## EU Case Law

Fabrizio Esposito and Lucila de Almeida*

# European Union Litigation

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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 2022 and the end of June 2022. Out of a total of 270 judgments decided in this period, 52 had a contract law dimension.

**keyword:** Court of Justice, first semester 2022, most relevant cases

## 1 Consumer Rights Directive

### 1.1 'Buchung abschließen' as an Ambiguous Alternative to 'Order with Obligation to Pay': Judgment in Case C-249/21 *Fuhrmann-2*

The controversy originates from the 'complete booking' (in German: "Buchung abschließen") on Booking.com of several hotel rooms by a consumer, who did not show up and later was invoiced cancellation fees for the amount of 2.240 EUR. When the consumer refused to pay, the hotel owner brought an action before the Local Court of Bottrop, Germany.

The referring judge seeks guidance on the interpretation of Article 8(2) Directive 2011/83 (Consumer Rights Directive, CRD). More precisely, the referring judge explains that 'another German court has ruled that it is appropriate to take into account the overall circumstances of the ordering process' and that, accordingly, the expression used by the online platform Booking.com in German – namely, 'Buchung abschließen' – complies with the national law transposing the CRD. However, the referring judge is doubtful about the said ruling in light of the wording of Article 8(2)

***Corresponding author: Lucila de Almeida**, LL M (EUI), Assistant Professor, Wageningen University & Research, Wageningen, Netherlands; and European University Institute, Florence School of Regulation, Florence, Italy, E-mail: lucila.dealmeida@wur.nl
**Fabrizio Esposito,** LL M (EUI), Assistant Professor, NOVA School of Law, Lisbon, Portugal

of the Directive, which states that traders must use 'the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader' or the consumer is not bound by the contract. In particular, the expression 'Buchung', taken by itself, may also mean 'pre-order or reserve in advance free of charge' (para 17). The referring judge takes the view that if the expression has to be interpreted out of context, the trader did not comply with its obligation and the consumer has no obligation to pay the cancellation fee.

The Court of Justice analyses the present issue in five steps. First and preliminarily, the CJEU observes that the case regards the conclusion of a distance contract within the meaning of Article 2(7) Consumer Rights Directive and that the Directive seeks to ensure a high level of 'consumer protection by ensuring that consumers are informed and secure in transactions with traders' (para 21).

As a second step, the Court observes that Article 8(2) CRD implements this objective by introducing procedural and substantive information requirements before the conclusion of the contract. The present case focuses on one of such requirements, namely that 'the trader must ensure that the consumer, when placing his or her order, explicitly acknowledges that the order implies an obligation to pay' (para 24).

As a third step, the CJEU notes that Member States shall impose on traders the obligation to use the formulation 'order with obligation to pay', but are also 'permitted to allow traders to use any other corresponding formulation, provided that it is unambiguous as regards the creation of that obligation' (para 26). The fourth and pivotal step builds on the use of the word 'explicitly' in Article 8(2) CRD, to infer that 'only the words used on that button or similar function must be taken into account' (para 28).

Before concluding, as a fifth and final step, the Court of Justice supports its finding by way of reference to Recital 39 CRD to reinstate that an unambiguous formulation is one that can be comprehended 'without any reference to an overall assessment of the circumstances' (para 29), adding that this interpretation is consistent with the objective of ensuring a high level of consumer protection. Moreover, the decision strikes the right balance between consumer protection and competitiveness and respective the trader's freedom to conduct business because 'the formulation or alteration of words on an electronic ordering button or function does not entail a significant burden that might harm the competitiveness of the traders concerned or their freedom to conduct a business' (para 31).

In sum, the Court of Justice strongly points toward the finding that the plaintiff's action will be unsuccessful. In this regard, it must be noted, however, that the referring judge focuses on the interpretation of the term 'Buchung' only, whereas the expression used by Booking.com is 'Buchung abschließen'; it may follow that the consumer's defence does not withstand scrutiny once the broader

expression is analysed. Another interesting issue is whether Booking.com has an obligation to indemnify the hotel owner in case its action against the consumer is unsuccessful.

# 2 Unfair Contract Terms

## 2.1 Soft Law as Ineffective Measure of Consumer Protection when a Suppletive Norm is Needed: Judgment in Case C-472/20 *Lombard Lízing*

In this case still unavailable in English, the Sixth Chamber offers guidance on the powers and duties of national courts in relation to the consequences of finding a core term unfair under the Unfair Contract Terms Directive (UCTD). This is another case concerning a loan issued in Swiss Francs but to be reimbursed in national currency. More precisely, the referring judge asks four questions; however, the third and fourth questions are considered inadmissible for either lack of clarity or being hypothetical. With the first question, the referring court asks whether a non-binding opinion issued by the national supreme court is enough to ensure the effectiveness of the UCTD. The second question, in essence, asks the CJEU to provide guidance on the consequences under the UCTD of the finding that a core term in a loan agreement is found unfair.

In answering the first question, as a first step, the Court of Justice reminds that pursuant to Article 288(3) TFEU Member States enjoy ample discretion when deciding how to transpose a directive in the national legal system, but have the duty to ensure that it is effect in pursuing its objectives. In particular, the objective of the UCTD is to 'put a stop to the use of unfair terms in contracts between professionals and consumers' (para 36).

As a second step, the Court points out that national supreme courts, when 'armoni[zing] the interpretation of the law and aiming at legal certainty', may develop criteria 'that lower courts must follow when assessing the unfairness of a contract term' (para 37). However, the CJEU warns, such criteria cannot limit the lower courts' power and duty to ensure the effectiveness of the UCTD.

Having reviewed its previous case-law on the relationship between the guidance offered by national supreme courts and lower judges, the Court of Justice is ready to examine specifically the situation in the main proceedings, where the guidance offered by the Hungrian Supreme Court on how to substitute the unfair term in a loan agreement is a non-binding opinion. The CJEU takes the view that such soft law instruments 'cannot be considered able to ensure the effectiveness of

Directive 93/13' (para 40). The only reason the Court of Justice gives is that a soft law instrument cannot be considered akin to 'a provision of national law of a suppletive nature intended to substitute the unfair term in a loan agreement' (para 42).

In answering the second question, as often it is the case, the Court of Justice sets the stage by articulating some foundational considerations about the structure of the UCTD. In particular, the CJEU reminds that Article 4 shields core terms from the unfairness test if they are transparent, but being the Directive a minimum harmonization one, Member State can opt for a higher level of consumer protection.

In this context, the normal consequence of finding a term unfair is 'reestablishing the situation of fact and of law the consumer would have been into without the unfair term' (para 50). In this way, the Directive substitutes the 'formal equilibrium' set by the unfair contract terms with a 'substantive equilibrium, aimed at reestablishing the equality between the parties' (para 51). One central feature of the protection introduced by the UCTD is that the consumer has 'the right to the restitution of the benefits the professional has gained unduly to the detriment of the consumer pursuant to the unfair term' (para 55).

Against this background, the CJEU frames the present situation as one where there is no provision of suppletive national law applicable in the case and adds that the national judge must 'taking into account the whole of the national legal system, all the measures necessary to protect the consumer' against particularly adverse consequences, citing *Banca B.* (Judgment of 25 November 2020, C-269/19, ECLI:EU:C:2020:954, para 41) in support of this holding.

In light of the previous considerations, the Court of Justice holds that in a situation such as the one in the main proceedings, the national judge must 'ensure that the consumer is, ultimately, in the same situation as he would have been had the unfair term not existed' (para 58).

One way to achieve that, which was followed in the main proceedings, is the restitution of the sum unduly paid to the professional by relying on unjust enrichment. The CJEU concludes with a generic warning that the national judge 'cannot go beyond what is strictly necessary to reestablish the contractual equilibrium' (para 59).

The answer to the first question raises some doubts about the perceived effectiveness of the use of soft law instruments by the Court, in particular often adopted by EU institutions, to provide guidance to organs and bodies of national legal systems. The answer to the second question is perhaps even more interesting in light of the lack of any reference to the controversial answer[1] given to a

1 F. Esposito, 'Dziubak Is a Fundamentally Wrong Decision: Superficial Reasoning, Disrespectful of National Courts, Lowers the Level of Consumer Protection' (2020) 16(4) *European Review of Contract Law* 538.

very similar question in *Dziubak* (Judgment of 3 October 2019, C-260/18, ECLI:EU:C:2019:81, para 62), where the Third Chamber held that a gap caused by the removal of an unfair core term cannot be filled by a national court on the basis of provisions of a 'general nature'. It is to be expected that the Court of Justice will be asked to clarify the relationship between these two rulings in the early future.

## 2.2 Decisions with no Grounds on the Review of Unfair Terms Do Not Benefit from *Res Judicata* and Time-barring: Judgment in Case C-600/19 *Ibercaja Banco*

It is a well-known fact that the Court of Justice has been reducing the degree of procedural autonomy Member States have to ensure the effectiveness of EU consumer law and, in particular, of Directive 93/13 on unfair terms in consumer contracts (UCTD). With the present decision, the Court crosses the Rubicon in that it opens to the review of judgments with the force of *res judicata*.

The case in the main proceedings follows the repossession and sale to a third-party of immovable property following the default by the consumer. Of the over 200.000,00 EUR still due to the bank, almost 25% were represented by default interests. After having sold the property, the bank had not fully satisfied its credit and notified the heirs of the debtor a claim including the request of more than 32.000,00 EUR for default interests.

The defendants lodged an objection contending the unfairness of the floor clause and the default interest clause included in the contract. The referring judge notes that the judgment ruling in favour of the bank has the force of *res judicata* and that the special legislation introduced to protect consumers in case of mortgages includes a deadline that had passed in the main proceedings. At the same time, at the trial, the issue of the unfairness of the contract terms had been reviewed by the court of its own motion, but no explanation of the results of this review is present in the grounds of the decision.

Against this background, in essence, the referring judge seeks guidance on the limits of the procedural protection granted by the duty to review the unfairness of contract terms in consumer contract and, also, what the remedy could be in a situation such as that in the main proceeding.

To provide guidance in relation to the first issues, the Court of Justice articulates a reasoning in five main steps. As a first step, the Court formulates the usual consideration about consumers' weakness and the need to substitute the formal balance introduced by the contract with a substantive one. Secondly, the CJEU recalls its case law on the *ex officio* review of contract terms in consumer contracts.

In particular, since this matter has not been harmonised, national law must comply with the principles of equivalence and effectiveness.

In this context, as a third step, the Court carefully explains that the procedural protection under consideration was found to be limited by the principle of *res judicata*, in the interest of 'the stability of the law and legal relations, as well as the sound administration of justice' (para 41), citing in this regard *Astrucom Telecomunicaciones* and *Banco Primus* (Judgments of 6 October 2009, C-40/08, ECLI:EU:C:2009:615, paras 35 and 36, and of 26 January 2017, C-421/14, ECLI:EU:C:2017:60, para 46). As a fourth step, the CJEU cites its decision in *Kancelaria Medius* (Judgment of 4 June 2020, C-495/19, ECLI:EU:C:2020:431, para 35) to the effect that the principle of effectiveness requires 'effective review of whether the terms of the contract concerned are unfair' (para 46).

As a fifth and final step, the Court of Justice analyses the situation in the main proceedings in light of the above considerations. The Court focuses its attention on the function of reviewing the unfairness of the contract terms on the grounds of a decision and observes that 'an effective review of the possible unfairness of contractual terms, as required by Directive 93/13, could not be guaranteed if the force of *res judicata* extended also to judicial decisions which do not indicate such a review' (para 50). Probably, due to the delicate nature of the matter under consideration, in the following paragraph the CJEU clearly states that even 'summary reasons' would have been sufficient to ensure the effectiveness of the UCTD (para 51).

Moving to the issue of the remedies available to the consumer in a situation such as that in the main proceedings, the Court of Justice begins by excluding that a finding of unfairness would have an effect against the third party to whom the property was already transferred for reasons of 'legal certainty' (para 57).

Unsurprisingly, the consequence cannot be that the consumer is left with no protection. Instead, in subsequent proceedings, the consumer will be entitled to 'compensation for the financial damage caused by the application of those terms' (para 58).

# 3 Information Duties

## 3.1 Comprehensive Analysis of Information Duties in Case of Unit-Linked Life Assurance: Judgment in Joined Cases C-143/20 and C-213/20 *A (Contrats d'Assurance 'Unit-linked')*

A unit-linked life assurance is a peculiar financial transaction, where the policy holder is an investment fund who sells shares to third parties, often consumers.

The investment contracts offered by the policy holder to consumers include penalties for early disinvestment, which are at the center of the main proceedings. The referring judges ask several questions aimed at clarifying the scope of application and content of Article 36(1) Directive 2002/83 (Life Assurance Directive, LAD) as well as the consequences of its violation.

The Court of Justice first clarifies who the right holder and duty bearer are in relation to the information requirement set by Article 36(1) LAD in the case of unit-linked life assurance. The Court identifies the right holder in two steps. First, it uses various interpretive arguments to reach the conclusion that the policy holder is the 'creditor of the characteristic performance' in the assurance contract (para 75). As a second step, the CJEU explains that in the present circumstances, the concept of creditor of the characteristic performance covers also the consumers who invest in the corporate policy holder because they pay the premia in return for a performance if some uncertain conditions are verified. It follows that also the consumers who invest in the corporate policy holder are entitled to receive the information pursuant to Article 36(1) LAD.

Moving to the identification of the duty bearer, the CJEU finds that the duty is shared between the assurance company and the corporate policy holder. In fact, the corporate policy holder is an insurance mediator within the meaning of Article 2, n 3 LAD and has to receive from the assurance company the information referred to by Article 36(1) LAD and answer to the consumers' requests for clarification.

With regard to the content of the information requirement, the Court of Justice excludes that the consumers have the right to receive 'exhaustive' information on the investment and the connected risks (para 93). While this information is of 'primary importance' for the consumer (para 99), consumers are entitled to receive only information that is 'objectively necessary' (para 101). In particular, the information requirement under consideration does not cover 'a detailed and exhaustive description of the nature and scope of all the investment risks' (para 102).

With regard to the practical (time and place) modality for discharging the obligation to inform the consumer, the Court of Justice expands the intensity of the obligation in comparison to what can be inferred from the plain meaning of Recital 52 LAD. This recital simply holds that consumers must be given the opportunity to 'choose the contract best suited to [their] needs'. To reach this conclusion, the CJEU relies 'by analogy' on its judgments in *CA Consumer Finance* and *Bundesverband der Verbraucherzentralen und Verbraucherverbände* (Judgments of 18 December 2014, C-449/13, ECLI:EU:C:2014:2464, para 46, and of 25 June 2020, C-380/19, ECLI:EU:C:2020:498, para 34) and on the principle of effectiveness.

Finally, the Court of Justice strongly suggests that the violation of the information requirement pursuant to Article 36(1) LAD is likely to count as a misleading omission within the meaning of the Unfair Commercial Practices Directive because it is of 'fundamental importance' for the consumer (para 134).

A particularly significant point is that neither Article 36(1) LAD nor the provision interpreted in *Bundesverband der Verbraucherzentralen und Verbraucherverbände* make any express reference to the time when information must be provided to the consumer. As noted elsewhere, this line of cases might mean that a new 'general requirement of procedural transparency [exists], according to which essential information has to be given to the consumer in good time before the conclusion of the contract'.[2]

# 4 Consumer Data Law

## 4.1 The GDPR does not Prohibit Consumer Protection Associations from Bringing an Action Against the Violation of Consumer Protection Rules Related to Data Protection in the Absence of a Mandate for a Specific Violation: Judgment in Case C-319/20 *Meta Platforms Ireland*

This decision touches upon the coordination between the General Data Protection Regulation (GDPR) and pre-dating German legislation transposing the Directive 2009/22 (Injunctions Directive). In this context, Federal Union, a body that under national law has standing to protect the collective interests of consumers, has lodged a complaint against Meta Platforms Ireland (Meta) related to the lack of valid consent to data collection and unfair contract terms.

In this context, Article 80(2) GDPR grants to Member States the power to confer to the entities referred to in Article 80(1) thereof the power to exercise the rights granted to data subjects by Chapter VIII GDPR. In light of this provision, Meta has argued that since the German government has not exercised the power *ex* Article 80(2) GDPR, Federal Union lacks standing after the GDPR entered into force. The Court of Justice disagrees.

The Court begins its argumentation by reminding that the purpose of the GDPR, as described by Recital 10 thereof, is to harmonize the protection of data

**2** F. Esposito, 'Op-Ed: "The Who, What, When, Where, and What If Not of Information Requirements In Case of Unit-Linked Group Life Assurance"' *EU Law Live*, 11 March 2021.

subjects in the Union. The 'harmonisation' ensured by the GDPR 'is, in principle, full', but the Regulation includes 'opening clauses', which give to Member States 'a margin of discretion as to the manner in which those provisions may be implemented' (para 57). Article 80(2) GDPR is one of those provisions.

The next issue to analyse is whether the discretion Member States enjoy was exercised within the limits set by the opening clause. In the present case, the German government confirmed that the German legislature did not adopt legislation on the basis of Article 80(2) GDPR. However, the national legislation transposing the Injunctions Directive already allows entities such as Federal Union to bring an action for the violation of data protection laws. The CJEU does not give significance to the temporal element and moves 'to ascertain whether the national rules at issue in the main proceedings fall withing the scope' of Article 80(2) GDPR (para 62).

The first requirement to be examined is that the entity 'pursues a public interest objective consisting in safeguarding the rights and freedoms of data subjects in their capacity as consumers, since the attainment of such an objective is likely to be related to the protection of the personal data of those persons' (para 65). This wording makes apparent that the Court of Justice struggles a bit to coordinate consumer and data protection laws into a single consumer data law framework. However, the CJEU finds that consumer protection and data protection infringements 'may be related' to each other (para 66).

Next, the Court of Justice moves to the examination of the material scope of application of the provision. First, the Court interprets the requirement that the entity may act 'independently of a data subject's mandate' set by Article 80(2) GDPR. The issue, in particular, is whether the data subject referred to in the provision has to be identified before bringing an action. The CJEU rejects this view as incompatible with the wording of the provision itself, especially in light of the definition of data subject given in Article 4(1) GDPR, where a data subject can be a merely identifiable (although not identified yet) person.

Second, the Court of Justice finds that there is no need for the entity bringing the action 'to prove the actual harm suffered by the data subject, in a given situation, by the infringement of his or her rights' (para 72). Notably, in paragraphs 73–76 of the decision, the Court supports this finding with an argument based on the need to ensure the effectiveness of the protection granted by the GDPR, which 'could not be guaranteed if the representative action … allowed only for the infringement of the rights of a person individually and specifically affected … to be invoked' (para 76).

Finally, the Court of Justice examines the issue of the concurrent infringement of consumer and data protection laws. As a first step, the CJEU observes that there is nothing in the wording of Article 80(2) GDPR suggesting that Member States

cannot opt for the use of 'rules intended to protect consumers or combat unfair commercial practices' to take action against GDPR violations (para 79). This finding is then confirmed by the evolutive legislative context, namely by an analysis of Directive 2020/1828, which will replace the Injunctions Directive as of 25 June 2023. Directive 2020/1828 indicates that representative actions can be initiated for the violation of the GDPR and also states in Recital 15 that the mechanism provided by Article 80(2) GDPR cannot be 'replaced or amended' (para 82).

In conclusion, with this case the Court of Justice has made it apparent that consumer and data protection laws can find concurrent application in the European Union. From a doctrinal point of view, this finding confirms the need to interpret consumer and data protection laws coherently when the interests of natural persons as both consumers and data subjects are at stake.

# 5 Competition Law

## 5.1 Consumer Welfare as the Ultimate Goal of Competition Law: Judgment in Case C-377/20 *Servizio Elettrico Nazionale and Others*

The present decision concerns the allegedly abusive practice of a dominant firm in the electricity market during its liberalization. In particular, following the process of legal unbundling in the Italian electricity sector, the ENEL group includes two companies, SEN and EE, which are involved in the contested practice. SEN is the operator of the regulated market, whereas EE operates on the free market. The Italian National Competition Authority (AGCM) found that the ENEL group abused its dominant position because SEN created lists of clients interested in being contacted by EE and its competitors on the free market based on consent requested separately and in a discriminatory way for the data processing (para 11).

The referring judge asks five questions to the Court of Justice. The present analysis focuses primarily on the answer to the second question since it is the one most relevant and innovative from a contractual perspective. The question asks 'in order to establish whether a practice constitutes abuse of a dominant position, it is sufficient for a competition authority to prove that that practice is capable of adversely affecting an effective competition structure on the relevant market or whether it must be proved further, or in the alternative, that that practice is capable of affecting the well-being of consumers' (para 40).

The CJEU holds that consumer harm does not need to be proven. This is not a novel finding.[3] What is worthy of particular attention is the systematic theorization of the goal of Article 102 TFEU and its place in the architecture of EU law.

The Court of Justice begins its reasoning by quoting *TeliaSonera Sverige* (Judgment of 17 February 2011, C-52/09, ECLI:EU:C:2011:83, paras 21 and 22) to hold that Article 102 TFEU protects competition 'to the detriment of the public interest, individual undertakings and consumers, which ensure the well-being in the European Union' (para 41).

In this context, Article 102 TFEU has the aim of avoiding that a dominant undertaking limits competition 'to the detriment of consumers' (para 44); at the same time, it is compatible with Article 102 TFEU that competitors who are 'less attractive for consumers' are excluded from the market on the basis of 'competition on the merits' (para 45). Accordingly, the Court unambiguously holds that 'the well-being of both intermediary and final consumers must be regarded as the ultimate objective warranting the intervention of competition law in order to penalise abuse of a dominant position' (para 46).

This holding is particularly important because the goals of EU competition law are constantly debated in the literature. Hopefully, the present decision will prompt scholars to investigate how the different goals of EU competition law can be rationally connected to consumer welfare. From this perspective, the fact that the Court relies on *TeliaSonera Sverige* is particularly interesting. Parts of the reasoning in this decision are one of the few instances where EU competition law can be better explained as if EU competition law aimed at maximizing total welfare instead of consumer welfare.[4]

For contract law scholarship, the case is even more important. The explicit claim that market exchange in the European Union is about consumer welfare is a feature of EU law that theories of contract law in the European Union shall be able to accommodate, or at least discuss. However, contract law scholars tend not to take seriously consumer welfare in their attempts to build normative theories about contract.[5]

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**3** See, Judgment of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, Joined Cases C-501/06, C-513/06 and C-519/06 P, ECLI:EU:C:2009:610, paras 63–64.

**4** See, F. Esposito, *The Consumer Welfare Hypothesis in Law and Economics* (Cheltenham: Edward Elgar, forthcoming in 2022) chapter 5, section 3.1.

**5** See, for example, H. Dagan and M. Heller, *The Choice Theory of Contracts* (New York: CUP, 2018) and M. Hesselink, *Justifying Contract in Europe* (Oxford: OUP, 2021). For attempts to theorize contract law building on the consumer welfare standard, see F. Esposito and S. Grundmann, 'Investor-Consumer or Overall Welfare: Searching for the Paradigm of Recent Reforms in Financial Services Contracts' *EUI Law Department Research Paper Series 2017/5* and F. Esposito, 'Carrying the Choice Theory of Contracts Further: Transfers, Welfare, and the Size of the Community' (2019) 15(3) *European Review of Contract Law* 297.

This is particularly, unfortunate since consumer welfare as normative standard has great potential to build a bridge between classical contract law and sector-specific regulation.[6]

# 6 Services of General Economic Interest

## 6.1 Security of Supply as a Justified Criteria to Validate Discriminatory Dispatching and Access to Transmission Contracts by Thermoelectrical Power Plants: Judgment in Case C-179/20 *Fondul Proprietatea*

Fondul Proprietatea, a minority shareholder of the hydropower plant SPEEH SA, brought an action before the Court of Appeal of Bucharest seeking the annulment of the Romanian legislation granting two state-owned thermoelectrical power plants three different types of benefits in their contractual relationship with the national transmission system operator (TSO), Transelectrica. The latter had the obligations of granting priority dispatch to the grid, guarantee access of an average of at least 700 MW approximately, and the purchase obligation of ancillary services of an average of 1 GW.

In those circumstances, the referring judge decided to ask two questions to the Court of Justice: one on whether the national measure is compatible with Article 15(4) of Directive 2009/72 (Internal Electricity Market Directive); the other concerning State aid. The present analysis focuses on the former question because it ruled on the contractual obligations of TSOs towards specific undertakings.[7] The Directive, which is no longer in force, established that the priority to the dispatch of generating installation using non-renewable sources could not have exceeded 15% of the overall primary energy consumed in the Member State concerned. However, the Romanian legislation not only granted priority dispatching to power plants based on non-renewable sources, but also rights to guaranteed access.

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**6** For an investigation in this sense focused on the electricy market, see F. Esposito and L. de Almeida, 'A Shocking Truth for Law and Economics: The Internal Market For Electricity Explained With Consumer Welfare', in K. Mathis and B. Huber (eds), *Energy Law and Economics in Europe* (Dordrecht: Springer, 2018) 101.

**7** To have further details about the reasoning of the Court about the application of the state aid rules, see L. de Almeida, 'Op-Ed: "State aid as means to preclude priority dispatching and guaranteed access of fossil fuels to networks in the electricity market: C-179/20 *Fondul Proprietatea*' *EU Law Live*, 16 February 2022.

The Court of Justice begins its analysis by observing, in agreement with Advocate General Pikamäe, that 'priority dispatching' and 'guaranteed access' are distinguished measures. 'Priority dispatching' consists in dispatching electricity from generation installations by the TSO on the basis of criteria other than economic precedence. It is regulated by Article 15(3) and (4) of the Internal Electricity Market Directive. 'Guaranteed access', instead, aims to ensure that all renewable electricity sold and supported obtained access to the grid, allowing the maximum use of renewable energy resources. Guaranteed access is referred to in Article 16(2) of Directive 2009/28 on promoting the use of energy from renewable sources.

In those circumstances, the Court decided to enlarge the scope of the first referred question and interpret Articles 15(3) and (4), and 32(1) of the Internal Market Electricity Directive, as well as Article 16(2) of Directive 2009/28 on the promotion of the use of energy from renewable sources. For the CJEU, Article 15(3) and (4) could not serve as the legal basis for the Member States to introduce a guaranteed right of access. As for Article 16(2) of Directive 2009/28, although it concerned the possibility of creating 'guaranteed access', it did so regarding renewable electricity only. Instead, the present case is about guaranteed access to power generation from non-renewable sources. Accordingly, the Court excluded those articles as not relevant to the issue in dispute (para 65).

Next, the Court of Justice interprets Article 32(1) Internal Electricity Market Directive, which disciplines the provision of third-party access. Member States should ensure non-discriminatory access of undertakings to networks, and a different treatment should be justified on objective and justified criteria. The CJEU observes the Romanian legislation justified the right to guaranteed access to thermoelectrical power stations as a security of supply measure. Furthermore, in the verification of the compliance with the principle of proportionality, the judgment left to the referring court to consider whether that objective of security of supply could not have been achieved by other means.

The conclusion of the Court of Justice may sound disappointing for those who trust the coherence of EU legislation with policy goals of decarbonising the energy sector. Moreover, despite the Directive 2009/72 is no longer in force, this judgment remains important because its reasoning concerns the extent to which ensuring security of supply in an objective and justified criterion to grant discriminatory access and dispatching in transmission contacts to carbon intense energy producers. Therefore, the judgment illustrates the non-easy

balance between often conflicting goals in the energy sector, namely security of supply versus mitigation of climate change.[8]

# 7 Private International Law

## 7.1 The Mandatory Provisions of the *Lex Consumatoris* Apply Irrespective of the Choice of Law in a Consumer Contract Relating to Trees Planted for the Sole Purpose of Being Harvested for Profit: Judgment in Case C-595/20 *ShareWood*

The present case relates to a complex transaction where one natural personal, UE, bought thousands of trees to be planted on land UE leased to a Swiss company, ShareWood, and the latter also undertook the task of managing the trees and the land and eventually sell the timber on the market and transfer the profit to UE.

The complex transaction became inviable after the purchase of a few hundred trees, and UE, an Austrian resident, sued ShareWood in Austria. The applicable law in the case is controversial since the contracts between the parties include a choice of law clause in favour of Swiss law, but pursuant to Article 6(2) of Rome I Regulation a consumer is still entitled to the protection granted by the mandatory provisions of the law that would have been applicable in the absence of the choice of law clause.

Given the complex content of the transaction, the referring court is unsure about whether the exception set by Article 6(4)(c) of the Regulation applies in a case such as the one in the main proceedings. According to the said provision, the protection granted to consumers by Article 6(2) does not apply in the case of 'a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC'.

To answer the question, the Court of Justice begins by noting that the Rome I Regulation does not define the terms used in Article 6(4)(c) and, in the absence of any reference to national laws, these terms have to receive an autonomous interpretation. Against this background, the CJEU focuses first on the interpretation of 'right *in rem* in immovable property' and then of 'tenancy of immovable property'.

**8** About the challenges of balancing conflicting policies as security of supply and environmental goals in the context of the war in Ukrania, See J. van Zeben, L. de Almeida, M. Alessandrini, 'Stress Testing the European Green Deal: the securitisation of energy, food and climate' *Weekend EU Law Live Edition*, no 106, 2 July 2022.

In relation to the concept of right *in rem* in immovable property, the Court of Justice focuses on whether the trees can be considered immovable property before the harvest. In this regard, the Court first finds that trees are to be qualified as proceeds of the land because, in particular, they are planted 'for the sole purpose of being harvested' (para 27). Accordingly, they shall not be treated in the same way as the land itself for the purposes of applying Article 6 of the Rome I Regulation.

The Court of Justice then considers the interpretation of the term 'tenancy of immovable property' and concludes that 'the mere existence of a lease agreement … is insufficient' for the exclusion set by Article 6(4)(c) to apply (para 31). To reach this conclusion, the Court relies on its decision in *Klein* (Judgment of 13 October 2005, C-73/04, ECLI:EU:C:2005:607, para 26), which reached the same conclusion in the interpretation of Article 16(1)(a) of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Moreover, the CJEU observes that 'the main purpose of the contract at issue in the main proceedings is not the use, in the context of a lease, of the land on which the trees concerned are planted, but … to generate income from the sale of the timber' (para 37).

Interestingly, neither the referring court nor the Court of Justice have touched upon the matter of whether a natural person in a case such as the one in the main proceedings can be considered a consumer in the first place.

Note: The primary responsibility for the areas of Consumer Rights Directive, Unfair Contract Terms, and Competition Law lies with Fabrizio Esposito; for the areas of Consumer Data Law, Services of General Economic Interest, and Private International Law with Lucila de Almeida.