HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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2019 CJEU Judgments in Summary

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Summary

This briefing paper summarises a selection of Court of Justice of the EU (CJEU) judgments from 2019. The cases included were chosen because they clarify or advance an aspect of primary EU law or secondary EU law of general interest, or because they address a point of EU law that is relevant to the Brexit/Future Relationship negotiations.

Omitted from the briefing are intra-institutional proceedings, Commission enforcement proceedings, and any other proceedings regarding very detailed and sector-specific EU secondary legislation.

The briefing is organised first by subject area of EU law, and secondly by date of the relevant judgments.

1. The Fundamental Freedoms

1.1 Free Movement of Capital

1.2 Freedom of Establishment & Free Movement of Services

Case C-630/17 – Milivojević

In 2007, the Croatian Ms Milivojević concluded a credit agreement with an Austrian bank for almost 50,000 euros in order to reconstruct her home in order to create lettable apartments in it. She took out the loan using a Croatian intermediary, and the agreement itself contains an alternative jurisdiction clause in favour of either Austrian or Croation courts. As a security for the loan's repayment, Ms Milivojević also signed a notarised mortgage deed based on the agreement, which was entered into the Croatian land register.

In 2015, Ms Milivojević brought an action before the Muncipial Court of Rijeka in Croatia against the Austrian bank for a declaration of invalidity of the credit agreement and the notarised deed, and for the removal of the related mortage from the land register. The bank argues that the agreement was concluded in Austria, and Ms Milivojević argues that it was concluded in Croatia.

Where the agreement was concluded matters because in July 2017, a Croatian law entered into force which provided for retroactive invalidity for credit agreements concluded *in Croatia* with a foreign lender that is not approved by the Croatian authorities. The Croatian referring court notes that the law would apply to the Austrian bank in question, *if* the contract was concluded in Croatia—but that the Croatian law also appears to restrict the freedom to provide services, so may be contrary to EU law.

In the current judgment, the CJEU first found that even though the law predates Croatia's accession to the EU, its effects continue to apply after accession, and so the CJEU has the jurisdiction to review that law's compatibility with EU law. It then observed that the law in question did constitute an indirect restriction on the freedom to provide services, as it makes it more difficult for non-Croatian lenders to provide lending services in Croatia. While the authorisation of lenders can be necessary to maintain the functioning of the financial sector and consumer protection, as the CJEU's earlier case law has acknowledged, the Croatian law is disproportionate as it is a general, automatic and retroactive rule, and less disproportionate measures could serve the same aims (eg, such as a law enabling the relevant Croatian authorities to examine unfair commercial practices in cross-border lending on a case by case basis). As such, the Croatian law is contrary to EU law.

Case C-563/17 - Associação Peço a Palavra and Others

The case concerned a reprivatisation process commenced by the Portuguese government, which sought to reprivatise TAP (a Spanish airline undertaking). A non-profit named Associação Peço a Palavra ('I Want to be Heard Association', APaP) challenged the tender specifications that were drawn up by the Portuguese government in 2015 before the Supreme Administrative Court, arguing that certain requirements set out in those tender documents violate the Treaty freedoms of establishment and provide services. The Supreme Administrative Court asked the CJEU for clarification on whether EU law permits the relevant requirements, which were that the company's headquarter and effective management remained in Portugal, had the capabilities to comply with Portuguese public service obligations, and that the existing national (air) hub be maintained and developed.

In the current judgment, the CJEU found that Article 49 TFEU on the freedom of establishment does not preclude headquartering and management or ability to comply with public service obligation, but the requirement that the existing national hub be maintained and developed is an unjustified restriction on the freedom of establishment. Regarding public service obligations, the regulation that harmonises the operation of air services in EU law makes it clear that these can be imposed by a Member State under set conditions – and where compliant with the regulation, such a tender requirement will comply with primary EU law.

Requiring headquartering and management in Portugal is a restriction of establishment, but one that can be justified in light of public interest reasons to ensure that flights to and from Portuguese-speaking third countries is maintained, as it is Portugal that is the other party to bilateral agreements that grant the air traffic rights for those routes. Moving TAP to a different Member State could mean losing relevant operating licenses that permit those routes to continue. The restriction is proportionate, according to the CJEU, because TAP is not precluded from setting up subsidiaries or branches outside of Portugal.

However, maintain and developing the existing national (air) hub is disproportionate given the objective of maintaining ties with the Portuguese-speaking third countries concerned, and consequently the that requirement in the tender is contrary to the Treaty freedom of establishment.

Case C-431/17 – Monachos Eirinaios

In 2015, a monk requested the Athens Bar Association to enter him on the special register of the Athens Bar as a lawyer, as he qualified as a lawyer in Cyprus. The Bar Association rejected the application on account of Greek domestic law provisions that declared the profession of lawyer and the status of monk as incompatible, arguing that these also applied to lawyers who qualified outside of Greece but wished to practice.

The monk challenged the Bar Association's decision for the Greek Council of State, who referred questions to the CJEU regarding the compatability with EU law of the domestic provisions that preclude monks with Greek churches to be registered with the Greek bar, while qualified as a lawyer in another Member State.

In the current judgment, the CJEU notes that the EU directive on the lawyer profession[1] harmonises the conditions for exercising the right of establishment as a lawyer in full, and consequently requires mutual recognition of the professional titles of migrant lawyers. The only condition attached to registration with the host country authority that regulates the legal profession is consequently a certificate attesting registration with the home country authority.

The directive does not harmonise rules on professional conduct, and so the requirements there may vary between Member States – but any rules restricting registration on the basis of professional conduct must be proportionate to their aims. The Greek Council of State consequently has to investigate if the domestic provisions on the incompatibility of the legal profession with the status of monk are proportionate. As written, the Greek legislation that requires refusing to register a monk who is also a lawyer in another Member State with the Bar Association, however, is contrary to the directive.

Case C-622/17 – Baltic Media Alliance

Baltic Media Alliance ('BMA', a company registered in the UK) broadcasts a channel aimed at the Lithuanian public, showing primarily Russian-language programmes. In 2016, the Lithuanian Radio and Television Commission (LRTK), in compliance with Lithuanian legislation, a measure that obliged operators broadcasting to Lithuanian consumers to no longer broadcast the BMA's channel outside of pay-per-view packages. The Lithuanian law was based on the fact that an April 2016 broadcats on the channel contained information that incited hatred of the Baltic States on grounds of nationality.

BMA brought an action before the Regional Administrative Court in Vilnius to contest the LRTK decision, arguing it was in breach of the EU's Audiovisual Media Directive.[2] The Regional Administrative Court has asked the CJEU to interpret that directive in light of the Lithuanian restrictions.

In the current judgment, the CJEU found that a national measure is not a 'restriction' for the purposes of that directive if it pursues a public policy objective and merely regulates the way in which a television channel is distributed to consumers, provided that transmission of the channel is not precluded as such. The measure in this particular case

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1 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77/36).

2 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95/1).

was clearly pursuing a public policy objective, in the view of the CJEU, as it targeted the Russian-speaking minority in Lithuania and intended to incite its hostility towards the Baltic States and their policies in general. The objective behind restricting distribution of the channel in question consequently was justifiable under EU law, and the measure taken was proportionate, as it does not fully preclude retransmission of the channel.

Case C-417/18 – AW and Others (112)

The case concerns ES, a 17 year old girl in Lithuania who was kidnapped, raped, and burnt alive in the boot of a car in September 2013. When trapped in the car boot, she had attempted to call 112—the European emergency number—10 times in order to seek help. However, the equipment used in the call centre that received the calls did not reveal her mobile phone number, and so could not be used to trace her location, for reasons that remain unclear to date.

AW and others brought an action before the Vilnius administrative court, seeking an order that would require Lithuania to pay compensation for the non-material damage suffered by both ES and her family (including AW and others). They are arguing that Lithuania failed to properly implement the Universal Service Directive[3], which provides that telephone companies should make caller information regarding calls made to 112 available to the authorities 'as soon as' the call is received. The failure to do so meant that police officers could not be direct to ES in order to help her.

The court in Vilnius has asked the CJEU whether that Directive requires Member States to ensure that location information is made available even when, as may have bene the case here, a mobile telephone is not fitted with a SIM card, or if they have some discretion in laying down conditions for how this information is relayed between telephony undertakings and the authorities.

The CJEU, in the current judgment, emphasises that the Directive requires 'all calls' made to 112 to be passed on to the relevant authorities with caller information; this includes calls from mobile phones not equipped with a SIM card. Subject to technical feasibility, then, the Directive requires the Member States to ensure that any telephony undertaking can make relevant caller location available as soon as it receives a call from *any* mobile phone, regardless of how it is fitted out.

In terms of discretion, while the Member States enjoy some latitude in domestically regulating how accurate and reliable information about caller location, these in any event have to be accurate and reliable enough to permit emergency services to actually help those calling 112.

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[3] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337/11).

The national court is to determine if this standard of accuracy and reliability was met in Lithuania.

Finally, in determining if Lithuania is liable for a failure to accurately implement the directive, the Court confirmed that if Lithuanian law were to award damages for an indirect link between state action and damage suffered, it must also award damages under EU state liability.

Case C-299/17 – VG Media

VG Media is a German copyright management organisation. It brought an action for damages against Google before the Berlin regional court, claiming that Google had infringed the copyrights of some of its members by producing 'snippets' of the work of VG Media members on its search engine results *without* paying a fee for the use of those snippets. The relevant members are publishers of newspapers and magazines.

The Berlin regional court has asked the CJEU if the German law that enables VG Media to bring such an action, which aims to protect publishers of newspapers/magazines, is compatible with EU law. Specifically, the German law restricting the publication of these 'snippets' was adopted but not notified to the Commission as a 'technical regulation' under a relevant EU Directive on regulations relating to 'information society services'. The Berlin court notes that if this measure is a technical regulation, it should have been notified to the Commission in order to be enforceable.

In the current judgment, the CJEU confirms that this law does represent a 'technical regulation', as it is a rule regulating how information society services operate. Without prior notification of such a rule, the relevant rule must be disapplied before a national court. Google consequently cannot be found liable for damages at this time. (Should the relevant German law of 2013 be notified to the Commission and declared compatible with EU law, however, a subsequent action would have to be considered on its merits.)

Case C-390/18 – Airbnb Ireland

The case involved a criminal claim against Airbnb Ireland made in the French courts by the French Association for Professional Tourism and Accommodation (AHTOP). In brief, Airbnb operate an electronic platform on which those with space in accommodations can offer their accommodation to potential tenants. AHTOP argued that Airbnb did not simply make a connection lodgers say, a French 'host' under Airbnb and a private individual wishing to book a stay, but also acted as an estate agent without holding a professional license to do so. According to Airbnb, Directive 2000/31 precluded French legislation requiring a service like Airbnb to have an estate agents' license.[4]

[4] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('the Directive on electronic commerce') (OJ 2000 L 178/1).

The CJEU was asked to consider the nature of the service provided by Airbnb, and whether it could be required under French law to hold an estate agents' license or this requirement was incompatible with EU law.

In the current judgment, the CJEU considered the service provided by Airbnb and determined it was distinct from the actual provision of accommodation. Airbnb consequently qualified as an 'information society service', and fell within the scope of Directive 2000/31. Airbnb does not 'provide' accommodation services but rather facilitates the conclusion of rental agreements. Arrangements for that accommodation can also be made outside of Airbnb, which is therefore not indispensable to the accommodation provision; and Airbnb does not regulate the rents charged by hosts, again suggesting it is not in the estate agency business.

A final point made by the CJEU was that the French law relied upon by AHTOP to require Airbnb to hold an estate agents' license had not been notified to the Commission as relating to information society services. As such, under the EU principle of incidental effect, Airbnb could not be charged by AHTOP with failing to comply with that law, as the law itself was not compliant with EU law requirements.

1.3 Free Movement of Goods

Case C-220/17 – Planta Tabak

Planta Tabak, a German undertaking, manufactures tobacco products, including a flavoured variety of 'roll-your-own' tobacco. It brought an action to the German Administrative Court in Berlin, seeking to declare that certain provisions of the German law implementing a 2014 directive on tobacco products do not apply to its products. The directive in question prohibits flavourings, shock photographs and the prohibition of advertising of flavourings, and the Berlin Administrative Court asked the CJEU a number of questions about the validity and interpretation of that directive.

The CJEU, in the current judgment, found that the prohibition of flavoured cigarettes and tobacco on the internal market by May 2016 (for products whose EU-wide sales volume is less than 3%) and May 2020 (all other products) is valid. In detail, it made the following observations:

- The fact that the directive does not specify what products have the May 2016 ban date, nor how to determine that they have a 3% market share, does not violate the principle of legal certainty – this is for national law to determine, as set out in the directive.
- The principle of equal treatment is not violated by measures that distinguish on tobacco products on the basis of their sales volume.
- The directive is also not disproportionate in prohibiting flavoured tobacco for the purpose of ensuring a high level of protection of human health, particularly for young

people, who all parties agree are particularly drawn to certain flavourings.

- Finally, though the directive represents a restriction on the free movement of goods, the restriction is justified on account of its proportionality and necessity.

Beyond that, it interpreted several provisions in the directive. Namely, the prohibition of information referring to taste, smell, flavourings or other additives applies even where that material is not used for promotional purposes, and the prohibition of trade marks referring to a flavouring on product packaging is not a deprivation of property, but a mere limitation to the right to property.

Case C-482/17 – Czech Republic v Parliament and Council

The Czech Republic commenced an action for annulment of Directive 853/2017, which amends and replaces a previous directive regulating the acquisition and possession of firearms. It argued that the Council and the European Parliament had breached EU principles of the rule of law in adopting this directive, such as conferral of powers, proportionality, legal certainty, legitimate expectations, and non-discrimination.

The purpose of the directive is to set up a minimum harmonisation framework for possession and acquisition of firearms in the Schengen area. It thus lays down conditions relating to some firearms as well as prohibitions (grounded in public safety) on other firearms. The 2017 directive specifically targeted dangerous, deactivated semi-automatic firearms.

The CJEU dismissed the Czech action on the following points. Regarding conferral of powers, and the scope of adopting harmonising legislation under Article 114 TFEU, the CJEU pointed out that even though a previous piece of EU legislation has already removed all barriers to trade, the EU legislature can respond to new circumstances—such as the fight against international terrorism—by updating that legislation. As the new Directive 853/2017 continues to regulate the movement of firearms for civilian use, it fell within the EU's competences regarding the internal market, which include consumer protection relating the safety of goods.

The Commission did not carry out an impact assessment on the changes introduced in Directive 853/2017, as the evaluation proportionality of the measures introduced there did not require an impact assessment—the Commission had a variety of other analyses and recommendations at its disposal when acting.

The claims regarding legal certainty and legitimate expectations were also dismissed, and the argument regarding non-discrimination—as there was an exception in the Directive for Switzerland, in light of historic practices regarding its military service—was justified as Switzerland alone has 'proven experience' in permitting certain otherwise prohibited arms to be held by civilians without risking public security, as pursued by the directive.

1.4 Free Movement of Persons & Citizenship

Case C-221/17 – Tjebbes and Others

Several Dutch nationals who possess a second nationality of a non-EU Member State brought proceedings before Dutch courts after the Minister of Foreign Affairs in the Netherlands refused to examine their applications for passport renewals. The refusal was based on Dutch nationality law, which states that dual nationals living outside of the EU for longer than ten years will lose their Dutch nationality unless, within the period of ten years, they stay in the EU for at least one year, or if they apply for a new passport/national ID card before the ten years finish.

The Dutch Council of State has asked the CJEU if there are any EU restrictions on this loss of Dutch citizenship by automatic operation of the law stemming from the fact that those who lose their Dutch citizenship also lose their EU citizenship.

In the current judgment, the CJEU confirmed that cases where Member State nationals at risk of losing that nationality, and by proxy, their EU citizenship, fall within the scope of EU law. However, it accepted the Dutch government's argument that the objective of the law is to preclude those who no longer have a genuine link with the Netherlands from retaining Dutch nationality, and considered a ten year absence as being a legitimate indicator of such a link being absent. The Dutch law is further legitimated by the fact that loss of nationality can be avoided simply by renewing a passport or ID card within the ten years.

However, the CJEU considered that the Dutch nationality law's consequences on EU citizenship may be disproportionate if there is no scope for examining the circumstances of an individual who stands to lose their EU citizenship. In particular, the consequence of the loss of nationality and EU citizenship must be compatible with the Charter of Fundamental Rights, and its right to family life. If consular authorities are capable of carrying out an individual assessment of the consequences of this loss of EU citizenship rights stemming from a loss of nationality, and determine that this loss would be compatible with EU law, the Dutch nationality law itself is compatible with EU law.

Case C-129/18 – SM (Enfant placé sous kafala algérienne)

A French couple, resident in the UK, applied to the UK authorities for entry clearance for an Algerian child who had been placed in their guardianship in Algeria under the *kafala* system of Islamic family law. They applied for the clearance for an 'adopted child', but this was refused by the UK authorities. Following the child's appeal, the UK Supreme Court asked the CJEU if the citizenship directive covers a *kafala* relationship by its definition of 'direct descendants', who have almost automatic rights of entry alongside EU nationals exercising Treaty rights.

The CJEU, in the current judgment, examined *kafala* and concluded it acted more like parental responsibility and guardianship than like

adoption. *Kafala* can also come to an end at the request of the biological parents, and ceases when the child reaches the age of majority. It then considered if the concept of 'direct descendant', which is an EU law concept, could encompass the *kafala* relationship.

It ultimately found that as *kafala* does not create a parent-child relationship between the child and its guardian, a *kafala* relationship is not the same as a direct descendancy relationship.

However, the citizenship directive also requires the Member States to facilitate entry for what it calls 'other family members' – and the CJEU found that a child in a *kafala* guardianship is covered by this concept of 'other family members'. As the objective of the directive is to maintain the unity of a family, the CJEU instructed the UK authorities to facilitate the entry and residence of this child as an 'other family member', by carrying out a reasonable and balanced assessments of the circumstances of the child and their best interest. If the *kafala* relationship has resulted in a genuine family life, and there is a genuine dependency of the child on their guardians, the combination of EU fundamental rights and the obligation to take account of the best interest of the child demand that the child be granted permission to live with its guardians in its host Member State.

Case C-254/18 - Syndicat des cadres de la sécurité intérieure

The case involved a dispute between the French union of higher-ranking security forces personnel and the French government, regarding the method used by the French government to calculate the average weekly working time of officials in the national police force. The French decree applicable to those officials states that on average, their working time over a seven day period cannot exceed 48 hours in the course of a six month period in a calendar year.

The union sought the annulment of that provision before the Council of State in 2017. It argued that the use of a fixed reference period of six calendar months, as opposed to a rolling reference period of six months (which has different start and end dates as time passes), to calculate average working time is contrary to the conditions set out in the EU working time directive. The Council of State asked the CJEU for its views.

In the current judgment, the CJEU held that the working time directive is silent on the calculation of reference periods, and consequently the Member States are free to determine these as they see fit, provided they do so in a way that respects the objectives of the working time directive (eg, seeking high levels of health and safety protection for workers by limiting their maximum working time). However, it noted that a fixed reference period may result in a worker 'straddling' two reference periods and being asked to work too many hours then. Provided national law ensures that the average weekly working time of 48 hours is respected during these 'straddling' weeks, national legislation permits fixed reference periods that commence and end on set calendar dates.

Case C-22/18 – TopFit and Biffi

In 2016, the German Athletics Association (the DLV) amended the German Athletics Rules to preclude nationals from other EU Member States from participating in the German amateur athletics championships even if they held an entitlement to participate through a German athletics association or community for at least one year. The reasoning is that only a German athlete, participating under abbreviation 'GER', should be the German champion.

Mr Biffi is an Italian resident in Germany, who had participated in these amateur German championships since 2012 but found himself excluded in March 2017. A later tournament that year permitted him to participate him, but without classification and without being able to participate in 'finals' of events where they existed.

Mr Biffi and his sports association, TopFit, brought an action before the local court in Darmstadt, seeking his admission to future events alongside classification at those events. They argue that the sole reason he is precluded at the moment is his nationality, as he meets all other requirements set out by the DLV.

The Darmstadt court has asked the CJEU if the German Athletics Rules as written are a form of unlawful discrimination that is contrary to EU law, and specifically, the provisions in the Treaties prohibiting discrimination on grounds of nationality; granting freedom of movement to EU citizens; and promoting European sports).

In the current judgment, the CJEU found that the rules applied by the DLV are contrary to EU law unless they can be objectively justified and are proportionate to the objective being pursued. While the ultimate consideration of justification and proportionality falls to the Darmstadt court, the CJEU noted that the objective of ensuring that a national champion should hold the nationality of a given Member State looks justifiable, the measures adopted to achieve that objective have to be necessary and proportionate.

The CJEU raised some questions regarding the DLV justifications, not least of all because non-German EU nationals can become European champions in the senior category while competing for Germany. It also argued for a need of consistency, or adopting the same rules at all age categories, but in practice it selects national athletes for participation in international championships only when they are in the 'elite' category. The measures consequently do not appear justified, unless DLV can raise further justifications before the Darmstadt court.

Finally, given that Mr Biffi was permitted to participate without classification in one tournament, the CJEU argued that a total participation ban would in any event be disproportionate – less restrictive measures are available to achieve the stated goal of having a German champion.

Case C-591/17 – Austria v Germany

The case involved intended German laws charging for road usage by passenger vehicles. Since 2015, this 'infrastructure use charge' has

been mooted, and ultimately will aim to replace taxation-funded road repair under a 'user/polluter pays' principle. The charge will be calculated on the basis of car emission standards as well as other technical components of the vehicles, like their engine type.

The charge will be due from every vehicle on the German roads, regardless of where it is registered – though the methods of payment of the charge vary between an annual charge (for German registered cards) and charges of variable duration for motorway usage (for non-German registered cars). Moreover, vehicles registered in Germany will qualify for relief from the motor vehicle tax to a sum at least equal to the amount of the charge they are liable for.

Austria believes this legislative framework to be contrary to EU law, and specifically, the Treaty-based prohibition on discrimination on grounds of nationality. It brought its concerns before the Commission, but failed to get an opinion from the Commission in the prescribed period, and so commenced infringement proceedings against Germany before the CJEU.

In the current judgment, the CJEU agrees with Austria: the manner in which the 'infrastructure use charge' is designed and operates, in tandem with German motor vehicle tax relief, is indirectly discriminatory on grounds of nationality and is contrary to the free movement of goods and freedom to provide services.

The manner in which the charge and tax relief are designed result in the actual economic burden created by the 'infrastructure use charge' will fall exclusively on the owners/drivers of vehicles that are registered in other Member States. Member States are free to fund road maintenance out of a system other than general taxation, but any new system must comply with EU law, and the current system is discriminatory.

The fact that the annual charge is what is 'relieved' moreover demonstrates that in reality, the 'infrastructure use charge' does not shift away from general taxation for vehicle-owners with vehicles registered in Germany. The relief is always for 'full charge', even if a vehicle is used on the relevant roads less often than that, and thus does not reflect a 'user/polluter pays' principle.

The CJEU notes that Germany failed to justify the framework on environmental grounds or any other considerations, meaning it is contrary to the prohibition of discrimination on nationality grounds.

Regarding the other two 'freedoms' raised, the CJEU found that the framework introduced is liable to restrict the market access of goods and services/service recipients from other Member States, as the prices of their products and (providing/accessing services) was likely to increase as a consequence of increased transport goods – making them less competitive. Germany did not raise any specific justifications for restricting the free movement of goods and services, but the CJEU noted that the justifications raised regarding the indirect discrimination also would not justify the restrictions of movement of services and

goods. In sum, therefore, the proposed German 'infrastructure use charge' as currently designed is contrary to EU law.

Case C-410/18 – Aubriet

Mr Aubriet was a cross-border worker, resident in France but employed in Luxembourg from 1991 to 2014, with a break between 2008 and 2012. His son applied, as a student not resident in Luxembourg, for a financial aid grant to study in Strasbourg (France) from the State of Luxembourg in 2014-2015. When the son applied, his father had contributed to the Luxembourg social security system for over 17 years and was a taxpayer in Luxembourg.

In November 2014, the Ministry for Higher Education and Research rejected the son's application for financial aid, on the grounds that Mr Aubriet had not worked in Luxembourg for a full five years of the seven years preceding the application, and this disqualified his son from financial aid under Luxembourg law.

The son filed an action before the Luxembourg Administrative Court, which asked the CJEU to consider if the Luxembourg law—the objective of which is to increase the proportion of those in Luxembourg with a higher education degree—was compatible with EU law, specifically Article 45 TFEU and related rules on the freedom of movement for workers and their family members in the EU.

In the current judgment, the CJEU stressed that the principle of equal treatment prohibits both direct and indirect discrimination, whether de jure or de facto. The Luxembourg legislation is a distinction in treatment on the basis of residence, which is likely to disadvantage nationals of other Member States in practice, as they are less likely to satisfy the condition of five years continuous residence. Such a condition is consequently only acceptable if it is objectively justifiable, meaning it is necessary and proportionate in light of the objective it seeks to attain.

First, the CJEU considered if the objective of the Luxembourg law is legitimate, and concluded that it is and as such can justify indirect discrimination on the grounds of nationality. It then examined if the 'seven year reference period' is proportionate to the aim pursued, and concluded that as this excludes someone like Mr Aubriet from being seen as 'connected' to Luxembourg, it is too restrictive. The Luxembourg law consequently will need to be amended to achieve the aim of increasing the proportionate of the population in higher education in a more proportionate manner.

2. Competition and State Aid Law

2.1 Competition Law

Case C-265/17P – Commission v UPS

The case concerned the acquisition of TNT Express (a delivery service for small parcels) by the United Parcel Service., which the Commission prohibited in 2013 on the grounds that it would serve as a 'significant impediment to effective competition' in that sector in 15 Member States. It determined that the likely effect of the acquisition would be a price increase in the majority of those markets.

UPS challenged the Commissions prohibition before the General Court, and in March 2017, the General Court annulled the Commission decision because the price increase modelling exercise it engaged in differed in substantial ways from the modelling exercise disclosed to UPS, making it impossible for UPS to mount a proper defence to the modelling exercise's results.

The Commission appealed the General Court's finding to the CJEU, but in the current judgment, the CJEU confirmed the General Court's finding that the Commission committed a procedural irregularity (infringing the rights of the defence) that annuls its prohibition of the acquisition. Specifically, it stressed that the Commission *was* required to disclose its final analysis model to UPS, and a failure to do so infringed UPS' rights.

Cases T-762/15, T-763/15, T-772/15, T-1/16, T-8/16 – Sony v Commission

In a 2015 decision, the Commission found that several undertakings operated a cartel in the optical disk drive (ODD) market. The relevant disk drives are used inter alia in personal computers manufactured by Dell and HP, who hold important shares of the global market in personal computing devices. The cartel, which operated between 2004 and 2008, engaged in price-fixing at levels higher than prices would have been in the absence of the cartel.

Several undertakings were granted immunity from fines on account of having reported the anticompetitive practices to the Commission, but other participating undertakings were fined for a total sum exceeding 120 million euros. The fined undertakings, including Sony, brought actions before the General Court to seek an annulment of the Commission's decision or a reduction of the fines imposed.

In the current judgment, the General Court considered the Commission's decision and concluded that the Commission's findings of the geographic scope of the cartel as being EU-wide was correct, and so EU law applied to the case. The contracts concluded between Dell and HP and the ODD suppliers revealed practices that, by object, distort competition on the internal market, and the Court agreed that this was a single continuous infringement as well as a series of instances of individual anticompetitive conduct. The calculation of the fines imposed

was also declared as valid by the General Court, and as such, it dismissed the appeals in their entirety.

Case T-105/17 – HSBC Holdings and Others

The case involved a cartel, notified by Barclays, in the 'Euro Interest Rate Derivatives' (EIRD) sector. Barclays was granted conditional immunity in exchange of cooperation in 2011. When the Commission carried out an investigation at various of the premises reported by Barclays, infringement proceedings were commenced against a number of financial institutions, including HSBC.

In 2016, the Commission found that HSBC, amongst others, participated in a single, continuous infringement that restricted or distorted competition in the EIRD sector. HSBC, in light of that decision, was fined over 33 million euros.

HSBC appealed the Commission decision. In the current judgment, the General Court confirmed the finding of participation in a cartel, but annulled the fine imposed on HSBC as the Commission had not provided sufficient reasoning for the calculation of the fine – and as such the fine was annulled.

Case C-435/18 - Otis and Others

The case involved a claim for compensation made by an Austrian region against five companies that were found to be in a cartel on the market for the installation and maintenance of lifts and escalators. The Austrian region itself had not suffered a loss as a purchaser of a lift or escalator, but the cartel's activities had resulted in increased construction costs in the region, which led to the local government to grant subsidies (in the form of promotional loans) of a higher value than would have been offered in the absence of the cartel.

The Austrian Supreme Court, hearing the case, has asked the CJEU if an Austrian law, stating that the Austrian region cannot apply for compensation because it made no purchases on the market affected by the cartel itself, is compatible with Article 101 TFEU.

The CJEU reminded the Austrian Court of the fact that Article 101 TFEU is directly effective, and while the EU operates under a principle of national procedural autonomy when it comes to remedies, those remedies have to be effective. As those damaged by a cartel are not necessarily only those who have made purchases on the relevant market, the full effectiveness of Article 101 TFEU requires that those in situations like the Austrian region can also claim compensation under EU law, if indeed the cartel was responsible for any losses it suffered. The national court was thus asked to consider if the Austrian region did indeed lose money (by not investing funding in more profitable means, and instead granting these subsidies) and if a causal link between that loss and the cartel was demonstrable.

2.2 State Aid

Joined Cases T-131/16, T-263/16 – Belgium v Commission

The case concerned a number of tax exemptions that were granted by Belgium since 2005. They applied in situations where Belgium entities that are part of multinational corporate groups could demonstrate that significant business was moving to Belgium, in which case so-called 'excess profits' (beyond those made by comparable standalone entities in similar situations) would be exempted from corporate income tax.

In 2016, the Commission declared this system of 'excess profit' tax exemptions in exchange for creating jobs and investment in Belgium was a form of illegal state aid, and ordered the recovery of that aid as granted to 55 beneficiaries.

Belgium and one of the beneficiaries, Magnetrol International, brought an action before the General Court seeking to annul the Commission's decision, finding that the Commission acted beyond its competences and erred in its finding that the scheme in question was a form of state aid.

In the current judgment, the General Court agreed and annulled the Commission's decision. Specifically, while the Commission did not infringe on Member State competences by considering the structure of direct taxation in Belgium, the excess profit exemption did not qualify as an aid scheme under EU law. It came to this conclusion for several reasons, related to the definition of an 'aid scheme' in Council Regulation 2015/1589 and the ways in which the Belgian exemption did not meet this definition. First, the Belgian provisions in law required further implementation in practice, and operated in practice with a margin of discretion, including whether the exemption was granted at all, which precluded an aid scheme. Finally, there was no systematic extension of the aid in practice, which also precluded an aid scheme. The Commission's decision was consequently annulled.

Cases T-679/16, T-865/16 – Athletic Club v Commission[5]

The case concerned a Spanish law of 1990, which required all Spanish professional football clubs to convert to so-called 'sports public limited companies' (SPLCs). However, there was an exception: four Spanish football clubs (namely, Barcelona, Real Madrid, Osasuna and Athletic Bilbao) were exempted from the requirement because they achieved a 'positive result' for the tax years preceding 1990. They thus continued to operate as a 'sports club' under Spanish law, which in practice means that they operate as non-profit organisations and were, until 2016, taxed at a lower rate than the SPLCs.

In 2016, the Commission decided that the 'sports club' regime for these four football clubs amounted to a form of illegal state aid, in the shape

[5] The judgment is not available in English.

of a corporation tax privilege, and ordered Spain to discontinue the scheme and recover any aid granted immediately.

Barcelona and Athletic Bilbao brought an action before the General Court. In the current judgments[6], the Commission's decision was annulled. Specifically, the Commission's calculations of the tax advantage that was borne by the four 'sports club' football clubs was incomplete and covered only four of years of the period in which the scheme operated, and further ignored statements submitted by the football clubs that demonstrated that this supposed advantage did not materialise in practice because of other components of the tax regime applicable to non-profits. As such, the Commission failed to demonstrate that the 'sports club' status actually conferred an advantage to these clubs to the required legal standard, and its decision was annulled.

Joined Cases T-98/16, T-196/16, T-198-16 – Italy v Commission[7]

The Italian bank Banca Tercas (Tercas) was placed under special administration in 2012, on account of irregularities identified by the public body that performs the functions of the central bank of Italy, Banca d'Italia. In 2013, a different bank, BPB, expressed an interest in the subscription of additional capital in Tercas, but under specific conditions. Namely, the FITD – a consortium of banks governed by private law which acts as a mutual benefit body and can both statutorily and voluntarily guarantee depostis for its members – should cover Tercas' deficit, and Tercas should be audited.

In 2014, after concluding that following the BPB conditions would be more beneficial than reimbursing Tercas' depositors, the FITD covered Tercas' negative equity and covered its guarantees, with the approval of Banca d'Italia. This set of actions was investigated by the Commission, which in December 2015 decided that the measures adopted to cover Tercas' negative equity constituted a form of Italian state aid.

Italy, BPB, and the FITD (with support from Banca d'Italia) have all requested the General Court annul this decision, and in the current judgment, the General Court has done so, finding that the measures granted to Tercas did *not* involve the use of state resources and were *not* imputable to the state, thus making it impossible for them to be state aid. FITD acted independently when adopting the measures to benefit Tercas, rather than under state instruction or influence, and did not act under its sole public function (which is deposit guaranteeing) when adopting these measures. No public authorities appeared to be involved in the adoption of the measures at issue, and the funds granted to Tercas to counteract its negative equity were not demonstrated to be under public control. As such, the Tercas 'rescue'

6 The Commission decision was annulled in the Barcelona judgment; as a consequence, the Athletic Bilbao claim on the same points was dismissed.

7 The judgment is not available in English.

was not proven to involve state aid by the Commission, and its decision was annulled.

Case C-405/16 P – Germany v Commission

Germany adopted a law on renewable energy in 2012 that introduced a scheme to support undertakings that were producing electricity from renewable energy sources and mine gas. The law guaranteed those producers a higher-than-market price for their electricity; and to make that price feasible, it imposed a surcharge on the suppliers to final customers (which in practice customers paid for). However, certain undertakings were eligible for a cap on that surcharge in order to maintain their international competitiveness.

In 2014, the Commission found that the system set up by Germany in 2012 involved state aid, and while it largely approved of both the price guarantee as a form of state aid, and the exemption for the surcharge as state aid, there were certain aspects of the 'surcharge cap' that were contrary to EU law.

Germany appealed the finding that any part of its scheme constituted illegal state aid before the General Court, which was dismissed in 2016; and Germany then appealed that dismissal before the CJEU.

In the current judgment, the CJEU upheld Germany's appeal, set aside the General Court's judgment and annulled the Commission's decision, on the basis that the General Court wrongly concluded that the funds generated by the 'surcharge' were 'state resources'. Specifically, the surcharge was neither a levy, nor was it clear that the German state actually controlled money generated by the surcharge. The surcharge instead appears to be used to finance the compensation scheme itself, and does not leave discretion to the German state to use the funding in other ways. As such, the cycle set up by the 2012 law does not demonstrably involve state resources, but rather funds the 'price increase' by a 'surcharge' that lay outside of public control. The CJEU concluded this was not state aid.

Joined Cases T-836/16 and T-624/17 – Poland v Commission[8]

The case concerned a 2016 Polish law taxing the retail sector. The scope of the law covered all retailers, regardless of their legal status, and was progressively calculated on the basis of the turnover of the retailer. The tax rates commenced at a turnover of approximately 4 million euros, taxed at 0.8%.

The Commission considered the law to be a form of State Aid, and ordered the Polish authorities to immediately suspend the progressive tax rates until the Commission took a decision on whether this was a form of aid compatible with the internal market. The Polish government suspended application of the law in response.

In 2017, the Commission found that the tax was a form of prohibited State aid, and that it had been implemented unlawfully. No aid was

[8] The judgment is not available in English.

recovered, as the law setting up the tax had been suspended only two weeks after it came into force, and no 'aid' had consequently been given out.

Poland contests the Commission's view that this was a selective measure favouring certain undertakings, largely because of its progressive nature. It commenced annulment procedures before the General Court regarding both the suspension order and the final decision on the Polish tax law.

In the current judgment, the General Court commenced by tax measures that grant certain undertakings an advantage over other taxpayers is a form of state aid. What mattered for the purposes of determining if this law constituted state aid is if there were other taxpaying undertakings in Poland that were in a comparable legal and factual position, but who did not benefit from the measure at hand because they were subject to the 'normal' taxation system.

It found that the Commission erred in noting that the retail sector was subjected to a more beneficial tax regime than similar undertakings, as it assumed a hypothetical flat tax rate that started at a turnover of a single Polish zloty, but such a system did not exist. As Poland set up sectoral taxes, the 'normal' system was the tax that applied to the retail sector in general – which was the current system.

It further found that it cannot be assumed that progressive taxation is itself contrary to the EU laws on state aid: the aim of the Polish government was to introduce a sectoral tax with an ultimate redistributive purpose, and a progressive tax satisfies that objective. The Commission thus wrongly suggested that the Polish government failed to satisfy its objective of taxing all turnover in the retail sector – this had never been the Polish government's objective.

Finally, the CJEU concluded that starting progressive taxation from a high threshold does not in and of itself imply a 'selective advantage', and so the Commission needed more evidence of those selective advantages than it presented in deciding the Polish retail tax law was contrary to EU law. The Commission's final decision was consequently annulled, as was its initial request to suspend the law, as the foundation of the Commission's claims was on a 'manifestly incorrect analysis' of the Polish law.

Cases T-353/15, T-373/15 - NeXovation

The case concerned a leisure complex called the Nürburgring in Germany, consisting of a race track, a leisure park, hotels and restaurants. Between 2002 and 2012 the owners of the complex received regional support measures for the construction, as well as the organisation of Formula 1 races.

The Commission investigated these support measures in 2012, following a complaint by a German motorsport association in 2011. Simultaneously, the owners of the complex were found insolvent by a local German court, and in 2013 a tender process was started to sell their assets (including the complex). A second complaint by the same

German motorsport association was lodged with the Commission as well in 2013, this time arguing that the tender process had not been transparent or non-discriminatory.

A further complaint was filed with the Commission by an American company called NeXovation, also contesting the tendering of the complex as failing to be transparent, non-discriminatory, or unconditional. Part of the complaint was that domestic tenderers (including the one who won, Capricorn) would continue to benefit from new aid, whereas NeXovation would not.

In October 2014, the Commission found that some of the support granted to the Nürburgring complex' owners was incompatible with internal market law, but that the tender process had taken place in a non-discriminatory and transparent manner and resulted in a fair price that did not amount to 'economic continuity' between the sellers and Capricorn.

NeXovation and the German motorsport association brought actions before the General Court in light of this Commission decision and sought to have it annulled. In the current judgment, the General Court found those actions to be inadmissible in part and unfounded as to the remainder, and so dismissed them.

Case T-20/17 – Hungary v Commission

In 2014, Hungary introduced a new advertising tax, which applied to turnover derived from broadcasting or publishing advertisements in Hungary. Affected by the tax are, in particular, newspapers, audiovisual media and billboard poster operators. The tax operated on the basis of progressive rates, and where pre-tax profits for the 2013 financial year were zero or negative, those subject to the tax could deduct 50% of the losses carried forward from their 2014 taxable amount.

In 2016, the Commission found that this taxation system (both in terms of its progressive structure and the deduction of losses for non-profit making undertakings) constituted a state aid measure that was incompatible with the internal market. The Commission found that the progressive tax rates differentiated between large and small undertakings, and involved a size-based advantage to smaller undertakings, and that a 50% deduction of taxable amount was a form of state aid.

Hungary brought an action before the General Court, seeking to annul the Commission's decision. In the current judgment, the CJEU found that the Commission could not infer that there were selective advantages constituting state aid in the advertising tax solely by noting its progressive structure. It based its findings on a comparison with a hypothetical 'normal' system that did not operate a progressive tax, when it should have considered the progressive tax as the 'normal' system in the absence of an alternative. The Commission also failed to actually demonstrate that any selective advantages stemmed from the progressive tax, and did not prove that the structure of the tax ran contrary to the stated tax objectives (establishing sectoral taxation or turnover in accordance with redistributive purpose).

With regards to the 50% deductability of losses from the previous tax year, the General Court found that this is not a selective advantage as it is based on objective criteria irrespective of choices made by the undertakings concerned. The measure also satisfies the redistributive purpose underpinning the advertising tax, and is not discriminatory in nature.

The Court thus annulled the Commission's decision in full.

Cases T-755/15, T-759/15 – Luxembourg v Commission

The case concerned a Luxembourgian tax authority ruling in favour of Fiat Chrysler Finance Europe ('FFT'), an undertaking in the Fiat/Chrysler group of companies that was in charge of providing treasury and financing services to the remainder of the group's European companies. The tax ruling endorsed a calculation method for determining FFT's remuneration (and thus taxable profits) in Luxembourg.

In 2015, the Commission found that this ruling (and the underpinning calculation method) was a form of State Aid that was incompatible with the internal market. It ordered Luxembourg to recover the unlawful and incompatible aid.

FFT and Luxembourg both brought an action before the General Court to seek the annulment of the Commission decision, arguing that the relevant tax ruling was not a form of State Aid that was contrary to EU law on a number of grounds.

In the current judgment, the General Court dismissed the FFT and Luxembourg actions, and confirmed the validity of the Commission's original decision. In comparing this tax ruling to normal corporate taxation for undertakings in similar positions in Luxembourg, it agreed with the Commission that an advantage had been granted, and the calculation method extended to FFT offered advantages that would not have been negotiated under normal market conditions for other companies in Luxembourg. It also found that recovery of the aid extended under this tax ruling did not breach the principle of legal certainty, and thus upheld the Commission decision in full.

Cases T-760/15, T-636/16 – Netherlands v Commission

The case concerned a tax arrangement (known as an 'advance pricing arrangement', APA) between the Netherlands and Starbucks Manufacturing EMEA BV (SMBV), part of the Starbucks group. The purpose of the arrangement was to determine what SMBV's remuneration for its activities within the Starbucks group was; and that determination would be used to calculate its taxable profit for Dutch corporate income tax purposes. The APA also confirmed the royalties due to be paid by SMBV to another part of the Starbucks group for the use of the Starbucks' roasting intellectual property.

In 2015, the Commission found that the APA was a form of State Aid incompatible with EU law, and ordered that the advantages granted to SMBV via the aid be recovered.

The Netherlands and Starbucks brought an action against the Commission decision before the General Court, seeking its annulment on the grounds that the APA did not actually confer a selective advantage to SMBV (which would make it a form of State Aid). Their primary objections were to the Commission methodology employed to determine the existence of selectivity in the APA, as well as the methodology employed to determine that this granted an advantage to SMBV.

In the current judgment, the CJEU found in favour of the Netherlands and Starbucks, and annulled the Commission decision. While it did not disagree with the entirety of the Commission's identification of issues with the APA, it had failed to demonstrate that SMBV actually benefitted from a selective reduced tax burden, or that the royalties determined as due were miscalculated and thus conferred an advantage onto SMBV. As the Commission failed to demonstrate that SMBV was granted an economic advantage via the APA, the APA does not contravene Article 107 TEU and is not unlawful.

3. Area of Freedom, Security and Justice

3.1 Judicial Cooperation in Civil and Commercial Matters

Case C-671/18 – Centraal Justitieel Incassobureau (CJIB)

In November 2017, Polish national ZP was issued with a fine of 232 euros in the Netherlands in light of a road traffic offence that had taken place in a car registered to ZP. The Dutch Highway Code means that liability for road traffic offences lies with the registered car owner, unless proven otherwise. ZP's fine was sent to his letter box, with a deadline for an appeal to the decision of late December 2017.

In 2018, the Dutch fine collection agency (CJIB) sent a request to the Polish District Court in Chelmno for the recognition and execution of the fine, in light of an EU framework decision on the mutual recognition of financial penalties.[9] Before that Polish court, ZP submitted that on the date of the offence, he had already sold the vehicle and had informed his car insurer of that sale—but had failed to inform the authority responsible for registering the vehicle.

The Polish court has asked the CJEU if it can refuse to enforce the decision to fine ZP, and if the fact that the Dutch system fines the car owner is compatible with the principle, under Polish law, that criminal liability lies with the driver, not the car owner.

The CJEU responded by stressing that as the EU framework decision is meant to establish an EU-wide mechanism for the enforcement of fines in relation to certain offences, grounds for refusing to carry out a request under that framework decision must be interpreted restrictively.

It noted that the time to appeal the decision set out by Dutch law was sufficient to allow ZP to contest the fine, but the Polish court should verify that he actually received the decision on time and had time to prepare a defence. If so, the Polish court must recognise the decision imposing the fine. If not, the Polish and Dutch authorities must exchange information and come to a mutual agreement.

The fact that under Dutch law, the vehicle owner is liable where the driver is not immediately traceable, is not contrary to EU law, even if Polish law sets out different processes.

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[9] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (OJ 2005 L 76/16), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81/24).

3.2 Asylum & Immigration

Case C-557/17 – Y.Z. and Others

The Chinese national Y.Z. was granted a fixed-term residence permit in the Netherlands in 2001 on account of his duties as the manager of a company. In 2002, his wife and minor son (also Chinese) obtained family reunification residence permits in the Netherlands, and in 2006 those were changed into residence permits for long-term residents.

In 2014, the Dutch State Secretary withdrew, with retroactive effect, the resident permit granted to Y.Z. in 2001, on the ground that his employment back then had been fictitious – and so all residence permits obtained had been obtained fraudulently, and the residence permits granted to Y.Z.'s wife and son were also withdrawn. Whether the wife and son were aware of the fraud committed by Y.Z. was, according to the State Secretary, irrelevant.

The Dutch Council of State, following an appeal brought by all three parties, has asked the CJEU if the State Secretary could withdraw the wife and son's residence permits even if they were unaware of the fraudulent actions of Y.Z..

In the current judgment, the CJEU first observed that the directive on family reunification[10] can require fraudulently obtained residence permits to be withdrawn, without specifying who had to commit the fraud or if the family members were aware of it. As such, withdrawal of the residence permits granted to the wife and son is in principle possible under the directive. However, it cannot occur automatically, and the family situation must be examined on a case-by-case basis to ensure that a residence permit is withdrawn in compliance with fundamental rights.

The same is true for the directive on long-term residence[11], though in principle withdrawing a long-term residence permit results in the applicants lose their original right of residence (based on family reunification in this case). As such, in revoking either the current permit or the family reunification permit, the Dutch authorities have to consider the duration of the wife and son's residence in the Netherlands, the son's age of arrival, the possibility that he has been effectively raised there and has extensive ties to the Member State. Their unawareness of the fraud is part of a consideration of their right to family life, and their connections (or lack thereof) to their country of origin equally must be considered. Only after a full assessment of all these factors can the Council of State determine if withdrawal of the residence permits is justified.

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[10] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003, L 251/12).

[11] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44).

Cases C-163/17, C-297/17, C-318-319/17, C-438/17 - Jawo and Ibrahim and Others

The current cases involve the relationship between the Charter of Fundamental Rights and the Dublin III Regulation on determining the responsible Member State for examining an application for asylum or international protection.

The Gambian Mr Jawo lodged an initial asylum application in Italy, which he had reached by sea. Traveling on, he also submitted an application for asylum in Germany. The German authorities rejected that application and ordered his removal to Italy. However, as they did not find him at the accommodation he was living at when attempting to transfer him, Mr Jawo argued that Germany had become responsible for his application under the Dublin III Regulation[12] as they had failed to return him within 6 months (as required under that regulation). He further argued that there are systemtic deficiencies in the Italian asylum procedures, reception conditions and living conditions for asylum and international protection seekers.

The German Administrative Court in Baden-Württemberg has asked the CJEU for an interpretation of the Dublin III Regulation regarding transfer deadlines, as well as the meaning of the prohibition of inhuman and degrading treatment as set out in the Charter. Regarding the latter, it referred to a Swiss Refugee Council report from 2016 which concluded that beneficiaries of international protection in Italy are exposed to the risk of homelessness and destitution.

The Ibrahim and Others cases concern stateless Palestinians and Chechen national who were granted subsidiary protection in Bulgaria and Poland respectively. They applied for asylum in Germany as well, and their applications were rejected, on account of the grant of subsidiary protection by other Member States.[13] They challenged this before the German Federal Administrative Court, which asked the CJEU if their applications could be rejected when the living conditions of those who have subsidiary protection in Bulgaria and Romania must be regarded as 'inhuman or degrading'.

In the current judgments, the CJEU first stressed that there is a presumption that a Member State will treat those applying for protection and those granted protection in a way that is compatible with the Charter of Fundamental Rights, the Geneva Convention and the European Convention on Human Rights. However, this does not mean that this presumption cannot be challenged by means of factual evidence. Accordingly, where a court hearing an action challenging a transfer or application decision provides evidence that aims to establish

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12 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180/3).

13 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180/60).

a risk of inhuman or degrading treatment, that court is required to assess such evidence.

However, for deficiencies in protection/asylum processes to amount to 'inhuman or degrading treatment', they would need to attain a 'particularly high level of severity', which the CJEU elaborated on as resulting in a situation where a person wholly dependent on state support finding themselves 'in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity'.

The absence of a subsistence allowance, or a very low allowance that is comparable to what nationals of the Member State would receive, consequently only amount to inhuman or degrading treatment where an applicant would find themselves in such 'extreme material poverty'.

EU law as such does not preclude transfers to the responsible party or rejections of applications by a non-responsible party *unless* it can be demonstrated that such a transfer or rejection would place the applicant in a situation of 'extreme material poverty'.

Regarding the failure to find Mr Jawo in order to return him to Italy, the CJEU found that his absence from his accommodation, along with a failure to inform the authorities of that absence, can be considered as him having 'absconded' if it was deliberate. If it was deliberate, the transfer time limit is extended to 18 months, as per the directive; and if it was not, Germany would have become the responsible Member State. This was for the national court to determine.

Case C-444/17 – Arib and Others

Moroccan national Mr Arib had been subject to an expulsion order removing him from France, and subsequently had his papers checked on board a coach that had travelled from Morocco to France, near the French/Spanish border. He was apprehended as he was suspected of having entered France illegally, and the local Prefect made an order requiring him to leave France and be in administrative detention until that date.

However, his detention in police custody was annulled by the Regional Court in Montpellier on appeal. A further appeal to the Court of Appeal in Montpellier upheld that decision, and the Prefect appealed to the Court of Cassation. Relevant to the facts is that at the time the check on Mr Arib was carried out in 2016, France had temporarily reintroduced border checks at internal Schengen borders on account of a 'state of emergency' posed by a serious threat to public policy and internal security (stemming from the refugee crisis). This was done in compliance with exceptions permitted by the Schengen Border Code.[14]

[14] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2016 L 77/1).

The Court of Cassation has asked the CJEU if a Schengen internal border with temporary controls can be equated to an external border for the purposes of the Returns directive[15], in which case the provisions of the Returns directive do not apply to Mr Arib's expulsion: the Returns directive excludes third country nationals who were intercepted at an external border from its return procedures.

The CJEU, in the current judgment, first noted that Mr Arib was not subject to a refusal to enter into French territory. The relevant determination to be made was thus if a third-country national caught illegally in a Member State, near its internal border (which was at the time controlled) falls within the exception stated in the Returns directive.

The Schengen Border Code, per the CJEU, must be interpreted as not permitting Member States to equate an external border with an internal border at which controls have been reintroduced. As such, the Returns Directive's exceptions for third country nationals having crossed external borders do not apply to someone in Mr Arib's position.

Joined Cases C-391/16 M, C-77/17 X, C-78/17 X

Three applicants or holders of refugee status in Belgium and the Czech Republic have had their applications rejected or statuses revoked on the basis of provisions in the Refugee Directive.[16] Specifically, the directive permits rejections and revocations of refugee status where the persons applying or holding the status represent a danger to the host State, or have been convicted of committed a particularly serious crime within the host State.

The above applicants and holders contested these refusals/revocations before the Belgian Council for Asylum and Immigration Proceedings and the Supreme Administrative Court of the Czech Republic respectively; and these courts have asked the CJEU whether these provisions of the Refugee Directive are compatible with the Geneva Convention on the Status of Refugees.[17] Particularly, they are concerned about the Directive'ss consequence of losing refugee status: while the Geneva Convention permits the expulsion or refoulement of a foreign national, it does not clarify that this would result in that national no longer being a refugee – and so the Directive may go further than the Geneva Convention in excluding these nationals from refugee status. As such, they have asked if such a consequence is compatible with the Charter of Fundamental Rights (CFR) and the EU Treaties, which require EU asylum policy to comply with the Geneva Convention.

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15 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348/98).

16 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337/9).

17 Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 137, No 2545 (1954)), which entered into force on 22 April 1954, as supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

The CJEU, in the current judgment, stressed that the Refugee Directive is intended to comply fully with the Geneva Convention. Given that, any person with a 'well-founded fear of persecution' in their country of origin or residence must be classified as a refugee, regardless of if that status has been formally granted in line with the directive. 'Refugee status' under the directive is defined as the recognition of that status by a Member State – which is purely declaratory, not constitutive.

As such, anyone formally recognised as a refugee is entitled to the protection levels set out in the Geneva Convention, supplemented by the Refugee Directive where this offers *greater* protection than the Convention.

The Court continued by noting that the Directive sets out grounds for revocation and refusal that correspond to the Geneva Convention's grounds for refoulement of a refugee. The Directive, however, has to be interpreted and applied in such a way that the CFR rights are protected – and refoulement to a country in which a refugee has their life or freedom threatened would violate the CFR's provisions on torture, inhuman or degrading punishment or treatment, as well as removal of any person to a State where they are at serious risk of being subjected to such punishment or treatment.

The Geneva Convention actually permits refoulement in the situations where EU law would not, as such; and so EU law provides more extensive protection for refugees than the Convention does.

The Court finally clarified that revocation of refugee status, or a refusal to grant that status, does not mean that the person in question is no longer a refugee – which is dependent only on having a well-founded fear of persecution in their country of origin. Being excluded from the directive does not mean being without the protection offered by the Geneva Convention, in that case, and that in particular, rights set out in the Geneva Convention that exist on the basis of physical presence in a territory (rather than lawful presence) continue to apply.

In conclusion, the CJEU found that the directive is compatible with the Geneva Convention, when interpreted in line with the rules of the CFR and the EU Treaties, and so its provisions on revocation and refusal are valid.

Case C-233/18 – Haqbin

Mr Haqbin, an Afghan national, arrived in Belgium as an unaccompanied minor. He lodged an application for international protection and was thereafter hosted in a reception centre. While resident in the centre, he was involved in a fight with various other residents. The director of the reception centre excluded him for 15 days from material aid in a reception facility in light of this. While excluded, Mr Haqbin stayed with friends or overnight in a park.

He appealed the exclusion decision, arguing it violated the Charter of Fundamental Rights. The Belgian court referred questions about the possibility of excluding applicants for international protection in Mr Haqbin's situation under EU law.

The CJEU found in the current judgment that Article 20(4) of Directive 2013/33, which lays down the standards for reception of applicants for international protection, does mention that sanctions can be imposed on applicants that are involved in violence against other applicants.[18] However, Article 20(5) notes that any sanctions covering material reception conditions must be 'objective, impartial, motivated and proportionate' and must 'under all circumstances, ensure a dignified standard of living'.

The withdrawal (even temporary) of all material reception conditions (so those relating to housing, food, and clothing) would automatically fail that latter condition and would be disproportionate. Any sanctions applied therefore must in all cases comply with proportionality and the fundamental right of dignity of the applicant. Such sanctions can include holding the applicant in a separate part of the reception centre, or in detention, but not failing to provide any material reception conditions. The sanction imposed against Mr Haqbin was consequently in violation of EU law.

The CJEU stressed that in cases involving unaccompanied minors, increased account of the particular situation and of the principle of proportionality must be taken, and any decision to impose sanctions must be taken in view of the best interest of the child, in compliance with the Charter of Fundamental Rights.

3.3 European Arrest Warrant

Joined Cases C-508/18, C-82/19 and C-509/18 – PPU PI, PF and OG (Parquet de Lübeck)

Two Lithuanian nationals and one Romanian national are have brought an action before the Irish courts to challenge the execution of European Arrest Warrants (EAW) that were issued by German public prosecutor's offices and the Prosecutor General of Lithuania for the purposes of criminal prosecution. OG is accused of murder and GBH; PF is accused of armed robbery, and PI is accused of organised or armed robbery.

The three applicants claim that the German public prosecutor's office and the Prosecutor General of Lithuania lack the competence to issue an EAW as they are not 'judicial authorities' as defined in the framework decision on the EAW.[19] Specifically, OG and PI argued that the German public prosecutor is not independent of the executive, as it is part of an administrative structure that is headed by the Minister for Justice.

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18 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L 180/96).

19 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81/24).

The Irish Supreme and High Court have asked, in that context, how the concept of 'judicial authority' under the framework decision on the EAW should be interpreted.

In the current judgment, the CJEU held that an 'issuing judicial authority 'does not include public prosecutor's offices where these are at risk of being subjected to instructions (whether direct or indirect) from the executive, as the German public prosecutor's office is. However, the Prosecutor General of Lithuania has sufficient independence from the executive as an independent criminal prosecutor to qualify as an 'issuing judicial authority' under the framework decision.

The key distinction highlighted by the CJEU is that any authority responsible for issuing an EAW must act independently in the execution of its functions, and specifically, must not be subject to directions or instructions from any other body, but particularly the executive.

Joined Cases C-556/19 PPU, C-626/19 PPU, C-625/19 PPU, C-627/19 PPU – Public Prosecutors

In these combined cases, the CJEU has supplemented existing case law on the Framework Decision establishing the European Arrest Warrant, providing guidance on what the concept of 'independence' of the 'issuing judicial authority' means under EU law, and how it relates to 'effective judicial protection'.

The cases concern European Arrest Warrants issued by Public Prosecutors' Offices in France, Sweden and Belgium. Could the French Public Prosecutor's Office issue these warrants, and could these warrants guarantee 'effective judicial protection' when they were not issued by courts?

The CJEU considered the French Public Prosecutor's Office first, and ruled that it had demonstrated it was independent enough from the executive in order to qualify as 'issuing judicial authorities', which do not necessarily have to be judges or courts. Moreover, the fact that a public prosecutor's office is not itself a court does not mean that a decision to issue a European Arrest Warrant cannot be subject of court proceedings that result in 'effective judicial protection'. National procedural rules in Sweden and France allow for the decisions of public prosecutor's offices to be judicially reviewed, which satisfies this requirement.

The Belgian European Arrest Warrant was issued for the purposes of executing a custodial sentence imposed by a final judgement, and so the matter of 'effective judicial protection' had to be interpreted in that context. The CJEU here found that 'effective judicial protection' did not require the existence of a separate appeal against the public prosecutor's office, as the original judgment on which an arrest warrant for a custodial sentence is based could be judicially reviewed.

4. Social Policy

4.1 Employment

Cases C-24/17, C-396/17 - Österreichischer Gewerkschaftsbund

The Austrian system for determining pay and promotions for State officials and public servants excluded taking into account professional experience gained before the age of 18, until the CJEU found this to be unjustifiable age discrimination in 2010.[20] Austrian attempts to revisit the system in question initially failed to remove their discriminatory character,[21] and were again reviewed in 2015 and 2016. The 2016 amended system retroactively sets out that State officials and public servants are to be moved to a new system of pay/promotion calculations, under which their first 'grade' is calculated based on their final pay under the old system.

The Austrian Supreme Court has asked the CJEU, in light of an action brought by Mr Leitner, who works for the Austrian police, if the new systems are compatible with EU law.

In the current judgment, the CJEU has declared that they remain contrary to EU law.[22] The unfair treatment set up by the old pay/promotions system is retained: those who were treated unfavourably (on account of experience gained before the age of 18) have that unfavourable treatment carried on, as their current pay under the old system will be lower than that of comparable State employees and public servants who gained identical experience over the age of 18. The CJEU declared that this continued difference in treatment cannot be justified by a respect for acquired right, the protection of legitimate expectations, or budgetary/administrative considerations.

The EU principle of non-discrimination on the grounds of age is long-established, and any measures adopted by Austria that do not fully re-establish equal treatment by granting those unfavourably treated under the old system *identical* treatment to those who enjoyed advantages under the old system will fall foul of EU law.

Any State official or public servant who has been discriminated against on account of their age, the CJEU stressed, is entitled to receive a payment of financial compensation that amounts to the difference of their pay *had* their pre-18 experience been taken into account, and the pay they actually received.

A further shortcoming of the new Austrian regime was that it put a limit of 10 years onto how much work experience gained outside of 'the public sector' was taken into account when calculating pay and promotions; whereas any work experience obtained as an employee of

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20 Case C-88/08 Hütter.
21 Case: C-530/13 Schmitzer.
22 Specifically, the Charter of Fundamental Rights (CFR) and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303/16).

a local authority, a municipal association, or the EU or an intergovernmental body was taken into account in full. The CJEU ruled that this, too, is contrary to EU law, as it discourages those who are acquiring more than 10 years of work experience with their non-public employer from exercising their right to free movement in a non-justifiable manner.

In short, the Austrian regime for calculating State official and public servant pay and promotions remains contrary to EU law.

Case C-161/18 - Villar Láiz

Ms Villar Láiz has challenged the calculation of her retirement pension by the Spanish National Institute of Social Security (INSS), which was based in part on the fact that she had spent significant portions of her working life working part-time. She claims that the difference in pension totals that part-time versus full-time work results in under these calculations is a form of indirect sex discrimination, as the majority of part-time workers are women. Specifically, the law calculates pensions on the basis of actual time worked, but then applies a further 'reduction' multiplier to part-time work.

The High Court of Justice of Castile considered her claim on appeal, and agreed in principle that the Spanish law on pension calculations often adversely effects part-time workers. It considered that the Spanish legislation results in indirect sex discrimination as according to the Spanish National Institute of Statistics, 75% of part-time workers in Spain in quarter 1 of 2017 were women. It has asked the CJEU for its opinion, focusing on whether the Spanish legislation is contrary to the Equal Treatment Directive, on account of the reduction factor the law applies to part-time workers.[23]

The CJEU, in the current judgment, found that the Equal Treatment Directive precludes the Spanish law *if* its consequence is that female workers are placed at a particular disadvantage. The Directive precludes both direct and indirect sex discrimination in the calculation of social security benefits. The Spanish law includes a seemingly neutral provision that nonetheless particularly disadvantages women workers, which is a form of indirect discrimination.

If the Spanish High Court concludes that the statistics do evidence that there are significantly more women who work part-time than there are men who are part-time, and that as a consequence women are placed at a particular disadvantage compared to men in pension calculations, the Spanish law would be contrary to the directive unless it could be objectively justified. The fact that pensions are already calculated on the basis of amount of time actually worked, and then further reduced by a set factor for part-time workers, does not appear to be objectively justifiable. The objective of awarding pensions on the basis of consideration of actual time worked is achieved by the first measure,

[23] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6/24).

and the second is disproportionate and unnecessary to achieve that objective.

As the High Court has already agreed that the majority of part-time workers are women, and that 75% of a given workforce seems statistically significant, it will likely declare the pension calculation method for part-time workers as being contrary to the Equal Treatment Directive.

Case C-486/18 – Praxair MRC

Ms RE started working as a sales assistant with Praxair MRC in November 1999; and her contract was changed from fixed-term and full-time to an indefinite full-time contract in August 2000. She took maternity and childcare leave for two years, and then took a further period of maternity leave, following a period of childcare leave that reduced her contract to a 0.8 FTE. This last period of childcare was due to finish on 29 January 2011.

On 6 December 2010, Ms RE was made redundant as part of a collective redundancy for economic purposes. She accepted 9 months of redeployment leave, and left Praxair MRC on 7 September 2011.

She has challenged the way in which her compensation for dismissal and redeployment leave has been calculated: as dismissal and redeployment took place when she was on her 0.8 FTE parental leave contract, this part-time salary was used to calculate the compensation. The French Court of Cassation has asked the CJEU if this was contrary EU law, specifically, the EU's framework agreement on parental leave,[24] and if it formed indirect discrimination since many more women than men take parental leave on a part-time basis.

The CJEU, in the current judgment, first stressed that the framework agreement on parental leave applies to both male and female workers and parents. Regardless of gender, if a worker is dismissed while exercising parental leave on a part-time basis, the framework agreement requires the calculation of compensation for their dismissal to be on the basis of their full-time contract. The alternative would act to discourage men and women from taking up parental leave, and thus the objectives of the framework agreement. The French national legislation that permitted Ms RE's compensation and redeployment leave allowance to be calculated on the basis of a part-time contract was consequently found to be contrary to this framework agreement.

Regarding the discrimination argument, the CJEU first set out that Article 157 TFEU requires equal pay for equal work for men and women, and that the concept of 'pay' must be interpreted broadly – benefits in lieu of pay also fall within the definition of 'pay' under that Article. Indirect discrimination would arise where a measure appears neutral, but in practice affects workers of one gender significantly more

[24] Framework agreement on parental leave concluded on 14 December 1995, which is set out in the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4) as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10/24).

than others – as appears to be the case here, as the Court of Cassation pointed out that 96% of workers taking parental leave are women. As France was not able to objectively justify the difference in treatment between men and women that the national 'part-time compensation' legislation results in, the legislation is also incompatible with Article 157 TFEU as it is indirectly discriminatory.

Case C-55/18 – CCOO

The Spanish trade union CCOO brought an action before the Spanish National High Court, seeking a declaratory judgment that Deutsche Bank SAE is under an obligation to set up a system for recording working time for its employees. Without such a system, the union argued it was impossible to see if Deutsche Bank SAE was complying with national law and EU law obligations on working time and overtime – with the EU law obligations stemming from the Working Time Directive[25] and the Charter of Fundamental Rights.

Deutsche Bank SAE, however, has argued that Spanish law (and case law from the Spanish Supreme Court) does not require a general working time tracking system to be set up; Spanish case law demonstrates that Spanish law only requires that a record is kept of overtime hours worked, with monthly communication to workers of what these were.

The Spanish National High Court questions if the Spanish law, as interpreted by the Supreme Court, is compatible with EU law. It has told the CJEU that 53.7% of overtime hours worked in Spain are not recorded, and that the interpretation of the law by the Supreme Court deprives workers and their representatives of the evidence they need to prove that they have exceeded working time limits. As such, Spanish law and practice cannot ensure that the Working Time Directive's requirements are met, in the view of the National High Court.

In the current judgment, the CJEU agreed with the National High Court, and found that the Working Time Directive, read in light of the Charter on Fundamental Rights, precludes national laws that (as interpreted) do not require employers to set up a system enabling the measurement of daily working time for each worker. Without such a system, it is not possible to determine actual hours worked, whether overtime or regular, and that makes it impossible for the workers to ensure that their rights (as stemming from the Working Time Directive) are complied with. The specific arrangements relating to the functioning and implementation of a 'daily working time' measuring system are for the Member States to determine, so as to ensure they can take account of the characteristics of the national employment market.

Case C-72/18 - Ustariz Aróstegui[26]

Mr Ustariz Aróstegui was hired in 2017 by the Ministry of Education for the government of Navarre in Spain as a professor under a fixed-term

[25] 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).

[26] The judgment is not available in English.

public law contract. Since then, he has worked in several other educational centers.

In 2016, he requested the Ministry of Education to grant him the additional remuneration for grade enjoyed by civil servant professors with the same seniority he held. His request was rejected, and he brought an action before the Administrative Court in Pamplona.

The Pamplona Court has observed that the only objective condition for the payment of additional remuneration per grade is a seniority of six years and seven months in the grade immediately below; advancement is thus automatic as time passes. Spanish national legislation meanwhile considers additional remuneration for grade to be a personal remuneration inherent in the status of official – which would be a subjective condition for granting the additional remuneration.

It has asked the CJEU whether the nature and purpose of the additional remuneration for grade can be an objective reason that justifies treating fixed-term workers less favourably than permanent workers under the fixed-term work framework agreement.[27]

In the current judgment, the CJEU has found that the framework agreement precludes national legislation that grants additional remuneration to teachers employed as statutory civil servants but not those teachers employed via fixed-term contracts under public law if the only condition for granting the additional remuneration if length of service.

It notes that while it is for the Pamplona court to consider the facts in detail, it suggests that these permanent and fixed-term employees are in comparable situations insofar as the functions of and obligations of the two different types of professors. They are, however, treated differently under Spanish law, and the CJEU reminded that the mere existence of a fixed-term contract is not an objective reason to justify different treatments. As the award of additional remuneration is solely based on length of service, there is no objective reason to exclude those on fixed-term contracts from that award, and the current laws are consequently contrary to the framework agreement.

Case C-450/18 - Instituto Nacional de la Seguridad Social

In January 2017, the Spanish national institute of social security (INSS) awarded WA a permanent absolute incapacity pension of 100% of the basic amount. WA appealed this decision, arguing that as the father of two daughters, under Spanish law he was entitled to receive a pension supplement representing 5% of his initial pension. That supplement is granted to women who find themselves in his circumstances. The INSS dismissed his appeal, stating that this pension supplement is granted

[27] Framework agreement on fixed-term work, concluded on 18 March 1999 ('the framework agreement'), annexed 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 1999 L 175/43).

exclusively to women in those circumstances because of their demographic contribution to social security.

WA challenged the INSS decision, and the Spanish courts referred questions to the CJEU concerning the compatibility of a Spanish law that grants a pension supplement to women in certain situations, but not men in identical situations, with EU law.

The CJEU found, in the current judgment, that the directive on the equal treatment of men and women in matters of social security precludes the Spanish law. The demographic contribution made by women with two children to social security alone cannot justify the difference in treatment between men and women. The Spanish law also cannot be justified by one of the derogations found in the directive, nor by the Article 157(4) TFEU, which permits positive discrimination so as to compensate for disadvantages experienced by women over the course of their professional careers.

4.2 Social Security Coordination

Case C-322/17 – Bogatu

Mr Bogatu is a Romanian national who has lived in Ireland since 2003. In January 2009, he applied for family benefits in respect of his two children, who still lived in Romania, to the Irish authorities. He was employed until 2009, but lost his job in 2009, received a contributory unemployment benefit from 2009-2010, and then a non-contributory unemployment benefit from April 2010 to January 2013, and finally a sickness benefit from 2013 until 2015.

The Irish authorities approved Mr Bogatu's claim for family benefits but excluded the period during which he was in receipt of a non-contributory unemployment benefit. In their view, he was not entitled to those benefits at that time because he was neither employed nor receiving a contributory benefit. Mr Bogatu argued that this was a misinterpretation of EU law, and appealed to the Irish High Court, which has asked the CJEU for clarification on the Regulation coordinating social security systems.[28]

The CJEU, in the current judgment, found that in general, the Regulation makes clear that whichever is the competent Member State, it is also obliged to grant family benefits for family members that are resident in another Member State. It does not require the applicant to have a particular status, such as employed, in order to receive those benefits; the Regulation is instead the consequence of legislative developments that extend its operation of social security coordination beyond employed persons.

The Regulation also does not make receiving family benefits for family members living in another Member State dependent on the receipt of a particular kind of benefit, such as a contributory benefit related to employment. Consequently, under the Regulation, Mr Bogatu is

[28] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166/1).

entitled to family benefits for his Romanian-based family from the competent Member State (which is Ireland) for the period from April 2010 to January 2013 as well as the other periods.

Case C-372/18 - Dreyer

Mr and Mrs Dreyer reside in France for tax purposes, but are insured under the Swiss social security scheme, as Mr Dreyer worked there and is receipt of a Swiss pension.

In 2016, the French tax authorities declared Mr and Mrs Dreyer subject to contributions and levies due to the French National Solidarity Fund for Independent Living (the CAN) in respect of income from French assets received in 2015.

As these contributions/levies are both funding social security in France, the Dreyers disputed their liability for them before the French court on the ground that they are already insured under (and thus liable to) the Swiss social security system; specifically, the Regulation coordinating social security precludes anyone subject to that regulation from falling under the legislation of more than one Member State. Switzerland, for the purposes of the Regulation, counts as a Member State.

The French Administrative Court of Appeal in Nancy asked the CJEU for clarification on the nature of the benefits funded by the CAN. These are a personal independence allowance and a disability compensation allowance, and France argues that they are not social security benefits.

The CJEU, in the current judgment, responded by noting that a 'social security benefit' is one that is granted without any individual assessment, on the basis of a legislative position, *and* must relate to one of the risks addressed by the Regulation.

The two allowances at play do not involve such an individual assessment, in the sense that the amount of benefits are automatically calculated on the basis of legally defined, objective criteria, and there are similarly predefined guides and lists that determine entitlement to a given benefit. As such, the two benefits fall within the definition of a 'social security benefit', and as such fall within the scope of the Regulation – meaning that France cannot collect levies and contributions for them from the Dreyers, who are insured under the Swiss social security scheme.

Case C-631/17 – Inspecteur van de Belastingdienst

Between August and December 2013, Latvian national and resident SF worked as a seafarer for a Dutch undertaking, on board a vessel flying the flag of the Bahamas that sailed outside the territory of the EU. The Netherlands determined that SF was liable for social security in the Netherlands during that period, but SF disagreed and brought and action before the Dutch courts.

The Dutch Supreme Court has asked the CJEU how to interpret the regulation on the coordination of social security systems,[29] and thus which Member State's legislation applies, in a situation like this.

In the current judgment, the CJEU first determines that though the ship operated outside of EU territory, SF's employment relationship was sufficiently closely linked to the EU to fall into the scope of EU law, primarily because SF was resident in Latvia and SF's employer was established in the Netherlands.

As none of the provisions in the regulation relating to 'posted workers' or contract staff for EU institutions applied, nor did those provisions (as set out in Article 11(3)(a)-(d)) applicable to workers in a host Member State; civil servants; those in receipt of unemployment benefits; or those called for service by the armed forces, the CJEU examined whether SF fell within the scope of the regulation's 'catch-all' provision in Article 11(3)(e), which declares the legislation of the Member State of residence applicable to persons to whom other provisions do not apply.

They found that while ordinarily this provision read so as to apply to economically inactive persons, the risk that SF and those in similar situations face is that if this provision does *not* apply to them, they may not be covered by social security in *any* Member State. As such, Article 11(3)(e) must be interpreted broadly, and must cover all of those to whom the remainder of Article 11(3) of the regulation does not apply.

As such, a person in a situation like SF's is covered by the regulation coordinating social security, with the legislation applicable to them being that of the Member State of his or her residence.

[29] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149/4).

5. Fundamental Rights

5.1 Provisions Regarding the Rule of Law

Case C-619/18 – Commission v Poland

In April 2018, the Polish 'Law on the Supreme Court' entered into force. Under the law, the retirement age of Supreme Court judges was lowered to 65 as of the date of entry into force of the law – and so it included judges appointed before that date. Requests to serve longer than 65 had to be authorised by the Polish President, without any restrictions on criteria for approval or denial of the request, and without a possibility of judicial review of the President's decision.

The Commission brought an action against Poland in October 2018, arguing that Poland had failed to fulfil obligations under the Treaties before the CJEU. It argued that both the lowering of the retirement age, and the discretionary extensions granted to the President, are infringements of fundamental principles of EU law. It argued in the hearing before the CJEU that amendments made to the Polish law in November 2018 did not obviously eliminate these alleged violations, and that there was in general a (public) interest in having this case decided.

In the current judgment, the CJEU first drew attention to the Article 2 TEU values underpinning EU law – and particularly, the rule of law. This meant that while the organisation of justice is a Member State competence, when Member States exercise that competence they must comply with their EU law obligations, and specifically, they must ensure effective legal protection in their judicial and legal systems (under the Charter of Fundamental Rights). For a Supreme Court to offer effective legal protection, it must be independent – and so the Commission can challenge the Polish law as a potential violation of the Article 19(1) TEU obligation to ensure that 'courts and tribunals' in the Member States guarantee effective legal protection.

Specific to the situation of the judiciary, the CJEU stressed that to do their jobs without being subject to external intervention or pressure, they must be appropriately protected from interference, and this includes being protected against removal from office. This principle of irremovability is not absolute, but any exceptions to it must be subject to the principle of proportionality – and as such, justified by a legitimate objective and proportionate in light of that objective.

The CJEU, analysing Poland's arguments, rejected the claim that this law was adopted to further standardise retirement ages in Poland, and in any event found the adopted measures to disproportionate to the aim pursued. Lowering the retirement age, as such, was found to be contrary to the general principles of EU law. The unlimited discretion granted to the President regarding extensions of tenure was also found to be a violation of the principle of effective legal protection, specifically because it was likely to cast doubt on the independence and neutrality of the judiciary.

Case C-192/18 – Commission v Poland

Not to be confused with the case directly above, this case involved the Polish law of 12 July 2017 which lowered the retirement age of judges in Poland (both in ordinary courts and the Supreme Court) to 60 for women and 65 for men, from 67 for both men and women. The law preserved the possibility for the Minister for Justice to extend the service of judges working in the ordinary courts. The Commission believed these rules to be contrary to EU law, and specifically, EU law on the non-discrimination on the basis of gender.

The CJEU considered the different retirement ages applicable to men and women and found they fell within the scope of Article 157 TFEU, which obliges all Member States to apply the principle of equal pay for male and female workers. As earlier pension ages for women will result in smaller pensions, the Polish law falls foul of that principle; Poland's argument that it is positive discrimination in favour of women (who are able to access their pensions sooner) was dismissed. The Polish law was consequently found to infringe upon Article 157 TFEU and related secondary legislation.

Next, the CJEU considered the discretionary power awarded to the Minister of Justice regarding an extension of tenure. It referred here to the above judgment in case C-619/18 and stressed that this, too, was a measure that appeared to violate Article 19(1) TEU on account of undermining the effective legal protection that courts considering aspects of EU law must offer. Without independence, they cannot provide such protection.

A power to extend tenure itself is not per se contrary to the principle of effective legal protection, but the rules governing the power are, according to the CJEU. There are no objective rules to apply to the power granted to the Minister of Justice, and the length of any extension is wholly discretionary. More generally, any variations to the general principle of judicial irremovability would have to be motivated by legitimate and compelling grounds and be proportionate. The manner in which the system set up by the Polish law functions does not set out such grounds, and does not guarantee proportionality, and as such fails to comply with the principle of irremovability, as an aspect of judicial independence. The CJEU thus found that Poland has failed to comply with its obligations as an EU Member State in enacting this law.

Joined Cases C-585/18, C-624/18, C-625/19 – A.K.

These cases are referred from three Polish disputes in which three Polish judges (of the Supreme Administrative Court and the Supreme Court) argued that the Polish law of 2017 that forced their early retirement infringed the EU prohibition of discrimination on the basis of age. The Polish law in question has, since the cases commenced, been amended to exclude currently serving judges, but the Polish court hearing their actions nonetheless believed their cases raised procedural issues that required answering. Specifically, cases concerning the forced retirement of Polish judges would normally have to be heard within the Supreme

Court's newly-created 'Disciplinary Chamber'—but given the concerns about the independence of the Polish Supreme Court, as flagged up by the above two cases, the referring court wished to know if it was required to ignore national rules on jurisdiction in this case and rule on the substance of the actions of the Polish judges itself.

The CJEU once more reiterated the essential nature of the requirement that courts be independent for ensuring effective judicial protection and fair trials. It stressed that independence particularly required separation of the branches of government, and proceeded to set out what factors had to be examined to determine if the Disciplinary Chamber of the Supreme Court was independent.

First, appointment to the Chamber by the President is not problematic providing *once* appointed, the judge is free from influence or pressure. The role of the National Council of the Judiciary in proposing judges can help bolster impartiality, provided it itself is independent of the legislature, the executive and the President. The role of the National Council of the Judiciary and its membership should thus be considered carefully by the referring court, and particularly, it should be considered if their nominations for judges can be judicially reviewed, as the President's appointment process is not necessarily.

Regarding the Disciplinary Chamber itself, the CJEU referred back to its judgment in case C-619/18 (see above) and noted that the Polish 'New Law on the Supreme Court' had given this Chamber the exclusive jurisdiction to rule on retirement cases; that the Chamber was to be composed solely of newly-appointed judges; and was autonomous to a high degree within the Supreme Court. That combination of factors, while perhaps unproblematic in isolation, may be problematic once they are all taken together. This is for the referring court to determine.

5.2 Prohibition of Discrimination on Grounds of Religion or Belief

Case C-193/17 – Cresco Investigation

In the majority Roman Catholic Austria, Good Friday is a paid public holiday only for members of specific Austrian churches. It allows those members of those churches to practice their religions on very important days without needing an employer's permission to take a day off. If a member of the relevant churches works on that Good Friday, he is entitled to additional pay.

Mr Achatzi is a non-Catholic employee of a private detective agency named Cresco Investigation, and claims that he is discriminated against by being denied holiday pay for the work he did on Good Friday in 2015.

The Austrian Supreme Court has asked the CJEU if the Austrian law at stake is compatible with EU law, specifically, the prohibition on discrimination on grounds of religion in the Charter of Fundamental Rights.

The CJEU, in the current judgment, declared the Austrian law at stake to constitute direct discrimination on religious grounds. It cannot be justified as necessary; there are other provisions in Austrian law that permit employees to take time off for religious duties as necessary, meaning this particular provision is not needed. It also is not proportionate, in that not all religions are treated equally, but rather employees belonging to other religions must take specific time off (with their employer's consent) rather than get an automatic 24 hours off for religious purposes.

The CJEU concluded that until Austria amends its legislation, a private employer subject to the relevant Austrian laws has to grant all their employees a day off on Good Friday, provided they have sought permission to have the day off, and they must be paid if they are asked to work regardless.

5.3 Data Protection & Privacy Rights

Case C-40/17 – Fashion ID

Fashion ID is an online clothing retailer established in Germany. On its website, it embedded the Facebook 'Like' button. This means that whenever anyone visits Fashion ID's website, their personal data is transmitted to Facebook Ireland without their notice, independent of whether the visitor is a member of Facebook or has clicked the 'Like' button.

Verbraucherzentrale NRW, a German association tasked with safeguarding consumer interests, has taken an action against Fashion ID for transmitting visitor data to Facebook Ireland without a) their consent and b) in breach of the duties to inform set out in German data protection law.

The Higher Regional Court in Düsseldorf has asked the CJEU to interpret the 1995 Data Protection Directive[30] in light of this case.

In the current judgment, the CJEU found that the 1995 Directive does not preclude standing for a consumer interest association to bring legal proceedings in light of a breach of data protection laws. (The new GDPR expressly provides for this possibility).

In terms of Fashion ID's liabilities under that Directive, the CJEU first held that it cannot be considered a 'controller' regarding the data processing operations carried out by Facebook Ireland post-transmission: it cannot determine the means and purposes of that processing.

[30] The timing of the complaint means that the 1995 Directive (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281/31) was applicable to the case; however, the 1995 Directive has been replaced by the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ 2016 L 119/1).

However, Fashion ID is a 'joint controller' with Facebook Ireland regarding the data collection on Fashion ID's website, and the disclosure by transmission to Facebook Ireland of that data, as Facebook Ireland and Fashion ID determine jointly the means and purposes of that collection and disclosure. In displaying the 'Like' button, Fashion ID has at least implicitly consented to the collection and disclosure of the personal data of visitors, in order to benefit from commercial advantages granted by increased visibility of its website on Facebook. Both Fashion ID and Facebook Ireland (which uses the personal data for its own commercial purposes) thus gain consideration from the 'Like' button and associated data transmission.

As a joint controller, the CJEU stressed, Fashion ID must inform visitors that their data is being collected at the time of its collection. Prior consent to collect that data is needed for the collection and transmission of the data, as Fashion ID is a joint controller only. In the absence of this consent, the processing of data without consent is permissible where it is 'necessary for the purposes of a legitimate interest' – but where there are joint controllers, both of these controllers must be pursuing a legitimate interest in collecting and transmitting the personal data in order for that data processing to be justifiable.

In short, Fashion ID is not responsible for what Facebook does with the data collected – but must inform visitors that their data is being collected and, in the absence of a legitimate justification, must have their consent for this collection.

Case C-507/17 – Google

In 2016, the French Data Protection Authority (DPA) imposed a fine of 100,000 euros on Google for refusing to 'de-reference' links in all of its search engine's domain name extensions. Instead of a global de-listing, following the granting of a request to reference, Google had 'de-referenced' in all versions of its search engine that operated with Member State domain name extensions. Google brought an action before the French Council of State to annul the DPA's finding, arguing that the right to 'de-reference' (or the right to be forgotten) does not require that links are removed from *all* of its search engine's domain names, including those outside of the EU.

The Council of State has referred questions to the CJEU regarding the scope of the right to be forgotten in light of this claim. The CJEU, in the current judgment, confirms the existence of the right to be forgotten; and that Google's French establishment engaged in the processing of personal data that would make it responsible for any right to be forgotten claims.

However, while it acknowledges that given the global nature of the internet, global de-referencing would meet the objectives of the right to be forgotten, it also notes that the 'right to be forgotten' is not a right that is universally recognised – and must in any event be balanced with other fundamental rights, in light of the principle of proportionality.

The EU legislature did not intend to create an extra-territorial right, per the CJEU, and has not structured the right to be forgotten in such a way

that it could be extra-territorially applied. As such, there is not currently any obligation under EU law for a search engine like Google to 'de-reference' globally.

However, the CJEU does find that a 'de-referencing' request that is granted must result in EU-wide de-listing, and not simply de-listing in the Member State that grants the 'de-referencing' request. It also suggests that the Council of State should investigate if Google effectively 'discourages' internet users from immediately switching to a non-EU domain to carry out the identical search, so as to find the 'de-referenced' results.

Finally, the CJEU observes that a global version of de-listing is not required under EU law, but the Member States could make this required under domestic law, as they retain this competence in the absence of EU action regarding the right to be forgotten and third countries.

Case C-136/17 – G.C. and Others

Ms G.C. and others brought proceedings before the French Council of State against the French Data Protection Authority (DPA) concerning four DPA decisions. The decisions in question were refusals to serve formal notice to Google to de-reference various links appearing when their names were searched for.

The Council of State asked the CJEU about the scope of the right to be forgotten, and particularly, if data processing prohibitions on data falling in certain special categories (like political opinions, religious or philosophical beliefs, and sex lives) apply also to search engine operators.

In the current judgment, the CJEU stresses the power held by the search engine in disseminating information, and as such, its particular responsibility for ensuring that its data processing activities are EU law compliant. One of the requirements of EU law is that the processing of personal data that reveals sensitive information (such as racial/ethnic origin, political opinion, etc) is prohibited, with specific derogations and exceptions in place. Similar restrictions are in place for the processing of data relating to offences, which is restricted to use by official authorities.

The CJEU determines that these prohibitions and restrictions apply to all data controllers. While a search engine is not responsible for the content of the page, in linking that page in a list of results it *does* hold responsibility for the data in question under EU law.

In determining whether a search engine operator should de-reference links to pages that contain sensitive personal data, it must consider the balance between the right to privacy of the subject, and the right to information of all internet users. This requires an assessment of whether the link to the information is *necessary* and proportionate in response to a search for the name of the subject. A balancing of public interest and the right to privacy thus determines if the link to the sensitive data can remain, or needs to be de-referenced. If the search engine concludes that the data is no longer relevant, or accurate, or incomplete, the

privacy rights of the subject override the public's right to information. Particularly with regard to criminal convictions, it has an obligation to ensure that the most accurate legal information appears first in its results.

Case C-18/18 – Glawischnig-Piesczek

The case was an action brought by a member of Austrian's national party and the chair of the Austrian Green party, Ms Glawischnig-Piesczek. She sued Facebook Ireland, seeking an order that it remove a comment published by a user that is harmful to her reputation, as well as equivalent earlier accusations.

The Facebook user in question had shared an article form an Austrian online news magazine, which had generated a thumbnail of the article on Facebook, a brief article summary, and a picture of Ms Glawischnig-Piesczek. It came accompanied with a comment found defamatory by the Austrian courts.

The CJEU has been asked by the Austrian Supreme Court how to approach Ms Glawischnig-Piesczek's request in light of the Directive on electronic commerce.[31] That directive makes clear that a host provider like Facebook will not be liable for information it stores if it is not aware that it is illegal and acts to remove the information or disable access to it as soon as it becomes aware that the information is illegal. However, that lack of liability does not preclude a host provider from being ordered to terminate/prevent infringements – but the directive does preclude a requirement in national law for host providers to monitor generally if it stores any information that might be illegal.

The CJEU, in the current judgment, stresses the fact that the directive tries to strike a balance between the different interests at stake—privacy of individuals vs freedom of information rights for the host providers. In light of that balance, the directive does not preclude a Member State court form order a host provider to remove information which holds *identical* or *equivalent* content to content previously declared unlawful, insofar as technology can detect such 'equivalence' automatically and does not require an independent assessment of the level of similarity between the illegal content and the hosted content. Such an order can be made with worldwide application, insofar as this is compatible with international law – which is a matter for the Austrian court to consider.

Case C-673/17 – Planet49

A German company, Planet49, uses a pre-ticked checkbox on its website that allows users to access its promotional games; the tickbox in fact results in the storage of cookies used for advertising purposes. The German Federation of Consumer Organisations has brought an action before the German courts to challenge this 'pre-ticked' checkbox, and the German Federal Court of Justice has asked the CJEU if such a pre-

[31] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ 2000 L 178/1).

ticked box is compatible with EU law on the protection of privacy in electronic communications (as set out, inter alia, in the GDPR).[32]

In the current judgment, the CJEU has interpreted the relevant EU law as requiring consent to be an active choice. As such, a pre-ticked box does not satisfy that consent requirement, and being able to 'de-select' the checkbox is insufficient as well. Furthermore, the information next to the checkbox does not specify that it results in the storage of cookies, meaning that any consent given is also not specifically for the storage of cookies. The CJEU stresses that a service provider has to encourage active consent, by ticking a box, in light of accurate and complete information, including the duration of the operation of relevant cookies and whether third parties can access them. Planet49's current setup consequently is contrary to EU law.

[32] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119/1).

6. External Relations

6.1 On Treaties Concluded by the EU and its Member States

Opinion of the Court 1/17 (on CETA's ISDS mechanism)

The opinion in question was delivered on the investor-state dispute settlement (ISDS) mechanism included in the Comprehensive Economic and Trade Agreement, CETA, concluded between the EU and Canada in 2016. What CETA proposes to set up for ISDS is the creation of a tribunal and an appellate tribunal, and eventually, a multilateral investment tribunal – or, an 'Investment Court System' (ICS).

Belgium, in 2017, asked the CJEU to comment on the compatibility of this ICS with EU primary law, and particularly, the autonomy of EU law, which requires the CJEU to have the exclusive jurisdiction to give definitive interpretations of EU law. It also questioned if the ICS, as proposed, is compatible with EU general principles of equal treatment and effectiveness, and if it satisfied the Charter of Fundamental Right's requirement for an independent and impartial tribunal.

In the current opinion, the CJEU first noted that in principle, the creation of a non-EU court that gives binding decisions on the EU is compatible with EU law. However, such a court must operate in a way that preserves the specific characteristics and autonomy of the EU legal order; and so must encompass values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.

The primary distinction drawn by the CJEU is in the functioning of the proposed ICS. Where it interprets and applies the provisions of CETA, having regard to international law as applicable to the parties to CETA, it does not affect the autonomy of the EU legal order. However, the tribunals and the ICS cannot have the power to interpret or apply provisions of EU law outside of CETA, nor can its judgments affect the ability of the EU institutions from operating as intended by the EU Treaties.

Following an assessment of the CETA provisions, the CJEU considered that CETA does not confer onto the tribunals or the ICS a general interpretative power regarding EU law. CETA specifically confers powers on the EU to determine if Canadian investors should file actions against the EU or the Member States in light of the challenged measures, which preserves the division of powers between the EU and the Member States set out in the Treaties. CETA furthermore deprive the tribunals and the ICS from any power to question the standards of protection set by either Party to CETA in the fields of public order, safety, morals, health and life of humans and animals, food safety, plants and the environment, welfare at work, product safety, consumer protection or fundamental rights. As such, again, the agreement does not affect the

autonomy of the EU legal order, which continues to determine those standards without outside interference.

Regarding equal treatment, the CJEU concluded that Canadian investors investing in the EU are not in a comparable situation to Member State nationals who invest in the EU. The effectiveness of EU law was also not undermined by the tribunals and the ICS; the scenario raised by Belgium, which is that a tribunal award might in practice nullify a fine imposed by the Commission or a Member State competition authority, would occur in exceptional circumstances only, and is itself permissible under EU law.

Finally, regarding the accessibility and independence of the tribunals and the ICS, the CJEU found that in legal terms, CETA seeks to ensure that the tribunals are accessible to any investor (from a Member State or from Canada). While CETA is silent on making this financially feasible as well, the commitments made by the Council and the Commission (and on which ratification of CETA is contingent) ensuring the accessibility of the tribunals for small and medium enterprises (SMEs) are sufficient to conclude that CETA complies with the requirement of accessibility. It also noted that there were sufficient safeguards in CETA to ensure that the tribunals as planned would be independent.

In conclusion, the CJEU declared the ISDS mechanisms (of two tribunals and eventually a court) proposed by CETA to be compatible with EU law as designed.

6.2 Restrictive Measures taken by the Council

In the following cases, the CJEU and the General Court considered restrictive measures (including, but not limited to, the freezing of assets) that the Council adopted against various non-EU actors.

Joined Cases T-244/16, T-285/17, T-245/16, T-286/17, T-274/18, T-284/18, T-285/18, T-289/18, T-305/18 – Yanukovych v Council

The case concerns EU measures taken against a number of persons identified as responsible for the misappropriation of Ukranian State funds: this includes Viktor Fedorovych Yanukovych, the former Ukranian President, as well as one of his sons, and a number of other state officials. They were included on the list of those subject to the freezing of funds on the ground that they were subject to criminal proceedings in Ukraine to investigate embezzled and illegally transferred Ukranian State funds.

In the current judgment, the General Court upheld the actions brought by the Ukranians by annulling the restrictive measures taken against them between 2016 and 2019, as applicable, as the Council failed to investigate if the defendants' rights to effective judicial protection were complied with in the Ukraine during the ongoing criminal investigation before extending the restrictive measures.

7. Intellectual Property

7.1 Trademark Registration

Case T-647/17 – Serendipity and Others v EUIPO (CHIARA FERRAGNI)[33]

In 2015, Serendipity asked to register the words 'Chiara Ferragni' with the letter 'i' bolded accompanied by an eye with similarly stylised eyelashes, as an EU trade mark with the European Intellectual Property Office (EUIPO) for a variety of products in the categories of 'bags' and 'clothing'. Their registration was opposed by a Dutch company that had registered the word mark 'Chiara' for a clothing products in the Benelux in 2015.

In 2017, the EUIPO refused to register the 'Chiara Ferragni' logo for a number of types of bags and all 'clothing' products applied for, because there was a likelihood that consumers would confuse the two signs at issue. Serendipity consequently brought an action before the General Court, seeking to annul the EUIPO's decision to not register their trademark.

In the current judgment, the General Court found in Serendipity's favour and annulled the EUIPO's decision. First, the fact that 'Chiara' was only a word mark but 'Chiara Ferragni' has both those words and a distinctive logo of an eye and other distinguishing marks meant that it was unlikely that the public would confuse the two logos solely because they both have the word 'Chiara' in them (in very different styles).

The EUIPO was thus wrong to consider the similarity of the word 'Chiara' as more important than the overall design of the 'Chiara Ferragni' logo. In reality, the two signs are only slightly visually and phonetically similar, and conceptually different, and so the public is unlikely to be confused by them – and Serendipity's logo could be registered as an EU mark.

Case T-795/17 – Moreira v EUIPO (NEYMAR)

In December 2012, Mr Moreira applied with the EUIPO to register the word sign 'NEYMAR' as an EU trade mark in respect of clothing, footwear and headgear. It was registered in April 2013.

In February 2016, Mr Neymar Da Silva Santos Junior (known commonly as 'Neymar' or 'Neymar Jr', a professional football player) filed an application with the EUIPO to have this mark declared invalid. That application was upheld by the EUIPO in a decision that was challenged by Mr Moreira before the General Court.

In the current judgment, the General Court upheld the decision taken by the EUIPO, which held that Mr Moreira was acting in bad faith when he applied to register 'NEYMARK' as a mark. Mr Moreira had claimed that while he had been aware of the existence of Neymar Jr when he applied to register the mark, he claimed to have been unaware of

[33] The judgment is not available in English.

Neymar Jr's rising star status in European football – arguing he had been unknown in Europe at the time.

The General Court countered this by noting that there had been significant press devoted to Neymar Jr as a member of the Brazilian national team in France, Spain and the UK already between 2009 and 2012, as the EUIPO had demonstrated. They also agreed with EUIPO that Mr Moreira clearly was aware of the world of football, as he had applied to register a mark of 'IKER CASILLAS' (a famous Spanish goaltender) on the same day he sought registration of the 'NEYMAR' mark. It was as such inconceivable that Mr Moreira did not *know* of Neymar Jr when he applied to register the mark.

The General Court rejected Mr Moreira's argument that he simply liked the sound of the word, and there was thus a coincidence between the mark and Neymar Jr's name, as well as his argument that the EUIPO did not evidence any 'bad faith' intention – both were evident from EUIPO's dossier of findings, which included press coverage of Neymar and the attempt to register the 'IKER CASILLAS' mark.

Case T-307/17 – adidas

In 2014, adidas registered an EU trademark of three stripes (parallel, equidistant, and facing any direction) for clothing, footwear and headgear with the EUIPO. In 2016, a Belgian undertaking called Shoe Branding Europe BVBA applied to have that trademark declared invalid – and in response, EUIPO annulled the registered mark as it was devoid of a distinctive character – which adidas had not managed to prove the mark of three stripes in any direction held throughout the EU.

The General Court, in the current judgment, upheld the annulment decision, finding that the mark was an ordinary figurative mark and that it is not consistently used by adidas (eg, colours are sometimes inverted) meaning that not all evidence produced actually related to the registered mark. The three stripes in *any* direction had not been proven to be used throughout the EU, nor had it been proven to have been associated with adidas on account of its distinctive character.

Case T-219/18 – Piaggio & C v EUIPO and Zhejiang Zhongneng Industry Group

In 2010, the Zhejiang Zhongneng Industry Group (ZZIG) successfully registered the design for the 'Zhejiang scooter' with the EUIPO. In 2014, the Italian company Piaggio & C filed an application with EUIPO for a declaration to declare the 'Zhejiang scooter' design invalid, arguing it lacked novelty and individual character and instead was very similar to the 'Vespa LX scooter' of 2005. Piaggio noted that the Vespa LX was protected in Italy as an unregistered three-dimensional trademark, and in France and Italy as a copyright intellectual work.

In 2015, and confirming following an administrative appeal in 218, the EUIPO rejected Piaggio's request for a declaration of individuality. In the current judgment, the General Court confirmed the legality of the EUIPO's decision. It agreed with the EUIPO that the Vespa LX and the Zhejiang scooter 'produce different overall impressions', with the former

favouring rounded lines and the latter favouring angular lines. An informed user would easily distinguish between the two scooters.

The Court also found that Piaggio did not provide sufficient evidence to prove that the Zhejiang scooter made use of the Italian-held unregistered three-dimensional mark, and that the Zhejiang scooter does not infringe Piaggio's copyrights held in Italy and France, in that it is sufficiently distinct from the Vespa.

Case T-601/17 – Rubik's Brand

The case concerned the ongoing registration of the shape of the 'Rubik's Cube' as a trademark. It was registered by the EUIPO in 1999 as a 'three-dimensional trademark' in respect of 'three-dimensional puzzles', but in 2006, Simba Toys (Germany) applied to the EUIPO to have this 'three-dimensional' trademark declared invalid. It argued, amongst other things, that the 'three-dimensional shape' actually represented a technical solution relating to its rotating capability, which would make it suitable for registration as a patent rather than a trademark.

When the EUIPO dismissed Simba Toys' application, it brought an action before the General Court. The General Court in 2014 also dismissed the action brought by Simba, agreeing with the EUIPO, and finding that the technical solution dimension of the Rubik's Cube came from an invisible mechanism inside of the cube, rather than its trademarked shape.

Simba Toys appealed that decision before the CJEU. In 2016, the CJEU set aside the General Court's judgment and annulled EUIPO's decision to dismiss Simba's application. It held that the rotating capability of the cube may have been part of the 'non-visible functional elements of the product represented by that shape', and as such, EUIPO and the General Court needed to have considered this possibility.

EUIPO, in light of the CJEU's directions, took a new decision regarding Simba's application in 2017. It here found that there were three essential characteristics to the 'cube shape' trademark: the overall cube shape; the black lines and little squares; and the differences in colours on the six faces of the cubes. Each of those different elements was necessary to obtain the 'technical solution' inherent to the Rubik's Cube, eg, the rotating puzzle itself. The EU Trademark Regulation[34] prohibits the registration of a shape whose essential characteristics are necessary to obtain such a 'technical result' – and so the EUIPO found that the trademarked had been registered in breach of the regulation and decided to cancel its registration.

Rubik's Brand, the current owners of the trademark, appealed that decision before the General Court. In the current judgment, it disagreed with EUIPO that the different colours were an essential characteristic of the 'cube shape' trademark, but otherwise agreed with EUIPO that the essential characteristic of different black lines separating coloured

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

squares is 'necessary' in order to make the puzzle work, as is the cube shape itself. As such, despite the colour element not being an essential characteristic, the General Court agreed with the EUIPO that the 'technical result' of the Rubik's Cube could not be attained without the 'cube' and 'separated squares' characteristics, and as such could not have had the 'cube shape' registered as a trademark. It therefore upheld the EUIPO decision and dismissed Rubik's Brand's action.

Case T-683/18 – Conte

In 2016, Ms Santa Conte filed an application with the EUIPO for the registration of a sign displaying marijuana leaves and the words 'Cannabis store Amsterdam' as an EU trademark in respect of food and drink and catering. The EUIPO rejected the application, on a finding that the sign (and the marijuana leaves) were contrary to public policy.

Ms Santa Conte brought an action before the General Court, seeking to annul the EUIPO decision. The General Court, in the current judgment, upheld the EUIPO's decision. It reasoned that the public may believe that a store holding that logo would sell food and drink products which contain cannabis, which (as a narcotic substance) remains illegal in most Member States. The rules applicable to consumption and use of cannabis are matters of public policy, and the TFEU provides that the EU will complement Member State action in tackling drugs-related health damage. As the sign will be perceived by the public as relating to cannabis-containing food and drink and catering services, permitting that sign to be trademarked will be contrary to the public policy of many Member States.

7.2 Copyright

Case C-469/17 – Funke Medien NRW

Germany produces two forms of weekly military status reports regarding foreign deployments of the German army. One form of the report is a Parliamentary briefing, made available to selected members of the German Parliament and parts of the federal Government; this Parliamentary briefing is categorised as a 'classified document – Restricted', which is the lowest form of confidentiality available. The second form of the report is a Public briefing, which is a summary of the Parliamentary briefing.

Funke Medien NRW operates the website of the German newspaper *Westdeutsche Allgemeine Zeitung*. It applied for access to all Parliamentary briefings from 2001-2012 in 2012, and that application was refused on the grounds that it could have adverse effects on security-related interests of the German armed forces. However, through unknown means, Funke Medien nonetheless attained a large proportion of these Parliamentary briefings and published them – some as the so-called 'Afghanistan papers'.

The German government brought an action against Funke Medien for the publication of these papers in the German civil courts, claiming a copyright infringement. The German Federal Court of Justice has asked

the CJEU to clarify the relationship between the EU Copyright Directive[35] and the fundamental right to freedom of expression in light of this action.

In the current judgment, the CJEU found that the national court has to first determine if these military status reports are protected by copyright – are they an intellectual creation of their author that reflect the author's personality and are expressed by free and creative choices made by that author during the drafting process? If they are, they would be 'works', and are covered by the Copyright Directive. The provisions of that directive do not justify derogations from copyright on grounds of freedom of information and freedom of the press *beyond* the exceptions set out in the directive.

The CJEU emphasised that the Copyright Directive aims to strike a fair balance between copyright holders in protecting their intellectual property (under Article 17(2) of the Charter of Fundamental Rights) and the fundamental rights of users of information, such as freedom of expression under Article 11 of the Charter. It thus contains exclusive intellectual property rights, but also exceptions and limitations to those rights.

Reflecting on European Court of Human Rights case law on this balance, the CJEU stressed that the European Court has referred to the need to take into account whether speech or expression is of 'particular importance', where it relates to political discourse and discourse concerning the public interest. Given that Funke Medien published the reports on the internet as a matter of public interest, the CJEU suggests to the national court that it is not inconceivable that this can be covered by the 'current events reporting' exception in the Copyright Directive, which would make Funke Media NRW not liable for a breach of copyright.

Case C-476/17 – Pelham and Others

The case concerns 'sampling' of existing music and sound. In 1977, German electronica group Kraftwerk published a song called *Metall auf Metall*. Mr Pelham and Mr Haas composed a song in 1997 titled *Nur mir*, and members of Kraftwerk accused Mr Pelham of 'sampling '2 seconds of a rhythm sequence of *Metall auf Metall* for a loop in *Nur mir*. As such, they claimed that their rights as the original phonogram producers were infringed, and they sought damages as well as a surrender of *Nur mir* phonograms so they could be destroyed.

The German Federal Court of Justice, hearing the case on appeal, has asked the CJEU if non-authorised 'sampling' constitutes an infringement of the phonogram's producer's rights under EU copyright law or fundamental rights law. It clarifies that German legislation allows an independent work created in free use of a protected work to be in principle published and exploited without rightsholder consent and wishes to know if this provision of German law is compatible with EU law.

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[35] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167/10).

In the current judgment, the CJEU found that reproduction of any part of a phonogram, however small, falls within the exclusive rights of the phonogram producer. However, a sound sample that is sufficiently modified and thus unrecognisable in its new phonogram does not fall under 'reproduction' of that sample. Requiring copyright holder permission for this kind of modified 'sampling' would fail to strike a fair balance between the copyright holders' interests and the rights of the users of copyrighted materials under the Charter rights related to freedom of the arts.

If a substantial part of a phonogram's sounds are reproduced, this would count as a copy; but where a sound sample in modified form is transferred for the purposes of creating a new and distinct work, this is not a copy. This is reflected in the provisions of the EU law on copyright.

The German legislation provides exceptions to EU copyright law that go beyond what EU copyright law permits, and this violates EU law, as the rights of phonograms producers have been fully harmonised throughout the EU. The German law consequently has to be modified, but the CJEU's ruling suggests that the use of the Kraftwerk 'sample' is nonetheless permissible under EU copyright law.

Case C-516/17 – Spiegel Online

Mr Beck, a former German Parliamentarian, authored a manuscript on criminal policy relating to sexual offences committed against minors, which was pseudonymously published in 1998. In 2013, that manuscript was discovered in archives and he was confronted with it when standing for election to Parliament. Mr Beck contended that the meaning of his manuscript had been altered by the publisher of the book, and provided various newspaper editors with his version of the manuscript, but did not give consent for his version of the manuscript to be published by those newspaper. He did, however, publish the manuscript and the 'published' version on his own website, indicating he was distancing himself from their content.

Spiegel Online, an internet news source, published an article that argued that the central argument in Mr Beck's manuscript had not been altered in the published copy. Spiegel Online, in support of that argument, published both the published and Mr Beck's version of the manuscript via downloadable hyperlinks.

Mr Beck challenged the lawfulness of making the manuscript available before the German courts, believing this infringed his copyright. The German Federal Court of Justice has asked the CJEU to interpret the exceptions in the Copyright Directive[36] relating to the reporting of current events in light of Mr Beck's action.

In the current judgment, the CJEU noted that the national court must strike a balance between exclusive rights of the author as well as freedom of expression, both of which are fundamental rights. It stressed

[36] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167/10).

that protection of intellectual property rights is not absolute, and where 'speech' or information is of particular importance (eg, in the public interest), exceptions to those rights can exist.

Regarding the use of protected works in connection with reporting current events, the CJEU held that the Member States cannot subject such reporting to a requirement for prior consent by the author. Where the publication of the documents themselves was necessary for informatory purposes, and was not disproportionate, this would be covered by exceptions in the Copyright Directive.

Case C-683/17 – Cofemel

Cofemel and G-Star, two companies active in clothing design, sale and production, were in a dispute before the Portuguese Supreme Court. G-Star claimed that Cofemel sold and produced jeans, sweatshirts and t-shirts that copied G-Star designs – and it wished to make a copyright claim under Portuguese law in order to protect those designs.

The Portuguese Supreme Court has notified that the Portuguese Code on Copyright and Related Rights is ambiguous about how the protection of designs relates to copyright protection. The Court has thus asked the CJEU whether the EU directive on copyright precludes domestic law that grants copyright protection to designs when specific conditions are satisfied, namely that designs must produce a 'special aesthetic effect' in order to be protected.

The CJEU, in the current judgment, found that the directive does preclude such conditions. It stressed that protection of designs on the one hand, and copyright protection, are distinct measures that pursue different objectives and are subjected to different rules. Designs are to be protected, but also mass-produced; whereas copyright can only apply to specific 'works' but is intended to last significantly longer than design protection. As such, these two regimes should not overlap, and the CJEU concluded that the fact that designs produce a 'specific aesthetic effect' does not in and of itself mean that they can be classified as 'works' for the purposes of the EU copyright directive.

Case C-263/18 – Nederlands Uitgeversbond

Two Dutch associations responsible for defending the interest of publishers in the Netherlands applied to a Dutch District Court for an injunction prohibiting several other entities from making e-books available to members of 'reading clubs' on their website or reproducing those books. The associations argue that the activities on this website infringe the copyrights of the Dutch publishers by effectively offering 'second-hand' e-books for sale to members of these reading clubs.

The entities operating the 'reading clubs', on the other hand, argue that their activities are covered by Directive 2001/29 on copyright[37] and its 'distribution rights', which are subject to a rule of exhaustion where e-books have been sold by the rightsholder in the EU. Given that these e-

[37] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167/10).

books have been for sale, their argument is that the two Dutch associations are no longer exclusively able to authorise or prohibit distributions of these e-books to the public.

Having been asked to consider the meaning of Directive 2001/29 as pertaining to digital work, the CJEU determined that downloading of an e-book is not covered by the concept of 'distribution to the public' in the copyright directive, but it is covered by the right of 'communication to the public' in the same directive. The CJEU noted that the preparatory work on the Directive made it clear that the rules of exhaustion were only meant to apply to 'tangible objects'. A rule of exhaustion as applicable to e-books would be inappropriate, as they do not deteriorate the way physical copies do in a second-hand market.

The concept of 'communication to the public', according to the Court, should also be broadly interpreted. As such, the act of making a work available to a substantial portion of the public such as these 'reading clubs' is covered by the concept. This kind of communication to the public needs to be authorised by the author of the work under the Directive, which had not happened in this case. The national court consequently will have to find in favour of the Dutch publishers' associations, and the making available of the e-books for these 'reading clubs' is a violation of copyright under EU law.

8. Transport

Case C-501/17 – Germanwings

Mr Pauels booked a flight that was delayed by 3 hours and 28 minutes from Dublin to Düsseldorf with Germanwings. Germanwings refused to pay him compensation on the ground that the delay was due to 'extraordinary circumstances', namely, the airplane tyre being punctured by a screw on the runway, and under the EU regulation of air passenger rights[38], there is no obligation to pay compensation when delay was due to extraordinary circumstances.

The Cologne Regional Court has asked the CJEU if these do indeed count as extraordinary circumstances. The CJEU, in the current judgment, clarified the meaning of that term, noting that events are 'extraordinary' within the meaning of the air passenger rights regulation if, by their nature or source, they are not inherent to the normal activities of the air carrier, and are outside of the air carrier's control. It found that while tyre damage may be a regular occurrence, the malfunctioning of a tyre solely on account of impact with a foreign object on a runway is not 'inherent' to an air carrier's activities, and is outside of the air carrrier's actual control. In principle, it is therefore an extraordinary circumstance.

However, to have the obligation to pay for compensation under the regulation waived in full, the air carrier must demonstrated that it did everything possible to change the tyre as quickly as possible, and so to avoid the tyre damage from leading to a long delay. As such, compensation may still be due Mr Pauels if it was found that Germanwings did not exercise the available option to have a priority tyre change service at all airports in which they operate. Whether it thus contributed to the delay, and is still liable for compensation, will be for the Cologne Regional Court to determine.

Case C-163/18 – HQ and Others

The case concerned three persons flying between the Netherlands and Greece through the Netherlands-established Hellas Travel as part of a 'package tour'. Their flights were to be operated by Aegean Airlines (a Greek undertaking), which had entered into a contract accordingly with G.S. Aviation Services under which Aegean Airlines made a number of seats available to G.S., in return for a payment of a 'charter' price – and G.S. then sold those seats onwards to travel agents, including Hellas Travel.

A few days before their intended trip, Hellas Travel informed the three travellers that Aegean Airlines had decided that, on account of price changes, it no longer operated flights to and from Corfu. Hellas was

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

declared insolvent in August 2016 and did not reimburse the travellers for their ticket costs.

They brought proceedings before the Dutch District Court, which ordered Aegean Airlines to pay them compensation in light of the EU's Passenger Rights regulation.[39] However, it referred questions about reimbursing their ticket costs to the CJEU, seeking to know if passengers booking package travel (regulated by a directive on package travel[40]) can hold both the air carrier and the tour organiser liable for the cost of their air travel tickets.

In the current judgment, the CJEU held that the existence of a right to reimbursement under the directive on package travel is sufficient to rule out the possibility of claiming reimbursement through the Passenger Rights regulation. Reimbursement of the cost of the ticket is not cumulative – passengers would be overcompensated via the directive and the regulation, which is not the legislature's intent. This is unchanged by the insolvency of the tour organiser, as the directive on package tours requires tour organisers to hold adequate security to refund passengers in the case of insolvency. Were this not carried over into the Dutch implementing legislation, an action for state liability against the Netherlands would be possible.

Case C-502/18 - České aerolinie

Eleven passengers booked flights with České aerolinie (a Czech airline) for flights that connected Prague to Bangkok via Abu Dhabi. The first of the connecting flights was operated by České aerolinie between Prague and Abu Dhabi; it flew on time. The second connecting flight, however, was operated under a code-share agreement by Etihad Airways, and it arrived in Abu Dhabi 8 hours and 8 minutes late. The eleven passengers are thus entitled to compensation under the Air Passenger Regulation.[41]

They brought an action before the Czech courts seeking compensation from České aerolinie, but it contended that their proceedings are unfounded as it cannot be held responsible for the lateness of the flight operated by Etihad Airways. On appeal, the Prague City Court has referred a question to the CJEU regarding České aerolinie's obligations under the Regulation.

The CJEU, in the current judgment, that under the Regulation, a flight with several connections but made by a single booking is treated as a 'whole' for compensation purposes. As such, as the first leg of the flight commenced in the EU, the entire flight falls within the scope of the Regulation.

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

40 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ 1990 L 158/59).

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

Under the Regulation, the obligation to pay compensation for heavily delayed flights falls solely on the operating air carrier – but as the journey was made under a single reservation, the fact that České aerolinie operated a leg of the journey, it serves as an operating air carrier and is liable for compensation in this case.

Finally, however, the CJEU noted that the Regulation does permit České aerolinie to bring an action against Etihad Airways in order to seek redress for the compensation that it owes these eleven passengers on a flight leg performed in practice by Etihad Airways.

Joined Cases C-349-351/18 – NMBS

The case concerned the Belgian laws on riding trains without tickets and penalty payments for ticketless riding. The Belgian national railway company, SNCB, applies penalties for ticketless riding that involve either paying for a ticket immediately (with a penalty surcharge) or within 14 days, with a surcharge of 75 euros. After 14 days, the surcharge to be paid increases to 225 euros.

The current case involved three passengers who did not pay their penalty surcharges and were sued by the SNCB before the Antwerp Magistrates' Court for significantly increased penalty charges. The SNCB claimed that its relationship to these passengers was not contractual but regulatory, as the passengers had not actually bought tickets (and thus established a contractual relationship).

The Magistrates' Court has asked the CJEU to consider if this is correct, and particularly, if ticketless riders nonetheless have formed a 'transport contract' for EU law purposes, and if so, whether it has the power to amend a penalty charge stemming from a contract where it believes this charge to be unfair.

The CJEU, in the current judgment, holds that by permitting free entry onto trains, and by boarding that train with an intention to travel, a contractual relationship is formed. A transport contract is *embodied* by possession of a ticket, but not formed by it. The ticketless riders thus have engaged in a transport contract with SNCB.

The CJEU then considered if the national court can modify the penalty clause attached to that 'transport contract'. It stresses that any contractual terms which reflect mandatory regulatory or statutory provisions are not subject to the EU law on unfair contract terms.[42] Otherwise, the penalty clause imposed by the SNCB's conditions of carry would be subject to the EU's unfair contract terms directive—but the Magistrates' Court nonetheless could not moderate the penalty applied. It has to instead exclude the clause in its entirety, meaning no penalty could be charged at all.

Case C-532/18 – Niki Luftfahrt

A young girl is seeking compensation from the (insolvent) Austrian airline 'Niki Luftfahrt' for burns/scalding she experienced on one of their flights .For unknown reasons, the coffee served to her father and placed

[42] Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29).

on his tray table tipped over and hurt her. Niki argue that it cannot be liable for what occurred, as it was not an accident within the meaning of the so-called Montreal Convention[43] which governs the liability of airlines in the event of accidents. Specifically, what happened could not be covered by obligations under that Convention since it was unclear if the accident happened because of defects in the tray table or due to airplane vibration.

The Austrian Supreme Court has asked the CJEU to clarify the meaning of the concept of an 'accident' under the Montreal Convention, which entered into force in the EU in 2004.

In the current case, the CJEU determined that the ordinary meaning of the word 'accident' is to describe an 'unforeseen, harmful and involuntary event'. That meaning, as well as the objective of the Montreal Convention to lay down a system of strict liability for airlines, means that the incident that occurred in the plane is covered by the concept of an 'accident'. The term 'accident' cannot exclude issues (such as turbulence) which normally occur during aviation, nor can it require there to be a connection between the 'accident' and any particular aspect of the operation of the airplane. The only exception to liability for an accident under the Montreal Convention occurs where a passenger contributed to the damage experienced.

Throughout the EU, in other words, airlines are liable for coffee spills that hurt passengers during travel, regardless of how those spills occur, providing the spill was not directly caused *by* a passenger.

[43] Convention for the Unification of Certain Rules for International Carriage by Air, concluded in Montreal on 28 May 1999, signed by the European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001 (OJ 2001 L 194/38).

9. Other

9.1 Brexit

Case C-661/17 – M.A. and Others

In 2017, the Irish International Protection Appeals Tribunal (IPAT) upheld a decision of the Irish Refugee Applications Commissioner, recommending the transfer of a family of asylum seekers (S.A., M.A. and their child A.Z.) to the UK, which was responsible for their asylum application under the Dublin III Regulation[44].

IPAT concluded that it could not exercise the discretion provided by Dublin III to examine an application even if it is not the responsible Member State under the Dublin III Regulation.

In an action brought against the IPAT's decision, the Irish High Court took the view that it was necessary to consider if there are implications stemming from the UK's Brexit process for the Dublin System of allocating responsibility for applications – and it thus referred several questions to the CJEU.

In the current judgment, the CJEU found that the UK remains the responsible state for the purposes of the Dublin III Regulation even when it has given notice under Article 50 TEU, thus starting the withdrawal process. While the IPAT could have exercised its discretion to examine the application itself, the fact that the UK had notified its intention to withdraw does not oblige it to exercise that discretion. As the clause is discretionary, there is also no obligation to provide a remedy against a decision to *not* exercise that discretion. IPAT's refusal to consider the application was consequently compatible with the Dublin III Regulation, under which the UK remained the responsible Member State.

9.2 Enforcement (Meaning of Arts 258-260 TFEU)

Case C-543/17 – Commission v Belgium (Art 260(3))[45]

The case concerns Belgium's failure to implement an EU directive on high-speed electronic communication networks by the deadline for implementation, which was 1 January 2016. When in September 2017 Belgium still had not implemented the directive or notified the Commission of its implementing measures, the Commission brought an action for failure to fulfil Treaty obligations before the CJEU. It also requested that CJEU rule that Belgium paid a daily penalty payment from the date of the delivery of the judgment on account of its failure to transpose the directive into national law – originally fixing this fine at

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44 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ 2013 L 180/31).

45 The judgment is not available in English.

54,639 euros, but reducing it to 6,017 by the time of the judgment because all regions in Belgium except Brussels-Capital had implemented the directive by then.

In the current judgment, the CJEU agreed with the Commission that Belgium had failed to fulfil its obligations as a Member State by failing to implement the directive on time. It then considered the possibility of a penalty payment for a failure to fulfil the 'obligation to notify measures transposing' a directive set out in Article 260(3) TFEU, newly introduced in the Lisbon Treaty.

Considering that Article 260(3) TFEU applies in situations where Member States fail their 'obligation to notify measures transposing a directive', the CJEU notes that penalty payments become possible in situations where Member States do not disclose sufficiently clear and precise information on what domestic measures are transposing an EU law. Such a failure to disclose is seemingly automatic when the Member State, in fact, has not transposed the directive (in full or in part). As such, the CJEU assessed the seriousness and duration of Belgium's infringement and applied a daily penalty of 5,000 euros a day to Belgium from the date of the judgment (8 July 2019) to the notification of transposition and transposition in full of the directive.

9.3 Relating to the Citizens' Initiative

Case C-420/16 P - Izsák and Dabis v Commission

The applicants submitted a European Citizens Initiative (ECI) titled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures' to the Commission in June 2013. The aim of the initiative is to ensure that EU cohesion policy pays special attention to 'national minority regions', so as to avoid them being disadvantaged economically in comparison to nearby regions that do not constitute 'minority' regions. According to the ECI, current implementation of EU cohesion policies threatens the specific characteristics of minority regions, and that the 'minority' characteristics they exhibit (whether ethnic, cultural, religious or linguistic) constitute a 'severe and permanent demographic handicap' that the EU is meant to (but does not) combat with its cohesion policy.

In July 2013, the Commission refused to register the ECI, on the ground that it fell outside of its powers to propose legislation to the EU legislature. The applicants appealed to the General Court, which dismissed their action in 2016 on the ground that the applicants had not demonstrated that the EU cohesion policy threatens minority regions, and that minority regions suffer from the above handicap.

The applicants then appealed to the CJEU, which in the current judgment found that the General Court erred in law regarding the conditions for registration of an ECI: the Commission is not to, at the point of receipt of a proposed ECI, consider whether there is proof of the factual elements set out in that ECI. When registering an ECI, it has to confine itself to an abstract assessment of whether what is asked for in the ECI falls within the scope of the Treaties. As such, the General

Court's judgment was set aside, and the Commission's decision was annulled, though the CJEU confirmed that 'specific ethnic, cultural, religious or linguistic characteristics' are not covered by the concept of a 'demographic handicap' for the purposes of economic development in cohesion policy, and so the Commission's ability to *act* on the ECI may in practice remain very limited.

Case T-391/17 – Romania v Commission

In July 2013, a proposed European Citizens' Initiatives (ECI) was submitted to the Commission with the title 'Minority SafePack – one million signatures for diversity in Europe'. It called upon the Commission to legislate to improve the protection of persons belonging to national or linguistic minorities, and to strengthen cultural and linguistic diversity in the EU.

In September 2013, the Commission refused to register the Initiative, on the grounds that it fell 'manifestly' outside of EU competences. The organisers of the Initiative challenged the Commission's decision before the General Court. In February 2017, the General Court found in favour of the organisers and annulled the Commission's decision to not register the Initiative on the grounds that it had failed to comply with its obligation to state reasons (for not registering the Initiative). In response, the Commission issued a new decision that resulted in partial registration of the Initiative in March 2017.

Romania challenged the Commission decision to partially registrate the Initiative before the General Court, arguing that the Commission erred in concluding that the proposals made fell within EU competences. In the current judgment, the General Court dismisses Romania's action.

First, the General Court finds that the proposals made in the Initiative are aimed at ensuring respect for minorities, which is an explicit EU value, and promoting cultural and linguistic diversity, which is an EU objective. As such, while the General Court stresses that the EU does not have general competence in those areas, the Commission was correct in finding that it must consider those values and objectives when taking EU actions in the areas proposed in the Initiative, and that the legislative proposals suggested do not fall outside of the limited competence the EU does have to legislate.

Case C-418/18 P – Puppinck and Others

The case in question concerns the European Citizens' Initiative known as 'One of Us', successfully registered with the Commission in 2012. 'One of Us' was a petition to end EU financing of research activities that involved the destruction of human embryos, including the (in)direct funding of abortion. The Commission responded to that initiative by noting it did not intend to take any action in light of 'One of Us', and the applicants brought an action for the annulment of the Commission communication before the General Court in 2018. The applicants appealed that General Court ruling before the CJEU.

In the current judgment, the CJEU stressed that under Article 11(4) TEU, the Commission is 'invited' to respond to an ECI. It is not obligated to;

its only obligation is to inform the petitioners of what action, if any, it intends to take, and why.

The power of legislative initiative means that the Commission cannot be 'forced' to introduce legislation by any other body, including under the ECI mechanism, unless the EU Treaties oblige it to. An ECI is meant to be akin to the rights of the European Parliament and the Council to request the Commission to act—but not to oblige it to.

The ECI is not deprived of effectiveness if the Commission chooses not to act in response to one. It is nonetheless an instrument of participatory democracy, and even if the Commission does not legislate in response to an ECI, the ECI will have initiated debate within the EU institutions on policy.

Finally, the CJEU stressed that the Commission has a broad discretion to act in response to an ECI, and that consequently only limited judicial review of its decisions can take place, centring on whether it provided sufficient reasons for why its decision, and whether any manifest errors of assessment took place. As neither were the case here, the Commission communication stands.

9.4 Consumer Protection

Case C-118/17 – Dunai

In 2014, Hungary adopted a set of laws that amended unfair terms of loan contracts that were denominated in foreign currencies. They specifically provided that borrowers cannot retroactively cancel a loan contract which includes an unfair term that is not covered by the 2014 laws. One of the areas of unfair contract terms *not* covered by the 2014 laws is that of exchange-rate related risks.

In 2007, Mrs Dunai concluded with ERSTE Bank Hungary a loan contract that was denominated in Swiss francs. Under the contract, the loan was to be advanced in Hungarian florins, and the conversion of francs to florins was to be made by applying the exchange rate that applied *on the day* of the provision of the loan. The loan was to be repaid in florins, and the amount of repayment required would be calculated on the basis of the exchange rate that was practiced by the bank on each repayment day.

Mrs Dunai bore the risk of exchange rate fluctuations, and they turned out to be significant: the florint depreciated significantly, resulting in a significant increase in the amount of money due to be repaid.

Mrs Dunai challenged the validity of her contract with ERSTE Bank Hungary before the Hungarian courts, which have asked the CJEU to rule on whether the 2014 laws are compatible with the EU directive on unfair contract terms.[46]

In the current judgment, the CJEU found that the 2014 Hungarian laws in principle complied with the directive, but that their content that

[46] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29).

precluded the retroactive cancellation of a loan on account of an unfair term relating to exchange-rate risk is contrary to EU law. It stressed that under the unfair contract terms directive, the cancellation of a contract must be possible if the contract cannot continue to exist without the unfair term. It was for the domestic court to assess if Mrs Dunai's contract was of this nature.

Case C-681/17 – slewo

Mr Ledowski purchased a mattress on from German online retailer slewo. When the mattress was delivered, he removed its packaging (including a protective film), and then returned the mattress, requesting a return of the cost of the mattress and its transport.

slewo argued that in taking off the packaging, Mr Ledowski lost his right of withdrawal under the Consumer Rights Directive.[47] The directive stresses that a 14 day return policy for online purchases applies, except where 'sealed goods' are 'unsealed'.

The German Federal Court of Justice has asked the CJEU if this notion of 'sealing' and 'unsealing' applies to goods like mattresses, where their protective packaging has been removed by the consumer after delivery.

In the current judgment, the CJEU distinguished 'protective film' from a 'seal'. 'Unsealed' products are excluded from the return policy for health and hygiene regions, in that when they are 'unsealed', those goods are not usable by another party and thus cannot be resold. Mattresses do not fall into that category, in that mattresses can be reused and resold – as hotels demonstrate, per the Court. A mattress in a protective film is more similar to an article of clothing or a garment, which explicitly can be returned under the directive, than it is to a 'sealed' product.

That said, it did note that Mr Ledowski will be liable for any diminished value in the goods following their return. This appears to suggest that if slewo can demonstrate that the mattress would have to be sold at a lower price without its protective film, it could charge Mr Ledowski for the difference.

Case C-649/17 – Amazon EU

Amazon was sued before the German courts by the German Federal Union of Consumer Organisations and Associations ('Federal Union') for failing to inform consumers of its telephone and fax contact details in a clear and comprehensible manners. The Federal Union considered this to be a failure to offer an efficient means to enter into contact with a company, and that the Amazon 'callback service' does not satisfy that obligation, as it requires consumers to take a number of steps before being able to speak to an interlocutor of Amazon. The relevant German law being violated by Amazon, per the Federal Union, requires traders

[47] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ 2011 L 304/64).

to provide their telephone numbers in *all instances* before concluding distance or off-premise contracts with them.

The German Federal Court of Justice has asked the CJEU whether the Consumer Rights Directive[48] precludes this condition in the German law, and if other means of contacting Amazon (eg, via e-mail, 'chat' or callback) would satisfy the Directive's provisions.

In the current judgment, the CJEU found that the Directive does not require the establishment of a telephone or fax line for contact purposes, and so the Directive does preclude national legislation demanding this, as it is a disproportionate imposition on companies. The Directive permits other forms of communication, providing they are direct and efficient – including 'chats', contact forms, or callback services. It is for the German national court to consider if the way in which Amazon can be contacted by consumers satisfies those conditions of 'direct and efficient', and if the contact information is accessible in a clear and comprehensible manner—though it notes that having to take several steps in order to reach a telephone number does not, in and of itself, mean that the means of reaching the company is 'unclear' or 'incomprehensible.'

Case C-260/18 – Dziubak

In 2008, the Dziubaks concluded a contract for a mortgage loan specified in Polish zlotys but indexed to the Swiss franc with the Raiffeisen Bank. This meant that funds were made available in zlotys, but repayments were expressed in francs – albeit in a way where they were recovered from the Dziubaks' bank account in zlotys

When the loan was disbursed, the debt remaining (in francs) was determined on the basis of the zloty-franc exchange rate on the day of disbursement; however, repayment charges were calculated in light of the zloty-franc exchange rate on the day the repayment was due. Their repayments were consequently subject to fluctuations in the relevant exchange rates.

The Dziubaks brought an action before the Warsaw regional court seeking a declaration of invalidity of the loan, on the ground that the term that resulted in them being to different sets of exchange rates vis-à-vis the original loan and the repayments was an unfair contract term that could not be binding on them under the EU directive on unfair contract terms in consumer contracts.[49] However, without those terms, it would be impossible to determine the correct exchange rate to be applied to the contract, meaning the contract itself could on longer exist.

The Polish court has asked the CJEU if, subsequent to their removal, unfair terms may be replaced by general provisions of Polish law which provide that the effects expressed in a contract are to be completed by the effects arising from principles of equity or other established customs. The CJEU answered this question in the negative in the current

[48] Ibid.

[49] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29).

judgment, in that it also cannot be determined if the Polish legislature adopted those general provisions in light of the balance struck in the unfair contract terms directive.

The Polish court has secondly asked if the directive permits the annulment of the contract where maintenance of the contract without unfair terms would alter it fundamentally. The CJEU noted here that the directive does not preclude annulment in these circumstances, as it is objectively uncertain if the loan can continue to function without the connections to the Swiss franc that are set out in the unfair terms. However, the CJEU stressed that the unfair contract terms directive will only apply to the consumer if the consumer wishes for it to: where annulment of the contract as a whole would hurt the consumer more than retaining the unfair terms, the consumer could decline this form of 'protection' under the directive.

9.5 Environmental Law

Case C-723/17 – Craynest and Others

The case concerns a dispute regarding the air quality plan drawn up for the so-called Brussels zone. A number of residents of Brussels and ClientEarth have argued before the Court of First Instance in Brussels that the plans drawn up by the local Brussels government and its Environmental Management Institute are inadequate.

The Belgian Court has asked the CJEU to interpret the EU directive on ambient air quality and cleaner air for Europe in light of this dispute.[50] It specifically wishes to know if national courts can review the locations measuring stations that take samples of air quality, and second, whether an average can be taken from different measuring stations when determining if air quality limits have been complied with.

The CJEU, in the current judgment, noted that the directive sets out detailed rules for measuring air quality, and some of these are clear, precise and unconditional enough to be directly effective in national courts. The obligation to establish sampling points in such a way that they provide information on the most polluted locations, and the obligation to establish a minimum number of sampling points, are two of these directly effective obligations. While the directive leaves the locations of sampling sites to the national authorities, the CJEU stressed that this does not make them exempt from judicial review.

The directive's obligation to catch the most polluted air effectively implies the possibility for a national court, hearing complaints about sampling locations, to consider if the relevant sampling points are sited in a way that meets these directive obligations. The directive rules out an average from different measuring stations being used, noting that this does not make it possible to determine the level of exposure to air of bad quality that the population in general suffers from.

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[50] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152/1), as amended by Commission Directive (EU) 2015/1480 of 28 August 2015 (OJ 2015, L 226/4).

As such, when examining if a limit value has been exceeded, a measurement at a single sampling point that exceeds that level is sufficient for there to have been a violation of the directive.

Case C-411/17 – Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen[51]

In 2003, the Belgian Parliament adopted a timetable for phasing out the production of electricity via nuclear power plants. No new plants were to be built, and the power stations that operated in Belgium were to be phased out after operating for 40 years (meaning between 2015 and 2025). As such, Doel 1 station ceased production of electricity in February 2015, and Doel 2 power station was to cease production in 2015 as well.

By the end of 2015, however, the Belgian legislature extended the operating life of Doel 1 for a further 10 years and postponed the cessation of Doel 2 by almost 10 years as well. This new legislative act was accompanied by major works on both stations, intending to modernise them and ensure their compliance with safety standards.

Two Belgian environmental organisations brought an action before the Belgian Constitutional Law, seeking annulment of the 2015 extension law, as it was adopted without an environmental assessment and without a procedure permitting public participation. Their action is based on a variety of international legal instruments and the EU Environmental Impact Assessment (EIA) Directive, the Habitats Directive, and the Birds Directive, as Doel 1 and 2 are adjacent to several conservation sites.

The Belgian Constitutional Court has asked the CJEU to interpret the relevant international laws and EU directives for the purposes of establishing whether EIAs were required prior to adopting an extension to the operation of nuclear power stations.

The CJEU, in the current judgment, found first of all that the 'major works' and the extension, though technically in different legislation, were clearly part of the same 'project' under the EIA Directive. In determining if this project would have significant effects on the environment, the CJEU considered that it must be regarded akin to the initial commissioning of the nuclear power stations. As such, an EIA on the works and extension is mandatory and should have taken place. The only possible exemption from an EIA would relate to the security of electricity supply, but Belgium does not appear to be arguing that there was a risk to security of supply in this case.

Additionally, the Habitats Directive also requires an impact assessment of the associated protected sites. Where such an impact assessment is negative, the Habitats Directive only permits works like those proposed to go ahead if they are justified by security of energy supply concerns. This is for the Belgian Constitutional Court to consider.

[51] The judgment is not available in English.

However, the CJEU notes that the assessments can be carried out while the project is being executed so as to 'regularise' the works once they are completed, so long as this 'regularisation' does not give an opportunity for the works to circumvent EU law and that the assessments go back to consider the works from their outset.

Case C-280/18 – Flausch and Others

The case concerned proposals for creating a tourist resort on the island of Ios in Greece. A notice inviting any interested person to participate in the required environmental impact assessment (EIA) procedure was published in the local newspaper on Syros, as well as posted in the offices of the administrative authority of the South Aegean region there. Ios is 55 nautical miles away from Syrus and there are no daily transport services to it.

After a year, the Greek Ministers for Environment and Energy and Tourism adopted the relevant decision that approved the creation of the Ios resort. It was published on a government portal and the Ministry of the Environment's website.

18 months after that decision, several property owners and environmental protection associations brought an action against the decision, arguing that they did not become aware of the decision until work on Ios had actually begun. Under Greek law, however, proceedings have to be brought within 60 days of the publishing of the decision on the internet.

The Greek Council of State referred questions to the CJEU regarding the Greek functioning of the EIA system. The CJEU notes that the EIA Directive leaves the detailed functioning of the EIA system to national authorities, provided that they are equivalent to similar domestic processes and that they actually enable the EU rights at stake to be exercised.

The latter condition, known as the principle of effectiveness, requires that appropriate information channels are used to reach concerned citizens. The posting of a notice in a regional administrative headquarters 55 nautical miles away does not appear to contribute sufficiently to informing the concerned public. The national court should also investigate how easy it in practice is for anyone resident on Ios to access the relevant EIA procedure's file, given that it was held on Syros.

Finally, the 60 day 'cut-off' for bringing proceedings was found to be contrary to the EIA Directive, which does not permit such a cut-off date.

Case C-752/18 – Deutsche Umwelthilfe

The case concerned a dispute between Deutsche Umwelthilfe, a German environmental protection organisation, and the German Land of Bavaria. Bavaria consistently refused to adopt the necessary measures to comply with EU Directive 2008/50 on ambient air quality, particularly with regard to the volume of nitrogen dioxide present in the air in Munich. Two injunctions (in 2012 and 2016) did not result in Bavaria to take the necessary measures; it was ordered to pay a penalty in 2017,

and did so, but nonetheless did not comply with the obligations set out in the Directive.

Deutsche Umwelthilfe brought a new action in 2018, seeking a further financial penalty, and secondly, the detention of the persons at the head of the Bavarian government (eg, the Minister for the Environment and Consumer Protection, or failing that, the Minister-President). The penalty was upheld, but the action for coercive detention was dismissed. Following an appeal by Bavaria, the Higher Administrative Court upheld the penalty, and decided to use a preliminary reference to see if coercive detention needed to be a possible order under EU law in this situation, as the German Constitution precluded it.

The CJEU, in the current case, thus investigated if the Article 47 Charter right to an 'effective remedy' had to be interpreted as empowering or requiring national courts to adopt 'coercive detention' measures in situations where penalties were not resulting in compliance with EU law.

It held that where national authorities persistently fail to comply with judicial decisions that enjoin it to fulfil EU law obligations, the national court having jurisdiction should order coercive detention of the persons at the head of that national authority where *two* conditions were met:

- First, domestic law must provide a legal basis for coercive detention in a way that is accessible, precise and foreseeable.
- Second, the EU principle of proportionality had to be observed.

The CJEU reminded the German court of the EU law obligation to provide 'effective judicial protection' under the Charter. National legislation of any kind that results in an inability for a national court to enforce its judgment, particularly where it concerns the endangerment of human health (as the Directive does), would result in the absence of 'effective judicial protection'. The German courts consequently must, to the fullest extent possible, interpret national law in a way that gives such 'effective judicial protection'—and failing that, must set aside national law.

That said, coercive detention would potentially contravene the 'right to liberty' as guaranteed by Article 6 of the Charter. The rights of effective judicial protection and the right to liberty must consequently be balanced. This could be done by ensuring that the law in question was accessible, precise and foreseeable, and that detention could only apply if there were no less restrictive measures (eg, very high penalties) that could achieve effective judicial protection.

In the situation where the national court found that *only* coercive detention could result in effective judicial protection, EU law would not only authorise but require such a measure.

9.6 Agriculture and Fisheries

Case C-497/17 - Oeuvre d'assistance aux bêtes d'abattoirs

In 2012, the French association Œuvre d'assistance aux bêtes d'abattoirs ('OABA') submitted to asked the French Minister for Agriculture and

Food to ban the use of an 'organic farming' indication on any adverts for or packing for certified 'halal' meat patties from animals that were slaughtered without being stunned first. The relevant certification body, Ecocert, refused OABA's request, and an initial judicial challenge by OABA was also dismissed.

The French Administrative Court of Appeal in Versailles, however, has asked the CJEU whether relevant EU law means that the EU 'organic farming' label can or cannot be used in relation to products that are derived from non-stunned animals in line with religious rites.

In the current judgment, the CJEU first iterated that 'organic farming' implies a high standard of animal welfare, characterised by enhanced animal welfare standards at all stages of production. It noted that scientific studies reveal pre-stunning as a technique that least compromises animal welfare when killing animals; ritual slaughter, while permitted under EU law as an exception to the general expectation that animals are pre-stunned, does not preclude animal pain, distress and suffering as well as pre-stunning does. As such, the two methods of animal killing are not equivalent, and one implies lower animal welfare than the other.

The CJEU thus found that as consumers expect the highest possible standard of animal welfare when seeing that food is labelled as 'organic', EU law precludes the placing of the 'organic farming' logo on animals that have been slaughtered in accordance with religious rites but without being stunned first.

Case C-614/17 - Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego

Industrial Quesera Cuquerella SL ('IQC') markets three of its cheeses using labels with clear references to the character of Don Quixote de la Mancha (as made famous in the eponymous novel by Cervantès), as well as Don Quixote's horse Rocinante – the labels on the cheeses contain the words 'Quesos Rocinante'.

These three cheeses are not covered by the protected designation of origin (PDO) of 'queso manchego', which covers sheep milk cheese made in the La Mancha region of Spain. The applicant ('the Foundation') manages that PDO, and brought an action against IQC, seeking a declaration that the labels used to identify and market Quesos Rocinante constitute an unlawful evocation of their PDO.[52]

The Spanish courts of first and second instance indicated that while the cheeses may reference the region of La Mancha, they did not reference 'queso manchego'. The Spanish Supreme Court, on further appeal, has asked the CJEU whether a registered name can be evoked through the use of figurative signs, and secondly, whether the use of signs evoking the geographical area of a PDO is an evocation of that designation.

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[52] Under Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 2006 L 93/12).

In the current judgment, the CJEU held that a registered name can be evoked through figurative signs – these, too, are a form of evocation, and a PDO covers 'any evocation'. The key factor is whether the figurative image immediately evokes, in the consumer's mind, the image of the protected product – eg, queso manchego. The national court has to determine if the figurative signs used here (eg, a gangly knight, windmill, and the horse) immediately bring to mind 'queso manchego' or not.

However, the CJEU also found that where these figurative signs evoked the *region* with which a PDO is associated, by a producer also in that region, this is not automatically covered by the PDO. The Supreme Court here has to consider if there is clear and direct 'conceptual proximity' between queso manchego and the Quesos Rocinante labels that would result in consumers concluding that Quesos Rocinante *are* queso manchego. The relevant consumers are those in all Member States where Quesos Rocinante are sold.

The Court concluded that the Supreme Court must therefore assess whether the Quesos Rocinante, made and consumed primarily in Spain, evoke 'queso manchego' in the minds of Spanish consumers. If so, the PDO makes the labels on Quesos Rocinante unlawful evocations of 'queso manchego' throughout the EU.

Case C-432/18 – Consorzio Tutela Aceto Balsamico di Modena

The name 'Aceto Balsamico di Modena', for balsamic vinegar from Modena, Italy, has been registered since 2009 in the register of protected designations of origins and protected geographical indications (PDO and PGI).

Balema, a German company, produces and markets vinegar-based products made using wines from the Baden region in Germany. It uses the words 'balsamico' and 'Deutscher balsamico' on the labels.

A consortium of Italian balsamic vinegar producers who make products covered by the PDO and PGI above requested that Balema stop using the term 'balsamico'. Balema brought an action before the German courts, seeking a declaration that it has the right to use that term for its products.

The German Federal Court of Justice has asked the CJEU to determine if the protected designation of 'Aceto Balsamico di Modena' covers that term as a whole, or extends to the use of non-geographical individual terms in the name – eg, 'Aceto' and 'Balsamico'.

In the current judgment, the CJEU declared that the protection of the name 'Aceto Balsamico di Modena' does not cover the individual non-geographical terms in that name. The name as a whole has a clear reputation, nationally and internationally, but terms that effectively are just Italian words for 'balsemic' and 'vinegar' are not geographically protected, not least of all because they appear in other registered PDOs relating to balsamic vinegar from other regions in Italy.

9.7 Regulation of Financial Services

9.8 Public Procurement

Case C-465/17 – Falck Rettungsdienste and Falck

The City of Solingen in Germany invited a number of public aid associations to submit tenders for a contract for the provision for emergency services, and awarded the contract to two of the associations who submitted tenders. The type of emergency services related particularly care of patients in emergency situations by qualified professionals, and the transport of patients in an ambulance alongside qualified medical professionals.

Falck brought an action before the German courts seeking a declaration that the award of the contract in question was illegal, as it was not publicly advertised in the EU's Official Journal, as is required by the EU public procurement rules. The Higher Regional Court in Düsseldorf asked the CJEU if these types of 'emergency services' contracts fall within the scope of the public procurement directive, or are excluded from those directives as they fall in the concept of 'danger prevention services'.

In the current judgment, the CJEU confirmed that in general, emergency services, as the contract concerned, are not subject to the public procurement rules as they fall within the concept of 'danger prevention' of both individual and collective risks – the only condition is that such emergency services must be provided by non-profit organisations or associations. Regarding the specific types of emergency services sought by Solingen, care of patients in an emergency is definitely covered by 'danger prevention' and is thus exempt from the normal public procurement rules.

However, a specific regime applies to so-called 'patient transport ambulance services' – they are neither exempt from the procurement directives nor fully subject to them, but instead must follow a simplified procurement regime. The CJEU considered that transport by ambulance is not in general exempt from the procurement directives, unless it can be established that there is a possible 'emergency' that may occur during that transport (eg, a patient at severe risk of deteriorating further). In such circumstances, the transport would fall within the exemption provided for 'emergency services'. The Solingen contract required qualified medical professionals on the ambulance service in question precisely because it was prepared for possible 'emergency' transport – and as such, it is also exempt from the public procurement directives' rules.

9.9 Taxation

Case C-449/17 - A & G Fahrschul-Akademie

The private driving school A&G Fahrschul-Akademie (A&G) was challenging a decision made by the German tax authority to refuse to exempt driving tuition for licenses in the passenger transport categories

(B and C1) from Value Added Tax (VAT). It argued that it was not providing purely recreational services, because these licenses are likely to be required to meet professional needs. Its view was thus that its driving lessons should be covered by the exemption in the VAT Directive that applies to 'school or university education'.

The German Federal Finance Court has asked the CJEU if this is a correct interpretation of the directive, and in the current judgment, the CJEU concluded that it is not. Driving tuition is a form of specialised tuition, which does not result in a general transfer of knowledge and skills covering a wide range of diverse subjects – which is what 'school or university education' provides. A&G consequently is liable for VAT on its driving tuition.

9.10 Insurance

Case C-100/18 – Linea Directa Aseguradora

In August 2013, a vehicle that had not been driven for a period exceeding 24 hours and which was parked in a private garage of a building caught fire and caused damage. The fire originated in the car's electrical system. The owner of the car had taken out insurance that covered them for civil liability in respect of the use of motor vehicles with Linea Directa. The building was separately insured by Segurcaixa, and the owner was compensated for almost 45,000 euros as a result of damage caused by the vehicle fire.

In March 2014, Segurcaixa brought proceedings against Linea Directa seeking an order that it reimburse Segurcaixa for those 45,000 euros, on the grounds that the incident had commenced in an event that was covered by the motor vehicle insurance. Linea Directa was ordered to pay that compensation, as the Spanish local court determined that under Spanish law, 'use of vehicles' covered situations where the car was parked and had caught fire without intervention of third parties.

Linea Directa appealed this judgment before the Spanish Surpeme Court, which has referred questions to the CJEU regarding the concept of 'use of vehicles' as contained in the directive on insurance against civil liability in respect of the use of motor vehicles.[53]

In the current judgment, the CJEU found that the directive's concept of 'use of vehicles' does in fact cover a situation where a parked car catches fire even though the vehicle had not been moved for more than 24 hours before the fire occurred. 'Use of vehicles' is an autonomous EU law concept that must be given an EU definition, and that its usage in EU law is not restricted to road use. Specifically, the CJEU found that parking and not moving the car are 'natural and necessary steps which form an integral part of the use of that vehicle as a means of transport'. Which part of the vehicle caught fire was irrelevant in determining that the fire originated in the vehicle.

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[53] Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (OJ 2009 L 263/11).

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