EU Case Law

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European Union Litigation

Abstract: This section provides an overview of cases in front of the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of July 2014 and the end of December 2014.

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General Law of Contracts and Obligations

– Right of a library to digitise a work contained in its collection in order to make it available to users by dedicated terminals: Judgment in case 117/13 *Eugen Ulmer* 11 September 2014: In the case at hand, the university library digitized a book published by Eugen Ulmer before making it available on its electronic reading posts. The library refused the offer of the publishing house to purchase and use as e-books the textbooks that Eugen Ulmer publishes. Eugen Ulmer is seeking to prevent the university from digitizing the particular book in question and users of the library to print out the book or store it on a USB stick and/or take those reproductions out of the library. The German court asked the CJEU about the scope of the exception to the exclusive rights of the author to authorize or prohibit the reproduction and the communication to the public of their works for the purpose of research and private study under Article 5(3)(n) of Directive 2001/29/EC.[1] The CJEU held that, even if the rightholder offers to a library the possibility of concluding licencing agreements for the use of its works, the library may avail itself of the exception provided for in favour of dedicated terminals. Otherwise, the library could not realise its core mission or promote the public interest in promoting research and private study. The Directive does not preclude Member States from granting

1 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* 2001 L 167/10.

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to libraries the right to digitise the works contained in their collections, if such an act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals. However, the exception does not extend to acts such as the printing out of works on paper or their storage on a USB stick. However, such acts may be authorised under national legislation transposing the exceptions provided for in Article 5(2)(a) or (b), provided that fair compensation is paid to the rightholders. The ruling of the CJEU is in line with the opinion of Advocate General Jääskinen delivered on 5 June 2014.

– Facilities 'for making payments to unit holders' in the Member State of marketing pursuant to Article 45 of Directive 85/611:[2] Judgment in case 88/13 *Gruslin* 11 September 2014: The preliminary reference arose out of proceedings between Mr Gruslin, a Belgian resident, and Beobank, formerly Citibank Belgium, concerning the delivery of certificates for registered units in the Luxembourgish Citiportfolios common investment fund. The prospectus of the Citiportfolios fund was distributed in Belgium by Citibank Belgium, who was designated by Citiportfolios to supply the services referred to in Article 45 of Directive 85/611. While Mr Gruslin obtained the prospectus of the fund from Citibank Belgium, in order to perform the investment, he subscribed directly in Luxembourg. After Citibank Luxembourg terminated all its accounts and business relationships with Mr Gruslin, the units in the Citiportfolios fund were registered in his name in the issuer's register of units. When Mr Gruslin requested the delivery by Citibank Belgium of all his bearer unit certificates, Citibank Belgium instructed him to refer the matter directly to Citibank Luxembourg. In this context, the Belgian court asked whether Article 45 of Directive 85/611 is to be interpreted as meaning that the concept of 'payments to unit-holders' also refers to the delivery to unit-holders of certificates for registered units. Following the reasoning of Advocate General Jääskinen in his opinion delivered on 13 February 2014, the CJEU held that an undertaking for collective investment in transferable securities (UCITS) is not under an obligation to ensure that the finance department of that undertaking delivers a certificate providing evidence of title to the units to which the unit-holder subscribed.[3] The provisions of the Directive which govern the financial rights of unit-holders and the obligations of UCITS to make information available to unit-holders do not contain any provision as to the rules

2 Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), *OJEC* 1985 L 375/3.

3 For the opinion of AG Jääskinen, see *European Review of Contract Law* 2014, 287, 288.

governing evidence of title, the holding or movement of units in a UCITS, or as to the proof of ownership of units for the purpose of enabling the holder to exercise the rights attached to them.

Consumer Protection

Advertising

– Application of the exception in Article 3(5) of the Unfair Commercial Practices Directive: Judgment in case 421/12 *Commission v Belgium* 10 July 2014: The European Commission brought infringement proceedings against Belgium for the incorrect implementation of Directive 2005/29.[4] According to the CJEU, Belgium failed to comply with its obligation on three grounds. Firstly, by excluding from the scope of the Belgian transposition members of a profession, dentists and physiotherapists, Belgium has failed to fulfil its obligations under Article 3, read in conjunction with Article 2(b) and (d) of the Directive. Secondly, by maintaining in force stricter rules for the announcement of price reductions than foreseen by the Directive, Belgium breached its obligation in Article 4, which lays down the maximum harmonization nature of the Directive. According to Article 3(5) of the Directive, for a period of six years from 12 June 2007, Member States are able to continue to apply national provisions within the field approximated by the Directive which are more restrictive or prescriptive and which implement directives containing minimum harmonisation clauses. However, as the Belgian provisions do not fall within the scope of the Price Indication Directive 98/6/EC,[5] Belgium is precluded from relying on Article 3(5) of the Unfair Commercial Practices Directive 2005/29 in that regard. Finally, Belgium failed to comply with Article 4 of the Directive by adopting stricter provisions for itinerant trading of certain products. Belgium cannot rely on Article 3(5) since the respective national legislative provisions entered into force after the entry into force of the Unfair Commer-

4 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('the Unfair Commercial Practices Directive'), *OJ* 2005 L 149/22.

5 Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, *OJ* 1998 L 80/27.

cial Practices Directive 2005/29. The CJEU follows the opinion of Advocate General Cruz Villalón issued on 26 November 2013.[6]

Passenger rights and package travel

- The concept of 'arrival time' to determine the length of a flight delay: Judgment in case 452/13 *Germanwings* 4 September 2014: The CJEU held that according to Articles 2, 5 and 7 of Regulation No 261/2004,[7] the concept of 'arrival time', which is used to determine the length of the delay to which passengers on a flight have been subject, refers to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft. In the case at hand, the passenger took the view that the final destination was reached by the aircraft with a delay of more than three hours in relation to the scheduled arrival time, resulting in his right to compensation of EUR 250 on the basis of Articles 5 to 7 of Regulation No 261/2004. On the other hand, the undertaking claimed that, as the actual arrival time was the time at which the plane touched down on the tarmac at the airport and not when the plane reached its parking position, the delay in relation to the scheduled arrival time is only two hours and 58 minutes, with the result that no compensation is payable. The CJEU reasoned that as long as the passengers are unable, in the enclosed space in which they are sitting, to carry on their personal, domestic, social or business activities, the flight has not ended. The flight has only ended once the passengers are permitted to leave the aircraft and the order is given to open the doors, so that the passengers may in principle resume their normal activities.
- Scope of the principle of pricing freedom: Judgment in case 487/12 *Vueling Airlines* 18 September 2014: The Spanish court asked the CJEU whether national legislation which prohibits air carriers from charging for checking in passengers' baggage in the form of an optional price supplement is compatible with Article 22(1) of Regulation No 1008/2008.[8] In the case at hand, the air

6 *European Review of Contract Law* 2014, 132, 133.

7 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, *OJ* 2004 L 46/1.

8 Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, *OJ* 2008 L 293/3.

carrier added a price supplement to the base price of the plane tickets for a return journey purchased by the passenger when she checked in the baggage online. The passenger complained against the air carrier, claiming that the contract of carriage by air contained an unfair term. The Galician Consumer's Institution subsequently imposed an administrative penalty on the air carrier. In line with the opinion of Advocate General Bot of 23 January 2014, the CJEU held that Article 22(1) precludes national law that requires air carriers to carry, in all circumstances, the baggage checked in by the passenger for the price of the plane ticket and without it being possible to charge any price supplement to carry such baggage. The price to be paid for the carriage of air passengers' checked-in baggage constitutes an optional price supplement within the meaning of Article 23(1) of Regulation 1008/2008, given that such a service cannot be considered to be compulsory or necessary for the carriage of the passengers. In contrast, hand baggage must, in principle, be considered as a necessary item for the carriage of passengers and therefore cannot be made subject to a price supplement, provided that it meets reasonable requirements in terms of its size and complies with applicable security requirements. While the Member States are not precluded from regulating aspects of the contract of carriage by air to protect consumer against unfair practices, such national legislation cannot be against the pricing provisions established by EU law. The Spanish law contravenes the right of air carriers freely to set fares for the carriage of passengers and the condition under which those fares apply and is likely to call into question the effective comparison of fares. Finally, the CJEU pointed out that it is for the national authorities to determine whether the air carrier complied with its information and transparency obligations as regards price supplements.

Unfair contract terms

– Procedural safeguards in mortgage enforcement proceedings: Judgment in case 169/14 *Sánchez Morcillo and Abril García* 17 July 2014: The preliminary reference of the Spanish court results from the reform of the Spanish law relating to enforcement proceedings against mortgaged or pledged property prompted by the judgment of the CJEU in case 415/11 *Aziz*. The Spanish civil procedure law now provides for the party opposing the mortgaged enforcement proceedings to object to those proceedings on the ground of an unfair clause. In that regard, the Spanish court questions the inequality of procedural safeguards available to the parties involved in mortgage enforcement proceedings. In the case at hand, the consumers signed a notarial act with a

bank for the loan of EUR 300.500 secured by a mortgage on their property. Since the consumers failed to meet their obligations, the bank demanded payment of the entire loan together with ordinary and default interest and the enforced sale of the property. The consumers lodged an objection to the enforcement proceedings, which was rejected by the first instance court. The court hearing the appeal explained in its reference to the CJEU that the Spanish civil procedure does not allow the debtor whose objection has been dismissed to bring an appeal against the judgment at first instance ordering the enforcement procedure to be carried on. However, in contrast, it allows an appeal by the creditor against a decision which, upholding the objection raised by the debtor, terminates the enforcement proceedings. According to the CJEU, the Spanish system of mortgage enforcement still does not offer adequate or effective protection to consumers in compliance with Article 7(1) of Directive 93/13,[9] read in conjunction with Article 47 of the EU Charter of Fundamental Rights. The enforcing court may examine of its own motion whether the contractual clauses upon which the request for enforcement is based are unfair, but this assessment is not mandatory. Moreover, while the debtor may raise objections based on the unfairness of a contractual clause, the assessment by the court is subject to time constraints. Furthermore, in case a court in parallel proceedings establishes an unfair clause in the loan agreement, the consumer can only claim monetary compensation. Finally, the procedure for objecting to enforcement places the consumer in a weaker position compared with the seller or supplier and therefore does not respect the principle of equality of arms or procedural equality enshrined in Article 47 of the Charter. Advocate General Wahl reached the opposite conclusion: the issue of the right to appeal against a judgment ruling on an objection to mortgage enforcement is governed by the principle of procedural autonomy. The principle of effectiveness does not preclude the national procedural provision at stake. Since this issue is entirely governed by national law, the CJEU has no jurisdiction to give a ruling in the light of Article 47 of the EU Charter of Fundamental Rights.[10]

– Extrajudicial enforcement of a charge on immovable property: Judgment in case 34/13 *Kušionová* 10 September 2014: The Slovak court referred to the CJEU the question whether Directive 93/13, in the light of Articles 38 and 47 of the EU Charter of Fundamental Rights, precludes the national legislation, which allows the recovery of a debt that is based on potentially unfair terms

9 Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993 L 95/29.
10 3 July 2014.

by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer. In the case at hand, the consumer concluded a credit agreement with SMART Capital for an amount of EUR 10.000. The loan was secured by a charge on the family home. The terms of the contract contained a clause relating to extrajudicial enforcement of the charge on immovable property provided as security, which allows the creditor to enforce the charge without a court having the opportunity to review the clause. The CJEU considered the national legislation on which the disputed clause is based to be in line with EU law. While Directive 93/13 is silent as to enforcement of charges attached to loan agreements, the CJEU pointed out that it is necessary to determine to what extent it is impossible in practice or excessively difficult to apply the protection conferred by the Directive. Under Slovak law, the sale by auction may be contested within 30 days of the notice of enforcement of the charge, and, after the public auction, the contesting person has a period of three months to take steps against the conditions under which the sale took place. Moreover, according to Slovak civil procedure law, national courts may adopt any interim measure to prevent an auction from going ahead during the extrajudicial enforcement of a charge. The fact that the national court may adopt interim measures suggests that adequate and effective means to prevent the continued use of unfair terms exist. Interim measures constitute a proportional penalty taking into account that the property subject to the charge is immovable property forming the consumer's family home and the right to accommodation being a fundamental right guaranteed under Article 7 of the Charter.

Consumer Credit

– Burden of proving the non-performance of the creditor's obligations: Judgment in case 449/13 *CA Consumer Finance* 18 December 2014: In the case at hand, the consumers failed to repay the monthly instalments under their loan agreements, and so the bank sought immediate repayment of the sums borrowed together with interest. The French court raised several questions concerning the creditor's obligations to provide consumers with certain information and an explanation and to assess the consumer's creditworthiness laid down in Articles 5 and 8 of Directive 2008/48/EC.[11] The CJEU held that while it is for the Member States to determine the burden of proving that the creditor has fulfilled its obligations to provide information and to check the creditworthiness, the principles of equivalence and effectiveness apply. Compliance with the principle of effectiveness requires that the creditor must prove to the court that those

pre-contractual obligations have been fulfilled. The CJEU states that if a standard term implied that the consumer acknowledges that the creditor's pre-contractual obligations have been fully and correctly performed, it would result in a reversal of the burden of proof such as to undermine the effectiveness of the rights conferred by the Directive. The standard term should function as an indication which the lender must substantiate with one or more relevant items of evidence. As to the question whether the assessment of the consumer's creditworthiness may be carried out solely on the basis of information supplied by the consumer, without such information being effectively scrutinized against other evidence, the CJEU held that the Directive affords the creditor a margin of discretion for the purposes of determining whether or not the information at its disposal is sufficient to demonstrate the consumer's creditworthiness and whether it is necessary to check that information against other evidence. Furthermore, the creditor may give explanations to the consumer without being required to assess his creditworthiness beforehand. However, it may be that the assessment of the consumer's creditworthiness means that the explanations provided need to be adapted. Those explanations must be communicated to the consumer in good time before the credit agreement is signed. The explanations do not necessarily have to be provided in a specific document, but may be given orally in the course of an interview. The judgment is in line with the opinion of Advocate General Wahl delivered on 11 September 2014.

Others

– Unilateral adjustment of the price of the service by the service provider: Judgment in joined cases 359/11 and 400/11 *Schulz and Egbringhoff* 23 October 2014: The preliminary references of the German Federal Court arose out of two disputes between electricity and gas customers and their suppliers concerning several price increases introduced between 2005 and 2008. The customers, who are covered by a universal supply obligation, consider those increases to be unreasonable and based on unlawful clauses. At the material time, the German legislation in force determined the standard terms and conditions of consumer contracts and incorporated those terms and condi-

11 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, *OJ* 2008 L 133/66, and corrigenda *OJ* 2009 L 207/14, *OJ* 2010 L 199/40 and *OJ* 2011 L 234/46.

tions directly into contracts concluded with customers covered by a universal supply obligation. It allowed the supplier to unilaterally adjust the prices of electricity and gas without indicating the reasons or preconditions for that adjustment or its scope, while ensuring, however, that customers are informed of the increase in charges and that they can terminate their contract if they so wish. The German Federal Court questioned the compliance of the national legislation with Article 3(5) of Directive 2003/54,[12] read in conjunction with Annex A thereto, and Article 3(3) of Directive 2003/55,[13] read in conjunction with Annex A thereto. The CJEU held that those two Directives require the Member States to ensure that consumers have a high level of protection with regard to the transparency of the contractual conditions. In addition to the right to terminate the contract, consumers must also be empowered to challenge such adjustments. In order to fully and effectively benefit from those rights, customers who are covered by a universal supply obligation must be informed, with adequate notice before any adjustment enters into effect, of the reasons and preconditions for that adjustment and its scope. The German legislation is therefore not in line with the Directives. The CJEU is unwilling to limit the temporal effects of its judgment. It has not been demonstrated that calling into question legal relations which have exhausted their effects in the past would retroactively cast into confusion the entire electricity and gas supply sector in Germany. While Advocate General Wahl reached the same substantive conclusion as the CJEU, he proposed to limit the temporal effects of the ruling.[14]

Competition Law, Public procurement and State Regulation

– Conditions for exclusion from a tender procedure: Judgment in case 358/12 *Consorzio Stabile Libor Lavori Pubblici* 10 July 2014: The preliminary reference of the Italian court gave rise to the question whether Articles 49 TFEU, 56

12 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* 2003 L 176/37, and corrigendum in *OJ* 2004 L 16/74.

13 Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* 2003 L 176/57.

14 Opinion of Advocate General Wahl issued on 8 May 2014.

TFEU and 101 TFEU and the principle of proportionality preclude a national legislation which, with regard to public works contracts the value of which is below the threshold laid down in Article 7(c) of Directive 2004/18,[15] requires the contracting authorities to exclude from the award procedure a tenderer who has committed an infringement relating to social security contributions where the difference between the sums owed and those paid exceeds EUR 100 and is greater than 5 % of the sums owed. After ruling out the applicability of Article 101 TFEU, the CJEU clarified that the principles of freedom of establishment and freedom to provide services and the principle of proportionality are among the principles of the Treaty which must be respected when awarding public contracts. The application of a national provision which excludes persons who have committed serious infringements of national rules governing social security contributions from participating in procedures for the award of public works contracts may compromise the widest possible participation by tenderers in a call for tenders, and therefore amounts to a restriction within the meaning of Articles 49 TFEU and 56 TFEU. However, the objective of the legislation to ensure the reliability, diligence and responsibility of the tenderer and its proper conduct in relation to its employees constitutes a legitimate objective in the public interest. Since the national measure cannot be regarded as going beyond what is necessary to attain the objective pursued, it may be justified.

– Definition of 'public works contract': Judgment in case 213/13 *Impresa Pizzarotti* 10 July 2014: In the case at hand, Pizzarotti was selected by the Comune di Bari to construct a new judicial centre. The decision to that effect indicated that some of the buildings would be sold to the Comune di Bari for the sum of EUR 43 million and that the remainder would be leased to it for an annual rent of EUR 3 million to be paid over the 18 years of the contractual term. Even though the public resources available had been reduced, Pizzarotti was prepared to go ahead with the procedure already commenced. However, finally, public financing was completely eliminated. Following the removal of that funding, Pizzarotti submitted a second proposal, setting out the possibility of completing the work intended for letting which was contemplated in its initial proposal. As the authorities took no action, Pizzarotti initiated legal proceedings seeking an order obliging the administration to act. The national court expressed doubts as to whether the transaction

15 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ* 2004 L 134/240.

constitutes a public works contract for the purposes of EU legislation. In line with the opinion of Advocate General Wahl delivered on 15 May 2014, the CJEU held that on a proper construction of Article 1(a) of Directive 93/37,[16] where the main object of a contract is the execution of a work corresponding to the requirements expressed by the contracting authority, that contract constitutes a public works contract and is not, therefore, covered by the exclusion referred to in Article 1(a)(iii) of Directive 92/50,[17] even if it contains an undertaking to let the work in question. The main object of the contract is the creation of a building complex, which the subsequent letting of the complex necessarily presupposes. The execution of the planned work corresponds to the requirements specified by the contracting authority, ie that the authority was in a position to have a decisive influence on the design of the work to be constructed. While the contract contains also elements of a lease, the decisive element for the purposes of the classification of the contract is the main object of that contract, not the amount paid to the contractor or the arrangements for payment. The national court asked further, in case that the contract constitutes a public works contract, whether it may hold that a judgment having the authority of *res judicata* is ineffective in so far as it has led to a situation which is incompatible with EU law on public procurement. The CJEU held that to the extent that it is authorised to do so by the national rules of procedure, the national court must either supplement or go back on that definitive ruling so as to take into account any interpretation of that legislation provided by the Court subsequently.

– Amount of the minimum operating costs fixed by a body representing the operators concerned: Judgment in joined cases 184/13–187/13, 194/13, 195/13 und 208/13 *API* 4 September 2014: The preliminary reference raised the question whether EU law precludes the Italian legislation pursuant to which the price of road haulage services for hire and reward cannot be lower than minimum operating costs, which are fixed by a body composed mainly of representatives of the economic operators concerned ('Osservatorio'). According to the national legislation, the minimum operating costs are established, primarily, in the framework of voluntary sectoral agreements, concluded by professional associations of carriers and customers, failing that, in the absence of such agreements, by the Osservatorio and, in the event of inaction by the latter, directly by the Ministry for Infrastructure and Transport. The CJEU

16 Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, *OJ* 1993 L 199/54.

17 Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, *OJ* 1992 L 209/1.

held that the national legislation is precluded by Article 101 TFEU, read in conjunction with Article 4(3) TEU, laying down a duty of the Member State not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings. In the light of the composition and the method of operation of the Osservatorio, on the one hand, and of the absence both of any public-interest criteria laid down by law in a manner sufficiently precise to ensure that carriers' and customers' representatives in fact operate in compliance with the general public interest and of actual review and of the power to adopt decisions in the last resort by the State, on the other, the CJEU held that the Osservatorio must be regarded as an association of undertakings within the meaning of Article 101 TFEU. The fixing of mandatory minimum operating costs prevents undertakings from setting tariffs lower than those costs, amounting to the horizontal fixing of mandatory minimum tariffs, which is capable of restricting competition in the internal market. According to the CJEU, the fixing of minimum operating costs cannot be justified by a legitimate objective.

– Power of the review body to declare the public procurement contract ineffective: Judgment in case 19/13 *Fastweb* 11 September 2014: In the case at hand, the Italian Ministero dell'Interno appointed Telecom Italia as its supplier and technological partner for the management and development of telecommunication services. It considered it possible, for the purposes of awarding the electronic communications contract, to use the negotiated procedure without prior publication of a contract notice, provided for in Article 28(1)(e) of Directive 2009/81/EC.[18] In line with that procedure, the Ministero dell'Interno published a notice in the Official Journal, announcing its intention of awarding the contract to Telecom Italia. Subsequently, the Ministero dell'Interno and Telecom Italia signed a framework agreement. The contract award notice was published in the Official Journal. Fastweb brought a legal action for annulment of the award of the contract, and a declaration that the contract was ineffective, on the ground that the conditions laid down in Article 28 of Directive 2009/81 for use of a negotiated procedure without prior publication of a contract notice were not satisfied. On appeal, the Consiglio di Stato upheld the annulment of the award of the contract, but was uncertain as to the inferences to be drawn from that annulment in terms of the effects of the

18 Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, *OJ* 2009 L 216/76.

contract in the light of the wording of Article 2d(4) of Directive 89/665/EEC.[19] Article 2d(1)(a) of Directive 89/665 provides that the body responsible for review procedures is to declare the contract ineffective if the contracting authority has awarded the contract without prior publication of a contract notice in the Official Journal and if that was not permissible under Directive 2004/18. Article 2d(4) of Directive 89/665 provides for an exception, applicable if: (i) the contracting authority considers that the award of a contract without prior publication of a contract notice in the Official Journal is permissible in accordance with Directive 2004/18; (ii) the contracting authority has published in the Official Journal a notice announcing that it intends to conclude the contract; and (iii) the contract was not concluded before the expiry of a period of at least 10 calendar days after the publication of that notice. The CJEU clarified further that the review body is under a duty to determine whether, when the contracting authority took the decision to award a contract by means of a negotiated procedure without prior publication of a contract notice, it acted diligently and whether it could legitimately hold that the conditions laid down in Article 31(1)(b) of Directive 2004/18 were in fact satisfied. If, at the conclusion of its review, the review body finds that the conditions laid down in Article 2d(4) of Directive 89/665 are not satisfied, it must then declare that the contract is ineffective. It must determine, on the basis of national law, the consequences of the declaration of ineffectiveness. If the review body finds that those conditions are satisfied, it must maintain the effects of the contract. The examination of the CJEU did not reveal anything that might affect the validity of Article 2d(4) of Directive 89/665 in the light of the right to an effective remedy under Article 47 of the Charter. The conclusion reached by the CJEU is in line with the opinion of Advocate General Bot delivered on 10 April 2014.

– National legislation requiring tenderers and their subcontractors to pay a minimum wage to staff: Judgment in case 549/13 *Bundesdruckerei* 18 September 2014: The CJEU understood the German court as asking whether, in a situation in which a tenderer intends to carry out a public contract by having recourse exclusively to workers employed by a subcontractor established in another Member State, Article 56 TFEU precludes the application of national legislation which requires that subcontractor to pay those workers a fixed minimum wage. The CJEU held the national requirement constitutes an addi-

19 Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, *OJ* 1989 L 395/33, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, *OJ* 2007 L 335/31.

tional economic burden that may prohibit, impede or render less attractive the provision of services in the host Member State. While the legislation intends to ensure the legitimate objective that employees are paid a reasonable wage in order to avoid both 'social dumping' and the penalisation of competing undertakings which grant a reasonable wage to their employees, the measure appears to be disproportionate. The fixed minimum wage bears no relation to the cost of living in the Member State in which the services relating to the public contract are performed and for that reason prevents subcontractors established in that Member State from deriving a competitive advantage from the differences between the respective rates of pay. It also cannot be justified in the light of the objective of stability of the national social security system, since consequences could only arise for the social security system of the workers' Member State.

– Compulsory statement concerning the person designated as 'technical director': Judgment in case 42/13 *Cartiera dell'Adda* 6 November 2014: In the case at hand, CEM Ambiente decided, as contracting authority, to exclude the joint venture formed by Cartiera dell'Adda and Cartiera di Cologno Monzese from a selection procedure on the ground that a statement relating to the person designated as Cartiera di Cologno Monzese's technical director, certifying that there were no criminal proceedings pending against him and that he had not been convicted of an offence by a judgment having the force of *res judicata*, was not submitted with the joint venture's bid. After the decision, Cartiera di Cologno Monzese forwarded to CEM Ambiente a statement in which it indicated that none of the grounds for refusal applied to its technical director. Subsequently, the joint venture also indicated that the technical director has been identified in error, as he was simply a member of the board of directors with no power of representation. In the absence of any reply from CEM Ambiente, the joint venture brought proceedings before the referring court seeking the annulment of the decision excluding the joint venture from the award procedure. The referring court has doubts as to the compatibility with European Union law of the fact that it is impossible for such a tenderer, after submitting his bid, to remedy the fact that he failed to annex such a statement to his bid, whether by submitting such a statement to the contracting authority directly or by showing that the person concerned was identified as the technical director in error. The CJEU held that, in the situation of the case at hand, Article 45 of Directive 2004/18/EC does not preclude the exclusion of an economic operator from a procurement procedure on the ground that the operator had failed to comply with the requirement laid down in the contract documentation to annex to his bid. In line with the principle of equal treatment and the obligation of transparency, the contracting authority must

comply strictly with the criteria which it has itself established, so that it is required to exclude from the contract an economic operator who has failed to provide a document or information which he was required to produce under the terms laid down in the contract documentation, on pain of exclusion.

- National provision laying down minimum rates for independent service providers: Judgment in case 413/13 *FNV Kunsten Informatie en Media* 4 December 2014: The preliminary reference arose out of the proceedings between a trade union and the Staat der Nederlanden concerning the validity of a reflection document by which the Dutch Competition Authority found that the provision of a collective labour agreement setting minimum fees for the supply of independent services is not excluded from the scope of Article 101 (1) TFEU. The Dutch court asked whether a provision of a collective labour agreement, which sets minimum fees for self-employed service providers, who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers falls within the scope of Article 101(1) TFEU. The CJEU held that it is for the national court to determine whether the agreement is entered into in the interests of and on behalf of self-employed persons, ie that Article 101(1) TFEU would apply, or in the interests of and on behalf of 'false self-employed persons', ie that Article 101(1) TFEU does not apply. Although they perform the same activities as employees, service providers can constitute 'undertakings' within the meaning of Article 101(1) TFEU. In so far as an organisation representing workers carries out negotiations acting for those self-employed persons, it does not act as a trade union association and therefore as a social partner, but, in reality, acts as an association of undertakings. Therefore, the collective labour agreement cannot be excluded from the scope of Article 101(1) TFEU. However, the situation would be different if the self-employed service providers are 'false self-employed', ie they perform for an employer, under a works or service contract, the same activity as that employer's employed workers. It is for the national court to ascertain whether their relationship is one of subordination during the contractual relationship or whether they enjoy more independence and flexibility than employees who perform the same activity, as regards the determination of the working hours, the place and manner of performing the tasks assigned. In case they are 'false self-employed', the CJEU pointed out that the minimum fees scheme directly contributes to the improvement of the employment and working conditions and cannot, by reason of its nature and purpose, be subject to the scope of Article 101(1) TFEU.
- Decision by the contracting authority not to proceed with the definitive award of the contract and to withdraw the invitation to tender: Judgment in

case 440/13 *Croce Amica One Italia* 11 December 2014: The preliminary reference arose out of the proceedings between Croce Amica One and the Azienda Regionale Emergenza Urgenza concerning the lawfulness of the latter's decision, in its capacity as contracting authority, not to proceed with the definitive award of a contract for services to Croce Amica One, to which the contract had been provisionally awarded, and to withdraw the invitation to tender. While Article 45 of Directive 2004/18 requires the exclusion of a tenderer who has been the subject of a conviction by final judgment, the criminal proceedings against the legal representative of Croce Amica One were still pending. Moreover, the referring court is also uncertain as to the full extent of its own jurisdiction in that regard, taking the view that under EU law its jurisdiction cannot be confined to review of procedural flaws vitiating the exercise of the administration's powers. The CJEU held that Article 45 does not preclude the adoption of a decision not to award a contract for which a procurement procedure has been held and not to proceed with the definitive award of the contract to the sole tenderer remaining in contention to whom the contract had been provisionally awarded. Article 41(1) requires contracting authorities to inform candidates and tenderers as soon as possible of such decisions and to state the grounds for the decision, while Article 43 requires them to refer to those reasons in the report which it is obliged to draw up for any public contract. Provided the principles of transparency and equal treatment are complied with, a contracting authority cannot be required to carry to its conclusion an award procedure that has been initiated and to award the contract in question, including where there remains only one tenderer in contention. Furthermore, the CJEU held that according to Article 1(1) of Directive 89/665, the national court must review the lawfulness of decisions adopted by contracting authorities, ensuring that the relevant rules of EU law are complied with. It is not possible for such review to be confined to a simple examination of whether the decisions adopted by contracting authorities are arbitrary. However, that does not mean that it is not open to the national legislature to grant the competent national courts and tribunals more extensive powers for the purpose of reviewing whether a measure was expedient.

– Exclusion of an economic operator having committed an infringement of national competition rules: Judgment in case 470/13 *Generali-Providencia Biztosító* 18 December 2014: The request of the Hungarian court has been made in proceedings between Generali and the board of appeal of the public procurement office, concerning the dismissal of that company's action brought before the board of appeal against the decision to exclude Generali from a tendering procedure on the ground that it had previously committed an infringement of the national competition rules, which had been confirmed

by a court ruling having the force of *res judicata*. The CJEU held that Articles 49 TFEU and 56 TFEU do not preclude the application of national legislation excluding the participation in a tendering procedure of an economic operator who has committed an infringement of competition law, established by a judicial decision having the force of *res judicata*, for which a fine was imposed. Even though the CJEU ruled out the applicability of Directive 2004/18 to the contract at stake due to the threshold in Article 7(b), it clarified that Article 45(2)(d) makes it possible to cover all wrongful conduct which has an impact on the professional credibility of the operator and not only the infringements of ethical standards in the strict sense of the profession. If such a cause for exclusion is possible under Directive 2004/18, it must *a fortiori* be regarded as justified in relation to public contracts which fall short of the threshold defined in Article 7 of that directive and which are consequently not subject to the strict special procedures laid down in that directive.

Employment law and Discrimination

– National measures to prevent abuse arising from the use of fixed-term contracts: Judgment in joined cases 362/13, 363/13 and 407/13 *Fiamingo* 3 July 2014: The Italian Corte di Cassazione has asked the CJEU whether the Framework Agreement[20] applies to maritime labour and whether it permits national legislation which (i) provides that fixed-term employment contracts have to specify the duration of the contract (but not its termination date), (ii) considers that the mere indication of the voyage(s) to be made constitutes objective justification for a fixed-term contract and (iii) provides for the conversion of successive fixed-term contracts into an employment relationship of indefinite duration where a worker has been employed continuously for a period exceeding one year (the employment relationship being deemed continuous when the time elapsing between contracts is less than or equal to 60 days). The seafarers in the case at hand were employed on board ferries for the crossing between Sicily and Calabria by Rete Ferroviaria Italiana under successive fixed-term contracts concluded for one or several voyages and for a maximum of 78 days. They worked for their employer less than a year, with periods of less than 60 days elapsing in each gap between the contracts. The CJEU held that the Framework Agreement applies to workers,

20 Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ* 1999 L 175/43.

who are employed as seafarers under fixed-term employment contracts on board ferries making sea crossings between two ports situated in the same Member State. The Court also declared that since the Framework Agreement does not contain any provision relating to the formal particulars that must be included in fixed-term contracts, Italy was entitled to provide that it is only the duration of the contract that has to be stated. Finally, the Italian legislation complies with the requirement to prevent abuse arising from the use of successive fixed-term contracts since it provides for both a preventive measure (ie the maximum duration of one year for successive fixed-term contracts) and a penalty in the event of abuse (ie the conversion of successive fixed-term contracts into an employment relationship of indefinite duration, where a worker has been employed continuously by the same employer for longer than one year). The national court must, however, consider in each case all the circumstances at issue, taking account, in particular, of the number of successive contracts concluded with the same person or for the purposes of performing the same work, in order to ensure that fixed-term relationships are not abused by employers. A finding of abuse might be made if the maximum duration is calculated not by reference to the number of calendar days covered by the contract, but by reference to the number of days' service actually completed by the employee, in particular when the latter number is considerably lower than the former, because of the low volume of crossings.

– Conversion of part-time to full-time employment relationship without the worker's consent: Judgment in case 221/13 *Mascellani* 15 October 2014: The CJEU was asked by the Italian court whether it is compatible with the Framework Agreement for a Member State to provide for rules allowing an employer to modify an employment relationship unilaterally, thereby requiring the worker to change from part-time to full-time employment without the worker's consent. In the case at hand, the Ministero della Guistizia re-examined the part-time arrangements granted to the applicant, and, in accordance with Italian law, unilaterally terminated that arrangement by imposing a full-time working arrangement. The applicant brought an action before the referring court seeking the annulment of the decisions of the Ministero della Giustizia as working part-time has enabled her to use her free time to care for her family and to undertake vocational training. The CJEU held that Clause 5.2 of the Framework Agreement does not preclude national legislation pursuant to which the employer may order the conversion of a part-time employment relationship into a full-time employment relationship without the consent of the worker concerned. Moreover, in line with the opinion of Advocate General Wahl delivered on 22 May 2014, the possibility of converting a part-time

employment relationship into a full-time employment relationship without the worker's consent cannot be considered to be discriminatory under the Framework Agreement.

- Calculation of child allowance paid to part-time workers: Judgment in case 476/12 *Österreichischer Gewerkschaftsbund* 5 November 2014: The Austrian Oberster Gerichtshof asked the CJEU whether Clause 4.2 of the Framework Agreement on part-time work must be interpreted to the effect that the principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by the employer of a part-time worker pursuant to a collective agreement. In the case at hand, the Österreichischer Gewerkschaftsbund, as the competent body for the employees in the Austrian banking sector, lodged an application against VÖBB, as the competent body representing employers in the Austrian banking sector, for a declaration that part-time workers falling within the scope of the collective agreement are entitled to payment of the full amount of the dependent child allowance and not to only an amount calculated *pro rata* on the number of hours worked. The CJEU reasoned that since the dependent child allowance is part of a worker's pay, it is determined by the terms of the employment relationship agreed between the worker and the employer. Therefore, it follows that if, according to the terms of the employment agreement, the worker is employed part-time, the calculation of the dependent child allowance in accordance with the principle of *pro rata temporis* is objectively justified, within the meaning of Clause 4.1 of the Framework Agreement, and appropriate within the meaning of Clause 4.2 thereof. In accordance with the opinion of Advocate General Sharpston delivered on 13 February 2014, the CJEU considers the reduced working time as compared with that of a full-time worker as an objective criterion allowing a proportionate reduction of the rights of the workers concerned.
- Conditions for successive fixed-term employment contracts: Judgment in joined cases 22/13, 61/13 to 63/13 and 418/13 *Mascolo and Others* 26 November 2014: The Italian legislation at stake lays down a system for temporary replacement of teaching and administrative staff in public schools. These temporary appointments are made by drawing on lists of suitable candidates, which include teachers who have passed a competition, but have not been able to obtain a tenured post and teachers who have attended courses leading to certification run by specialist teacher-training colleges. The teachers who work as replacements in this way may be granted tenure depending on the posts available and their progression on those lists drawn up in ranking order. The grant of tenure may also result directly from passing a competition. Those competitions were, however, broken off between 1999 and 2011. The

two referring Italian courts asked whether it is admissible under the Framework Agreement to renew fixed-term employment contracts to fill posts that are vacant and unfilled, pending the completion of competitive selection procedures for the recruitment of tenured staff of public schools, without any definite period being set for the completion of those procedures and while excluding all compensation for damage suffered on account of such a renewal. The CJEU held that the Italian legislation is not in compliance with the Framework Agreement. Such legislation does not contain objective and transparent criteria in order to verify whether renewal responds to a genuine need, is capable of achieving the objective pursued and is necessary for that purpose. Moreover, the Italian legislation does not contain any measure designed to prevent the misuse of successive fixed-term employment contracts and does not contain any appropriate penalizing measures in the event of a misuse. The CJEU followed the opinion of Advocate General Szpunar delivered on 17 July 2014.

Discrimination

– Inclusion of periods of study and service completed before the age of 18 for the purpose of determining remuneration subject to an extension of the periods for advancement: Judgment in case 530/13 *Schmitzer* 11 November 2014: In the case at hand, Mr Schmitzer, an official at the Federal Ministry of the Interior, submitted a request for a review of his advancement reference date in order that account could be taken of periods of training and service, which he had completed before the age of 18. While the law on the date of his recruitment did not allow account to be taken of those periods, an amendment now makes provision to that effect. The Ministry of the Interior fixed the new reference date in accordance with the request. However, it also stated that advancement to the second incremental step is subject to completion of a period of five years on the first step. That is based on the amendment, which also introduced a three-year extension of the period required in order to progress from the first to the second incremental step in each job category and each salary group. Mr Schmitzer brought an action before court challenging the refusal of the Ministry to review the request. The national court is uncertain whether the legislative amendment which introduces a new non-discriminatory method of determining the reference date to be taken into account for the advancement of civil servants may, concurrently, provide for an extension of the periods which must be completed in order to move from one incremental step to the next. According to the national court, it applies

solely to civil servants who request a review of the reference date taken into account for their incremental step advancement and remuneration status, to the exclusion of those who do not make such a request and those for whom a change to that date is irrelevant.The CJEU indeed held that the national legislation is discriminatory under Article 2(1) and (2)(a) and Article 6(1) of Directive 2000/78/EC.[21] The national legislation not only neutralises the advantage resulting from the inclusion of periods of training and service completed before the age of 18, but also places at a disadvantage only the civil servants disadvantaged by the previous system in so far as the extension to the periods for advancement is likely to apply to them alone. While budgetary considerations may underpin the chosen national social policy, such considerations cannot in themselves constitute a legitimate justification. Also, even if the system is capable of ensuring the protection of acquired rights and legitimate expectations with regard to civil servants favoured by the previous system, it is not appropriate for the purpose of establishing a non-discriminatory system for civil servants who were disadvantaged by that previous system. The CJEU further held that a civil servant, who has suffered age-based discrimination because of the method by which the reference date for the calculation of his advancement was fixed, must be able to rely on Article 2 in order to challenge the discriminatory effects of the extension of the period for advancement, even though, at his request, that reference date has been revised.

– Fixing of a maximum age of 30 for police officers: Judgment in case 416/13 *Vital Pérez* 13 November 2014: The Spanish Court asked the CJEU whether Directive 2000/78/EC allows a maximum age of 30 years to be set for access to the post of local police officer in a notice of competition issued by a municipality. The CJEU held that the Directive precludes national legislation which sets the maximum age for recruitment of local police officers at 30 years. The Court states that the national law has the consequence that certain persons are treated less favorably than other persons in comparable situations on the sole ground that they have exceeded the age of 30 years. While some of the duties of local police officers require a particular physical capability, there is nothing to prove that the particular physical capacities required are inevitably related to a particular age and are not found in persons over a certain age. Moreover, there is nothing to confirm that the legitimate objective of safeguarding the operational capacity and proper

21 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* 2000 L 303/22.

functioning of the local police service makes it necessary to maintain a particular age structure within that service. The age limit therefore constitutes a disproportionate requirement. Stringent, eliminatory physical tests make it possible to attain the objective in a less binding manner. In addition, the Court held that none of the evidence submitted to it shows that the age limit for recruitment is appropriate and necessary in the light of objectives of ensuring that officers have the necessary training for the post concerned and ensuring a reasonable period of employment before retirement. Advocate General Mengozzi reached in his opinion of 17 July 2014 the same conclusion.

– Discrimination on grounds of obesity: Judgment in case 354/13 *FOA* 18 December 2014: The Danish court asked the CJEU whether EU law prohibits discrimination on grounds of obesity and whether obesity can constitute a disability under Directive 2000/78/EC. Mr Kaltoft, who works as a childminder, was dismissed by his employer. While the dismissal was motivated by a decrease in the number of children to be taken care of, a workers' union acting on behalf of Mr Kaltoft takes the view that the dismissal resulted from unlawful discrimination on grounds of obesity. The CJEU held that in the area of employment and occupation, EU law does not lay down a general principle of non-discrimination on the grounds of obesity. However, the obesity of a worker may constitute a 'disability' within the meaning of the Directive where it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility or the onset, in that person, of medical conditions preventing him from carrying out his work or causing discomfort when carrying out his professional activity. It is for the national court to determine whether those conditions are met. The conclusion reached by the CJEU is in line with the opinion of Advocate-General Jääskinen delivered on 17 July 2014.

Private International and International Procedural Law

– Action for payment of a debt arising out of the international carriage of goods brought by the insolvency administrator: Judgment in case 157/13 *Nickel & Goeldner Spedition* 4 September 2014: The preliminary reference arose out of

the proceedings between Nickel & Goeldner Spedition GmbH, a company incorporated under German law, and 'Kintra' UAB, a company incorporated under Lithuanian law that has been placed in liquidation, concerning the payment of a debt in respect of services comprising the international carriage of goods. The Lithuanian court asked the CJEU whether the action brought by the insolvency administrator of 'Kintra' UAB in the course of insolvency proceedings opened in Lithuania and directed against Nickel & Goeldner Spedition GmbH falls within the scope of Regulation No 1346/2000[22] or of Regulation No 44/2001.[23] According to the CJEU, it must be determined whether the right or the obligation which constitutes the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. The action in the case at hand could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters. There is no direct link with the insolvency proceedings. Therefore, that action is not covered by Article 3(1) of Regulation No 1346/2000 and does not concern bankruptcy or winding-up for the purposes of Article 1(2)(b) of Regulation No 44/2001, but comes under the concept of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001. The Lithuanian court asked further whether, in a situation where a dispute falls within the scope of both Regulation No 44/2001 and the Convention on the Contract for the International Carriage of Goods by Road ('CMR'),[24] a Member State may, in accordance with Article 71(1) of that Regulation, apply the rules concerning jurisdiction provided for in the CMR. The CJEU answered in the affirmative that the national court may apply the rules concerning jurisdiction laid down in Article 31(1) of the CMR, which are in compliance with the principles which underlie judicial cooperation in civil and commercial matters in the EU.

– Applicable law to a commission contract for the carriage of goods in the absence of choice by the parties: Judgment in case 305/13 *Haeger & Schmidt* 23 October 2014: In the case at hand, the French company Va Tech engaged the French company Safram to organise the carriage of a transformer originating from the United States from the port of Antwerp (Belgium) to Lyon (France).

22 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, *OJ* 2000 L 160/1.

23 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2001 L 12/1.

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

Safram, acting on behalf of Va Tech, concluded a second commission contract with the German company Haeger & Schmidt for the carriage of the transformer by inland waterway. Haeger & Schmidt chose for that purpose Mr Lorio, a carrier established in France and owner of a barge registered in Belgium.While the transformer was being loaded in Antwerp, the transformer slid on the slipway, causing the barge to capsize and sink with its cargo. Va Tech sought compensation for its loss before the French courts from Safram and Haeger & Schmidt. The French Cour de cassation referred to the CJEU several questions on Article 4 of the Rome Convention, which, in the absence of a choice by the parties as to the law applicable to the contract, provides for connecting criteria to determine the applicable law. It is based on the general principle, that in order to establish a contract's connection with a national law, it is necessary to ascertain the country with which that contract is 'most closely connected'. As an exception, the second sentence of Article 4(4) of the Convention sets out an exhaustive enumeration of the connecting criteria concerning the law applicable to contracts for the carriage of goods. The CJEU held that Article 4(4) applies to a commission contract for the carriage of goods solely when the main purpose of the contract consists in the actual transport of the goods concerned, which is for the referring court to verify. Where the law applicable to a contract for the carriage of goods cannot be fixed under Article 4(4), it must be determined in accordance with the general rule laid down in Article 4(1), ie that the law governing that contract is that of the country with which it is most closely connected. In case the contract at stake cannot be equated with a contract for the carriage of goods, the CJEU clarified that under Article 4(2), where it is argued that a contract has a closer connection with a country other than that the law of which is designated by the presumption laid down therein, the national court must compare the connections existing between that contract and, on the one hand, the country whose law is designated by the presumption and, on the other, the other country concerned. In so doing, the national court must take account of the circumstances as a whole, including the existence of other contracts connected with the contract in question.

– Damages for infringement of European competition law and recognition of provisional and protective measures: Judgment in case 302/13 *flyLAL-Lithuanian Airlines* 23 October 2014: The request for a preliminary ruling from the Latvian court arose out of the action of the Lithuanian company flyLAL for recognition and enforcement in Latvia of a judgment of a Lithuanian court ordering provisional measures or protective measures against two Latvian companies. The proceedings before the Lithuanian courts concerned the action by flyLAL for compensation for damage resulting, first, from the abuse of a dominant position by Air Baltic on the market for flights from or to

Vilnius Airport (Lithuania) and, second, from an anti-competitive agreement between Air Baltic and the company managing the airport in Riga (Latvia). The Lithuanian court granted the application for provisional and protective measures and issued an order for sequestration, on a provisional and protective basis, of the moveable and immoveable assets and property rights of the defendants. The Latvian court questioned whether the concept of a 'civil and commercial matter' covers the claims arising from infringements of competition law which are directed against undertakings in which the State is the majority stakeholder, and, if so, under which conditions the enforcement of protective measures may be refused in the interests of public policy under Regulation No 44/2001. The CJEU affirmed that an action seeking legal redress for damage resulting from alleged infringements of European Union competition law comes within the notion of 'civil and commercial matters' within the meaning of Article 1(1) of Regulation No 44/2001. That conclusion is not contradicted by the fact that the alleged infringements of competition law resulted from provisions of Latvian law or by the fact that the State holds 100 % and 52.6 % of the shares in the defendants. While the applicant by its action for damages, is also, indirectly, objecting to the charging policy operated by the Latvian company managing the airport, which may also have eventually found its way into decisions adopted by its shareholders or its board of management, the CJEU excluded the applicability of Article 22(2) of Regulation No 44/2001 concerning proceedings having as their object the validity of the decisions of organs of companies. Finally, the CJEU held that the refusal to recognise a judgment on grounds of public policy under Article 34(1) of Regulation No 44/2001 cannot be based either on a failure of the judgment to state the detailed rules for determining the amount of the sums which are the subject of the provisional and protective measures granted, in case where it is possible to follow the line of reasoning which led to the determination of the amount, and where legal remedies were available which were used to challenge such methods of calculation, or on the mere invocation of serious economic consequences associated with its enforcement. The ruling of the Court is in line with the opinion of Advocate General Kokott delivered on 3 July 2014.