recently, F. Esposito, 'Carrying the Choice Theory of Contracts Further: Transfers, Welfare, and the Size of the Community' (2019) *European Review of Contract Law* 15(3) 297–334.

Hungarian jurisdiction cannot be grounded in the second prong of the criterion, the place of the event giving rise to the damage.

Accordingly, the Court focuses on the interpretation of 'the place where the damage occurred'. In this regard, the case-law of the Court denies the establishment of jurisdiction in 'any place where the adverse consequences of an event … can be felt' (para 28). Citing *flyLAL-Lithuanian Airlines* (judgment of 5 July 2018, C-27/17, EU:C:2018:533, para 32), the CJEU observes that the criterion under scrutiny does not cover 'the place where the victim claims to have suffered financial damage following initial damage arising and suffered by him in another State'. At this point, it remains to be decided whether 'the additional costs incurred because of artificially high prices' (para 30) are similar to the damages in *flyLAL-Lithuanian Airlines* and, therefore, do not suffice to establish jurisdiction.

The Court finds that the damage allegedly suffered by the plaintiff is an 'immediate consequence' of the infringement of EU competition law (para 32). This interpretation of Article 7(2) of the Brussels II Regulation is consistent with the interpretation of Regulation 867/2007. Finally, the fact that the plaintiff initiated a proceedings against only one of the infringers of competition law is irrelevant, as the infringers are jointly and severally liable.

Applicable Law

Silence on the law applicable to the third-party effects of the assignment of a claim: Judgment in Case C-548/18 *BGL BNP Paribas*

The referring court asked to the CJEU four questions to understand the scope of Article 14, Regulation 593/2008 on the law applicable to contractual obligations (Rome I), determining the law applicable to the relationship between the assignor and assignee of a credit against a contractual debtor. The main proceedings concerns the third-party effects of the assignment of a claim in the event of multiple assignments of the claim by the same creditor to successive assignees.

The first and third questions ask whether, directly or by analogy, Article 14 Regulation Rome I determines the law applicable in the main proceedings. The second and fourth questions ask more specifically which law applies in the main proceedings if the first and third questions are answered in the affirmative. However, the Court finds that Article 14 does not apply and, therefore, does not answer to these latter questions.

To reach this conclusion, the Court engages in a thorough exegesis of Article 14. The literal meaning of the provision implies its inapplicability to third-party claims. This conclusion is consistent with a series of additional considerations.

Article 12 of the Rome Convention that was replaced by Article 14 Regulation Rome I, would not have applied in the main proceedings. Also the legislative history of the regulation confirms this conclusion. The initial proposal of regulation expressively applied to third-party claims like the one in the main proceedings, but the text was amended by deleting this reference. Moreover, Article 27 imposes on Member States reporting obligations to evaluate whether the Regulation Rome I shall be amended to apply to third-party claims. The 2016 report by the Commission pursuant to Article 27 also moved from the premise that Article 14 does not apply to third-party claims.

This argumentative scheme convincingly leads the CJEU to conclude that 'the absence of rules of conflict expressly governing the third-party effects of assignments of claims is a choice of the EU legislature' (para 37). The Court could have perhaps spent a few words explaining why the choice of the EU legislature implies, *a contrario* probably, that also the third question of the referring court is to be answered in the negative.

Note: The primary responsibility for the areas of General Law of Contract and Obligations, Consumer Rights Directive, Passenger Rights and Package Holiday, Consumer Credit, lies with Philipp Hacker; for the areas of Unfair Contract Terms, Services and Employment Law, and Private International Law with Fabrizio Esposito.