HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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2020 CJEU Judgments in Summary

By Sylvia de Mars

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Summary

This briefing paper summarises a selection of Court of Justice of the EU (CJEU) judgments from 2020. 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, most 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. The subject areas were identified as most common in previous years' CJEU case law; an empty 'subject area' heading simply means that no cases in 2020 in that subject area have been decided (yet) at the time of publication.

At this time, it includes a selection of cases ruled upon between 1 January 2020 and 30 June 2020.

1. The Fundamental Freedoms

1.1 Free Movement of Capital

1.2 Freedom of Establishment & Free Movement of Services

Case C-482/18 – Google Ireland

Google Ireland, active in Hungary, carries on activity that is subject to the Hungarian tax on advertising. It failed to comply with the obligation to submit a tax declaration in respect of that tax. The Hungarian system of penalties relating to the tax of advertising meant that Google was fined approximately 31,000 euros in the first instance, and within a few further days, additional fines of approximately 3.1 million euros—the maximum fine that could be imposed under the relevant Hungarian law.

Google brought an action before the Budapest Administrative and Labour Court to challenge the compatibility of the operation of the Hungarian advertising tax with EU law. Specifically, it challenged the requirement for foreign service providers to declare taxes in Hungary, and it challenged the system of penalties set up under the advertising tax. The court in Budapest referred questions on those two challenges to the CJEU.

In the current judgment, the CJEU found that the Article 56 TFEU freedom to provide services does not preclude Hungarian legislation that requires service suppliers established in another Member State to submit a tax declaration in Hungary under its tax on advertising. This was declared an administrative formality which did not constitute an obstacle to the freedom to provide services.

However, the volume and speed at which the fines accumulated under the Hungarian advertising tax law in the event of non-compliance was found to be contrary to the freedom to provide services. The time given to reach compliance was found disproportionate, and the overall volume of the fines levied on foreign service suppliers who fail to declare taxes was significantly higher than on equivalent domestic service providers. The latter makes the measure discriminatory on the basis of nationality—as well as disproportionate and unjustifiable. As such, Article 56 TFEU prohibits the system of fines relating to the advertising tax as currently operational in Hungary.

Case C-753/18 – Stim and SAMI

The current case involved the Swedish organisations that respectively manage copyright in music (Stim), and the related rights of performers (SAMI). Stim has argued that a company called Fleetmanager, which makes available vehicles for rental that are equipped with radio receivers, contributes to the copyright infringement committed by its clients, as they made music available to the public without being authorised to do so.

SAMI is involved in a similar dispute with a private company called NB, who have asked for a declaration that they are not required to pay fees to SAMI purely on account of the fact that the vehicles it offers for rental come with a radio and CD player.

The Swedish Supreme Court, hearing both disputes on appeal, has asked the CJEU to determine if hiring out vehicles that come equipped with radios is captured by the phrase "communication to the public" within the meaning of the EU copyright directives.[1]

In the current case, the CJEU cited recital 27 of the first copyright directive, which reads that 'the mere provision of … facilities for enabling or making a communication does not in itself amount to communication'. On that basis, the fact that vehicles for rental that come equipped with radios that *can* be used to engage in communication acts engaging EU copyright law does not make the vehicle rental companies liable under those directives. In other words, making available cars and other vehicles that have radios installed them is not in itself an 'act of communication' – and so Fleetmanager and NB do not owe Stim and SAMI fees.

Case C-581/18 - TÜV Rheinland LGA Products GmbH and Allianz IARD

The case concerns breast implants. In 2006, a German national underwent a procedure in Germany to have these breast implants inserted. In 1997, the manufacturer of the implants (PIP, a French company) commissioned TÜV Rheinland to undertake an assessment of the quality system that PIP had put in place regarding the design, manufacture and inspection of the PIP breast implants. This commissioning was in accordance with the EU directive on medical devices.

Following several inspections at the PIP premises, TÜV Rheinland approved their quality assurance system and renewed their EU-wide 'CE' examination certification, which guarantees conformity of the implants with the requirements in the medical devices directive.

Separately, PIP had taken out an insurance contract that covered its civil liablity arising from the manufacture of the breast implants. It contained a claseu that limited the geographical extent of insurance coverage to harm occurring in France or French overseas territories.

In 2010, the French agency for the safety of healthcare products found that the PIP implants were filled with an unauthorised form of industrial silicone. PIP, the company, was liquidated in 2011, and in 2012, the German Federal Institute for medicinal products and medical devices advised any patients with PIP implants to take steps to have those implants removed, as a precaution, as they were at risk of premature

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167/10) and Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 2006 L 376/28).

rupture, and the silicone they were made with had inflammatory effects.

The German patient in the current case brought an action for damages before the German courts, against the doctor who inserted the PIP implants, TÜV Rheinland and Allianz, with whom PIP had taken out insurance. Her argument is that under French law, she has a direct right of action against the insurer, even though the insurance policy has a jurisdictional limiting clause, as such a clause is contrary to EU law.

Her action was dismissed in the first instance, but she brought an appeal before the Higher Regional Court of Frankfurt am Main, who have asked the CJEU if the geographical limitation clause in the insurance contract between PIP and Allianz is compatible with EU law, and specifically, the prohibition of discrimination on the basis of nationality found in Article 18 TFEU.

In the current judgment, the CJEU first examined whether Article 18 TFEU applied to the current case. It would be if the situation at play in the case falls within the scope of application of EU law; and if there is no more specific provision in the Treaties that prohibits discrimination on the grounds of nationality that would apply here.

Regarding whether the insurance contract falls within the scope of EU law, the CJEU concluded that the EU directives on medical devices do not impose an obligation on manufacturers of those devices to take out civil liability insurance; nor do the directives regulate such insurance. As such, these types of insurance contracts are not currently the subject of EU law.

The CJEU then examined if the situation described affected any of the EU's fundamental freedoms (eg, free movement of goods, persons, services, or capital) and as such was brought within the scope of EU law. It found that free movement of persons did not apply as the German patient did not travel anywhere to obtain the breast implants. Regarding the freedom to provide services, the implants were inserted by a doctor in Germany, so there was no cross-border activity there; and likewise, the insurance contract was concluded between two French companies, again involving no cross-border activity. Finally, regarding the free movement of goods, the CJEU found that the dispute at hand did not actually relate to the cross-border movement of goods itself—as the breast implants themselves were not subject to discriminatory treatment when moving from France to Germany.

As such, the CJEU concluded that an insurance contract concluded by a manufacturer of medical devices, and an insurance provider established in the same Member State, falls outside of the scope of EU law, and as such Article 18 TFEU cannot apply to it.

1.3 Free Movement of Goods

Case C-786/18 – ratiopharm

Novartis manufactures a medical product known as 'Voltaren Schmerzgel', a pain-relieving gel that contains Diclofenac as its active

substance. It has brought an action before the German courts seeking to prohibit ratiopharm, who manufactures generic medication, from distributing free samples of the product 'Diclo-ratiopharm-Schmerzgel' (which also contains Diclofenac) to pharmacists. According to Norvatis, giving out such samples is contrary to German domestic law on medicinal products, which precludes giving out samples to pharmacists and only permits them being given to doctors.

The German Federal Court has asked the CJEU to interpret EU law, specifically on medicinal products for human use[2], and to clarify if EU law permits pharmaceutical companies to distribute free samples of medicinal products to pharmacists.

The CJEU, in the current judgment, found that the EU code on medicinal products for human use does *not* authorise this in relation samples of medicinal products which are only available on prescription. It does not, however, prohibit it regarding medicinal products for which a prescription is not required. As Diclofenac is only available on prescription in Germany, it consequently cannot be distributed to pharmacists in 'sample' form, but only to doctors—who would be able to prescribe it.

1.4 Free Movement of Persons & Citizenship

Case C-447/18 - UB v Generálny riaditel' Sociálnej poist'ovne Bratislava[3]

The case involved a Czech national resident in Slovakia, who obtained gold and silver medals in European and World Ice Hockey Championships as a member of the national team for 'Czechoslovakia'. He was refused a social security benefit that was made available to high-level athletes who have represented Slovakia, because he did not have Slovak nationality. He challenged this finding before the Slovak courts, arguing it was contrary to Regulation 492/2011 on the freedom of movement of workers, which guarantees that nationals of any Member State enjoy the same 'social advantages' as national workers in the Member State they have moved to.[4]

The Slovak courts asked the CJEU if the provision of Slovak law that made receipt of the above benefit was contrary to EU law, given the particular circumstances of Czechoslovakia (which dissolved into two nations and allowed a 'choice' of nationality at this time).

The CJEU first considered if the 'high-level athlete' benefit was covered by the EU's social security coordination rules, but found it was not, not

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2 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311/67), as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ 2004 L 136/34).

3 Note: the judgment was made on 18 December 2019, but reported only in a press release dated 4 February 2020.

4 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141/1), Art 7(2).

least of all because it was funded directly by the Slovak State and not out of 'social security' contributions to a select number of high-level athletes. Nonetheless, Regulation 492/2011 and its concept of a 'social advantge' does cover this benefit. As such, a Czech migrant worker qualifying for this benefit as a high-level athlete who has represented Slovakia is entitled to this benefit in the same way as ongoing Slovak nationals who are high-level athletes who have represented Slovakia. The Slovak law regulating the benefit consequently discriminated on the basis of (current) nationality and was found to be contrary to EU law.

Case C-830/18 - Landkreis Südliche Weinstraße

German national PF attends secondary school in a district in Germany, but lives in France with his German national parents; his mother works in Germany.

As of 2015/2016, the German district refused to pay for PF's school transport costs on the ground that regional law makes the district responsible only for school transport to students who *live* in the relevant German state.

The regional higher administrative court has asked the CJEU in light of the dispute between PF and the district whether a measure that makes the payment of school transport costs contingent on residence within a particular state amounts to a form of indirect discrimination against migrant workers, which would be contrary to the EU Treaties. If so, the German court has also asked if there may be an overriding justification for such a policy, such as the effective organisation of the school system.

The CJEU, in the current case, first noted that the measure at play does constitute indirect discrimination, as by its nature it is more likely to affect cross-border workers who reside in another Member State. It also has a deterrent effect on free movement of persons, in that parents aware of the measure would be less likely to exercise such movement.

As to whether such a measure can be justified, the CJEU accepted that the 'effective organisation of the school system' was a legitimate objective to be pursued. However, the fact that students who live in the relevant state but go to a school outside of it *will* have their transport costs covered means that the measures are not inextricably linked to organising a school system *within* that state. While the objective stated is legitimate, the CJEU thus found that the measures adopted to achieve that objective are not necessary. Additionally, other measures could be adopted that would be less stringent – such as paying for the fees up to the state border. The justification, while in principle pursuing a valid objective, consequently fails on grounds of necessity and proportionality.

Case C-754/18 – Ryanair Designated Activity Company

In October 2017, police at Liszt Ference Airport in Budapest screened passengers on a Ryanair flight from London. They found that a passenger of Ukrainian nationality, who held a valid residence card

issued by the UK in light of the EU citizens' directive[5], did not hold a 'visa'. In the absence of a visa, the police found that the Ukranian national did not have the necessary travel documents to enter Hungary, and so asked Ryanair to bring him back to London. It also found that Ryanair had failed to carry out its required due diligence as carrier (by ensuring that the correct travel documentation was held by all passengers) and fined Ryanair for 3000 euros.

Ryanair challenged administrative decision resulting in the fine before the Administrative and Labour Court of Budapest. It argued that the passenger did have correct travel documentation, as the permanent residence card issued by the UK enabled entry into any EU Member State under the citizens' directive.

The Court in Budapest has asked the CJEU whether holders of permanent residence cards are exempt from 'visa' requirements and whether that also applies to those non-EU nationals holding permanent residence cards from Member States that are, like the UK at the time, not part of the Schengen area. It also wishes to know if holding a permanent residence cards is sufficient for establishing that a non-EU national is a 'family member' of an EU national.

The CJEU, in the current judgment, first held that even though the directive is only explicit that holding a *residence* card exempts non-EU national family members from visa requirements, this does not imply that those holding *permanent* residence cards cannot benefit from this exemption. It is clear from the directive as a whole that if residence card holders benefit from such an exemption, the permanent residence card holders are also intended to be exempted, as a permanent residence card can only be obtained after five years of being eligible to hold a residence card. In any event, integrating to the point of obtaining a permanent residence card should not result in a loss of rights.

The 'visa requirement' exemption thus also applies to holders of permanent residence cards, and this is not dependent on those cards being issued by a Schengen Member State, as free movement of persons is not affected by the law on the Schengen area. The citizens' directive applies equally to all Member States.

Finally, the CJEU noted that permanent residence cards can only be issued to 'family members of an EU national' under the directive – and as such, holding a permanent resident card necessarily implies that a Member State has verified that the holder is a family member of an EU national. It is thus evidence enough, on its own, of that 'family member' relationship.

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[5] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158/77 and corrigenda, OJ 2004 L 229/35, and OJ 2005 L 197/34).

2. Competition and State Aid Law

2.1 Competition Law

Case C-307/18 – Generics (UK) and Others

The case involved a decision imposed by the UK Competition and Markets Authority (CMA). GlaxoSmithKline (GSK), the pharmaceutical group, held a patent for the active ingredient in 'paroxetine', as well as secondary patents protecting certain processes to manufacture that active ingredient. Its principal patent expired in 1999, and at that time, a number of manufacturers considered introducing generic 'paroxetine' on the UK market.

GSK brought infringement proceedings against these manufacturers, who in kind challenged the validity of one of the GSK secondary patents on paroxetine's active ingredient. Eventually, GSK and these manufacturers concluded settlement agreements: the manufacturers agreed to refrain, for a set period, from entering the market with generics of 'paroxetine', in return for payments made by GSK.

The CMA held that the settlement agreements were contrary to EU competition law, and particularly, the prohibition in Article 101 TFEU on concluding anti-competitive agreement; and they also constituted, under Article 102 TFEU, abuse by GSK of its dominant position in the market. The CMA thus imposed financial penalties on both GSK and the other manufacturers.

The CMA's decision was challenged before the Competition Appeal Tribunal, who asked the CJEU to explain the criteria governing whether this type of 'settlement agreement' is contrary to Articles 101 and 102 TFEU.

Regarding Article 101, the CJEU first emphasised that agreements between undertakings are only prohibited under that Article if they have an appreciable negative effect on competition within the internal market. This can only happen if the undertakings are at least *potentially* competing with each other. As the manufacturers of the generic 'paroxetine' had not yet entered the market, the CJEU noted that the Tribunal had to confirm that there was a real possibility for them *to* enter the market, as well as an intention to do so. Patent rights did not in and of themselves preclude them entering the market, as their validity could be contested.

If the Tribunal found that there was potential competition, it had to be considered if the settlement agreement concluded restricted competition, either by object or because of its anti-competitive effects. The CJEU recalled its earlier caselaw on these concepts, and noted that the as the consequence of the settlement agreement was undoubtedly higher prices for consumers (eg, generics would lower prices, but were precluded by it), this could be evidence that the objective of the agreements was itself anti-competitive. It was for the Tribunal to assess if there were any pro-competitive effects that could outweigh this harm to competition.

Should it fail to find that the very objective of the agreement was anti-competitive, it would have to consider the anti-competitive effects of the agreements. Here, again, the CJEU recalled its case law, and stressed that the Tribunal here could consider what the market would look like without the agreements *without* needing to consider the likelihood of the manufacturers of the generics to successfully challenge the patents at issue.

As for abuse of GSK's dominant position, the CJEU held that again, the relevant market had to include manufacturers of generics of 'paroxetine' without consideration of the existing patents, provided they otherwise are found to be in a position to enter the market. Beyond that, abuse of GSK's dominant position required an assessment of to what extent the settlement agreements foreclosed the market in 'paroxetine'. Unless GSK could demonstrate that this would benefit consumers somehow, the cumulative effect of the agreements would be found contrary to Article 102 TFEU.

Case T-399/16 – CK Telecoms UK Investments v Commission

In 2016, the Commission adopted a decision under the Merger Regulation to block the takeover of O2 (Telefonica UK) by Three (Hutchinson 3G UK). According to the Commission, that acquisition would have decreased competition on the UK mobile telephony market significantly, and would have resulted in increased prices and lesser quality of mobile telephone services in the UK.

Three brought an action before the General Court to seek the annulment of this decision, and in the current judgment, the General Court has found in favour of Three. It has annulled the Commission Decision for several reasons:

- The Commission has failed to prove to the standard required in the Merger Regulation that this merger will result in higher prices and lower quality services for consumers. Its analysis of the market power of Three and O2 merged contained several errors of law and assessment; specifically, it assumed too easily that fewer competitors would automatically result in ineffective competition. It also made assumptions about Three's powers in the market and the nature of the market in general, resulting in findings that do not establish with a sufficiently *high* degree of probability that prices would increase.
- The Commission also failed to show that the merger would impede competition on the mobile network infrastructure in the UK. It assumed that as Three and O2 historically have been part to separate network-sharing agreements, this merger would result in lessened competition on the network development market. This, again, was not proven to a sufficient standard.
- Finally, the Commission failed to demonstrate that the effects of this merger on concentration levels on the wholesale market were sufficient to result in a significant impediment to effective competition. Three's wholesale market shares were too small to result in such an effect.

The Commission decision is as such annulled, and the merger of Three and O2 can proceed.

2.2 State Aid

Cases T-732/16, T-901/16 – Valencia FC

Between 2009 and 2010, the financial establishment of the Regional Government of Valencia (Spain) granted a number of guarantees to associations linked to professional football clubs Valencia CF, Hercules CF and Elche CF. The guarantees were intended to cover bank loans taken out by the three associations in order to participate in the increase in the capital of the three clubs to which they are linked.

In 2016, the Commission found that these guarantees were unlawful State aid incompatible with the internal market, and ordered their recovery. The three clubs brought an action before the General Court to review and annul the Commission decision. On 20 March 2019, the General Court annulled the decision in relation to Hercules CF. The current decisions relate to the actions brought by Valencia CF and Elche CF.

Regarding Valencia CF's action, the General Court found that the Commission made a manifest error of assessment by finding that no equivalent guarantee would be available on the market—based on the finding that no financial establishment would act as a guarantor for Valencia CF, given its financial difficulties. It did not carry out an overall assessment to support that finding, however. Evaluations of the financial situation of Valencia CF in 2010 were also found to be inaccurate, and as such the Commission's findings were overturned.

Regarding Elche CF, the Commission made various manifest errors in assessment as well: it failed to consider the financial situation of the association receiving the guarantee, and failed to take into account the counter-guarantees that the Elche CF association had made available to the regional government. Further, the recapitalisation of the club was also not considered for the purpose of assessing shares in the club. Finally, the Commission here also assumed (without investigation) that no financial establishments would act as a guarantor for a loan to the club. All of the Commission's decisions regarding illegal state aid for these football club associations have consequently been overturned by the General Court at this time.

Cases T-607/17, T-716/17, T-8/18 – Volotea v Commission

These separate but related cases involved actions brought by airlines Volotea, easyJet and Germanwings ('the airlines') against a decision of the Commission from 2016 which declared Italian aid granted to several airlines serving Sardinia as incompatible with EU law.

The 'aid' concerned an Italian regional law from 2010 that authorised the financing of three airports in Sardinia with a view to making air transport to Sardinia less seasonal. The regional law was implemented via a number of measures that the Region's executive adopted, which

provided (amongst other things) the conclusion of commercial agreements between the airport operators and relevant airlines so as to improve air service to Sardinia. The regional measures also determined the conditions and arrangements of reimbursement by Sardinia to the airport operators of whatever sums they agreed to pay airline operators.

The Commission's decision found that the Italian government's actions amounted to state aid *not* given to the Sardinian airports, but rather to airlines serving those airports. In the current actions before the General Court, the airlines have argued that the Commission made various errors of law in its finding that the Italian measures adopted were aid *for* the airlines, not the airports, were contrary to EU state aid law.

In the current judgments, the General Court agreed with the Commission that it was the airlines and not the airports that were the primary beneficiaries of the aid measures. The payments made by the airports were funded directly by the Sardinian government, and could only be used to pay airlines under the rlevant concluded agreements. The airports themselves, moreover, did not benefit from the aid scheme themselves; they effectively implemented the aid scheme, by ensuring the Italian government's aid made it to airlines that served Sardinia.

The General Court also supported the Commission's finding that the Italian measures constituted an aid scheme solely by examining its general characteristics, and that the Commission was not obliged to have investigated if the actual payments at issue were 'de minimis' in nature or not.

Finally, the Court agreed with the Commission that the airlines could not rely on the principle of 'legitimate expectations' regarding the payments they would receive in light of the agreements concluded with the airports, not least of all because the measures had been implemented without awaiting confirmation from the Commission that it had been notified of them, and the agreements were clearly not 'commercial' in nature in that they specified that their payments were of State origin.

The Court thus upheld the Commission decision in full.

3. Area of Freedom, Security and Justice

3.1 Judicial Cooperation in Civil and Commercial Matters

Case C-234/18 – "AGRO IN 2001"

The Chair of the supervisory board of a Bulgarian bank, BP, was subject to criminal proceedings for having incited others (for a period of approximately 3.5 years) to misappropriate funds belonging to that bank, to a total sum of approximately 105 million euros. The criminal proceedings, at the time of the CJEU judgment, are pending and have not yet resulted in a final judgment.

Separately from those criminal proceedings, the Bulgarian Commission for the combatting of corruption has found that BP and his relatives had acquired assets of considerable value without a clear origin. This Commission thus brought civil proceedings before the Sofia City Court with a view to confiscating any assets illegally obtained.

The Sofia City Court has asked the CJEU whether EU law precludes Bulgarian legislation that provides that a court can order the confiscation of assets *without* those court proceedings being subject to a finding of a criminal offence.

The CJEU, in the current judgment, held that the relevant EU law – the Framework Decision on the confiscation of property[6] aims to establish common minimum rules amongst the Member States in terms of confiscation of crime-related proceeds, as this will ease the mutual recognitions of confiscation orders that arise in the context of *criminal proceedings*. As such, the Framework Decision does not govern the confiscation of assets in the context of civil proceedings.

As the proceedings before the Sofia City Court are not covered by the Framework Decision, they are not precluded under EU law.

3.2 Asylum & Immigration

Joined Cases C-924/19 PPU, C-925/19 PPU - Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság

In these two cases, Afghan nationals (Case C-924/19 PPU) and Iranian nationals (Case C-925/19 PPU), who arrived in Hungary via Serbia, applied for asylum in the Röszke transit zone, on the Serbian-Hungarian border. Under Hungarian law, the applications were declared inadmissible, and the Hungarian authorities adopted decisions to return the applicants to Serbia. However, Serbia refused to readmit the persons

[6] Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property (OJ 2005 L 68/49).

concerned as it felt that the conditions set out the Serbian-EU Agreement on readmission were not met.[7]

Subsequently, the Hungarian authorities amended the 'country of destination' mentioned in the initial return decisions it had adopted to the respective countries of origin of the applicants—rather than Serbia. The applicants lodged objections against these amendments, which were rejected. The applicants then brought an action before a Hungarian court, seeking annulment of the decisions to reject their objections to the amended 'country of destination' information, and to have the Hungarian asylum authority ordered to conduct a new procedure—despite such an action not being provided for under Hungarian law. They also brought actions regarding their general treatment, which involved being moved to a sector of the transit zone reserved for third-country nationals whose asylum applications were rejected.

The CJEU, sitting as the Grand Chamber, first examined the situation of the applicants in the mined the situation of the persons concerned in the Röszke transit zone, in the light of the EU rules governing both the detention of applicants for international protection (the 'Procedures' and 'Reception' Directives[8]) and that of illegally staying third-country nationals ('the Return Directive'[9]). It held that keeping applicants in the transit zone had to be regarded as a 'detention measure' – meaning, under all of these EU rules, a coercive measure that presupposes deprivation, as opposed to a mere restriction of freedom of movement – as the applicants could not leave the zone, including towards Serbia, without risking losing their chance at refugee status in Hungary and being subjected to penalties in Serbia for unlawful entry.

It next considered if 'detention' in the transit zone complied with the requirements of EU law. The relevant EU directives specify that neither applicants nor unsuccessful applicants for international protection can be detained solely on the grounds that they cannot meet their own needs; and no detention can take place without a formal reasoned decision authorising detention, which considers the proportionality of detention measures. Furthermore, it considered Article 43 of the 'Procedures' Directive, which makes it explicit that detention in a 'transit zone' cannot in any circumstances exceed four weeks from the date of application.

Finally, the CJEU found that the lawfulness of any detention measure must be amenable to judicial review under both the Reception and the Returns Directive. Where national law did not provide for such review,

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7 Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, annexed to the Council Decision of 8 November 2007 (OJ 2007 L 334/45).

8 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) and 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).

9 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.)

the principles of supremacy and effective judicial protection require a national court to declare that it has jurisdiction to hear such a case and rule on it. If the national court then finds that detention took place in a manner contrary to EU law, the national court must further be able to substitute its decisions for any administrative decisions authorising detention, and authorise immediate release or a similar measure. Likewise, an action to guarantee rights of accommodation under these Directives must also be heard by a national court in the absence of national law enabling enforcement.

The CJEU next considered the jurisdiction of a Hungarian national court to hear an action brought against the decisions taken by the Hungarian authorities to amend their 'country of destination' in the applications. Here, the CJEU ruled that amending the country of destination is so substantial a change that it should e treated as a new application, and applicants should have a remedy against such a change. In the current cases, judicial review was not guaranteed—and objections could only be brought before the asylum authority, which is not independent for the purposes of effective judicial review. This, too, under supremacy and effective judicial protection, is thus a matter that the Hungarian national court can hear in the absence of national law setting out such remedies.

Finally, the CJEU considered the original reasoning for the decisions of inadmissibility of the applications adopted by the Hungarian authorities. Hungarian law here permits rejecting applications where applicants arrive via so-called 'safe transit countries'. The CJEU observed that this ground is expressly contrary to Article 33 of the 'Procedures' Directive, and that consequently the applicants, under EU law, are permitted to submit a 'subsequent application' in which the current ruling is a new element or finding. Any decision of inadmissibility by an asylum authority in the first instance enables a second application where the rejection of the application in the first instance was contrary to EU law, as the CJEU has at this point established.

The applicants therefore can apply for asylum under a 'secondary application', and can also protest the conditions of their detention in the transit zone before the Hungarian national court.

Case C-36/20 PPU – Ministerio Fiscal

In December 2019, a ship carrying 45 men from non-EU countries was intercepted by the Spanish Marine Rescue service off the coast of Gran Canaria. The third country nationals, including VL (from Mali), were taken by the authorities at that point. The next day, a Spanish administrative authority ordered their removal and made a request for their detention before the Spanish courts. When VL was informed by the court of his rights, he indicated he wished to apply for international protection. There was, at the time, no accommodation in the Spanish humanitarian reception centres, and so the court ordered that VL should be detained in a detention centre for foreign nationals while his application was processed.

VL appealed against that detention decision, on the round that it was incompatible with the Reception Directive. During the appeal, the

Spanish courts referred questions to the CJEU regarding its status under that Directive, and whether it was lawful to hold VL in detention while his application was processed.

First, in the current judgment, the CJEU considered the term 'other authorities which are likely to receive' applications for international protection under the Reception Directive. The CJEU found that the use of the word 'other' suggests the EU legislature wanted to ensure that a broad range of authorities that may receive applications for international protection would be covered by the Directive. That broad definition consequently covers both judicial and administrative authorities, so as to achieve the overall goal of the Directive (which is to guarantee effective access to international protection). The Spanish magistrates in the courts in question are consequently covered by the Directive via the concept of 'other authorities', which also ensures that an applicant is covered by that Directive regardless of which 'other authorities' they express an intention to apply for international protection to.

In light of this latter fact, VL could not be detained—as he was protected by the Reception Directive from the date of application onwards, and the Reception Directive lists exhaustively the grounds under which an applicant may be 'detained'. Lack of space in humanitarian reception centres is not one of these grounds, and so VL's detention as contrary to the requirements of the Reception Directive.

3.3 European Arrest Warrant

Case C-717/18 – X (Double Incrimination)

In 2017, the National High Court in Spain convicted X for acts committed in 2012 and 2013 which constituted the offence of glorification of terrorism and humiliation of victims of terrorism, set out in Article 578 of the then-in-force Spanish Criminal Code. The High Court imposed on X the maximum prison sentence of two years stemming from that version of the Criminal Code. However, in 2015 the Code was amended, and the custodial sentence for those two offences now amounts to a maximum of three years.

X had left Spain for Belgium when the National High Court issued a European Arrest Warrant against him in 2018. This arrest warrant was issued for the offence of 'terrorism', which features in EU Framework Decision on the European Arrest Warrant as an act which does not have to be verified for 'double criminality' (meaning, confirmation that the act in question must be punishable in both the issuing state and the executing state) provided that they are punishable in the issuing Member State by a detention order of *at least* three years.[10] The Court of Appeal in Ghent, Belgium, in hearing an appeal in the procedure for executing the arrest warrant, has asked the CJEU as to which version of Article 578 of the Spanish Criminal Code should be taken into account in the relevant case—thus determining whether a custodial sentence of

[10] 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 190/1).

three years maximum applied in the appeal it was hearing, and determined if verification of double criminality of the act was required.

The CJEU first observed that Article 2(2) of that framework decision does not specify what law must be applied when the law has been amended between the date of the *facts* of the case and the *issue/execution* of the arrest warrant. Considering the context of that provision, in the form of other articles in the framework decision, the CJEU found that the relevant time point was that of the facts of the case, not the issue of the arrest warrant. It concluded that any alternative interpretation would be contrary to the principle of legal certainty, not least because the executing authority may not be able to ascertain *if* a domestic law has been amended between the date of the facts and the dates of the issue of the warrant.

Finally, while the Framework Decision precludes surrender without the verification of double criminality of the act (per Article 2(2)) if the original Spanish Criminal Code is applied, the CJEU stressed that this does not per se mean that the 2018 warrant cannot be executed. What it does mean is that the executing authority has the responsibility to examine double criminality of the act, as set out in Article 2(4) of the framework decision, in light of the offence.

Case C-897/19 PPU – Ruska Federacija

In May 2015, Moscow's Interpol office issued an international wanted persons notice regarding a Russian national. In June 2019, that national (who had acquired Icelandic nationality in the interim period) was arrested in Croatia on the basis of that Interpol notice. In August 2019, the Croatian authorities received an extradition request from Russia. The Croatian court permitted this request.

The person concerned sought to have that decision set aside before the Croatian Supreme Court, invoking the risk of torture and inhuman/degrading treatment or punishment if he was extradited to Russia. He also noted that Iceland, before granting him nationality, had recognised him as a refugee on account of the criminal proceedings he was subject to in Russia. Finally, he argued that prior CJEU case law makes clear that where a Member State (in this case Croatia) receives an extradition request about an EU citizen national from another Member State, they must inform the latter Member State and if requested, surrender that national to the Member State concerned, provided it has the jurisdiction to prosecute for extraterritorial offences.

The Croatian Supreme Court has asked the CJEU if that prior case law applies also where the national concerned is not an EU national, but (as in this case) the national of an EFTA State party to the EEA Agreement.

The CJEU first considered if EU law applied to the situation, and concluded that it did – not on account of the Treaty provisions of citizenship, but rather because the EEA Agreement is an integral part of EU law. Moreover, free movement applies to EEA states in line with EU Member States, and the individual concerned had travelled to Croatia from Iceland using free movement rights (receipt of tourist services).

Secondly, as the situation was covered by EU law, the Charter of Fundamental Rights also applied to it. Article 19(2) of the Charter precludes extradition where there is a risk of the death penalty, torture or other inhuman/degrading treatment or punishment. Any Member State thus receiving an extradition request must consider this right. The fact that the individual was granted refugee status in Iceland is significant evidence for considering if there was a risk of breaching Article 19(2) in extraditing him to Russia. Unless the situation in Russia had demonstrably changed since Iceland granted the individual refugee status, the Croatian court should therefore refuse the extradition.

Should the Court find that the situation in Russia had substantially changed, the CJEU considered Croatian extradition rules—which precluded the extradition of Croatian nationals, and nationals of other states, such as the EFTA States. Such rules are liable to affect the free movement of services in the view of the CJEU, and can only be justified on the basis of necessary and proportionate overriding requirements. The CJEU noted that preventing the risk of impunity of non-national persons who have allegedly committed an offence abroad is an appropriate objective, and permitting the extradition of such individuals to a third State is an appropriate means of achieving that objective. However, proportionality requires contact with (in this case) Iceland to see if they wished to request the surrender of their national.

In short, the CJEU found that the rules on extradition applicable to EU national citizens must by analogy be applied to EFTA State nationals who are in a comparable situation.

Case C-641/18 – Rina

In 2006, the vessel *Al Salam Boccaccio '98*, sailing under the flag of the Republic of Panama, sank in the Red Sea, with more than 1000 people losing their lives. Relatives of the victims and survivors of the sinking brought an action before the District Court in Genoa against the societies that carried out the classification and certification of the sunk ship ('the Rina companies'), which have their seat in Genoa.

The applicants claimed compensation for the losses stemming from the Rina companies' civil liability, arguing that the classification and certification operations were the cause of the sinking. The Rina companies, however, argued that the District Court lacked jurisdiction, relying on the principle of immunity from jurisdiction, since the classification and certification operations which they conducted were carried out on behalf of the Republic of Panama and, therefore, are a manifestation of the sovereign powers of the delegating State.

The District Court in Genoa referred a question on the jurisdiction of Italian courts in this case to the CJEU.

In the current judgment, the CJEU Commenced by considering the concept of 'civil and commercial matters' in the Brussels I Regulation (which governs jurisdiction, recognition and enforcement of judgments

in civil and commercial matters).[11] If the ship classification and certification activities that the Rina companies carried out were such matters, the Italian courts would have jurisdiction under Article 2(1) of the Brussels I Regulation.

The CJEU found that it is irrelevant that the activities were carried out upon delegation from a State: the activities themselves were not necessarily an exercise *of* public power by Panama. It thus needs to be determined if these ship classification and certification activities were carried out in the 'exercise of public powers', and as such represent a recourse to powers that fall outside the scope of the normal legal rules applicable to private parties.

In looking at the activities carried out by the Rina companies, the CJEU found that they consisted of effectively establishing whether the ship examined met the requirements laid down by law, and if they did, the relevant certificates were issued. The CJEU determined that in carrying out these checks and issuing or not issuing a certificate, the Rina companies were not exercising a public power within the meaning of EU law.

Regarding the principle of immunity from jurisdiction, the CJEU agreed this was a principle of customary international law, but stressed that it is not an absolute principle—and primarily applies in situations where sovereign actors exercise public powers. It can, on the other hand, be excluded if legal proceedings relate to acts that do not represent the 'exercise of public powers'. Thus, the CJEU found that the Genoa District court has jurisdiction to hear the case for damages under the Brussels I Regulation, unless further evidence arises that suggests that the Rina companies were carrying out activities in the exercise of public powers.

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

4. Social Policy

4.1 Employment

Case C-103/18 - Sánchez Ruiz

The case concerned several persons employed for a long time in the context of fixed-term employment relationships within the health service of Madrid. They requested recognition of their status as members of the permanent regulated staff, or alternatively, as public employees enjoying a similar status. The Community of Madrid refused their request, and so the employees brought actions before the Administrative Courts of Madrid. These courts referred questions to the CJEU for the interpretation of applicable EU law, and in particular, clause 5 of the Framework Agreement on fixed-term work,[12] which defines the concept of 'successive fixed-term employment contracts or relationships'.

The CJEU considered if this concept of 'successive fixed-term employment contracts or relationships' encompasses the situation these employees were in. They noted that the framework agreement aims to prevent abuse of successive fixed-term contracts to the detriment of workers; and that it is for the Member States to determine when fixed-term contracts are 'successive'. However, such a determination has to be consistent with the aim of the framework agreement.

Clause 5 of the framework agreement *does* in the Court's view preclude national law (whether legislation or case law) that considers successive fixed-term contracts to be justified for 'objective reasons' of necessity or urgency where that necessity or urgency could be avoided by the conclusion of a permanent appointment process.

In this specific case, the CJEU observed that these fixed-term contracts were never replaced with permanent appointment processes, and concluded that therefore the continuation of these employees in these 'fixed-term' posts for years on end is the result of the failure of the employers to arrange for a procedure to definitively fill the post. As such, these 'fixed-term' posts were implicitly extended from year to year.

The Community of Madrid argued that the employees consented to this implicit extension, but the CJEU here observed that this did not make the successive use of fixed-term employment contracts unabusive. If this consent resulted in the disapplication of the framework agreement, the goal of the framework agreement—which is to counteract the power imbalances between employees and employers—would be fully undermined.

The CJEU thus found that the Spanish public health sector is experiencing a structural problem, in that there is a high percentage of

[12] Framework Agreement on fixed-term work concluded on 18 March 1999, 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).

temporary workers and a general failure to comply with the legal obligation to fill posts permanently where they are temporarily covered. Finally, the CJEU found that Clause 5(1) of the framework agreement is not directly effective.

Case C-507/18 – Associazione Avvocatura per i diritti LGBTI

The case concerned an Italian lawyer who, during a radio interview, stated that he would not wish to recruit homosexual persons to his firm, nor use their services in his firm. The 'Associazione Avvocatura per i diritti LGBTI' ('the association'), an association of lawyers that defends the rights of LGBTI persons in court proceedings, brought an action for damages against the lawyer. Their action was successful both in the first instance and on appeal, but the lawyer appealed in cassation before the Italian Supreme Court of Cassation, which requested a preliminary ruling from the CJEU on whether these statements were caught by the anti-discrimination directive's prohibition on discrimination in 'conditions for access to employment… and to occupation'.[13]

In the current judgment, the CJEU noted that the concept of 'conditions for access to employment … and to occupation' had to be given an autonomous and uniform interpretation in the EU, and could not be interpreted restrictively. In line with its existing case law on discrimination, the CJEU found that statements that suggest a homophobic recruitment policy fall within the concept, even if they are made by someone who is not themselves legally capable of recruiting staff – providing that a link can be made between the statements made and the employer's recruitment policy. This requires an assessment by national courts of the circumstances surrounding the statements, and particularly an assessment of whether the person making the statements could have or be perceived as having 'a decisive influence on the employer's recruitment policy'.

This finding is not changed by the fact that such an interpretation of 'conditions for access to employments … or to occupation' potentially limits the freedom of expression of others. The CJEU stressed that freedom of expression is not an absolute right, and it can be limited provided that limitations are provided for by law, respect the essence of the right, and are proportionate. Those conditions are met here, in that the anti-discrimination directive requires the limitations, and they are applied only to achieve its objectives: namely, to end discrimination in employment and occupation. The CJEU also concluded that the interference this poses to the right to freedom of expression is proportionate, in that it is not excessive: only statements constituting discrimination *regarding employment and occupation* are prohibited by the directive. If statements like those made here fell outside of the scope of the directive, the directive would fail to actually offer any protection to employees.

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[13] 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).

Finally, the CJEU confirmed that the Italian association in this action was not obliged to be given standing in proceedings where no injured party is identifiable, there is also nothing in the directive that precludes an Italian law that gives such associations automatic rights of standing even in the absence of an injured party, so as to enforce the obligations within the directive, provided that national law sets out the scope of their standing and the consequences of their actions in compliance with the directive.

Case C-802/18 – Caisse pour l'avenir des enfants

FV, a Luxembourgian national, works in Luxembourg and lives in France with his wife GW. They have two children and GW has sole parental responsibility over her child HY from a previous marriage. Until 2016, the couple benefitted from Luxembourgish family allowances for all three of their children on account of FV's status as a frontier worker. Since 2016, however, HY has been excluded from the definition of 'family members' of FV, as the Luxembourg social security code no longer includes children of a spouse/partner as 'family members' and FV has no child-parent relationship with HY himself.

FV brought proceedings before the Luxembourg Social Security Arbitration Board in order to challenge this decision by the social security authorities. The Board held that family benefits constituted a 'social advantage' under the EU Worker's Rights regulation, and that they were benefits related to employment, as FV had to employed in Luxembourg to benefit from them.[14]

The social security authorities challenged this finding on appeal, arguing before the Higher Social Security Board that these benefits were not a 'social advantage'. The Higher Board has referred questions to the CJEU about the status of the family benefit under EU law, and as to whether the exclusion of HY from the benefit receipt is legal under EU law given that all children *resident* in Luxembourg (regardless of parent-child relationship to their 'worker' parent) are entitled to the benefit.

The CJEU, in the current judgment, first considered if this family allowance was a 'social advantage'. It found that as it was, in FV's case, explicitly linked to him carrying out salaried employment in Luxembourg, it constituted a social advantage.

It then considered the situation of HY. It first observed that the family allowance was paid for all children resident in Luxembourg and all children of non-resident workers in a child-parent relationship with those workers. It is thus granted without discretion or assessment of need, and serves the purpose of alleviating the costs of childcare in very general terms. As such, it is also a social security *benefit*, which means that the EU Worker's Rights regulation applies to it.

Under that regulation, there is no *exclusion* of children in the HY situation. The concept of family under that regulation must be interpreted in light of equal treatment obligations, and to exclude HY

[14] Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April on freedom of movement for workers within the Union (OJ 2011 L 141/1).

would be a form of indirect discrimination, largely based on residence (as children resident in Luxembourg without a child-parent relationship to their 'worker' parent would be entitled to the allowance). Excluding children like HY from the allowance also cannot be objectively justified, according to the CJEU. FV is consequently entitled to the family allowance for HY as well as his two other children, and the Luxembourg social security legislation will need to be amended.

Case C-211/19 - Készenléti Rendőrség

The case involved UO, a member of the Rapid Intervention Police in Hungary. The RIP is a special unit of the Hungarian Police carrying out specific missions, which include border patrols with non-Schengen States. He patrolled the borders between Hungary and Serbia, Croatia and Romania between 2015 and 2017, and was during that time ordered to carry out a variety of duties outside normal working hours.

The RIP treated on-call periods as 'rest time', for which UO only received an on-call supplement. UO, however, considers that this on-call time should be treated as 'working time' for the purpose of the Working Time Directive – and according to which he should have received an extraordinary duties payment.[15]

The Administrative and Labour Court in Miskolc, Hungary, has asked the CJEU whether the activities of the RIP are covered by the Working Time Directive.

In the current judgment, the CJEU acknowledges that certain public service jobs are so specific that planning for working time in line with the requirements of the Directive is impossible—in which case they fall outside of the scope of the Directive. However, it finds that the surveillance missions on Hungary's external borders with non-Schengen states are not 'specific' to that extent—in that the facts do not make it clear that those surveillance missions can *only* be carried out continuously and only by UO.

However, activities can further be excluded from the scope of the Directive where they take place in circumstances of 'exceptional gravity and scale'. It is for the Hungarian Court to ascertain whether, during the relevant period, the missions UO performed were of 'exceptional gravity and scale' and as such justified the non-application of the Working Time Directive. The CJEU directs the Hungarian Court to consider specifically if the ongoing migrant crisis between 2015 and 2017 prevented RIP work from being carried out under normal conditions—eg, with rotating staff permitting for rest time.

Finally, the CJEU stresses that the directive covers the organisation of working time, and not the remuneration of workers directly. Even if UO was found to fall within the scope of the Working Time Directive during the relevant period, the matter of his remuneration during that period would need to be dealt with under Hungarian law.

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15 Directive 2003/83/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).

Joined Cases C-762/18, C-37/19 – Varhoven kasatsionen sad na Republika Bulgaria

Case C-762/18 concerned QH, a former school employee in Bulgaria. She was dismissed and then reinstated following a court ruling that declared her dismissal unlawful. Following this reinstatement, however, she was dismissed again.

Case C-37/19 concerned CV, a former employee of an Italian credit institution who was dismissed, reinstated, and dismissed in similar manner.

QH brought an action against the school seeking, amongst other things, compensation in lieu of leave not taken for the period between her unlawful dismissal and her reinstatement. The Supreme Court of Cassation in Bulgaria, ruling at last instance, did not uphold these claims.

CV likewise sought an order that the Italian credit institution pay compensation for leave not taken between the unlawful dismissal and the reinstatement, before the Italian Court of Cassation.

These courts referred questions to the CJEU on how EU law applied to these situations, and specifically, if the Working Time Directive meant that a worker was entitled to paid annual leave or financial compensation in lieu of paid annual leave for periods between unlawful dismissal and reinstatement, even where they had not actually worked during these periods.

The CJEU, in the current judgment, found that the Working Time Directive meant that both paid annual leave *and* financial compensation should be available to these workers. Where a worker's inability to perform their duties is beyond their control, as it is in cases of sickness as well as cases where they were unlawfully dismissed, they are entitled to paid annual leave. The period between an unlawful dismissal and a reinstatement consequently counts as a period of 'actual work' for determining paid annual leave allowances, and where such leave was not taken but the worker was again dismissed, they are entitled to payment in lieu of leave not taken.

The one exception to this general rule is one where the employee, during periods where they were unlawfully dismissed and reinstated, took on new employment, in which case they are only entitled to paid leave in that period from the new employer for those dates where they were employed by their new employer.

4.2 Social Security Coordination

5. Fundamental Rights

5.1 Provisions Regarding the Rule of Law

Joined Cases C-558/18, C-563/18 - Miasto Łowicz

The two cases, though concerning factually very distinct questions, both resulted in Polish courts asking the CJEU whether the new Polish legislation setting out the disciplinary regime for Polish judges was compatible with the Article 19(1) TEU right to effective judicial protection. The preliminary references were sent out of concern by the Polish judges that if they were to rule as inclined, they would be subject to disciplinary proceedings under this new Polish law. In their view, the disciplinary procedures set out under this new law conferred upon the legislative and executive branches a means of ousting judges whose decisions they did not like, thus influencing the court in making judgments.

The CJEU, in the current case, first confirmed that it has the jurisdiction to interpret Article 19(1) TEU. It then considered the admissibility of the two requests from the Polish courts for preliminary rulings in light of Article 267 TFEU, governing this process. That article states that a reference, resulting in the providing of an interpretation of EU law, must be 'necessary' in order to enable a referring court to give a judgment in a specific dispute.

In the current case, the two cases before the Polish courts were not connected with EU law. The Polish courts consequently do not need an interpretation of any EU law in order to rule on the substance of those cases. As such, the questions referred were general in nature rather than specific to a dispute, and the preliminary references submitted were declared inadmissible.

The CJEU finally did observe that provisions of national law which expose national judges to disciplinary proceedings purely because they submitted references to the CJEU cannot be permitted; as such, disciplinary proceedings cannot (under EU law) be started against these two judges for requesting CJEU input (regardless of whether they received it).

Case C-791/19 R – Commission v Poland

This judgment is the latest in a series of actions commenced by the Commission against Poland in light of its new laws regarding the judiciary. It concerns the establishment of the 'Disciplinary Chamber' in 2017, which was given the jurisdiction to cover disciplinary cases involving Supreme Court judges as well as, on appeal, judges of lower courts.

The Commission considered the establishment of this new disciplinary regime as being a failure to fulfil Poland's obligations under EU law, by threatening the independence of the courts, and so it brought an action against Poland in October 2019. The new disciplinary regime does not guarantee the independence of the judges on the disciplinary chamber, who are all indirectly elected by the Polish Parliament.

In November 2019, the CJEU found in a separate preliminary ruling application from the Polish Supreme Court, that EU law precluded cases concerning EU law from falling within the exclusive jurisdiction of a court or tribunal which is not independent and impartial. The Supreme Court ruled as a consequence that the Disciplinary Chamber cannot be considered a 'tribunal' for the purposes of either EU law or Polish law; nonetheless, the Chamber continued carrying out its functions.

As such, the Commission commenced proceedings before the CJEU to seek interim relief in January 2020, and asked the CJEU to order Poland to suspend the application of the provisions in Polish law that give the Disciplinary Chamber the jurisdiction over disciplinary cases concerning judges, and to refrain from referring cases to Disciplinary Chamber panels that cannot be deemed 'independent'—until the CJEU issues its final judgment on whether the 'Disciplinary Chamber' exists in violation of EU law.

The CJEU, in the current order, first rejected the Polish arguments regarding inadmissibility of an interim relief application brought by the Commission. While each Member State holds the competence to organise their justice systems however they see fit, they are as Member States obliged to ensure that their justice systems ultimately are compliant with obligations deriving from EU law. Where justice systems appear to fall short of the EU requirement for independence and impartiality, the CJEU has the jurisdiction to order interim measures to suspend those non-compliant parts of national justice systems.

After reiterating the conditions under which interim measures can be ordered by the CJEU, the CJEU first found that granting interim measures appeared here to be prima facie justified in fact and in law, in that the Commission's factual evidence suggests that there may very well be shortcomings to the independence and impartiality of the Disciplinary Chamber. Secondly, regarding the fact that interim measures are only awarded where they are 'urgently needed', the CJEU notes that awaiting the final judgment in the current case would be likely to cause serious and irreparable harm regarding the functioning of the EU legal order. The risk of a disciplinary court handling the cases of judges not being independent or impartial is essential to preserve the independence of other Polish courts. The mere prospect that they may be subject to disciplinary proceedings before a body whose independence is not guaranteed is likely to affect their own independence; and if the Polish Supreme Court cannot be guaranteed to be independent, this will cause serious damage to the EU legal order, and particularly the rule of law. As such, the CJEU concluded that Commission successfully established the 'urgency' of the interim measures applied for.

Finally, the CJEU considered the balance of interests in the case, and found in favour of the grant of interim measures. Granting those would not dissolve the Disciplinary Chamber, but merely suspend its activities until a final judgment in the current case was delivered. Further, while the pausing of disciplinary proceedings currently before the Disciplinary Chamber would harm the individuals concerned by those proceedings,

it would be more harmful to those individuals if their cases were decided by a body whose independence and impartiality cannot be guaranteed.

As such, the Commission's application for interim measures was granted by the CJEU, and the Disciplinary Chamber is immediately required to stop hearing disciplinary cases involving judges until the Commission's action against Poland receives a final judgment.

5.2 Prohibition of Discrimination on Grounds of Religion or Belief

5.3 Data Protection & Privacy Rights

6. External Relations

6.1 On Treaties Concluded by the EU and its Member States

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.

7. Intellectual Property

7.1 Trademark

Case C-240/18 P – Constantin Film Produktion

The case concerns a German movie franchise by the name of 'Fack Ju Göhte', produced by Constantin Film. Constantin Film applied in 2015 to register the word sign 'Fack Ju Göhte' as an EU trade mark designating a variety of goods and services: cosmetics, jewellery, office items, travel and sorting goods, games, foodstuffs, and beverages.

The EUIPO refused the application, on the ground that it infringed on the accepted principles of morality – 'Fack Ju' being a German phonetically transcribed version of 'F You' in English. The addition of the further word 'Göhte' did not substantially alter that the first two words were insulting.

Constantin Film challenged the EUIPO decision before the General Court; the General Court, on 24 January 2018, dismissed this action, and Constantin Film appealed that decision before the CJEU.

In the current decision, the CJEU sets aside the judgment of the General Court and annuls the decision made by the EUIPO, and requests that EUIPO must give a fresh decision on the application for trademark registration. According to the CJEU, both the General Court and the EUIPO failed to appropriate consider whether the term 'Fack Ju' was actually seen as morally unacceptable to the German public. Given the success of the film franchise, the titles of the films do not appear to have been controversial in Germany, and the films received funding and were used for educational purposes by the Goethe Institute. The phrase 'F You' may not be as offensive in German as it is in English, and in any event, the trademark application is not for that phrase, but rather a phonetic translation of it with an added word.

Given that no concrete evidence was provided that the German public will find items marked with the sign ''Fack Ju Göhte' as going against fundamental German morals and values, the CJEU finds that the EUIPO has failed to demonstrate to the required legal standard that the mark cannot be registered.

Case C-766/18 P – Halloumi

The Cypriot Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi ('the Foundation') owns the EU collective mark HALLOUMI, registered for cheese. A collective mark is a specific type of EU trade mark, applying to the products or services of members of a specific association and so distinguishing those products from those made by other undertakings.

Given the collective mark, the Foundation brought an action against the registration of an EU trade mark of a figurative sign with the word 'BBQLOUMI', which a Bulgarian company had applied for in relation to (inter alia) cheese.

The EUIPO dismissed that opposition on the ground that there was no risk of confusing HALLMOUI with BBQLOUMI. The Foundation brought an action against that EUIPO decision before the General Court, which agreed with the EUIPO that there was no risk of confusion.

In the current judgment, the CJEU heard an appeal by the Foundation against that judgment by the General Court. The CJEU first stressed where confusion existed in relation to collective marks: a risk that the public might believe that the goods or services with the unrelated mark are actually produced by members of the relevant trademark-owning association. The likelihood of such confusion must be assessed by the EUIPO, the General Court and the CJEU.

The Regulation governing the European Union Trade Mark[16] otherwise does not indicate that assessments of distinctiveness of a mark should be conducted differently or held to a different standard in the case of collective marks; as the case for any trademark, the association applying for registration of a collective mark must ensure itself that the sign has elements that enable the consumer to distinguish from its mark and other marks.

Regarding the likelihood of confusion, the CJEU then overturned the General Court's finding. The General Court held that where an earlier mark is of weak distinctive character, the likelihood of confusion must be ruled out as soon as a simple similarity test suggests the products will not be confused. The CJEU instead held that even in cases of weak distinctive character, a likelihood of confusion may exist and so the General Court had been obliged to consider if the low degree of similarity of the marks HALLOUMI and BBQLOUMI was offset by the fact that both marks applied to cheese on a global level. As the General Court did not conduct a global assessment of this nature, it committed an error for law, and was instructed by the CJEU to carry out a further examination of the existence of a likelihood of confusion between HALLOUMI and BBQLOUMI.

Case C-567/18 – Coty Germany

Coty Germany, a German perfume distributor, holds a license for the distribution of the EU trade mark 'Davidoff'. It claims that two companies in the Amazon group infringed its rights on that mark by storing a (Amazon FC Graben, which operates the relevant warehouse) and dispatching (Amazon Services Europe, who operate the Amazon Marketplace in the EU) bottles of 'Davidoff Hot Water' sold by third-party sellers on the Amazon Marketplace in Germany. Amazon argues that it did not consent to selling those bottles on the EU market. Coty has commenced an action before the German courts, seeking an order to the two Amazon companies to desist the storage and dispatch of 'Davidoff Hot Water' not licensed by them.

[16] Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78/1), as amended (replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154/1)).

The German Federal Court of Justice has asked the CJEU for an interpretation of the EU trade mark regulation,[17] effectively seeking an answer as to whether Amazon can be liable for infringement committed by a third-party seller simply by storing its goods, without being aware of the infringement.

The CJEU, in the current judgment, held that in order for trade mark rights to be violated by a company (like Amazon) storing products violating trade marks, Amazon would have to pursue offering the goods for sale or putting them on the market. The German court referring the question has made clear that these two Amazon companies were not themselves involved in offering the goods for sale or putting them on the market, and that only the third-party seller pursued that aim. As such, Amazon has not 'used' the 'Davidoff' trade mark itself, and cannot be held liable for a trade mark infringement under the EU trade mark directive. However, it concluded by observing that other EU law, and particularly that on e-commerce and IP enforcement, allows for legal proceedings to be brought against intermediaries that permit a third party to *use* a trade mark unlawfully.

7.2 Copyright

[17] Council Regulation (EC) No 207/2009 of 26 February 2009 on the [European Union] trade mark (OJ 2009 L 78/1).

8. Transport

Case C-832/18 – Finnair

Various travellers booked a direct flight from Helsinki to Singapore with Finnair. The flight in question was cancelled due to a technical defect appearing in the aircraft. Accepting Finnair's offer for a different flight, the travellers were rerouted on a different flight that connected via Chongqing. Finnair also operated the Helsinki-Chongqing-Singapore flight—but due to a technical failure on that craft, the re-routing flight was delayed as well.

The travellers brought an action against Finnair in light of the the Air Passenger Regulation[18], seeking compensation for both the first cancelled flight, and the delayed re-routed flight. Finnair had paid the first compensation, but refused to grant the second claim, arguing that the regulation did not set out that passengers were eligible for a second claim in those situations, and that the delay of the second flight was a consequence of 'extraordinary circumstances' under the regulation.

The Court of Appeal in Helsinki has asked the CJEU whether an air passenger is entitled to a further compensation where a re-routed flight they have agreed to take is delayed, where both the original and re-routed flight are operated by the same air carrier.

The CJEU, in the current judgment, held that the regulation does not in any way limit the rights of passengers where they find their flights being re-routed. As such, under earlier CJEU case law, the relevant travellers here were entitled to compensation for cancellation of the first flight and delay of the second flight. It also disagreed with Finnair's assessment that the technical failure in the re-routing flight was a matter of 'extraordinary circumstances'. The passengers consequently were held to be entitled to two sets of compensation under the regulation.

Case C-215/18 – Primera Air Scandinavia

Ms Králová entered into a package travel contract with a Czech travel agency that consisted of a) carriage by air between Prague and Keflavik, Iceland, to be operated by Primera Air Scandinavia; and b) accommodation in Iceland. Her flight under this package was delayed by four hours. She brought an action for compensation against Primera Air before the Prague District Court under the Air Passenger Regulation.

The District Court has asked the CJEU if it has jurisdiction in the given case, given that as a general rule, actions against undertakings must be commenced in the Member States where they are established. Second, there is no express contractual relationship between Ms Králová and Primera Air Scandinavia in this case.

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[18] 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).

The CJEU, in the current judgment, has found that there is a contractual relationship between a passenger like Ms Králová and the airline carrier, and as such, that the action against the airline carrier can be commenced in the place of departure of the given flight. The regulation explicitly foresees the possibility of a third party operating a flight that forms part of a travel contract. It makes clear that passengers can rely on the regulation against such third parties, even when there is no contract between the passenger and the third party itself.

It further noted that this relationship can be described as 'matters relating to a contract' for the purposes of the regulation, and as such, Ms Králová can bring an action for compensation against Primera Air Scandinavia.

Case C-28/19 – Ryanair

In 2011, the Italian Competition and Market Authority ('the AGCM') criticised Ryanair for publishing its prices online without including the amount of VAT on domestic flights, the online check-in fees, and the fees charged to certain credit card users. The AGCM found that those price elements were foreseeable and unavoidable and so the consumer had a right to be informed as soon as the price of tickets was indicated. As a result it imposed fines on Ryanair for conducting unfair commercial practices.

Ryanair sought to have this decision by the AGCM annulled. Its action was rejected at the first instance, and it appealed to the Italian Council of State. The Council of State has asked the CJEU whether the AGCM was correct, in light of the EU regulation on the operation of air services,[19] in finding that those above price elements are 'unavoidable' and 'foreseeable'.

In the current judgment, the CJEU held that according to its own earlier case law, air carriers are obliged to indicate all charges and fees that are 'unavoidable' and 'foreseeable'. Optional price elements, on the other hand, must be made transparent and unambiguous at the start of the booking process only.

It considered each of three price elements in turn, and found that online check-in fees are not 'unavoidable' where there is at least one option to check-in free of charge available. If there are no free options available, the fees are unavoidable and foreseeable and must be made clear in the initial 'offer' of the flight.

VAT on the flight air fare is unavoidable and foreseeable and must be included, whereas VAT applied to optional flight elements is not.

Finally, fees charged for using certain credit cards are unavoidable and foreseeable and must be made clear in the initial price offer to the customer.

Depending on whether or not Ryanair offers any free check-in options, then, the AGCM's decision will be upheld.

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Case C-584/18 – Blue Air – Airline Management Solutions

DZ, a Kazakh national, tried to fly from Cyprus to Romania with the Romanian airline carrier Blue Air I n2015. At the airport in Cyprus, he presented a variety of personal documentation, including an email from the Ministry of Foreign Affairs in Romania telling him a visa was not necessary for his trip. The airport handlers, however, were told by Blue Air ground control staff that DZ could not enter Romania without holding a visa, which led to him being denied boarding onto the flight.

DZ brought an action against Blue Air before the Cypriot District Court in Larnaca, seeking compensation for the prejudice he claims to have suffered on account of that denied boarding.

The District Court has asked the CJEU to interpret several pieces of EU legislation, including the air passenger regulation.[20]

In the current judgment, the CJEU first considered that Romania had opted into an EU decision whereunder it can recognise visas and residency permits issued by other Member States as equivalent to their own national visas for tourist purposes. DZ held a Cypriot residence permit, and the CJEU found that where a Member State has opted into this decision, it cannot derogate from the regime introduced on a case-by-case basis. However, DZ could not directly rely on this decision against the air carrier, as the air carrier was not acting as an emanation of the Member State—and the EU decision on border controls was not found to be horizontally directly effective.

That said, any boarding denied on the allegedly inadequate nature of travel documentation does not deprive passengers from protection under the air passenger regulation. The CJEU held that it would be contrary to the high level of protection that is the objective of the regulation to effectively make it so that air carriers can unilaterally determine whether denied boarding is justified, and so not subject to compensation. Such a determination—of whether denied boarding is justifiable or not—must be made by the competent courts, and air carriers cannot in their terms and conditions limit or exclude their liability under the regulation for reasons relating to passenger travel documentation.

Case C-74/19 - Transportes Aéreos Portugueses

The case concerns a dispute between a passenger and a Portuguese air carrier, TAP, who refused to compensate the passenger for the long delay that their connecting flight experienced when arriving at its final destination. The flight delay was caused by the unruly behaviour of a passenger taking a previous flight on the same aircraft, which led to the aircraft being re-routed, which according to TAP is an 'extraordinary circumstance' under the Air Passenger Regulation—and thus exempts TAP from paying compensation under that regulation.

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[20] 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).

The District Court in Lisbon has asked the CJEU if a delay caused by unruly behaviour of a passenger qualifies for the status of 'extraordinary' and thus exempts TAP paying, particularly given that that passenger had been on a previous, re-routed flight, rather than the one the current passenger was intending to take.

In its judgment, the CJEU first noted that a delay is 'extraordinary' where circumstances arose that could not have been avoided even though all reasonable measures had been taken by the air carrier, and where the air carrier's responses to the situation were appropriate and deployed all available resources to preventing the delay—though short from making 'intolerable sacrifices' in light of its capacities. In light of that definition, the CJEU finds that security risks can be classified as 'extraordinary circumstances', as they are not inherent to the normal work of air carriers—and an unruly passenger lies outside of the air carrier's control to a great extent, in that passenger behaviour is very difficult to police once on board an aircraft.

However, the CJEU noted that if the air carrier had contributed to the situation (and the passenger's unruly behaviour), or could have anticipated it and taken appropriate measures at an earlier stage (say, prior to boarding), this situation would not have been 'extraordinary'.

If the situation does qualify for the status of an 'extraordinary circumstance', the CJEU ultimately found that air carriers must be able to rely on its liability exemption even where the 'extraordinary circumstance' took place on an earlier flight, but direct causal links exist between the circumstance and the delays experienced.

Finally, the CJEU stressed that the obligation of the air carrier to deploy 'all resources' includes seeking alternative direct or indirect flights which may be operated by other air carriers, where these arrived at an earlier time. Merely offering a passenger their own next available flight is not 'deploying all resources', unless there are no seats available on earlier flights or booking such a flight would make for an 'intolerable sacrifice' in light of the air carrier's capacities.

9. Other

9.1 Brexit

9.2 Enforcement (Meaning of Arts 258-260 TFEU)

Case C-457/18 – Slovenia v Croatia

Slovenia brought an action under Article 259 TFEU against Croatia, seeking a declaration that Croatia has failed to fulfil its obligations as a Member State by failing to comply with obligations stemming from an arbitration agreement concluded with Slovenia for the purposes of resolving a border dispute between the two States. The arbitration award defined the sea and land borders between Slovenia and Croatia in June 2017, but Croatia believed that its impartiality was compromised and that it therefore considered that there were material breaches of the arbitration agreement concluded in 2009 – and it was terminating that agreement in 2015.

Slovenia started an Article 259 TFEU action against Croatia for a failure to execute the arbitration award that continued despite Croatia's unilateral termination of the agreement enabling that arbitration in 2015. The General Court, however, had to consider if this was a matter of EU law that it could rule on – or, in legal terms, if it had jurisdiction to decide the case.

It found the action inadmissible because it does not have jurisdiction to rule on the interpretation of any international agreement concluded by Member States outwith the competence of EU law. As ultimately the failure to comply with EU law obligations argued by Slovenia was based on a failure to comply with such an international agreement, the General Court found that these EU law obligations were 'ancillary' to the failure to comply with a bilateral agreement between it and Croatia. As an action under Article 259 TFEU can only relate to a failure to comply with obligations *stemming* from EU law, the General Court declared it lacked jurisdiction to rule on Slovenia's action.

9.3 Relating to the Citizens' Initiative

9.4 Consumer Protection

Case C-125/18 - Gómez del Moral Guasch

The case concerned a request for a preliminary ruing by the Court of First Instance of Barcelona, where Mr Gómez del Moral Guasch brought an action concerning the unfairness of a contractual term governing the interest rates in the mortgage loan agreement he had concluded with Bankia SA. The term in question stated that the interest rate on the loan was to vary in line with a reference index provided for by national legislation. However, the Spanish Court explained to the CJEU that rates

calculated on the basis of this reference index were less favourable than rates calculated on the basis of the average Euro Interbank Offered Rate (Euribor), which was used in 90% of the mortgage loans in Spain. The Spanish Court thus wished to know if the contractual term linking interest rates to the 'reference index' fell within the scope of the Unfair Contract Terms Directive.[21]

The CJEU first noted that the national legislation on mortgage loans in Spain did not require the use of an official 'reference index', but merely established conditions that a reference index had to satisfy in order for credit institutions to be able to rely on them. Given this, the term in Mr Gómez del Moral Guasch's mortgage loan agreement fell within the scope of the Unfair Contract Terms Directive (which excludes mandatory statutory provisions).

It then found that domestic courts are required to verify, regardless of context, that a contractual term relating to the main subject matter of the contract is plain and intelligible. In order to satisfy the transparency requirements of the directive, contractual terms must be 'formally and grammatically intelligible' but more than that, must 'enable an average consumer… to be in a position to understand the specific … method used for calculating that rate'. Only then would consumers be in a position to be able to evaluate the economic consequences of accepting such a contractual term.

Should the Spanish court find this contractual term to be unfair, largely because it lacks in transparency, the directive permits the national court to replace this 'reference index' with the reference index applicable in situations where no express contractual terms requiring a different one exist (which is in this case Euribor), insofar as the mortgage agreement could not continue without an alternative term and annulling the agreement in its entirety would result in 'particularly unfavourable consequences' for Mr Gómez del Moral Guasch.

Case C-511/17 – Lintner

In 2007, Mrs Lintner concluded a mortgage loan with UniCredit Bank Hungary that was denominated in a foreign currency. The contract contained terms according the bank the right to make unilateral amendments to the contract at a later stage. Mrs Lintner brought an action before the Hungarian courts seeking those terms to be declared invalid with retroactive effect on the basis of the Unfair Contract Terms Directive.

In 2014, the Hungarian legislature adopted new laws that effectively mean that domestic Hungarian courts are no longer responsible for ruling on the compatibility on unilateral contractual amendment terms in bank loan agreements with the Unfair Contract Terms Directive.

The Budapest High Court questions if these provision of national law mean that the Hungarian domestic courts also cannot rule on the compatibility of certain other terms in the loan contract with the EU

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

directive. Here, those terms concerned issues such as grounds for termination and fees payable. They were not terms raised in the action, and the Hungarian court wishes to know if it is required to assess of its own motion whether any of the other terms of the contract are unfair, if it can do so (ie, has the legal and factual ability to carry out such a task), and even if this is not necessary to rule on the action brought.

The CJEU, in the current judgment, held that national courts do not have to examine, of their own volition, all other contractual terms in a contract, where they were not challenged by the consumer. However, they *do* have to examine terms which are connected to the subject matter of any action brought by the consumer. Where the case file gives rise to doubts about the fairness of terms not raised by the consumer, the court must complete that file by carrying out an investigation into the factual elements of the case (by requesting the parties for further information). This is the EU law requirement; the CJEU also noted that Member States can make more extensive domestic court powers available for the sake of consumer protection.

In the current case, the CJEU observed that the Budapest High Court does not believe the other unfair terms to be connected to the action brought by Mrs Lintner, and so that court does not seem to be required by the directive to examine those terms.

Case C-66/19 – Kreissparkasse Saarlouis

In 2012, a consumer concluded a credit agreement secured by mortgages with credit institution Kreissparkasse Saarlouis. The agreement provided that the borrower had a 14 day withdrawal period, which ran from the date of conclusion of the agreement but also did not start to run until the borrower received all mandatory information required under the German Civil Code. The relevant information was not included in the agreement, which merely refers to provisions of German law.

In early 2016, the consumer informed the Kreissparkasse that he was withdrawing from the agreement. The Kreissparkasse argued that the 14 day withdrawal period had clearly expired already by that point. However, before the Regional Court hearing the action, it became unclear if the consumer was correctly informed of the operation of the withdrawal period (and its commencement). It asked the CJEU to provide clarity by interpreting the directive on consumer credit agreements.[22] The Regional Court acknowledged that the directive does not apply to credit agreements secured by a mortgage, but as German law itself requires the directive to be applied to such agreements, the Regional Court considered that an interpretation by the CJEU is necessary for the sake of consistency in interpretation of the directive in German law.

[22] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (OJ 2008 L 133/66, and corrigenda OJ 2009 L 207/14, OJ 2010 L 199/40, OJ 2011 L 234/46 and OJ 2015 L 36/15).

The CJEU agreed, and held in the current judgment that the directive must be interpreted as meaning that credit agreements for consumers have to include 'clear and concise' information on how the period for withdrawal is to be calculated. Effectiveness of withdrawal rights would be seriously undermined otherwise.

Specifically, the directive precludes credit agreements that refer to provisions of national law that then cross-reference other national law as a means of satisfying the distribution of 'mandatory information' relating to the withdrawal period and when it commences. Such a chain of references makes it impossible for the consumer to determine purely on the basis of the agreement what their contractual obligations are.

The credit agreement in the current dispute consequently does not comply with the requirements of the directive.

9.5 Environmental Law

Cases T-526/19, T-530/19 – Nord Stream 2 v Parliament and Council

The Swiss company Nord Stream AG (majority owned by the Russian company Gazprom) owns and operates the Nord Stream pipeline that enables gas to flow between Vyborg, Russia and Lubmin, Germany. The construction of the pipeline was completed in 2012 and the pipeline will be operational for 50 years.

Nord Stream 2 AG, owned by Gazprom as well, is responsible for planning, constructing and operating the second Nord Stream pipeline, to run parallel to the first. Works to recover pipes for the use of Nord Stream 2 commenced in 2017.

In 2019, the Parliament and Council adopted Directive 2019/692, which amended the existing EU directive on the common rules for natural gas in the internal market, in particular by applying significant portions of these rules to third-country operators of pipelines insofar as the pipes are in the territorial sea of a Member State.[23] The amendments entered into force in May 2019 and should have been transposed by the Member States by 24 February 2020 at the latest. On that date, according to Nord Stream 2 the work to recover pipes for Nord Stream 2 were 95% complete.

Both Nord Stream companies have argued that the directive's adoption was a violation of core EU principles such as equal treatment and legal certainty, but first need to demonstrate that they have standing before the CJEU. Here, Nord Stream 2 AG in particular has argued that the amendments to the directive lead to significant changes in how it operates, in that the new requirements set out in the natural gas directive requires Nord Stream 2 AG to fundamentally alter both legal and funding arrangements that enable the project, and thus brought actions to see the amending directive annulled. Nord Stream AG

[23] Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ 2009 L 211/94).

meanwhile has argued that deadlines set for requesting exemptions from the new rules have a disproportionate impact on its financial and legal structure.

In the current judgment, the General Court heard these actions and declared them both inadmissible, finding instead that neither Nord Stream AG nor Nord Stream 2 AG were directly concerned by the amending directive, precisely because the amending directive leaves significant leeway to Member States on how to be implemented—including over how exemptions from the rules were to operate. Nord Stream AG furthermore did not have individual standing, as it was not specifically indicated by the amended directive.

Consequently, the CJEU found that the applicants did not have standing, and that any action that Nord Stream AG and Nord Stream 2 AG wish to bring should be brought before the German courts in light of Germany's implementation of the amending directive.

Case C-378/19 – Prezident Slovenskej republiky

In October 2017, the President of the Slovak Republic brought an action before the Slovak Constitutional Court, seeking a declaration that certain provisions of national law regarding the Slovak Network Industries Regulatory Authority were incompatible with the Slovak constitution when read in conjunction with EU law.

In the view of the current President of the Slovak Republic, the Slovak legislature interfered twice with the independence of the Network Industry Regulatory Authority, required by the EU's electricity market directive.[24] The first interference involved the transfer of the power to appoint and dismiss the Authority's president from the President of the Republic, who is directly elected by the Slovak population, to the government. The second interference involved an increase in the number of parties involved in the price-setting procedure that the electricity market directive sets out before the Authority, given that this increase has meant that representatives of national ministries are now party to the price-setting procedure, where they are meant to protect the public interest.

The CJEU has consequently been asked by the Slovak Constitutional Court if the electricity market directive precludes these 'interventions' and the national legal provisions they are based on.

In the current judgment, the CJEU first observed that the directive does require the Member States to ensure that their national regulatory authorities can carry out their task free from external influence. However, it does not prescribe who is meant to appoint or dismiss from the national regulatory authorities. As such, the government of a Member State is not precluded from appointing or dismissing the president of a national regulatory authority, insofar as this does not

[24] Directive 2009/72/EC of the European Parliament and of the Council, of 13 July 2009, concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211/55).

interference with the authority's independence. The latter condition is one for the Slovak Constitutional Court to investigate.

Regarding the second alleged interference, the CJEU observed that under the directive, the national regulatory authorities have to adopt their decisions autonomously and 'based solely on the public interest', and must do so without being subject to external instructions from other public or private bodies. All the same, the directive does not prohibit representatives from national ministries from participating in price-setting procedures, provided that the national regulatory authority's independence is safeguarded. Again, this is for the Slovak Constitutional Court to examine – though the CJEU does add that any participation by ministry representatives is conditional on it being clear that any opinions expressed by them during price-setting are not binding, and cannot be taken as 'instructions' by the national regulatory authority. They can participate, but they cannot themselves dictate the price-setting procedures.

The President's action is consequently dismissed on both counts.

Case C-88/19 – Alianta pentru combaterea abuzurilor

In 2016, employees of an animal protection organisation, alongside a veterinary surgeon, captured and relocated a wolf that had been present on the property of a resident of a village that was *between* two major sites protected under the Habitats Directive[25]—without prior authorisation. The relocation of the wolf did not go to plan, and the wolf escaped into a nearby forest. The organisation and the veterinary surgeon were criminally charged with having made offences associated with the unsafe capture and relocation of a wolf. In the context of those proceedings, the referring court has asked if the Habitats Directive's provisions apply in a situation where a wolf is captured *outside* of protected areas, and on the outskirts of a nearby town or city.

In the current judgment, the CJEU observed that the Habitats Directive requires the Member States to take the necessary measures that protect the protected animal species 'in their natural range', and prohibits all forms of capture or killing of the species 'in the wild'.

The concept of 'natural range' for an animal like a wolf is far greater than the stated 'protected areas', and so the Habitats Directive's protections apply to the wolves wherever they roam, without the application of any limits or borders. As such, an animal like a wolf has not left its 'natural range' if it strays into human settlements, and so the prohibition on its killing or capture also does not cease to apply where an animal like a wolf strays into a human settlement. The phrase 'in the wild' only excludes those animals who are kept in a lawful form of captivity—but does not apply to this wolf.

As for how to manage situations where a wild animal enters a human settlement, the CJEU noted that the Habitats Directive allows the

[25] Council Directive 92/43/EEC of 21 May on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206/7).

Member States to adopt a series of a measures that can be adopted to prevent wildlife damage to human settlements or to guarantee public safety—but that this nonetheless means that the capture and relocation of an animal under the protection of the Habitats Directive can only be carried out where the competent national authorities have adopted a derogation so as to protect public safety, which had not been the case here.

Case C-24/19 – A and Others (Wind turbines at Aalter and Nevele)

The case concerned proceedings between the neighbours of a site on the territory of Aalter and Nevele (in Belgium), where a wind farm installation was planned by the regional planning office. The regional planning office had consented to the building of five wind turbines in November 2019, subject to a set of conditions set out respectively by an order of the Flemish government, and a circular on the installation and operation of wind turbines.

An action seeking the annulment of this consent was brought before the Council for consent disputes in Belgium, arguing that the Environmental Impact Assessment (EIA) Directive[26] had been breached on the ground that the order and circular at play in the situation had not themselves been subject to an EIA. The official who had granted the consent believed that the order and circular in question were not required to be subject to an EIA. The Council asked the CJEU for an interpretation of the relevant Directive.

In the current judgment, the CJEU noted that the EIA Directive covers plans and programmes that are prepared or adopted by Member State authorities, insofar as they are 'required by legislative, regulatory or administrative provisions'. The obligation to carry out an EIA is subject to the condition that a plan or programme is likely to have significant environmental impacts.

On the first condition, the CJEU noted that an order and circular adopted by the federal government of a Member State, both of which contain several conditions and provisions on the working and installation of wind turbines, are plans and programmes required by legislative, regulatory or administrative provisions. The UK government and the referring Court asked the CJEU if its earlier case law on this point stood, and the CJEU noted that this broad definition of 'plans and programmes required by legislative, regulatory or administrative provisions' is necessary to ensure that the wide-ranging practices of national authorities are captured by the Directive. The aim of protecting the environment could be more easily circumvented by national authorities if they simply could avoid carrying out an EIA by choosing to adopt a plan or programme without making it 'required' if the definition were to be loosened.

[26] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197/30).

The CJEU next considered the order and the circular, and observed that they had been adopted by the Flemish government and both contained requirements that had to be satisfied by law, and as such, are covered by the concept of required 'plans and programmes'. Both instruments were also likely to have a significant environmental impact, in that they would result in the installation and operation of wind turbines. Consequently, the consent granted could only be maintained under national law if national law left room for this, or if the annulment of the consent would have drastic consequences for Belgian energy supply—but the illegality of the consent granted must be remedied, and so EIAs must be carried out on the order and the circular for the consent to be fully compliant with EU law.

9.6 Agriculture and Fisheries

9.7 Regulation of Financial Services

9.8 Public Procurement

9.9 Taxation

Cases C-75/18, C-323/18 – Vodafone Magyarország

These cases concern special taxes levied in Hungary in the telecommunications and retail trade sectors. The special taxes, which apply to turnover progressively, are mainly borne by undertakings owned by non-Hungarian EU nationals, on account of the fact that those undertakings achieve the highest turnovers in Hungary. Questions were submitted to Hungarian courts about their compatibility with the freedom of establishment, the VAT directive as well as EU state aid law.

The Court first found that these special taxes did not constitute a form of state aid, largely because the taxation obtained was general and did not result in specific benefits or tax advantages for any particular closed group of undertakings.

The Court then considered if the special taxes constituted a form of discrimination based on nationality, in the form of discrimination on the basis of where in the EU undertakings were registered. This would be contrary to Article 49 TFEU on the freedom of establishment. However, the CJEU found that the special taxes were neutral as to where companies' registered offices were established. All undertakings active in Hungary were liable the special taxes, and the rates of taxation were turnover rather than nationality-related.

The latter could nonetheless be indirectly discriminatory, if the tax in practice only targeted foreign-established undertakings. The fact that all undertakings falling in the lower special tax band were established in Hungary, and the majority of the undertakings falling in the higher special tax bands were established in other Member States, could support such a finding of indirect discrimination.

However, the CJEU here stressed that the Member States can develop their systems of taxation how they see fit, and this includes the freedom to establish progressive taxation on turnover, which itself is a neutral and relevant measure of the ability of an undertaking or individual to pay taxes. Given that starting point, the mere finding of this factual difference in turnover between undertakings established in Hungary and in other Member States respectively cannot in itself result in a finding of discrimination; rather, it in this case merely demonstrates that the most lucrative markets in Hungary happen to be established in other Member States.

Specifically in relation to the special taxes in the telecommunications sector, the CJEU also considered if they were contrary to the VAT directive. This required an evaluation of whether the special taxes jeopardised the functioning of the common system of VAT by *in effect* working in a way that is similar to VAT. However, the CJEU found that the special taxes do not operate in a way comparable to VAT, by checking against four specific criteria established in its earlier case law. Two of these four criteria of what constitutes VAT are not met by the Hungarian special taxes, and so the special taxes are permissible under the VAT directive.

Joined Cases C-168/19, C-169/19 – Intituto nazionale della previdenza sociale

Italian nationals HB and IC are former Italian public sector employees who are receiving a pension from the Italian national social security institute ('the INPS'). After moving to Portugal, they requested the INPS in 2015 that they receive (in line with the Italian-Portuguese double taxation convention) the gross amount of their pension without deduction of tax at the source by Italy, so as to be able to benefit from the tax advantages offered by Portugal.

The INPS rejected these requests, arguing that these rules only apply to Italian pensioners from the private sector who have transferred their residence; *and* to public sector pensioners who have, in addition to moving to Portugal, taken on Portuguese nationality.

HB and IC brought actions before the Italian Court of Auditors in Puglia. It has asked the CJEU whether the Italian taxation system, as designed, constitutes an obstacle to the freedom of movement of Italian public sector pensioners, and if that obstacle constitutes discrimination on the grounds of nationality.

The CJEU has answered both questions in the negative in the current judgment. Member States are free, within the framework of double taxation conventions, to lay down the criteria for the allocation of tax jurisdiction between them, and double taxation conventions are not intended to ensure 'equivalence' of taxation in different Member States. This is not a matter of prohibited discrimination of nationality; the CJEU concluded that the difference in treatment is a consequence of there being different tax systems in Portugal and Italy, which is not contrary to EU law.

9.10 Insurance

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