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 June 2021 and the end of December 2021. Out of a total of 329 judgments decided in this period, 55 had a contract law dimension.

Keywords: Court of Justice, contract law, consumer law, credit, services, public procurement

General European Contract Law

Mail-Order Advertisement Campaigns to Promote the Sale of Medical Products as Certain Selling Arrangements Protected by the Keck Doctrine: Judgment in Case C-190/20 *DocMorris*

The present case concerns the compatibility with EU law of the German law prohibiting a Dutch mail-order pharmacy that sells medical products from organising certain selling arrangement practices (more precisely, advertisement campaigns to German consumers). Since the pharmacy uses mail only and no digital channel (e-mail, website, social media, etc.) as means to disseminate

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its campaigns and receive its orders, the case falls out of the scope of Directive 2000/31 and is, therefore, governed by the fundamental freedoms.

In essence, the referring judge asks the Court of Justice to examine whether Directive 2001/83, = and, in particular, Article 87(3) thereof, precludes national legislation which prohibits a pharmacy that sells medicinal products by mail order from organising an advertising campaign in the form of a prize competition. The campaign allowed participants to win everyday items other than medicinal products, such as electric bicycles and toothbrushes. Participation was conditional on submitting an order form for a medicinal product for human use subject to a medical prescription, together with that prescription.

The reasoning of the Court starts by assessing whether the advertising campaign at issue in the main proceeding falls within the scope of the Title VIII of Directive 2001/83 on the Community code relating to medicinal products for human use, which disciplines the advertising of such products. Since the provisions concern the advertisement of medical products, the Court excludes the application of the Directive. The reason is that 'such campaigns are not intended to influence the customer's choice of a given medicinal product, but the choice of the pharmacy from which that customer purchases that medicinal product' (para 21).

Despite excluding the application of Directive 2001/83, the Court of Justice invokes Article 267 TFEU to expand the scope of the referred question to provide the referring court with all elements of interpretation of EU law which may be of assistance in adjudicating the case pending before it. On these grounds, the Court analyses the compatibility of the German legislation with, first, Directive 2000/31 and, later, the free movement of goods.

First, the Court of Justice excludes the application of Directive 2000/31 despite the fact that several interested parties argued for its applicability. The reason it that the present case concerns an advertising campaign provided not by electronic means but mail order and, therefore, it is different from the recent precedent of the Court in *Advertising and sale of medicinal products online* (judgment of 1 October 2020, C-649/18, EU:C:2020:764), commented by us in a previous issue of this journal.[1]

Considering the prohibition of advertisement campaigns to promote the sale of medical products has not been subjected to any harmonization at EU level, the Court observes that Member State have the power to determine the relevant rules. However, these rules shall be compatible with the Treaty's fundamental freedoms.

The Court of Justice finds Article 34 appliable to the national law prohibiting the advertisement campaign because the campaign was meant to advertise a form

1 F. Esposito and L. de Almeida, 'European Union Litigation' (2021) 17(1) *European Review of Contract Law*, 87–106.

of selling goods, namely medical products, not the provisions of mail-order services. Next, the CJEU considers the purpose of the national law. The Court finds that the German national law aims to regulate the offer of monetary advantages or other promotional gifts with monetary value in the field of the sale of medicinal products. Finally, the Court of Justice takes the view that such a provision of national law must be regarded as 'governing selling arrangements' (para 36) within the meaning of *Keck and Mithouard* (judgment of 24 November 1993, C-267/91 and C-268/91, EU:C:1993:905). By relying on this landmark decision, the Court excludes the application of Article 34 TFEU to the Germain law concerning certain selling arrangements for medical products, including promotional gifts.

In light of the above, the Court of Justice concludes that the prohibition introduced by German law is compatible with EU law.

Consumer Law

Unfair Commercial Practices

Any Form of Consideration Counts as Paying for an Advertorial: Judgment in Case C-371/20 *Peek & Cloppenburg*

The parties facing each other in the main proceedings are two independent retail clothing sellers operating under the same company name, 'Peek & Cloppenburg'. The dispute is about an alleged advertorial published in 2011. Advertorials are misleading commercial practices according to point 11 of Annex I to the Unfair Commercial Practices Directive (UCPD), which defines them as follows: 'Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer'.

The aledged advertorial consisted in a 'Reader offer' to participate in an event consisting in a private sale published on the magazine 'Grazia'. More precisely, the advertorial consisted of a double-page article inviting the reader to attend the 'Grazia StyleNight by Peek & Cloppenburg'. The article included images of the store where the event would take place and invited the readers to participate. Moreover, the article clarified that there are two independent companies named Peek & Cloppenburg and that the event was organized by P&C Düsseldorf.

It is uncontested that P&C Düsseldorf and Grazia shared part of the costs of the events and that P&C Düsseldorf's premises and staff were used to organize the event. Finally, P&C Düsseldorf assigned to the magazine the right to use the images published in the aledged advertorial.

The referring court is unsure about the interpretation of the requirement that 'the trader has paid for the promotion' and, ultimately, its application in the main proceedings. Other aspects of the prohibitions, and in particular whether the aledged advertorial made it clear to the consumer whether the editorial content is paid for by P&C Düsseldorf.

Against this background, the Court of Justice begins its analysis of the case by noting that the UCPD covers practices that harms the economic interests of both consumers and competitors. Therefore, the interpretation of the UCPD is relevant unless the national legislation focuses on commercial practices that harm competitors only or are otherwise excluded from the scope of application of the Directive.

Next, the CJEU frames the case within the context of the UCPD. First, the Court finds that the aledged advertorial is a commercial practice within the meaning of Article 2(d) of the UCPD. Second, it reminds that, pursuant to Article 5(5) UCPD, practices listed in Annex I are prohibited without the need for the case-by-case assessment disciplined by Article 5–9 ('blacklist').

Focusing on the concept of payment within the meaning of point 11 of Annex I, the CJEU notes that the plain meaning of the provision supports different outcomes depending on the official language considered. Some translations suggest a narrow interpretation of 'payment', limited to monetary consideration, while other languages suggest a broader interpretation.

In this regard, the Court of Justice relies on its settled case-law that in case of linguistic divergence no language version is to be taken as prevalent, as this approach is incompatible with the need to ensure the uniform application of the Directive. The focus is therefore shifted to the 'context and the objectives pursued by the legislation of which [the provision] forms part' (para 37).

In relation to the objective, the CJEU reminds that the UCPD protects the consumer as the weaker party in the business-to-consumer transaction. In this regard, the words used by the Court to characterize consumer weakness are notable. The Court connects consumer weakness primarily to the asymmetrical level of information, adding that 'it cannot be denied that there is a major imbalance of information and expertise between those parties' (para 39). The present decision is not the first one to use this strong formulation. However, it is the first time where the Court uses it in general terms, and not specifically in the telecommunication sector.[2] It remains to be seen if this reference signals the CJEU's willingness to have a more interventionist approach in the application of the UCPD, or in consumer law more generally.

2 The Court referred to the technical complexity of the telecom sector in *Wind Tre* (judgment of 13 September 2018, *Wind Tre*, C-54/17, ECLI:EU:C:2018:710, para 54) and again in *Orange Polska* (judgment of 12 June 2019, *Orange Polska*, C-628/17, ECLI:EU:C:2019:480, paragraph 36).

In this context, the prohibition set by point 11 of Annex I 'requires advertising undertakings to indicate clearly that they have paid for editorial content in the media where that content is intended to promote a product or service originating from those traders' (para 40). Given this purpose, the Court continues, the form of financing of the advertorial is immaterial: 'the specific form of financing, whether by payment of a sum of money or by means of any other consideration having an asset value, has no bearing from the point of view of consumer protection or on the confidence of readers in the neutrality of the press' (para 41). In support this finding, the Court cites both the Advocate General Opinion and – a rare occurrence – the Report of the European Parliament of 19 December 2013 on the application of Directive 2005/29.

Finally, the CJEU briefly considers and rejects the opportunity of including a *de minimis* filter in the application of point 11 of Annex I. Accordingly, a payment of any amount will be sufficient to trigger the duty to clarify that the content is paid for.

In light of the above, the Court of Justice comes to the conclusion that the requirement that the adverstising was paid for is satisfied in the main proceeding. The Court carefully avoids elaborating on the remaining issues – indeed, not explicitly asked by the referring judge. Especially interesting is the question of whether the editorial content clarified that it was paid for by P&C Düsseldorf now that payment has such a broad meaning.

Unfair Contract Terms

National Courts Reviewing the Fairness of Provisions Determining the Content of the Contract is Compatible with EU Law: Judgment in Case C-243/20 *Trapeza Peiraios*

In this case, still unavailable in English, a Greek first instance judge seeks clarification on the compatibility of national law with the Unfair Contract Terms Directive (UCTD). More precisely, the referring judge raises three issues. First, whether the provisions of national law determinig the content of the contract are excluded from the scope of application of the UCTD pursuant to Article 1(2) thereof which was not transposed in the Greek legal system. Second and subsequently, whether Article 1(2) can be considered implicitly transposed by the national legislation transposing Article 3(1) and 4(1) of the UCTD. Finally, the referring judge asks whether Article 8 of the UCTD allows national law to subject the provisions of national law determining the content of the contract to the system of protection established by the UCTD.

From an institutional perspective, it is notable that the Greek Civil Supreme Court has taken a clear position on these issues in 2019. In its decision n. 4/2019, the Grand Chamber of the Greek Civil Supreme held that provisions of national law determining the content of the contract are shielded from the fairness review since 'by definition it is inconceivable that the balance between the contracting parties is disturbed or that the clause is unfair' (para 20).

Having affirmed rapidly the admissibility of the preliminary reference, the Court of Justice focuses first on the interpretation of Article 1(2) of the UCTD, which states that 'the contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are a party, particularly in the transport area, shall not be subject to the provisions of this Directive'.

The Court begins its analysis by reminding that the expression 'mandatory statutory or regulatory provisions' shall be interpreted, in light of Recital 13 thereof as covering also rules 'which are supplementary in nature, that is to say, which apply by default, in the absence of other arrangements established by the parties' (para 30). The Court then confirms this finding by looking at the structure of the Directive, as well as its objectives.

Next, the Court of Justice deals with issues related to the partial transposition of the UCTD in national law. More precisely, the referring judge wishes to know whether Article 1(2) has to be applied even if the Greek legislator has not transposed it. In particular, the referring judge is unsure whether Article 1(2) might be considered to have been included in nation law 'indirectly' due to the transposition of Article 3(1) and 4(1) (para 40).

This is an ingenious question since being the UCTD a minimum harnonisation directive, it is indeed unclear whether the national legislator decided to extend the scope of application of the UCTD or not by not transposing Article 1(2) thereof. The practical relevance of this doubt follows from the position taken by the Greek Civil Supreme Court, namely that it is inconceivable that Article 1(2) is not transposed in national legislation.

As a first step, the Court of Justice analyses the issue ignoring the fact that the UCTD is a minimum harmonization directive. In this context, the CJEU cites its previous decision in *Condominio Meda*[3] (judgment of 2 April 2020, C-329/19, EU:C:2020:263, para 37) to hold that the scope of application of EU law measures shall be the same in all Member States, 'with the exception of the adjustments authorized by EU law'; more precisely, the adjustments have to be 'compatible with the objectives of the directive and the Treaties' (paras 45–46).

3 For a comment, see F. Esposito and L. de Almeida, 'European Union Litigation' (2020) 16(3) *European Review of Contract Law*, 442–443.

The application of this test in the present case remains implicit in the reasoning of the Court of Justice. The Court will return on this issue in answering the next question, without elaborating on the matter on that occasion as well. For the moment, the CJEU prefers to carve a subtle doctrinal argument to rule out the possibility of inferring the national legislator's intention about the scope of application of the UCTD by reference to Articles 3(1) and 4(1) thereof. In essence, the Court explains that the unfairness test enshrined in the said provisions 'logically presupposes' the finding that the clauses to be reviewed fall within the scope of application of the Directive.

It is only in the answer to the last question that the Court of Justice takes a position about whether is it is really inconceivable – as stated by the Greek Supreme Court – that default rules may be subject to the unfairness test. The CJEU's analysis of this issue is strongly influenced by a procedural simplification, namely that the Court takes at face value the interpretation of national law presented by the referring judge.

In the reference for a preliminary ruling, the referring judge had taken the view that the lack of transposition of Article 1(2) UCTD pursued the objective of increasing the level of consumer protection above the minimum level set by the UCTD. On these premises, the only real issue to be discussed is the compatibility of such an interpretation of national law passes the 'Condominio Meda' test mentioned above.

To address the issue, the Court investigates the relation between Articles 1(2) and 8 UCTD. More precisely, the CJEU clarifies the meaning of 'area covered by this Directive' figuring in Article 8 UCTD. To this end, the Court focuses on whether the terms covered by Articles 1(2) fall within the area covered by the UCTD or not.

To analyse the matter, the Court of Justice draws a comparison between Article 1(2) UCTD and Article 4(2) UCTD, excluding the application of the unfairness test to 'core terms' as long as they are written in plain and intelligible language. The CJEU had previously held that core terms fall within the meaning of the expression 'area covered by this Directive',[4] to the effect that Member States had the power to make the unfairness test applicable to core terms as well.

However, the Court explains, there is a difference between Articles 1(2) are 4(2) UCTD, namely that Article 1(2) defines the scope of application of the Directive, whereas Article 4(2) limits the scope of application of the unfairness test introduced by the Directive. On these grounds, the Court holds apodictically that 'area covered by this Directive' means 'scope of application of the Directive'. The opposite finding, namely that the area covered by this Directive is contract terms in

4 Judgment of 3 June 2010, *Caja de Ahorros y Monte de Piedad de Madrid*, C-484/08, EU:C:2010:309, paras 30–35, 40 and 43.

consumer contracts is general, sounded equally plausible. In any event, the CJEU concludes that Article 8 UCTD is irrelevant in the present case.

On these grounds, the Court simply refers again to the 'Condominio Meda' test[5] – a directive can be applied to cases outside its scope of application if this is 'compatible with the objectives of the directive and the Treaties' (para 62). Rather than applying the test explicitly, the CJEU (again) apodictically states Article 8 does not preclude the application of the unfairness test to terms falling within the scope of application of Article 1(2) UCTD.

In sum, Greek law can be reconstructed systematically as extending the scope of application of the UCTD also to default rules. That is to say, what was unthinkable for the Greek Supreme Court is apodictically held by the Court of Justice of the European Union.

Consumer Credit

No Interest as Sanction for Failing to Assess a Consumer's Creditworthiness: Judgment in Case C-303/20 *Ultimo Portfolio Investment*

A wife and her husband have entered into a total of 24 consumer credit agreements, generating total monthly payments more than four times higher than the couple's monthly income. The main proceeding was started by a financial company that was assigned part of the credit arising from the 24th credit agreement. During the proceedings, it emerged that no questions about the couple's financial situation before the conclusion of the agreement.

The referring judge seeks guidance on the interpretation of the criteria of effectiveness, proportionality and dissuasiveness that penalties for the violation of the obligations established by Directive 2008/48, pursuant to Article 23 thereof. The referring judge takes the view that national law does not comply with Article 23 of the Directive because the sanction provided for the violation of the obligation to assess a consumer's creditworthiness is a fine of small amount, the application of which in the main proceedings is time barred.

The Court of Justice begins its analysis by reminding that the obligation to check consumers' creditworthiness 'is of fundamental significance' from consumers since it is meant to protect them against 'the risks of over-indebtedness and bankruptcy' (para 29). Next, the Court observes that the choice of the applicable penalties is at the discretion of member states, as long as these penalties are effective, proportionate and dissuasive.

5 Judgment of 2 April 2020, *Condominio di Milano, via Meda*, C-329/19, EU:C:2020:263, para 37.

Against this background, the CJEU notes that from the written observations submitted to the court, additional penalties are applicable to the lender in case of failure to assess a consumer's creditworthiness, 'including civil penalties' (para 31). Indeed, the CJEU agrees that a small administrative fine is unlikely to be effective and dissuasive, since to achieve this result, 'those responsible must be deprived of the economic benefits derived from their infringement' (para 32). Notably, the Court adds that 'above all' the sanction will not be effective if it does not improve the situation of the consumer (para 32).

However, a decision on whether national law complies with the Directive requires considering the whole system of applicable penalties. The Court focuses, in particular, the compliance with Article 23 of the Directive of a penalty consisting in 'the forfeiture of entitlement to interest' (para 38). The Court reminds that in *HomeCredit Slovakia* (judgment of 9 November 2016, C-42/15, EU:C:2016:842, paras 69–71) it held that this sanction is proportionate in case of breach of 'a vitally important obligation' (para 39).

At this point, all that is left is for the CJEU is to make the convincing point that forfeit of interest is an effective and dissuasive sanction. Instead, the Court of Justice offers a rather tortious directive to the national court: 'the referring court must ascertain whether the imposition of the penalty provided for by Directive 93/13 is not less advantageous for the consumer than a simple penalty of forfeiture of entitlement to interest, provided for by the national legislation implementing Article 23 of Directive2008/48' (para 43).

This last remark is not easy to grasp in full. In fact, if the sanctions following the violation of the two directives are complementary, there is no need to compare them. If the sanctions are alternative, the more convincing solution seems to be letting the consumer choose the preferred sanction, since they are all aimed at protecting her economic interest.

Liability for Defective Product

Health Advice Published in a Printed Newsletter as a Service and Detached from the Nature of the Latter for the Product Liability Directive: Judgment in Case C-65/20 *KRONE – Verlag*

Could the inaccurate healthy tip published in a daily newspaper be regarded as a defective product within Article 2 of Directive 85/374, read together with Article 1 and 6 of the same Directive? The question was referred to the Court of Justice by the Supreme Court of Austria in a liability dispute between KRONE – Verlag, a publisher of a regional edition of a newspaper, and VI, a reader and consumer. The case is particularly relevant since it is the first time the Court of Justice decides on

the nature of the information provided by printed newspapers and their responsibility for misleading or inaccurate information under Directive 85/374.

On 31 December of 2016, KRONE published an article with health advice about alleviating rheumatic pain with the use of fresh coarsely grated horseradish. The article mistakenly advised the readers to use the plant for two to five 'hours' into the affected area instead of 'minutes'. VI, following the health advice, experienced severe pain due to a toxic skin reaction and, consequently, claimed compensation for physical harm against KRONE. The referring Court specified that the proceeding raises the question of whether a newspaper publisher or owner can be held liable under Directive 85/374 for the harmful consequences of inaccurate information contained in an article the publication of which it has authorised.

The Court of Justice's reasoning starts with the interpretation of the definition of 'product' given in Article 2 of Directive 85/374, which encompasses movables even if incorporated into another movable or into an immovable. First, the CJEU notes that the plain meaning of this definition makes it 'apparent' that it does not apply to services (para 27). This finding is reinforced by the consideration that the Directive defines 'producers' as manufacturers of a finished product, thereby confirming that services and service providers are excluded from its scope.

The reasoning of the Court then moves to address a second issue, namely whether health advice which, by its nature, constitutes a service, can be considered a product when incorporated into a physical item as a printed newspaper. Within the meaning of Article 6 of the Directive, a product is defective when it does not 'provide the safety which a person is entitled to expect, taking all the circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that it would be put and the time when the product was put into circulation' (para 33). Based on Article 6, the Court concludes that, being the provision of health advice a service, it is unrelated to the printed newspaper, which constitutes its medium. 'More specifically, that service does not concern either the presentation or the use of the latter. Therefore, that service is not part of the inherent characteristics of the printed newspaper' (para 36). Also, the interpretation of Article 6 confirms that the inaccurate advice at issue in the main proceedings falls outside the scope of Directive 85/374.

The reasonsing of the Court of Justice does not discuss explicitly an important trade-off made by this case. On the one hand, inaccurate health advice can have significant detrimental consequences, if followed. Imagine a newspaper giving grossly negligent information about the current pandemic – for example by publishing and open-Ed written by an anti-vaccine protester based on 'fake news'. It seems that the protective ethos of Directive 85/374 would justify expanding the scope of the Directive to cover content creation. On the other hand, making the Directive applicable to the content in printed newspapers is problematic in terms of

technological neutrality: would it be easy to find the publisher of an online newspaper liabile for inaccurate health advice? It seems difficult to stretch the scope of Directive 85/374 to this extent. It is a known fact that Directive 85/374 is struggling to keep up with the digital age and the European Commission is aware of this.[6] From this perspective, the present decision can be read as an exercise of judicial self-restraint in favour of the legislative process.

Service Law

Passenger Rights

Strike as an Ordinary Circumstance When Workers of a Subsidiary Join the Workers of the Parent Company: Judgment in Case C-613/20 *Eurowings*

The Court of Justice adds another piece to the puzzling relationship between the workers' right to strike and air passengers' right to compensation in case of flight cancellation or delay pursuant to Regulation (EC) 261/2004.

The dispute in the main proceedings relates to a flight from Salzburg to Berlin which was cancelled. According to the regulation, the passenger is entitled to receive 250 EUR due to the distance between the cities and the fact that the passenger was informed of the cancellation on short notice. However, as often is the case with these claims, the air carrier denied compensation, holding that the strike satisfies the conditions set by Article 5(3) of the regulation, according to which no compensation is due if 'the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken'.

The allegedly extraordinary circumstance which led to the flight cancellation was a strike. Strikes have long been considered as being inherent to aviation services; in the recent *Airhelp* decision (judgment of 23 March 2021, C-28/20, EU:C:2021:226), the Court of Justice clarified that Article 5(3) can be invoked successfully by an air carrier if the workers' demands are directed to public authorities.[7] The strike causing the cancellation of the flight at issue in the main proceedings had two features Eurowings relies upon. First, the strike lasted longer

6 C. Twigg-Flesner, *Guiding Principles for Updating the Product Liability Directive for the Digital Age* (Vienna: European Law Institute, 2021). The Commission has set up an expert group for issuing guidance on the interpretation of the Directive and for its amendment.

7 For a comment, see F. Esposito and L. de Almeida, 'European Union Litigation' (2021) 17(3) *European Review of Contract Law*, 320–334, 326–327.

than originally announced, in violation of the applicable legislation. Second, the workers who went on strike are employees of a subsidiary who joined the strike action in solidarity with the employees of the parent company upon a call by the trade union.

To analyse the issue, the Court of Justice begins its analysis with a powerful statement about the importance of strikes in labour relations, which anticipates its more detailed findings: 'a strike nevertheless remains one of the ways in which collective bargaining may manifest itself and, therefore, must be regarded as an event inherent in the normal exercise of the activity of the employer concerned, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of the fundamental right guaranteed in Article 28 of the Charter of Fundamental Rights of the European Union' (para 20).

In relation to the extension of the strike, which was in violation of national law, the Court of Justice relies on its previous decision in *Krüsemann and Others* (judgment of 17 April 2018, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paras 46–47). The CJEU confirms that the fact the strike is in violation of national legislation is irrelevant for the interpretation of Regulation 261/2004. The reason is the uniform level of air passenger protection and the level playing field between air carriers the regulation is intended to ensure; these objectives would be frustrated, in the Court's view, by 'making a distinction between strikes which, under the applicable national law, are legal and those which are not in order to determine whether they are to be classified as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation 261/2004 would make the right to compensation of passengers dependent on the social legislation specific to each Member State' (para 33).

The analysis of the relevance of the parent-subsidiary relationship is more innovative and, therefore, deserves more attention. The Court of Justice begins by noting that a strike aiming at increasing the working conditions of the striking workers would not be an extraordinary circumstance. Next, the CJEU explain why the fact that the workers are employed by a subsidiary of the company involved in the collective bargaining does not change this finding. The Court takes the view that it is rational for the employees of the subsidiary to participate in the strike since 'the social policy within a parent company and the group policy established by that company may have an impact on the social policy and strategy of the subsidiaries in that group' (para 23). This argument is supported analogically by reference to the Court of Justice's decision in *Organisationen Danske Slagterier* (judgment of 7 May 1991, C-338/89, EU:C:1991:192, para 18). In that occasion, the Court found that a strike 'which it has been announced that it could spread to

sectors affecting the activities of an undertaking initially not concerned by that strike does not constitute an abnormal and unforeseeable event' (para 26).

As usual with analogical reasoning, unfortunately, the commonality between the two cases remains implicity in the Court's decision. The commonality seems to be that if it is not 'an abnormal and unforeseeable event' that a strike extends beyond its original scope, *a fortiori* it shall not be extraordinary for the workers of a subsidiary to join a strike in circumstances such as those in the main proceedings. Making the commonality explicit helps seeing that the relevance of the reasoning in *Organisationen Danske Slagterier* is not particularly convincing. As noted above, if the strike is related to demands that the air carrier cannot meet, it falls outside the scope of Article 5(3) of the regulation. That was exactly the case in *Organisationen Danske Slagterier*. Accordingly, additional elaboration was needed to explain why the present case is analogous to the one in *Organisationen Danske Slagterier* and, at the same time, the present decision does not challenge *Airhelp*. Be this as it may be, the finding that it is in the self-interest of the subsidiary's workers seems strong enough to stand on its own.

A final comment. In constructing the analogy, the Court makes the counter-intuitive comment that the workers of the subsidiary acting in their own self-interest are actually acting 'in solidarity with the staff of its parent company' (para 28). In any event, this case represents an important addition to the image of the worker as being developed in EU law.[8]

Services of General Economic Interest

Incompatibility of the Financial Compensation of Reduced Electricity Price for Vulnerable Consumers with the Non-Discrimination Principle of Public Service Obligations: Judgment in Case C-683/19 *Viesgo Infraestructuras Energéticas*

The present case concerns the interpretation of Article 3(2) of Directive 2009/72, particularly the provision on public service obligations consisting of supplying electricity at a reduced rate to vulnerable consumers. The Spanish law 24/2013 lays down a methodology for allocating the costs of a reduced rate tariff applied to vulnerable consumers to a group of five companies, being the applicant one of them: E.ON, the predecessor-in-law of Viesgo. The common feature of these companies is that they simultaneously carry on electricity production, distribution, and retail activities. This case is of particular interest since it gave the Court

8 See, M. Gruber-Risak and T. Dulliger, *The Concept of 'Worker' in EU Law: Status Quo and Potential for Change* (Brussels, European Trade Union Institute: 2018).

the opportunity to return on the case-law establishing the conditions Member States must comply with to intervene in fixing electricity prices, more precisely the requirements of non-discrimination and proportionality, and to interpret them in line with the financial mechanisms used to finance the reduced tariff rate of vulnerable consumers.

The Court of Justice begins its reasoning by examining whether the national measure at issue amounts to a public service obligation within the meaning of Article 3(2) of the Directive 2009/72 from two perspectives: one is the regulation of a reduced tariff for vulnerable consumers, the other is the financial contribution imposed on a group of companies intended to cover its cost. First, the Court holds that the concept of 'public service obligations' corresponds to public intervention measures in the electricity market to pursue a general economic interest. Therefore, the obligation of a retail undertaking to supply electricity to vulnerable consumers for a reduced tariff corresponds to a public service obligation. Second, Spanish law imposes an obligation on a group of companies to pay a financial contribution to cover the costs of the reduced rate for vulnerable consumers. Since these contributions are allocated exclusively to financing the regulated discount, the Court argues there is an inextricable link between that financial contribution and the public service obligation (para 40).

On these grounds, the Court recalls that Article 106 TFEU allows Member States to impose on undertakings operating in the electricity sector public service obligations, which may relate to the price of supplies. Although the State intervention in electricity prices constitutes an obstacle to competition, the Court of Justice refers to its settled case-law in *ANODE* (judgment of 7 September 2016, C-121/15, EU:C:2016:637) and *Overgas Mrezhi and Balgarska gazova asotsiatsia* (judgment of 30 April 2020, C-5/19, EU:C:2020:34) to recall the three conditions of acceptability of the State intervention on prices within the framework of Directive 2009/72. The intervention must pursue an objective of general economic interest; second, it must comply with the principle of proportionality; and third, it must be clearly defined, transparent, non-discriminatory, verifiable, and guarantee equality of access for EU electricity undertakings to national consumers.

According to the latter condition, public service obligations must be non-discriminatory. The Court finds that this is not the case in Spain. The financial contribution is imposed on a group of vertically integrated companies operating electricity production, distribution, and retail activities simultaneously. The national measure excludes other undertakings that might have the financial capacity of bearing the costs of the reduced tariff for vulnerable consumers; for example, undertakings operating at the production or retail level only.

In that regard, the Court of Justice argues that it is for the national court to decide whether the differentiation made between undertakings about the burden

of covering the costs of vulnerable consumers is objectively justified (para 46). Nevertheless, the Court does not refrain from suggesting that is apparent from the order for reference and the national legislature that the differentiation criterion chosen by national law is not objectively justified and, therefore, shall be incompatible with Article 3(2) of the Directive 2009/72.

By its second question, the referring court asked whether Article 3(2) of Directive 2009/72 could preclude a national system that finances the reduced rate of vulnerable consumers without any temporal limit and compensatory measure.

The CJEU analyses, first, whether the absence of any temporal limitation on such public services obligations infringes the principle of proportionality. The settled case-law of the Court in *Federulity and Others* (judgment of 20 April 2010, C-265/08, EU:C:2010:205) establishes that national measures could intervene in electricity prices only if it is necessary to achieve the objective of general economic interest and for a period that is necessarily limited in time. However, the Court notes that the measure at stake is not about the State regulation of energy price, but the system for financing the reduced tariff price for vulnerable consumers. Therefore, the Court concludes that the obligation of periodically reviewing the regulated prices is not applicable to a measure creating a system of financing the regulated discount of vulnerable consumers (para 57).

Regarding the absence of the compensatory measure, the Court finally noted that Article 3(2) of the Directive makes no mention of a possible right to compensation for undertakings taking over public services obligations (para 59). Consequently, the absence of such compensation under that system for financing a public service obligation is not contrary to Directive 2009/72.

Public Procurement Law

The Distinction Between Selection Criteria and the Condition for Performance of Contracts in the Public Procurement Directive: Judgment in Case C-295/20 *Sanresa*

The present case concerns the interpretation of certain provisions of Directive 2014/24, in particular Articles 58 and 70 thereof. Article 58 concerns the selective criteria that a contracting authority may request to a participant in a public procurement procedure and Article 70 refers to conditions for performance of contracts. A contracting authority in Lithuania published an international tender relating to a contract for hazardous waste management services, which would require, among other activities, the shipment of waste from one Member State to

another. Since Regulation 1013/2006 requires economic operators to hold a certain authorisation to perform cross-borders transference of waste, the contracting authority rejected a tendered because it failed to prove the possession of such authorisation. The judgment is interesting since it gives the Court the chance of clarifying the distinction between selection criteria in a public procurement procedure and the conditions for performance of contracts within the Public Procurement Directive.

The first referred question asks the Court whether Article 18(2) and Articles 58 and 70 of Directive 2014/24 are to be interpreted as meaning that an economic operator wishing to ship waste from a Member State to another must possess the authorisation concerned by the shipment, in compliance with Article 2(35) and Article 3 of Regulation 1013/2006 concerning the shipment of waste in the European Union.

The reasoning of the Court starts by clarifying that only qualitative selection criteria can be imposed by contracting authorities as a condition to enter in a public procurement procedure according to Articles 56(1)(b), 57 and 58 of Directive 2014/24. These provisions introduce three selection criteria. First, Article 58(2) permits contracting authorities to require economic operators to be enrolled in a professional or trade register in their Member State of establishment, as well as, in the case of procurement for services, require a particular authorisation or membership of an organisation necessary to provide the service in their country of origin. The Court finds that the obligation to obtain the authorisation to ship waste from one Member State to another cannot be equated with the requirements established by Article 58(2). The second selection criteria refers to the suitability to pursue the professional activity as stated in Article 58(1)(a), and the economic and financial standing of an economic operator as referred to in Article 58(1)(b). The Court also excludes the equivalence of these criteria and the authorization requested in Regulation 1013/2006, which neither refers to a professional activity nor to the economic and financial conditions of an undertaking. The third and last selection criterion relates to the technical and professional ability of the economic operators as referred to in Article 58(1) and 58(4). Contracting authorities can request economic operators to possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard, but those assessments depend on a retrospective evaluation of the experience gained by the economic operator. However, the CJEU finds that this criterion does not extend to an authorisation needed to perform an economic activity expected in the tender at issue.

After excluding the claim that authorisation to perform the shipment of waste from one Member State to another could be one of the three selection criteria permitted by Directive 2014/24, the Court moves further to interpret whether the

same authorisation could be considered a condition for the performance of contract within Article 70 of the same Directive. Bearing in mind these conditions may include economic, innovation-related, environmental, social or employment-related considerations, the Court concludes that such an authorisation relates to the performance of the contract. Having analysed Article 70 to answer the first question, the Court considers that there is no need to answer the second question and moves to answer the third question.

By the third question, the referring judge asked whether Article 70 of Directive 2014/24, in conjunction with Article 18(1) thereof, is to be interpreted as that a tenderer's bid may not be rejected solely on the ground that the tenderer has not produced proof that it meets a condition for performance of the contract concerned at the time of submitting the bid. To answer this question, the Court raises two points. First, the failure of contracting authorities to state any condition for performance of contracts in the call for tenders does not make the procurement procedure unlawful when the conditions in question arise from EU legislation – in the present case, Regulation 1013/2006. Second, a tenderer can wait until it is awarded the contract to supply proof that it fulfils the conditions for performance of the contract.

The judgment importantly clarifies that an authorisation required by EU law is to be considered a condition for performance of a contract, rather than a selection criterion imposed during the public procurement procedure. Failing to prove a performance condition at the timing of submitting the tender does not serve as a ground to exclude the economic operator from a public procurement procedure.

Note: The primary responsibility for the areas of Unfair Commercial Practices, Unfair Contract Terms, Passenger Rights and Consumer Credit lies with Fabrizio Esposito; for the areas of General European Contract Law, Services of General Economic Interest, Liability for Defective Product, and Public Procurement Law with Lucila de Almeida.