EU Case Law

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European Union Litigation

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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 January 2015 and the end of June 2015.

General Law of Contracts and Obligations

– Contractual limitation on the rights of users of a database: Judgment in case 30/14 *Ryanair* 15 January 2015: That preliminary reference arose out of the proceedings between the flight company Ryanair Ltd and the operator of a website on which consumers can search through the flight data of low-cost air companies, compare prices and, on payment of commission, book a flight. The latter used, for commercial purposes, data from Ryanair's website contrary to the terms and condition of use of that website. Taking the view that the Ryanair dataset at stake constitutes a database, within the meaning of Article 1(2) of Directive 96/9,[1] which is not protected by copyright on the basis of Chapter II or the *sui generis* right on the basis of Chapter III, the Dutch court asked the CJEU whether, according to the combined application of Articles 6 (1), 8 and 15 Directive 96/9, the freedom to use such a database cannot be contractually limited. First, the CJEU clarified that Directive 96/9 is not applicable to a database, which is not protected either by copyright or by the *sui generis* right under that Directive. Consequently, Articles 6(1), 8 and 15 of the Directive 96/9, which establish mandatory rights for lawful users of databases, are not applicable and cannot prevent the adoption of contractual clauses on the conditions of use of such a database.

1 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ* L 77, 27 March 1996, 20.

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- Resale right for the benefit of the author of an original work of art: Judgment in case 41/14 *Christie's France* 26 February 2015: In the case at hand, the French national association of antique dealers (SNA) brought legal proceedings against Christie's France SNC, which arranges voluntary sales by public auction, in which it acts on behalf of the sellers. As a result of some of those sales a royalty is payable in respect of the resale right. Christie's France has included a term in the general conditions of sale, pursuant to which it collects from the buyer an amount equal to the royalty due to the author in respect of the resale right. The SNA took the view that the term at issue was placing the onus for payment of the resale royalty upon the buyer and that that amounted to unfair competition. The French court raised the question to the CJEU whether Article 1(4) of Directive 2001/84[2] must be interpreted as meaning that the seller is required definitively to bear, in every case, the cost of the resale royalty or whether any derogation by agreement is possible. The CJEU held that where national legislation provides that the seller or an art market professional involved in the transaction is to be the person by whom the royalty is payable, Directive 2001/84 does not preclude those persons from agreeing, on the occasion of a resale, with any other person, including the buyer, that that other person will definitively bear the cost of the resale royalty due to the author, provided that a contractual arrangement of that kind does not affect the obligations and liability which the person by whom the royalty is payable has towards the author.
- Differentiation in the amount of the insurance premium depending on the territory in which the vehicle is used: Judgment in case 556/13 *Litaksa* 26 March 2015: The preliminary reference of the Lithuanian court arose out of the proceedings between Litaksa UAB, a road haulage company, and BTA Insurance Company SE, concerning the reimbursement of compensation paid by way of compulsory insurance against civil liability in respect of the use of motor vehicles to the victims of road traffic accidents. The question arose whether a compulsory motor insurance contract meets the requirements of EU law, in particular of Article 2 of the Third Directive 90/232/EEC,[3] where, in return for payment by the party insured of the initial premium, the insurer undertakes to compensate the victims of accidents involving the insured vehicle, regardless of the Member State in whose territory those accidents

2 Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, *OJ* L 272, 13 October 2001, 32.
3 Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, *OJ* L 129, 19 May 1990, 33.

take place, but can have recourse to the party insured to obtain the reimbursement of half of the compensation paid where those accidents take place in the territory of a Member State other than the one in which the vehicle in question is normally based. Article 2 of the Third Directive requires that all compulsory motor insurance policies must offer, in return for payment of a single premium, insurance cover valid throughout the territory of the European Union. The CJEU held that that provision is not aimed exclusively at the relationship between the insurer and the victim, but also at the one between the insurer and the party insured. Therefore, a premium that varies according to whether the insured vehicle is to be used only in the territory of the Member State or in the entire territory of the European Union does not fall within the concept of 'single premium'. Such a variation, contrary to what that article provides, amounts to subjecting the insurer's commitment to assume the risk of using that vehicle outside the Member State in which it is normally based to the payment of a premium supplement.

– Possibility of including service charges in the taxable amount of rental services: Judgment in case 42/14 *Wojskowa Agencja Mieszkaniowa w Warszawie* 16 April 2015: The preliminary reference of the Polish court arose out of the proceedings between the Polish Minister for Finance and the Military Housing Agency in Warsaw concerning the method for calculating and applying value added tax ('VAT') applied by the latter in respect of goods delivered and services provided in the context of the letting of immovable property. The Polish court was unsure how to qualify the rental arrangements between the Agency and its tenants under the VAT Directive 2006/112/EC.[4] The CJEU held that, according to Articles 14(1), 15(1) and 24(1) of the VAT Directive, in the context of the letting of immovable property, the provision of electricity, heating and water and refuse collection, provided by third-party suppliers for the tenant directly using those goods and services must be regarded as being supplied by the landlord where he has concluded agreements for the provision of those supplies and simply passes on the costs thereof to the tenant. Furthermore, the letting of immovable property and the provision of water, electricity and heating as well as refuse collection must, in principle, be regarded as constituting several distinct and independent supplies which need to be assessed separately for VAT purposes, unless the elements of the transaction, including those indicating the economic reason for concluding the contract, are so closely linked that they form, objectively, a single,

4 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, *OJ* L 347, 11 December 2006, 1.

indivisible economic supply which would be artificial to split. That is for the national court to determine taking into account all the circumstances of the letting and the accompanying supplies and, in particular, the content of the agreement itself.

– Scope of the distribution right of a copyright holder: Judgment in case 516/13 *Dimensione Direct Sales and Labianca* 13 May 2015: The preliminary reference of the German court arose out of the proceedings between Dimensione Direct Sales Srl, an Italian company that distributes designer furniture by direct sale in Europe and offers furniture for sale on its website, and Knoll International SpA, an Italian company that belongs to a group that manufactures high-value furniture. Knoll alleged that its exclusive distribution right has been infringed resulting from offers for sale, made by Dimensione, of reproductions of furniture protected by copyright in Germany through a targeted advertising campaign directed at that Member State. The German court asked whether the distribution right laid down in Article 4(1) of Directive 2001/29[5] includes the right to offer the original or a copy of a protected work to the public for sale. If that is the case, the questions arise whether, firstly, that right also includes the exclusive right to advertise those objects, and, secondly, whether the distribution right is infringed where no purchase of such an original or such copies takes place on the basis of the offer for sale of them. By reference to its rulings in *Donner*,[6] *Blomqvist*[7] and *Peek & Cloppenburg*,[8] the CJEU held that there may be an infringement of the exclusive distribution right, where a trader, who does not hold the copyright, sells protected works or copies thereof and addresses an advertisement, through its website, by direct mail or in the press, to consumers located in the territory of the Member State in which those works are protected in order to invite them to purchase it. It is irrelevant, for a finding of an infringement of the distribution right, that the transfer of ownership of the protected work or a copy does not follow such advertising thereof to the purchaser. Therefore, in line with the opinion of Advocate General Cruz Villalón delivered on 4 December 2014, a holder of an exclusive right to distribute a protected work is entitled to prevent an offer for sale or a targeted advertisement of the original or a copy of that work, even if it is not established that that advertisement gave rise to the purchase

5 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* L 167, 22 June 2001, 10.

6 Case 5/11 *Donner*, EU:C:2012:370.

7 Case 98/13 *Blomqvist*, EU:C:2014:55.

8 Case 456/06 *Peek & Cloppenburg*, EU:C:2008:232.

of the protected work by an EU buyer, in so far as that that advertisement invites consumers of the Member State in which that work is protected by copyright to purchase it.

Consumer Protection

Advertising

– Definition of 'commercial practice': Judgment in case 388/13 *UPC Magyarország* 16 April 2015: The preliminary reference of the Hungarian court arose out of the proceedings between the Hungarian consumer protection authority and a provider of cable television services concerning erroneous information which had been provided by the provider to one of its subscribers concerning the duration of their contractual relationship and which prevented the subscriber from making an informed choice and, moreover, occasioned him additional costs. The CJEU was asked whether the communication of erroneous information to a single consumer may be regarded as a 'commercial practice' within the meaning of Directive 2005/29/EC.[9] Contrary to the opinion of Advocate General Wahl of 23 October 2014, the CJEU confirmed that the communication, by a professional to a consumer, of erroneous information, must be classified as a 'misleading commercial practice', even though that information concerned only one single consumer. To reach this conclusion, the Court refers to the wide scope *ratione materiae* of the Directive. The sole criterion for a commercial practice is that the trader's practice is directly connected with the promotion, sale or supply of a product or service to consumers. The Directive is applicable to commercial practices in relations between a professional and a consumer and following the conclusion of a contract or during the latter's performance of that contract. It is immaterial that the action of the professional took place on only one occasion and affected only one single consumer. Therefore, there is no threshold beyond which an act or omission must come within the scope of that Directive and moreover, the consumer has no obligation to establish that other individuals have been harmed by that same trader. Finally, the other question of the

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

Hungarian court gave the CJEU the opportunity to restate its ruling in *CHS Tour Services*:[10] If a commercial practice meets all of the criteria specified in Article 6(1) for classification as a misleading practice in relation to the consumer, it is not necessary further to determine whether such a practice is also contrary to the requirements of professional diligence under Article 5(2)(a), in order for it legitimately to be regarded as unfair.

Passenger rights and package travel

– Price transparency in case of a computerised booking system: Judgment in case 573/13 *AirBerlin* 15 January 2015: In the case at hand, the German Federal Union of Consumer Organisations and Associations took action against the air carrier AirBerlin because of the way in which air fares are presented in the company's computerised booking system. After the costumer has selected a journey and a date on the company's website, he is re-directed to a table listing the possible flight connections for the chosen requirements. The computerised system automatically pre-selects the cheapest flight connection for the costumer and for that option indicates the airfare, separately surcharges, as well as the total flight price, including the service charge. However, for the alternative connections from the table, the system indicates the final price only, if the customer chooses that connection from the table. In this context, the German court asked whether, according to Article 23(1) of Regulation 1008/2008,[11] the final price to be paid must be indicated i) when the prices of air services are shown for the first time and ii) for each of the air services shown in the table. The CJEU confirmed both questions. In line with the aim of the Regulation to enable customers to compare effectively the prices for air services of different air carriers, the final price to be paid must be shown to the consumer whenever the prices of air services are shown, without a distinction between the moment when the price is indicated for the first time, when the consumer selects a particular flight or when the contract is concluded.

10 Case 435/11 *CHS Tour Services*, EU:C:2013:574.

11 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 (Recast), *OJ* L 293, 31 October 2008, 3.

Unfair contract terms

- Scope of 'consumer contracts': Judgment in case 537/13 *Šiba* 15 January 2015: The preliminary reference of the Lithuanian court raised the question whether Directive 93/13/EEC[12] must be interpreted as applying to standard-form contracts for legal services concluded by a lawyer with a natural person who is acting for purposes outside his trade, business or profession. In the case at hand, Ms Šiba concluded with a lawyer three standard-form contracts for the provision of legal services for a fee, without specifying the arrangements for payment of fees and the periods within which payment was to be made. Since Ms Šiba did not pay the fees within the period stipulated by the lawyer, the latter brought a legal action seeking an order for payment. In her appeal in cassation, Ms Šiba argues that the lower courts did not take account of her status as a consumer so that they failed to interpret the contracts at issue in a manner favourable to her. The CJEU confirmed the applicability of the Directive. A lawyer, who provides a legal service for a fee, in the course of his professional activities, to a natural person acting for private purposes is a 'seller or supplier' within the meaning of Article 2(c) of Directive 93/13 and therefore, the contract relating to the supply of such a service is covered by the Directive. There is no specific characteristic of the legal profession that requires an exemption of contracts between lawyers and 'client-consumers'. However, in its assessment whether the contractual terms are plain and intelligible in accordance with the Directive, the national court must take into account the specific nature of the services and, in case of doubt, must render the interpretation most favourable to the consumer.
- National ceiling on the default interest recoverable through the enforcement of a mortgage: Judgment in cases 482/13, 484/13, 485/13 and 487/13 *Unicaja Banco* 21 January 2015: The cases at hand deal with the recovery of unpaid debts arising from mortgage-loan consumer contracts. The preliminary references of the Spanish courts relate to the Spanish Transitional Provisions of Law No 1/2013, which were enacted to repair the flaws in the national legal framework for mortgage enforcement identified by the CJEU in *Aziz*.[13] The legal provisions require that the rate of default interest recoverable through the enforcement of a mortgage must not be more than three times the statutory interest rate. If that ceiling is exceeded, the courts are to give

12 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* L 95, 21 April 1993, 29.

13 Case 415/11 *Aziz*, EU:C:2013:164.

creditors the possibility of adjusting the default interest rate so that it falls within the statutory limit. In line with the opinion of Advocate General Wahl of 16 October 2014, the CJEU held that Directive 93/13 does not preclude the Spanish law provided that its application is without prejudice to the assessment by the national court of the unfairness of the term and does not prevent that court removing the clause if it were to find the latter to be unfair within the meaning of the Directive. That means that the national court must be able assess the possible unfairness of a term relating to default interest also if the rate is less than three times the statutory rate. Moreover, when the default interest rate laid down in a term is higher than that provided by Spanish law and must be subject to a limitation, that must not preclude the national court from drawing all the inferences of possible unfairness of the clause in the light of the Directive and, if necessary, annulling it. In that regard, the CJEU notes that it held in *Kásler and Káslerné Rábai*[14] that the possibility for the national court of substituting a supplementary provision of national law for an unfair term is limited to cases in which the invalidity of the unfair term would require the annulment of the contract in its entirety, thereby exposing the consumer to disadvantageous consequences. However, in the cases at hand, the annulment of the contractual clauses does not appear to have adverse consequences for the consumer, inasmuch as the amounts for which the mortgage enforcement proceedings have been brought will necessarily be lower in the absence of an increase resulting from default interest laid down by those clauses.

– Jurisdiction to rule on an action brought by a consumer seeking a declaration of invalidity of an unfair contract term: Judgment in case 567/13 *Baczó and Vizsnyiczai* 12 February 2015: The preliminary reference arose out of proceedings between two consumers and a Hungarian bank concerning an application for a declaration of invalidity of a mortgage loan contract and of the arbitration clause contained in that contract. The local court referred the case to the county court, which, according to Hungarian Law, has jurisdiction for actions seeking to have unfair contract terms set aside. The consumers challenge the referral of their case because proceedings before that court result in higher costs than those brought before the local court. The CJEU held that the jurisdiction of the court competent to hear actions by consumers seeking a declaration of invalidity of unfair terms does not fall within the scope of Directive 93/13. In line with the national procedural autonomy, it is for the Member States to designate the courts and tribunals having jurisdic-

14 Case 26/13 *Kásler and Káslerné Rábai*, EU:C:2014:282.

tion and to lay down the detailed procedural rules governing actions for safeguarding rights, which individuals derive from EU law. Therefore, the Directive does not preclude national procedural rules pursuant to which a local court which has jurisdiction to rule on an action brought by a consumer seeking a declaration of invalidity of a standard contract does not have jurisdiction to hear an application by the consumer for a declaration of unfairness of contract terms in the same contract. However, that would not be the case if declining jurisdiction by the local court gives rise to procedural difficulties that would make the exercise of the rights conferred on consumers by the EU legal order excessively difficult.

- Scope of the exemption of the assessment of unfairness: Judgment in case 143/13 *Matei* 26 February 2015: The preliminary reference arose out of the proceedings between two borrowers and a Romanian bank concerning allegedly unfair terms in consumer credit contracts providing, first, for a 'risk charge' calculated by the bank as percentage of the outstanding loan and payable every month and, second, authorising the latter to alter the rate of interest unilaterally in case of significant changes in the money market. The CJEU was asked by the Romanian court whether such terms should be exempted from the assessment of unfairness under Directive 93/13 as forming part of the contract's 'main subject matter' and/or 'price' within the meaning of Article 4(2) of the Directive. The CJEU held that those terms are in principle not exempted from the control under the Directive 93/13. However, the final decision has to be taken by the national court having regard to the nature, general scheme and stipulations of the agreements concerned and the legal and factual context of which they form part. For its assessment, the CJEU gives the national court criteria at hand on the basis of its rulings in *Invitel*[15] and *Kásler and Káslerné Rábai*.[16]
- Scope of the exemption of the assessment of unfairness: Judgment in case 96/14 *Van Hove* 23 April 2015: The preliminary reference arose out of the proceedings between a consumer and an insurance company concerning an allegedly unfair contractual term in the insurance contract that includes the definition of 'total incapacity for work' for the purposes of that company's cover of repayments on mortgage loans taken out by the consumer. The insurance company considers that the term regarding the definition of total incapacity for work cannot constitute an unfair term because it concerns the very subject matter of the contract. Moreover, it contends that the definition

15 Case 472/10 *Invitel* EU:C:2012:242.

16 Case 26/13 *Kásler and Káslerné Rábai*, EU:C:2014:282.

of total incapacity for work is clear and precise, even if the criteria which are taken into account for the purposes of fixing the functional incapacity rate are different to those used by the national social security authorities. Firstly, the CJEU held that it cannot be excluded that the term at stake concerns the subject matter of the contract, in so far as it seems to circumscribe the insured risk and the insurer's liability while laying down the essential obligations of the insurance contract. The Court leaves it to the national court to determine this point by taking into account the nature, general scheme and the stipulations of the contract and its legal and factual context. Secondly, as to the question of transparency of contractual terms, the national court has to determine whether the contract sets out transparently the specific functioning of the arrangements to which the relevant term refers and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms, so that, the consumer is in a position to evaluate, on the basis of precise, intelligible criteria, the economic consequences for him which derive from it.

Others

– Information duties for insurance companies: Judgment in case 51/13 *Nationale-Nederlanden Levensverzekering Mij* 29 April 2015: The preliminary reference arose out of the proceedings between an insurance company and an individual concerning the amount of costs and death risk cover premiums forming part of the life assurance policy taken out by the latter. The CJEU was asked by the Dutch court whether Article 31(3) of the Third Life Assurance Directive 92/96/EEC[17] is to be interpreted as precluding an insurance company, on the basis of national general principles, such as the 'open and/or unwritten rules' of Dutch law (which include, in this case, the duty of care of the insurance company, pre-contractual good faith and requirements of reasonableness and fairness), from being required to send to policyholders certain information additional to that listed in Annex II to that Directive. The CJEU held that an obligation to provide additional information can be imposed only where it is necessary to achieving the objective of informing the policyholder and where the information required is clear and accurate in

17 Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC, *OJ* L 360, 9 December 1992, 1.

order to achieve that objective and thus, in particular, in order to guarantee the insurance companies a sufficient level of legal certainty. However, it is for the national court to assess whether the 'open and/or unwritten rules' at issue meet those requirements. The interpretation of Article 31 (3) is in line with the opinion of Advocate General Sharpston of 12 June 2014. However, the Advocate General also offers a more wide-ranging interpretation of the Directive.

Competition Law, Public procurement and State Regulation

– Requirement of non-discrimination for the supply of universal services: Judgment in case 340/13 *bpost* 11 February 2015: Bpost is a universal service supplier in the postal sector in Belgium. It provides for two types of price reductions, namely 'operational discounts', applicabile if a client prepares the mail prior to the handling by bpost, and 'quantity discounts', which are calculated according to the income generated for bpost by a client during a reference period. Prior to 2010, consolidators, ie companies that group together mail from various senders, could aggregate the volume of mail they handled in order to obtain greater quantity discounts. In 2010, bpost decided to change the system so that the discount granted to consolidators was not calculated on the basis of the total volume of mailings coming from all senders to which they provided their services, but on the basis of the volume of mailings generated individually by each of their clients. The Belgian national regulatory authority for postal services decided that bpost's new calculation method was inconsistent with the non-discrimination principle enshrined in Directive 97/67/EC,[18] since an individual bulk sender was entitled to a higher quantity discount than a consolidator. Bpost appealed against that decision before the national court, which decided for a preliminary reference to the CJEU. The CJEU held that the principle of non-discrimination in postal tariffs laid down in Article 12 of Directive 97/67/EC does not preclude the system of quantity discounts per sender at stake. According to the CJEU, a difference in treatment will constitute discrimination prohibited under Article 12 of Directive 97/67 only if, firstly, the senders and the con-

18 Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, *OJ* L 15, 21 January 1998, 14.

solidators are in comparable situations on the postal distribution market and, secondly, there is no objective justification for that difference in treatment. However, the CJEU found that bulk senders and consolidators are not in comparable situations as regards the objective pursued by the system of quantity discounts per sender, which is to stimulate demand in the area of postal services and thereby to increase the turnover of bpost. While the quantity discounts per sender encourage the senders to hand on more mail to bpost, enabling it thereby to make economies of scale, the activity carried out by the consolidators does not contribute to an increase in the mail handed on to bpost and, accordingly, to bpost achieving those savings. Advocate General Sharpston reached the same conclusion in her opinion of 16 October 2014.

– Bias of the contracting authority's experts and the award criteria in a public procurement procedure: Judgment in case 538/13 *eVigilo* 12 March 2015: The preliminary reference of the Lithuanian court arose out of the proceedings between eVigilo Ltd and the contracting authority concerning the evaluation of tenders in a public procurement procedure. eVigilo claimed that the specialists referred to in the tender submitted by the successful tenderers were colleagues of three of the six experts of the contracting authority who drew up the tender documents and evaluated the tenders. Moreover, it claimed that the contracting authority laid down very abstract criteria for the evaluation of the most economically advantageous tender, in particular the criterion of 'compatibility with the needs of the contracting authority'. According to the contracting authority and the successful tenderers, eVigilo was required to prove that the experts were biased and they maintain that eVigilo challenged out of time the lawfulness of the criteria for the evaluation of the most economically advantageous tender. Firstly, the CJEU held that the third subparagraph of Article 1(1) of Council Directive 89/665/EEC[19] and Articles 2, 44(1) and 53(1)(a) of Directive 2004/18/EC[20] do not preclude a finding that the evaluation of the tenders is unlawful solely on the grounds that the tenderer has had significant connections with experts appointed by the contracting authority who evaluated the tenders. The contracting authority is required to determine the existence of possible conflicts of interests and to take appropriate measures in

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* L 395, 30 December 1989, 33.

20 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* L 134, 30 April 2004, 114.

order to prevent and detect conflicts of interests and remedy them. In relation to the examination of an action for annulment of an award decision on the ground that the experts were biased, the unsuccessful tenderer may not be required to provide tangible proof of the experts' bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts has had an effect on the decision to award the contract. Secondly, on the basis of the same provisions, a right to bring an action relating to the lawfulness of the tender procedure must be open, after the expiry of the period prescribed by national law, to reasonably well-informed and normally diligent tenderers who could understand the tender conditions only when the contracting authority, after evaluating the tenders, provided exhaustive information relating to the reasons for its decision. Such a right to bring an action may be exercised until the expiry of the period for bringing proceedings against the decision to award the contract. Finally, according to Articles 2 and 53(1)(a) of Directive 2004/18, a contracting authority may use, as an evaluation criterion of tenders submitted by the tenderers for a public contract, the degree to which they are consistent with the requirements in the tender documentation.

– Award criteria for procurement contracts for the provision of services of an intellectual nature, training and consultancy: Judgment in case 601/13 *Ambisig* 26 March 2015: The preliminary reference of the Portuguese court arose out of the proceedings between Ambisig and Nersant concerning the decision by Nersant to award to Iberscal a contract for the supply of training and consultancy services for the execution of a project. Ambisig challenged the fact that the contract notice included in its evaluation criteria the factor relating to evaluation of the team assigned to performance of the contract. The Portuguese court asked the CJEU whether, for the award of a procurement contract for the provision of services of an intellectual nature, Article 53(1)(a) of Directive 2004/18 precludes the contracting authority from using an award criterion enabling evaluation of the teams specifically put forward by the tenderers for the performance of the contract and which takes into consideration the composition of the team and the experience and academic and professional background of the team members. When the award is made to the tender most economically advantageous, Article 53(1)(a) sets out the criteria on which the contracting authorities shall base the award of public contracts. The CJEU reasoned that the quality of performance may depend decisively on the 'professional merit' of the people entrusted with the performance of the contract, which is made up of their professional experience and background. Where a contract for the provision of services of an intellectual

nature, training and consultancy is to be performed by a team, it is the abilities and experience of its members which are decisive for the evaluation of the professional quality of the team. That quality may be an intrinsic characteristic of the tender and linked to the subject matter of the contract for the purposes of Article 53(1)(a) of Directive 2004/18. Therefore, in line with the opinion of Advocate General Wathelet of 18 December 2014, the CJEU held that that quality may be included as an award criterion in the contract notice or in the relevant tendering specifications.

– Change of technical specifications after the publication of the public contract notice: Judgment in case 278/14 *Enterprise Focused Solutions* 16 April 2015: The preliminary reference of the Romanian court arose out of the proceedings between SC Enterprise Focused Solutions SRL ('EFS') and Alba Iulia District Emergency Hospital concerning the latter's decision rejecting the tender submitted by EFS in the context of a procedure for the award of a public contract for the supply of computing systems and equipment. The tender documentation stated that the processor was required to correspond 'at least' to an 'Intel Core i5 3.2 GHz or equivalent' processor. EFS filed a complaint, claiming that the performance of the processor offered in its tender is superior to that of the processor specified in the technical specifications of the contract. However, the contracting authority rejected the tender on the ground that it did not comply with the technical specifications of the contract by reference to the third-generation processor of Intel. Having consulted the Intel website, that first and second-generation Core i5 processors with a speed of 3.2 GHz were no longer in production or supported by that manufacturer, albeit still commercially available, and the same type of processor now being produced by that manufacturer and having a speed of at least 3.2 GHz was the third-generation processor. The CJEU rephrased the question of the national court as asking whether a contracting authority which has defined a technical specification by reference to a product of a particular brand may, where that product is no longer in production, modify that specification by referring to a comparable product of the same brand which is now in production but which has different characteristics. Even though the contract, in view of its value, does not fall within the scope Directive 2004/18, it is none the less subject to the fundamental rules and the general principles of the FEU Treaty, in particular the principles of equal treatment and of non-discrimination on grounds of nationality and the consequent obligation of transparency, provided that those contracts have a certain cross-border interest. It is for the referring court to make a detailed assessment, taking into account all the relevant information characterising the context of the case brought before it, as to whether the contract at issue does have certain cross-border interest. If

that is the case, in line with the principles of equal treatment and of non-discrimination and the obligation of transparency, the contracting authority cannot reject a tender which satisfies the requirements of the contract notice on grounds which are not set out in that notice. It is irrelevant, in that regard, whether or not the element to which that specification refers is still in production or available on the market.

Employment law and Discrimination

– Posted workers and minimum wage provided for by the collective agreements: Judgment in case 396/13 *Sähköalojen ammattiliitto* 12 February 2015: The preliminary reference of the Finnish court arose from a dispute between a Finnish trade union and a Polish undertaking, 'ESA'. In order to carry out electrical installation work at the construction site for a nuclear power station in Finland, ESA concluded, in Poland and under Polish law, employment contracts with 186 workers. The latter were posted to ESA's Finnish branch. Maintaining that ESA did not pay them the minimum remuneration that was due to them under the Finnish collective agreements, the workers individually assigned their pay claims to the Finnish trade union so that it could recover those claims. Firstly, the CJEU held that on the basis of Directive 96/71/EC[21] read in the light of Article 47 of the Charter, the Member State of the seat of the undertaking that has posted workers to the territory of another Member State – under which the assignment of claims arising from employment relationships is prohibited – may not prohibit a trade union to bring an action before a court of the second Member State, in which the work is performed, in order to recover for the posted workers, pay claims which have been assigned to it in conformity with the law in force in the second Member State. Secondly, the CJEU concluded that Article 3(1) and (7) of Directive 96/71, read in the light of Articles 56 TFEU and 57 TFEU i) does not preclude a calculation of the minimum wage for hourly work and/or for piecework which is based on the categorisation of employees into pay groups, provided that this is carried out in accordance with rules that are binding and transparent; ii) a daily allowance must be regarded as part of the minimum wage on the same conditions as those applicable to local workers when they are posted

21 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *OJ* L 18, 21 January 1997, 1.

within the Member State concerned; iii) compensation for daily travelling time, which is paid on condition that the daily journey to and from the place of work is of more than one hour's duration, must be regarded as part of the minimum wage; iv) coverage of the cost of those workers' accommodation is not to be regarded as an element of their minimum wage; v) an allowance taking the form of meal vouchers is not to be regarded as part of the latter's minimum salary; vi) the pay which the posted workers must receive for the minimum paid annual holidays corresponds to the minimum wage to which those workers are entitled during the reference period. The outcome reached by the CJEU is largely in line with the opinion of Advocate General Wahl of 18 September 2014.

– Measures to prevent the abusive use of successive fixed-term contracts: Judgment in case 238/14 *Commission* v *Luxembourg* 26 February 2015: In the case at hand, the European Commission claims that the CJEU should declare that the Grand Duchy of Luxembourg has failed, in the case of occasional workers in the entertainment arts, to fulfil its obligation to prevent the abuse of fixed-term employment contracts under Clause 5 of the Framework Agreement on fixed-term work.[22] The CJEU reminds that the purpose of Clause 5(1) of the Framework Agreement is to place limits on successive recourse to fixed-term employment contracts or relationships, regarded as a potential source of abuse to the detriment of workers, by laying down as a minimum a number of protective provisions designed to prevent the status of employees from being insecure. The national legislation at stake permits the recruitment of occasional workers in the entertainment arts on the basis of successive fixed-term employment contracts, without providing for any measure limiting the maximum duration of those contracts, or the number of times that they may be renewed, in accordance with Clause 5(1)(b) and (c) of the Framework Agreement. In particular, according to national law, fixed-term employment contracts concluded with occasional workers in the entertainment arts may be renewed more than twice, even for a total period exceeding twenty-four months, without being deemed to be permanent employment contracts. Therefore, in respect of occasional workers in the entertainment arts, the national legislation does not lay down legal measures equivalent to those described in Clause 5(1) of the Framework Agreement. The CJEU determined next whether the renewal of successive fixed-term employment contracts

22 Framework Agreement on fixed-term work of 18 March 1999, which is set out in the Annex to Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, *OJ* L 175, 10 July 1999, 43.

concluded with workers in that category may be justified by an 'objective reason' for the purposes of Clause 5(1)(a) of the Framework Agreement. However, the CJEU held that even supposing that the national legislation pursues the objective to provide occasional workers in the entertainment arts with a measure of flexibility, as well as social benefits, by making it possible for employers of that category of worker to recruit on the basis of recurring fixed-term employment contracts, such an objective cannot bring that legislation into conformity with Clause 5(1)(a) of the Framework Agreement, since it does not prove the existence of specific and concrete circumstances characterising the activity in question and therefore justifying, in that particular context, the use of successive fixed-term employment contracts.

– Review of prohibitions or restrictions on the use of temporary agency work: Judgment in case 533/13 *AKT* 17 March 2015: In the case at hand, an action has been brought before the Finnish Labour Court by the Finnish transport workers' union, seeking a decision finding that Shell Aviation Finland (SAF) and an employers' association have infringed a clause in the applicable collective agreement relating to the use of temporary agency work. SAF is an undertaking that supplies fuel to several airports in Finland. In 2010, SAF concluded a contract with the temporary-work agency Ametro Oy. Based on this contract, SAF was required to use temporary agency workers provided by Ametro Oy to replace permanent workers on sick leave, or to deal with peaks of work. The trade union took the view that SAF has contravened the applicable collective agreement by employing temporary agency workers permanently and continuously to perform the same tasks as performed by its own workers, which is an improper use of temporary agency workers. The Finnish court questions whether the clause in question constitutes an unjustified restriction on the use of temporary agency workers which is incompatible with Article 4(1) of Directive 2008/104[23] and whether it should therefore be disapplied. However, the CJEU held that, by imposing upon the competent authorities of the Member States the obligation to review their national legal framework, in order to ensure that prohibitions or restrictions on the use of temporary agency work continue to be justified on grounds of general interest, and the obligation to inform the Commission of the results of that review, Article 4(1) is addressed solely to the competent authorities of the Member States. The provision does not impose an obligation on national courts not to apply any rule of national law containing prohibitions or restrictions on the use of temporary agency

23 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, *OJ* L 327, 5 December 2008, 9.

work, which are not justified on grounds of general interest within the meaning of Article 4(1). The CJEU thereby reached a different conclusion than Advocate General Szpunar in his opinion of 20 November 2014. The Advocate General concluded that Article 4(1) prohibits the continued application or the introduction of prohibitions or restrictions on the use of temporary agency work that are not justified on grounds of general interest.

– Definition of 'worker': Judgment in case 316/13 *Fenoll* 26 March 2015: The preliminary reference of the French court raised the question whether a person placed in a 'Centre d'aide par le travail' (work rehabilitation centre) can be classified as a 'worker' within the meaning of Article 7 of Directive 2003/88[24] or within the meaning of Article 31 of the Charter of Fundamental Rights of the EU. These centres provide socio-medical and educational support to young people or adults who are temporarily or long-term handicapped. Mr Fenoll worked in a work rehabilitation centre from 1 February 1996 to 20 June 2005. According to the employment conditions of his contract, he was entitled to five weeks of fully paid annual leave per year. However, due to illness he was not able to enjoy this annual leave, and upon the end of his contract, he claimed pecuniary compensation for these entitlements. This was refused, however, because a worker in a 'Centre d'aide par le travail' is not to be considered an employee under French law. In line with the opinion of Advocate General Mengozzi delivered on 12 June 2014, the CJEU ruled that a worker, who works in a work rehabilitation centre, can be classified as a 'worker' within the meaning of Article 7 of Directive 2003/88 and within the meaning of Article 31 of the Charter of Fundamental Rights of the EU.
– Meaning of 'establishment': Judgment in case 80/14 *USDAW and Wilson* 30 April 2015: In the case at hand, Woolworths and Ethel Austin, which are companies active in the high street retail sector throughout the UK, became insolvent. Protective awards against the employers were given to some dismissed employees because the consultation procedure provided for in the Trade Union and Labour Relations Act 1992 had not been followed. Only employees that had worked at stores with more than 20 employees received this award because the employers claimed that each store was to be regarded as a separate establishment. In this context, the English court asked about the exact scope of the concept of 'establishment' for the purposes of determining whether collective redundancies have taken place. In line with the

24 Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ* L 299, 18 November 2003, 9.

opinion of Advocate General Wahl delivered on 5 February 2015, the CJEU held that the term 'establishment' in Article 1(1)(a)(ii) of Directive 98/59[25] must be interpreted in the same way as the term in Article 1(1)(a)(i) of that Directive. The term must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. In line with it's ruling in *Rockfon*,[26] it is not essential that the unit in question is endowed with a management that can independently effect collective redundancies. Moreover, in line with *Athinaïki Chartopoïia*,[27] an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks. The entity in question need not have legal, economic, financial, administrative or technological autonomy, in order to be regarded as an 'establishment'. Consequently, where an 'undertaking' comprises several entities meeting the criteria set out above, it is the entity to which the workers made redundant are assigned to carry out their duties that constitutes the 'establishment' for the purposes of Article 1(1)(a) of Directive 98/59. Therefore, national legislation is allowed to lay down an obligation to inform and consult workers in the event of the dismissal, within a period of 90 days, of at least 20 workers from a particular establishment of an undertaking, and not where the aggregate number of dismissals across all of the establishments or across some of the establishments of an undertaking over the same period reaches or exceeds the threshold of 20 workers.

– Meaning of 'establishment': Judgment in case 182/13 *Lyttle and Others* 13 May 2015: The preliminary reference of the Irish court arose out of the proceedings against Bluebird, concerning the lawfulness of the dismissal of four former employees. Bonmarché at four different stores employed the claimants. Bonmarché became insolvent and was then transferred to Bluebird, who started a business restructuring process entailing the closure of many stores, including the stores in which the claimants worked. The claimants were dismissed together with the other employees. However, the dismissal process was not preceded by any consultation procedure as referred to in Directive 98/59. The CJEU rendered the same interpretation as in the case 80/14 *USDAW and Wilson*.

25 Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, *OJ* L 225, 12 August 1998, 16.

26 Case 449/93, *Rockfon* EU:C:1995:420.

27 Case 270/05, *Athinaïki Chartopoïia* EU:C:2007:101.

- Meaning of 'establishment' and 'collective redundancies': Judgment in case 392/13 *Rabal Cañas* 13 May 2015: The preliminary reference of the Spanish court arose out of the proceedings between Mr Rabal Cañas and Nexea concerning the dismissal of Mr Rabal Cañas, which he submits was void on the ground that Nexea had fraudulently circumvented the application of the mandatory procedure relating to collective redundancies under Directive 98/59. In the course of 2012, Nexea dismissed several workers and in December 2012 Nexea had to close its establishment in Barcelona and transfer the remaining staff to its other establishment in Madrid. On 20 December 2012, Mr Rabal Cañas, who was working in Barcelona, was dismissed on economic grounds relating to production and organisation. The CJEU held that Directive 98/59 precludes national legislation that introduces the undertaking and not the establishment as the sole reference unit, where the effect is to preclude the information and consultation procedure provided for in Articles 2 to 4 and, when the dismissals in question would have been considered 'collective redundancies', had the establishment been used as the reference unit. Furthermore, for establishing whether 'collective redundancies' have been effected, there is no need to take into account individual terminations of contracts of employment concluded for limited periods of time or for specific tasks, when those terminations take place on the date of expiry of the contract or on the date on which that task was completed. When it comes to the existence of collective redundancies effected under contracts of employment concluded for limited periods of time or for specific tasks, it is not necessary for the cause of such collective redundancies to derive from the same collective contractual framework for the same duration or the same task.
- Minimum contribution period required for the grant of maternity leave: Judgment in case 65/14 *Rosselle* 21 May 2015: In September 2003 Ms Rosselle began working as a teacher in Belgium, and, five years later, was appointed as an established public servant by the Flemish Community. She obtained non-active status for personal reasons in order to teach in language immersion classes in the French Community, as from 1 September 2009, as a salaried employee. Ms Rosselle continued to work as a salaried employee until her maternity leave started, on 11 January 2010. However, her request for maternity allowances was rejected on the ground that Ms Rosselle had changed her status on 1 September 2009, by becoming a salaried employee after having been an established public servant. Under Belgian law, in order to be eligible to receive a maternity allowance, a minimum contribution period of six months must be completed, a condition which Ms Rosselle had not fulfilled as a salaried employee. The Belgian court seeks guidance from the CJEU on whether refusing to grant Mrs Rosselle a maternity allowance is

in breach of Directive 92/85.[28] The CJEU held that the second subparagraph of Article 11(4) of Directive 92/85 precludes a Member State from refusing to grant a worker a maternity allowance on the ground that, as an established public servant having obtained non-active status for personal reasons in order to work as a salaried employee, she has not completed, in the context of her work as a salaried employee, the minimum contribution period required under national law in order to be eligible to receive that maternity allowance, even if she has worked for over 12 months immediately prior to the presumed date of confinement. The judgment is in line with the opinion of Advocate General Sharpston delivered on 18 December 2014.

Discrimination

– National legislation providing for severance allowance not to be paid to workers entitled to a State retirement pension: Judgment in case 515/13 *Ingeniørforeningen i Danmark* 26 February 2015: Mr Landin worked as an engineer under the provisions of the Danish Law on salaried employees since 1999. With effect from his 65th birthday, he applied to have payment of his State retirement pension postponed to a later time so as to increase his pension entitlement. Two years later, his employer notified Mr Landin of its decision to dismiss him after the expiry of six months. As Mr Landin was over the age of 65 and entitled to a State retirement pension, the employer did not pay him severance allowance. The employer took the view that under the Law on salaried employees, an employee who is entitled to a State retirement pension loses his claim to severance allowance, even if he continues to be in active employment and even though he has asked for payment of his State retirement pension to be postponed. The Danish court asked the CJEU whether the prohibition of direct discrimination on grounds of age contained in Articles 2 and 6 of Directive 2000/78[29] preclude a Member State from maintaining a legal situation whereby an employer, upon dismissal of a salaried employee who has been continuously employed, must, upon termination of the salaried employee's employment, pay an allowance, while this allowance is not to be paid where the salaried employee, upon termination

28 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, *OJ* L 348, 28 November 1992, 1.

29 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* L 303, 2 December 2000, 16.

of employment, is entitled to receive a State retirement pension. The CJEU held that that legislation is not prohibited, provided that it is both objectively and reasonably justified by a legitimate aim relating to employment and labour market policy, and constitutes an appropriate and necessary means of achieving that aim.

Private International and International Procedural Law

– Financial services purchased from a professional intermediary: Judgment in case 375/13 *Kolassa* 28 January 2015: The preliminary reference of the Austrian court arose out of the proceedings between an Austrian consumer and Barclays Bank Plc, established in London, concerning an action for damages based on the contractual, precontractual, tortious or delictual liability of that bank as a result of the loss in value of a financial investment made by the consumer through a financial instrument issued by the bank. However, the certificates at stake issued by Barclays Bank were not sold directly to consumers, but instead to institutional investors, who only in turn sold them to consumers. The Austrian court had doubts about its jurisdiction and submitted several questions regarding Regulation 44/2001[30] to the CJEU. The CJEU held that in the absence a contract between the consumer and the issuer of the certificates, a consumer may not invoke jurisdiction under Article 15(1) of Regulation 44/2001. Moreover, jurisdiction cannot be based on Article 5(1), which requires a legal obligation freely consented to by one person towards another. The Austrian court wanted to know if its jurisdiction could then be based on Article 5(3). The CJEU affirmed that Article 5(3) applies to an action seeking to put in issue the liability of the issuer of a certificate on the basis of the prospectus relating to it and of breach of other legal information obligations binding on the issuer, in so far as that liability is not based on a matter relating to a contract. Accordingly, the courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, particularly when the damage alleged occurred directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts. Finally, the CJEU ruled that in the context of determining the international jurisdiction under the Regulation, a national court does not have to conduct a comprehensive taking of evidence in relation to disputed

30 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* L 12, 16 January 2001, 1.

facts that are relevant both to the question of jurisdiction and to the existence of the claim. The court can, however, examine its international jurisdiction in the light of all the information available to it, including, the allegations made by the defendant. The CJEU followed the opinion of Advocate General Szpunar delivered on 3 September 2014.

– Enforcement of an anti-suit arbitral award: Judgment in case 536/13 *Gazprom* 13 May 2015: In the case at hand, the Lithuanian court asked the CJEU whether Regulation 44/2001 precludes a national court from recognising and enforcing, or from refusing to recognise and enforce, an anti-suit arbitral award. The Russian company Gazprom supplies gas to Lithuania via a Lithuanian company, which was owned by Gazprom, E.ON and the Lithuanian State. A shareholders' agreement between Gazprom, E.ON and the Lithuanian Ministry of Energy obliged those parties to safeguard the gas supply and contained an arbitration clause. The Ministry of Energy commenced domestic court proceedings against the Lithuanian company, its managing director and two board members appointed by Gazprom. The Ministry alleged that the setting of the gas price had been contrary to the company's interests and sought an investigation. In response, Gazprom commenced arbitration in Stockholm under the shareholders' agreement. It sought an order that the Ministry should have arbitrated these matters and that it should withdraw its court proceedings. In July 2012 the tribunal made such an award. Before the Lithauanian courts, the Ministry relied on the public policy exception in Articles V(2)(a) and (b) of the New York Convention 1958 but also argued that recognition of the tribunal's award would be contrary to the Regulation 44/2001, in particular the CJEU's decision in *West Tankers*.[31] The CJEU distinguished the case at hand from *West Tankers*. In *West Tankers*, the CJEU prohibited the grant of an anti-suit injunction by a court of a Member State against proceedings in breach of an arbitration clause brought before a court of another Member State. However, in the case at hand, the order originated from an arbitral tribunal and arbitration is excluded from the scope of Regulation. Therefore, in line with the result reached by Advocate General Wathelet on 4 December 2014, it held that Regulation 44/2001 does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State. This should be left to be determined by the national arbitration law applicable in the state of enforcement and, as the case may be, the New York Convention.

31 Case 185/07 *West Tankers* EU:C:2009:69.

- Acceptance of the general terms and conditions of a contract for sale by 'click-wrapping': Judgment in case 322/14 *El Majdoub* 21 May 2015: The preliminary reference arose out of the legal proceedings between a car dealer and CarsOnTheWeb.Deutschland GmbH, concerning the sale on the latter's website of a motor vehicle to the applicant. In the light of the assessment of the validity of the jurisdiction clause contained in the contract, the question arose whether 'click wrapping' fulfils the requirements relating to a communication by electronic means within the meaning of Article 23(2) of Regulation 44/2001. On the seller's website, before making a purchase, a potential purchaser must expressly accept the general terms of sale by clicking the relevant box before making a purchase. However, that operation does not automatically lead to the opening of the document containing the seller's general terms, as an extra click on a specific hyperlink for that purpose is still necessary. The applicant took the view that the click-wrapping method of accepting general terms and conditions does not fulfil the requirements laid down in Article 23(2) of Regulation 44/2001, in that the window containing those conditions does not open automatically on registration on the site or during a transaction. The CJEU held, however, that click-wrapping fulfils the requirements under Article 23(2) as that method makes it possible to print and save the text of those terms and conditions before the conclusion of the contract. It therefore constitutes a communication by electronic means, which provides a durable record of the agreement, within the meaning of that provision.
- Jurisdiction for the claim of compensation against several participants in a cartel: Judgment in case 352/13 *CDC Hydrogen Peroxide* 21 May 2015: In the case at hand, following a decision by the European Commission finding several companies supplying hydrogen peroxide and sodium perborate to have participated in a cartel contrary to EU competition rules, Cartel Damage Claims Hydrogen Peroxide SA (CDC) brought an action for damages before the German courts. CDC is a Belgian company to which a number of companies transferred their rights to damages suffered in connection with that cartel. As the defendants were established in various Member States, CDC claimed that the German courts had jurisdiction to rule in respect of all the defendants because one of them had its registered office in Germany. However, eventfully, CDC withdrew its action against that German company, following an out-of-court settlement. The other defendants challenge the international jurisdiction of the German court on the basis of the jurisdiction clauses contained in their supply contracts. Harbouring doubts as to whether it had international jurisdiction, the German court referred to the CJEU several questions concerning the interpretation of Regulation 44/2001. The CJEU

pointed out first that the requirements for holding the companies, which participated in the cartel liable in tort have to be determined by national law. Since the national laws might differ and there is a risk of irreconcilable judgments if the victims bring actions before the courts of various Member States, Article 6(1) of the Regulation provides for an action to be brought before the courts of one single Member States against several defendants domiciled in various Member States. An applicant's withdrawal of its action against the sole defendant domiciled in the same Member State does not affect the jurisdiction to hear and determine actions brought against the other defendants. However, this may not give rise to abuse of the Regulation. Secondly, the CJEU held that according to Article 5(3), a person wronged by an unlawful cartel has the possibility to bring its action for damages either before the courts of the place where the cartel itself was concluded, or one specific agreement which implied the existence of the cartel, or before the courts of the place where the loss arose. That place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office. While the courts thus identified have jurisdiction to hear an action brought either against any one of the participants in the cartel or against several of the participating companies, jurisdiction is limited to the loss suffered by the undertaking whose registered office is located in its jurisdiction. Therefore, an applicant such as CDC, who has consolidated several undertakings' potential claims for damages, would need to bring separate actions for the loss suffered by each of those undertakings before the courts with jurisdiction for their respective registered offices. Thirdly, in line with Article 23(1), the court seised of a matter is bound by a jurisdiction clause, which derogates from the specific provisions of the Regulation, provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law. That is to ensure the victim's consent to the clauses. Advocate General Jääskinen in his opinion delivered on 11 December 2014 reached the same conclusion with regard to the first and the third question. Regarding the second question Advocate General Jääskinen concluded that Article 5(3) is inoperative in the present case.