



Fact sheet

ELECTRONIC COMMERCE AND CONTRACTUAL OBLIGATIONS

The rules on electronic commerce lie at the heart of Directive 2000/31/EC¹ on certain legal aspects of information society services, in particular electronic commerce, in the internal market, which lays down provisions on the establishment and information requirements applicable to information society service providers and on the liability of intermediary service providers.

However, electronic commerce affects a variety of areas of economic life falling outside the ambit of that directive, such as games of chance, questions relating to agreements or practices governed by cartel law and taxation (see Article 1(5) of the Directive on electronic commerce concerning the directive's objective and scope). Similarly, copyright and related rights, trade mark rights, consumer protection and the protection of personal data fall within the realm of electronic commerce but are governed by a set of specific directives and regulations.

This fact sheet provides an overview of the relevant case-law. To that end, it divides the main judgments covering this range of areas into two parts, one relating to aspects of contractual obligations between parties and the other the limits on electronic commerce.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

I. Contractual relations between parties

1. Conclusion of the contract

Judgment of 5 July 2012, Content Services (C-49/11, EU:C:2012:419)

The company Content Services operated a subsidiary in Mannheim (Germany) and offered various services online on its website, configured in German and also accessible in Austria. On that site, it was possible inter alia to download free software or trial versions of software which incur a charge. Before placing an order, internet users had to fill in a registration form and tick a specific box on the form declaring that they accepted the general terms and conditions of sale and waived their right of withdrawal.

That information was not shown directly to internet users, but they could nonetheless view it by clicking on a link on the contract sign-up page. The conclusion of a contract was impossible if the box had not been ticked. Next, the internet user concerned would receive an email from Content Services which did not contain any information on the right of withdrawal but, as before, contained a link in order to view the information. The Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) referred a question to the Court of Justice for a preliminary ruling on the interpretation of Article 5(1) of Directive 97/7/EC.² It asked whether a business practice consisting of making the information referred to in that provision accessible to the consumer only via a hyperlink on a website of the undertaking concerned meets the requirements of that provision.

According to the Court, Article 5(1) of Directive 97/7/EC must be interpreted as meaning that that business practice does not meet the requirements of that provision, since the information is neither 'given' by that undertaking nor 'received' by the consumer and a website cannot be regarded as a 'durable medium'.

The consumer must receive confirmation of that information without there being any requirement for active conduct on his part. Furthermore, if a website is to be regarded as a durable medium, it must ensure that the consumer, in a similar way to paper form, is in possession of the information referred to in that provision to enable him to exercise his rights where necessary. It must allow the consumer to store the information which has been addressed to him personally, ensure that its content is not altered and that the information is accessible for an adequate period, and give consumers the possibility to reproduce it unchanged (paragraphs 35, 42, 43, 50 and 51 and the operative part).

² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

Judgment of 25 January 2017, BAWAG (C-375/15, EU:C:2017:38) ³

The bank BAWAG, which operated in Austria, used a standard contractual term to have consumers sign up to online banking services ('e-banking').

Under that term, 'notices and statements which the bank has to provide to the customer or make available to him shall be sent by post or electronically by means of e-banking'. The information could be sent using an online account messaging system. Consumers were able to view, reproduce and download the messages. The messages in the e-banking online accounts remained there without change and were not deleted during a period of time adequate for the purposes of informing those consumers, so that they could be viewed and reproduced unchanged by electronic or printed means. However, consumers were not informed of the receipt of a new message by any other means.

The Oberster Gerichtshof (Supreme Court, Austria) referred a question to the Court of Justice for a preliminary ruling in order to ascertain whether Article 41(1) of Directive 2007/64/EC, ⁴ read in conjunction with Article 36(1) thereof, must be interpreted as meaning that information sent by means of the electronic mailbox of an online banking platform is 'provided on a durable medium'.

The Court held that certain websites have to be classified as 'durable mediums' within the meaning of Article 4(25) of that directive (paragraphs 43 to 45).

However, changes to the framework contract, which are sent by the payment service provider to the user of those services by means of an electronic mailbox, may not be considered to have been provided on a durable medium unless the following two conditions are met:

- the website must allow only that user to store and reproduce information in such a way that he may access it for an adequate period;
- the transmission of that information must be accompanied by active behaviour on the part of the payment service provider aimed at drawing the user's attention to the availability of that information.

The sending of an email to the address regularly used by the user of those services to communicate with other persons and which the parties agreed to use in the framework contract entered into between the payment service provider and that user could also constitute such behaviour. The address thus chosen may not, however, be the address assigned to that user on the online banking website managed by the payment service provider (paragraphs 51 and 53 and the operative part).

2. Applicable law/jurisdiction

³ A summary of the judgment can be found in the 2017 Annual Report, p. 71.

⁴ Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market, amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (OJ L 319, 5.12.2007, p. 1).

Judgment of 28 July 2016, Verein für Konsumenteninformation (C-191/15, EU:C:2016:612) ⁵

The undertaking Amazon EU Sàrl, established in Luxembourg, sold goods online to consumers established in various Member States. In the main proceedings, the Austrian consumer protection association (Verein für Konsumenteninformation) had brought an action for an injunction, based on Directive 2009/22/EC,⁶ claiming that the contractual terms used by Amazon were contrary to legal prohibitions or accepted principles of morality.

Proceedings having been brought before it by the Austrian association, the Oberster Gerichtshof (Supreme Court, Austria) enquired whether a term in the general terms and conditions of sale of a contract concluded in the course of electronic commerce between a seller or supplier and a consumer, under which the contract is to be governed by the law of the Member State in which the seller or supplier is established, is unfair within the meaning of Article 3(1) of Directive 93/13/EEC.⁷ The Oberster Gerichtshof also asked whether the processing of personal data by an undertaking is subject, in accordance with Article 4(1)(a) of Directive 95/46/EC,⁸ to the law of the Member State towards which that undertaking directs its activities.

According to the Court, the Rome I⁹ and Rome II¹⁰ Regulations must be interpreted as meaning that the law applicable to an action for an injunction is to be determined in accordance with Article 6(1) of the Rome II Regulation, since the undermining of legal stability results from the use of unfair terms. On the other hand, the law applicable to the assessment of the contractual term in question must be determined pursuant to the Rome I Regulation, whether that assessment is made in an individual action or in a collective action.

However, it is apparent from Article 6(2) of the Rome I Regulation that the choice of the applicable law is without prejudice to the application of the mandatory provisions laid down by the law of the country of residence of the consumers whose interests are being defended by means of that action for an injunction. Those provisions may include the provisions transposing Directive 93/13/EEC, provided that they ensure a higher level of protection for the consumer (paragraphs 59 and 60 and point 1 of the operative part).

Thus, a term which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair within the meaning of Article 3(1) of Directive 93/13/EEC, in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term (paragraph 71 and point 2 of the operative part).

⁵ A summary of the judgment can be found in the 2016 Annual Report, p. 41.

⁶ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ L 110, 1.5.2009, p. 30).

⁷ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

⁹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

¹⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

Moreover, Article 4(1)(a) of Directive 95/46/EC must be interpreted as meaning that the processing of personal data carried out by an undertaking engaged in electronic commerce is governed by the law of the Member State to which that undertaking directs its activities, if it is shown that the undertaking carries out the data processing at issue in the context of the activities of an establishment situated in that Member State. Both the degree of stability of the arrangements and the effective exercise of activities in the Member State in question must be assessed (paragraphs 76, 77 and 81 and point 3 of the operative part).

Judgment of 7 December 2010 (Grand Chamber), Pammer and Alpenhof (C-585/08 and C-144/09, EU:C:2010:740) ¹¹

The joined cases *Pammer and Alpenhof* concern two sets of main proceedings dealing with similar issues. In *Pammer*, a consumer domiciled in Austria brought proceedings against a cargo shipper, established in Germany, concerning the reimbursement of the voyage cost. He argued that the vessel and the voyage did not correspond to the description provided on the website of the agency that acted as intermediary, also established in Germany, advertising such voyages.

The Austrian first-instance court found that it had jurisdiction to hear the case. By contrast, the appellate court held that the Austrian courts did not have jurisdiction. The question referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) asked the Court of Justice to interpret the concept of contract combining travel and accommodation for an inclusive price, as referred to in Article 15(3) of Regulation (EC) No 44/2001, ¹² to which the provisions of Section 4 of Chapter II thereof apply. The national court also wondered whether the fact that the Austrian consumer's attention had been drawn to the voyage by consulting the website of the intermediary agency, without the voyage having been reserved by internet, was sufficient to find that the Austrian courts had jurisdiction.

The second case, *Alpenhof*, involved proceedings brought by an Austrian company, which operated a hotel and had its seat in Austria, against a consumer, domiciled in Germany, concerning the payment of a bill for hotel services agreed upon by an exchange of emails based on information provided on the applicant company's website. The Austrian courts dismissed the action on the ground that they lacked jurisdiction.

According to the Court, a contract concerning a voyage by freighter may constitute a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation if that voyage by freighter involves, for an inclusive price, accommodation too and is for a period of more than 24 hours (paragraphs 45 and 46 and point 1 of the operative part).

In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, it should be ascertained whether that trader was envisaging doing business with consumers domiciled in one or more Member States.

¹¹ A summary of the judgment can be found in the 2010 Annual Report, p. 49.

¹² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established, and the possibility of making and confirming the reservation in that other language. On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established (paragraphs 92 to 94 and point 2 of the operative part).

Judgment of 6 September 2012, Mühlleitner (C-190/11, EU:C:2012:542) ¹³

The main proceedings involved a dispute between a consumer, Ms Daniela Mühlleitner, domiciled in Austria, and car sellers domiciled in Hamburg, Germany, concerning the purchase of a car. After locating their contact details on their website, Ms Mühlleitner telephoned the sellers from Austria, where she later received an offer by email. The contract was nonetheless concluded at the sellers' premises in Germany.

Subsequently, the first-instance court, the Landesgericht Wels (Regional Court, Wels, Austria), rejected the action on the ground that it lacked jurisdiction. The Oberlandesgericht Linz (Higher Regional Court, Linz, Austria) confirmed the decision, recalling that a purely 'passive' website was not sufficient for it to be considered that an activity is directed to the consumer's State. Ms Mühlleitner brought an appeal on a point of law against the judgment before the Oberster Gerichtshof (Supreme Court, Austria). That court asked the Court of Justice whether the application of Article 15(1)(c) of the Brussels I Regulation ¹⁴ presupposes that the contract between the consumer and the trader has been concluded at a distance.

The Court ruled that Article 15(1)(c) of Regulation (EC) No 44/2001 must be interpreted as not requiring the contract between the consumer and the trader to be concluded at a distance.

In the first place, that provision does not expressly make its application conditional on the fact that the contracts falling within its scope have been concluded at a distance. In the second place, as regards a teleological interpretation of that provision, the addition of a condition concerning the conclusion of consumer contracts at a distance would run counter to the objective of that provision, in particular the objective of protecting consumers as the weaker parties to the contract. In the third place, the essential condition to which the application of Article 15(1)(c) of that regulation is subject is that relating to a commercial or professional activity directed to the State of the consumer's domicile. In that respect, both the establishment of contact at a distance and the reservation of goods or services at a distance or, a fortiori, the conclusion of a consumer contract at a distance are indications that the contract is connected with such an activity (paragraphs 35, 42, 44 and 45 and the operative part).

¹³ A summary of the judgment can be found in the 2012 Annual Report, p. 28.

¹⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

Judgment of 17 October 2013, Emrek (C-218/12, EU:C:2013:666)

Mr Emrek, domiciled in Saarbrücken (Germany), was looking for a car and had learned from acquaintances of Mr Sabranovic's business. Mr Sabranovic operated a business selling second-hand motor vehicles in Spicheren (France). He also had a website which contained the contact details for his business, including French telephone numbers and a German mobile telephone number, together with the respective international codes. However, Mr Emrek did not learn of the business from the website. Thus, Mr Emrek, as a consumer, concluded a written contract for the sale of a second-hand motor vehicle with Mr Sabranovic at his premises.

Mr Emrek subsequently brought an action against Mr Sabranovic under the warranty before the Amtsgericht Saarbrücken (Local Court, Saarbrücken, Germany). The court held that it lacked jurisdiction. Mr Emrek appealed against that decision before the referring court, the Landgericht Saarbrücken (Regional Court, Saarbrücken, Germany). The referring court sought to ascertain whether the application of Article 15(1)(c) of Regulation (EC) No 44/2001 required the existence of a causal link between the trader's activities directed to the Member State in which the consumer is domiciled over the internet and the conclusion of contracts.

The Court pointed out that in its judgment in *Pammer and Alpenhof* (C-585/08 and C-144/09), it had identified a non-exhaustive list of factors capable of constituting evidence which national courts may use to determine whether the essential condition of commercial activity directed to the Member State of the consumer's domicile is fulfilled (paragraph 27).

It found that Article 15(1)(c) of Regulation (EC) No 44/2001 must be interpreted as meaning that it does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely a website, and the conclusion of the contract with that consumer. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity (paragraph 32 and the operative part).

Judgment of 21 May 2015, El Madjoub (C-322/14, EU:C:2015:334)¹⁵

The dispute in the main proceedings concerned the sale of a motor vehicle through a website. The general terms and conditions of sale accessible on that website contained an agreement conferring jurisdiction on a court in a Member State. The window containing those general terms and conditions of sale did not open automatically upon registration and upon every individual sale; instead the purchaser had to click a specific box to accept the terms and conditions.

The Landgericht Krefeld (Regional Court, Krefeld, Germany) asked the Court of Justice to determine whether the validity of a jurisdiction clause is affected if the click-wrapping technique is used.

¹⁵ A summary of the judgment can be found in the 2015 Annual Report, p. 35.

In the first place, regarding the question of ensuring the real consent of the parties, which is one of the aims of Article 23(1) of Regulation (EC) No 44/2001, the Court held that the purchaser in the main proceedings had expressly accepted the general terms and conditions at issue, by clicking the relevant box on the seller's website. In the second place, it found that it follows from a literal interpretation of Article 23(2) of that regulation that it requires there to be the 'possibility' of providing a durable record of the agreement conferring jurisdiction, regardless of whether the text of the general terms and conditions has actually been durably recorded by the purchaser before or after he clicks the box indicating that he accepts those conditions.

The Court observed that the purpose of that provision is to treat certain forms of electronic communications in the same way as written communications in order to simplify the conclusion of contracts by electronic means, since the information concerned is also communicated if it is accessible on screen. In order for electronic communication to offer the same guarantees, in particular as regards evidence, it is sufficient that it is 'possible' to save and print the information before the conclusion of the contract. Consequently, since click-wrapping makes it possible to print and save the text of the terms and conditions before the conclusion of the contract, the fact that the web page containing that information does not open automatically upon registration on the website and during each purchase cannot call into question the validity of the agreement conferring jurisdiction. Click-wrapping therefore constitutes a communication by electronic means within the meaning of Article 23(2) of Regulation (EC) No 44/2001 (paragraphs 33, 39 and 40 and the operative part).

Judgment of 25 January 2018, Schrems (C-498/16, EU:C:2018:37)

Mr Maximilian Schrems had been a private user of the social network Facebook since 2008. He brought class actions against the company Facebook Ireland Limited. Furthermore, in 2011, he opened a Facebook page registered and established by him, in order to report to internet users on his legal proceedings. He founded a non-profit organisation the purpose of which was to enforce the fundamental right to data protection and provide financial support for test cases.

In proceedings between Mr Maximilian Schrems and Facebook Ireland Limited concerning applications seeking declarations and an injunction, disclosure and production of Facebook accounts, the Oberster Gerichtshof (Supreme Court, Austria) enquired whether Article 15 of Regulation (EC) No 44/2001 must be interpreted as meaning that a person loses his consumer status if, after using a private Facebook account for several years, he publishes books, delivers lectures for remuneration or manages websites. The national court also asked whether Article 16 of that regulation must be interpreted as meaning that a consumer can also invoke at the same time as his own claims under a consumer contract similar claims of other consumers who are domiciled in the same Member State, in another Member State, or in a non-Member State.

The Court stated that the notion of 'consumer' must be independently and strictly construed. To determine whether Article 15 applies, the contract must have been concluded between the parties for the purpose of a use of the relevant goods or services that is other than a trade or professional use. As regards a person who concludes a contract for a purpose which is partly concerned with his trade or profession, the link between the contract and the trade or profession of the person concerned is so slight as to be marginal and, therefore, has only a

negligible role in the context of the supply (paragraphs 28 to 32, 39, 40 and 41 and point 1 of the operative part).

Next, the Court found that the consumer is protected only in so far as he is, in his personal capacity, the plaintiff or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts. The same considerations must also apply to a consumer to whom the claims of other consumers have been assigned. Indeed, Article 16(1) necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned (paragraphs 44 and 45).

In addition, the assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction. It follows that the jurisdiction of courts cannot be established through the concentration of several claims in the person of a single applicant. The regulation does not apply to the proceedings brought by a consumer as in the instant case (paragraphs 48 and 49 and point 2 of the operative part).

3. Consumer protection

Judgment of 16 October 2008, Bundesverband der Verbraucherzentralen (C-298/07, EU:C:2008:572)

DIV, an automobile insurance company, offered its services exclusively on the internet. On its web pages, it mentioned its postal and email addresses but not its telephone number. Its telephone number was communicated only after the conclusion of an insurance contract. However, persons interested in DIV's services were able to ask questions via an online enquiry template, the answers to which were sent by email. The Bundesverband der Verbraucherzentralen (the German Federation of Consumers' Associations) took the view that DIV had an obligation to mention its telephone number on its website. That would be the only means of guaranteeing direct communication.

The Bundesgerichtshof (Federal Court of Justice, Germany) decided to ask the Court of Justice whether Article 5(1)(c) of Directive 2000/31/EC¹⁶ requires a telephone number to be given.

The Court held that Article 5(1)(c) of Directive 2000/31/EC must be interpreted as meaning that a service provider is required to supply to recipients of the service, before the conclusion of a contract with them, in addition to its email address, other information which allows the service provider to be contacted rapidly and communicated with in a direct and effective manner.

That information does not necessarily have to be a telephone number. It may be in the form of an electronic enquiry template through which the recipients of the service can contact the service provider via the internet, to whom the service provider replies by email except in situations where a recipient of the service, who, after contacting the service provider

¹⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ L 178, 17.7.2000, p. 1).

electronically, finds himself without access to the electronic network, requests the latter to provide access to another, non-electronic means of communication (paragraph 40 and the operative part).

Judgment of 3 September 2009, Messner (C-489/07, EU:C:2009:502) ¹⁷

Ms Messner, a German consumer, withdrew from the purchase of a laptop computer over the internet. The seller of the computer had refused to repair free of charge a defect that had appeared eight months after the purchase. Ms Messner subsequently stated that she was revoking the contract of sale and offered to return the laptop computer to the seller in return for a refund of the purchase price. That revocation was carried out within the period provided for in the BGB (German Civil Code) in so far as Ms Messner had not received effective notice, provided for in the provisions of that Code, such as to commence the period for withdrawal. Ms Messner claimed reimbursement of EUR 278 before the Amtsgericht Lahr (Local Court, Lahr, Germany). In opposition to that claim, the seller submitted that Ms Messner was, in any event, obliged to pay him compensation for value inasmuch as she had been using the laptop computer for approximately eight months.

In its judgment, the Court found that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC ¹⁸ must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract.

If the consumer were required to pay such compensation merely because he had the opportunity to use the goods while they were in his possession, he would be able to exercise his right of withdrawal only against payment of that compensation. Such an outcome would be clearly at variance with the wording and purpose of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC and would, in particular, deprive the consumer of the opportunity to make completely free and independent use of the period for reflection granted to him by that directive.

Likewise, the efficiency and effectiveness of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply because he had examined and tested the goods. To the extent to which the right of withdrawal is intended precisely to give the consumer that opportunity, the fact of having made use of it cannot have the consequence that the consumer is able to exercise that right only if he pays compensation.

However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and

¹⁷ A summary of the judgment can be found in the 2009 Annual Report, p. 35.

¹⁸ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine (paragraphs 23, 24 and 29 and the operative part).

Judgment of 15 April 2010, Heinrich Heine (C-511/08, EU:C:2010:189) ¹⁹

A mail-order undertaking, Heinrich Heine, provided in its general terms and conditions of sale that the consumer is to pay a flat-rate charge of EUR 4.95 for delivery. The supplier would not refund that amount even if the consumer were to exercise his right of withdrawal. The Verbraucherzentrale Nordrhein-Westfalen, a German consumer association, brought an action for an injunction to prevent Heinrich Heine from engaging in that practice, arguing that the delivery costs should not be charged to consumers in the event of withdrawal. According to the Bundesgerichtshof (Federal Court of Justice, Germany), German law does not explicitly grant the purchaser any right to reimbursement of the costs of delivering the goods ordered. Since the court was unsure about the compatibility with Directive 97/7/EC ²⁰ of charging the costs of delivering the goods to the consumer, even where he has withdrawn from the contract, it asked the Court of Justice to interpret that directive.

In its judgment, the Court held that Article 6(1), first subparagraph, second sentence, and Article 6(2) of Directive 97/7/EC must be interpreted as precluding national legislation which allows the supplier under a distance contract to charge the costs of delivering the goods to the consumer where the latter exercises his right of withdrawal.

Those provisions authorise suppliers to charge consumers, in the event of their withdrawal, only the direct cost of returning the goods. If consumers also had to pay the delivery costs, such a charge, which would necessarily dissuade consumers from exercising their right of withdrawal, would run counter to the very objective of Article 6.

In addition, charging them in that way would compromise a balanced sharing of the risks between parties to distance contracts, by making consumers liable to bear all of the costs related to transporting the goods (paragraphs 55 to 57 and 59 and the operative part).

Judgment of 6 July 2017, Air Berlin (C-290/16, EU:C:2017:523)

The German airline Air Berlin introduced into its general terms and conditions of sale a term under which, if a passenger cancelled his flight booking at the economy rate or did not take the flight, he would be charged a handling fee of EUR 25 on the amount to be reimbursed to him. The Bundesverband der Verbraucherzentralen (German Federal Union of Consumer Organisations) argued that that term was invalid under German law because it unduly disadvantaged customers. Moreover, Air Berlin could not charge any separate fees for the fulfilment of a legal obligation. The Bundesverband therefore brought an action before the German courts seeking an injunction against Air Berlin.

¹⁹ A summary of the judgment can be found in the 2010 Annual Report, p. 28.

²⁰ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19).

In the same action, the Bundesverband challenged the practices of Air Berlin relating to the display of prices on its website. During a simulated online booking in 2010, the Bundesverband had found that the taxes and charges indicated were much lower than those actually levied by the airports concerned. The Bundesverband submitted that the practice could mislead consumers and was contrary to the rules on price transparency laid down in EU law on the operation of air services.²¹ The Bundesgerichtshof (Federal Court of Justice, Germany) asked the Court of Justice, first, whether Regulation (EC) No 1008/2008 is to be interpreted as meaning that, when publishing their air fares, air carriers must specify the actual amount of charges and therefore may not partially include them in their air fares, and, secondly, whether that regulation precludes the application of a national law on general terms and conditions of sale, which is based on EU law, according to which a separate handling fee cannot be imposed on customers who have not taken a flight or cancelled their booking.

The Court replied that the third sentence of Article 23(1) of Regulation (EC) No 1008/2008 must be interpreted as meaning that, when publishing their air fares, air carriers must specify separately the amounts payable by customers in respect of taxes, airport charges and other charges, surcharges or fees referred to in that regulation. Furthermore, they may not, as a consequence, include those items, even partially, in the airfare. Article 23(1) of Regulation (EC) No 1008/2008 seeks to ensure, in particular, that there is information and transparency with regard to prices for air services from an airport located in a Member State and accordingly to contribute to safeguarding protection of customers who use those services. Moreover, a different interpretation would deprive that provision of all practical effect (paragraphs 29 to 32 and 36 and point 1 of the operative part).

Article 22(1) of Regulation (EC) No 1008/2008 must be interpreted as not precluding the application of national legislation transposing Directive 93/13/EEC from leading to a declaration of invalidity of a term in general terms and conditions of sale which allows separate flat-rate handling fees to be billed to customers who did not take a flight or who cancelled their booking. The Court found that the general rules protecting consumers against unfair terms also apply to contracts of carriage by air.

Thus, Regulation (EEC) No 2409/92, repealed by Regulation (EC) No 1008/2008, stated in its fifth recital that it was appropriate 'to complement price freedom with adequate safeguards for the interests of consumers and industry'.

Judgment of 10 July 2019, Amazon EU (C-649/17, EU:C:2019:576)

Amazon EU Sàrl, a company established in Luxembourg, offers online sales of various products. In the main proceedings, the Federal Union of Consumer Organisations and Associations, Germany ('The Federal Union') had brought an application for an injunction before a regional court relating to Amazon EU practices for the display of information on its website www.amazon.de and the possibility for consumers to contact that company. Since that Court dismissed that application, the Federal Union brought an appeal against that decision before a

²¹ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p. 3).

higher regional court, which was also dismissed. In those circumstances, the Federal Union brought an appeal on a point of law (Revision) before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany).

The request for a preliminary ruling concerned the interpretation of Article 6(1)(c) of Directive 2011/83/EU.²²

First, the Court noted that the possibility, for consumers, to contact traders quickly and to communicate with them efficiently, as provided for in that provision, is of fundamental importance for ensuring and effectively implementing consumer rights and, in particular, the right of withdrawal, the detailed arrangements and conditions for the exercise of which are set out in Articles 9 to 16 of that directive. However, in interpreting that provision, it is necessary to ensure the right balance between a high level of consumer protection and the competitiveness of undertakings, as is stated in recital 4 of Directive 2011/83/EU, while respecting the undertaking's freedom to conduct a business, as set out in the Charter of Fundamental Rights of the European Union ('the Charter') (paragraphs 41 and 44).

The Court held that it is for the national court to assess whether, in the light of all the circumstances in which consumers make contact with traders through a website and in particular of the presentation and functionality of that site, the means of communication made available to those consumers by those traders allow consumers to contact traders quickly and to communicate with them efficiently, in accordance with Article 6(1)(c) of Directive 2011/83/EU (paragraph 47).

In that regard, the Court pointed out that an unconditional obligation to provide consumers, in all circumstances, with a telephone number, or even to put in place a telephone or fax line, or to create a new email address in order to allow consumers to contact traders seems to be disproportionate (paragraph 48).

The Court thus held that it is necessary to interpret the words 'where available' provided for in Article 6(1)(c) of Directive 2011/83/EU as covering cases where traders have a telephone or fax number and do not use them solely for purposes other than contacting consumers. In the absence thereof, that provision does not impose on traders the obligation to inform consumers of that telephone number, to provide a telephone or fax line, or to create a new email address to allow consumers to contact them (paragraphs 51, 53 and the operative part).

Secondly, having examined whether those traders may, in circumstances such as those in the main proceedings, make use of means of communication which are not mentioned in Article 6(1)(c) of Directive 2011/83/EU, such as instant messaging or a telephone callback system, the Court held that Article 6(1)(c) of Directive 2011/83/EU must be interpreted as meaning that, although that provision requires traders to make available to consumers a means of communication capable of satisfying the criteria of direct and effective communication, it does

²² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

not preclude those traders from providing other means of communication than those listed in that provision in order to satisfy those criteria (paragraphs 52, 53 and the operative part).

4. Protection of personal data

Judgment of 1 October 2015, Weltimmo (C-230/14, EU:C:2015:639) ²³

Weltimmo, a company registered in Slovakia, ran a property dealing website concerning Hungarian properties. In that context, it processed the personal data of advertisers. The advertisements were free of charge for one month but thereafter a fee was payable. Many advertisers sent a request by email for the deletion of both their advertisements and their personal data at the end of the first month. However, Weltimmo did not delete those data and charged the interested parties for the price of its services. As the amounts charged were not paid, Weltimmo forwarded the personal data of the advertisers to debt collection agencies. The advertisers complained to the Hungarian data protection authority. That authority imposed on Weltimmo a fine of 10 million Hungarian forint (HUF) (approximately EUR 32 000) for having infringed the Hungarian law transposing Directive 95/46/EC. ²⁴

Weltimmo challenged the decision of the supervisory authority before the Hungarian courts. An appeal having been brought before it on a point of law, the Kúria (Supreme Court, Hungary) asked the Court of Justice whether that directive allowed the Hungarian supervisory authority to apply the Hungarian law adopted on the basis of the directive and impose the fine provided for in that law.

The Court pointed out that a flexible definition of the concept of ‘establishment’ follows from recital 19 of Directive 95/46/EC. Accordingly, in order to establish whether a company, the data controller, has an establishment in a Member State other than the Member State or third country where it is registered, both the degree of stability of the arrangements and the effective exercise of activities in that other Member State must be assessed. This is particularly true for undertakings offering services exclusively over the internet (paragraph 29).

The Court found that Article 4(1)(a) of Directive 95/46/EC must be interpreted as permitting the application of the law on the protection of personal data of a Member State other than the Member State in which the controller with respect to the processing of those data is registered, in so far as that controller exercises, through stable arrangements in the territory of that Member State, a real and effective activity. By contrast, the issue of the nationality of the persons concerned by such data processing is irrelevant (paragraph 41 and point 1 of the operative part).

Where the supervisory authority of a Member State reaches the conclusion that the applicable law is not the law of that Member State, but the law of another Member State, Article 28(1), (3) and (6) of that directive must be interpreted as meaning that that supervisory authority will not

²³ A summary of the judgment can be found in the 2015 Annual Report, p. 52.

²⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

be able to exercise the effective powers of intervention. Accordingly, it cannot impose penalties on the basis of the law of its own Member State on the controller with respect to the processing of those data who is not established in the territory of its own Member State. It follows from the requirements derived from the territorial sovereignty of the Member State concerned, the principle of legality and the concept of the rule of law that the exercise of the power to impose penalties cannot take place, as a matter of principle, outside the legal limits within which an administrative authority is authorised to act subject to the law of its own Member State (paragraphs 56 and 60 and point 2 of the operative part).

Judgment of 6 October 2015 (Grand Chamber), Schrems (C-362/14, EU:C:2015:650) ²⁵

Mr Maximilian Schrems, an Austrian citizen, had used Facebook since 2008. Some or all of the data provided by Mr Schrems to Facebook were transferred from Facebook's Irish subsidiary to servers located in the United States, where they were processed. Mr Schrems lodged a complaint with the Irish supervisory authority arguing that in view of the revelations made in 2013 by Mr Edward Snowden concerning the activities of the United States intelligence services (in particular the National Security Agency or 'NSA'), the law and practices of the United States did not provide adequate protection against the surveillance by public authorities of data transferred to that country. The Irish authority rejected the complaint on the ground, inter alia, that in Decision 2000/520/EC,²⁶ the Commission had found that under the 'safe harbour' scheme, the United States ensured an adequate level of protection for transferred personal data.

Proceedings having been brought before it, the High Court (Ireland) sought to ascertain whether that decision of the Commission has the effect of preventing a national supervisory authority from investigating a complaint claiming that a third country does not ensure an adequate level of protection and, where appropriate, from suspending the disputed transfer of data.

The Court replied that the operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46/EC,²⁷ carried out in a Member State. The national authorities are therefore vested with the power to check whether a transfer of personal data from their own Member State to a third country complies with the requirements laid down by Directive 95/46/EC (paragraphs 43 to 45 and 47).

Thus, until such time as the Commission decision is declared invalid by the Court — which alone has jurisdiction to declare that an EU act is invalid — the Member States and their organs cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. In a situation where a supervisory authority comes to the conclusion that the arguments put forward in support of a claim concerning the protection of rights and freedoms

²⁵ A summary of the judgment can be found in the 2015 Annual Report, p. 51.

²⁶ Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the Department of Commerce of the United States of America (OJ L 215, 25.8.2000, p. 7).

²⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

in regard to the processing of those personal data are unfounded and therefore rejects it, the person who lodged the claim must have access to judicial remedies enabling him to challenge such a decision adversely affecting him before the national courts. In the converse situation, where the national supervisory authority considers that the objections advanced by the person who has lodged with it such a claim are well founded, that authority must be able to engage in legal proceedings, in accordance with the third indent of the first subparagraph of Article 28(3) of Directive 95/46/EC, read in the light in particular of Article 8(3) of the Charter (paragraphs 51, 52, 61, 62, 64 and 65).

Article 25(6) of Directive 95/46/EC, read in the light of Articles 7, 8 and 47 of the Charter, must be interpreted as meaning that a decision adopted pursuant to that provision, by which the Commission finds that a third country ensures an adequate level of protection, does not prevent a supervisory authority of a Member State from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which have been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection (paragraphs 58, 59, 63 and 66 and point 1 of the operative part).

The term 'adequate level of protection' in Article 25(6) of Directive 95/46/EC must be understood as requiring the third country in fact to ensure, by reason of its domestic law or its international commitments, a level of protection of fundamental rights and freedoms that is essentially equivalent to that guaranteed within the European Union by virtue of that directive, read in the light of the Charter (paragraphs 73, 75, 76 and 78).

The safe harbour principles are applicable solely to self-certified United States organisations receiving personal data from the European Union, and United States public authorities are not required to comply with them. In addition, Decision 2000/520/EC enables interference, founded on national security and public interest requirements or on domestic legislation of the United States, with the fundamental rights of the persons whose personal data is or could be transferred from the European Union to the United States, without containing any finding regarding the existence, in the United States, of rules adopted by the State intended to limit any interference with those rights and without referring to the existence of effective legal protection against interference of that kind.

Furthermore, the Commission exceeded the power conferred upon it in Article 25(6) of Directive 95/46/EC, read in the light of the Charter, by adopting Article 3 of Decision 2000/520/EC, which is therefore invalid (paragraphs 82, 87 to 89, 96 to 98 and 102 to 105 and point 2 of the operative part).

Judgment of 1 October 2019 (Grand Chamber), Planet49 (C-673/17, EU:C:2019:801) ²⁸

Planet49 is a company that organises a promotional lottery on the website www.dein-macbook.de. In order to take part, internet users were required to enter their names and

²⁸ This judgment was included in the 2019 Annual Report, p. 120.

addresses on a web page where there were checkboxes. The checkbox authorising the installation of cookies contained a preselected tick.

The Bundesgerichtshof (Federal Court of Justice, Germany), before which the Federation brought an appeal on a point of law (Revision), had doubts as to the validity of the consent obtained from internet users by means of the pre-ticked checkbox and as to the extent of the information obligation on the service provider.

The request for a preliminary ruling essentially concerned the interpretation of the concept of 'consent' referred to in the Directive on privacy and electronic communications, read in combination with Directive 95/46/EC and with the General Data Protection Regulation.

First, the Court observed that Article 2(h) of Directive 95/46/EC, to which Article 2(f) of the Directive on privacy and electronic communications refers, defines consent as being 'any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed'. It noted that the requirement of an 'indication' of the data subject's wishes clearly points to active, rather than passive, behaviour. However, consent given in the form of a preselected tick in a checkbox does not imply active behaviour on the part of a website user. In addition, the origins of Article 5(3) of the Directive on privacy and electronic communications, which, since its amendment by Directive 2009/136/EC, provides that the user must have 'given his or her consent' to the storage of cookies seems to indicate that henceforth user consent may no longer be presumed but must be the result of active behaviour on the part of the user. Lastly, active consent is now required under the General Data Protection Regulation since Article 4(11) of that regulation requires an indication of the data subject's wishes in the form of a 'clear affirmative action' and recital 32 thereof expressly precludes 'silence, pre-ticked boxes or inactivity' from constituting consent (paragraphs 49, 52, 56 and 62).

The Court therefore held that consent is not validly constituted if the storage of information, or access to information already stored in the website user's terminal equipment, is permitted by way of a pre-ticked checkbox which the user must deselect to refuse his or her consent (paragraph 63, point 1 of the operative part).

Secondly, the Court found that Article 5(3) of the Directive on privacy and electronic communications aims to protect the user from interference with his or her private sphere, regardless of whether or not that interference involves personal data. It follows that the concept of 'consent' is not to be interpreted differently according to whether or not the information stored or accessed on a website user's terminal equipment is personal data consent (paragraphs 69, 71, point 2 of the operative part).

Thirdly, the Court noted that Article 5(3) of the Directive on privacy and electronic communications requires that the user concerned has given his or her consent, having been provided with clear and comprehensive information, inter alia, about the purposes of the processing. Clear and comprehensive information implies that a user is in a position to be able to determine easily the consequences of any consent he or she might give and ensure that the consent given is well informed. In that regard, the Court held that the duration of the operation of the cookies and whether or not third parties may have access to those cookies form part of

the clear and comprehensive information which must be provided to a website user by the service provider (paragraphs 73 to 75, 81, point 3 of the operative part).

5. Copyright

Judgment of 3 July 2012 (Grand Chamber), UsedSoft (C-128/11, EU:C:2012:407) ²⁹

The company Oracle developed and distributed, in particular by downloading from the internet, what is known as 'client-server' software. The customer would download a copy of the software directly to his computer. The user right included the right to store a copy of the program permanently on a server and to allow 25 users to access it. The licence agreements provided that the customer would acquire, for an unlimited period, a non-transferable user right exclusively for internal business purposes. UsedSoft, a German undertaking, marketed licences purchased from customers of Oracle. Customers of UsedSoft not yet in possession of the software would download it directly, after acquiring a 'used' licence from Oracle's website. Customers who already had that software could purchase a further licence or part of a licence for additional users. In those circumstances, customers would download the software to the main memory of the workstation computers of those other users.

Oracle brought proceedings against UsedSoft before the German courts seeking an order prohibiting that practice. The Bundesgerichtshof (Federal Court of Justice, Germany) asked the Court of Justice to interpret, against that background, Directive 2009/24/EC ³⁰ on the legal protection of computer programs.

According to the Court, Article 4(2) of Directive 2009/24/EC must be interpreted as meaning that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.

The downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Those transactions involve a transfer of the right of ownership of the copy of the computer program. It makes no difference whether the copy of the computer program was made available to the customer by means of a download or by means of a material medium such as a CD-ROM or DVD (paragraphs 44 to 47 and 72 and point 1 of the operative part).

In addition, Articles 4(2) and 5(1) of Directive 2009/24/EC must be interpreted as meaning that, in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder's website, that licence having originally been granted to the first acquirer, the second acquirer of the licence, as well as any subsequent acquirer of it, will

²⁹ A summary of the judgment can be found in the 2012 Annual Report, p. 36.

³⁰ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

be able to rely on the exhaustion of the distribution right under Article 4(2) of that directive and benefit from the right of reproduction (paragraph 88 and point 2 of the operative part).

Judgment of 10 November 2016, Vereniging Openbare Bibliotheken (C-174/15, EU:C:2016:856) ³¹

In the Netherlands, the lending of electronic books by public libraries was not covered by the rules on public lending applicable to paper books. Public libraries would make electronic books available to the public via the internet, on the basis of licensing agreements with rightholders. The Vereniging Openbare Bibliotheken, an association representing all public libraries in the Netherlands ('the VOB'), was of the view that the rules applying to paper books should also apply to digital lending. Against that background, it brought proceedings against Stichting Leenrecht, a foundation entrusted with collecting remuneration due to authors, seeking a declaratory judgment to that effect. The VOB's action concerned lending arrangements following the 'one copy, one user' model, namely the lending of a digital copy of a book by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user. Proceedings having been brought before it, the Rechtbank Den Haag (District Court, The Hague, Netherlands) asked the Court of Justice whether Articles 1(1), 2(1)(b) and 6(1) of Directive 2006/115/EC are to be construed as meaning that 'lending' covers the lending of a digital copy of a book and whether that directive precludes such a practice.

The Court held that Articles 1(1), 2(1)(b) and 6(1) of Directive 2006/115/EC ³² on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the concept of 'lending' as referred to in those provisions covers the 'one copy, one user' model.

It is necessary to interpret the concept of 'rental', in Article 2(1)(a) of Directive 2006/115/EC, as referring exclusively to tangible objects and to interpret the concept of 'copies', in Article 1(1) of that directive, as referring, as regards rental, exclusively to copies fixed in a physical medium. That conclusion is, moreover, borne out by the objective pursued by that directive. Recital 4 thereof states, inter alia, that copyright must adapt to new economic developments such as new forms of exploitation (paragraphs 35, 39, 44 to 46 and 54 and point 1 of the operative part).

Furthermore, EU law must be interpreted as not precluding a Member State from making the application of Article 6(1) of Directive 2006/115/EC subject to the condition that the digital copy of a book made available by the public library must have been put into circulation by a first sale or other transfer of ownership of that copy in the European Union by the holder of the right of distribution to the public or with his consent, for the purposes of Article 4(2) of Directive 2001/29/EC. ³³ The Member States cannot be prevented from setting, where appropriate,

³¹ A summary of the judgment can be found in the 2016 Annual Report, p. 57.

³² Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

³³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

additional conditions such as to improve the protection of authors' rights beyond what is expressly laid down in that provision (paragraphs 61 and 65 and point 2 of the operative part).

Article 6(1) of Directive 2006/115/EC must be construed as precluding the public lending exception laid down therein from applying to the making available by a public library of a digital copy of a book where that copy was obtained from an unlawful source (paragraphs 67, 68 and 72 and point 3 of the operative part).

Judgment of 8 September 2016, GS Media (C-160/15, EU:C:2016:644) ³⁴

GS Media operated the website *GeenStijl*, which was one of the 10 most visited websites in the area of news in the Netherlands. In 2011, GS Media published an article and a hyperlink directing readers to an Australian site where photographs of Ms Dekker had been made available. Those photographs had been published on the Australian site without the consent of Sanoma, the publisher of the monthly magazine *Playboy* which held the copyright over the photographs at issue. Despite receiving demands from Sanoma, GS Media refused to remove the hyperlink in question. When the Australian site removed the photographs at Sanoma's request, *GeenStijl* published a further article which also contained a hyperlink to another site where the photographs at issue could be viewed. That other site also complied with Sanoma's request to remove the photographs. On the *GeenStijl* forum, users then posted new links to other websites where the photographs could be viewed. Sanoma claimed that GS Media had infringed its copyright. Proceedings having been brought before it, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) submitted a question to the Court of Justice on that point. Under Directive 2001/29/EC, every act of communication of a work to the public has to be authorised by the copyright holder. ³⁵

According to the Court, Article 3(1) of Directive 2001/29/EC must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

Where it is established that a person knew or ought to have known that the hyperlink he posted provides access to a work illegally placed on the internet, for example owing to the fact that he was notified thereof by the copyright holders, it is necessary to consider that the provision of that link constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29/EC.

When the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not

³⁴ A summary of the judgment can be found in the 2016 Annual Report, p. 56.

³⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

illegally published on the website to which those hyperlinks lead. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29/EC (paragraphs 33, 47 to 51 and 55 and the operative part).

Judgment of 14 June 2017, Stichting Brein (C-610/15, EU:C:2017:456)³⁶

Ziggo and XS4ALL were internet access providers. A significant number of their subscribers used the online sharing platform ‘The Pirate Bay’. That platform allowed users to share and download, in segments (‘torrents’), works present on their own computers. The files at issue were mainly copyright-protected works, without the rightholders having given their consent to the operators or users of that platform to carry out the sharing acts. Stichting Brein, a Netherlands foundation which protects the interests of copyright holders, brought proceedings before the Netherlands courts seeking an order directing Ziggo and XS4ALL to block the domain names and IP addresses of ‘The Pirate Bay’.

The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) essentially enquired whether a sharing platform such as ‘The Pirate Bay’ makes a ‘communication to the public’ within the meaning of Directive 2001/29/EC³⁷ and may therefore infringe copyright.

The Court held that the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC, must be interpreted as covering the making available and management, on the Internet, of a sharing platform which, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

It must be noted, as recital 23 of Directive 2001/29/EC states, that the author’s right of communication to the public, provided for in Article 3(1), covers any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

The Court has already held that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works. The same is true as regards the sale of a multimedia player on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available without the consent of the rightholders. It can therefore be inferred from that case-law that, as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29/EC.

In order to be categorised as a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC, the protected works must also in fact be communicated to a ‘public’.

³⁶ A summary of the judgment can be found in the 2017 Annual Report, p. 68.

³⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

The concept of 'public' involves a certain *de minimis* threshold. Thus, it is necessary to know not only how many persons have access to the same work at the same time, but also how many of them have access to it in succession (paragraphs 30 to 34, 40, 41 and 48 and the operative part).

Judgment of 29 July 2019 (Grand Chamber), Funke Medien NRW (C-469/17, EU:C:2019 623)³⁸

The company Funke Medien operated the internet portal of the German daily newspaper Westdeutsche Allgemeine Zeitung. The Federal Republic of Germany, taking the view that Funke Medien had infringed its copyright over certain reports concerning military status that were 'classified for restricted access' and had been drawn up by the German Government, brought an action for an injunction against the latter. That action was upheld by a regional court and confirmed on appeal by a higher regional court. In its appeal on a point of law (Revision), brought before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany), Funke Medien maintained its contention that the action for an injunction should be dismissed.

As a preliminary point, the Court recalled that military status reports can be protected by copyright only if those reports constitute an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting those reports, which must be ascertained by the national court in each case (paragraph 25).

The Court noted that the provisions of Directive 2001/29/EC providing for the exclusive rights of authors over reproduction and communication to the public of their work constitute measures of full harmonisation of the corresponding substantive law. On the other hand, the Court considered that the provisions of Directive 2001/29/EC allowing derogation from those rights in relation to the reporting of current events or quotations do not constitute measures of full harmonisation of the scope of the relevant exceptions or limitations. Nevertheless, the Member States' discretion in the implementation of those provisions must be exercised within the limits imposed by EU law in order to maintain a fair balance between, on the one hand, the interest of rights holders in the protection of their intellectual property rights, as guaranteed by the Charter, and, on the other hand, the rights and interests of users of protected works or subject matter, in particular their freedom of expression and information, which is also guaranteed by the Charter, as well as of the public interest (paragraphs 38, 46, 51, 54, 57, operative part 1).

Next, the Court clarified that freedom of expression and information is not capable of justifying, beyond the exceptions and limitations provided for in Directive 2001/29/EC, a derogation from the authors' exclusive rights over the reproduction and communication to the public of their works, other than that provided for by the said directive. In that regard, the Court reiterated that the list of exceptions and limitations provided for in Directive 2001/29/EC is exhaustive (paragraphs 56, 64, operative part 2).

Lastly, the Court stated that, in the context of striking the balance, which is to be carried out by the national court, having regard to all the circumstances of the case before it, between, on the

³⁸ This judgment was included in the 2019 Annual Report, p. 96.

one hand, the exclusive rights of authors over the reproduction and communication to the public of their works and, on the other hand, the rights of users of protected subject matter referred to in the derogating provisions of Directive 2001/29/EC concerning the reporting of current events or quotations, a national court must rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter (paragraph 76, operative part 3).

Judgment of 29 July 2019 (Grand Chamber), Spiegel Online (C-516/17, EU:C:2019:625) ³⁹

The company Spiegel Online operated the internet news portal named Spiegel Online. Mr Volker Beck, who was a member of the Bundestag (Federal Parliament, Germany), challenged, before a regional court, the making available of complete texts of one of his manuscripts and an article on Spiegel Online's website. Mr Beck considered that publication to be an infringement of his copyright. That court upheld Mr Beck's action. After its appeal was dismissed, Spiegel Online brought an appeal on a point of law (Revision) before the referring court, the Bundesgerichtshof (Federal Court of Justice, Germany).

The Court held that the provisions of Directive 2001/29/EC allowing derogation from the exclusive rights of the author in relation to the reporting of current events or quotations allow the Member States discretion in their transposition into national law but do not constitute measures of full harmonisation. Nevertheless, the Member States' discretion in the implementation of those provisions must be exercised within the limits imposed by EU law in order to maintain a fair balance between, on the one hand, the interest of rights holders in the protection of their intellectual property rights, as guaranteed by the Charter, and, on the other hand, the rights and interests of users of protected works or subject matter, in particular their freedom of expression and information, which is also guaranteed by the Charter, as well as of the public interest (paragraphs 31, 36, 42, operative part 1).

As regards the freedom of expression and information, the Court noted that it is not capable of justifying, beyond the exceptions and limitations provided for in Directive 2001/29/EC, a derogation from the authors' exclusive rights over the reproduction and communication to the public of their works, other than that provided for by the said directive. In that regard, the Court reiterated that the list of exceptions and limitations provided for in that directive is exhaustive (paragraphs 41, 49, operative part 2).

Furthermore, the Court stated that, in the context of striking the balance, which is to be carried out by the national court, having regard to all the circumstances of the case before it, between, on the one hand, the exclusive rights of authors over the reproduction and communication to the public of their works and, on the other hand, the rights of users of protected subject matter referred to in the derogating provisions of Directive 2001/29/EC concerning the reporting of current events or quotations, a national court must rely on an interpretation of those provisions which, whilst consistent with their wording and safeguarding their effectiveness, fully adheres to the fundamental rights enshrined in the Charter (paragraph 59, operative part 3).

³⁹ This judgment was included in the 2019 Annual Report, p. 97.

In the first place, the Court held that the derogating provision of Directive 2001/29/EC concerning the reporting of current events precludes a national rule restricting the application of the exception or limitation provided for in that provision in cases where it is not reasonably possible to make a prior request for authorisation with a view to the use of a protected work for the purposes of reporting current events. When a current event occurs, it is necessary, as a general rule, particularly in the information society, for the information relating to that event to be diffused rapidly, which is difficult to reconcile with a requirement for the author's prior consent, which would be likely to make it excessively difficult for relevant information to be provided to the public in a timely fashion, and might even prevent it altogether (paragraphs 71, 74, operative part, 4).

In the second place, the Court held, first, that the concept of 'quotations', referred to in the derogating provision of Directive 2001/29/EC concerning quotations, covers a reference made by means of a hyperlink to a file which can be downloaded independently. In that context, the Court recalled the case-law according to which hyperlinks contribute to the sound operation of the internet, which is of particular importance to freedom of expression and of information, enshrined in the Charter, as well as to the exchange of opinions and information in that network characterised by the availability of incalculable amounts of information. Secondly, the Court held that a work has already been lawfully made available to the public where that work, in its specific form, was previously made available to the public with the rightholder's authorisation or in accordance with a non-contractual licence or statutory authorisation. It is for the national court to decide whether a work has been lawfully made available to the public, in the light of the particular case before it and by taking into account all the circumstances of the case (paragraphs 81, 84, 91, 95, operative part, 5 and 6).

II. Limits on electronic commerce

1. Advertising

Judgment of 23 March 2010 (Grand Chamber), Google France (Joined Cases C-236/08 to C-238/08, EU:C:2010:159) ⁴⁰

Google operated an internet search engine and offered, among other things, a paid referencing service called 'AdWords'. That service enabled any economic operator, by means of the reservation of one or more keywords, to obtain the placing of an advertising link to its site, together with an advertising message. Vuitton, the proprietor of the Community trade mark 'Vuitton' and other proprietors of French trade marks became aware that the entry, by internet users, of terms constituting its trade marks into Google triggered the display of links to sites offering imitation versions of Vuitton's products and to sites of competitors of other proprietors of trade marks. The Cour de cassation (Court of Cassation, France) asked the Court of Justice whether it was lawful to use signs corresponding to trade marks as keywords in an internet referencing service, without consent having been given by the proprietors of those trade marks.

⁴⁰ A summary of the judgment can be found in the 2010 Annual Report, p. 39.

The Court held that an internet referencing service provider does not use that sign within the meaning of Article 5(1) and (2) of Directive 89/104/EEC⁴¹ or Article 9(1) of Regulation (EC) No 40/94,⁴² even if it permits advertisers to select, as keywords, signs identical with trade marks, stores those signs and displays its clients' ads on the basis thereof. The use, by a third party, of a sign identical with, or similar to, the proprietor's trade mark implies that that third party uses the sign in its own commercial communication and amounts to use for the purposes of that directive, where the display seeks to mislead internet users as to the origin of its goods or services (paragraphs 53 to 57, 71 to 73 and 105 and point 2 of the operative part).

The proprietor of a trade mark is entitled to prohibit an advertiser from advertising where such advertising makes it difficult for an internet user to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or a third party. The essential function of the trade mark is, in particular, to enable internet users to distinguish the goods or services of the proprietor of that mark from those which have a different origin (paragraphs 84, 85, 87 to 90 and 99 and point 1 of the operative part).

Nevertheless, repercussions of use by third parties of a sign identical with the trade mark do not of themselves constitute an adverse effect on the advertising function of the trade mark (paragraphs 91 to 95). Article 14 of Directive 2000/31/EC⁴³ must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If the conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores, that provider cannot be held liable (paragraphs 114, 119 and 120 and point 3 of the operative part).

Judgment of 11 July 2013, Belgian Electronic Sorting Technology (C-657/11, EU:C:2013:516)⁴⁴

The undertakings Belgian Electronic Sorting Technology (BEST) and Visys were producers, manufacturers and distributors of sorting machines and sorting systems incorporating laser-technology. Visys had been established by Mr Peelaers, a former employee of BEST. Mr Peelaers registered, on behalf of Visys, the domain name 'www.bestlasersorter.com'. The content of the website hosted under that domain name was identical to that of Visys' usual websites, accessible under the domain names 'www.visys.be' and 'www.visysglobal.be'. When the words 'Best Laser Sorter' were entered in the search engine google.be, the second search result to appear, directly after BEST's website, was a link to Visys' website. Visys used for its websites the following metatags, among others: 'Best+Helius, Best+Genius'. The referring court, the Hof van Cassatie (Court of Cassation, Belgium), asked the Court of Justice whether the registration and use of a domain name and the use of metatags in a website's metadata could be regarded as falling

41 Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ L 40, 11.2.1989, p. 1).

42 Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ L 11, 14.1.1994, p. 1).

43 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ L 178, 17.7.2000, p. 1).

44 A summary of the judgment can be found in the 2013 Annual Report, p. 41.

within the concept of advertising within the meaning of Directives 84/450/EEC⁴⁵ and 2006/114/EC.⁴⁶

The Court found that Article 2(1) of Directive 84/450/EEC and Article 2(a) of Directive 2006/114/EC must be interpreted as meaning that the term advertising, as defined by those provisions, covers the use of a domain name and that of metatags in a website's metadata, where the domain name or the metatags consisting of keywords ('keyword metatags') make reference to certain goods or services or to the trade name of a company and constitute a form of representation that is made to potential consumers and suggests to them that they will find a website relating to those goods or services, or relating to that company.

The term advertising cannot be interpreted and applied in such a way that steps taken by a trader to promote the sale of his products or services that are capable of influencing the economic behaviour of consumers and, therefore, of affecting the competitors of that trader, are not subject to the rules of fair competition imposed by those directives.

By contrast, the registration of a domain name, as such, is not encompassed by that term. That is a purely formal act which, in itself, does not necessarily imply that potential consumers can become aware of the domain name and which is therefore not capable of influencing the choice of those potential consumers (paragraphs 39, 43, 48, 53 and 60 and the operative part).

Judgment of 4 May 2017, Luc Vanderborght (C-339/15, EU:C:2017:335)⁴⁷

Mr Luc Vanderborght, a dentist established in Belgium, advertised the provision of dental care services. He installed a sign stating his name, his designation as a dentist, the address of his website and the telephone number of his practice. In addition, he created a website informing patients of the various types of treatment offered at his practice. Finally, he placed some advertisements in local newspapers. As a result of a complaint made by the Verbond der Vlaamse tandartsen, a professional association of dentists, criminal proceedings were brought against Mr Vanderborght. Belgian law prohibited all advertising for the provision of oral and dental care services and imposed requirements of discretion. Proceedings having been brought before it, the *Nederlandstalige rechtbank van eerste aanleg te Brussel* (Brussels Court of First Instance (Dutch-speaking), Belgium) decided to submit a question to the Court of Justice on the matter.

According to the Court, Directive 2000/31/EC⁴⁸ must be interpreted as precluding national legislation such as that at issue in the main proceedings.

Recital 18 of Directive 2000/31/EC states that the concept of 'information society services' spans a wide range of economic activities which take place online. Furthermore, Article 2(f) of that

⁴⁵ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, as amended by Directive 2005/29/EC (OJ L 250, 19.9.1984, p. 17).

⁴⁶ Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (OJ L 376, 27.12.2006, p. 21).

⁴⁷ A summary of the judgment can be found in the 2017 Annual Report, p. 74.

⁴⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ L 178, 17.7.2000, p. 1).

directive stipulates that the concept of 'commercial communication' covers, inter alia, any form of communication designed to promote the services of a person practising a regulated profession. It follows that advertising relating to the provision of oral and dental care services by means of a website constitutes such a service (paragraphs 36 to 39). The EU legislature has not excluded regulated professions from the principle of the permissibility of online commercial communications laid down in Article 8(1) of that directive. Although that provision makes it possible to take into account the particularities of health professions when the relevant professional rules are drawn up, by supervising the form and manner of the online commercial communications with a view, in particular, to ensuring that the confidence which patients have in those professions is not undermined, the fact remains that those professional rules cannot impose a general and absolute prohibition of any form of online advertising designed to promote the activity of a person practising such a profession (paragraphs 48 to 50 and point 2 of the operative part).

Article 56 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which imposes a general and absolute prohibition of any advertising relating to the provision of oral and dental care services.

As regards the need for a restriction on the freedom to provide services such as that at issue in the main proceedings, account must be taken of the fact that the health and life of humans rank foremost among the assets and interests protected by the Treaty and that it is, in principle, for the Member States to determine the level of protection which they wish to afford to public health.

All the advertising messages prohibited by that legislation are not, in themselves, likely to produce effects that are contrary to the objectives referred to. In those circumstances, it must be held that the objectives pursued by the legislation at issue in the main proceedings could be attained through the use of less restrictive measures (paragraphs 71 to 73, 75 and 76 and point 3 of the operative part).

Judgment of 30 March 2017, Verband Sozialer Wettbewerb eV (C-146/16, EU:C:2017:243)

The subject matter of the dispute was an advertisement published in a newspaper by DHL Paket, which operated the online sales platform 'MeinPaket.de' on which commercial sellers offered products for sale. The goods presented in that advertisement, which each had a code, could be purchased from third-party sellers through that platform. Once connected to the site, the user could enter the corresponding code to be redirected to a page providing further details on the product in question and mentioning the seller, whose relevant particulars could be consulted under a heading for that purpose.

According to the Verband Sozialer Wettbewerb (VSW), an association whose members include suppliers of electric and electronic products and mail-order companies, which sell all sorts of products, the published advertisement constituted an unfair business practice. According to VSW, DHL Paket did not meet its obligation to state the identity and geographical address of the suppliers using its sales platform. It brought an action seeking the cessation of that advertising activity.

In reply to a question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany), the Court of Justice held that Article 7(4) of Directive 2005/29/EC⁴⁹ must be interpreted as meaning that an advertisement, such as that at issue in the main proceedings, which falls within the definition of an 'invitation to purchase' within the meaning of that directive, may satisfy the obligation regarding information laid down in that provision.

It is for the referring court to examine, on a case-by-case basis, first, whether the limitations of space in the advertisement warrant information on the supplier being provided only upon access to the online sales platform and, secondly, whether, so far as the online sales platform is concerned, the information required by Article 7(4)(b) of that directive is communicated simply and quickly (paragraph 33 and the operative part).

Judgment of 3 March 2016, Daimler AG (C-179/15, EU:C:2016:134)

Együd Garage, a Hungarian company specialising in the sale and repair of Mercedes cars, was bound by an after-sales service contract with Daimler, the German manufacturer of Mercedes cars and proprietor of the international trade mark 'Mercedes-Benz'. The Hungarian company was entitled to use that trade mark and to describe itself as an 'authorised Mercedes-Benz dealer' in its own advertisements. Following the termination of that contract, Együd Garage tried to remove all internet advertisements on the basis of which the public might assume that there was still a contractual relationship between it and Daimler. Despite taking those steps, advertisements referring to such a relationship continued to be distributed online and displayed by search engines. The Fővárosi Törvényszék (Budapest High Court, Hungary) asked the Court of Justice whether Directive 2008/95/EC on trade marks⁵⁰ entitled Daimler to require a previous contractual partner to take extensive steps to prevent detriment to its trade mark.

The Court held that the use of a trade mark by a third party, without the proprietor's authorisation, in order to inform the public that that third party carries out repairs and maintenance of goods covered by that trade mark or that he has specialised in such goods constitutes a use of that mark for the purposes of Article 5(1)(a) of Directive 2008/95/EC. That may be prohibited by the trade mark proprietor unless Article 6, concerning the limitation of the effects of the trade mark, or Article 7, concerning exhaustion of the rights conferred by it, are applicable. Such use, where it is made without the consent of the proprietor of the mark, is liable to affect the origin function of the mark (paragraphs 28 to 30).

Article 5(1)(a) and (b) of that directive must be interpreted as meaning that use does not occur where that advertisement has not been placed by that third party or on his behalf or, if that advertisement has been placed by that third party or on his behalf with the consent of the proprietor, where that third party has expressly requested the operator of that website, from whom the third party ordered the advertisement, to remove the advertisement or the reference to the mark contained therein. Furthermore, an advertiser cannot be held liable for the

⁴⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 22).

⁵⁰ Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ L 299, 8.11.2008, p. 25).

independent actions of other economic operators, such as those of referencing website operators, which do not act by order but on their own initiative and in their own name.

In both situations, the proprietor of the mark is not entitled, under Article 5(1)(a) or (b) of Directive 2008/95/EC, to take action against the advertiser in order to prevent him from publishing online the advertisement containing the reference to its trade mark (paragraphs 34, 36, 37 and 44 and the operative part).

2. Liability of intermediary service providers/Injunctions

Judgment of 3 October 2019, Glawischnig-Piesczek (C-18/18, EU:C:2019:821)

Facebook Ireland operates a global social media platform ('Facebook Service') for users located outside of the United States of America and Canada. Ms Glawischnig-Piesczek was a member of the Nationalrat (National Council, Austria), chair of the parliamentary party 'die Grünen' (The Greens) and federal spokesperson for that party. On 3 April 2016, a Facebook Service user shared on that user's personal page an article from the Austrian online news magazine oe24.at entitled 'Greens: Minimum income for refugees should stay', which had the effect of generating on that page a 'thumbnail' of the original site, containing the title and a brief summary of the article, and a photograph of Ms Glawischnig-Piesczek. That user also published, in connection with that article, a comment which the referring court found to be harmful to the reputation of the applicant in the main proceedings, and which insulted and defamed her. This post could be accessed by any Facebook user.

In a letter of 7 July 2016, Ms Glawischnig-Piesczek, inter alia, asked Facebook Ireland to delete that comment. Because Facebook Ireland did not withdraw the comment in question, Ms Glawischnig-Piesczek brought an action before a commercial court which directed Facebook Ireland, with immediate effect and until the proceedings relating to the action for a prohibitory injunction have been finally concluded, to cease and desist from publishing and/or disseminating photographs showing the applicant in the main proceedings. Facebook Ireland disabled access in Austria to the content initially published.

On appeal, a higher regional court upheld the order made at first instance as regards the identical allegations. However, it also held that the dissemination of allegations of equivalent content had to cease only as regards those brought to the knowledge of Facebook Ireland by the applicant in the main proceedings, by third parties or otherwise. Each of the parties in the main proceedings lodged appeals on a point of law at the Oberster Gerichtshof (Supreme Court, Austria).

The request for a preliminary ruling mainly concerned the interpretation of Article 15(1) of Directive 2000/31/EC.

As a preliminary point, the Court noted that, in order to ensure that the host provider at issue prevents any further impairment of the interests involved, it is legitimate for the court having jurisdiction to be able to require that host provider to block access to the information stored, the content of which is identical to the content previously declared to be illegal, or to remove

that information, irrespective of who requested the storage of that information (paragraph 37 and the operative part).

Further, according to the Court, a court of a Member State is authorised to order a host provider to remove information which it stores, the content of which is identical to the content of information which was previously declared to be illegal, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content (paragraphs 45, 53 and the operative part).

Lastly, a court of a Member State may order a host provider to remove information covered by the injunction or to block access to that information worldwide within the framework of the relevant international law (paragraph 53 and the operative part).

3. Competition law

Judgment of 13 October 2011, Pierre Fabre (C-439/09, EU:C:2011:649)

The company Pierre Fabre Dermo-Cosmétique ('PFDC') manufactured and marketed cosmetics through pharmacists on the European market. The products at issue were not classified as medicines. However, the distribution contracts for those products stipulated that sales had to be made exclusively in a physical space and in the presence of a qualified pharmacist, thereby limiting, in practice, all forms of selling by internet. The French competition authority decided that, owing to the de facto ban on all internet sales, PFDC's distribution contracts constituted anticompetitive agreements of the kind contrary to French law and EU competition law. PFDC challenged that decision before the cour d'appel de Paris (Court of Appeal, Paris, France), which asked the Court of Justice whether a general and absolute ban on internet sales constitutes a restriction of competition 'by object', whether such an agreement could be eligible for a block exemption, and whether, if the block exemption does not apply, it could be eligible for an individual exemption under Article 101(3) TFEU.

The Court replied that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause amounts to a restriction by object within the meaning of that provision where, following an individual examination, that clause is not objectively justified. Such a contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.

However, there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. In that regard, the organisation of a selective distribution system is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of

objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary. As regards, in particular, the sale of cosmetics and personal care products, the aim of maintaining a prestigious image is not a legitimate aim for restricting competition (paragraphs 38, 40, 41, 46 and 47 and the operative part).

Article 4(c) of Regulation (EC) No 2790/1999⁵¹ must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to vertical agreements which have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment (paragraphs 53, 54, 56, 58 and 59 and the operative part).

Judgment of 6 December 2017, Coty Germany (C-230/16, EU:C:2017:941)

Coty Germany sold luxury cosmetics in Germany. In order to preserve its luxury image, it marketed certain brands through a selective distribution network, namely through authorised distributors. The sales locations of those authorised distributors had to satisfy a number of requirements relating to their environment, decor and furnishing. Furthermore, the authorised distributors were permitted to sell the goods in issue online provided they used their own electronic shop window or unauthorised third-party platforms where the use of such platforms was not discernible to the consumer. On the other hand, they were expressly prohibited from selling the goods online through third-party platforms operating in a discernible manner towards consumers.

Coty Germany brought an action before the German courts against one of its authorised distributors, Parfümerie Akzente, seeking an order prohibiting it, in accordance with that contractual clause, from distributing Coty goods through the platform 'amazon.de'. Being unsure whether that clause was lawful under EU competition law, the Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) submitted a question to the Court of Justice for a preliminary ruling in that regard.

According to the Court, Article 101(1) TFEU must be interpreted as meaning that such a selective distribution system designed to preserve the luxury image of those goods complies with that provision to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature that are laid down uniformly for all potential resellers and applied in a non-discriminatory fashion and that the criteria laid down do not go beyond what is necessary (paragraph 36 and point 1 of the operative part).

⁵¹ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ L 336, 29.12.1999, p. 21).

Furthermore, Article 4 of Regulation (EU) No 330/2010⁵² must be interpreted as meaning that the prohibition imposed on the members of a selective distribution system for luxury goods, which operate as distributors at the retail level of trade, of making use, in a discernible manner, of third-party undertakings for internet sales does not constitute a restriction of customers, within the meaning of Article 4(b), or a restriction of passive sales to end users, within the meaning of Article 4(c) of that regulation (paragraph 69 and point 3 of the operative part).

4. Online sales of medicinal products and medical devices

Judgment of 11 December 2003 (Grand Chamber), Deutscher Apothekerverband (C-322/01, EU:C:2003:664)⁵³

The main proceedings involved a dispute between Deutscher Apothekerverband eV, an association for the protection of the economic and social interests of pharmacists, and 0800 DocMorris NV, a Dutch pharmacy established in the Netherlands. Mr Jacques Waterval was a pharmacist and one of the legal representatives of DocMorris. Since June 2000, DocMorris and Mr Waterval had been offering medicinal products for sale at the internet address www.0800DocMorris.com. The medicinal products in issue were authorised either in Germany or the Netherlands. This type of medicinal product was supplied only on production of the original prescription. The Apothekerverband challenged, before the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany), the offer of medicinal products for sale over the internet and their delivery by international mail order. It argued that the provisions of the German law on medicinal products did not permit the pursuit of a business of that kind. The national court asked the Court of Justice whether such prohibitions infringe the principle of the free movement of goods. Next, assuming that there is an infringement of Article 28 EC, the national court sought to ascertain whether the German legislation at issue in the main action is necessary for the effective protection of the health and life of humans for the purposes of Article 30 EC.

The Court held that the national prohibition was a measure having equivalent effect within the meaning of Article 28 EC. It has a greater impact on pharmacies established outside national territory and could impede access to the market for products from other Member States more than it impedes access for domestic products.

Article 30 EC may justify such a national prohibition in so far as it covers medicinal products subject to prescription. Given that there may be risks attaching to the use of those medicinal products, it is necessary to be able to check effectively and responsibly the authenticity of doctors' prescriptions and thus to ensure that the medicine is handed over either to the customer himself, or to a person to whom its collection has been entrusted by the customer. However, Article 30 EC cannot be relied on to justify an absolute prohibition on the sale by mail order of medicinal products (paragraphs 68, 74, 76, 112, 119, 124 and 134 and point 1 of the operative part).

⁵² Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 102, 23.4.2010, p. 1).

⁵³ A summary of the judgment can be found in the 2003 Annual Report, p. 27.

Furthermore, Article 88(1) of Directive 2001/83/EC⁵⁴ precludes a national prohibition on advertising the sale by mail order of medicinal products which may be supplied only in pharmacies in the Member State concerned, in so far as the prohibition covers medicinal products which are not subject to prescription.

Article 88(2) of Directive 2001/83/EC, which allows medicinal products not subject to prescription to be advertised to the general public, cannot be interpreted as precluding advertising for the sale by mail order of medicinal products on the basis of the alleged need for a pharmacist to be physically present (paragraphs 143, 144 and 148 and point 2 of the operative part).

Judgment of 2 December 2010, Ker-Optika (C-108/09, EU:C:2010:725)⁵⁵

Under Hungarian law, contact lenses could only be sold in a specialist shop with a minimum area of 18 m² or in premises separated from the workshop. Furthermore, the sale of those goods required the services of an optometrist or an ophthalmologist qualified in the field of contact lenses to be used. However, the Hungarian company Ker-Optika sold contact lenses on its website. The Hungarian health authorities prohibited it from pursuing that business. Ker-Optika challenged that prohibition before the courts. The Baranya megyei bíróság (County Court, Baranya, Hungary), before which the case was brought, asked the Court of Justice whether EU law precluded the Hungarian legislation.

The Court replied that the national rules relating to the selling of contact lenses fall within the scope of Directive 2000/31/EC⁵⁶ in so far as they relate to the online offer and the conclusion of the contract by electronic means. On the other hand, the national rules relating to the supply of contact lenses are not covered by that directive. Articles 34 TFEU and 36 TFEU and Directive 2000/31/EC must be interpreted as precluding national legislation which authorises the selling of contact lenses only in shops which specialise in medical devices (paragraphs 28, 31 and 77 and the operative part).

That legislation constitutes a measure having an effect equivalent to a quantitative restriction, as prohibited by Article 34 TFEU, since the prohibition concerns the sale of contact lenses via the internet by mail order and the delivery to the home of customers resident in national territory and deprives traders from other Member States of a particularly effective means of selling those products, thus significantly impeding access of those traders to the market of the Member State concerned.

The national legislature exceeded the limits of the discretion it enjoys to determine the level of protection which it wishes to afford to public health and the legislation at issue must be held to go beyond what is necessary to attain the objective pursued. That objective may be achieved by less restrictive measures, namely measures which subject to certain restrictions only the first

⁵⁴ Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ L 311, 28.11.2001, p. 67).

⁵⁵ A summary of the judgment can be found in the 2010 Annual Report, p. 18.

⁵⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ L 178, 17.7.2000, p. 1).

supply of lenses and which require the economic operators concerned to make available a qualified optician to the customer. For the same reasons, that legislation cannot be held to be proportionate to the objective of ensuring the protection of public health, for the purposes of Article 3(4) of Directive 2000/31/EC (paragraphs 58, 64, 74 to 76 and 78 and the operative part).

Judgment of 19 October 2016, Deutsche Parkinson Vereinigung (C-148/15, EU:C:2016:776)

The Deutsche Parkinson Vereinigung, a German self-help organisation aiming to improve the lives of patients suffering from Parkinson's disease, agreed upon a bonus system with the Dutch mail-order pharmacy DocMorris. Its members were eligible for the bonus system if they purchased prescription-only medicinal products for Parkinson's disease available only from pharmacies. A German association for protection against unfair competition considered that the bonus system infringed German law, which provided for uniform pharmacy retail prices for prescription-only medicinal products.

The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany) asked the Court of Justice whether the setting of uniform prices is compatible with the free movement of goods.

The Court held that Article 34 TFEU must be interpreted as meaning that the national legislation constitutes a measure having equivalent effect to a quantitative restriction on imports. That legislation has a greater impact on the sale of prescription-only medicinal products by pharmacies established in other Member States than on the sale of the same medicinal products by pharmacies established within the national territory.

Traditional pharmacies are better placed than mail-order pharmacies to provide patients with individually tailored advice and to ensure a supply of medicinal products in cases of emergency. It must be held that price competition is capable of providing a more important factor of competition for mail-order pharmacies than for traditional pharmacies.

Article 36 TFEU must be interpreted as meaning that national legislation cannot be justified on grounds of the protection of health and life of humans, inasmuch as that legislation is not appropriate for attaining the objectives pursued. The objective of ensuring a safe and high-quality supply of medicinal products throughout a Member State comes within the ambit of Article 36 TFEU. However, such legislation can be properly justified only if it is appropriate for securing the attainment of the legitimate objective pursued and does not go beyond what is necessary in order to attain it.

Increased price competition between pharmacies would be conducive to a uniform supply of medicinal products and does not adversely affect traditional pharmacies in performing certain activities in the general interest, such as producing prescription medicinal products or maintaining a given stock and selection of medicinal products. Lastly, price competition could be capable of benefiting the patient in so far as it would allow for prescription-only medicinal products to be offered at more attractive prices (paragraphs 34, 38, 40, 43 and 46 and point 2 of the operative part).

5. Games of chance

Judgment of 6 November 2003 (Full Court), Gambelli (C-243/01, EU:C:2003:597) ⁵⁷

Mr Piergiorgio Gambelli and 137 other individuals ran data transmission centres in Italy which collected sporting bets in that Member State on behalf of an English bookmaker to which they were linked by the internet. The bookmaker, Stanley International Betting Ltd, carried on its business under a licence granted by the City of Liverpool pursuant to English law. In Italy, that business was reserved to the State or its licensees. Any infringement of that rule was liable to result in a criminal penalty of up to one year's imprisonment. Criminal proceedings were brought against Mr Gambelli. He argued that the provisions of Italian law were contrary to the Community principles of freedom of establishment and freedom to provide services. The Tribunale di Ascoli Piceno (District Court, Ascoli Piceno, Italy), before which the case had been brought, asked the Court of Justice how to interpret the relevant provisions of the EC Treaty.

The Court held that such national legislation constitutes a restriction on the freedom of establishment and the freedom to provide services provided for in Articles 43 EC and 49 EC respectively. In order to be justified, it must be based on imperative requirements in the general interest, be suitable for achieving the objective pursued, not go beyond what is necessary in order to attain that objective and be applied without discrimination.

It is for the national courts to determine whether such legislation, having regard to the detailed rules for its application, actually serves the aims which might justify it, and whether the restrictions it imposes are disproportionate in the light of those aims.

The Court also found that in so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings (paragraphs 65, 69, 72 and 76 and the operative part).

Judgment of 8 September 2009 (Grand Chamber), Liga Portuguesa and Bwin International (C-42/07, EU:C:2009:519) ⁵⁸

Bwin, an online gambling undertaking which has its registered office in Gibraltar (United Kingdom) and has no establishment in Portugal, offered games of chance on a website. Its servers were in Gibraltar and Austria. La Liga, a private-law legal person, made up of all the clubs taking part in football competitions at professional level in Portugal, changed its name to Bwin Liga, as Bwin had become the main institutional sponsor of the First Football Division in Portugal. La Liga's website included references and a link to Bwin's website.

⁵⁷ A summary of the judgment can be found in the 2003 Annual Report, p. 39.

⁵⁸ A summary of the judgment can be found in the 2009 Annual Report, p. 27.

The directors of the Gaming Department of Santa Casa subsequently adopted decisions imposing fines on La Liga and Bwin for promoting games of a social nature and also for advertising such gambling. La Liga and Bwin brought actions before the Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court, Oporto, Portugal) seeking the annulment of those decisions on the basis of, inter alia, Articles 43 EC, 49 EC and 56 EC.

The Court held that where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it (paragraph 47).

Next, it found that such legislation gives rise to a restriction on the freedom to provide services enshrined in Article 49 EC, by also imposing a restriction on the freedom of the residents of the Member State concerned to enjoy, via the internet, services which are offered in other Member States. However, the restriction may be regarded as justified by the objective of combating fraud and crime.

The sector involving games of chance offered via the internet has not been the subject of Community harmonisation. A Member State is therefore entitled to take the view that the mere fact that a private operator lawfully offers services via the internet in another Member State, in which it is established, cannot be regarded as amounting to a sufficient assurance that national consumers will be protected. In addition, because of the lack of direct contact between consumer and operator, games of chance accessible via the internet involve different risks of fraud. Moreover, the possibility cannot be ruled out that an operator which sponsors some of the sporting competitions on which it accepts bets might be in a position to influence their outcome and thus increase its profits. Article 49 EC does not preclude legislation of a Member State which prohibits private operators established in other Member States, in which they lawfully provide similar services, from offering games of chance via the internet within the territory of that Member State (paragraphs 53, 54 and 67 to 73 and the operative part).

Judgment of 22 June 2017, Unibet International (C-49/16, EU:C:2017:491)

The Maltese company Unibet International organised online games of chance. In 2014, Unibet, which held licences issued by several Member States, provided online games of chance on Hungarian-language websites although it did not have the necessary licence in Hungary. The Hungarian authorities ordered the temporary closure of access to Unibet's websites from Hungary and imposed a fine on Unibet. It was theoretically possible for operators established in other Member States to be granted a licence for the organisation of online games of chance in so far as the provision of such services was not reserved to a State monopoly. However, it was, in practice, impossible for them to secure such a licence. Against that background, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) asked the Court of Justice whether the Hungarian legislation at issue was compatible with the principle of the freedom to provide services.

The Court held that Article 56 TFEU must be interpreted as precluding domestic legislation which introduces a system of concessions for the organisation of online games of chance, if it contains discriminatory rules with regard to operators established in other Member States or if

it lays down rules which are not discriminatory but which are applied in a manner which is not transparent in such a way as to prevent or hinder an application from tenderers established in other Member States.

A rule according to which trustworthy operators must have carried out, for a period of at least 10 years, an activity of organisation of games of chance in the territory of that Member State puts operators established in other Member States at a disadvantage. The mere fact of putting forward an objective of general interest cannot suffice to justify such a difference in treatment.

The national requirement to have carried out an activity of organising games of chance for three years in a Member State does not create an advantage for operators established in the host Member State and could be justified by a general interest objective. However, it is important that the rules in question are applied transparently to all tenderers. That requirement is not satisfied by national legislation whose conditions governing the exercise of the powers of the Minister for the Economy which it sets in such a procedure and technical conditions having to be fulfilled by operators of games of chance when submitting their tenders are not defined with sufficient precision (paragraphs 44 to 48 and point 1 of the operative part).

Article 56 TFEU must be interpreted as precluding penalties imposed for the infringement of national legislation introducing a system of concessions and licences for the organisation of games of chance, if such national legislation proves to be contrary to that article (paragraph 51 and point 2 of the operative part).

6. Sharing economy

Judgment of 20 December 2017 (Grand Chamber), Asociación Profesional Élite Taxi (C-434/15, EU:C:2017:981) ⁵⁹

The electronic platform Uber provided, by means of an application, a paid service consisting of connecting non-professional drivers using their own vehicle. In 2014, a professional taxi drivers' association in Barcelona (Spain) brought an action before the Juzgado de lo Mercantil no 3 de Barcelona (Commercial Court No 3, Barcelona, Spain). It argued that Uber's activities amounted to misleading practices and acts of unfair competition. The Commercial Court considered it necessary to ascertain whether Uber required prior administrative authorisation. If the service was covered by the Directive on services in the internal market ⁶⁰ or Directive 98/34/EC, ⁶¹ Uber's practices could not be regarded as unfair practices.

The Court held that the questions submitted by the national court concerned the legal classification of the service at issue and that it therefore had jurisdiction to reply to them (paragraphs 20 and 21).

⁵⁹ A summary of the judgment can be found in the 2017 Annual Report, p. 38.

⁶⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).

⁶¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 21.7.1998, p. 37).

Thus, such a service could be classified as an ‘information society service’, within the meaning of Article 1(2) of Directive 98/34/EC, to which Article 2(a) of Directive 2000/31/EC refers. That service is a ‘service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services’.

It is more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey. In a situation such as that with which the referring court is concerned, the provider simultaneously offers urban transport services, which it renders accessible through the application and whose general operation it organises.

Without the application, drivers would not be led to provide transport services and passengers would not use the services of those drivers. In addition, Uber exercises decisive influence over the conditions under which the service is provided by those drivers and determines at least the maximum fare by means of the eponymous application, which it receives from the client before paying part of it to the non-professional driver of the vehicle. It also exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion. That intermediation service must thus be regarded as a ‘service in the field of transport’, within the meaning of Article 2(2)(d) of Directive 2006/123/EC, with the result that it is excluded from the scope of that directive (paragraphs 35, 37 to 40 and 42 and 43).

Judgment of 10 April 2018 (Grand Chamber), Uber France (C-320/16, EU:C:2018:221)

The French company Uber France, the operator of a service called UberPop through which it put non-professional drivers using their own vehicle in contact with persons who wished to make urban journeys, by means of a smartphone application, was prosecuted for having organised that service. It argued that the French legislation under which it had been prosecuted was a technical rule concerning an information society service within the meaning of the Directive on technical standards and regulations.⁶² That directive requires Member States to communicate to the Commission any draft law or regulation laying down technical rules relating to information society goods and services. In the instant case, the French authorities had not notified the Commission of the criminal legislation at issue prior to its enactment. Proceedings having been brought before it, the tribunal de grande instance de Lille (Regional Court, Lille, France) asked the Court of Justice whether or not the French authorities were required to give prior notice of the draft law to the Commission.

The Court held that Article 1 of Directive 98/34/EC, as amended by Directive 98/48/EC, and Article 2(2)(d) of Directive 2006/123/EC must be interpreted as meaning that a provision of national law that lays down criminal penalties for the organisation of such a system concerns a ‘service in the field of transport’, in so far as it applies to an intermediation service that is provided by means of a smartphone application and forms an integral part of an overall service the principal element of which is the transport service. Such a service is excluded from the scope of those directives (paragraph 27 and the operative part).

⁶² Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (OJ L 204, 21.7.1998, p. 37).

The Court recalled its finding in *Asociación Profesional Élite Taxi*, C-434/15 (see above), that the UberPop service fell within the field of transport and did not amount to an information society service within the meaning of Directive 98/34/EC. According to the Court, the UberPop service offered in France is essentially the same as that provided in Spain. It follows that the French authorities were not required to give prior notice of the draft criminal law in issue to the Commission.

7. VAT

Judgments of 5 March 2015, Commission v France and Commission v Luxembourg (C-479/13 and C-502/13, EU:C:2015:141 and EU:C:2015:143)

In France and Luxembourg, the supply of electronic books was subject to a reduced rate of VAT. Thus, since 1 January 2012, France and Luxembourg had respectively applied a VAT rate of 5.5% and 3% to the supply of electronic books.

The electronic (or digital) books at issue in this case covered books in electronic format supplied for consideration by download or streaming from a website to be viewed on a computer, smartphone, electronic book reader or other reading system. The European Commission asked the Court of Justice to declare that, by applying a reduced rate of VAT to the supply of electronic books, France and Luxembourg had failed to fulfil their obligations under the VAT directive.⁶³

The Court held that a Member State which applies a reduced rate of VAT to the supply of digital or electronic books fails to fulfil its obligations under Articles 96 and 98 of Directive 2006/112/EC and Regulation (EU) No 282/2011.⁶⁴

It is apparent from the wording of point 6 of Annex III to Directive 2006/112/EC that the reduced VAT rate is applicable to a transaction consisting of the supply of a book on a physical medium. Admittedly, in order to be able to read an electronic book, physical support, such as a computer, is required. However, such support is not included in the supply of electronic books. Furthermore, as is clear from the second subparagraph of Article 98(2) of that directive, the EU legislature decided to exclude any possibility of a reduced rate of VAT being applied to electronically supplied services. The supply of electronic books constitutes such a service, since it cannot be regarded as a supply of goods within the meaning of Article 14(1) of that directive because an electronic book cannot qualify as tangible property. Similarly, the supply of electronic books meets the definition of electronically supplied services set out in Article 7(1) of Regulation (EU) No 282/2011.

That interpretation is not undermined by the principle of fiscal neutrality, since that principle cannot extend the scope of reduced rates of VAT in the absence of clear wording to that effect (paragraphs 27, 28, 33 to 36, 42, 43 and 46 and the operative part).

⁶³ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1).

⁶⁴ Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax (OJ L 77, 23.3.2011, p. 1).

Judgment of 7 March 2017 (Grand Chamber), RPO (C-390/15, EU:C:2017:174) ⁶⁵

Under the VAT directive,⁶⁶ Member States were able to apply a reduced rate of VAT to print publications such as books, newspapers and periodicals. By contrast, digital publications had to be subject to the standard rate of VAT, except digital books supplied on a physical support (for instance, CD-ROM). Proceedings having been brought before it by the Polish Commissioner for Civic Rights, the Trybunał Konstytucyjny (Constitutional Court, Poland) expressed doubts about the validity of that difference in tax treatment. It asked the Court of Justice whether that difference was compatible with the principle of equal treatment and whether the European Parliament had been sufficiently involved in the legislative procedure.

According to the Court, the obligation to consult the Parliament during the legislative procedure in the cases laid down by the Treaty means that the Parliament is consulted afresh whenever the text finally adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except in cases where the amendments substantially correspond to a wish of the Parliament itself.

The text of point 6 of Annex III to Directive 2006/112/EC as amended is nothing other than a simplification of the drafting of the text which was set out in the proposal for a directive and the substance of which has been fully preserved (paragraphs 26, 30 to 32, 34 and 36).

In addition, the examination of the questions referred for a preliminary ruling disclosed no factor of such a kind as to affect the validity of point 6 of Annex III to Directive 2006/112/EC or of Article 98(2) of that directive, read in conjunction with point 6 of Annex III thereto.

The supply of digital books on all physical means of support and the supply of digital books electronically amount to comparable situations. Those provisions must be regarded as establishing a difference in treatment between two situations that are, however, comparable in the light of the objective pursued by the EU legislature. Where such a difference is found, the principle of equal treatment is not infringed in so far as that difference is duly justified. That is the case where the difference in treatment relates to a legally permitted objective pursued by the measure having the effect of giving rise to such a difference and is proportionate to that objective.

In that respect, it is understood that, when the EU legislature adopts a tax measure, it is called upon to make political, economic and social choices, and to rank divergent interests or to undertake complex assessments. Consequently, it should, in that context, be accorded a broad discretion, so that judicial review must be limited to review as to manifest error. Indeed, it is apparent from the explanations provided by the Council and the Commission that it was considered necessary to make electronically supplied services subject to clear, simple and uniform rules in order that the VAT rate applicable to those services may be established with certainty and, thus, that the administration of VAT by taxable persons and national tax authorities is facilitated. The possibility of applying a reduced rate of VAT to the supply of digital

⁶⁵ A summary of the judgment can be found in the 2017 Annual Report, p. 24.

⁶⁶ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ L 347, 11.12.2006, p. 1), as amended by Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax (OJ L 116, 9.5.2009, p. 18).

books electronically would effectively compromise the overall coherence of the measure intended by the EU legislature (paragraphs 41, 42, 49, 51 to 54, 57, 59, 60, 66, 70 and 72 and the operative part).