EU Case Law

Betül Kas

European Union Litigation

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 April 2014 and the end of June 2014.

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General Law of Contracts and Obligations

- ***Surcharging clause in contract between a mobile phone operator and its customers***
- Judgment in case 616/11 *T-Mobile Austria* 9 April 2014 (CJEU): The Austrian Consumers' Association initiated an action for an injunction against the mobile phone operator, T-Mobile Austria. T-Mobile charged customers who chose to pay their 'Europe free' subscription by paper transfer order or via online banking (instead of direct debit or credit card) an additional monthly fee of 3 euros. In this context, the referring court asked whether Article 52(3) of the Payment Services Directive[1] applies to mobile phone companies, whether a transfer order form constitutes a payment instrument and whether the general prohibition of surcharges in Austria is compatible with the Directive. In line with the opinion of Advocate General Wathelet delivered on 24 October 2013,[2] the CJEU affirmed the applicability of Article 52(3) of the

1 Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, *OJEC* 2007 L 319/1.

2 For a summary of the Opinion of AG Wathelet, see *European Review of Contract Law* 2014, 142.

Betül Kas: PhD Researcher, Law Department, European University Institute, Via dei Roccettini 9, 50014 San Domenico di Fiesole/Italy, E-Mail: Betul.Kas@EUI.eu

Payment Services Directive to the use of a payment instrument in the course of the contractual relationship between a mobile phone operator, as payee, and that operator's customer, as payor. Moreover, both the procedure for ordering transfers by means of a transfer order form signed by the payor in person and the procedure for ordering transfers through online banking constitute payment instruments under its scope. Regarding Austria's prohibition of payment charges, according to the CJEU, it is for the national court to assess, whether the national legislation, as a whole, takes into account the need to encourage competition and the use of efficient payment instruments. Both the Court and the Advocate General ruled out the need to limit the temporal effects of the judgment.

- ***Application of the private copying exception***
- Judgment in case 435/12 *ACI Adam and Others* 10 April 2014 (CJEU): The case dealt with the exception to the exclusive reproduction right of holders of copyright and related rights under Article 5(2)(b) of the Copyright Directive.[3] Member States which decide to introduce the private copying exception into their national law are required to provide for the payment of 'fair compensation' to copyright holders in order to compensate them adequately. It was questioned whether the private copying exception may be applied to reproductions made from unlawful sources and, accordingly, whether the private copying levy may be charged by reference to reproductions made from unlawful sources. In accordance with the opinion of Advocate General Cruz Villalón delivered on 9 January 2014,[4] the CJEU came to the conclusion that the private copying exception is only applicable to private copies made from lawful sources and not to those made from unlawful sources. National legislation which makes no distinction in that regard is not in compliance with the Directive.

- ***Prospectus requirements for the offer of securities to the public***
- Judgment in case 359/12 *Timmel* 15 May 2014 (CJEU): In its judgment, the CJEU followed closely the opinion of Advocate-General Sharpston, delivered

3 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, *OJEC* 2001 L 167/10.

4 For a summary of the Opinion of AG Cruz Villalón and the factual background of the case, see *European Review of Contract Law* 2014, 285.

on 26 November 2013.[5] The Court clarified that according to Article 22(2) of the Prospectus Regulation,[6] where the issuer or offeror does know, or is able to determine at the time of approval of the base prospectus, the information referred to in Article 22(1), that information must be published in the base prospectus. If the required information can only be determined at the time of the individual issue and does not involve a significant new factor, material mistake or inaccuracy, it has to be published in the final terms. In that case, it is necessary for the base prospectus to indicate the information that will be included in those final terms and for that information to comply with the conditions laid down in Article 22(4). However, if that information, first, constitutes a significant new factor or corrects a material mistake or inaccuracy and, second, is capable of affecting the assessment of the securities, it requires publication of a supplement, in accordance with Article 16(1) of the Prospectus Directive[7] and Article 22(7) of the Prospectus Regulation. Regarding the requirement that a prospectus must be easily accessible on its website under Article 29(1)(1) of the Prospectus Regulation, the CJEU held that it is not fulfilled where there is an obligation to register on that website, entailing acceptance of a disclaimer and the obligation to provide an email address, where a charge is made for that electronic access or where consultation of parts of the prospectus free of charge is restricted to two documents per month. Finally, according to Article 14(2)(b) of the Prospectus Directive, the base prospectus has to be made available both at the registered office of the issuer and at the offices of the financial intermediaries.

- ***Creation of copies of an internet site on-screen and in the cache of the hard disk in the course of browsing the internet***
- Judgment in case 360/13 *Public Relations Consultants Association* 5 June 2014 (CJEU): The case at hand raised the question whether internet users who view websites on their computers without downloading or printing them out are committing infringements of copyright by reason of the creation of on-screen copies and cached copies. As stated by the UK Supreme Court, the creation of

5 For a summary of the Opinion of AG Sharpston and the factual background of the case, see *European Review of Contract Law* 2014, 126.

6 Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71 as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, *OJ* 2004 L 149/1.

7 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *OJ* 2003 L 345/64.

those copies is the automatic result of browsing the internet and constitutes an indispensable element of the operation of the technical processes involved in internet browsing. The CJEU held that those copies made by an end-user in the course of viewing a website satisfy the conditions for the exception in Article 5 of the Copyright Directive to apply. They may be made without the authorisation of the copyright holders since they are temporary, transient or incidental in nature and constitute an integral and essential part of a technological process. Moreover, the legitimate interests of the copyright holders concerned are properly safeguarded and there is no conflict with a normal exploitation of the works.

Consumer Protection

Advertising

- ***Conditions of a 'pyramid promotional scheme'***
- Judgment in case 515/12 *4finance* 3 April 2014 (CJEU): The CJEU was asked to rule on the conditions under which a system of trade promotion can be considered a 'pyramid promotional scheme' within the meaning of Annex I, point 14, of the Unfair Commercial Practices Directive[8] and, therefore, is prohibited in all circumstances. The Court identified three conditions of a 'pyramid promotional scheme'. First, the promotion must be based on the promise that the consumer will have the opportunity of making a commercial profit. Secondly, the realisation of that promise depends on the introduction of other consumers into the scheme. Thirdly, the greater part of the revenue to fund the compensation promised to consumers does not result from a real economic activity. On that basis and in accordance with the opinion of Advocate-General Sharpston delivered on 19 December 2013,[9] the CJEU clarified that it is required that the consumer gives financial consideration for the opportunity to receive compensation that is derived primarily from the introduction of other consumers into the scheme rather than from the sale or

8 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* 2005 L 149/22.

9 For a summary of the Opinion of AG Sharpston and the factual background of the case, see *European Review of Contract Law* 2014, 134.

consumption of products. The amount of the financial contribution is irrelevant. Regarding the case at hand, the CJEU expressed doubts as to whether the condition of consumers' compensation deriving *primarily* from the introduction of new members to the scheme was met since the bonuses paid to existing members were funded only to a very small extent by the financial consideration required from new members. However, the final assessment has to be carried out by the national court.

- ***Ratione temporis of the dealer's obligation to display energy labels on televisions***
- Judgment in case 319/13 *Rätzke* 3 April 2014 (CJEU): In the case at hand, Mr Rätzke brought an action for an injunction under the German Law against unfair competition by which he sought to prohibit his competitor, S+K Handels GmbH, from offering for sale televisions not bearing the label provided for in Annex V to the Commision Delegated Regulation No 1062/2010.[10] The question was raised whether S+K was obliged to label, in accordance with Article 4(a) of the Commision Delegated Regulation, the television which was delivered to it on 20 May 2011 without a label. The CJEU held that the dealer's obligation to display labels is ancillary to the supplier's obligation to provide the relevant labels. Regarding the responsibilities of the supplier, Article 3(3) in conformity with the scope *ratione temporis* of the Commission Delegated Regulation, which applies from 30 November 2011, contains no requirement in respect of televisions placed on the market before that date. Therefore, the obligation for dealers to ensure that each television, at the point of sale, bears the label provided by the suppliers applies only to televisions which have been placed on the market, ie dispatched for the first time by the manufacturer with a view to their distribution in the sales chain, from 30 November 2011.

- ***Ratione temporis of the labelling obligations for health claims made on foods***
- Judgment in case 609/12 *Ehrmann* 10 April 2014 (CJEU): The preliminary reference arose out of the proceedings between Ehrmann and the German Association for Combatting Unfair Competition regarding the temporal application of the obligations laid down in Article 10(2) of Regulation No 1924/

10 Commission Delegated Regulation (EU) No 1062/2010 of 28 September 2010 supplementing Directive 2010/30/EU of the European Parliament and of the Council with regard to energy labelling of televisions, *OJ* 2010 L 314/64.

2006.[11] According to Ehrmann, Article 28(5) has the effect of suspending temporarily the condition of authorisation laid down in Article 10(1), and, as a result, all the obligations laid down therein, including the specific information requirements detailed in Article 10(2). In line with the opinion of Advocate-General Wathelet, delivered on 14 November 2013,[12] the CJEU clarified that for health claims to be permitted, they must comply with the conditions in Article 10(1), ie that inter alia it must be included in the lists of authorised claims provided for in Articles 13 and 14, and must include the mandatory information referred to in Article 10(2). For the period between the entry into force of the regulation and the adoption of the list referred to in Article 13, Article 28(5) allows food business operators, under its own responsibility and in accordance with the conditions laid down in the regulation, to make health claims. Therefore, during this transitional period, health claims can be made provided they comply with the regulation, i.e. inter alia the obligations laid down in Article 10(2). It is for the national court to determine whether, in the case at hand, the slogan falls within Article 13(1)(a), and if it does, whether it satisfies the conditions laid down in Article 28(5).

Unfair contract terms

- ***Contractual term relating to the exchange rate applicable to repayments of a loan denominated in a foreign currency***
- Judgment in case 26/13 *Kásler and Káslerné Rábai* 30 April 2014 (CJEU): According to a consumer credit agreement, the amount of the loan was determined at the buying rate of exchange for the foreign currency applied by the bank on the date of advance of the funds. Pursuant to the disputed term, the selling rate of exchange of that currency was applied for the purpose of calculating the loan repayment instalments. The borrowers claimed that that term conferred an unjustified benefit on the bank. The CJEU was asked to determine whether the contested term is exempted under Article 4(2) of the Unfair Terms Directive.[13] The expression the 'main subjectmatter of a contract' could cover the contested term, if the national court finds, having

11 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, *OJ* 2006 L 404/9, and corrigendum *OJ* 2007 L 12/3, as amended by Commission Regulation (EU) No 116/2010 of 9 February 2010, *OJ* 2010 L 37/16.

12 For a summary of the Opinion of AG Wathelet and the factual background of the case, see *European Review of Contract Law* 2014, 132.

regard to the nature, general scheme and stipulations of the contract and its legal and factual context, that it lays down an essential element of the debtor's obligation. The Court excluded the point that the difference between the selling and buying rates of the foreign currency can be considered as 'remuneration' for a supplied service, the adequacy of which may also not be examined as regards unfairness. The term merely determines the conversion rate of the foreign currency in which the loan agreement is denominated, in order to calculate the repayment instalments, without the lender providing any foreign exchange service. Secondly, the Court affirmed that the requirement of transparency in Article 4(2) cannot be reduced merely to the terms being formally and grammatically intelligible. By analogy with its reasoning in *RWE Vertrieb*,[14] the contract has to set out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him. Finally, the CJEU held that if the contract cannot continue in existence after an unfair term has been deleted, Article 6(1) of the Directive does not preclude the replacement of that term with a supplementary provision of national law. The ruling of the Court is in accordance with the opinion of Advocate-General Wahl, delivered on 12 February 2014.[15]

- ***Enforcement proceedings of a mortgage loan agreement***
- Judgment in case 280/13 *Barclays Bank* 30 April 2014 (CJEU): The preliminary reference dealt with Spanish legislation, which, first, provides that in spite of the award of the mortgaged property for an amount equal to 50% of its estimated value to the lender when there is no third party bidder, that lender may continue with the enforcement proceedings for the outstanding amount of the debt and, second, allows the extension of the mortgage where the valuation of the property decreases by 20%, without providing for an upward revision in favour of the debtor. The CJEU clarified that contrary to *Banco Español de Crédito*[16] and *Aziz*,[17] the dispute at hand is not concerned with contractual terms

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

14 Case 92/11 *RWE Vertrieb* 21 March 2013 (CJEU), nyr.

15 For a summary of the Opinion of AG Wahl and the factual background of the case, see *European Review of Contract Law* 2014, 295.

16 Case 618/10 *Banco Español de Crédito* 14 June 2012 (CJEU), nyr.

17 Case 415/11 *Aziz* 14 March 2013 (CJEU), nyr.

or any limitation of the powers of the national courts to determine whether those terms were unfair. The national provisions at stake are laws or regulations and are not set out in the contract. In accordance with Article 1(2) of the Unfair Terms Directive, such provisions do not fall within the scope of that directive which aims to prohibit unfair terms in consumer contracts. Unlike in *RWE Vertrieb*,[18] the respective national statutory and regulatory provisions are applicable without any modification by means of a contractual term. Therefore, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties.

Competition Law, Public procurement and State Regulation

- ***Conditions for the application for compensation for financial burdens arising from a public service obligation***
- Judgment in joined cases 516/12 and 518/12 *CTP* 3 April 2014 (CJEU): The preliminary reference arose out of the proceedings between CTP, providing local public transport services in the province of Naples, and the Regione Campania and the Provincia di Napoli, concerning the latter's refusal to grant CTP compensation in respect of the economic disadvantage suffered as a result of the provision of those services. It was questioned whether, according to Article 4 of Regulation No 1191/69,[19] the right to compensation can arise only where a transport undertaking has previously made an application for termination of the public service obligation and that application has been rejected by the competent authorities. In line with the opinion of Advocate General Cruz Villalón delivered on 6 February 2014,[20] the CJEU clarified that Articles 4 and 6 apply only if the local public transport services provided by CTP derive from a public service obligation within the meaning of Article 2(1) of the regulation. Those Articles are inapplicable if the public transport services provided by CTP derive from a public service contract under Arti-

18 Case 92/11 *RWE Vertrieb* 21 March 2013 (CJEU), nyr.

19 Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, *OJ* 1969 L 156/1, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991, *OJ* 1991 L 169/1.

20 For a summary of the Opinion of AG Cruz Villalón and the factual background of the case, see *European Review of Contract Law* 2014, 298.

cle 14(1). This matter is for the national court to establish. For public service obligations that came into existence before the entry into force of that Regulation, ie 1 January 1969, the right to compensation is subject to the submission of an application for termination of those obligations and a decision to maintain the obligations or to terminate them by the competent authorities.

- ***Applicability of Directive 2004/18/EC[21] to (horizontal) in-house transactions***
- Judgment in case 15/13 *Datenlotsen Informationssysteme* 8 May 2014 (CJEU): In the case at hand, Datenlotsen Informationssysteme GmbH challenged the decision of the Technische Universität Hamburg-Harburg to directly award the supply contract for an IT system to Hochschul-Informations-System GmbH without applying the award procedures under Directive 2004/18. The CJEU was asked whether that contract between the University, which is a contracting authority and whose purchases of products and services are controlled by the City of Hamburg, and the undertaking governed by private law, owned by the Federal Republic of Germany and by the Federal States (including the City of Hamburg), constitutes a public contract for the purpose of Article 1(2)(a) of the Directive. The CJEU recalled that in *Teckal*,[22] it established an exemption for 'in-house' transactions according to which a contracting authority is not required to issue a call for tenders for the award of a public contract, provided that it exercises over the contractor a control which is similar to that which it exercises over its own departments and that contractor carries out the essential part of its activities with the controlling contracting authority. The concept of 'similar control' means that the contracting authority must have the power to exercise decisive influence over both the strategic objectives and the significant decisions of the contractor, and that the control exercised by the contracting authority must be genuine, structural and functional. However, regarding the case at hand, the CJEU held that there is no relationship of control between the University and the company. The University has no share capital of the company and no legal representative in its management board. Therefore, the situation cannot be covered by the exemption established in the Court's case-law. Moreover, the City of Hamburg is not in a position to exercise 'similar control' over the University. Its control is limited to matters of procurement and does not

21 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 134/114.

22 Case 107/98 *Teckal* 1999 I-08121 (CJEU).

extend to education and research, where the University enjoys autonomy. Consequently, the CJEU held that there is no need to determine whether the exception applies also to 'horizontal in-house transactions', defined as a situation in which the same contracting authority exercises 'similar control' over two distinct economic operators, one of which awards a contract to the other. Advocate General Mengozzi reached in his opinion, delivered on 23 January 2014, the same conclusion regarding the situation at hand.

- ***Time-limits for bringing actions to review the decisions taken by contracting entities***
- Judgment in case 161/13 *Idrodinamica Spurgo Velox and Others* 8 May 2014 (CJEU): A contracting authority launched an open tendering procedure for the award of a four-year contract related to the water sector. One of the unsuccessful tenderers challenged the tender procedure on the ground that the contracting authority authorised a change in composition of the ad hoc consortium to which the contract had been awarded and, moreover, that that authority should have excluded one of the ad hoc tendering consortiums because the legal representative of one of the member undertakings of that consortium produced a false declaration. However, the referring court notes that, in accordance with national law, the action brought should be declared inadmissible, since it was initiated after the 30-day time-limit starting from the communication that the contract had been definitively awarded. The CJEU held that according to Articles 1(1), 1(3) and 2a(2) of Directive 92/13/EEC,[23] the time allowed for bringing an action for the annulment of the decision awarding a contract starts to run again where the contracting authority adopts a new decision, after the award decision has been adopted but before that contract is signed, which may affect the lawfulness of that award decision. In particular, the national 30-day period for bringing an action against the award decision must start to run again so as to permit the examination of the lawfulness of the contract authority's decision authorising the change in the composition of the consortium to which the contract had been awarded. The period must start to run from the date on which the tenderer receives communication of the decision authorising the change in composition of the consortium or the date on which it became aware of that

23 Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, *OJ* 1992 L 76/14, as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, *OJ* 2007 L 335/31.

decision. However, that does not apply to the second complaint raised by the applicant, as that alleged irregularity must have happened before the decision awarding the contract was adopted, unless such a right is explicitly provided for by national law in accordance with Union law.

- ***Claim for compensation on the basis of umbrella pricing***
- Judgment in case 557/12 *Kone and Others* 5 June 2014 (CJEU): The preliminary reference concerns the question whether the civil liability in damages of the members of a cartel also extends to 'umbrella pricing'. Under Austrian civil law, an action for compensation would have to be dismissed from the outset, because, when an undertaking not party to a cartel takes advantage of the effect of umbrella pricing, there is no adequate causal link between the cartel and the loss potentially suffered by the buyer. The loss caused by umbrella pricing is considered to be merely a side-effect of an independent decision that a person not involved in that cartel has taken based on his own business considerations. The CJEU held that while it is for the Member States to lay down the rules governing the application of the concept of the 'causal link', national legislation must ensure that European Union competition law is fully effective. The full effectiveness of Article 101 TFEU would be put at risk if the right to claim compensation for harm suffered is excluded by national law because the victim had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy is a result of the cartel that contributed to the distortion of the market. Therefore, the victim of umbrella pricing may obtain compensation, where it is established that the cartel was liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel. The conclusion reached by the CJEU is in line with the opinion of Advocate General Kokott, delivered on 30 January 2014.[24]

- ***Requirement of 'similar control' in order for the award of a public contract to be regarded as an in-house operation***
- Judgment in case 574/12 *Centro Hospitalar de Setúbal und SUCH* 19 June 2014 (CJEU): CHS, which is a public hospital, concluded with SUCH a service contract concerning the supply by SUCH of meals to patients and staff, without application of the award procedures laid down in Directive 2004/18.

24 For a summary of the Opinion of AG Kokott and the factual background of the case, see *European Review of Contract Law* 2014, 299.

SUCH is a non-profit organisation the aim of which is to carry out a public service mission. In accordance with its statutes, SUCH can have as partners not only public sector entities but also private social solidarity institutions carrying out non-profit activities. At the date of the award of the contract, SUCH had 88 partners, including 23 social support institutions, all of them non-profit organisations, of which 20 were charitable organisations. The referring court asked whether the requirement for 'similar control' in order that the award of the public contract may be regarded as an in-house operation and may be made directly, without application of Directive 2004/18, was met. On the basis of its reasoning in *Stadt Halle and RPL Lochau*,[25] the CJEU held that this was not the case since SUCH's private partners pursue interests and objectives which are different in nature from the public interest objectives pursued by the awarding authorities which are at the same time partners of SUCH. Additionally, as pointed out by Advocate General Mengozzi in his opinion of 27 February 2014, the private partners of SUCH, despite their status as social solidarity institutions carrying out non-profit activities, are not barred from engaging in economic activity in competition with other economic operators. The direct award of a contract to SUCH is likely to offer an advantage for the private partners over their competitors. Therefore, Directive 2004/18 is applicable to the situation at hand.

Employment law and Discrimination

Leave

- ***Entitlement to payment of commission during annual leave***
- Judgment in case 539/12 *Lock* 22 May 2014 (CJEU): The CJEU was asked whether, when the remuneration received by a worker comprises a fixed monthly salary and a variable commission the amount of which is paid by reference to sales made and contracts entered into by the employer in consequence of the worker's own work, the commission must form part of the remuneration to which a worker is entitled in respect of his paid annual leave. In accordance with the conclusion reached by Advocate General Bot in his opinion of 5 December 2013,[26] the Court held that Article 7(1) of the Working

25 Case 26/03 *Stadt Halle and RPL Lochau* 2005 I-00001 (CJEU).

26 For a summary of the Opinion of AG Bot and the factual background of the case, see *European Review of Contract Law* 2014, 154.

Time Directive[27] precludes the reduction of the worker's remuneration to the fixed monthly salary. The fact that that reduction in remuneration occurs only after the period of annual leave because the payment of the commission is deferred is irrelevant. The financial disadvantage is suffered by the worker during the period following that of his annual leave and might deter him from exercising his right to take paid annual leave. Therefore, the commission must be taken into account in the calculation of the total remuneration to which a worker is entitled in respect of his annual leave. The method of calculating the commission must be assessed by the national court on the basis of the rules and criteria set out by the case-law of the CJEU and the objective pursued by Article 7 of the Directive.

- ***Allowance in lieu in the event of death of the employee***
- Judgment in case 118/13 *Bollacke* 12 June 2014 (CJEU): The preliminary reference arose out of the proceedings between Mrs Bollacke and the former employer of her late husband concerning her right to receive an allowance in lieu of paid annual leave not taken by her husband at the date of his death. The CJEU held that, first, Article 7 of the Working Time Directive does not mean that the death of a worker that ends the employment relationship relieves the deceased worker's employer of payment of the allowance in lieu to which that worker would ordinarily have been entitled by way of paid annual leave outstanding, and, secondly, that receipt of such an allowance cannot be made subject to the existence of a prior application for that purpose.

Discrimination

- ***National legislation making the basic pay dependent on the age of the civil servant***
- Judgment in joined cases 501/12 to 506/12, 540/12 and 541/12 *Specht and Others* 19 June 2014 (CJEU): The applicants are permanent civil servants in Germany and were initially classified under the remuneration system of the old version of the Federal Law on remuneration of civil servants (hereafter 'BbesG'), ie according to their seniority on the date of appointment.[28] They

27 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* 2003 L 299/9.

28 The Federal Law on remuneration of civil servants, in the version in force on 6 August 2002, remained applicable to federal civil servants until 30 June 2009 and to Land Berlin civil servants until 31 July 2011.

claim that they have been discriminated against on grounds of age and are entitled to the retrospective grant of the remuneration corresponding to the highest step in their grade. Moreover, the applicants dispute the Law establishing the Land Berlin transitional system for the reclassification under the new system according to which their step is to be determined on the basis of the amount of basic pay that they received under the old (discriminatory) remuneration system. The CJEU firstly held that according to Article 3(1)(c) of the Employment Equality Framework Directive,[29] pay conditions for civil servants fall within its material and personal scope. Although Article 153(5) TFEU provides that the EU is not entitled to intervene in matters of pay, that exception applies only to direct interference by EU law in the determination of pay and does not encompass pay conditions, which form part of employment conditions. In addition, it is expressly stated that the Directive applies to all persons in the public sector. Next, on the basis of its ruling in *Hennigs and Mai*,[30] the Court held that the old version of the BbesG gives rise to a difference in treatment that is directly based on age, for the purposes of Article 2(1) and (2)(a). The basic pay awarded to two civil servants appointed on the same day in the same grade, whose professional experience is the same or equivalent but whose ages are different, will differ according to their age at the time of appointment. The allocation, on the basis of age, of a basic pay step to a civil servant upon his appointment goes beyond what is necessary for achieving the legitimate aim of taking account of the professional experience acquired by that civil servant before he is appointed. Therefore, the difference in treatment cannot be justified under Article 6(1) of the Employment Equality Framework Directive. Also the scheme put in place by the Law establishing the Land Berlin transitional system determining the basic pay on the basis of the pay previously received by established civil servants leads to direct discrimination on grounds of age. Contrary to the opinion of Advocate General Bot, delivered on 28 November 2013, the CJEU held that that measure pursues a legitimate aim, namely to ensure the preservation of acquired rights, and is appropriate and necessary for achieving that aim. Finally, while EU law does not require civil servants who have been discriminated against to be retrospectively granted an amount equal to the difference between the pay actually received and that corresponding to the highest step in their grade, it is for the referring court to ascertain whether

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

30 Case 297/10 *Hennigs und Mai* 2011 I-07965 (CJEU).

all the conditions are met for Germany to have incurred liability under EU law. On the other hand, Advocate General Bot proposed to guarantee civil servants who suffer discrimination allocation to the same step as that to which an older civil servant with equivalent professional experience was allocated. The CJEU and the Advocate General agree that EU law does not preclude a national rule which requires the civil servant to take steps before the end of the financial year to assert a claim to financial payments that do not arise directly from the law, provided that rule does not conflict with the principles of equivalence and effectiveness.

Private International and International Procedural Law

- ***Staying proceedings on grounds of lis pendens in exclusive jurisdiction cases***
- Judgment in case 438/12 *Weber* 3 April 2014 (CJEU): The case concerns a dispute between two elderly sisters over a piece of land that they both partially owned in Germany. M. Weber sold her part of the land to an Italian company, managed by her son. I. Weber was informed about this transaction and decided to use her pre-emptive right to purchase that land. The sisters expressly acknowledged the valid exercise of that right of pre-emption and signed an agreement on the transfer of ownership to I. Weber. The Italian company initiated legal proceedings before the Tribunale Ordinario di Milano against the sisters, claiming that the pre-emptive right was unlawfully used and that their purchase contract should be recognized as valid. I. Weber brought subsequently an application before the Landgericht München seeking to require M. Weber to consent to the registration in the property register of the transfer of ownership. However, M. Weber objected, relying, at the outset, on the existence of lis pendens on account of the dispute pending before that Italian court. The CJEU held that an action seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to a property and producing effects with respect to all parties falls within the category of proceedings which have as their object 'rights in rem in immovable property' in Article 22(1) of Regulation No 44/2001.[31] Therefore, the courts of the

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

Member State where the property is situated (*forum rei sitae*) have exclusive jurisdiction. If the court first seised gives a judgment which fails to take account of Article 22(1) of Regulation, according to Article 35(1), that judgment cannot be recognised in the Member State in which the court second seised is situated. Consequently, in such circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction under Article 27, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction. The conclusion reached by the CJEU is in line with the opinion of Advocate General Jääskinen, delivered on 30 January 2014.[32]

- ***Jurisdiction in matters relating to the cross-border infringement of a copyright***
- Judgment in case 387/12 *Hi Hotel HCF* 3 April 2014 (CJEU): In the case at hand, Mr Spoering, a photographer, took 25 transparencies of interior views of various rooms in a hotel run by Hi Hotel SARL in Nice. He granted Hi Hotel the right to use the photographs in advertising brochures and on its website. Since Mr Spoering considered that Hi Hotel had infringed his copyright in the photographs by passing them on to a third party, namely Phaidon-Verlag in Berlin, Mr Spoering brought proceedings against Hi Hotel in Germany. Hi Hotel submitted that Phaidon-Verlag also has a place of business in Paris (France) and that the manager of Hi Hotel could have made the photographs in question available to that publisher. The Bundesgerichtshof referred to the CJEU the question, whether Article 5(3) of Regulation No 44/2001 means that, where there are several supposed perpetrators of the damage allegedly caused to rights of copyright protected in the Member State of the court seised, that provision allows jurisdiction to be established with respect to one of those perpetrators who did not act within the jurisdiction of that court. The CJEU held that that provision does not allow jurisdiction to be established, on the basis of the causal event of the damage, of a court within whose jurisdiction the supposed perpetrator did not act, but does allow the jurisdiction of that court to be established on the basis of the place where the alleged damage occurs. That court has jurisdiction only to rule on the damage caused in the territory of the Member State to which it belongs.

32 For a summary of the Opinion of AG Jääskinen and the factual background of the case, see *European Review of Contract Law* 2014, 307.

- ***Jurisdiction in matters relating to the cross-border infringement of a Community trade mark***
- Judgment in case 360/12 *Coty Germany* 5 June 2014 (CJEU): The preliminary reference arose out of the proceedings between Coty Germany GmbH and First Note Perfumes NV concerning an alleged infringement of a Community trade mark and of the German Law against unfair competition, on account of the sale in Belgium of counterfeit products to a German trader which resold them in Germany. While the actions by Coty Germany before the German courts were dismissed both at first instance and on appeal, the Bundesgerichtshof decided to stay the proceedings and referred several questions to the CJEU. The CJEU explained that Regulation No 40/94,[33] which has the character of *lex specialis* in relation to the rules provided for by Regulation No 44/2001, establishes in Article 93(5) jurisdiction in favour of the Community trade mark courts of the Member State in which the infringement was committed or is threatened. The linking factor provided for by that provision refers to the Member State where the act giving rise to the alleged infringement occurred or may occur, not the Member State where that infringement produces its effects. Consequently, jurisdiction under Article 93(5) of Regulation No 40/94 may be established solely in favour of Community trade mark courts in the Member State in which the defendant committed the alleged unlawful act. For the case at hand, that means that the courts in Belgium and not Germany are competent. Actions relating to civil liability and unfair competition do not come within the jurisdiction of the Community trade mark courts. The jurisdiction to hear such actions is therefore not governed by Regulation No 40/94, but by Regulation No 44/2001. In that regard, the CJEU held that Article 5(3) of Regulation No 44/2001 allows jurisdiction to be established, on the basis of the place of occurrence of damage, to hear an action for damages based on that national law brought against a person established in another Member State and who is alleged to have committed, in that State, an act which caused or may cause damage within the jurisdiction of that court. This means that those actions may be brought before the German courts, to the extent that the act committed in Belgium caused or may cause damage within the jurisdiction of the court seised. The conclusion reached by the CJEU is in line with the opinion of Advocate General Jääskinen, delivered on 21 November 2013.

33 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, *OJ* 1994 L 11/1.