

## Litigation

### Betül Kas\* and Fabrizio Esposito European Union Litigation

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**Abstract:** This article provides an overview of cases decided by the Court of Justice of the European Union (CJEU) concerning contract law. The present issue covers the period between mid-January 2018 and mid-July 2018.

## General Law of Contract and Obligations

### Scope of the concept ‘injured party’ to determine the applicability of the special rules of jurisdiction in insurance matters: Judgment in Case C-106/17 *Hofsoe*

In the case at hand, a vehicle belonging to a natural person domiciled in Poland was damaged in a traffic accident in Germany caused by a German national insured with LVM. The owner of the damaged vehicle concluded a contract for the assignment of a claim, whereby he transferred his right to damages to Mr Hofsoe. Mr Hofsoe exercises his commercial activity, which consists of recovering insurance indemnity claims against insurance companies in Szczecin (Poland). He brought an action before the courts in Szczecin seeking damages from LVM. However, relying on Regulation 1215/2012, LVM disputed the jurisdiction of that Polish court. Particularly, the insurer argued that Mr Hofsoe is not the ‘injured party’ as such, but a professional, and could therefore not rely on the special rules of jurisdiction applicable in insurance matters.

The referring court considered it necessary to make a reference to the CJEU in so far as the field of application *ratione personae* of the attribution of jurisdiction provided for in Article 11(1)(b) of Regulation 1215/2012 depends on the interpretation of the concept of ‘injured party’ within the meaning of Article 13(2) of that Regulation. In its preliminary reference, the national court pointed out that

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according to the Polish Civil Code, the assignment of the claim should include that of the benefit of jurisdiction. In addition, the referring court reasoned that such an interpretation would contribute towards achieving the purpose of protecting the weaker party, which underlies the special rules of jurisdiction.

According to the Court, the derogations from the principle of jurisdiction of the defendant's domicile must be exceptional in nature and be interpreted strictly. The special rules of jurisdiction are therefore not to be extended to persons for whom that protection is not justified. That is the case where the parties concerned are professionals in the insurance sector, neither of whom may be presumed to be in a weaker position than the other. As a result, a person such as Mr Hofsoe, who carries out a professional activity recovering insurance indemnity claims against insurance companies, in his capacity as contractual assignee of such claims, should not benefit from the special protection constituted by the *forum actoris*. The fact that a professional carries out his business on a small scale is irrelevant in that regard. A case-by-case assessment would give rise to the risk of legal uncertainty and would be contrary to the objective of Regulation 1215/2012, according to which the rules of jurisdiction must be highly predictable.

### **Jurisdiction for a claim for compensation arising from the termination of a commercial concession agreement: Judgment in Case C-64/17 *Saey Home & Garden***

The request for a preliminary ruling arose out of the proceedings between Saey Home & Garden, established in Belgium, and Lusavouga, established in Portugal, concerning a claim for compensation arising from the termination of a commercial concession agreement. Under that agreement, Lusavouga ordered kitchen equipment and utensils from Saey Home & Garden and sold them in Spain. Lusavouga brought an action against Saey Home & Garden before the Portuguese courts seeking compensation for loss arising from the premature and sudden termination of the agreement together with a good will indemnity for failing to observe the related requirement of semi-exclusivity. Saey Home & Garden raised a plea of lack of jurisdiction of the Portuguese courts to hear the dispute, arguing, *inter alia*, that the general terms and conditions to which the sale of those goods were subject contained a jurisdiction clause providing that disputes would be decided by the courts of Kortrijk (Courtail, Belgium).

The CJEU examined first whether the jurisdiction clause at stake could satisfy the requirements of Article 25(1) of Regulation 1215/2012. The Court explained that the jurisdiction of a court of a Member State, agreed by the parties to a contract in

a jurisdiction clause is, in principle, exclusive. However, it must be established whether the jurisdiction clause was in fact the subject of consensus between the parties. In that regard, the CJEU referred to its ruling in *Hőszig* (judgment of 7 July 2016, C-222/15, EU:C:2016:525, para. 39), where it held that a jurisdiction clause stipulated in the general conditions is lawful where the text of the contract signed by both parties itself contains an express reference to general conditions which include a jurisdiction clause. According to the assessment of the CJEU, the jurisdiction clause in the case at hand does not satisfy these requirements, which is, however, ultimately for the national court to confirm. In that regard, the Court pointed out that the commercial concession agreement at stake was concluded verbally and was not evidenced in writing. In addition, the general terms containing the jurisdiction clause concerned were mentioned only in the invoices issued by the defendant. Moreover, it has to be verified whether the jurisdiction clause actually concerns the legal relationship that is the subject matter of the dispute before the national court. In addition, the CJEU explained that a jurisdiction clause may also be concluded in a form which accords with practices which the parties have established between themselves, or in a form which accords with a usage of which the parties are or ought to have been aware. It is for the referring court to determine whether that is actually the case.

Next, the Court examined Article 7(1) of Regulation 1215/2012 in order to determine which court has jurisdiction to hear an application for damages relating to the termination of a commercial concession agreement. The connecting factors that are laid down in Article 7(1)(b) are applicable only in so far as a commercial concession agreement constitutes a ‘contract for the sale of goods’ or a ‘contract for the provision of services’. The Court referred to its ruling in *Corman-Collins*, where it held that an exclusive or semi-exclusive concession agreement falls, in principle, with the definition of ‘contract for the supply of services’ (judgment of 19 December 2013, *Corman-Collins*, C-9/12, EU:C:2013:860, para. 27, 28 and 41). The characteristic service provided by the concessionaire is that of distributing the products of the grantor of the concession. As a result of the supply guarantee it enjoys and, possibly, its involvement in the grantor’s commercial planning, in particular with respect to marketing operations, the concessionaire is able to offer clients services and benefits that a mere reseller cannot and thereby acquire, for the benefit of the grantor’s products, a larger share of the local market. The remuneration provided as consideration for that activity cannot be understood in the strict sense of the payment of a sum of money. Instead, account must be taken of the competitive advantage conferred on the concessionaire by the benefit of an exclusive or semi-exclusive right to sell the grantor’s products in a particular territory and the assistance provided to the concessionaire regarding access to advertising and communicating know-how. The CJEU

left the assessment whether the commercial concession agreement at stake may in fact be classified as a ‘contract for the supply of services’ to the national court.

Assuming the existence of a ‘contract for the supply of services’, the Court clarified that the court with jurisdiction to hear a claim for compensation relating to the termination of a commercial concession agreement concluded between two companies established and operating in two different Member States for the distribution of goods on the domestic market of a third Member State in which neither of those companies has a branch or establishment, is the court of the Member State of the place of the main provision of services, as it follows from the provisions of the contract and, in the absence of such provision, of the actual performance of that contract and, where it cannot be determined on that basis, the place where the agent is domiciled (to that effect, judgment of 11 March 2010, *Wood Floor Solutions Andreas Domberger*, C-19/09, EU:C:2010:137, para. 43).

### **Right to indemnity and compensation of commercial agent if termination of the agency contract occurs during the trial period: Judgment in Case C-645/16 *Councils and mise en relations (CMR)***

DTT concluded a commercial agency contract with CMR under which CMR was required to sell twenty-five individual houses per year on behalf of DTT. That contract provided for a 12-month trial period during which each party was allowed to terminate the contract, subject to notice being given. Approximately six months after the conclusion of the contract, DTT terminated it because CMR had made only one sale in five months and the objective set by the contract had therefore not been met. CMR brought an action against DTT for payment of compensation for the loss suffered as a result of termination of the commercial agency contract and for payment of damages for unlawful termination of the contract. The case reached the French Court of Cassation, which asked the CJEU whether Article 17 of Directive 86/653 providing for the right to indemnity or compensation of the self-employed commercial agent also applies where the commercial agency contract is terminated during the trial period.

The CJEU observed first of all that, as the Directive 86/653 does not regulate the provision of a trial period, such a period falls within scope of the freedom of contract of the parties and is not as such prohibited by the Directive. However, that does not mean that the right to indemnity and compensation is not applicable if the termination of the contractual relationship between the principal and the commercial agent occurs during the trial period. The CJEU rejected the settled case law of the Economic, Financial and Commercial Chamber of the French Court

of Cassation, according to which the commercial agent has no right to indemnity where the termination of the commercial agency contract occurs during the trial period. That case law was based on the premise that, during that period, the commercial agency contract has not yet been definitively concluded. The CJEU found no basis for such an interpretation in Directive 86/653. Conversely, according to its Article 1, relations between a commercial agent and a principal subsist as from the time when a contract, the purpose of which is either to negotiate the sale or purchase of goods, or to negotiate and conclude such transactions on behalf of the principal, has been entered into, irrespective of whether that contract provides for a trial period. The Directive is applicable as soon as such a contract is concluded between the principal and the commercial agent.

On the basis of an interpretation of the wording of the Directive, the Court clarified further that the indemnity and compensation regimes laid down by the Directive are not intended to penalise termination of the contract but to indemnify the commercial agent for his past services from which the principal will continue to benefit beyond the termination of the contractual relationship or for the costs and expenses he has incurred in providing those services. Consequently, the agent cannot be denied the indemnity or compensation on the sole ground that the termination of the commercial agency contract occurred during the trial period, as long as the conditions for the award of the indemnity or compensation set out in Article 17(2) and (3) are satisfied. It follows that the right to indemnity and compensation is applicable even if the termination of the contractual relationship between the principal and the commercial agent occurs during the trial period. Finally, the Court stated that that conclusion is supported by the objective of the Directive, which is, *inter alia*, to protect the commercial agent in his relations with the principal. Making reparation conditional on the existence of a trial period, without regard for the performance of the agent or the costs and expenses that he has incurred, would be detrimental to the agent.

## Advertising

### Definition of ‘audiovisual media service’: Judgment in Case C-132/17 *Peugeot Deutschland*

The preliminary reference of the German Federal Court of Justice arose out of the proceedings between Peugeot Deutschland and the NGO ‘Deutsche Umwelthilfe’ concerning the publication by the former, on the video channel which it runs on the YouTube internet service, of a short video advertising a new passenger car model without providing information in that video on its official fuel consump-

tion and CO<sub>2</sub> emissions. The lower courts upheld the action brought by the Deutsche Umwelthilfe on the basis of an infringement of the German regulation on consumer information on fuel consumption, CO<sub>2</sub> emissions and energy consumption of new passenger cars (hereafter ‘the Pkw-ENVKV’).<sup>1</sup> Seized of an appeal on a point of law, the Federal Court of Justice observed that the outcome of the dispute depends on whether the provision of a promotional video channel for new passenger car models on YouTube constitutes an ‘audiovisual media service’ within the meaning of Article 1(1)(a) of the Audiovisual Media Services Directive 2010/13. If that were the case, Peugeot Deutschland would be exempt from the obligation imposed by the Pkw-ENVKV to provide that information.<sup>2</sup>

The CJEU confirmed the view set out by the Federal Court of Justice in its preliminary reference that the video and the YouTube channel at issue do not constitute an ‘audiovisual media service’. The CJEU explained that Article 1(1)(a) (i) of Directive 2010/13 in conjunction with recital 22 specifies that the principal purpose of those services is the provision of programmes, in order to inform, entertain or educate the general public. However, a promotional video channel on the YouTube internet service cannot be regarded as fulfilling this requirement as the purpose of such a video is to promote, for purely commercial purposes, the product or service advertised. Its promotional purpose suffices to exclude it from the scope of Article 1(1)(a)(i) of Directive 2010/13. The Court rejected the argument of Peugeot Deutschland that such an exclusion is contrary to the freedom of expression and information as enshrined in Article 11 of the Charter of Fundamental Rights of the European Union.

Secondly, the video in question cannot be regarded an audiovisual media service in the sense of an ‘audiovisual commercial communication’ in line with Article 1(1)(a)(ii) of Directive 2010/13. Contrary to the definition in paragraph 1(h) of that article, the video at stake cannot be regarded as accompanying or being included in a programme in return for payment or for similar consideration or for self-promotional purposes. The video channel at stake contains solely videos, which are individual elements independent of one another, and it therefore

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<sup>1</sup> Verordnung über Verbraucherinformationen zu Kraftstoffverbrauch, CO<sub>2</sub>-Emissionen und Stromverbrauch neuer Personenkraftwagen (Regulation on consumer information on fuel consumption, CO<sub>2</sub> emissions and energy consumption of new passenger cars) of 28 May 2004 (BGBl. I, p. 1474; ‘the Pkw-ENVKV’).

<sup>2</sup> That exemption would be based on the Commission Recommendation of 26 March 2003 on the application to other media of the provisions of Directive 1999/94/EC concerning promotional literature, that recommendation being itself based on point (c) of the first subparagraph of Article 9(2) of that Directive.

cannot reasonably be argued that that video accompanies or is included in a ‘programme’. The Court rejected the argument of Peugeot Deutschland that images pursuing advertising purposes are situated only at the beginning and at the end of the video and, therefore, accompany or are included in that video, which itself constitutes a programme. The video in question is promotional in its entirety and it would be artificial to assert that only the images at the beginning and the end of that video pursue advertising purposes.

## Unfair Contract Terms

### **The imposition of proportionate procedural requirements to consumers is compatible with EU law: Judgment in Case C-483/16 *Sziber***

In this judgement, still unavailable in English, the Hungarian referring court seeks guidance on the compatibility of special legislation applicable to a loan in foreign currency between a financial institution and a consumer. In particular, the legislation considers unfair the term that, without being individually negotiated, applies the bid price for the calculation of the amount provided and a different exchange rate for reimbursement and expenses. The legislation imposes also procedural requirements that are inapplicable to other loans concluded with consumers. The consumer must seek the invalidity of the term and not of the entire contract and a report of the amounts unduly requested must be produced, normally by the lender.

Having assumed the similarity between the procedure applicable to the loans covered by the special legislation and the one applicable to the others, the CJEU finds that the principle of equivalence is respected by the special legislation. Accordingly, it moves to assess whether the principle of effective judicial protection is also respected. As the protection granted to consumers by EU law “is not absolute”, the presence of special procedural requirements does not necessarily imply that the rights of consumers do not receive an effective judicial protection (para. 50).

The Court at this point argues that the general interest to a well-functioning judicial system may prevail over individual interests. The Court quotes its judgment of 12 February 2015, *Baczó and Vizsnyiczai* (C-567/13, EU:C:2015:88, para. 51) to support this view, but in *Sinués and Drame* there is a reason pointing in a different direction. In that judgment, it was held that considerations about “overburdening the courts” do not justify restrictions on “the exercise of subjective rights conferred by Directive 93/13” (order of 29 November 2016, Joined Cases

C-381/14 and C-385/14 ECLI:EU:C:2016:909, para. 42). One – perhaps, plausible way – to reconcile these two reasons is considering that, in light of considerations about Hungarian courts being overburdened, the Hungarian legislation makes consumers at least as well-off because of the benefits they receive from a better-functioning judicial system, so that their right are *de facto* not restricted even if *de jure* they are.

It is thus advisable that the Court clarifies the relation between a well-functioning legal system and the subjective rights of consumers in light of its case law. Additionally, there are two further points on which the CJEU is silent that matter for the architecture of EU consumer law. The first is the compatibility with EU law of the special legislation establishing the unfairness of the Term, on which the referring court was doubtful (see para. 25). Indeed, the doubt is not entirely unreasonable given that, pursuant to Article 4(1), the assessment must take “all the circumstances attending the conclusion of the contract” into account, but a general provision like the one under scrutiny does not allow for that. The second is that the relation between the Hungarian special legislation and the *ex officio* doctrine, which imposes on national judges the duty to assess of their own motion the unfairness of the terms of consumer contracts, is unclear.

## Passenger Rights and Package Holiday

### **International jurisdiction for claims against an operating air carrier that was not the passengers’ contractual air carrier: Judgment in Joined Cases C-274/16, C-447/16 and C-448/16 *flightright***

The joined cases concern three claims for compensation that were brought under Regulation 261/2004 against airline companies for delays and denied boarding on different segments of a multi-leg journey. The three factual situations at stake concern ‘triangular’ situations involving three actors (contractual air carrier – operating air carrier – passenger) and two contracts: the contract of carriage between the contractual air carrier and the passenger and an overall framework contract between the contractual air carrier and the operating air carrier. Moreover, in all three situations, one leg of the journey was operated by the contractual air carrier itself and the other by the operating air carrier. In the light of this complex constellation, the German courts asked the CJEU how to determine the international jurisdiction in relation to such compensation claims, in particular if the delay has been caused on the leg of the operating air carrier, which has no



direct contractual relationship with the passenger. The relevant facts are the following:

In case C-274/16, the passengers booked air transport on two flights with the airline Air Berlin, under a single booking reference, from Ibiza (Balearic Islands, Spain) to Düsseldorf (Germany), with a connection in Palma de Majorca (Balearic Islands, Spain). Since the first flight was delayed, the passengers missed the second flight to Düsseldorf. The passengers assigned their claims to possible compensation for that delay to flightright. The latter brought an action against Air Nostrum, as the operating air carrier carrying out the first flight, before the Local Court of Düsseldorf. That court considered that the hearing of that action depends on the existence of its international jurisdiction, which is available only, if Düsseldorf can be considered to be the ‘place of performance of the obligation in question’ within the meaning of Article 7(1) of Regulation 1215/2012.

Case C-447/16 concerns the situation of Mr Becker, who concluded with Hainan Airlines, which is domiciled outside the EU and which does not have an establishment in Berlin (Germany), a contract for carriage by air comprising the flights under a single booking from Berlin to Beijing (China) with a connecting flight from Brussels (Belgium). Mr Becker was checked-in for both flights at Berlin airport. Carriage on the first flight operated by the Belgian air carrier Brussels Airlines took place according to schedule. However, carriage on the second flight, which was to be operated by Hainan Airlines, did not take place. Mr Becker claimed that he has the right to receive compensation in accordance with Regulation 261/2004. The case reached the German Federal Court of Justice, which decided to ask the CJEU whether the place of departure of the first leg of the journey is to be regarded as being the place where the services were provided under the second indent of Article 5(1)(b) of Regulation 44/2001.

Case C-448/16 deals with the Barkan family, which booked a connecting flight from Melilla (Spain) to Frankfurt am Main (Germany) via Madrid (Spain) with the airline Iberia. The booking confirmation issued by Iberia provided that the flight between Melilla and Madrid was to be operated by Air Nostrum and that the flight between Madrid and Frankfurt am Main was to be operated by Iberia. Since the first flight was delayed, the Barkan family missed the second flight and reached its final destination with a four-hour delay. Also that case reached the Federal Court of Justice, which asked the CJEU (1) whether the concept of ‘matters relating to a contract’ in Article 5(1)(a) of Regulation 44/2001 covers a claim for compensation made under Article 7 of Regulation 261/2004 which is brought against an operating air carrier with which the passenger concerned does not have contractual relations and, if that is the case, (2) whether the passenger’s final destination is to be regarded as the place where the services were provided under the second indent of Article 5(1)(b) of Regulation 44/2001.

Regarding the question referred in Case C-447/16, the CJEU held that if the defendant (in this case, Hainan Airlines) is not domiciled in a Member State, the international jurisdiction is determined by national law and not by Regulation 44/2001. However, the Court noted that, in accordance with the principle of effectiveness, rules under national law should not make it impossible or excessively difficult to exercise the rights conferred by Regulation 261/2004 to air passengers. Indeed, although not directly indicated by the CJEU, Article 3(1)(a) of Regulation 261/2004 extends the scope of that Regulation to claims of passengers against non-EU carriers who departed ‘from an airport located in the territory of a Member State to which the Treaty applies’.

Regarding the Cases C-274/16 and C-448/16,<sup>3</sup> the CJEU clarified, firstly, that the concept of ‘matters relating to a contract’ in Article 5(1)(a) of Regulation 44/2001 covers a claim brought by air passengers for compensation, made under Regulation 261/2004, against an operating air carrier with which they do not have contractual relations. In that regard, the Court noted in particular that, according to Article 3(5) of Regulation 261/2004, where an operating air carrier which has not concluded a contract with the passenger fulfils obligations under that Regulation, it is to be regarded as doing so on behalf of the person which concluded the contract with the passenger concerned. Therefore, that carrier (in this case, Air Nostrum) must be regarded as fulfilling the freely consented obligations *vis-à-vis* the contracting partner of the passengers concerned (in this case, Air Berlin and Iberia). Those obligations arise under the contract for carriage by air.

Secondly, the Court held that, in the case of a connecting flight, the ‘place of performance’ of that flight, for the purposes of the second indent of Article 5(1)(b) of Regulation 44/2001 and the second indent of Article 7(1)(b) of Regulation 1215/2012, is the place of arrival of the second flight, where the carriage on both flights was operated by two different air carriers and the action for compensation is based on an irregularity which took place on the first of those flights, operated by the air carrier with which the passengers concerned do not have contractual relations. To reach that conclusion, the CJEU relied on its judgment of 9 July 2009, *Rehder* (C-204/08, EU:C:2009:439), where it held, in relation to a direct flight operated by the contracting partner of the passenger concerned, that the place of departure and the place of arrival of the aircraft

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<sup>3</sup> Although that issue was not raised in Case C-274/16, the CJEU pointed out that the answer to the first question in Case C-448/16 is relevant also to Case C-274/16 in so far as in that case the operating air carrier is not the contracting partner of the passengers concerned either. Even though Case C-274/16 falls, *ratione temporis*, within the scope of Regulation 1215/2012, the CJEU points out that Article 7(1) Regulation 1215/2012 is worded in terms almost identical to those of Article 5(1) of Regulation 44/2001.

must be considered, likewise, as the places of main provision of the services under a contract for carriage by air. Although that case concerned a direct flight, it also applies, *mutatis mutandis*, with respect to situations such as those at issue, in which, first, the booked connecting flight consists of two legs, and, secondly, the operating air carrier on the flight at issue did not conclude a contract directly with the passengers concerned. The Court noted in that regard that the contracts at issue, consisting of a single booking for the entire journey, establish the obligation, for an air carrier, to carry a passenger from a point A to a point C. Such a carriage operation constitutes a service of which one of the principal places of provision is at point C. According to the Court, it is sufficiently foreseeable for an airline which, like Air Nostrum, operates only the first flight from point A to point B that the passengers can take action against it before the courts of point C.

**Obligation to pay compensation in case of a ‘wildcat strike’:  
Judgment in Joined Cases C-195/17, C-197/17 to C-203/17,  
C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to  
C-286/17 and C-290/17 to C-292/17  
*Krüsemann and Others***

The key issue of the twenty-five joined references for a preliminary ruling submitted by the Local Courts of Hanover and Düsseldorf (Germany) concerned the question whether the spontaneous absence of a significant part of the flight staff in the form of a ‘wildcat strike’ amounts to ‘extraordinary circumstances’ under Article 5(3) of Regulation 261/2004, so that an air carrier is not obliged to pay compensation to passengers who suffer flight delays and cancellations as a result of it.

In the cases at hand, all applicants made bookings with TUIfly for flights to be operated by that carrier. All those flights were cancelled or were subject to a delay due to an exceptionally high number of absences on grounds of illness amongst TUIfly staff, following the notification by that air carrier’s management to its staff of prospective corporate restructuring plans. TUIfly refused to compensate the plaintiffs because the flight cancellations or delays in question were caused by ‘extraordinary circumstances’.

Contrary to the Opinion of Advocate General Tanchev, the Court held that the spontaneous absence of a significant part of the flight staff (in the form of a ‘wildcat strike’), which stems from the surprise announcement by an operating air carrier of a restructuring of the undertaking, following a call relayed not by

the representatives of the workers of the undertaking but spontaneously by the workers themselves, does not fall within the concept of ‘extraordinary circumstances’. To reach that conclusion, the CJEU reminded that the Regulation lays down two cumulative conditions for an event to be classified as an ‘extraordinary circumstance’: (1) it must not, by its nature or origin, be inherent in the normal exercise of the activity of the airline, and (2) it must be beyond its actual control (judgment of 4 May 2017, *Pešková and Peška*, C-315/15, EU:C:2017:342, para. 22).

Regarding the first condition, the Court underlined that restructuring and reorganising activities are part of normal business management measures. It is therefore also part of the ordinary course of business that airlines face disagreements or conflicts with their members of staff. Thus, the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the airline concerned.

Considering the second condition, the CJEU pointed out that the ‘wildcat strike’ at issue cannot be regarded as beyond TUIfly’s actual control. Not only did that ‘wildcat strike’ stem from a TUIfly decision, but, despite the high rate of absenteeism, it ceased as a result of the agreement reached by TUIfly with the staff representatives.

Finally, the Court observed that in view of the objectives of the Regulation, namely to ensure a high level of passenger protection and equivalent conditions for the exercise of the activities of air carriers on EU territory, the classification of the strike under national social legislation is irrelevant for the purposes of the assessment of the concept of ‘extraordinary circumstances’.

## **Responsibility to compensate passengers in case of a ‘wet lease’: Judgment in Case C-532/17 *Wirth***

The applicants claimed compensation under Regulation 261/2004 from Thomson Airways because of a flight delayed beyond its scheduled time of arrival by more than three hours. They had a booking confirmation for a flight from Hamburg (Germany) to Cancún (Mexico) bearing a flight number, the code for which refers to TUIfly. The booking confirmation stated that the bookings were issued by TUIfly, but that the flight was ‘operated’ by Thomson Airways. Under a ‘a wet lease’, TUIfly chartered an aircraft, including crew, from Thomson Airways. Therefore, Thomson Airways refused to pay compensation, claiming it was not the operating air carrier within the meaning of Article 2(b) of that Regulation. However, the Local Court of Hamburg held that Thomson Airways should be regarded as an operating air carrier on the ground that, according to recital 7 of

Regulation No 261/2004, it is irrelevant whether the operating air carrier performs the flight with its own aircraft or under a ‘dry’ or ‘wet’ lease. Thomson Airways appealed against that judgment before the referring court, the Regional Court of Hamburg, which decided to ask the CJEU for an interpretation of the concept of ‘operating air carrier’ under the Regulation.

According to the CJEU, the definition of ‘operating air carrier’ in Article 2(b) of Regulation 261/2004 sets out two cumulative conditions relating, first, to the operation of the flight in question and, second, to there being a contract concluded with a passenger. Regarding the first condition and on the basis of its previous rulings (judgments of 10 July 2008, *Emirates Airlines*, C-173/07, EU:C:2008:400, *Sousa Rodríguez and Others*, C-83/10, EU:C:2011:652, *Mennens*, C-255/15, EU:C:2016:472), the Court clarified that an air carrier which decides to perform a particular flight, including fixing its itinerary, and, by so doing, offers to conclude a contract of air carriage with members of the public must be regarded as the operating air carrier. Therefore, Thomson Airways, which merely leased the aircraft and the crew to TUIFly under a wet lease cannot be regarded as an ‘operating air carrier’. The fixing of the itinerary and the performance of the flight were determined by TUIFly. The Court considered that conclusion to be in line with the objective of ensuring a high level of protection for passengers, in so far as the passengers are relieved from having to take account of arrangements made by the air carrier for the purposes of actually performing the flight. Since the first condition was not met, the Court did not consider it necessary to examine the second cumulative condition.

## Employment Law

### **Guarantee in case of insolvency of the employer for the credit of employees originating from the voluntary termination on objective grounds: Judgment in Case C-57/17 *Checa Honrado***

The present case originates from the refusal of the *Fogasa*, the Spanish Wages Guarantee Fund, to guarantee, in the event of the insolvency of the employer, the payment of severance pay the employee is entitled after having terminated the contract on objective grounds (transfer of the place of work far away) pursuant to Article 40 of the Spanish Worker’s Statute.

The *Fogasa* takes the view that the employee is not entitled to the protection granted by the Worker’s Statute in case of insolvency of the employer because the payment originates from a termination decided by the employee. The referring court asks the CJEU to assess the compatibility of this exclusion with EU law, and

in particular with Directive 2008/94 on the protection of employees in the event of the insolvency of their employer.

The CJEU begins the analysis of the case by noting that, pursuant to the combined reading of Articles 2(2) and 3 of the Directive, the scope of application of the first paragraph of Article 3 of the Directive is determined by national law. However, the Court immediately adds that, as “repeatedly held”, national law must comply with “the general principle of equality and non-discrimination” (para. 31). Accordingly, “comparable situations should not be treated differently unless such difference in treatment is objectively justified” (para. 32).

The situations to be compared are, on the one hand, the dismissal or termination laid down in Articles 50 to 52 of the Workers’ Statute, and, on the other hand, the termination on the worker’s initiative on objective grounds according to Article 40 of the same statute. The CJEU finds the situations comparable because they are all cases “of termination of the contract of employment on objective grounds” (para. 40). Accordingly, the difference in treatment is lawful only if objectively justified. In this regard, the Court essentially considers the Spanish Government to have come to Luxembourg “empty-handed”.<sup>4</sup> In noting this, the CJEU observes in particular that Articles 1(2) and 12(a) of the Directive identify two types of objective grounds, namely the existence of alternative forms of protection and the need to avoid abuses.

## Discrimination

### **Extension of the power to treat religion as occupational requirement within churches or other organizations whose ethos is based on religion: Judgment in Case C-414/16 *Egenberger***

This case is about the power of a church or other organisation whose ethos is based on religion or belief to consider religion or belief as an occupational requirement. In particular, the Court examines the subjection of this power to judicial review and clarifies the criteria for assessing if there is a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of

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<sup>4</sup> Expression borrowed from S Weatherill, “Who is the ‘Average Consumer’?” in S Weatherill and U Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29* (Hart Publishing 2007).

Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.

The Court finds that, indeed, to ensure the respect of Article 4(2) of the Directive, the power under scrutiny is subject to effective judicial review. Failure to entrust the review of the decision to an “independent authority” would make the protection granted by EU law ineffective (para. 46). Moreover, the combined reading of recital 29 and Article 9 as well as Article 10 impose on the Member State to ensure the enforcement of rights and obligations under the Directive. Also Article 47 of the Charter of Fundamental Rights of the European Union supports the conclusion.

The clarification of the criteria for assessing if there is a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of the Directive is a much more complex task. The starting point is that Article 4(2) aims at striking “a fair balance between the right of autonomy of churches and other organisations whose ethos is based on religion or belief, on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds” of their religion (para. 51).

This balance is found when the occupational requirement is “genuine, legitimate and justified” having regard to the ethos of the organization and relates to “the nature of the activities concerned or the context in which they are carried out” (para. 61). At the outset, the Court carefully points out that a substantive review of the ethos of organization can be performed only exceptionally. Against this background, the Court infers from the scheme of Article 4(2) the need of an “objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned” (para. 63). To concretize these ideas, the Court notes that the nature of the activity may consist in “the determination of the ethos of the church or organization in question or contributing to its mission of proclamation”, while the context may become relevant to ensure the “credible presentation of the church or organisation to the outside world” (para. 63).

The CJEU then articulates the concepts of genuine, legitimate and justified occupational requirements. The Court gives generic guidance and indeed avoids particularized suggestions with regards to the decision in the main proceeding. The requirement is genuine when “professing the religion ... [is] necessary because of the importance of the occupational activity” for the external or internal action of the church or organization (para. 65). It is also legitimate when the requirement “is not used to pursue an aim that has no connection” with ethos or external and internal action of the organization (para. 66).

Finally, the requirement is justified when “the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that

imposing such a requirement is indeed necessary” (para. 67). To support this conclusion, the Court holds that Article 4(2) must comply with the principle of proportionality. This is not an obvious move because Article 4(1), contrary to Article 4(2), refers to proportionality explicitly. This difference may suggest the appropriateness of a strong *a contrario* argument according to which as proportionality is expressly mentioned in the first but not in the second paragraph of Article 4, it is not applicable in the second one. The Court decides differently because Article 4(2) refers to the general principles of Community law, which include also the principle of proportionality.

### **Right of residence of the third-country national, same-sex spouse of a Union citizen: Judgment in Case C-673/16 *Coman and Hamilton***

In this case, the CJEU delivers an important decision with regards to the difficult balance between individual rights and national identity. In the main proceedings, two individuals who entered into a same-sex marriage pursuant to Belgian law seek the right of one of them, who is a third-country national, to reside lawfully in Romania as the spouse of a Romanian citizen. The request is opposed by the *Inspectoratul General pentru Imigrări* (the Inspectorate) and the *Ministerul Afacerilor Interne*.

The reasoning of the Court is divided in four steps. In the first step, the Court observes that Directive 2004/38 is applicable to Union citizens only, but that the right granted to Union citizens by Article 21(1) TFEU justifies the analogical application of the Directive when family members are third-country nationals.

The second step concerns the interpretation of the term “spouse”, who refers to one of the family members entitled to the benefits granted by the Directive. The Court cites its judgment of 25 July 2008, *Metock and Others* (C-127/08, EU: C:2008:449, paras. 98 and 99) in support of the proposition that “the term ‘spouse’ ... refers to a person joined to another person by the bonds of marriage” (para. 34). In the next paragraph, the Court quickly observes that the term is “gender-neutral and may therefore cover the same-sex ‘spouse’” (para. 35).

At this point, the CJEU stresses that, contrary to what happens with regards to partners pursuant to Article 2(2)(b), in the case of a spouse, Article 2(2)(a) does not empower a Member State “to rely on its national law as justification for refusing to recognise” a same-sex marriage concluded in accordance with the law of another Member State (para. 36). At the same time, the Court cautiously points out that this finding is without prejudice to the freedom of Member States of allowing or not same-sex marriages.



The fourth and final step of the reasoning consists in assessing whether the limitation of the said freedom is justified because non-discriminatory on the grounds of nationality and “based on objective public-interest considerations and ... proportionate” (para. 41). In this regard, the Court rejects the view that such grounds can be identified in public policy and national identity. While the European Union must respect the national identity of the Member States pursuant to Article 4(2) TEU, a public-policy justification “cannot be determined unilaterally by each Member State”; rather, it “may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society” (para. 44). The Court finds that this is not the case because the application of the Directive in case of same-sex marriage is not a threat to the understanding of what a marriage is under national law. In particular, it does not impose to Member States the duty to introduce same-sex marriages in their legal systems. The Directive simply requires to recognize the existence of such marriages “for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law” (para. 46). *Ad adiuvandum*, the Court cites the case law of the European Court of Human Rights, where both homo- and heterosexual relations fall within the concepts of private and family life.

After having examined the most delicate issue of the preliminary reference, the Court points out that, pursuant to Article 7 of the Directive, the right granted to the spouse in the main proceedings cannot be limited to a period of three months.

## Private International Law

**An activist’s status of consumer with regards to the *forum consumatoris* is protected by the right of consumers to organization, but does not cover claims assigned to him by other consumers: Judgment in Case C-498/16 *Schrems II***

This case is the second of the (so far) trilogy<sup>5</sup> of preliminary references involving privacy activist Maximillian Schrems. This time, Mr Schrems has sued Facebook Ireland Limited (“Facebook”) in relation to his own account and to those of seven other users who assigned to him their claims. The preliminary reference has as its subject a procedural matter, namely the interpretation of Articles 15 and 16

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<sup>5</sup> The first case is the judgment of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650 and the third one is the on-going case *Facebook Ireland and Schrems*, C-311/18.

of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In fact, the eight claimants reside in Austria, Germany or in India.

The first question referred to the CJEU seeks to clarify whether Mr Schrems has lost his status of consumer within the meaning of Article 15 of the Regulation. The doubt arises in light of the various activities undertaken by Mr Schrems as privacy activist and the assignment to him of the claims of the other above-mentioned consumers. The Court starts out by citing its *Benincasa* and *Gruber* judgements to justify the strict construction of the notion of a “consumer” in the application of the Regulation (judgments of 3 July 1997, C-269/95, EU: C:1997:337, para. 16, and of 20 January 2005, C-464/01, EU:C:2005:32, para. 36). According to this interpretive criterion, in the case law of the Court a party is a consumer only when there is slight, marginal, and negligible link between the contract and the trade or profession of the person. In the application of these principles in the present case, the CJEU notes that Mr Schrems initially used Facebook exclusively for private purposes but that, from 2011, he had also a Facebook page.

With a minimalist attitude, the Court leaves for the referring court to decide whether Mr Schrems had one or several contracts with Facebook because the answer is considered of no consequence for current purposes. In fact, the CJEU observes that a user can rely on the status of consumer only if the use of the service has remained “predominantly non-professional” during the contractual relation (para. 38). In the view of the Court, neither the expertise of the person “nor his assurances given for the purposes of representing the rights and interests of [other] users” are relevant for this assessment. The legal reason justifying this view is the need to ensure the effectiveness of the “right of consumers to organize themselves in order to safeguard their interests” pursuant to Article 169(1) TFEU. Having found that Mr Schrems is a consumer within the meaning of Article 15 of the Regulation, the Court moves to the second referred question.

The second question is about the applicability of Article 16(1) of the Regulation, which establishes the *forum consumatoris*, when the consumer is asserting also the claims of additional consumers, domiciled in other Member States and in third countries even. The Court answers in the negative relying in the first place on its judgment of 19 January 1993, *Shearson Lehman Hutton* (C-89/91, EU: C:1993:15, paras. 18, 23 and 24), where a claimant that was not a party to the consumer contract was found incapable of relying on the *forum consumatoris*. This finding, which is applicable also in the present case, rests in particular on the wording of Article 16(1), in accordance to which the rules it lays down apply “only to an action brought by a consumer against the other party to the contract” (para. 45). According to the case law of the Court, and contrary to the view

expressed also by the Austrian and German Governments, the fact that the claims had been assigned to Mr Schrems personally does not change this conclusion.

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**Note:** The primary responsibility for the areas of General Law of Contract and Obligations, Advertising, as well as Passenger Rights and Package Holiday lies with Betül Kas; for the areas of Unfair Contract Terms, Employment Law, Discrimination, and Private International Law with Fabrizio Esposito.