EU Contract Case Law, July – December 2023

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Abstract: This article provides an overview of the most relevant cases decided by the Court of Justice of the European Union concerning contract law. The present issue covers the period between the beginning of July 2023 and the end of December 2023. Out of a total of 220 judgments decided in this period, 57 had a contract law dimension.

Keywords: Court of Justice, EU contract law, most relevant cases, second semester2023

1 General contract law

1.1 Transparency, Objectivity, Non-Discrimination and Proportionality as General Requirements of Private Ordering Rule: Judgment in Case C-333/21 *European Superleague Company*

The limits of the regulatory powers FIFA and UEFA (respectively the international and European football association) exercise over football clubs and players have been tested and, in essence, found wanting by the Court of Justice. The controversy concerns the intention of a group of European football clubs to join a competition called 'Super League'. FIFA, UEFA and the other five continental football confederations, refused to recognize the Super League and announced the expulsion from all their competitions of teams and players taking part in it.

This is a complex dispute. The case was referred to the Court of Justice by the Commercial Court of Madrid, which is essentially seeking guidance on the compatibility with EU law and in particular, competition law and free movement law of various provisions within the FIFA and UEFA statues and regulations, but in particular Articles 67 and 68 of the FIFA Statute establishing that FIFA and UEFA are 'the original owners of all of the rights emanating from competitions and other events coming under their respective jurisdiction'.

Given the complexity of the subject matter and the length of the decision, it is appropriate to begin the analysis by focusing on the peculiarities of international football governance, to then show how the CJEU frames said features within the legal frameworks for the protection of competition and the establishment of free movement. In fact, the most interesting feature of this judgment is how the Court gives relevance to said public interest in the interpretation if Articles 101(3), 102, and 56 TFEU. At least in principle, the Court of Justice recognizes that FIFA and UEFA may be restricting the power to set up football competitions 'in the public interest' and, in particular, to ensure that said competitions respect the 'values of openness, merit and solidarity' (para 253). Nevertheless, the CJEU emphasizes repeatedly that FIFA and UEFA will have to discharge difficult burdens of persuasion and proof. For example, the Court holds that the public interest pursued by them 'translates into genuine, quantifiable efficiency gains' (para 197).

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Be this as it may, based on the reconstruction of the FIFA and UEFA statutes and regulations offered by the referring judge, it is apparent that the Court of Justice finds a radical flaw to exist in football private ordering, namely that EU law is violated because 'there is no framework for substantive criteria and detailed procedural rules for ensuring that [private ordering norms] are transparent, objective, precise and non-discriminatory, when they confer on the entity called on to implement them the power to deny any competing undertaking access to the market' (para 147).
This finding is central in the judgment as it underpins the conclusion that: (i) Article 101(1) is violated and Article 101(3) does apply (paras 154 and 198-200); (ii) Article 102 is violated without an objective justification (paras 145-149 and 208) and; also, (iii) Article 56 is infringed (paras 254-255).
One aspect of the controversy might have needed more attention. The entire ruling of CJEU is framed as having to do with the competition between FIFA and UEFA on the one hand, and the new entrant, European Superleague Company. Yet, the teams intending to join the Super League have attained their status of 'super' teams by participating into the competitions within the FIFA and UEFA jurisdiction. Arguably, but for those competitions, professional football would not be as developed as it is. There is, therefore, a dynamic element of market making and management of football competitions in the activity of FIFA and UEFA that does not seem to have received sufficient consideration.
The Court of Justice acknowledges this fact by referring to an ''organized system' of national, European and international competitions' (para 253) but, as noted, insists on the limits of the existing private ordering. While these limits are concerning, the question remains whether the Super League project strikes so much the public interest protected by FIFA and UEFA that their statutes and regulations are sufficiently well-written to be legitimately invoked to put a stop to the Super League project, at least in its current design.

1.2 Stricter Technical Specifications Incompatible with EU Law as Ground for Compensation: Judgment in Case C-86/22 *Papier Mettler Italia Srl*

With ruling of 21st December 2023, the Court of Justice intervenes on a dispute regarding broadly the topical matter of environmental sustainability in relation to plastic packaging. The dispute arose between Papier Mettler Italia Srl (thereon, Papier) and the Italian Ministry of Ecological Transition and Ministry of Economic Development (hereinafter 'the authorities'). The proceedings, referred by the Tribunale Amministrativo Regionale per il Lazio (TAR), concern the lawfulness of a decree imposing compliance with technical requirements for the marketing of shopping bags. The effect of the decree was the prohibition of the marketing of most non-biodegradable plastic shopping bags. The judgment deals, *de facto*, with the regulation of the object of sale contracts and how such regulation varies depending on the level of harmonisation and on the public interests at stake.
In fact, Papier brought an action before the TAR, contesting that the technical specifications laid down in the decree exceeded those prescribed by EU law. It requested annulment of that decree and compensation for the damages caused. The company contested that the Italian authorities had failed to notify the draft of the technical regulation to the Commission as established by Article 8(1) of Directive 98/34 and Article 16 of Directive 94/62. Further, the authorities had allegedly infringed Article 114(5) TFEU, which imposes a duty to notify any measure 'based on new scientific evidence relating to the protection of the environment … on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure'. Finally, Papier argued that the decree constitutes a barrier to the free movement of goods, insofar as it requires that the plastic bags shall carry a mandatory reference in Italian detailing the features. The authorities replied, first, that promoting the use of biodegradable and compostable plastic bags and reusable bags through technical regulations was necessary to 'break the habit of Italian consumers of using disposable plastic carrier bags for collecting organic waste' (para 25). Second, they claimed to have complied with the notification requirements. Third, they maintained that they complied with the principle of proportionality, in that the decree did not prohibit the marketing of all plastic bags but rather authorised those traditional plastic carriers which are of a certain thickness and can therefore be reused.

The referring judge asked three questions. The first question asks whether the provisions of Directives 98/34 and 94/62 prescribing the notification duty must be interpreted as precluding national legislation that prohibits the marketing of single-use plastic bags made of non-biodegradable and non-compostable materials that otherwise meet the EU requirements considering that the Commission was notified of such legislation with only a few days notice. In this regard, the CJEU observes that the rationale of Directive 94/62 is to harmonise the regulation of packaging and packaging waste 'in order, first, to prevent any impact thereof on the environment or to reduce such impact, thus providing a high level of environmental protection, and, second, to ensure the functioning of the internal market' (para 56). Hence, the provisions must be interpreted as precluding national legislation of the kind of the decree.
With the second question, the referring court asked whether Article 18 of Directive 94/62, which provides that Member State 'shall not impede the placing on the market of their territory of packaging which satisfies the provisions' of said directive, is to be interpreted as precluding the decree. The Court of Justice adopts here the same rationale adopted to answer the first question. It clarifies that it stays with the EU institutions to strike a balance between the objective of freedom of movement of the goods in question (i.e., plastic bags carrier) and that of 'protecting the public interest and specific interests' (in this case, environmental protection) (para 67). The result of this balancing exercise may be put into discussion only where new scientific evidence relating environmental protection arises following the harmonisation of the regulation of the matter. Had the Italian authorities wanted to derogate from the assessment of the institutions, the Court emphasizes, they should have proceeded with notification to Commission pursuant to Article 114(5) TFEU (paras71-72). The CJEU thus concludes that Article 18 shall be interpreted as prohibiting national legislation which, by imposing stricter technical specifications, prohibits the marketing of single-use plastic carrier bags which otherwise comply with Directive 94/62.
Finally, in answering the third and fourth questions the Court rules that the domestic judges must, in a dispute between an individual and the authorities, disapply the legislation which is in breach of Article 18 of Directive 94/62, and that such 'national legislation … is liable to constitute a sufficiently serious infringement of Article 18' which thus gives origin to a right to compensation (para 90).

2 Unfair terms in consumer contracts

2.1 Proportionality Between the Exercise of the Acceleration Clause and the Consumer's Breach as Pivotal to Assess the Clause's Fairness: Judgment in Case C-598/21 *Všeobecná úverová banka*

With decision of 9 November,[1] the CJEU added to the case law on Directive 93/13/EEC on Unfair Contract Terms ('UCTD'), intervening on a case concerning consumer credit agreements. In particular, the request of the Slovakian referring judge concerned the suspension of the extrajudicial enforcement of the charge of the consumers' family home which secured their credit agreement with the bank.
In fact, in 2012, SP and CI entered into a consumer credit agreement with Všeobecná úverová banka a.s. ('VUB'). The credit was repayable over twenty years and was secured by a charge on the family home where they lived. SP and CI had taken out several other consumer credits with Consumer Finance Holding (CFH) which was linked with VUB. VUB decided to allocate almost the entire sum granted to the consumers under the new agreement to the repayment of the loans given by CFH, which they were unable to repay. After less than a year from the conclusion of the credit agreement, provided that the consumers were in default, VUB used the acceleration clause of the contract to demand repayment in full. SP and CI were notified that VUB would have proceeded with the enforcement by selling the family home by extrajudicial auction – that is 'without any judicial process and without a court having first been able to examine whether the amount of the claim is well founded or whether the sale is proportionate to the amount of the claim' (para 25). The Regional Court of

[1] A shorter version of this analysis first appeared on: Carolina Paulesu, 'Recent Developments in European Consumer Law: Repayment in Full of Consumer Credit – The CJEU on the Fairness of Acceleration Clauses and Their Judicial Review (Case C-598/21)' (*Recent developments in European Consumer Law*, 20 November 2023) <https://recent-ecl.blogspot.com/2023/11/repayment-in-full-of-consumer-credit.html> accessed 12 January 2024.

Prešov took the view that Slovakian law does not provide any ex ante protection to the consumer when the extrajudicial auction is in place and that, in the case at hand, the consumers were in default of only 1,106.50 EUR after less than a year from the agreement. In essence, it observed how domestic rules may be 'contrary to EU law and, in particular, to the principle of proportionality, since they allow the property where the consumer is residing to be sold, even in the event of a minor breach of contract' (para 31).

The referred question concerns Articles 3(1), 4(1), 6(1) and 7(1) UCTD, read in light of Articles 7 and 38 of the Charter of Fundamental Rights and aims at establishing whether the judicial evaluation of the unfairness of an acceleration clause may not consider the proportionality of the creditor's reaction to the default of the consumer when the family home of the consumer will be sold to repay the creditor*?*

As a first step, the CJEU observes that, although the acceleration clause reflects Slovakian provisions, the latter are not mandatory. Accordingly, said clause does not fall within the scope of Article 1(2) of the UCTD, which makes the UCTD inapplicable to mandatory statutory or regulatory domestic provision. Next, the Court of Justice moves to the analysis of the validity of the acceleration clause. To this end, the Court recalls its settled case law[2] holding that, to determine if the acceleration term is unfair within the meaning of the UCTD, one must consider whether: (i) the creditor's right to demand repayment in full is conditional upon the consumer having breached an obligation of essential importance in the contract or (ii) the creditor has the right when the non-compliance by the consumer is sufficiently serious considering the term and the amount of the loan or (iii) the national law provides the consumer with means to remedy the effects of the repayment being demanded. In essence, the national court must always consider whether the right of the creditor is proportionate to the breach of the consumer. It must consider 'the amount of the instalments which have not been paid in relation to the total amount of the credit and the duration of the contract' and when appropriate the judicial review must take into account any additional criteria which may be relevant (para 82).

Moreover, the Court of Justice explicitly holds that the national court 'must take into account the consequences of the eviction of the consumer and his family from the dwelling constituting their principal residence', in that '[t]he right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the national court must take into consideration when implementing Directive 93/13' (para 85). The CJEU thus concludes that the Directive must be interpreted as precluding national legislation which allows for a judicial review of the unfairness of the acceleration clause which does not take into account: first, the proportionality of the creditor's action to the breach of the consumer; and, second, the fact that the implementation of that clause may result in the creditor being able to recover the sums by selling, without any legal process, the consumer's family home.

2.2 Examining the Consequences of Annulling the Entire Contract as a Necessary Step Prior to the Renegotiation of an Unfair Agreement: Judgment in Case C-645/22 *R.A and Others*

Enriching the case law on Directive 93/13/EEC on Unfair Contract Terms, this case concerns the consequence of finding a contractual term to be unfair, which has been particularly lively in recent years. In particular, the Court of Justice of the European Union is called to determine whether a court may restore the balance between the parties after having found a term to be unfair, without having first evaluated the consequences of the annulment of the contract in its entirety.

In fact, R.A. and others (thereon, RA or 'the applicants') concluded several loan agreements denominated in Swiss francs with Luminor Bank AS (thereon, Luminor). Further, they converted existing loan denominated in euros or litai into Swiss francs, and refinanced loans they had with other

[2] See Judgment of 26 January 2017, *Banco Primus SA v Jesús Gutiérrez García*, C-421/14, EU:C:2017:60, para 66 and Judgment of 14 March 2013, *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa*, C-415/11, EU:C:2013:164, para 73.

banks in a currency other than Swiss francs. The depreciation of litai caused the amount to be paid in Swiss francs to almost double.
The applicants initiated judicial proceedings lamenting the unfairness of the contracts and seeking their amendment. The action, initially rejected, was referred back to the Court of Appeal by the Supreme Court. Upon order of the Court of Appeal, the applicants indicated that they would have amended the terms of the loan agreements by changing the currency from Swiss francs to euros. Luminor, instead, stated that the terms were not unfair and thus not to be amended. The Court of Appeal found the terms to be unfair because they were not transparent, and changed the loans to be denominated in euro at the exchange rate of the date in which the loans were issued.
The defendant appealed before the Supreme Court, the referring court. The bank argued, first, that the terms were not unfair and, second, that the court could not amend the agreements because no supplementary provisions which could replace the terms existed under national law. The referring court upheld only the part of the ruling which deemed the terms unfair but reopened the proceedings regarding the loan's amendment. The applicants argued that they would seek the annulment of the agreements, otherwise they would request the amendment of the agreements. Conversely, the defendant demanded their declaration of invalidity *ex nunc*.
The Supreme Court of Lithuania stayed the proceedings harbouring the following doubts, as reformulated by the CJEU: must Article 6(1) UCTD be interpreted as precluding a national court, which has found that a contract cannot remain valid due to the unfairness of its terms and where the consumers wish to preserve the contract by amending those terms, from ruling on how to restore the balance between the parties without having examined the consequences of annulling the contract in its entirety? Secondly, to answer the question, is it relevant that the national law of that State comprises of supplementary provisions or that the parties agree on a provision to do so?
To answer these questions, the CJEU recalls its case law according to which consumers may well renounce the protection provided by the UCTD by consenting to the applicability of a term a court would deem unfair. However, when consumer wants to benefit from the protection afforded by the UCTD, the domestic judge must examine whether a contract may continue existing 'without any amendment other than that resulting from the removal of the unfair term' (para 30). This examination must be carried out regardless of the consumer's intention to preserve the contract (para 31). The annulment of the entire contract, then, is prevented by Article 6(1) only if it 'would expose the consumer to particularly unfavourable consequences' (para 32). In that case, the domestic judge is entitled to replace the term 'with a supplementary provision of national law or a provision applied by mutual agreement of the parties' (ibid). Lacking these provisions, the domestic judge must 'take all measures necessary to protect the consumer … and thus restore the effective balance between the reciprocal rights and obligations of the parties' (para 34).
Contextualizing these considerations, the Court of Justice rules that a domestic judge finding that a contract cannot exist without the unfair term may not adopt 'other measures', like it happened in the case at stake with the reformed exchange rate as proposed by the applicant, without having first considered if the annulment would have exposed the consumer to particularly unfavourable circumstances (paras 40-41).
The question remains whether the action taken by the Court of Appeal would have been considered an acceptable 'measure' to restore the balance, if the consequences of the annulment had been deemed particularly unfavourable.[3]

3 Unfair Commercial Practices

3.1 Administrative Fine Imposed for Unfair Commercial Practices as Subject to the Application of the Principle of *ne bis in idem*: Judgment in Case C-27/22 *Volkswagen Group Italia and Volkswagen Aktiengesellschaft*

This ruling is yet another piece of the judicial saga involving Volkswagen. It concerns unfair commercial practices but deals with a peculiar aspect related to them, namely the applicability of the principle of *ne bis in idem*. In particular, the core question is whether a fine imposed for breaching the

[3] See also: Candida Leone, 'Recent Developments in European Consumer Law: "Particularly Unfavourable" Consequences of Unfairness and Renegotiation - CJEU in C-645/22 (Luminor)' (*Recent developments in European Consumer Law*, 1 November 2023) <https://recent-ecl.blogspot.com/2023/11/particularly-unfavourable-consequences.html> accessed 13 January 2024.

legislation on unfair commercial practices may be regarded as having criminal nature with all that follows from such classification. The dispute in which the Court of Justice intervenes is between Volkswagen Group Italian SpA (VWGI) and Volkswagen Aktiengesellschaft (VWAG) and the Italian Competition and Markets Authority (hereinafter, AGCM).

In 2016 the AGCM imposed on VWGI and VWAG a fine of EUR 5 million for having engaged in unfair commercial practices in violation of Articles 20(2), 21(1)b and 23(1)(d) of the Consumer Code (transposing Directive 2005/29/EC on Unfair Commercial Practices, 'UCPD'). The company had marketed in Italy, since 2009, diesel vehicles which contained a software distorting the levels of nitrogen oxides emissions during emission inspection tests. Further, the company had disseminated messages promoting its attention to the level of pollutant emissions and the vehicles' compliance with the statutory provisions on emissions. In 2018, pending an action brought by Volkswagen before the Regional Administrative Court of Lazio, the German Public Prosecutor's Office imposed a fine of EUR 1 billion on the companies. The fine was issued because VWAG had violated the provisions of the law on administrative offences, by negligently breaching the duty of supervision concerning the software development. The decision became final on 13 June 2018, when VWAG paid the fine. After it became final, the companies contested that the Italian decision resulting from the proceeding before the Administrative Court would have become unlawful in light of Article 54 of the Convention Implementing the Schengen Agreement ('CISA')and Article 50 of the Charter of Fundamental Rights providing for the *ne bis in idem*. The Regional Court dismissed the action and the companies appealed before the Italian Council of State, which referred three questions.

First, the Council asks whether the fine imposed for unfair commercial practices by the AGCM can be considered a criminal administrative penalty. Second, the Council asks whether Article 50 of the Charter must be interpreted as precluding a provision which makes it possible to 'uphold in court proceedings and make final a criminal [financial] administrative penalty' for unfair commercial practices, 'for which a final criminal conviction has been handed down against that person in the meantime in a different Member State, where the latter criminal conviction became final' before the other decision (para 33). The third question reformulated by the CJEU is under which condition a derogation of the *ne bis in idem* enshrined in Article 50 of the Charter is justified.

As for the first question, the CJEU recalls that the principle of *ne bis in idem*, as provided for by Article 50 of the Charter, 'prohibits a duplication both of proceedings and of penalties of criminal nature … for the same act and against the same person' (para 44). The case law of the Court of Justice establishes three criteria to determine whether a penalty has criminal nature: (i) legal classification of the offence under national law; (ii) its intrinsic nature; (iii) degree of severity of the penalty with regard to the specific person concerned. The CJEU provides the following guidance for the assessment: whereas the Italian Consumer Code regards the penalty as administrative, it must be determined whether the penalty has a 'punitive purpose, without regard to the fact that it also pursues a deterrent purpose' (para 49).

The Italian Government submitted that Article 27(9) of the Code, pursuant to which the fine was imposed in addition to the prohibition of the practices, is intended to deprive the company of the unfair competitive advantage it obtained (para 51). However, the CJEU argues against this in two ways. First it observes that such objective is not referred to in the provisions. Second, it observes that the article provides that the fine varies according to the gravity and duration of the infringement and that the minimum amount is EUR 50,000 while the maximum is EUR 5 million. That being the case, if the objective was to deprive the company of the advantage, this would entail for the objective not to be achieved where the advantage exceeds EUR 5 million. The same reasoning, in opposite terms, applies to the minimum amount. As far as the third criterion is concerned, the Court of Justice finds that the degree of severity of the penalty must be determined 'by reference to the maximum potential penalty' and that an amount of EUR 5 million indicates a 'high degree of severity' and the criminal nature of the penalty (paras 53-54).

To answer the second question, the Court of Justice determines first whether there exists a prior final decision ('*bis*'), and second whether the decision concerns the same facts ('*idem*'). A decision satisfies the *bis* condition if it is final and has decided on the merits of the case. The German decision satisfies both requirements, and its finality – finds the Court – is not put into question by the fact that it happened because VWAG paid the fine. The *idem* condition shall apply to both the recipient of the decisions and the facts. The CJEU finds that both decisions are directed towards the same legal person. As regards the facts, the Court observes that there must be 'identity of the material facts,

understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final … conviction' (para 66). While the assessment rests with the Italian court, the CJEU observes that the German Prosecutor's Office itself stated, in the decision, that the installation of the software, the obtaining of the approval and the promotion and sale of the vehicles are circumstances inextricably linked together and are the same facts as those grounding the decision at stake here.

To answer the third question, the Court of Justice refers to Article 52 of the Charter. The CJEU states that Charter's rights and freedoms may be limited only by law and only where there exist objectives of general interest, subject to the principle of proportionality (paras 87 ff.). Premised that the Italian and German law, respectively, are directed at high consumer protection and at protecting against negligent breach of the duty of supervision, the Court then finds (according to its case law) that the duplication of proceedings and penalties must satisfy three conditions to be justified (para96). First, the duplication cannot be an excessive burden on the person concerned. Second, there must be clear and precise rules that allow to predict which conducts are liable to be subject to a duplication. Third, the proceedings must have been coordinated. The Court regards the EUR 5 million fine as not excessively burdening, considering it is only 0.5% of the fine already paid. The provisions on both administrative offences in Germany and on unfair commercial practices in Italy are clear and thus the companies may have predicted the duplication. Finally, as far as the third condition, the CJEU observes that no coordination took place between the authorities and that while 'practical constraints' must be taken into account, the latter 'cannot provide justification for qualifying or disregarding the abovementioned requirement' (para 103).

Irrespective of the assessment of the specific facts, the ruling is important in establishing the prevalence of substance over form in the evaluation of the nature of a sanction. Thus, provided that the criteria detailed above are met, it opens the door to examining whether a legal person may be subjected to two sanctions in different Member States.

4 Air passenger rights

4.1 Pre-emptively Denied Boarding as Indistinguishable from Denied Boarding: Judgment in Case C-238/22 *LATAM Airlines Group*

FW booked a return flight between the end of 2017 and early 2018 with LATAM airlines. The air carrier unilaterally and without notice anticipated the outward flight and FW learned about this only after the rescheduled flight took off. Additionally, LATAM refused FW to board on the return flight since the passenger missed the outward flight. In the consequent litigation, two issues arose concerning the interpretation of Regulation 261/2004 on Air Passenger Rights that were the referred to Court of Justice.

The first question concerns whether the passenger who was not present for boarding has the right to compensation in case of a pre-emptively denied boarding, that is 'the situation in which an operating air carrier informs, in advance, a passenger that it is going deny him or her boarding, against that passenger's will' (para 25). The second one, as reformulated by the Court, aims at clarifying whether Article 5(1)(c)(i) of the Regulation applies also in case of denied boarding, to the effect that air passengers are not entitled to compensation in case they were informed of such denial at least two weeks in advance. The CJEU answers the first question in the affirmative and the second in the negative, thereby clarifying that air passengers affected by pre-emptively denied boarding have the same level of protection of passengers affected by traditional denied boarding.

In answering the first question, the Court of Justice uses a complex argumentative scheme including literal, teleological and systematic considerations. The first set of considerations is the most complex one. Indeed, the plain meaning of the definition of denied boarding pursuant to Article 2(j) excludes pre-emptive denials. To reject such conclusion, the CJEU observes that in repealing Regulation 295/91 with Regulation 261/2004, the EU legislative broadened the scope of the protection against denied boarding, disconnecting it from 'a situation of "overbooking" of the flight caused by the

carrier for economic reasons' (para 27). On these grounds, but also relying on its case law,[4] the Court holds that the 'EU legislature expanded the scope of the concept of 'denied boarding' in order to cover all situations in which an air carrier might refuse to carry a passenger' (ibid.). Teleological considerations support this finding, since the alternative interpretation 'would substantially reduce the protection granted to passengers' (para 29). Moreover, pursuant to Article 3(2)(b), passengers do not lose the protection for denied boarding if they are not present at the time of the boarding in case the air carrier transfers them to another flight. The CJEU consider this situation 'not distinguishable, in essence,' from the one of the passenger in the main proceedings (para 32). Thus, air passengers who were not present for boarding in case of a pre-emptively denied boarding have the right to compensation provided by the Regulation.

The answer to the second question follows from the application of the hermeneutical technique according to which provisions conferring rights aimed at ensuring a high level of protection must be interpreted extensively and their exceptions strictly (paras 43-44). In fact, moving from this premise, the Court of Justice finds that the two-week notice exception to the right to compensation in the event of a cancellation pursuant to Article 5(1)(c)(i) shall not be extended (or applied analogically) also to pre-emptively denied boardings.

The referring judge invoked the principle of equal treatment to resist this interpretation. The CJEU is not persuaded by this view, explaining that the difference between denied boarding and cancellation of the whole flight consists in the fact that 'they have been regulated separately by the EU legislature in Articles 4 and 5 of Regulation No 261/2004 with legal rules that are partly different' (para 48).

5 Competition Law

5.1 Processing of off-Facebook Data as Not Essential for the Performance of the Social-media Contract: Judgment in Case C-252/21 *Meta Platforms Inc.*

With decision C-252/21 delivered in the dispute between Meta Platforms Inc., which operates Facebook (thereon, Meta), and the Federal Cartel Office of Germany (thereon, FCO), the CJEU ruled on the significant matter of the interaction between data protection and competition law in the EU. The ruling contains however findings which are interesting from a contractual point of view.

The Higher Regional Court of Düsseldorf stayed the proceedings between Meta and the FCO, which dealt with the decision of the competition authority to prohibit Meta from processing certain personal data, as laid down by the company's general terms. The decision of the FCO objected to the company's business model and considered the way in which Meta processed Facebook's users' data to constitute an abuse of Meta's dominant position on the market for social network in Germany. The FCO regarded the processing to be in breach of Articles 6(1) and 9(2) of the General Data Protection Regulation (hereinafter, GDPR). Specifically, the authority considered that the general terms, being a result of Meta's dominant position, 'constitute an abuse since the processing of the off-Facebook data that they provide for is not consistent with the underlying values of the GDPR' (para 30).

As it is well-known, Facebook relies on the financing gathered through personalised advertising. Users' 'consumer behaviour, interests, purchasing power and personal situation' provide the basis for such advertising which is technically obtained by creating individual profiles (para 27). These profiles are in turn created through the data that users provide when signing up for Facebook and other online services offered by Meta (e.g., WhatsApp, Instagram) and other 'user- and device-related data … collected on and off that social network and the online services' which are linked to the users' accounts (ibid). The data collected off-Facebook concern users' visits to the webpages and applications of third parties. Users agree to the processing of such data when they accept Meta's general terms, thus when they enter their contract with Meta, when signing up. Acceptance of the general terms is necessary for individuals to use Facebook. In 2019, the FCO prohibited Meta from making the use of Facebook conditional upon the processing of their off-Facebook data and from

[4] More precisely, the CEJU cited the Judgments of 4 October 2012, *Finnair*, C-22/11, EU:C:2012:604, paras 19, 21 and 22, and of 4 October 2012, *Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor*, C-321/11, EU:C:2012:609, paras 21, 23 and 24.

processing the data without users' consent. Meta subsequently changed their general terms which then stated that the users agree to the advertisement, instead of paying to use Facebook products.
The German court referred two sets of questions. The first concerns Member States' competition authority's competence to review companies' compliance with the GDPR. The second refers to the lawfulness of the processing operated by the company. We shall focus on the latter, and in particular on questions 3 and 6. Question 3 concerns the interpretation of Article 6(1)(b), pursuant to which the processing of personal data is lawful when it is 'necessary for the performance of a contract to which the data subject is party'. The Higher Regional Court asks whether the provision must be interpreted as meaning that Meta's processing, entailing the collection of data of the Facebook user from other online services provided by the company or from visits to third-parties' webpages and apps, and the linking of those data with the Facebook's accounts of those users may be considered necessary for the performance of the contract within the meaning of letter (b).
The CJEU first observes that the FCO found that Facebook users cannot be considered to have consented to the processing of the data discussed above, within the meaning of Articles 6(1)(a) and 9(2)(a). Thus, it is necessary to assess whether the processing is lawful by virtue of compliance with any of the other justifications laid down in Article 6(1), including the performance of the contract (para 88). The Court clarifies that to fulfil such justification the processing 'must be objectively indispensable for a purpose that is integral to the contractual obligation intended for the data subject' (para 98). It is for the controller to demonstrate that it is not possible to achieve said purpose lacking the processing of the users' data (ibid). Relevantly, it is not necessary for the processing to be expressly referred to in the contract, the 'decisive factor' being that such processing is 'essential for the proper performance of the contract' and that there are no alternatives which are 'less intrusive' for the users (para 99).
As a second step, the Cort of Justice observes that whenever the contract comprises of separate services which can be performed independently, the processing of data must be necessary for the performance of each of them separately (para 100). In the case at stake, the Higher Regional Court identified two 'elements intended to ensure the proper performance of the contract', namely personalised content and the consistent and seamless use of Meta's services. One shall ask, therefore, whether the processing of data which enables and supports these two elements is necessary to achieve the contractual subject matter. As regards personalised content, the CJEU notes that, while useful, personalisation is not strictly necessary for Meta to offer the user the services of the social network. Similarly, it is not necessary for the company to process the data collected off-Facebook, through other online services of the group, in order for the data subjects to use the social network.
By question 6, the referring judge then asks whether consent to the processing can be considered valid when given to an undertaking with a dominant position on the national market. The concerns raised here are traditionally discussed in the field of European contract law: the dominant position causes a lack of choices for the social network user, resulting in an imbalance of bargaining power between the contractual parties. The legislative framework is clear. First, the GDPR defines consent as 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she … signifies agreement to the processing of personal data' (Article 4(11)). Second, 'consent should not be regarded as freely given if the data subject has no genuine or free choice' (Recital 42) and it 'should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear imbalance between the data subject and the controller' (Recital 43). Further, 'consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations' (ibid). Finally, Article 7(4) expressly provides that in assessing the validity of consent 'utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract'.
In light of this framework, the Court of Justice holds that the imbalance created by the dominant position may favour the 'imposition of conditions that are not strictly necessary for the performance of the contract' (para 148). In this case, it does not seem that the processing of the data at stake is necessary to perform the contract between Facebook users and Meta. Further, contrary to what Meta imposes, users must be 'free to refuse individually … to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service' (para 150).

On these grounds, the CJEU concludes that, although the fact that a social network operator holds a dominant position does not preclude users to give their consents validly, it is still 'an important fact in determining whether the consent was in fact validly and … freely given, which is for that operator to prove' (para 154).

5.2 Non-compete Clause Longer than and Non-Proportional to the Sale Agreement as Not Ancillary: Judgment in Case C-331/21 *Energias de Portugal and Others*

The judgment concerns a non-competitive clause in an association agreement between EDP Commercial ('EDP'), which is the company in charge of the retail supply of electricity within the EDP Group, the largest market player for the production and supply of electricity in Portugal, and Modelo Continente ('Continente'), a large corporation involved in the retail market of food in Portugal. Although the agreement, apparently at its surface, concerns a sales arrangement between companies operating in different markets, which puts in question its anticompetitive effects, a closer inspection reveals hidden purposes that raised questions about the nature of the contract and the non-competitive clause. The relevance of this judgment for contractual matters lies in the fact the Court of Justice had the opportunity to clarify concepts in competition law that have important implication to contracts such as the definition of the agency agreement and ancillary restrictions.

On 5 January 2012, EDP and Continente entered an association agreement called 'EDP Continente Scheme'. The agreement had a twofold purpose. On the one hand, during a year, Continente's clients who held its loyalty program card could have access to a contract for the supply of low-voltage electricity with EDP and benefit from a 10% reduction in their electricity price. The value equivalent to the 10% price reduction was provided by issuing discount vouchers, which were loaded onto the Continente card of the customers concerned to be spent on food purchases in Continente supermarkets. In the beginning, the costs for the scheme were supported by EDP but were to be gradually shared equally as the number of clients increased. On the other hand, clauses 12(1) and (2) of the agreement had a mutual non-competitive clause. It precluded Continente from engaging directly or indirectly in the market of electricity and natural gas supply in mainland Portugal. At the same time, EDP committed not to enter the market for food supply at the retail level.

On 4 May 2017, AdC, the Portuguese competition authority, imposed fines for the infringement of Article 9 of the Lei 19/2012, which, in essence, repeats Article 101 TFEU. In the administrative decision, AdC took the view that non-compete clauses 12(1) and (2) constituted 'horizontal cooperation' with the object of market-sharing, reasoning that was appealed before the national court by the undertakings. The referring judge, invested of the appeal against said decision, harbours uncertainties regarding the potential adverse effects of the contested association agreement on competition considering that EDP and Continente operate in distinct markets. Furthermore, the judge is contemplating whether the situation qualifies as a 'restriction of competition by object' as opposed to being merely a 'restriction of competition by effect'.. To answer the doubts about the interpretation of EU law in the case, the referred court submitted eleven questions for the preliminary ruling, which the Court of Justice merged into four significant concept clarifications about competition law. From those, two are particularly important for contract law matters.

The first clarification is about the concept of vertical agreements vis-a-vis agency agreements. In the main proceeding, the applicants argue that the association agreement between EDP and Continente must be regarded as being two cross-agency contracts, with each of the contracting parties being responsible for promoting sales by the other contracting party. For the Court of Justice, the association agreement between EDP and Continente is neither an agency agreement nor a vertical agreement, which excludes the conditions for the exemption from the application of Article 101(1) TFEU, laid down in Regulation No 330/2010.

The Guidelines on Vertical Restraints mention that agency agreements do not generally fall within the scope of Article 101(1) TFEU and define them as contracts under which an agent can negotiate and/or conclude contracts on behalf of another person. An agreement 'that shares between the contracting parties the risks associated with the transactions covered by it cannot be characterized as an agency agreement' (para 84). Furthermore, the Court states the association agreement in the

present could not be considered a vertical agreement under the definition of Article 1(1)(a) of Regulation No 330/2010, namely an agreement between two undertakings operating in different levels of the production and distribution. The judgment does not affirm the agreement between EDP and Continente concerned an horizontal agreement explicitly in the reasoning, but the proposition can be implied by the title of the referred question concerns the 'distinction between vertical and horizontal agreements'.

The second concept clarification relevant to contractual matters concerns the definition of ancillary restrictions. To what extent could the non-competitive clause in the agreement escape the prohibition laid down in Article 101(1) TFEU because it is ancillary to a main operation that is not anti-competitive in nature? For the Court, the non-compete clause could not be regarded as an ancillary restriction to that association agreement unless the restriction to which it gives rise is objectively necessary for implementing that association agreement and proportionate to its objectives (para 93). The fact that the duration of the non-competitive restriction clause was longer than the duration of the EDP Continente Scheme indicated the clause was not an ancillary to the sales arrangement.

By uncovering the factual and legal complexity of the case, the Court of Justice leaves unequivocal that the association agreement between EDP and Continente violated competition law because of its dubious purpose. At the same time, the agreement put forward a sales arrangement with clear financial benefits to Continente, it also hindered the same corporate group, a potential competitor, from entering the retail market of electricity in a period of time when the liberalization of the retail energy market was already in motion.

6 Private international law

6.1 Predictability as Paramount Value for the Determination of the *Forum* and *Lex Consumatoris*: Judgment in Case C-821/21 *Club La Costa*

This request for a preliminary reference concerns issues of jurisdiction and applicable law in relation to several consumer contracts entered into by NM (the consumer) with several companies of the same group. At the center of this complex contractual structure, there is a timeshare contract for a touristic accommodation situated in Spain between NM and the Spanish branch of Club La Costa, a UK company. Crucially, only of NM's counterparties is established in Spain, but NM sued them all in Spain, claiming that the contract is governed by Spanish law.

The first issue regarding jurisdiction (first and second questions) revolves around the term 'the other party to a contract' within the meaning of Article 18(1) Brussels Ia Regulation which states that 'consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled'. In the CJEU's wording, for jurisdiction to be successfully established in Spain, this term needs to also cover parties 'connected with' the contracting party (para 58). The Court of Justice finds the said route unviable.

The reasoning of the Court balances two values: weaker party protection and predictability (paras 43 and 52), ultimately finding in favor of predictability. The most delicate passage of this reasoning can be found in paragraph 54, where the CJEU distinguishes the situation in the present case from those in *Maletic*,[5] the difference being that in *Maletic* there were 'specific circumstances', namely that 'the consumer was from the outset contractually linked, inseparably, to two contracting partners' (para 54).

The second issue regarding jurisdiction concerns the interpretation of Article 63(1) and (2) of the same regulation and their coordination with Article 18(1) in determining the domicile of 'the other party to a contract'. More precisely, the Court of Justice first clarifies that Article 63 does not limit the options available to the consumer pursuant to Article 18(1), because these are construction is incompatible with the goal pursued by the regulation of protecting the consumer as the weaker party (para 64). At the same time, the Court explains that the criteria established by article 63(2) concerning the definition of 'statutory seat' for, *inter alia*, the United Kingdom is not a rebuttable presumption

[5] Judgment of 14 November 2013, *Maletic*, C-478/12, EU:C:2013:735, para 32.

because 'otherwise the objective of predictability of the rules on jurisdiction … would be undermined' (para 66).

Having examined all the issues concerning jurisdiction in the main proceedings, the Court of Justice examines two issues regarding the applicable law.

The fourth question presents the first issue as one concerning the interpretation of Article 3 of the Rome I Regulation. The referring judge had doubts about the validity of 'a choice-of-law clause in the general terms and conditions of a contract or in a separate document to which that contract refers and which has been provided to the consumer' (para 68).

The CJEU answers this question by formulating a strong a contrario argument building on its established case law on the conditions for the invalidity of a choice-of-law clause according to which said clause is invalid if it does not inform the consumer 'that … he or she also enjoys the protection afforded by the mandatory provisions … of the law of the country in which he or she has his or her habitual residence' (para 72).

Since in the present case the choice of law clause identifies as applicable the law of the country where the consumer has his or her habitual residence, the Court of Justice finds that no validity issues can be raised in the main proceedings according to EU law. This amounts to an implicit rejection of the concerns raised by the referring judge regarding the extent to which the consumer had been given a sufficient opportunity to read the standard form.

The last issue considered by the Court is the content of the fifth and sixth questions asked by the Spanish judge, and it regards the consequences of finding the choice-of-law clause invalid. Also in answering these questions, the CJEU balances weaker party protection and predictability. In fact, the referring judge is interested in understanding whether the *lex consumatoris* identified by Article 6(1) of the Rome I Regulation can be relied upon by both parties or only by the consumer and, at the same time, whether said provision identifies the applicable the law of the country of habitual residence of the consumer even when the general criteria set by Article 4 would lead to a more favorable outcome for the consumer.

Concisely, the Court of Justice concludes that the identity of the party relying on Article 6 is irrelevant, 'with the result that those rules may also be relied on by the professional' (para 80). Moving to the coordination between Articles 4 and 6 of the regulation, the CJEU explains that Article 6 identifies the *lex consumatoris* on the basis of the abstract evaluation that the law of the consumers' country of habitual residence is typically the most favorable to them, even when this is not the case in a concrete situation (para 87). The justification of this view rests, once again, on the need to ensure 'predictability of the applicable law', which 'would (be) necessarily seriously undermine(d)' by the alternative interpretation proposed by the referring judge (para 86).

The present case clearly illustrates the tension between taking an *ex ante* perspective and taking an *ex post* perspective.[6] Which perspective is better capable of leading to the best outcomes for consumers is hard to determine.

The point that may deserve further investigation is the extent to which, in a situation such as that in the main proceedings, where the consumer entered into a series of connected contracts, said contracts should actually be considered part of a single transaction and, ultimately, a single contract along the lines of *Maletic*. Following this route could have led to the conclusion that the consumer had entered into one complex contract so that, straightforwardly, all the professionals would count as 'other party to the contract'. In the present case, said construction would be reinforced by the fact that all the professionals involved belong to the same group. One is left to wonder to what extent the answer provided by the Court of Justice gives a strong enough incentive to the proliferation of contracts between one consumer and artificially created connected parties, established in multiple countries.

Note: The primary responsibility for the identification of the EU case law with a contractual dimension lies with Lucila de Almeida, who also wrote sections 4.1 and 5.2; Fabrizio Esposito is

[6] See W. Farnsworth, *The Legal Analyst Toolkit* (Chicago: The University of Chicago Press, 2007).

responsible for the general structure and coherence of the text and wrote sections 1.1 and 6.1; Carolina Paulesu wrote sections 1.2, 2.1, 2.2, 3.1 and 5.1.