EU Case Law

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Abstract: This article provides an overview of the most relevant cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of January 2023 and the end of March 2023. Out of a total of 265 judgments decided in this period, 57 had a contract law dimension.

Keywords: Court of Justice, EU contract law, most relevant cases, first trimester 2023

1 General Contract Law

1.1 Prohibited Defeat Devices as a Violation of Both Environmental and Individual Interests of Purchasers: Judgment in Case C-100/21 Mercedes-Benz Group

With this decision, the Grand Chamber of the Court of Justice adds some nuance to the ECJ involvement in the Dieselgate saga.¹ The controversy in the main proceedings relates to the legal consequences of the fact that on the car was present a prohibited

¹ See, recently, the twin Judgments of 14 July 2022, GSMB Invest (C-128/20, EU:C:2022:570) and Porsche Inter Auto and Volkswagen (C-145/20, EU:C:2022:572). For the broader context, see, M. Frigessi di Rattalma (ed), The Dieselgate. A Legal Perspective (Cham: Springer, 2017).

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defeat device within the meaning of Article 5(2) Regulation 715/2017 under German law in the relationship between the purchaser and the manufacturer. Notably, this case does not rely on any consumer-specific provision.

The referring judge formulates six questions, related essentially to two issues. The first is whether Regulation 715/2017 grants to purchasers individual rights or whether they protect environmental interests only and, if so, whether the individual rights can be vindicated under tortious liability regime established by Article 823 BGB. The second issue focuses on the determination of the damage the individual purchaser is entitled to, according to the referring judge, irrespective of the findings related to the first issue.

A preliminary remark on the contractual relevance of this case seems appropriate. In fact, the referring judge relies on a general tortious liability scheme. Thus, there is marked difference with *Porsche Inter Auto and Volkswagen* (Judgment of 14 July 2022, C-145/20, EU:C:2022:572) where the focus was on the legal relevance of the prohibited defeat device in the relationship between the buyer and the seller under consumer sales law. However, it seems too formalistic to ignore the relevance of this ruling for the governance of the production and distribution of cars in Europe. Indeed, in the context of global value chains, contractual barriers are becoming increasingly ineffective as ways to shield corporations from liability. The present decision is an instance of this broader trend.

In addressing the first issue, the Court of Justice observes that Regulation 715/2007 has the objective of ensuring a high level of environmental protection, as made apparent by its Recitals one and 6 (para 70). However, the regulation also imposes on manufacturers an information duty in favour of purchasers ‘intended … to ensure that customers and users are supplied with objective and precise information as to the extent to which vehicles are polluting when making their purchasing decisions’ (para 72).

This observation is arguably sufficient to conclude that the regulation grants individual rights to purchasers as a way to protect their interest in making an informed decision. Nevertheless, the ECJ reinforces the analysis with a systematic

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analysis, placing the regulation in its proper context', which includes ‘the regulatory framework for the approval of motor vehicles within the European Union of which that regulation forms part’ (para 73). In fact, Directive 2007/46 imposes on manufacturers the duty to obtain the EC type-approval attesting that the vehicles can circulate into the internal market and also the duty to issue a certificate of conformity for each vehicle, attesting that ‘all regulatory acts at the time of its production’ have been complied with (Article 3(36) Directive 2007/46). In this way, ‘fair competition between manufacturers’ is ensured, as well as the right of purchasers to register the car in any Member States (para 80). For these reasons, as found already in *Porsche Inter Auto and Volkswagen* (Judgment of 14 July 2022, C-145/20, EU:C:2022:572, para 54), purchasers ‘can reasonably expect’ that cars available in the internal market comply with Regulation 715/2007 and, consequently, no prohibited defeat device is installed (para 81).

Accordingly, Directive 2007/46 establishes ‘a direct link between the car manufacturer and the individual purchaser’ (para 82). It follows that the invalidity of the EC type-approval due to the presence of a prohibited defeat device can ‘ultimately, … harm the purchaser of a vehicle equipped with’ such a device (para 85). For these reasons, the ECJ rejected the position held by the German Federal Court of Justice and academic writings according to which ‘Article five of Regulation No 715/2007 is not intended to protect the right to economic self-determination of the individual purchaser of a vehicle’ (para 30); as later stated in the present decision, the said provision grants ‘the right that that vehicle not be fitted with a prohibited defeat device’ (para 89).

Moving to the second, issue, namely the remedies applicable, the Court of Justice chooses a less outspoken standpoint. In fact, the Court moves from the premise that from Directive 2007/46 and Regulation 715/2007 require only that penalties are ‘effective, proportionate, and dissuasive’ (para 90). On these grounds, the ECJ finds that the purchaser of a vehicle with a prohibited defeat device ‘has a right to compensation from the manufacturer of that vehicle’ (para 91).

However, the content of the said right is to be determined by Member States and EU law imposes the duty that such right is not ‘impossible or excessively difficult’ to exercise (para 93) thereby breaching the principle of effectiveness. Strangely, the Court does not even mention the principle of equivalence in its reasoning. Be this as it may, the Court of Justice complements these observations with a generic reminder that the right provided by EU law cannot ‘result in unjust enrichment’ (para 94), leaving to the national court the task to determine whether German law strikes an acceptable balance.
1.2 The Regulation of Certain Commercial Practices by the French Environmental Code as Compatible with EU Law: Judgment in C-147/21 CIHEF and Others

Despite there is a vast settled case-law of the Court of Justice interpreting the compatibility of EU law with national measures governing commercial practices, it is uncommon to find these provisions enshrined into national environmental codes such as in CIHEF and Others. The present case concerns the compatibility with EU law of Article L 522-18 of the French Environmental Code prohibiting commercial practices of certain biocidal products for healthy and environmental reasons. CIHEF, the Interprofessional Committee for French Essential Oils, and other applicants brought actions before the French Council of State seeking the annulment of the provisions of the French Environmental Code as incompatible with Regulation 528/2012 concerning the making available on the market and use of biocidal products. To provide the referring court with a helpful answer, the Court of Justice rephrased the question to also include the question of whether Articles 34 and 36 TFEU must be interpreted as precluding those measures of the national legislation (paras 24–27).

To answer the referred questions, the Court first clarifies that Article L 522-18 of the French Environmental Code prescribes three different approaches to commercial practices (para 28): it (i) prohibits certain commercial practices of biocidal products, such as discounts, price reductions, rebates, the differentiation of general and special sales conditions, and the gift of free units; (ii) requires the affixing of a statement to advertisement to professionals for biocidal products; and (iii) prohibits the advertisement to the general public. The judgment then interprets the compatibility of each commercial practice with the EU law.

Regarding the first group of commercial practices, the Court of Justice observes that Article 1(1) of Regulation 528/2012 has the purpose of improving the functioning of the internal market through the harmonization of the rules on the making available on the market and the use of biocidal products, whilst ensuring a high level of protection of both human and animal health and the environment. However, the same regulation does not contain any provision intended to harmonize specifically the rules governing commercial practices linked to the sale of biocidal products, such as those set in the French Environmental Code (para 34). Therefore, the French Environmental Code is compatible with Regulation 528/2012 as they regulate different subjects.

In the second place, the Court moved to analyse whether Article 34 TFEU precludes such type of commercial practice. The settled case law of ECJ establishes that national measures capable of hindering trade within the EU should be considered to have an effect equivalent to quantitative restrictions unless it satisfies two
conditions since *Dassonville* (Judgment of 11 July 1974, C-8/74, EU:C:1974:82, para 5). First, those provisions must be applied to all relevant traders operating within the national territory. Second, they must affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

The Court of Justice finds that the commercial arrangement measures meet the first condition, but the same cannot be said about the second (para 44). However, it is for the referring court to determine whether the prohibition of certain commercial practices affects the access of the biocidal products concerned ‘from other Member States more than it affects domestic products’ (paras 46–47).

If the national court finds a positive answer to the abovementioned question, then the national judge must ‘establish whether that legislation is justified by one or more of the public interest grounds listed in Article 36 TFEU or by one or more of the overriding requirements in the public interest recognised by the case-law of the Court’ (para 48).

The Court notes that the information provided by the national judge suggests that the legislation meets overriding reasons in the public interest capable of justifying a measure and that the measures are necessary and proportionate (paras 57–59).

Next, the Court of Justice moves to the analysis of the measures governing the advertisement practices addressed to professionals. First, the ECJ observes that Regulation 528/2012 regulates advertisement practices. More precisely, Article 72 provides that any advertisement for biocidal products must comply with Regulation 1272/2008 on classification, labelling and packaging of substances and mixtures. In particular, pursuant to Article 72(1), the advertisement must include a specific statement that must be clearly distinguishable and legible in relation to the whole advertisement: ‘Use biocides safely. Always read the label and product information before use’. Additionally, Article 72 shows that ‘the EU legislature intends to regulate, in a detailed and comprehensive manner, the wording of statements on the risks of using biocidal products which may appear in the advertisement of those products’ (para 63). Therefore, the Court concludes that the French Environmental Code violates Article 72 of Regulation 528/2012, which fully harmonized the regulation concerning the statements on the risks of using such products by requiring the affixing of an additional statement (para 67).

Finally, the Court moved to the interpretation of EU law in light of the national measure regulating the third type of commercial practice of biocidal: the prohibition of its advertisement to the general public. The ECJ observes that whereas Article 72 of Regulation 528/2012 covers risk statements, it does not preclude the prohibition of advertisement statements to the general public. Said so, the Court concluded that these national measures, despite potentially precluding trade, might be justified under Article 36 TFEU to protect human health and, therefore, be compatible with the EU law (para 83).
2 Unfair Terms in Consumer Contracts

2.1 Nature of Arrangement Fees and their Characterisation as Non-Transparent Contractual Terms in Consumer Loan Agreements: Judgment in Case C-565/21 CaixaBank

This case adds to the long list of cases arising from the Spanish banking sector regarding the interpretation of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

The banking institution granted a 130,000 EUR loan secured by a mortgage in September 2005. At that moment, the consumer was obliged to pay 845 EUR as an arrangement fee for the service provided. According to domestic legislation (Annex II to the Decree of the Ministry of Presidency on the transparency of financial terms in mortgage loans), an ‘arrangement fee’ includes ‘all expenses relating to the examination of the loan application, the granting or processing of the mortgage loan, or other similar expenses inherent in the activity of the lending entity incurred in granting the loan’.

Thirteen years later, in April 2018, the consumer sued the bank seeking the annulment of that term of the loan contract and asking for the reimbursement of the sum paid. The main legal discussion in the lower national instances was about the transparency of the term setting such a fee. The case ended up before the Spanish Supreme Court, which decided to refer a preliminary request to the European Court of Justice, mainly asking for a clarification of the previous ECJ case law settled in Caixabank and Banco Bilbao Vizcaya Argentaria (Judgment of 16 July 2020, joint cases C-224/19 and C-259/19, EU:C:2020:578). The Supreme Court considered that the ECJ judgment was leading many Spanish lower courts to declare its jurisprudence on arrangement fees as contrary to EU law.

The first question asked the Court of Justice if arrangement fees fall out of the scope of Articles 3(1) and 4(1) of Directive 93/13. The Spanish Supreme Court used to deem them as part of the price, which according to the Directive and the ECJ case law interpreting, is one of the essential elements of the contracts and so would be exempt from the mechanisms of reviewing unfair terms ‘in so far as these terms are in plain and intelligible language’ (Article 4(2)). At this point, the ECJ repeats its well-established doctrine on the notion of the ‘main subject matter of the contract’ of Article 4(2) for a loan agreement (paras 17–18) and, in accordance, it reinforces its Judgments of 16 July 2020, where it ruled that an arrangement fee cannot be considered to be an essential obligation solely because it is included in the total cost of that agreement (para 19). Next, the Court of Justice reaffirms that as Article 4(2) lays down an exception to the mechanism for reviewing the substance of unfair
terms, it shall be strictly interpreted to provide proper protection for the consumer (para 21, citing the recent Judgment of 12 January 2023, D.V. [Lawyer’s fees – Basis of an hourly rate], C-395/21, EU:C:2023:14, para 30). This leads the ECJ to consider that the arrangement fee covers remuneration for services connected with the main subject of the contract (availability of the granted sum and repayment), but they are not part of it. Examination, grant and treatment of the loan are therefore ancillary services (para 23).

The second question concerns which criteria should be taken into consideration by a national court when assessing whether a term establishing an arrangement fee meets the requirements of being plain and intelligible. Article 5 of Directive 93/13 provides that any contractual term must always be drafted in plain, intelligible language (para 28). This transparency requirement includes the fact of the terms being formally and grammatically intelligible, but also that the contract sets out transparently the specific functioning of its terms and their relationships between them, meaning that ‘the consumer is capable of evaluating, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it’ (paras 30–31). The transparency test becomes one more way of balancing the weaker position of the consumer, as the seller or supplier is presumed to have more barging power and level of knowledge (Judgment of 3 October 2019, Kiss and CIB Bank, C-621-17, EU:C:2019:820). Hence, the transparency requirement must be examined by national courts in the light of the relevant facts of the case (para 33). In paras 39–46 the ECJ details several criteria that the national court must assess when examining the transparency of the arrangement fee term: its particular wording; the information provided by the financial institution; the promotional material; the particular attention of the average consumer, who is reasonably well informed and reasonably observant and circumspect; and the location and structure of the term in the contract.

In answering the third and final question, the Court of Justice clarifies that Article 3(1) of Directive 93/13 empowers domestic courts to have always the chance to review whether the arrangement fee term set out in the loan contract as remuneration for the examination, constitution and personal processing of an application leads to a significant imbalance in detriment of the consumer (para 61).

This judgment contributes to the path towards an integral doctrine on the transparency test arising from Directive 93/13 to be applied to consumer contracts. On this occasion, the ECJ further elaborates on some of its earlier statements on arrangement fees in loan agreements, such as the nature of the term and the requirements it needs to meet in order to overcome the transparency test.
2.2 Distributing the Losses Equally Deriving from the Invalidity of a Loan Contract as Incompatible with EU Law unless there is Consumer’s Consent: Judgment in Case C-6/22 M.B. and Others

In this case, the Court of Justice is requested to provide answers about the consequences of the invalidation of a mortgage loan agreement concluded between three consumers and a bank. It concerns the interpretation of Articles 6(1) and 7(1) of Directive 93/13.

The dispute in the main proceeding involves a mortgage loan agreement concluded on June 2007 between three consumers (M.B. and others) and the defendant’s legal predecessor, a bank. The duration of the loan contract was 360 months (30 years), and the granted amount was 339,881,92 Polish zlotys (PNL), but indexed in Swiss francs (CHF). In this sense, the monthly instalments and the outstanding amount of the loan were calculated in CHF and paid in PNL, according to the rate of exchange between both currencies applicable to each monthly instalment.

In the main proceedings, the borrowers claim the unfairness of the indexation term because it leaves to the bank’s discretion the determination of the exchange rate used to calculate the monthly instalments. The claimants demand to remove the term from the contract and to calculate the monthly instalments in PNL with an interest rate based on the LIBOR index. They even accept the possible invalidation of the whole contract. In this regard, the Polish District Court agrees that the term is unfair and should be annulled, but observes that the loan agreement would not exist without such a term and that the invalidation of the whole contract would result in adverse effects for the consumers, blurring the deterrence effect for sellers and suppliers of the Unfair Terms Directive.

With the first question, the referring court seeks guidance on the compatibility with EU law of national law determining that the invalidation of the contract entails distributing the losses resulting from that invalidation equally between the plaintiffs and the defendant. The ECJ states that this outcome would be contrary to the objectives of the Unfair Terms Directive because it would neither restore the legal and factual situation that the consumer would have been in if the unfair terms would never exist nor have the desired dissuasive effect on sellers or suppliers (paras 27–30). This leads to the conclusion that Polish law, as explained by the referring court, does not comply with the objectives of consumer protection and restoration of the balance between the contracting parties, so it cannot be applied.

By its second question, the referring court would like to know if the Unfair Contract Terms Directive enables the national court to disallow of its own motion the remedy sought by the consumer once it has checked that there is an unfair
term in the contract and its invalidation would expose him or her to particularly unfavourable consequences. In this regard, the Court of Justice reminds us that even though the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, its system of protection does not apply if the consumer objects to it by giving his or her free and informed consent (para 38, citing the Judgment of 29 April 2021, Bank BPH, C-19/20, EU:C:2021:341, para 45). Such information about the legal consequences that the removal of the unfair term and thus the invalidation of the contract may entail must be given by the trial court objectively and exhaustively, even if the consumer has some professional counsel, and in accordance with the national procedural rules (paras 39–40).

In this case, the invalidity of the unfair terms would expose the consumer to a claim by the bank for restitution of the whole amount granted in 2007. However, the plaintiffs were the ones that requested the invalidity of the contract in their lawsuit, and as far as the national court has informed them about the particularly unfavourable financial consequences that may entail, it cannot disallow their waiver of the protection granted by the Unfair Terms Directive (para 43), because the wish expressed by the consumer is a decisive factor (Judgment of 3 October 2019, Dziubak, C-260/18, EU:C:2019:819, para 56). Moreover, the national court cannot rely directly on Directive 93/13 to examine the financial situation of the consumer ex officio to ascertain whether the invalidation would expose him or her to particularly unfavourable consequences. So doing requires a specific prerogative conferred by its national legislation (para 44).

Answering the third question, the ECJ mainly repeats the same arguments stated in its Judgment of 25 November 2020, Banca B., C-269/19, EU:C:2020:954, paras 29–44. After the removal of the unfair term, the contract continues in existence unless national law does not allow it. In addition, the national court cannot modify the content of the term, as one more evidence of the deterrence effect, because, if not, ‘sellers or suppliers would still be tempted to use those terms in the knowledge that, even if they were declared invalid, the contract could nevertheless be modified, to the extent necessary, by the national court in such a way as to safeguard the interest of those sellers and suppliers’ (para 54). However, if the contract is not capable of continuing to exist following the removal of the unfair term, the ECJ allows replacing it with a supplementary provision of national law to prevent the annulment of the whole contract and thus the penalisation for the consumer (as stated by the court in the Judgment of 30 April 2014, Kásler and Káslerné Rábai, C-26/13, EU:C:2014:282, para 85). The Court of Justice has specified that such a replacement cannot be done based on general provisions or applying the principle of equity or from established customs, but only on those provisions that have been subject to specific assessment by the national legislature to handle situations such as the one where a contractual term is deemed unfair and operate as supplementary provisions in these cases.
provisions of national law do not meet these requirements (as it occurs in this case), the national court can only rely on the measures granted by its domestic legislation to protect the consumer from the particularly unfavourable consequences of the annulment of the loan agreement, such as inviting the parties to negotiate a new method for calculating the interest rate (paras 52–61).

3 Consumer Services

3.1 Price Reduction Corresponding to the Value of the Services not in Conformity as Always Due Unless the Lack Is Attributable to the Traveller: Judgment in Case C-396/21 FTI Touristik

Two tourists, KT and NS, purchased a package travel within the meaning of Directive 2015/2302 to spend two weeks at the Canary Islands. Unfortunately, the trip coincided with the introduction of significant restrictions as a part of the Spanish plan to fight the COVID-19 outbreak. Notably, equivalent restrictions were introduced in the travellers’ country of origin.

The latter circumstance made the referring judge doubt about the extent of the right to a price reduction of the travellers vis-à-vis the travel organizer. The ECJ confirmed the right to price reduction of the travellers, opening perhaps some leeway regarding the amount.

The answer given by the Court of Justice can be divided in two main parts. In the first part, the Court confirms the existence of the right to price reduction in the circumstances under consideration in the main proceedings. Next, the ECJ offers some guidance on how the price reduction should be calculated.

The Court of Justice begins its analysis of Article 14(1) Directive 2015/2302 by reminding that ‘the interpretation of a provision of EU law requires that account be taken not only of its wording, but also of its context, the objectives pursued by the rules of which it is part and, where appropriate, its origins’ (para 19).

The plain meaning of the provision denies the right to price reduction for lack of conformity only when ‘the organiser proves that such lack of conformity is attributable to that traveller’ (para 20). The ‘finding of a lack of conformity is objective’, so that whether the lack of conformity ‘is attributable to that organiser’ is irrelevant (para 22).

The Court of Justice confirms these findings with a systematic analysis. According to Articles 13 and 14 of the Directive, in fact, the organiser has to cure lacks of conformity and pay damages stemming from them; however, if the lack of conformity cannot be cured, the traveller is entitled to price reduction and damages
pursuant to Article 14(1) and (2) of the directive, respectively. Only the right to compensation ex Article 14(2) allows for exceptions beyond the lack of conformity being attributable to the traveller (paras 27–28).

The objective of a high level of consumer protection is also consistent with the literal meaning of Article 14(1) (para 29). Finally, the initial proposal of the directive applied the exceptions currently applicable to the right to compensation pursuant to Article 14(2) also to the right to price reduction, but ‘in the course of the legislative process, the exceptions to the right to receive a price reduction were distinguished from those of the right to compensation’ (para 30).

The finding that the travellers in the main proceedings are entitled to price reduction is not questioned, according to the Court of Justice, by the circumstance that the restrictions at the travellers’ place of origin were equivalent to the ones at the place of performance. More precisely, the Court refused to analyse whether, at that time, the pandemic could be considered ‘normal circumstances’ or part of a “general life risk’ that a traveller must bear’ since they are not mentioned by Article 14(1) of the directive (para 33). Even the attempt to give relevance to the pandemic as covered by an ‘implicit term’ proposed by the Czech Government is rejected as this implied term would fall within the scope of Article 14(1) as just interpreted, to the effect that this implicit term would be inconsequential (para 35).

It is however with regard to the quantum to be reimbursement that the Court of Justice leaves more leeway to the national court to favour the travel organiser. In fact, the ‘organiser is not required to provide compensation for services it has not undertaken to provide’ (para 37). More precisely, the reference to the very different circumstances in Kuoni Travel (Judgment of 18 March 2021, C-578/19, EU:C:2021:213, para 45) should help the referring court in understand how to apply in concrete the idea that the organiser’s ‘obligations include not only those explicitly stipulated in the package travel contract, but also those linked to it as a result of the purpose of that contract’ (para 38).

In particular, the ECJ mentions four limitations: ‘the closure of the swimming pools in the hotel concerned, the lack of an entertainment programme in that hotel and the fact that it was not possible to access the beaches of Gran Canaria or visit that island’ (para 38). It seems that only the first two could be considered part of the obligations of the organizer; but at the same time, also the other two are central to the purpose of the contract.

The Court of Justice also points out that the relevant time framework is that of the ‘entire period in which there was lack of conformity’ (para 39) and that the traveller’s failure to inform the package operator of the lack of conformity

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cannot justify a limitation to the price reduction in a case such as that in the main proceedings (para 41).

Prompted by unusual circumstances, the Court of Justice offers a clear and precise analysis of the conditions for the right to price reduction pursuant to Article 14(1) Directive 2015/2302. However, when it comes to the more nuanced question of the criteria to determine the quantum, the ECJ relies on a seemingly accounting view of the single obligations of the travel organiser, which raises an interesting question, beyond the usual doubt regarding the distinction between exchange and use value in relation to price reductions: is the price to be reduced for the limits in the access to public goods or third-party premises? Apparently, they are part of the travellers’ motive and also of the location’s appeal the organiser benefits from; but it is somewhat counteintuitive to consider them part of the organizer’s obligations, as the Court does. In any event, this construction begs the question of what the value of the rest of the performance is. In the present case, for example, what is the value of sleeping at the Gran Canaria during a lock-down? Perhaps a different construction, in terms of the traveller’s expectations, rather than organizer’s obligations, could be more in line with the objective of traveller protection. The organizer’s liability would work as a form of insurance, allocating risks to the organizer, as several other provisions of the directive do.

4 Employment and Agency Law

4.1 Self-employed Contracts with an Occupational Purpose as Always Covered by the Employment Equality Directive: Judgment in Case C-356/21 TP

The present ruling constitutes one more step in the slow but continuous expansion of EU anti-discrimination law. It is among the very few cases where the ECJ has applied the principle of equal treatment and non-discrimination as laid down in the Anti-Discrimination Directives to a contract of a civil-law nature. More precisely, the judgment concerns the interpretation of the scope of the application of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Between 2010 and 2017, the plaintiff (JK), who was self-employed, concluded several short-term contracts with the public Polish television TP. He worked in one-week shifts within the Editorial and Promotional Office preparing audiovisual material, trailers or features for TP’s promotional programmes. His work was positively assessed by the company, as shown by the fact of counting on him for
an internal restructuring plan (summer-spring 2017) and the conclusion of a new contract for one more month at the end of November 2017. On 29 November he received his working hours for December 2017, which provided for two one-week shifts beginning on 7 and 21 December 2017 respectively.

On 4 December 2017, the plaintiff and his partner published on their YouTube channel a Christmas music video showing same-sex couples celebrating the feast and promoting tolerance towards same-sex couples. The dispute arose on 6 December 2017, when the plaintiff was notified by the manager of his division of the cancellation of his one-week shift starting on 7 December 2017. Later that month, on 20 December, the commitment for the shift starting the next day was cancelled too. TP did not contract him again.

JK decided to bring an action before the District Court of Warsaw claiming compensation of 47,924.92 PNL (approx. 10,130 EUR) for non-material harm resulting from a breach of the principle of equal treatment in the form of direct discrimination on grounds of sexual orientation in respect of the conditions for accessing and pursuing an economic activity under a civil law contract. The trial court had doubts about whether the situation of self-employment is covered by Directive 2000/78, as well as whether Article 5(3) of the 2010 Polish Law of equal treatment is compatible with EU law, as far as this provision has the effect of excluding, on the basis of the freedom of choice of contracting parties, the refusal, based on the sexual orientation of a person, to conclude or renew with that person a contract concerning the performance of specific work from the protection granted by the Directive.

Article 3(1) of Directive 2000/78 does not refer to the law of the Member States to define the concept of ‘conditions for access to employment, to self-employment or to occupation’ when setting its material scope of application nor does it give them an autonomous definition. Indeed, the wording of Article 3(1)(a) confirms that the scope of that directive is not limited solely to the conditions for accessing posts occupied by ‘workers’, but that the protection of the directive should be expanded to all the situations that may eventually fall under ‘employment and occupation’, as those are ‘key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and realising their potential’ (para 42, citing Judgment of 23 April 2020, Associazione Avvocatura per i diritti LGBTI, C-507/18, EU:C:2020:289, para 37).

Therefore, Directive 2000/78 seeks to eliminate all discriminatory obstacles covering a wide range of occupational activities, including those carried out by self-employed workers with a degree of stability in their legal relationship, as it was in this case (paras 43–47). Its protection cannot depend on the formal categorisation of an employment relationship under national law or on the choice made at the time of the appointment of the person concerned between one type of contract or another.
Since the terms of that directive must be constructed broadly, it also applies to the ‘conditions of access’ for that particular self-employed activity (paras 55–58). On these grounds, the ECJ concludes that TP’s decision to unilaterally cancel the contract and not renew it on the ground of his sexual orientation, thus terminating the professional relationship, falls within the scope of Directive 2000/78 (paras 63–66).

The last part of the ruling is devoted to addressing the justification for discrimination provided by the Polish Law of equal treatment. Pursuant to Article 5(3), the principle of non-discrimination does not apply when a party is exercising his or her freedom of choice so long as the choice is not based on sex, race, ethnic origin or nationality. Sexual orientation does not appear as a protected ground in this list. Regarding this point, Article 2(5) of Directive 2000/78 allows the Member States to lay down measures excluding its application due to public security, maintenance of public order and prevention of criminal offences, protection of health and protection of the rights and freedom of others. Relying on its ruling in Cafaro (Judgment of 7 November 2019, C-396/18, EU:C:2019:929, para 42), the Court notes that these reasons constitute an exception to the principle of non-discrimination and must be interpreted strictly.

Article 5(3) of the Polish Law on equal treatment apparently seeks to protect the rights and freedoms of others in the sense of Article 2(5) of the Directive, specifically freedom of contract as a particular manifestation of the freedom to conduct a business enshrined in Article 16 of the Charter of Fundamental Rights of the European Union (paras 73–74). However, ‘the freedom to conduct a business is not absolute, but must be viewed in relation to its social function’ (para 75). And the ECJ adds that ‘the very fact that Article 5(3) of the Law of equal treatment provides for a number of exceptions to the freedom to choose a contracting party shows that the Polish legislature itself considered that discrimination could not be regarded as necessary for the purposes of safeguarding freedom of contract in a democratic society. There is nothing to suggest that the situation would be different depending on whether the discrimination concerned is based on sexual orientation or one of the other grounds expressly referred in Article 5(3) of that law’ (para 76). Moreover, excluding sexual orientation from the protected characteristics listed in Article 5(3) deprives Directives 2000/78 of its practical effect (para 77).

To sum up, the judgment makes clear that Employment Equality Directive 2000/78 applies to contracts with self-employed that have an occupation purpose, regardless of its legal categorisation in the domestic legal order or by the contracting parties, and that discrimination on grounds of sexual orientation cannot constitute a legitimate exercise of freedom of contract in this field.
4.2 One-Off Commissions as Relevant for the Agent Indemnity at the Termination of the Contract: Judgment in Case C-574/21 O2 Czech Republic

Between 1 January 1998 and 31 March 2010, the applicant in the main proceeding (QT) performed as a commercial agent on behalf of the legal predecessor of O2 Czech Republic (hereinafter, O2). By that agency contract, the applicant offered and sold telecommunications services provided by O2, as well as supplied and sold mobile phones and their accessories, and other products and customer support services. For this task, the applicant received a one-off commission payment for each of the contracts which he concluded for O2. Given the maximum duration of the tariff commitment, those contracts (155 new subscriptions and 276 amendments to existing subscriptions) concluded by the agent in 2008 and 2009 exceeded the date of termination of the agency contract (31 March 2010).

The applicant received payment of the corresponding commission from O2, but not the indemnity recognized in Article 699(1) Czech Commercial Code, which transposes into the national legal order Article 17(2) of Council Directive 86/653/ECC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. The applicant claimed such indemnity for the termination of the agency contract (2,202,799 CZK; approx 82,000 EUR) before the Prague 4 District Court. The trial court dismissed the claim based on the fact that QT had not shown that, after the termination of the contract, O2 still retained substantial benefits resulting from business with customers he had brought. The Court of Appeal (Prague City Court) upheld that decision, and, finally, the case reached the Supreme Court of the Czech Republic, which is the referring court.

The main issue is the difference in the interpretation of Article 17(2)(a) of Directive 86/653 by different Member States. Whereas according to the Czech Supreme Court settled case law, the commission for the termination of the agency contract is restricted to transactions which the agent himself or herself concluded or the volume of which he or she significantly increased during the performance of the contract, other jurisdictions (such as Germany) understand that this commission ‘should include the commission which that agent would have received hypothetically, in respect of transactions which the principle carried out, after the end of the agency contract at issue, with customers whom that agent had brought or with whom he or she had significantly increased the volume of business during the performance of the contract’ (para 21). That is the reason why the Czech Supreme Court requests the ECJ to clarify the meaning of ‘the commission lost by the commercial agent’ of Article 17(2) and whether it applies to ‘one-off’ commissions for the conclusion of a contract.
First of all, the Court of Justice states that, although in 1998 – when the contract began – the Czech Republic was not a European Community Member, Directive 86/653 applies *ratione temporis* because the legal consequences of the contract’s termination took place after the Czech accession to the European Union (1 May 2004) (para 24). It makes another caveat regarding the material scope of that directive, which *prima facie* applies to the sale and purchase of goods (Article 1(2)). This activity constitutes a part of the contract at issue, but the latter also includes the provision of services. However, as the domestic legislation (the Czech Commercial Code) adopts the same solution for the sales of goods and the provision of services, those concepts taken from EU law should be interpreted uniformly for both activities in order to avoid discrimination or distortion in competition (paras 25–28; Judgment of 3 December 2015, *Quenon K.*, C-338/14, EU:C:2015:795, para 17).

When addressing the questions at stake, the ECJ considers as a preliminary point that ‘Directive 86/653 seeks to protect commercial agents in their relationship with their principals, to promote the security of commercial transactions, and to facilitate trade in goods between Member States by harmonising their legal systems within the area of commercial representation’ (para 36). To achieve these goals, the European legislature established, among others, some rules on the conclusions and termination of agency contracts. Regarding the termination of commercial agency contracts, Article 17 of the Directive allows the Member States to choose between two different mechanisms to provide compensation for the commercial agent, among which the Czech Republic opted for the system of indemnity recognized in paragraph 2 of such provision (paras 37–38). That system implies quantifying the benefits accruing to the principal as a result of the volume of business with customers brought by the commercial agent, based on two cumulative conditions: (i) the number of new customers or the significant increase in the volume of the business with existing customers and; (ii) the continuation of substantial benefits deriving from the business of such customers. After that, it shall be checked whether the amount of the indemnity calculated in this way is equitable, having regard to all the circumstances of the case and, in particular, to the commission lost by the commercial agent, with a maximum laid down statutorily (para 39).

The Court considers the version of Article 17(2) in different official languages of the Member States to ascertain that the persistent advantages include those also obtained after the termination of the contract (para 44). Consequently, the ‘commission lost by the commercial agent’ is ‘that which the commercial agent should have received if the agency contract continued and correspond to the benefits accruing to the principal which persist after the termination of the agency contract and which result from commercial relations established or developed significantly by that commercial agent before the termination’ (para 46). This interpretation is consistent with the objectives pursued by Articles 17(3), 7 and 8 of Directive 86/653 (paras 48–53) and aligned with a protective approach to the regime ruling the
termination of the agency contract since it ‘takes full account of the merits of the latter in carrying out the transactions assigned to him or her’ (paras 57–58).

The right to indemnity is mandatory (Article 19), so opting for a certain type of commission (e.g., one-off commission) may not be used to elude its application (para 63). In this case, O2 revealed at the hearing before the ECJ that the one-off commission payments to its agent corresponded to flat-rate remuneration. The Court agrees with the Advocate General that ‘such one-off commission payments do not cover the commission that the commercial agent loses, and which results from the business transacted with those customers by the principal after the termination of the commercial agency contract’ (para 65). However, it does not provide any formula to calculate the indemnity based on these parameters, so it leaves this task to national courts.

The ECJ unifies the doctrine on the interpretation of the indemnity for the commercial agent at the termination of the contract, choosing the German solution, and states that one-off commissions are not excluded from the calculation of the indemnity.

5 Essential Services Law

5.1 The Conferred Power of Energy Regulatory Authorities to Order the Reimbursement to Final Customers of Sums Paid Based on an Unlawful Contractual Term as Compatible with EU Law: Judgment in C-5/22 ‘Green Network’

By a decision of 20 June 2019, the Italian energy national regulatory authority, ARERA (Autorità di Regolazione per Energia Reti e Ambiente), imposed an administrative penalty of 655.000 EUR on Green Network SpA, an Italian electricity and natural gas distribution company, for having communicated to its final customers’ billing information in an unclear manner. The energy regulatory authority also sought restitution of sums billed to customers for 13.987.495 EUR after determining that a contractual clause used to levy such fees ‘was unlawful in so far as that fee was not stated in the comparison table, which makes it possible to compare the different commercial offers available on the market, or on the platform on which consumers may search for offers’ (para 14).

Green Network brought an action against that decision before the Regional Administrative Court, Lombardy, and later appealed to the Council of State. The latter referred two preliminary questions to the Court: the first on whether Article 37(1) and (4) of Directive 2009/72 would confer powers to the regulatory authority to order compensation to customers; the second whether the same provision of EU law would allow the agency to impose compensations and refund arrangement not based
on service quality levels, but a clause stipulated as covering operator administrative management.

The Court of Justice opens its reasoning by stating that Article 3(7) of Directive 2009/72 aims to ensure Member States take appropriate measures to protect final customers and are to ensure, inter alia, high levels of consumer protection (para 20). This is particularly relevant with respect to the transparency of contractual terms and conditions, including those set out in Annex I on the transparent information on applicable prices and tariffs (para 21).

In this regard, Article 37(1)(i) and (n) provide that the NRA is to have the duties of monitoring compliance to ensure consumer protection, including those set out in Annex I to that directive. In addition, Article 37(4) ensures that NRAs are granted the powers listed in that provision, which include the imposition of penalties on electricity undertakings not complying with their obligations.

The ECJ observes that, although Article 37(4) does not list the power of regulatory agencies to require those undertakings to repay any sum derived from a contractual term considered unlawful, the provision states that ‘the regulatory authority shall have at least the following powers’. This indicates that Member States have the discretion to expand the powers of the regulatory authority with the purpose of strengthening consumer protection (para 25), as well as it does not preclude Member States from granting the power to order repayment (para 28).

Therefore, the Court, on the one hand, concluded that Article 37(1) and (4) of Directive 2009/72 must be interpreted as not precluding Member States from conferring on a national regulatory authority the power to order an electricity undertaking to reimburse their final customers for the sums paid based on a contractual term considered to be unlawful. On the other hand, the judgment emphasizes that it is for the national court to assess whether national law actually confers appropriate powers to the national regulatory authority, or even whether that authority has applied that national law correctly (para 29).

6 Public Procurement Law

6.1 Considering Each Member of a Group of Economic Operators Unreliable Automatically After a Contracting Authority Terminates a Contract with the Group for Significant or Persistent Deficiencies as Precluded by EU Law: Judgment in Case C-682/21 HSC Baltic and Others

This request for a preliminary reference asks the Court of Justice to determine the compatibility with EU law of substantive and procedural aspects of Lithuanian law. More precisely, the preliminary reference refers to the inclusion in a list of
unreliable suppliers of all the members of a group of economic operators when a public contract with the said group is terminated ‘on account of a significant or persistent deficiencies which have resulted in the non-performance of a substantive requirement in relation to that contract’ (para 34).

The substantive issue concerns the interpretation of Article 57(4)(g) of Directive 2014/24, according to which an economic operator can be excluded ‘from participation in a procurement procedure’ when ‘the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract’.

The referring judge explains that under Lithuanian law, inclusion in a list of operators prohibited from participating in a public procurement procedure automatically follows from the judicial confirmation of ‘the lawfulness of the early termination of the contract’ for all the operators ‘who are de jure responsible for the performance of the contract’ (para 43).

The ECJ observes that the prohibition ex Article 57(4)(g) has the purpose of ‘excluding economic operators whose reliability is seriously compromised on account of wrongful or negligent conduct’ (para 36). National law has to ‘respect the essential characteristics’ of this prohibition and respect the principle of proportionality (paras 37–38).

To be compatible with Article 57(4)(g), a prohibition must respect three general requirements: it must be temporary and not longer than three years (para 39); the operator must be allowed to show that it adopted ‘corrective measures’ if the national law so allows (para 40); and, finally, the exclusion must be based on ‘a specific and individual assessment’ (para 41).

The Court of Justice finds Lithuanian law in violation of the last requirement as this national law considers de jure liability for the contractual performance a sufficient reason to consider unreliable each economic operator member of the group.

The second question concerns how an operator de jure responsible can prove that it is de facto reliable, despite the non-performance of the contract. The referring judge is unsure about whether the operator can rely ‘both on factors relating to its own situation and factors relating to the situation of third parties, such as the lead partner of that group’ (para 53). The Court of Justice answers in the affirmative.

In fact, the operator ‘must be given an opportunity to put forward any factor which it considers relevant’ (para 55). This power is particularly important given that Article 57(4)(g) is silent on the conditions making an operator ‘involved, or not, in the deficiencies’ (para 56). Accordingly, the directive entrusts the contracting authority and the competent judge ‘to determine … the weight to be attributed to each factor relied on’ (para 57).

The last question focuses on the interpretation of Article 1(1) and (3) of Directive 89/665. The referring judge asks whether the said provisions ensure to economic
operators, in a case such as that in the main proceedings, ‘the right to bring an action against their entry on that list of unreliable suppliers’ (para 59). The ECJ answers again in the affirmative.

The reasoning is straightforward. The said provisions ensure the right to an effective remedy and to a fair hearing enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and must, accordingly, be interpreted broadly (paras 62–63).

Simply allowing an operator to contest the decision to terminate the contract does not constitute an effective remedy since the decision to terminate the contract and the decision to consider an operator unreliable ‘may depend … on different factors’ (para 65).

With this decision, the Court of Justice strikes a fair balance between the public interest in ensuring that only reliable operators participate in public procurement decisions and the interest of economic operators, which entrusts to the competent authorities a pivotal role in ensuring this balance on the basis of case-by-case analyses.

Note: The primary responsibility for the identification of the EU case law with a contractual dimension lies with Lucila de Almeida, who also wrote Sections 1.2 and 5.1; Roger Barat i Rubio wrote Sections 2.1, 2.2, 4.1, and 4.2; Fabrizio Esposito is responsible for the general structure and coherence of the text and wrote Sections 1.1, 3.1, and 6.1.